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 TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation, California Manufacturers and Technology Association, and California Chamber of Commerce respectfully request leave of the Court to file this brief amicus curiae in support of Petitioners.[1] Counsel for Nike consents to the filing of this brief; however, counsel for Kasky withheld consent.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded 29 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise. PLF established a Free Enterprise Project in which it submits amicus briefs in cases impacting America's economic vitality. For example, PLF filed amicus briefs in *Chevron, U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002), *Adams v. Florida Power Corp.*, 122 S. Ct. 643 (2001), and *Pharmaceutical Research and Manufacturers of America v. Concannon*, Supreme Ct. Docket No. 01-188. PLF also filed an amicus brief in this case in the court below.

The California Manufacturers and Technology Association (CMTA) (formerly the California Manufacturers Association) works to improve and preserve a strong business climate for California's 30,000 manufacturers, processors, and technology based companies. Since 1919, CMTA has worked with state government to develop balanced laws, regulations, and policies that stimulate economic growth and create new jobs while safeguarding the state's environmental resources. CMTA

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

represents businesses from the entire manufacturing community—a segment of California's economy that contributes more than $250 billion annually and employs more than 2 million Californians.

The California Chamber of Commerce is a voluntary, nonprofit, California-wide business association with more than 15,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the Chamber's members are small- or medium-sized businesses which it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business. The Chamber is involved with legislative, regulatory, and judicial issues involving corporate free speech and the business community.

Amici will augment Petitioners' arguments by illustrating the wide range of situations that will be affected by the California Supreme Court's decision in this case. Justice Brown's dissenting opinion below implored this Court to review this case and to reconsider the current commercial speech doctrine, which no longer provides adequate guidance in a time when commercial and noncommercial speech are blurred beyond the ability of courts to separate them. Amici believe that this case presents an adequate record as well as fully developed legal arguments that make this case appropriate for review by this Court.

For all the foregoing reasons, the motion of Pacific Legal Foundation, California Manufacturers and Technology Association, and California Chamber of Commerce to file a brief amicus curiae should be granted.

DATED: November, 2002.

Respectfully submitted,

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QUESTIONS PRESENTED

1. When a corporation participates in a public debate—writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance—may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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SUMMARY OF ARGUMENT

In the past 60 years, this Court's approach to speech uttered by business interests ranged from zero protection (*Valentine v. Chrestensen*, 316 U.S. 52 (1942)), to very high protection (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)), to a four-part test (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)), which has itself undergone revision (*Board of Trustees of the State Univ. v. Fox*, 492 U.S. 469, 480 (1989) (upholding a regulation outlawing Tupperware parties on a university campus)). The analyses have differed depending on the speaker (*Bates v. State Bar*, 433 U.S. 350, 384 (1977), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978) (lesser protection accorded to attorney solicitations)) and the social worth of the activity promoted (*Compare Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342, 348 (1986) (upholding restrictions on advertisements for legal gambling facilities), *with Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (restrictions on solicitations for charity struck down)). The divergent lines of commercial speech jurisprudence have produced a well of confusion, the most extreme example of which is the California Supreme Court decision below.

Looking to the future, corporate speech takes many different forms and addresses issues far beyond offering to sell widgets at low, low prices. And even when the speech is fairly straightforward in its attempt to bolster a bottom line, it is so frequently intermingled with otherwise protected speech that courts simply cannot determine where the speech falls in the tangled web of cases comprising the "commercial speech doctrine." Only this Court can cut through the clutter. This case presents a perfect opportunity to do so.

For these reasons, the Petition for a Writ of Certiorari to the California Supreme Court should be granted.

ARGUMENT

I

NIKE'S PETITION SHOULD BE GRANTED SO THIS COURT CAN ADDRESS A MATTER OF CRITICAL PUBLIC CONCERN: THE LEVEL OF SCRUTINY APPLIED TO SPEECH UTTERED BY BUSINESS INTERESTS

The variety and pervasiveness of commercial and mixed commercial/noncommercial speech present in the market today cannot be analyzed adequately under the modern commercial speech doctrine. The decision below relies on this Court's cases, but in so doing, unmoors the precedents from the underlying source—the First Amendment. To prevent consumers from hearing misleading corporate speech, the California Supreme Court sought to prevent consumers from hearing misleading speech by holding that *all* corporate speech deserves only minimal constitutional protection. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 566, this Court formulated a four-part test against which restrictions on commercial speech would be weighed:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

This Court later expanded *Central Hudson*'s inherent flexibility. *See, e.g.*, *Board of Trustees of the State Univ. v. Fox*, 492 U.S. at 480 (requiring a "reasonable fit" rather than the least restrictive means to comply with the fourth prong). Unfortunately, this flexibility has "left both sides of the debate with their own well of precedent from which to draw," Abrams,

Floyd, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28. *See also* Shiffrin, Steven, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1222 (1983) ("commercial speech" was "an empty vessel into which content is poured").

Even this Court has been unable to apply the *Central Hudson* analysis in any predictable way. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 527 (1996) (Thomas, J., concurring) (courts have had difficulty in applying the *Central Hudson* balancing test "with any uniformity"); (*City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) ("This very case illustrates the difficulty of drawing bright-lines that will clearly cabin commercial speech in a distinct category. . . . The absence of a categorical definition . . . [is] also a characteristic of our opinions considering the constitutionality of regulations of commercial speech."). Many lower courts have expressly noted their struggle to apply *Central Hudson*. *See e.g., Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) (striking down a fairground lease term prohibiting gun shows, appellate court described this Court's commercial speech cases, concluding that "*Central Hudson* is not easy to apply"); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (recognizing "the difficulty of drawing bright-lines" (quoting *Discovery Network*, 507 U.S. at 419)); *Oxycal Lab., Inc. v. Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995) (recognizing "that, often, these definitions will not be helpful and that a broader and more nuanced inquiry will be required"). Moreover, this Court has noted the entreaties of "certain judges, scholars, and amici curiae" to repudiate *Central Hudson* and "implement[] a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

The commercial speech doctrine has become nearly impossible to apply because "commercial speech" is often extremely difficult, if not impossible, to identify. *See* Kozinski, Alex, & Banner, Stuart, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 631 (1990) (Kozinski & Banner). This Court has long recognized that speech can serve dual functions.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen v. California, 403 U.S. 15, 26 (1971). The duality of commercial and noncommercial speech becomes critically important when overlaid with the Court's treatment of false or misleading speech. Traditionally, in the realm of noncommercial speech, the government is restrained from acting as the arbiter of truth and falsity and the state may not punish its citizens for disseminating false noncommercial information. *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "); *see also First National Bank v. Bellotti*, 435 U.S. 765, 777, 783 (1978) (corporations enjoy the same degree of constitutional protection as individuals for direct comments on public issues; thus, corporate sponsored editorials which address the merits of a pending legislation should not be subject to government regulation of falsity).

The court below, in a groundbreaking decision, held that "*when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." Petitioners' Appendix (Pet. App.) 17a-18a. The court tries to downplay the nature of its holding, claiming that it merely means "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." Pet. App. 2a. There is, of course, nothing to prevent other courts from considering this reasoning persuasive enough to depart from the consumer fraud context to which the court tries to limit it.

Dissenting, Justice Janice Brown took issue with the current commercial speech doctrine that is dependent on speech being categorized as *either* commercial or noncommercial, with little quarter given to speech that contains elements of both. Pet. App. 40a (Brown, J., dissenting). Contemporary marketing, she argues, involves speech far more intermingled than segregated: "With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking." Pet. App. 41a. She further laments, "I believe the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries." Pet. App. 42a.

The commercial speech doctrine as currently applied by this Court and lower courts can lead to highly unpredictable results, such as the decision below. Pulling a little of this and a little of that from a variety of this Court's opinions, a majority of the California Supreme Court developed a new doctrine unlike any this Court—or any other court—ever articulated. Pet. App. 17a (describing the new "limited purpose" definition

of commercial speech). When the state of the law reaches this point, affected parties have no means by which to adapt their actions or their speech to prevent themselves from running afoul of the law. This uncertainty chills protected speech as those fearing liability shy away from expression that might be construed as "commercial."

The confusion engendered by the opinion below weighs heavily in favor of this Court's review. Stability, certainty, and predictability are valued because they promote confidence in the rule of law and make the resolution of disputes a less costly enterprise. Grodin, Joseph R., *Are Rules Really Better Than Standards*, 45 Hastings L.J. 569, 570 (1994). Certainty achieves fairness to those who rely upon the law, efficiency in following precedent, and continuity and equality in treating similar cases equally. *McGregor Co. v. Heritage*, 631 P.2d 1355, 1366 (Or. 1981) (Peterson, J., concurring). Certainty promotes business innovation and development by letting firms know what they can and cannot do. Further, by eliminating speculation as to what the law is and avoiding a need for interpretation, clarification, or explanation, certainty promotes efficiency for businesses and individuals. Loving, Paul E., *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994).

The decision of the California Supreme Court cannot be reconciled with the First Amendment. It can only serve as authority for other courts to ratchet downward the protection due not only to commercial speech, but to any speech that has even the slightest element of commercial gain for the speaker. Petitioners are correct that the decision below is so outlandish that no other court in the country can match it for sheer creativity. *See* Petition for Writ of Certiorari (Pet. Cert.) at 24. But the California Supreme Court is not a backwater tribunal lacking in influence. Not only does the decision impact any business whose speech comes within its borders (which is to say, any national company at the very least), but the decision provides fodder for lawsuits in other states. California

jurisprudence has a deserved reputation for being ahead of the curve.[2] This Court should not let the matter percolate further.

II

THE CURRENT COMMERCIAL SPEECH DOCTRINE ANALYSIS IS INADEQUATE APPLIED TO MARKETERS' INNOVATIVE PRESENTATIONS OF CORPORATE SPEECH

A profit motive, in and of itself, does not render speech unprotected. *Virginia Pharmacy*, 425 U.S. at 761-62. Instead, this Court held in *Virginia Pharmacy* that the speech is reduced to less-favored status only when it does "no more than propose a commercial transaction." *Id.* at 771 n.24. The Court has thus far relied on "common sense" to differentiate between commercial and noncommercial speech. *Id.* The two "common sense" distinctions are (1) that commercial speech is more verifiable than other types of speech and (2) that commercial speech is more durable than other types of speech. *Id., see also Central Hudson*, 447 U.S. at 564, n.6. Both distinctions have been criticized by judges and scholars. *See*,

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[2] For example, in *Foster-Gardner, Inc. v. National Union Fire Ins.* Co., 959 P.2d 265 (Cal. 1998), the California Supreme Court adopted the minority view that insurers do not have a duty to defend administrative agency proceedings. This ruling was then followed by the Ninth Circuit Court of Appeals (*Granite Mgmt. Corp. v. Aetna Cas. & Sur. Co.*, 37 Fed. Appx. 262, 2002 U.S. App. LEXIS 10836 (9th Cir. June 4, 2002)), and the State of Illinois (*W.C. Richards Co. v. Hartford Accident & Indem. Co.*, 724 N.E.2d 63 (Ill. 1999)). *See also*, Rees, Victoria L., *AIDSphobia: Forcing Courts to Face New Areas of Compensation for Fear of a Deadly Disease*, 39 Vill. L. Rev. 241, 249 n.41 (1994), noting that the trend towards recovery for emotional distress without accompanying physical injury began with the California Supreme Court's decision in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). A subsequent case, *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980), established the California Supreme Court as a trendsetter in this area of recovery.

e.g., Kozinski & Banner, *supra*, at 635-38; Lively, Donald E., *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289, 296-97 (1987); Post, Robert, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 31-32 (2000). Given that these distinctions no longer appear a solid foundation for diminished constitutional protection, and given the innovative new methods of advertising and marketing in contemporary society, reliance on a "common sense" approach can lead only to confusion.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992), this Court held that even speech that normally receives less First Amendment protection may not be regulated such that the state discriminates on the basis of content or viewpoint. Several lower courts have either applied or considered applying *R.A.V.* to content-based commercial speech restrictions. *See*, *e.g., Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1331 (9th Cir. 1997) (citing *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (acknowledging potential application of *R.A.V.* to content-based commercial speech regulation)); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *R.A.V.* and *Central Hudson* to speech regulation without deciding which is required); and *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's decision in *R.A.V. []*, that commercial speech must be protected by the usual strictures against content-based restrictions.").

Nonetheless, in *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 68 (1983) (quoting *Central Hudson*, 447 U.S. at 563 n.5), this Court held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" because "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." The Court reiterated this holding in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626

(1985), in which a state supreme court sanctioned a lawyer for running deceptive newspaper advertisements for his services in bringing personal injury actions related to use of Dalkon Shield contraceptives. Because some of the advertisements contained statements regarding the legal rights of persons injured by the Dalkon Shield, this Court recognized that such statements "in another context, would be fully protected speech." *Id.* at 637 n.7. Nonetheless, this Court concluded that the advertisements were still commercial speech subject to lesser protection under *Central Hudson*. "[A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* (quoting *Central Hudson*, 447 U.S. at 563 n.5). Based on these cases, the Third Circuit Court of Appeals found that advertisements by rival health care insurance companies that included information about health care insurance and delivery—matters indisputably at the center of public debate—do not escape the commercial speech category. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 937 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990). In each of these cases, the court suppressed noncommercial speech related to important public debates for the sole reason that it was coupled with commercial speech. The patronizing assumption that people cannot discount speech made by someone with an interest in a particular outcome has now led to a California decision in which the corporate side of a public debate is stifled in its entirety. Pet. App. 31a (Chin, J., dissenting) (arguing that Nike's speech is deprived of First Amendment protection only because the company "competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods").

A. Marketing and Advertising Are No Longer Necessarily Identifiable or Separable from Noncommercial Speech

As a corollary to the government's ability to regulate commercial transactions, the government also assumes the ability to regulate commercial speech. *See* Smolla, Rodney A.,

Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 Tex. L. Rev. 777, 780 (1993). The Court has already conceded that "commercial speech" is not easily defined. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("[T]he borders of the commercial speech category are not nearly as clear as the Court has assumed."); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("[A]mbiguities may exist at the margins of the category of commercial speech."); and *Bolger*, 463 U.S. at 81 (Stevens, J., concurring) ("[T]he impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted.") These "ambiguities" however, threaten to overcome the rest of the category.

The speech in this case involved press releases, letters to the editor, letters to university athletic directors, and the like describing Nike's overseas labor practices. Pet. App. 21a. Far from the prototypical commercial speech of offering to sell X product for Y price, the speech at issue in this case was intended to rehabilitate a corporate image as well as provide information to the public on a matter of broad concern. Extending the lesser protection of the commercial speech doctrine to this type of speech threatens a wide variety of public relations communications. These include:

"Product placement," an arrangement whereby a movie studio incorporates certain commercial products into its film in exchange for cash or free use of the product. Snyder, Steven L., *Note: Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?* 1992 U. Ill. L. Rev. 301 (1992). For example, in 1990, Disney reportedly charged advertisers $20,000 to show the product without comment, $40,000 to show the product and have an actor mention the product's name, and $60,000 for an actor to be shown using the product. *Id.* at 305 (citing *Ad Follies*, Advertising Age, Dec. 24, 1990, at 24).

Product placement began in feature films and television, but other media have followed suit. For example, author Beth Ann Herman featured a Maserati in her novel *Power City*. The protagonist drives a Maserati whose "V-6 engine had two turbochargers, 185 horsepower and got up to 60 in under 7 seconds." *Id.* at 308 (citing Rothenberg, Randall, *Now, Novels Are Turning Promotional*, N.Y. Times, Jan. 13, 1989, at D5). In exchange, a Beverly Hills Maserati dealership threw a $15,000 party for Herman that attracted nationwide television coverage. *Id.* Even record albums are not exempt. Barbara Mandrell's album, *No Nonsense*, was made with the financial support of the No Nonsense panty hose manufacturer. *Id.* at 308 n.67 (citing Epstein, Robert, *Public-Interest Group Tilts at Commercial Windmills*, L.A. Times, June 6, 1991, at F7).

Testimonials became part of main-stream marketing in the 1920s, when Pond's cold cream paid "Great Ladies" (including Mrs. Reginald Vanderbilt and Queen Marie of Rumania) to sing the praises of the moisturizer in exchange for contributions to charity. Madow, Michael, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125, 164-65 (1993). Lately, however, it may not be apparent that those giving testimony are paid to tout the product. For example, actress Kathleen Turner appeared on CNN in August, 2002, to discuss her struggles with rheumatoid arthritis. She failed to mention that the makers of Enbrel, a drug that battles the condition, paid her to appear. Stafford, Leon/Cox News Service, *Use of 'stealth' marketing raises questions of ethics* (Aug. 29, 2002) (http://www.coxnews.com/newsservice-/stories/2002/0829-STEALTH-ADS-COX.html) (visited Sept. 24, 2002). Similarly, Lauren Bacall appeared on "NBC Today," telling the story of a friend who had gone blind due to macular degeneration and then discussed a new drug that could prevent blindness from that cause. Novartis, the maker of the drug, paid for Ms. Bacall's appearance on the show, a fact revealed to the audience by neither Ms. Bacall nor NBC. Peterson, Melody, *Heartfelt*

Advice, Hefty Fees: Side Effects of Celebrity Drug Pitches Debated, New York Times, Aug. 11, 2002, § 3, at 1.

Music videos also blur the line between commercial and noncommercial speech. *See* Kozinski & Banner, *supra*, at 641. Music itself, of course, is entitled to full First Amendment protection. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). A primary function of a music video is to promote the artist and the song, in hopes of persuading consumers to buy the album on which the song appears. Yet whether the video is treated as lesser-protected commercial speech is not obvious under the Court's current jurisprudence. The only court thus far to consider this issue held in *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001), that:

> While music videos are not produced primarily for the sale of the video but, rather, the underlying song, this does not strip them of their First Amendment protection. Music videos are in essence mini-movies that often require the same level of artistic and creative input from the performers, actors, and directors as is required in the making of motion pictures. Moreover, music videos are aired on television not as advertisements but as the main attraction, the airing of which, consequently, is supported by commercial advertisements. Simply put, the commercial nature of music videos does not deprive them of constitutional protection.

(Footnote omitted.) This holding provoked a dissent that seems equally plausible:

> A music video stands to an album the same way that a movie "trailer" or "teaser" stands in relation to a movie; it represents an attempt to entice a customer to purchase the right to hear or see the larger work. Indeed, music videos are "doubly" commercial speech. MTV, VH1, the Nashville Network, and other music-video cable channels select and show the videos that they believe will generate the highest

> advertising revenue. The video channels' unwillingness to broadcast controversial materials—materials likely to spook boycott-wary advertisers—provide additional evidence of the essentially commercial nature of the undertaking.

Id. at 533 (Keller, J., dissenting). The disagreement between the majority and dissent in *Montgomery* is significant only because the categorization of the video impacts the level of protection to which it is entitled under the First Amendment.

"Virtual advertising" is a form of digital technology that allows advertisers to insert computer-generated brand names, logos, or animated images into previously recorded television programs or movies. Deutsch, Askan, *Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition*, 11 Marq. Sports L. Rev. 41, 42 (2000). It uses computers to place still or video images into live video broadcasts in real time so that they look as if they are part of the original scene. For example, several Major League Baseball teams have made use of virtual advertisements along the wall behind home plate. *Id.* (citing Elliott, Stuart, *Real or Virtual? You Call It*, New York Times, Oct. 1, 1999, at C1). Virtual advertising blurs the line between television programming and commercials. *Id.* at 44.

"Stealth" or "guerilla" marketing is a new way of using undercover actors to promote a product without the public being aware that the actors are paid by the product's manufacturer. For example, the United States arm of Sony Ericsson Mobile Communications Ltd. hired men and women to pose as tourists at tourist attractions in New York City, then ask passers by to take their picture with Sony's new phone/digital camera. Sony also hired attractive women to sit at opposite ends of a bar in a nightclub and play a computer game on their phones while engaging other patrons in conversation about their cool new toy. Under no circumstances are the actors supposed to tell the passers by or club patrons that they are employed by Sony. Vranica, Suzanne, *Advertising:*

That Guy Showing off His Hot New Phone May Be a Shill, Wall St. J., July 31, 2002, at B1. Moreover, the actors do not make any type of sales pitch, they simply demonstrate the product and make flattering comments about it. *Id.* Similarly, the public relations firm representing a new flavored-water brand dispatched young women fitting the target demographic to trendy Manhattan bars and clubs to be seen drinking the specific brand and making favorable comments about it to unsuspecting bar patrons. Harrelson, Michael, *The Fat Man Sings: Meet the 300-Pound Guerrilla of Undercover Marketing,* Nightclub & Bar Magazine (Feb. 2002) (http://www.nightclub.com/magazine-/February02/cover.html) (visited Sept. 24, 2002) (profiling Jonathan Ressler, CEO of Big Fat, Inc., a public relations firm that is at the vanguard of undercover marketing techniques). *See also* Goldberg, Michelle, *Confessions of an Undercover Drink Fink*, Salon (Dec. 9, 1997) (http://www.salon.com/media-/1997/12/09media.html) (visited Sept. 28, 2002) (first-hand account of methods used to sell cognac martinis without expressly offering to conduct a commercial transaction).

This type of marketing is not restricted to high-tech gadgets and liquor. Record companies may plant attractive young women in record shops, paid to notice the album in a customer's hand and helpfully suggest other artists the customer may like. Nord, Thomas, *Stealth marketing—is it the next big thing or just a big fat flop?*, The Courier-Journal (Louisville, KY) (August 3, 2001) (http://www.courier-journal.com/features/columns/popculture/fe20010803pop.html) (visited Sept. 24, 2002). Scooter companies pay college students to hang outside coffee shops, striking up conversations with customers and casually mentioning their new rides. Khermouch, Gerry & Green, Jeff, *Buzz Marketing*, Business Week, July 30, 2001, at 54. Children are given copies of hot new portable video games, urging them to bring it to class and show all their friends. *Id.* at 55.

Providing helpful advice (while selling a little something on the side) is also a time-honored method of marketing that is

evolving into a particularly powerful tool on the Internet. Using this method, an entrepreneur seeks out chat groups on the Internet that discuss issues related to what he has to sell. For example, someone who wants to sell bookkeeping software will find (e.g., through Yahoogroups) groups of people who talk about finances. He will "lurk" long enough to get a feel for the group's discussions, and then start contributing. He will spend the bulk of his time joining in the discussion and some percentage correctly answering questions related to his product. Each of his posts will link to his own webpage where he offers software for sale. After becoming a trusted member of the group, he will find occasional opportunities to suggest a "meeting" via private E-mail to discuss how the software can meet a particular person's special needs. Tincher, Rex, *Stealth Marketing in Usenet News Groups* (http://216.239.53.100/search?q=cache:pra0aYbfAtwC:www.dnaco.net/~tinc/stealth.htm+stealth+marketing+usenet&hl=en&ie=UTF-8) (visited Oct. 24, 2002).

Another common incarnation of this technique is found on websites geared toward parents, mothers in particular. Baby food manufacturers have websites chock full of helpful information as to when baby should achieve developmental milestones, advice on how to encourage baby to eat new foods, health advice for the expectant and breastfeeding mother, and so on. Some even have a doctor on staff to answer E-mail inquiries. Of course, the websites also provide information for purchasing products, but one may peruse the sites at length without ever making a purchase. *See, e.g.,* Website for Gerber products, http://www.gerber.com/main.asp (visited Oct. 29, 2002) (home page points readers to information about nutritional development, new products, and "expert advice, anytime, day or night"); and Website for Evenflo products, http://www.evenflo.com/yb/index.phtml (visited Oct. 29, 2002) (pregnancy tips, introducing solids, better bottlefeeding and factors to consider when purchasing a breast pump).

Websites as commercial speech have not yet generated much case law,[3] but, especially as regards lawyer advertising, they have generated some law review articles concerned about whether law firms' websites are subject to state rules regarding solicitation. *See*, *e.g.*, Kershen, Drew L., *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 Drake J. Agric. L. 141, 145 (1999). (Even if a website is primarily informational, if the content suggests a solicitation for a commercial relationship, the website is commercial speech subject to state regulation.").

B. Speech Intended to Bolster a Corporate Image Should Be Fully Protected Under the First Amendment

Corporate image advertising "describes the corporation itself, its activities or its views, but does not explicitly describe any products or services sold by the corporation." Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Sourcebook on Corporate Image and Corporate Advocacy Advertising, 95th Cong., 2d Sess. 1149, 1156 (1978), *quoted in* Lin, C.C. Laura, *Note: Corporate Image Advertising and the First Amendment*, 61 S. Cal. L. Rev. 459, 461 (1988). There are, generally, two types of image advertising. The first is advertising that treats the company itself as a product to be sold. For example, lumber giant

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[3] *See e.g., Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001) (court rejected Ford's challenge to a Texas law prohibiting the sale of used vehicles via a website as violating its First Amendment right to speech); *Planned Parenthood Fed'n of America, Inc. v. Bucci*, 1997 U.S. Dist. LEXIS 3338, *6-*12 (S.D.N.Y. Mar. 24, 1997), *aff'd*, 1998 U.S. App. LEXIS 22179 (2d Cir. Feb. 9, 1998), *cert. denied*, 525 U.S. 834 (1998) (defendant, doing business as Catholic Radio, registered a website at "plannedparenthood.com." dedicated to the pro-life position; court held that this use of plaintiff's mark was commercial speech because it impacted the plaintiff's ability to offer its own services over the Internet and because the very use of the Internet is "in commerce" because it requires long-distance, interstate phone lines to connect).

Weyerhaueser has been reviled by environmentalists for clear-cutting certain forest areas. *See*, *e.g.*, Binole, Gina, *After Buying MacBlo, Weyerhaeuser Won't Commit on Clear-Cutting*, Portland Bus. J. (June 28, 1999) (http://forests.org/archive/canada-/weywonts.htm) (visited Oct. 24, 2002). Promoting its image as a responsible steward of the earth, Weyerhauser publicized its partnership with CARE, a well-known international relief and development organization. Together, they will teach "sustainable forestry practices and environmental stewardship to improve living conditions of people in developing countries for current and future generations." *See* http://www.weyerhaeuser.com/ citizenship-/philanthropy/partnershipwithcare.asp (visited Oct. 24, 2002).

This type of image advertising also includes companies that project an ethos of social responsibility and a political philosophy that consumers presumably can share and support through the purchase of the companies' products. For example, The Body Shop sells cosmetics and one might reasonably presume that its communications with the public are intended to sell soap and moisturizers. The company's owner contends that the central mission of business is to improve the world by not only caring for its work force and customers, but also for its communities and the environment. She believes that business should be a force for social good first, and consider bottom line profits second. Hartman, Cathy L. & Beck-Dudley, Caryn L., *Marketing Strategies and the Search for Virtue: A Case Analysis of The Body Shop, International*, 20 J. of Bus. Ethics 249-63 (1999). Thus, The Body Shop's mission statement

> specifies that social, environmental, and political values are the fundamental bases of exchange with its constituents. Specifically, the company's first commitment is to "social and environmental change," and, second, to the "financial and human needs" of its stakeholders. Further, its product pledge involves "the protection of the environment, human and civil rights" within the cosmetics industry.

Id. Whether it is Weyerhaeuser's forest management or the Body Shop's focus on "natural" skin care reflecting broader environmental concerns, these businesses are speaking on relevant issues that do not come close to asking consumers to buy their products.

The second type of image advertising takes positions on public issues. As such, it is even further removed from actual commercial transactions than advertising to promote the company itself as a product. For example, when inexpensive Japanese compact cars began to flood the market, American automakers responded by urging consumers to "buy American." When the president of an American automobile company takes out an advertisement in a newspaper or buys air time on a network to urge people to "buy American," he may argue that by purchasing foreign automobiles Americans are putting other Americans out of work and that buying his company's cars is a patriotic act. The speech is profit motivated; it even proposes a commercial transaction and directly concerns the economic interests of the speaker. However, it also touches on matters of pressing political concern—consumer choice, protectionism, and free trade. Emord, Jonathan W., *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (1991). "Information about the quality and price of some products may relate to important political issues. For example, a belief that American cars are over priced influences views on foreign car import restrictions, on inflationary price increases for domestic cars, and on the effects of oligopoly . . . ." *Id.* (quoting Farber, Daniel, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 382 (1979)).

In *Quinn v. Aetna Life & Casualty Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (1978), a state court trial judge ruled that an insurance company's advertisements blaming high insurance premiums on large tort damage awards were commercial speech and, thus, could be enjoined if found to be false or misleading. Plaintiffs involved in on-going personal injury actions sought to enjoin Aetna from continuing publication of statements in

certain magazines that criticized the tort system and what Aetna perceived to be excessive damages awarded in many personal injury cases on the grounds that the advertisements contained misleading statements violating New York law. *Id.* at 549, 409 N.Y.S.2d at 475. Aetna responded that its publications advocating tort law reform were political expression and fully protected by the First Amendment. *Id.* The state judge ruled that the statements were commercial speech that could be enjoined if false or misleading. *See id.* at 553-54, 409 N.Y.S.2d at 478. The court made its ruling despite Aetna's purpose to influence potential jurors to give lower damage awards, rather than targeting its statement at consumers who might purchase insurance products. *Id.* at 554, 409 N.Y.S.2d at 478. When the case was removed to federal district court, *Quinn v. Aetna Life & Casualty Co.*, 482 F. Supp. 22, 29 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) (per curiam), the district court judge concluded that the advertisements were not commercial speech, *id.*, and the Second Circuit affirmed. *Quinn*, 616 F.2d at 40. The federal district judge concluded that the state court judge had "engaged in a fundamental misconception by calling the advertisements here in question 'commercial speech.'" *Quinn*, 482 F. Supp. at 29; *see also Rutledge v. Liability Ins. Indus.*, 487 F. Supp. 5, 8-9 (W.D. La. 1979).

The pharmaceutical industry has also sponsored political advertisements—"issue ads"—that praise certain candidates' stands on prescription drug legislation. The advertisements are prepared and placed by a nonpartisan group called United Seniors Association, but that group is funded largely by unrestricted educational grants from the Pharmaceutical Research and Manufacturers of America (PhRMA). Edsall, Thomas B., *Drug Industry Financing Fuels Pro-GOP TV Spots*, Washington Post, Oct. 23, 2002, at A11. The drug companies that are members of PhRMA undoubtedly would benefit economically if the positions they are advertising are enacted into law. Under the California Supreme Court's analysis, this core political speech could be transformed into commercial speech entitled to lesser protection.

This Court's current commercial speech jurisprudence simply is not up to the task of analyzing corporations' innovative ways of informing the public of their positions on issues ranging from the companies themselves to raging public debates. The California Supreme Court's decision demonstrates how far afield a court can go while relying on this Court's precedents.

CONCLUSION

"One of the most delicate tasks a court faces is the application of the legislative mandate of a prior generation to novel circumstances created by a culture grown more complex." *Vidal Sassoon, Inc. v. Bristol-Myers Co*., 661 F.2d 272, 273 (2d Cir. 1981). The current doctrinal framework is ill suited to handle the wide range of commercial and mixed commercial/noncommercial speech present in the market today. The decision below represents a distillation of this Court's commercial jurisprudence *reductio ad absurdem*: in its efforts to prevent consumers from hearing misleading corporate speech, the California Supreme Court has essentially outlawed *all* corporate speech. The petition for a writ of certiorari to the California Supreme Court should be granted.

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