No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC. *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of California

MOTION OF EXXONMOBIL, BANK OF AMERICA, MICROSOFT, MONSANTO, AND PFIZER FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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November 2002

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to this Court's Rule 37.2(b), ExxonMobil Corporation, Bank of America, Microsoft Corporation, Monsanto Company, and Pfizer Inc., respectfully request leave of this Court to file this brief *amici curiae* in support of petitioners. Petitioners have consented to the filing of this brief; their letter of consent will be lodged with this Court. Respondent has withheld consent, thus necessitating this motion.[1]

ExxonMobil is the world's largest integrated oil company, engaged in oil and gas exploration, production, supply, transportation, and marketing in some 200 countries around the world.

Bank of America is one of the world's leading financial services companies, providing consumer and commercial banking to one in four households in the United States and serving clients in over 150 countries.

Microsoft is the worldwide leader in software, services, and Internet technologies for personal and business computing.

Monsanto is a leading global provider of agricultural products and integrated solutions that seek to improve farm productivity and food quality throughout the world.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel representing a party in this case authored this motion or brief in whole or in part and that no person or entity other than *amici* or its counsel made a monetary contribution to the preparation or submission of this motion or brief.

Pfizer, the world's leading research-based health care company, discovers, develops, manufactures, and markets worldwide prescription medicines for both humans and animals and many of the world's best-known consumer brands.

Each of the *amici* does business in California and, accordingly, is subject to potential civil and criminal liabilities imposed under CAL. BUS. & PROF. CODE § 17200 *et seq.* and § 17500 *et seq.*

Like virtually every other large corporate enterprise in the United States, *amici* regularly speak out on issues of public concern and in so doing place before the public facts about their products, services, or business operations. In some instances, *amici* are responding to criticisms; in others, they are initiating public discussion. But in each such instance, their speech is an effort to engage public opinion, not to solicit business.

If a corporation's every press release, letter to an editor, customer mailing, op-ed article and website posting may, under the California statutes at issue here, be the basis for civil and criminal actions, corporate speakers will find it difficult to address issues of public concern implicating their products, services, or business operations—even to defend themselves in the court of public opinion when attacked.

Amici's participation in this case will aid the Court in two ways. First, *amici* will bring to the Court's attention the concern of a diverse group of large businesses that are constantly in the public eye. Second, *amici* will explain why it is imperative that the Court grant review now rather than wait for the completion of proceedings on remand, as well as why the Court should refine its commercial speech doctrine in a fashion that will better serve core First Amendment values.

Based on the foregoing, *amici* hereby move to file this brief *amici curiae* in support of petitioners in this case.

Dated: November 15, 2002

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INTEREST OF AMICI

The interest of *Amici Curiae* is fully set forth in the Motion that accompanies this brief.

SUMMARY OF ARGUMENT

Review should be granted because the California statutes, as construed by the California Supreme Court in this case, burden speech by corporate speakers that lies at the heart of the First Amendment. The effect of these statutes on First Amendment freedoms is both immediate and grave, threatening all corporate speakers with civil and criminal liability for engaging in protected speech.

The general chilling effect of the statutes exists now and will continue to exist regardless of the proceedings on remand. Only this Court can remedy the First Amendment harms caused by these statutes, and they are harms the Court should remedy now. The Court has granted review in similar circumstances on many other occasions, and it should do so here.

The California court's decision, by adopting a definition of "commercial speech" that goes far beyond anything the Court's commercial speech doctrine contemplates, burdens core First Amendment speech. But the California court's decision also reflects aspects of the doctrine that the Court should refine. The degree of First Amendment protection for a corporation's speech should not depend on the category—"commercial" or "non-commercial"—to which the speech is assigned. Here, as in all other realms of expression, content and context should be the touchstone of First Amendment analysis.

The fact that this Court has found it necessary to address the proper application of its commercial speech doctrine more than two-dozen times since 1976—more than

twenty times since it announced the *Central Hudson* test in 1980, and a dozen times in the last ten years alone—demonstrates that this Court should bring greater clarity to the doctrine. The obvious errors in the California court's decision on fundamental aspects of the doctrine make this the appropriate case to do so.

ARGUMENT

I. THE DECISION BELOW, IF NOT REVERSED, WOULD HAVE DEVASTATING IMPACTS ON CORPORATE SPEECH

A glance at a daily newspaper or a few minutes watching network news reveals a broad array of issues of intense public concern, where *amici* and other comparable businesses lie at or near the heart of the story. For *amici*, such issues range from global warming, the environmental effects of their operations or products, and human rights abroad to product safety, biotechnology, health-care costs, equitable treatment of customers, and diversity in the workplace. Every one of these issues of public concern relates directly or indirectly to the companies' products, services, or operations.

The decision below, if left uncorrected, would allow plaintiffs' lawyers to surf corporate websites, scan the daily press, or watch television looking for op-ed articles, press releases, speeches by management, letters to the editor, and the like in an attempt to find some statement as to which questions can at least be raised regarding accuracy. Suits could then be filed by a single individual seeking to impose massive liabilities on the corporate speaker in the hope of being able to convince a California judge or jury that the statement in fact was inaccurate or, even if accurate, might be misleading. Without question, the decision below has enormous consequences for free speech in the United States.

II. IMMEDIATE REVIEW IS WARRANTED

Although the California Supreme Court has remanded the case to determine whether Nike in fact violated the statutes as the California court construed them, this Court need not, and should not, wait to review the California Supreme Court's holding that those statutes, as thus construed, do not violate the First Amendment. Immediate review is not only permitted but required to remove the pall cast now by the statutes on speech by corporate speakers that lies at the core of the First Amendment.

A. As Construed by the California Supreme Court, the Statutes Chill Speech

As construed by the California Supreme Court, even a corporation's *truthful* statements about issues of public concern involving its products, services, or business operations are actionable if the plaintiff alleges that the statements are "either actually misleading or [have] a capacity, likelihood or tendency to deceive or confuse the public." App. 7a (quoting *Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985)).

Merely by making such strict-liability allegations, a public official or a private plaintiff can drag a corporation into potentially costly, intrusive, and protracted litigation—a prospect that this Court has repeatedly recognized chills the exercise of First Amendment rights. *See, e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality opinion) ("It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance." (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))). And if the corporation's statements, although believed to be

truthful when made, turn out to have been mistaken, or if its statements, although truthful, are later deemed to have been misleading or even potentially misleading, the corporation faces substantial monetary and even criminal sanctions. The Court has recognized the chilling effect of such strict-liability rules on speech. *See, e.g., Smith v. California*, 361 U.S. 147, 150-52 (1959).

The statutes at issue not only chill corporate speakers seeking to initiate discussion of matters of public concern involving their products, services, or operations. They also deter a corporation from responding to criticism, thereby serving a corporation's critics as a backup weapon to be deployed whenever the corporation defends itself against its critics' claims. The attorney-fees provisions of California law, CAL. CIV. PROC. CODE § 1021.5, combined with the ease with which plaintiffs' lawyers can allege violations of the broadly worded statutes, provide a corporation's critics with a financial incentive to use the statutes as just such a weapon. *See generally Hewlett v. Squaw Valley Ski Corp.*, 63 Cal. Rptr. 2d 118, 146 (Cal. Ct. App. 1997) (awarding attorneys' fees under CIV. PROC. CODE § 1021.5 in plaintiffs' successful unfair competition action).[1]

These statutes, as construed by the California court, are what now confront petitioners and all corporate speakers over which California's courts could assert jurisdiction. The California Supreme Court's construction "fixes the meaning

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[1] *Cf. In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998) (Posner, J.) (describing "shenanigans" of certain contingent-fee attorneys in "accus[ing] the lawyers for the class and for the defendants—groundlessly, as far as we can tell—of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism").

of the statute," *Winters v. New York*, 333 U.S. 507, 514 (1948), and "puts these words in the statute as definitely as if it had been so amended by the legislature," *Wainwright v. Stone*, 414 U.S. 21, 23 (1973) (per curiam) (quoting *Winters*, 333 U.S. at 514). The words of the California Supreme Court "are the words of the statute." *NAACP v. Button*, 371 U.S. 415, 432 (1963).

B. Review of the Court's Decision Upholding the Statutes Should Not Be Delayed

This Court may exercise certiorari jurisdiction over the "final" judgment of a state's highest court. *See* 28 U.S.C. § 1257(a). The Court has "recurringly" granted review in cases where "there [were] further proceedings in the lower state courts to come." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). In this case, review of the issues presented in the petition is warranted under *Cox*. *See id.* at 482-83.

First, the California Supreme Court fully considered and squarely resolved the First Amendment issue that is the subject of this petition. On remand, if Nike prevailed on nonfederal grounds (no federal issues remaining), the state court's decision on the First Amendment issue would go unreviewed by this Court, and the pall cast by its decision over all corporate speakers would remain. *See id.* at 482-85. *Second*, a victory for Nike in this Court on the federal issue now would end the case, thereby preventing a waste of resources by the parties and the courts. *See id. Third*, and most crucially from *amici's* standpoint, "refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 483.

This Court has repeatedly granted review in cases like this one where a state court has sustained a state statute against First Amendment challenge and ongoing state court proceedings on remand are contemplated. "Adjudicating the proper scope of First Amendment protections has often been

recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989).

For example, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court granted certiorari and reversed the Minnesota Supreme Court's ruling that a bias-motivated crime ordinance was permissible under the First Amendment, even though the state court, upon upholding the St. Paul ordinance, had remanded for trial under the ordinance as interpreted. *In re R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991). Similarly, in *Keller v. State Bar*, 496 U.S. 1 (1990), the Court granted certiorari and reversed the California Supreme Court's decision that the state bar's use of dues to finance certain ideological activities was permissible under the First Amendment, *id.* at 4-7, 17, even though the state supreme court had remanded the case to the trial court for further proceedings. *Keller v. State Bar*, 767 P.2d 1020, 1033 (Cal. 1989).

In *Fort Wayne Books*, the Court held that, because "petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal of the ... [state court's] holding would bar further prosecution," 489 U.S. at 55, and because the case "involve[d] a First Amendment challenge," *id.* at 57, review was proper. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court reviewed, and reversed, the Florida Supreme Court's decision that the state's "right of reply" statute, granting political candidates a right to equal newspaper space to reply to criticisms, was permissible under the First Amendment. *Id.* at 243-46. The Court did so in a posture similar to that here: the state supreme court had remanded to the trial court for further proceedings on the plaintiff's claim against the newspaper. *Id.* at 246. Finally, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), this Court reviewed a state court decision construing a state statute to require a defamation plaintiff to show only fault, not falsity, and

sustaining the statute as so construed against First Amendment challenge. *Id.* at 771. Although the state court had remanded for a new trial under the statute as so construed, this Court granted review. *Id.* Just as the issue here is the protected status of petitioners' speech, the issue in *Hepps* was whether defamatory statements not proven false warranted First Amendment protection. *Id.* at 776-77.

* * *

The chilling effect of the California Supreme Court's decision exists now and will continue to exist as long as it remains unreviewed. For that reason, delaying review "would constitute and aggravate a deprival of . . . [First Amendment] rights, if any, that the [petitioners] possess and may properly assert." *Nebraska Press Assoc. v. Stuart*, 423 U.S. 1319, 1325 (1975) (opinion of Blackmun, J.) (in chambers). And "each passing day may constitute a separate and cognizable infringement of the First Amendment." *Nebraska Press Assoc. v. Stuart*, 423 U.S. 1327, 1329 (1975) (opinion of Blackmun, J.) (in chambers).

Where "uncertainty of the constitutional validity of [a state statute] restricts the present exercise of First Amendment rights. . . . it would be intolerable to leave unanswered . . . an important question . . . under the First Amendment; an uneasy and unsettled constitutional posture of [the challenged state statute] could only further harm the operation of a free press." *Miami Herald*, 418 U.S. at 247 n.6. Delay by this Court in granting review would all but guarantee irreparable injury to petitioners, *amici*, and countless other corporate speakers, all of whom, operating under substantial uncertainty, will have to choose between engaging in what they believe to be protected speech and avoiding potential substantial liability under a state statutory scheme of dubious constitutional validity.

For all of these reasons, immediate review of the California Supreme Court's decision is warranted.

III. THE COURT SHOULD REFINE ITS COMMERCIAL SPEECH DOCTRINE

Under this Court's commercial speech cases, "the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). Speech classified as "commercial" is subject to a less demanding standard of review, allowing greater regulation, than speech classified as "noncommercial." *Id.* at 64-65; *see also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-66 (1980).

This dichotomous approach has produced inconsistent decisions by this Court. For example, the Court has applied its less demanding standard of review to commercial speech restrictions even where "the justification for allowing more regulation of commercial speech" was lacking. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (Stevens, J., concurring); *see also, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501-04 (1996) (opinion of Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 518 (Thomas, J., concurring); *id.* at 517 (Scalia, J., concurring).[2] On the other hand, the Court has also invalidated commercial speech restrictions the purposes of which were unrelated to any distinction justifying differential regulation of commercial and noncommercial

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[2] *See also Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1509 (2002) (Thomas, J., concurring); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring).

speech. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-94 (1999).

More generally, commercial speech is anomalously viewed as subordinate to and less deserving of First Amendment protection than, for example, the fare offered on the Playboy Channel. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny). And the Court has not provided definitions of "commercial" and "noncommercial speech," even though the category to which the speech is assigned determines its level of protection. *See Bolger*, 463 U.S. at 66-68 (enumerating criteria for identifying "commercial speech" but emphasizing that none of them is either necessary or sufficient); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring); *44 Liquormart*, 517 U.S. at 521 (Thomas, J., concurring); *Coors*, 514 U.S. at 493 (Stevens, J., concurring); *Discovery Network*, 507 U.S. at 419-23; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).[3]

This is not to say that this Court's decisions lack guideposts for determining what the Court has meant by its references to "commercial speech": it has meant speech informing consumers about "who is producing and selling what product, for what reason, and at what price," *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976)); that is, "a communication that does no more

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[3] *Cf. Playboy Entm't Group*, 529 U.S. at 817 ("'[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' *Speiser v. Randall*, 357 U.S. 513, 525 (1958). "Error in marking that line exacts an extraordinary cost.").

than propose a commercial transaction," *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)); *see also Lorillard*, 533 U.S. at 554 (commercial speech is "speech proposing a commercial transaction" (quoting *Central Hudson*, 447 U.S. at 562)); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) ("[C]ommercial speech [is] usually defined as speech that does no more than propose a commercial transaction."); *Discovery Network*, 507 U.S. at 423 ("[P]roposal of a commercial transaction [is] '*the test*' for identifying commercial speech." (quoting *Bd. of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989))). *This* is the type of expression for which the commercial speech doctrine was devised; it was this type of expression, proposing a sale—"I will sell you the X prescription drug at the Y price"—that the Court had previously held to be unprotected, but then determined should be protected. *Va. State Bd. of Pharm.*, 425 U.S. at 761; *see also Bates v. State Bar*, 433 U.S. 350, 364 (1977) (Commercial speech "inform[s] the public of the availability, nature, and prices of products and services."); *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) ("[A]dvertising provides consumers with accurate information about the availability of goods and services.").

And the Court explained that it is the "commonsense difference[ ]" not between "commercial speech" and "noncommercial speech," but between *this* type of commercial speech (speech that does "no more than propose a commercial transaction") and "other varieties" of speech, that warrants "a different degree of protection." *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). It is *this* type of commercial speech—speech about qualities of the advertiser's "product or service"—that the government may insist be truthful, *id.*; that it may require to "appear in such a form, or include such

additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive," *id.*; and as to which the prohibition against prior restraints may be inapplicable, *id.*[4] And it is the "commonsense distinction" between *this* type of commercial speech and "other varieties of speech" on which the Court has declared that the *Central Hudson* test itself is "based." *Coors*, 514 U.S. at 482

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[4] "[T]he commercial advertiser generally knows the *product or service* he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and his price substantially eliminates any danger that government regulations of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression."

Coors, 514 U.S. at 495 (Stevens, J., concurring) (emphasis added) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 777-78 (Stewart, J., concurring)); *see also id.* at 495 n.4 ("Most of the time, if a seller is *representing a fact or making a prediction about his product*, the seller will know whether his statements are false or misleading and he will be able to correct them.") (emphasis added). Justice Stevens stated that it is not simply a corporation's ability to verify particular speech that explains why the First Amendment permits greater regulation of such speech; such reasoning would support regulation of any factual statement by a corporation on *any* matter within its direct knowledge. As Justice Stevens stated, it is the *combination* of the corporation's ability to verify what it says about its products or services and "the immediate harmful impact" of false commercial speech on consumer transactions that "explain[s] why we tolerate more governmental regulation of this speech than of most other speech." *Id.* at 496; *see also id.* (the concern is that "consumers may purchase products that are more dangerous than they believe or do not work as advertised"). The California Supreme Court mistakenly focused only on the verifiability of a corporation's speech and its resistance to chill.

(quoting *Central Hudson*, 447 U.S. at 562). In short, under *Central Hudson* it is not *all* types of commercial speech that receive lesser protection but only "some types" of commercial speech (those proposing commercial transactions) that the government may regulate "more freely than other forms of protected speech." *44 Liquormart*, 517 U.S. at 498 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

The California Supreme Court departed from this principle when it ruled that a corporation's speech not about its products and services as such, but about issues of public concern involving its products, services, or operations could be regulated as "commercial speech" simply because the corporation indirectly aims, through its speech, to promote its sales and profits. As Justice Thomas observed in a similar connection, such a justification for regulation of commercial speech is unduly broad because "[a]lmost everything a business does has the purpose of promoting the sale of its products," with the result that such a justification of a corporation's speech would encompass virtually anything that a corporation might say. *Lorillard*, 533 U.S. at 585 (Thomas, J., concurring).

The California Supreme Court fell into its error because, inferring from *Bolger* that "commercial speech" could mean almost anything, it believed that its only recourse was to consider whether the rationales that this Court has offered to justify greater regulation of "speech proposing a commercial transaction" justified similar regulation of the speech at issue in this case. Those rationales include a corporation's ability to verify speech about itself, and the supposed resistance of its speech to being chilled because of the corporation's economic motivation to speak. The California court expanded the definition of "commercial speech" subject to regulation as far as it believed these rationales would allow.

The result of the California court's extrapolation, however, is a definition of regulatable "commercial speech" that sweeps far beyond the type of transactional speech for which the commercial speech doctrine was devised, encompassing speech on matters of public concern that proposes no commercial transaction. This Court has never suggested that such speech may be subject to the same degree of regulation as speech that does "no more than propose a commercial transaction." If that is to be the new First Amendment rule (which plainly it should not be), it should be this Court, rather than the California Supreme Court, that so enlarges the doctrine. If it is not to be the rule, this Court should disapprove it.[5]

Bolger is not to the contrary. *Bolger* merely affirmed that "commercial speech" subject to regulation under *Central Hudson* does not escape such regulation simply because it "links a product to a current public debate." 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563). The Court thus held that the mailings at issue in that case could be regulated under *Central Hudson* even though they contained "discussions of important public issues." *Id.* at 67-68. But the material in which these

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[5] If the First Amendment permits a corporation's speech on issues of public concern to be regulated as "commercial speech" under *Central Hudson*—simply because the speech addresses issues relating to the corporation's products, services, or operations—then the government could insist on pre-screening materials containing such speech and require that such materials "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24; *see also Zauderer*, 471 U.S. 626 (upholding such a disclosure requirement). This absurd, but alarming, result highlights the fundamental error in the California Supreme Court's decision.

discussions appeared were *advertisements*. *See id.* at 62. Although the Court stated that the informational pamphlets could not be characterized "merely as proposals to engage in commercial transactions," *id.* at 66, they were *at least that much*, and the only question addressed by the Court was whether their discussion of matters of public concern transformed them into fully protected speech. By contrast, the California Supreme Court has held that the First Amendment permits regulation of speech discussing matters of public concern that cannot fairly be characterized as proposals to engage in commercial transactions in the first place.

Several Members of the Court have expressed misgivings about the Court's commercial speech doctrine and the *Central Hudson* test that embodies it. *See Lorillard*, 533 U.S. at 571-72 (Kennedy, J., joined by Scalia, J., concurring); *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring); *Coors*, 514 U.S. at 493 (Stevens, J., concurring) (referring to "the misguided approach adopted in *Central Hudson*"). It is abundantly clear, after more than two-dozen cases, that both the doctrine and the test have not provided the needed guidance. Now is the time and this is the case "to break new ground." *Thompson*, 122 S. Ct. at 1504.

A categorical distinction between "commercial" and "noncommercial" speech is neither possible nor desirable. The two types of speech are not distinct: "the difference is a matter of degree." *Discovery Network*, 507 U.S. at 423. Moreover, what Justice Stevens has called the "artificial[ ]" and "rigid" "commercial/noncommercial distinction," *Coors*, 514 U.S. at 494 (Stevens, J., concurring), simply is not helpful in determining the appropriate level of protection for particular speech that includes *both* commercial *and* noncommercial elements. "The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse

the First Amendment secures." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

The Court should replace its *Central Hudson* test with a more nuanced approach. Such an approach would key the standard of First Amendment review not only to the purpose of a regulation, as several Members of the Court have urged, but, decisively here, also to the content and context of the particular "commercial" speech involved. To serve fully First Amendment values, the Court's commercial speech doctrine should prescribe a standard of review "that reflects the need for distinctions among contexts, forms of regulation, and forms of speech." *Thompson*, 122 S. Ct. at 1515 (Breyer, J., joined by Rehnquist, C.J., and Stevens & Ginsburg, JJ., dissenting).

And as Justice Brown noted in her dissent, even "[w]ithout abandoning the categories of commercial and noncommercial speech, the court could develop an approach better suited to today's world by recognizing that not all speech containing commercial elements should be equal in the eyes of the First Amendment." App. 61a (Brown, J., dissenting) (suggesting possible standards of review for regulating corporate speech on issues of public concern).

Review should be granted not only to reverse the California Supreme Court's decision but to fashion a commercial speech doctrine more in keeping with fundamental First Amendment principles.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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November 2002