No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,

v.

MARC KASKY,
Respondent.

On Writ of Certiorari
to the Supreme Court of California

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS[1]

Respondent Kasky offers no persuasive answer to the showing of petitioners Nike et al. (collectively, "petitioner" or "Nike") that the California Supreme Court's ruling must be reversed because it both (a) conflicts with this Court's precedents delimiting the category of "commercial speech" that receives lessened protection under the First Amendment, and in any event (b) approves a legal regime that gravely threatens fully protected speech. Before addressing those points, however, it bears emphasizing at the outset that Kasky's *amici* mischaracterize his complaint as alleging that Nike misled consumers into purchasing its products through reckless or purposeful falsehoods (*e.g.*, Cal. Br. 1), such that Nike must be claiming a First Amendment privilege "to lie" (*e.g.*, Sierra Club Br. 9) in order to sell its athletic apparel. In reality, Kasky does not allege that any California resident in fact relied on any false statement by Nike in purchasing its products but alleges only that those statements were misleading (even if not false) and were at most negligent. See Pet. Open. Br. 6, 12.[2]

This case accordingly raises no issue regarding the power of government to prosecute those who use deliberate deception to extract money from the public (see, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940); *Schneider* v. *State*, 308 U.S. 147, 164 (1939)); or to obtain civil injunctions against those who would "perpetrat[e] * * * swindling schemes" (*Donaldson* v. *Read Magazine*, 333 U.S. 178, 191 (1948)); or to provide a remedy for consumers who can prove that a seller's misrepresentations fraudulently induced them to purchase its

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[1] The State of California's allegation (Br. 19-20) that petitioner failed to include the certification required by 28 U.S.C. 2403(b) is flatly wrong. See App., *infra*.

[2] Kasky's *amici* cite the complaint's single suggestion that Nike committed a reckless omission in one type of statement (¶ 30); but Kasky not only abandoned that allegation in both the state appellate courts and this Court (see Pet. Open. Br. 6 n.1; Kasky Br. 17 (alleging only negligence)), he now disavows *all* allegations of liability by omission (Br. 28 n.7).

products. When the traditional elements of such a claim are alleged and proven – including, importantly, proof that the representations were knowingly or recklessly false, that the plaintiff reasonably relied on them, and that the plaintiff was injured – government's power to regulate the formation of contracts and to protect those who rely to their detriment on the promises of others (cf. *Cohen* v. *Cowles Media*, 501 U.S. 663, 669-71 (1991)), by providing remedies ranging from rescission and restitution to damages, presents no insuperable First Amendment problem. See *Bose Corp.* v. *Consumers Union of the United States*, 466 U.S. 485, 502 & n.19 (1984) (observing "kinship" between standard of liability under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and "motivation that must be proved to support a common-law action for deceit").

It also bears noting at the outset that Kasky's overarching contention that Nike's statements share *some* of the qualities of traditional commercial speech – principally, that Nike knew consumers would rely on its representations in making purchasing decisions (*e.g.*, Kasky Br. 6) – misses its mark, proving only how essential it is for this Court to decide both of the questions on which certiorari was granted. As Justice Brown stressed in her dissent below (Pet. App. 41a-42a, 61a), a ruling by this Court merely labeling petitioner's speech "commercial" or "noncommercial" would provide very little guidance. Whether or not this speech is deemed "commercial," it makes the kind of contribution to public discourse that precludes relegating it to reduced protection under the First Amendment.

Although the fact that this case obviously does not involve *pure* commercial speech is sufficient to require reversing the judgment below (see *infra* Pt. II), neither precedent nor common sense suggests that *all* government regulation is impermissible with respect to speech by manufacturers on ethical issues that affect consumer purchasing. Much depends on context and the contribution made by the type of speech involved to the exchange of information and ideas. That point is illustrated by this Court's jurisprudence applying differential protections to defamation defendants depending on the context in which they spoke despite the state's consistent interest in preserving

individual reputation (*e.g.*, *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749, 757-62 (1985) (plurality); *id.* at 764 (Burger, C.J., concurring); *id.* at 774 (White, J., concurring)), and applying varying degrees of scrutiny to government's regulation of distinct forms of "solicitation" despite the state's consistent interest in avoiding fraud (*e.g.*, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. REV. 1, 15-20 (2000)).

In petitioner's view, the elements a public figure must satisfy in suing for defamation or trade libel – including principally that the defendant be shown to have been reckless or worse, that the plaintiff prove injury, and that the speech be proven false as opposed to merely misleading – strike the proper balance between protecting consumers and facilitating free speech. (Indeed, the state interests furthered by the Unfair Competition Law (UCL) and False Advertising Law (FAL) pale in comparison to the interests in personal reputation at issue in defamation cases because these statutes award recovery to persons who have not even been injured.) But whether or not petitioner is right on that score, it is essential that the Court provide guidance by deciding both of the questions presented, lest its ruling merely invite an onslaught of follow-on litigation that rests on allegations barely more substantial than Kasky's.[3]

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[3] By contrast, merely invalidating the power of any state resident to bring a private attorney general lawsuit would leave unaffected all of the remaining facets of the UCL and FAL that pose a grave and lopsided threat to free speech and thus would hardly alleviate the fear of speakers that equally burdensome lawsuits would later be filed by public agencies or by private parties who allege that they have read Nike's statements, even if they cannot establish that petitioner caused any injury or was guilty of deliberate or reckless falsehood. As the Solicitor General has explained, the requirement that the plaintiff prove recklessness is the "most significant" of the ways in which the common law of fraud "provide[s] sufficient breathing room for protected expression." Br. for the U.S., *Madigan* v. *Telemarketing Assocs.*, No. 01-1806, at 10, 13.

I. This Court Has Jurisdiction.

Respondent's assertion that Article III and 28 U.S.C. 1257 deprive this Court of jurisdiction is meritless.

1. Although a literal "final judgment" has not been entered adverse to Nike, this Court has jurisdiction under 28 U.S.C. 1257 so long as (i) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (ii) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). Kasky makes the novel argument that a reversal would not be preclusive here because, if this Court were to hold that the *only* constitutional flaw in California law is that it imposes strict liability (Br. 16 (emphasis added)), then he would be entitled hypothetically to amend his complaint to delete that theory. Even ignoring Kasky's concession below that "Nike wins this appeal" if its statements are not "commercial speech" (Cal. S. Ct. Reply Br. 1) and his abandonment of the claimed right to amend (see Pet. Open. Br. 14), he makes no contention that he *could* in fact amend his complaint to allege that Nike spoke recklessly or that any person detrimentally relied on Nike's statements (Kasky Br. 17). And, even if such allegations were added, California's statutory scheme would not require *proof* either of reckless or deliberate falsehood or of actual injury.

Kasky also makes no substantial argument regarding the erosion of "federal policy" that a refusal to review this case immediately would entail: Not only has "[a]djudicating the proper scope of First Amendment protections * * * often been recognized by this Court as a 'federal policy' that merits application of this exception to the general finality rule" (*Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 55 (1989)), but that interest is heightened when, as in this case, the state court's judgment applies extraterritorially to threaten the exercise of federal rights in other states (*Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988)). Because the decision below "restricts the present exercise of First Amendment rights," "it would be intolerable to leave unanswered * * * [the] important question[s] [it poses] * * * under the First Amendment." *Miami*

Herald Pub. Co. v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974). The chilling effect of the ruling below on speech (see *infra* Pt. III) dwarfs that presented by the cases this Court has previously reviewed pursuant to the fourth *Cox* category, each of which involved a statute addressed to a discrete subject (such as a right of reply in *Tornillo*) in a single state. See Cert. Reply 4-7.

2. Kasky alternatively argues that this Court is without Article III jurisdiction because he lacks federal constitutional standing and because the decision below does not direct the trial court to enter a "judgment." Br. 14-16. To be sure, when a party invokes the authority of a federal court – not only when this Court reviews a state court ruling in a private attorney general action (as in this case and *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605 (1989)), but *whenever* a defendant takes a federal appeal – Article III's requirements "must be met by [those] seeking appellate review, just as [they] must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). Conversely, however, if the petitioners in this Court *do* "meet the requirements for federal standing" and "an actual case or controversy is before the Court, there is *no* jurisdictional bar to review." *ASARCO*, 490 U.S. at 624 (emphasis added). See also *id.* at 619 (*petitioner* must satisfy "the constitutional standing requirements"). Those conditions obtain here, for petitioner Nike indisputably does "meet the requirements for federal standing." *Id.* at 624. See also ExxonMobil Br. at 21-24. Indeed, it is only the *Rooker-Feldman* doctrine, not Article III (see 490 U.S. at 622-24), that prevents Nike from suing in federal court for a declaration that the application of the FAL and UCL to its past and contemplated speech, such as in Kasky's suit, violates the First Amendment. See, *e.g.*, *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Steffel* v. *Thompson*, 415 U.S. 452, 458-59 (1974); see also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502-07 (1985); *United States* v. *Grace*, 461 U.S. 171, 175 (1983).

Kasky similarly misunderstands the import of *ASARCO* – and advances a position whose acceptance would cast all interlocutory federal appeals by defendants into doubt under

Article III – when he argues that the decision below "produced a 'judgment' * * * * in [too] limited [a] sense" to support this Court's Article III jurisdiction to review that decision (Br. 15). Kasky fastens on the fact that the Arizona Supreme Court's remand order in *ASARCO* had "instructed the trial court to 'enter summary judgment for respondent'" invalidating a state law (*id.* (quoting 490 U.S. at 610)), but ignores the more salient fact that that "judgment" provided *no relief against the private defendants-petitioners*, leaving open *what* "*relief, if any, might be appropriate*" against them (490 U.S. at 610 (emphasis added)). See *Kadish* v. *Arizona State Land Dep't*, 747 P.2d 1183, 1197 (1987) ("It is not possible to tell on this record just what further relief is appropriate."). This Court took note of the summary judgment awarded against the state land department only because that judgment indicated that the petitioners faced a sufficiently imminent prospect of injury through the *threatened* invalidation of mineral leases issued to them under the statute that judgment invalidated (490 U.S. at 618-21), a prospect considerably more contingent and remote than the certain injury Nike confronts from having to defend its speech in the litigation unleashed by the ruling below. Cf. *City of Houston* v. *Hill*, 482 U.S. 451, 469 n.7 (1987) (prior application of statute to plaintiff's conduct confirms "genuine threat of enforcement" warranting pre-enforcement facial challenge).

II. The Decision Below Cannot Be Reconciled With This Court's Precedents Cabining The Category Of "Commercial Speech."

1. Petitioner's opening brief demonstrated that the category of "commercial speech" is "linked inextricably" (*Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979)) to the state's power over commerce and thus encompasses product advertising, product labels, and other statements touting the attributes of a product whose sale the speaker is promoting, such as its price, how it performs, or where it may be purchased. See Pet. Open. Br. Pt. I-B. The doctrine confers intermediate First Amendment protection to balance the state's traditional authority over the terms of commercial transactions with the interest of listeners in

receiving information about available products. The balance is struck in a way that permits government to police the truth of what sellers tell consumers not because such "commercial speech" has less value (see *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 418-23, 428 (1993)) but because advertising and labeling are uniquely able to mislead consumers through on-the-spot, if not invariably impulsive, "uninformed acquiescence" (*Edenfield* v. *Fane*, 507 U.S. 761, 775 (1993)), inasmuch as they (i) afford little opportunity for "considered reflection" (*Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring)); (ii) naturally invite greater and more reasonable reliance than do equally self-interested assertions by purveyors of goods in the media and in press releases; and (iii) ordinarily are conveyed, as, in effect, part of an offer to potential customers, rather than as an integral part of public discussion, analysis, or debate. Such speech involves not dialogue but "one-way communication: the seller speaks to potential consumers" (Pfizer Br. 22) in much the way that an offer, including the offer of a warranty, "speaks" to them.

a. Kasky's arguments and those of his *amici* only demonstrate why the decision below cannot be reconciled with these foundations of the commercial speech doctrine. The essence of their case for reduced First Amendment protection is that Nike knew some consumers would be influenced by its statements in their purchasing choices. But that rationale is simultaneously grossly overinclusive (because California law imposes liability for statements on which consumers do *not* rely) and underinclusive (because it excludes accusations calculated to *discourage* consumers from purchasing a particular manufacturer's products, and it applies only to statements of fact, even though a company's statements of opinion and its political views influence consumer choices as well). California's determination to police speech affecting its consumers' ethical conclusions regarding those whom they patronize is untethered from the traditional power to regulate commercial dealings: although a purchasing decision that reflects an ethical assessment of the seller based on the seller's speech results in "commerce," what such speech *induces* is, in

essence, *further speech* by the consumer about the entities with which he or she wishes to associate and the activities of which he or she wishes to signal approval or disapproval – a "speech act" akin to a public protest or letter writing campaign.

If it were the state's role to assure that listeners reach the decisions it regards as best informed, in commerce or elsewhere, lessened First Amendment protection would necessarily apply to speech intended to encourage consumers to boycott merchants who discriminate against employees or customers on account of race (but see *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982)), as well as to speech capable of influencing vital political choices, such as "who runs the country, what laws are adopted, [or] whether the country goes to war" (CIF Br. 13). See ACLU Br. 6. Nor does Kasky take account of how the "one-way communication" rationale for state regulation of commercial speech collapses when applied to speech of the sort at issue here: "when a business practice becomes a matter of public concern, the media scrutinize corporate speech and typically place potentially misleading statements into context, thereby providing timely and corrective information. That, in fact, is exactly what happened in this case." Media Br. 2-3. It is "paternalistic to assume that consumers lack the ability or sophistication to decide for themselves whether a company's image reflects reality, or whether that image should influence their purchasing decision at all." *Id.* 19.

Kasky's attempt to equate speech such as petitioner's with traditional advertising on the ground that both supposedly address matters of equivalent "public importance" (Br. 41) ignores the fact that only the former is integrally related to public *dialogue – viz.*, the critical exchange among competing perspectives that is fundamental to self-governance. "Whatever one thinks of Nike, it is a crucial participant in this continuing debate." Bob Herbert, Editorial, *Let Nike Stay in the Game*, N.Y. TIMES, May 6, 2002, at A21. See generally AFL-CIO Br. It cannot be seriously doubted that the raging debate over labor conditions in Asia is more central to the First Amendment than is a supermarket flyer advertising shoes. In any event, petitioner's speech addresses matters of public import in a

different and deeper sense than mere advertising: the essence of Kasky's suit is that the ethical issues raised by petitioner's speech are so transcendent that consumers will *override* the purchasing choices they would have made on the basis of what traditional product advertising says about the product's price or performance. Certainly, the First Amendment salience of Nike's speech is unaffected by its economic self-interest as a speaker. "From the Stamp Act to the debate over the structure and ratification of the Constitution, many of the most prominent contributors to the founding generation's debates were 'self-interested' commercial actors who addressed matters directly affecting their commercial interests" (Bus. Roundtable Br. 1), a pattern "repeated in major political debates throughout the nation's history" (*id.* 7).

b. Kasky fails even more obviously in his attempt to shoehorn the decision below into the specific definitions of "commercial speech" that this Court has articulated. His contention that speech "proposes a commercial transaction" whenever it seeks "to induce sales transactions" (Br. 38) does not merely minimize the requirement of a "proposal" – the critical element linking the Court's definition to the state's power to regulate commerce – it *eliminates* it *entirely*. A "definition" of commercial speech that looks principally to whether a business seeks through its speech to increase its sales inevitably sweeps in virtually *all* corporate communications. In fact, that is Kasky's only barely veiled premise, for he deems a Nike "production primer" (Compl. Exh. V), web-page (*id.* Exh. U), and press release (*id.* Exh. II) all to be "commercial speech" merely because they could be received by consumers (Br. 35-36), despite the fact that none did anything beyond participate in a public discussion of a matter of wide public importance without inviting anyone to purchase a Nike product.[4]

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[4] Kasky also contends that a letter from Nike to university officials appended to his complaint (Exh. R) is commercial speech because it is a direct communication by the company to potential customers. Br. 35. But this document on its face belies any claim that it was principally, much less exclusively, a direct solicitation of consumers to purchase Nike products, which are nowhere mentioned;

Hardly more defensible is Kasky's invocation of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, which looked to whether the speech "relate[s] solely to the economic interests of the speaker and its audience" (447 U.S. 557, 561 (1980)). To be sure, the statements this Court there deemed to be "commercial speech" discussed the consequences of energy conservation and in that sense sought "to sell a product by appealing to consumers' concern about the environment." Kasky Br. 40. But what made the speech regulated in *Central Hudson* relate "solely" to the parties' "economic interests" was its unmistakeable character as an advertisement that urged consumers to buy the speaker's product. See 447 U.S. at 559 (Commission policy applied only to "promotional [] advertising intended to stimulate the purchase of utility services" and left unregulated "all advertising not clearly intended to promote sales"). Kasky's contrary reading

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instead, it is a response to "attack[s] from the Made in the USA Foundation[] and other labor organizers" intended to further the universities' *academic* mission "*in discussions with faculty and students* who may be equally disturbed by these charges." Pet. Lodging 190 (emphasis added). College campuses were a focal point of the debate over Nike's practices. Moreover, any claim that such private correspondence misled any recipient into purchasing the writer's products can be fully vindicated by a traditional action seeking recission because the sale was induced by fraud. See *infra* Pt. III.

In any event, the university letter is not a ground for sustaining the judgment below because Kasky's complaint alleged only that the letter was misleading by *omission* (¶ 30), a theory he has since explicitly *abandoned* (see Br. 28 n.7). This Court should reject Kasky's repeated efforts to rely on claims that do not appear in the complaint. Although he alleges, *e.g.*, that Nike's opening brief failed to address several of his factual allegations, *none* of those allegations even appears in the relevant paragraphs of his complaint. See Kasky Br. 4 (relying on Exhs. D & Z regarding wage and hour violations not cited at Compl. ¶¶ 30-38); *id.* 5 (relying on Exhs. P & Z regarding meals and health care not cited at Compl. ¶¶ 52-53); *id.* (relying on Exh. D regarding treatment of workers not cited at Compl. ¶¶ 28-29); *id.* (relying on Exhs. Q, V, and Z regarding health and safety conditions not cited at Compl. ¶¶ 39-45).

cannot be reconciled with *Central Hudson*'s companion case – *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980) (also per Powell, J.) – which held that a utility's pamphlet about the benefits of nuclear power was fully protected speech although it indisputably sought to influence consumer choices. The court below nonetheless affixed the "relates solely" label to statements of fact regarding a commercial entity's operations that are at least as likely to affect the political and moral decisions of the public generally as they are to affect the purchasing decisions of the speaker's customers.

Kasky would similarly eliminate essential elements of the three-part test articulated in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which looked to (a) advertising format and (b) explicit product references, as well as (c) economic motivation. Like the court below, Kasky would collapse the *Bolger* inquiry into just the third element whenever a company speaks about its operations. He thus asserts that it suffices for Nike to have had an "economic motivation," because its statements were in some sense "promotional" and referred to Nike's "product" in the attenuated sense that they discussed the company's operations. Br. 40. That would, of course, eliminate the critical requirement that speech address the characteristics of the product being sold or of the proposed terms of sale: while the pamphlet in *Bolger* addressed an issue of public importance, it did so by touting the performance of the speaker's products (condoms, with respect to which the speaker had cornered the market) in preserving public health by preventing disease. Kasky's reading of *Bolger* furthermore would defy this Court's determination – citing almost identical language in *Central Hudson* – that it is precisely *because* "[a] company has *the full panoply of constitutional protections* available to its *direct comments on public issues*, [that] there is no reason for providing similar constitutional protection when such comments are made *in the context of commercial transactions*." 463 U.S. at 66-67 & n.13, 68 (emphases added).

III. The California Scheme Does Not Resemble Any Other Legal Regime And Impermissibly Chills Protected Speech.

When applied as the California Supreme Court did here to statements that neither refer to a product's characteristics nor appear in product advertisements or labels, the UCL and FAL inevitably chill a great deal of truthful, fully protected speech around the nation, and indeed the world.

1. There is no obstacle to this Court deciding whether – whatever label one attaches to petitioner's statements – the statutory scheme to which the court below would subject those statements comports with the First Amendment. Contra Kasky Br. 14-20. Nike repeatedly "pressed" this argument below. Kasky responded that, because Nike's statements were supposedly "commercial speech," all of petitioner's other First Amendment objections to the statutory scheme fell away:

> Under California's "policy of consumer protection" embodied in sections 17200 and 17500, false commercial speech is prohibited. Thus, if Nike's statements are proven false, *no issues can arise* about "the structure, definitions and remedies" of sections 17200 and 17500 ([Nike] Brf., p. 5); or a need "to narrow [their] application" (*id.*, p. 18); or whether they "provide the precision necessary" (*id.*, p. 43); or how to "construe [them] so as to preserve constitutional validity" (*id.*, p. 44 n.36); or how "to avoid 'chilling' protected expression" (*id.*, p. 45). Sections 17200 and 17500 are simply the state's means of prohibiting Nike's false commercial speech.

Kasky Cal. S. Ct. Reply Br. 7 (emphasis added).

The California Supreme Court, in turn, "passed on" those questions. It did not merely decide that petitioner's speech was "commercial," for it held (a) that statements like petitioner's are subject to the FAL and UCL, and (b) that there was no other First Amendment obstacle to imposing liability under those statutes, agreeing with Kasky that particularized challenges to the UCL and FAL were irrelevant because "commercial speech that is false or misleading receives *no* protection under the First

Amendment, and therefore a law that prohibits only such unprotected speech *cannot violate* constitutional free speech provisions." See Pet. App. 27a (emphases added). The court thus dismissed as unworthy of attention all challenges to the "chilling effect of [the] speech regulation" effected by the UCL and FAL (*id.* 12a) as well as the objection that this regulation would result in viewpoint discrimination by "restrict[ing] or disfavor[ing] expression of one point of view (Nike's) and not the other point of view (that of critics of Nike's practices)" (*id.* 27a), and remanded the case for consideration of Nike's demurrer to the extent that it raised defenses *other* than the First Amendment (*id.* 30a). In these circumstances, for this Court nonetheless *not* to decide the second question on which it has granted certiorari would in essence decide that question adversely to Nike.

In any event, "[o]nce a federal claim is properly presented, a party can make any *argument* in support of that *claim*; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534-35 (1992) (emphases added). Nike obviously preserved the claim that application of the UCL and FAL in this case violates the First Amendment because, among other things, "[t]he threat of litigation under these statutes, [with] the [attendant] risk of erroneous fact-finding," will unduly deter protected speech (Nike Cal. S. Ct. Br. 43-44), a claim that plainly encompasses Nike's argument that the several features of the UCL and FAL, taken separately or in combination, impermissibly chill fully protected expression. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (claim that Amtrak violated First Amendment encompasses argument that Amtrak is state actor); *Yee*, 503 U.S. at 534-35 (claim that ordinance constituted a taking encompassed both physical and regulatory takings arguments).

This case accordingly presents for decision the First Amendment implications of Kasky's statutory right under California law to sue as a private attorney general. The power of literally any state resident, having suffered no injury and possessing no knowledge of the facts, to bring suit under the UCL and FAL contributes significantly to the statutes' chilling

effect. Not only is that argument encompassed both by Nike's First Amendment claim and by its specific contention (rejected by the court below) that the statutes impermissibly chill protected speech, but the court below *specifically reaffirmed* the explicit statutory right, without which Kasky's complaint cannot survive, of "'any person acting for the interests of * * * the general public,' [to] bring an action for relief" under the UCL and FAL. Pet. App. 6a-7a.

2. The UCL and FAL (a) permit any California resident to bring suit while conceding a complete absence of personal knowledge as to whether the allegations made are true; (b) are not tailored to regulate speech on a particular topic about which the speaker can take special steps to assure accuracy (*e.g.*, that its products are "Made in the U.S.A.") but instead encompass every possible factual statement on every issue related to the company's operations; (c) apply to statements made anywhere in the world, including on the Internet, received in California; (d) apply to statements published not by the speaker but by *the press*, over which the speaker has no control; and (e) impose liability (i) without fault or at most on a showing of negligence, (ii) on the basis of "omissions" as well as affirmative assertions, (iii) for mere misleading statements as well as actual falsehoods, and (iv) despite the fact that *no one was injured*.

Kasky and his *amici* inadvertently illustrate the profound chilling effect of the decision below when they embrace its sweeping holding that, because consumers might "care" about virtually *every* aspect of corporate operations – however divorced from the qualities of the products being sold – almost any factual statement a business might make about itself or its contractors is relegated to the lessened First Amendment protection applicable to commercial speech. "The range of legitimate consumer concerns that may motivate buying is vast" (Kucinich Br. 12), ranging from selecting products with a view to "preserving American jobs, supporting union (or other types of) labor, [or] preventing harm to dolphins" (Kasky Br. 33), to "purchas[ing] products from companies that protect the environment, support the symphony or the local high school basketball team, avoid cruelty to animals in product testing,

underwrite tutoring programs for inner-city youth, * * * finance cancer research" (Cal. Br. 14), "donate[] some percentage of [their] profits * * * to charity" (Kucinich Br. 12) or reduce "vehicle emissions [said to] increase global warming" (Public Cit. Br. 22). Depending on the national mood, consumers may care even more about whether a corporation's owners are French and whether its executives support a decision to go to war. *E.g.*, Paul Blustein & Ariana E. Cha, *Product Protesters Face Tough Going*, WASH. POST, Apr. 6, 2003, at A21. By empowering its judges, without any showing of harm or of deliberate or reckless falsehood, to conduct, whenever any California citizen so requests, a roving inquiry into the truth of what companies say about all such matters, armed with wide-ranging discovery and intrusive remedial powers, the court below sucked the air out of the "breathing space" that speech on matters of public concern requires to "survive." *New York Times* v. *Sullivan*, 376 U.S. at 272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)).

The chilling effect of this legal regime (which has no parallel in any other jurisdiction and was unrecognized even in California until this case (see generally Civil Justice Ass'n of Cal. Br. & App.)) would be manifest even if *other* aspects of California law were to ameliorate the speech-inhibiting consequences of the UCL and FAL; but they do not. The state's anti-SLAPP law is no comfort (contra Kasky Br. 23) because it applies only to claims "lack[ing] *even minimal merit*" (*Navellier* v. *Sletten*, 29 Cal. 4th 82, 89 (2002) (emphasis added)), a standard unlikely to deter much litigation, given the plaintiff's paltry burdens of pleading and proof under the UCL and FAL. Kasky's further claim that "the defendant's financial exposure is limited" (Br. 21) is entirely invented, for the exorbitant costs of litigation are themselves a recognized deterrent to speech (*e.g.*, *First Nat'l Bank of Boston* v. *Belotti*, 435 U.S. 765, 785 n.21 (1978)), and are thus an invitation to bring extortive lawsuits (see, *e.g.*, Jonathan D. Glater, *California Says State Law Was Used as Extortion Tool*, N.Y. TIMES, Apr. 5, 2003, at A8).

Anyone whose speech might reach California also must fear that, if a plaintiff does take the case to trial and succeeds on the merits under the meager burdens imposed by state law, the

speaker may be required both to assume the burdens of a corrective speech campaign and also to provide to each of its California customers an amount of restitution that is unknowable *ex ante*, with *amicus* State of California retaining the power also to seek fines. See Pet. Open. Br. 4-5; Cal. Bus. & Prof. Code 17206. Although Kasky suggests that the demand for restitution set out in his own complaint is inoperative because he does not allege that any California consumer detrimentally relied on Nike's statements (Br. 21), California law with respect to restitution remains in a state of uncertainty that will cause risk-averse speakers to steer well clear of the statements that could lead to substantial liability. Thus, although the California Supreme Court decided after petitioner's opening brief was filed in this Court that state law does not authorize "*nonrestitutionary* disgorgement" in individual actions, it did not purport to limit the right to restitution. *Korea Supply Co.* v. *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146-51 (2003) (citing, *inter alia*, *Fletcher* v. *Sec. Pac. Nat'l Bank*, 591 P.2d 51 (Cal. 1979)).

3. Kasky altogether ignores two important respects in which the UCL and FAL as construed below necessarily chill even more than the expression of factual statements to which the decision below applies by its terms. *First*, respondent can offer no persuasive explanation of how Nike could make a genuine contribution to the debate over globalization without addressing the conditions at its own contract factories. Given that the statements of fact regulated by the decision below are "inextricably intertwined" with statements of opinion, the full protections of the First Amendment apply. Pet. Open. Br. 43 (citing *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988)). Because it is all but impossible to offer a meaningful "opinion" without reference to underlying "facts," and because the line between those two categories is inherently ambiguous, the ruling below will necessarily deter much protected expression from the perspective of commercial entities regarding social issues that relate to their business practices. *Id.* 42 (citing *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990)).

Second, prohibited viewpoint discrimination inheres in the reality that, under California law, Nike will be more susceptible

than its critics to liability for any misstatement about its labor practices. Kasky's argument that traditional "false advertising" claims are already subject to a more lenient burden of proof than the "actual malice" standard applicable to product defamation suits (Br. 50) ignores government's longstanding, special role in regulating the unique effects of traditional "advertising" on consumers as part of its regulatory authority over commercial transactions. This case is critically different: it involves allegations and responses that not only appear *in the same protected context* (*e.g.*, newspaper articles, editorials, and press releases) but also have an indistinguishable relationship to consumers' purchasing decisions. California law thus impermissibly discriminates against speakers based on their viewpoint – *i.e.*, depending entirely on whether they seek to encourage or discourage purchases of the same product.

4. Kasky cannot avoid recognition of the inevitable chilling effect and viewpoint tilt of the statutory scheme on which his complaint rests with the generalized assertion that businesses' statements of fact about their own operations are, by and large, "verifiable" and "hearty." Nor is there merit to his related argument that elements of the "actual malice" standard applied in cases such as *New York Times* v. *Sullivan* are inapposite whenever the speech in question concerns the speaker's own operations. The transaction-related statements regarding a product's own characteristics (such as its price and utility) that this Court has previously deemed "commercial speech" are easily verified and need not be published in the marketplace until the speaker has sufficient confidence in their accuracy. See *Rubin*, 514 U.S. at 495 n.4 (Stevens, J., concurring). By contrast, because the legal regime upheld below does not employ a "recklessness" standard, it accounts neither for the wide variation in the ready verifiability of statements regarding business operations, nor for the fact that the speaker may have needed to respond urgently, and without the opportunity for detailed study, to allegations raised by opponents. The allegations in this very case concerned operations at factories around the globe that petitioner *does not own or operate* and that were hotly debated every day in the media. In any event, "easy

verifiability" is not a ground for affording speech watered-down protection under the First Amendment. If it were, statements by unions regarding their practices and by politicians regarding their voting records could give rise to lawsuits seeking damages, reversal of election results, gag orders, and corrective speech campaigns – a prospect strikingly inconsistent with this Court's jurisprudence. Cf. *Republican Party of Minn.* v. *White*, 536 U.S. 765 (2002); *Brown* v. *Hartlage*, 456 U.S. 45 (1982); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

Unlike product advertising – "the *sina qua non* of commercial profits" (*Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976)) – statements by businesses regarding social issues are likely to be chilled by the prospect of liability because they often contribute only marginally to the speaker's bottom line. The prospect that the financial risks imposed by the UCL and FAL will inhibit protected speech is magnified by the fact that, unlike regulatory regimes previously considered by this Court, this one – by potentially authorizing wide-ranging restitution as well as corrective speech campaigns – imposes liability *entirely disproportionate* to any financial benefit the statements might have produced.

However careful it tries to be, no company can have confidence in its ability to speak about hotly contested aspects of its operations or its employees' activities in far-flung facilities without inviting a lawsuit by at least *one* dubious or critical resident of California – a lawsuit that will impose on the company the substantial and one-sided costs of defending the litigation – *even if* the company believes that, by enduring years of litigation, it would ultimately secure a trial court's judgment that its statements were absolutely truthful. Although Kasky and his *amici* repeatedly invoke this Court's statement in *Gertz* v. *Robert Welch, Inc.* that "there is no constitutional value in false statements of fact," more apt here is the *Gertz* Court's *conclusion* that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." 418 U.S. 323, 340 (1974). Given "[t]he increasingly widespread dissemination of

corporate speech * * * the law applied in the least protective jurisdiction effectively governs the national, and indeed worldwide, statements of thousands of corporations" (U.S. Chamber Br. 20) and to that degree the ruling below stands "in direct derogation [of] a policy announced and pursued by the European Union and its member nations, and therefore violates notions of international comity" (SRIMedia Br. 11).

5. Kasky's final contention that reversal of the judgment below would necessitate invalidating accepted forms of regulation of deceptive advertising is not correct. The principal statute Kasky cites, the FTC Act, does not confer a private right of action. Relief even for false "advertising" is limited to narrowly drawn prospective cease-and-desist orders, absent extraordinary circumstances in which the advertisements have left a firm misimpression in the public's mind. Montetary relief is unavailable at all unless "the defendant engaged in dishonest or fraudulent conduct." U.S. Br. 19 (citing 25 U.S.C. 57b(a)(2)).[5] The FTC also has not extended its enforcement authority beyond the context of advertising, packaging, and labeling to reach statements in the media like those in this case. See, *e.g.*, *FTC Enforcement Policy Statement on U.S. Origin Claims* (1997); *FTC Report on U.S. Origin Claims* (1997). There are thus three important distinctions between this case *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157 (CA7 1977). That ruling (i) granted the government a cease-and-desist order on the basis of false statements, (ii) that appeared in product advertisements, and (iii) that touted the effect of the product on consumers' health. Compare *Koch* v. *FTC*, 206 F.2d 311, 317 (CA6 1953) (FTC Act does not reach similar statements by a manufacturer in a book, because a book does not generate consumer reliance and because regulation of its contents would "violate the First Amendment").

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[5] Other statutes piggyback on the FTC Act's enforcement scheme and thus carry that principal statute's limitations. They furthermore are limited to representations made on product labels or in the course of a sale or offer for sale. See 16 U.S.C. 1385 (dolphin safe); 18 U.S.C. 1159(a) (produced by Native Americans).

Government has a freer hand in regulating speech under the securities laws both because it is an area of longstanding, pervasive regulation and because financial markets immediately incorporate statements relating to a business's financial health. See *SEC* v. *Wall St. Publ'g Inst.*, 851 F.2d 365 (CADC 1988), *cert. denied*, 489 U.S. 1066 (1989); cf. *Glickman* v. *Wileman Bros.*, 521 U.S. 457 (1997). No state has a remotely comparable scheme of regulation of the retail sale of athletic apparel. But in any event, although a civil suit under the securities laws could conceivably rest on the defendant's statements in newspaper articles, op-eds, and the like, such a suit would have to allege fraud. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976). A lower standard of liability applies only when the statements arise in the course of a commercial transaction – *e.g.*, the submission of a registration statement, the sale of securities, or the issuance of a proxy solicitation. *E.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 381-82 (1981); *Shidler* v. *All American Life & Fin. Corp.*, 775 F.2d 917, 926 (CA8 1985).

States occasionally regulate statements regarding matters of broader public importance that do not bear on the product's effects on buyers or users, such as whether it is made "in the U.S.A.," or by union members, blind workers, or Native Americans. But as even the examples Kasky collects (Br. 30 n.8, 31 n.11) make clear, almost all such regulations apply only to statements made in the course of a sale, in advertisements, or on the product's packaging or labeling, none of which is implicated by this case. They also do not provide nearly the breadth of remedies that the UCL and FAL do. And, a statute that places a seller on notice that it must henceforth be particularly careful with respect to a discrete set of factual representations has nothing like the chilling effect of the UCL and FAL, which apply to statements on every conceivable issue relating to the speaker's operations.

CONCLUSION

For the foregoing reasons, as well as those set forth in the opening brief of the petitioner, the judgment should be reversed.

Respectfully submitted,

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April 15, 2003

April 15, 2003

Hon. William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First St., NE
Washington, DC 20543

Re: No. 02-575, *Nike et al.* v. *Kasky*

Dear General Suter,

I serve as counsel of record to the petitioners in this matter and respectfully request that you circulate this letter to the Justices.

The *amicus curiae* brief filed by the Attorney General of the State of California (at 19-20 & n.10) contains the following serious allegation that petitioners have violated both federal law and the Rules of this Court:

> Nike apparently even ignored this Court's mandate that "the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the Attorney General of that State" when the constitutionality of a state law is "drawn into question" and the state has not appeared as a party. Sup. Ct. R. 29.4(c).
>
> /fn/The California Attorney General was not served with the Petitioner's Brief at the same time as the parties (the document was received on March 10, 2003) and is unaware of any document filed with this Court that indicates the potential applicability of 28 U.S.C. § 2403(b).

That allegation is so obviously and profoundly wrong as to be deeply irresponsible. The Petition for a Writ of Certiorari states, on page ii (bold-face type and capitalization in original):

RULE 29.4 CERTIFICATION

> Petitioner certifies that 28 U.S.C. 2403(b) may apply and that this Petition has been served upon the Attorney General of California.

Petitioners' Brief on the merits includes the *identical* certification (except that it refers to service of the Brief), also on page ii. As reflected in the Certificates of Service on file with this Court, Wilson-Epes Printing Co. duly served the Attorney General of California with both the Petition and the Brief on the merits.

It is unfathomable how the Attorney General could have made such false allegations that petitioners had violated federal law and this Court's Rules. The Attorney General could only have accused petitioners of not including the required certification in "the initial document filed in this Court" – *i.e.*, the Petition for Certiorari – by *failing to read the Petition*. And the Attorney General could have asserted that he was "unaware of any document filed with this Court that indicates the potential applicability of 28 U.S.C. § 2403(b)" only by *failing to read either the Petition or petitioners' Brief on the merits*.

The Attorney General's further reference to the circumstances in which he received petitioners' Brief on the merits is misleading as well. Because the State of California chose not to intervene in this case, it is not a party, and it has no *right* to be served with *any* document other than the Petition for Certiorari. Nor did the State contact Nike requesting service of the papers filed in this Court. Nonetheless, *as a courtesy*, petitioners provided the State with copies of its Reply in support of the Petition as well as its Brief on the merits. The Attorney General's suggestion to this Court that petitioners were somehow attempting to withhold materials from the State is not only a regrettable distortion of petitioners' *courtesy* in providing materials to the State, it also twists the facts. Petitioners mailed a copy of the page-proof filing of its Brief on merits to the Attorney General on the first business day after it was filed. Petitioners furthermore mailed copies of the printed Brief to the Attorney General *at the same time* as they were served upon respondent Kasky. As again reflected in the Certificates of

Service, Wilson-Epes Printing Co. mailed both sets of briefs contemporaneously.

Immediately upon receiving the Attorney General's brief, we notified the State's Counsel of Record, Ronald Reiter, of these errors and requested that the State provide the Court with a correction. It would have been a simple matter for the State to acknowledge the mistakes or even to submit a corrected Brief. But instead, the Attorney General has categorically refused to acknowledge that it made *any* error, stating that the briefs in the case speak for themselves and that if petitioners wished to write to the Court the State would submit any response it deemed appropriate.

We pressed Mr. Reiter how there could be any dispute that a mistake had been made, explaining that, if the State declined to submit a correction, we would prefer to advise the Court of the error and that the matter was resolved. He would say only that he believed that a copy of the Petition has not been received by the Attorney General. Not only was the Petition properly served, but the Attorney General's office presumably secured a copy of it at some point. His brief thus repeatedly cites the Lodging that petitioners filed with this Court together with the Petition. And hopefully the State took the time to read not only the Petition but also petitioners' Brief on the merits (which, as noted, also sets out the certification in question), although admittedly the Attorney General never bothers to cite our brief in purporting to refute the arguments it presents. But all the foregoing matters little because it was obviously essential for the Attorney General to review the materials filed by petitioners before launching an allegation that those materials failed to comply with federal law and this Court's Rules. We therefore regret that the matter has occupied the Court's time, but hope that the Court will recognize that it was essential for petitioners to correct the record.

Very truly yours,

Laurence H. Tribe

cc: Attorney General of California and His Representatives ((by overnight service and fax)