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

RESPONDENT'S BRIEF IN OPPOSITION

Patrick J. Coughlin
Randi Dawn Bandman
Albert H. Meyerhoff
Frank J. Janecek, Jr.
MILBERG WEISS BERSHAD HYNES & LERACH LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Paul R. Hoeber
Counsel of Record
221 Pine Street, Suite 600
San Francisco, CA 94104
(415) 217-3800

Alan M. Caplan
Philip Neumark
Roderick P. Bushnell
April M. Strauss
BUSHNELL, CAPLAN & FIELDING, LLP
221 Pine Street, Suite 600
San Francisco, CA 94104

November 14, 2002

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QUESTIONS PRESENTED

Acting only on behalf of the general public, respondent sued petitioner for making false statements in violation of state unfair-competition and false-advertising laws. The trial court sustained petitioner's demurrer to the first amended complaint on First Amendment grounds, but the state supreme court reversed and remanded for further proceedings. The questions presented are:

Jurisdictional

1. Whether respondent, who alleged no personal injury, has standing to sue under Article III; and, if not, whether petitioner, against whom no judgment has been entered, has Article III standing to seek review in this Court under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989).

2. Whether the decision below is a "final judgment" within the meaning of 28 U.S.C. § 1257(a).

Non-Jurisdictional

3. Whether the court below properly classified the statements at issue as commercial speech for purposes of laws regulating false advertising and other forms of commercial deception.

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The opinion of the California Supreme Court is officially reported at 27 Cal.4th 939 (2002).

Contrary to Pet. 1, the opinion of the California Court of Appeal is unpublished. See 79 Cal.App.4th 179 (2000) ("Opinion (*Kasky v. Nike, Inc.*) on pages 165-178 omitted."). Under California law, the California Supreme Court's grant of review automatically vacated the Court of Appeal's opinion. *See* Cal. R. Ct. 976(d) ("[N]o opinion superseded by a grant of review . . . shall be published.") (Opp. App. 6a); *In re Marriage of Flaherty*, 31 Cal.3d 637, 641, 646 P.2d 179, 182 (1982) ("The grant of the petition for hearing . . . vacated the Court of Appeal opinion, and required this court to decide the appeal as if it were originally taken here.").

JURISDICTION

The Court has no jurisdiction in this case, because: (1) respondent lacks standing to sue under Article III, and petitioner Nike lacks Article III standing to seek review in this Court under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989); and (2) the California Supreme Court's decision overruling Nike's demurrer and remanding for further proceedings is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS INVOLVED

The following statutes and rules are printed in the appendix to this opposition: 15 U.S.C. § 1125(a); 28 U.S.C. § 1257(a); Cal. Bus. & Prof. Code §§ 17200, 17203, 17204, 17500, 17535, 17569; Cal. Civ. Pro. Code §§ 472, 472a(c), 472c(a); Cal. R. Ct. 325(e), 976(d).

STATEMENT OF THE CASE

1. Proceedings in the California Courts

Respondent Marc Kasky filed suit against petitioner Nike, Inc. in San Francisco Superior Court on April 20, 1998. He subsequently filed a first amended complaint as a matter of right. *See* Cal. Civ. Pro. Code § 472 (Opp. App. 5a). The first amended complaint is the operative pleading.

Respondent brought this action under California laws regulating unfair competition and false advertising. Cal. Bus. & Prof. Code § 17200 *et seq.* (unfair-competition law), § 17500 *et seq.* (false-advertising law); see Pet. App. 5a-7a. Under section 17200, "unfair competition" includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false-advertising law]." Opp. App. 2a. Under section 17500, it is unlawful to disseminate advertising "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Id.* 3a. The first amended complaint alleged that Nike violated these laws when, for the purpose of inducing consumers to buy its products, it made false statements of fact about the working conditions in the factories that manufacture its athletic shoes.

Respondent alleged "no harm or damages whatsoever regarding himself individually." First Amd. Cmplt. ¶ 8. Rather, he sued Nike "on behalf of the General Public of the State of California," *id.* ¶¶ 3, 8, as authorized by California's unfair-competition and false-advertising laws, which provide that private enforcement actions may be brought "by any person acting for the interests of . . . the general public," Cal. Bus. & Prof. Code §§ 17204, 17535 (Opp. App. 3a, 4a). In such an action, the available remedies are limited to restitution and injunctive relief and do not include damages. Cal. Bus. & Prof. Code §§ 17203, 17535 (Opp. App. 2a, 4a); *Cel-Tech Communications, Inc. v. Los Angeles Cellular*

Tel. Co., 20 Cal.4th 163, 179, 973 P.2d 527, 539 (1999). Respondent sought an injunction and restitution, which would be payable to others, not to himself. First Amd. Cmplt., Prayer for Relief.

Nike demurred to the first amended complaint on several grounds, including a defense based on the First Amendment. Deft. Nike, Inc.'s Demurrer ¶ 3. The superior court sustained Nike's demurrer and dismissed the case. Pet. App. 80a-81a. Respondent appealed rather than requesting leave to amend the first amended complaint. *See* Cal. Civ. Pro. Code § 472c(a) (Opp. App. 5a). The California Court of Appeal affirmed the dismissal. Pet. App. 66a. The California Supreme Court granted respondent's petition for review, an action that automatically vacated the Court of Appeal's opinion. See *supra* at 1.

The California Supreme Court reversed and remanded for further proceedings. Pet. App. 30a. The court noted that the case had come to it "after the superior court sustained defendants' demurrers to plaintiff's first amended complaint." *Id.* 2a. As required by California law, the court accepted the truth of the allegations of the first amended complaint "for the limited purposes of reviewing the superior court's ruling." *Id.* On the assumption that the allegations were true, the court held that because the statements by Nike at issue "were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products," the statements were "commercial speech for purposes of applying state laws barring false and misleading commercial messages." *Id.* 1a-2a. The court emphasized that "this lawsuit is still at a preliminary stage" and that the court had not decided whether the first amended complaint "is vulnerable to demurrer for reasons not considered here," observing that "[b]ecause the demurrers . . . were based on multiple grounds, further

proceedings on the demurrers may be required in the Court of Appeal, the superior court, or both." *Id.* 2a, 30a.

2. Allegations of the First Amended Complaint

The California Supreme Court's opinion accurately states the allegations of the first amended complaint. See Pet. App. 2a-4a. Because under California law a plaintiff's allegations must be taken as true on demurrer, *id.* 2a, the facts of this case are only the facts alleged in the first amended complaint.

The first amended complaint alleges that Nike is in the business of manufacturing, importing, distributing, and selling consumer goods in the form of athletic footwear and apparel. Almost all its athletic shoes are manufactured in its subcontractors' factories in China, Vietnam, and Indonesia. The majority of the workers in these factories are women under the age of 24. *Id.* 3a; First Amd. Cmplt. ¶¶ 18, 40.

Beginning in 1996, internal and external studies and reports, issued by Ernst & Young, Vietnam Labor Watch, and others, described the actual practices and working conditions in these factories. Among the facts revealed were that workers making Nike's athletic shoes were paid less than the applicable minimum wage; required to work overtime, often without pay, and encouraged to work more overtime than applicable laws allowed; subjected to verbal, physical, and sexual abuse; and exposed to reproductive toxins and other harmful chemicals, heat, dust, and noise without adequate safety equipment, in violation of local laws. Pet. App. 3a; First Amd. Cmplt. ¶¶ 18-20, 29, 32-33, 36-37, 40, 45, 48-50, 54, 59-60, 64, 73.

In response to the public disclosure of these factory conditions, Nike made the statements at issue in this case. "[F]or the purpose of maintaining and increasing its sales and profits," Nike made false factual statements to California consumers about the manufacturing practices and conditions under which its athletic shoes are made. In particular, Nike

falsely claimed that the factory workers "are paid in accordance with applicable local laws and regulations governing wages and hours" and "receive a 'living wage'" and "free meals and health care"; that the average line-workers are paid "double the applicable local minimum wage"; that the workers "are protected from physical and sexual abuse"; and that the "working conditions are in compliance with applicable local laws and regulations governing occupational health and safety." Pet. App. 3a; First Amd. Cmplt. ¶¶ 18, 25, 28-30, 32-37, 39-50, 52-53, 62-64.

These false factual statements appeared in various sorts of documents: a Nike pamphlet distributed to the media; Nike press releases, some posted on a Nike website on the Internet; Nike letters to organizations, including a letter that was mass-mailed from Nike's Sports Marketing Director to the presidents and directors of athletics of every major university in the country; and a Nike letter to the editor. Pet. App. 4a; First Amd. Cmplt. ¶¶ 18, 25, 28, 30, 39, 46, 52, 62. Besides containing the false statements at issue, these documents were devoted almost entirely to praising and promoting Nike and its manufacturing practices and were replete with references to the athletic shoes it was trying to sell.

In these documents, then, Nike made specific factual claims about the practices and conditions in the factories making its shoes. The first amended complaint alleges that these claims were false and that Nike's purpose in making them was to maintain and increase its sales and profits by appealing to consumers opposed to inhumane manufacturing practices. These consumers, for example, do not want to buy athletic shoes unless the working conditions of the people making them are, as Nike claimed, "in compliance with applicable local laws and regulations governing occupational health and safety." Pet. App. 3a; First Amd. Cmplt. ¶¶ 1, 27, 75, 79, 82. Thus, Nike made the false statements of fact at issue in this case for the commercial purpose of selling shoes.

For its own tactical reasons, Nike's petition presents a significantly different version of the facts, which Nike relies on as the basis for its legal contentions. According to Nike, the statements at issue concerned "issues of great political, social, and economic importance," Pet. QP 1 (also *id.* 3, 9, 10, 14, 15, 19, 23, 25, 29); and Nike was embroiled in a dispute over whether it is "an immoral company" or instead "an ethical company," *id.* 2, 10. But at the pleading stage of the case, Nike's version of the facts cannot replace the factual allegations of the first amended complaint. Those allegations, set forth above and accepted by the California Supreme Court, do not support Nike's version of the facts. Accordingly, Nike's version of the facts, and the legal contentions based on it, raise no issue for this Court.

REASONS FOR DENYING THE PETITION

I. The Court has no jurisdiction in this case, because neither party has standing under Article III.

Under California law, a plaintiff bringing an action for unfair competition and false advertising need not have traditional Article III standing. Because respondent does not allege the requisite personal injury in his state-court suit, this case would not have met Article III's "case-or-controversy" requirement had it been filed in federal court. For this Court to assert jurisdiction in a case where there was no "case or controversy" in state court, the petitioner must show, under *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989), that "the judgment of the state court causes direct, specific, and concrete injury" to the petitioner. Petitioner Nike cannot make this showing, and it therefore lacks Article III standing to seek review in this Court under *ASARCO*.

A. Because respondent alleges no personal injury, he lacks standing to sue under Article III.

California's unfair-competition and false-advertising laws authorized respondent to bring this action, and thus he has standing under state law. See *supra* at 2. But standing in this Court is "a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).

Because respondent sues on behalf of the general public and alleges "no harm or damages whatsoever regarding himself individually," *supra* at 2, he does not meet Article III's "injury in fact" requirement, which requires "*personal injury*," *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks omitted). This has been the consistent ruling of the federal courts on claims by parties suing on behalf of the general public for violations of California's unfair-competition law. *See, e.g., Lee v. American Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (no removal); *Sony Pictures Entertainment, Inc. v. Fireworks Entertainment Group, Inc.*, 156 F.Supp.2d 1148, 1167-68 (C.D. Cal 2001) (no counterclaim).

Nor is there any basis for finding the required personal injury in the relief sought. This case is unlike *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), where the *qui tam* relator was entitled to a share of the United States' damages recovery, and the Court explained that, "as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a concrete private interest in the outcome of [the] suit." *Id.* at 772 (internal quotation marks omitted). Here, respondent neither sought nor was entitled to seek any damages or monetary award for himself. See *supra* at 2-3.

B. Because no judgment has been entered against petitioner Nike, it lacks Article III standing to seek review in this Court under *ASARCO, Inc. v. Kadish.*

ASARCO's standing requirement can be met only "if the judgment of the state court causes direct, specific, and concrete injury" to the petitioner. 490 U.S. at 623-24. This requirement is jurisdictional, and petitioner Nike, as the party invoking federal jurisdiction, "bears the burden of establishing its existence." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 104 (1998). Nike cannot avoid this burden by failing to mention the issue in its petition. Because no judgment of any kind has been entered against Nike in state court, Nike has suffered no "direct, specific, and concrete injury," and *ASARCO* does not allow review in this Court.

In *ASARCO*, the plaintiffs sued in state court to set aside leases of mineral rights in state land as void under federal law. The state supreme court held unconstitutional the state statute governing the leases and instructed the trial court to enter summary judgment for the plaintiffs, to enter a judgment declaring the statute invalid, and to consider whether further relief might be appropriate. 490 U.S. at 610. The defendants, mineral lessees who would lose their leases as a result of the summary judgment against them, petitioned for certiorari. *Id.*

The jurisdictional issue before the Court was twofold: first, "whether, under federal standards, the case was nonjusticiable at its outset because the original plaintiffs lacked standing to sue"; and if so, second, whether the Court could "examine justiciability at this stage" because the state courts had "heard the case and proceeded to judgment, a judgment which causes concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts in the case." *Id.* at 612. On the first question, the Court found that the original

plaintiffs (state taxpayers and a teachers association) did not meet Article III's standing requirements, *id.* at 612-17, although the state courts, not being bound by "the constraints of Article III," were entitled to ignore "federal standing rules in letting the case go to final judgment," *id.* at 617.

The Court therefore reached the second question: whether a state-court judgment in these circumstances could "support jurisdiction in this Court to review the case." *Id.* The Court answered in the affirmative, adopting the rule that, when a state court has issued a judgment in a case where the original plaintiff lacked Article III standing, the Court may nonetheless exercise its certiorari jurisdiction "if the judgment of the state court causes direct, specific, and concrete injury" to the petitioner-defendant. *Id.* at 623-24.

Applying this rule to the petitioner lessees, the Court found that the state-court judgment placed them under a "defined and specific legal obligation, one which causes them direct injury," and that the adverse declaratory judgment was "an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." *Id.* at 617-18. Hence, the Court concluded that the lessees satisfied Article III's injury requirement. *Id.* at 619.

But there is no comparable basis in this case for concluding that Nike satisfies Article III's injury requirement. The only result of the state-court proceedings so far is that Nike's demurrer has been overruled and the case remanded for possible further demurrer proceedings, followed by litigation and trial. See *supra* at 3-4. Unlike the state courts in *ASARCO*, therefore, the California courts have not "heard the case and proceeded to judgment." *Id.* at 612. Hence, the foundation on which this Court concluded it could "examine justiciability at this stage" of *ASARCO* is missing here. *Id.* Until a judgment of some kind is entered against Nike, the *ASARCO* rule cannot be applied.

Even if the Court were to extend *ASARCO* to apply to cases where no judgment of any kind has been entered against the petitioner, Nike cannot show that the California Supreme Court's decision "causes direct, specific, and concrete injury" to Nike. *Id.* at 623-24. The overruling of Nike's demurrer simply means that Nike must now respond to the first amended complaint so that the litigation process can move forward. An order advancing the initial pleading stage is a long way from a finding of liability or the entry of an injunction. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("[T]he alleged harm must be actual or imminent . . . ."). The California Supreme Court's remand order does not place Nike under any "defined and specific legal obligation," nor does the order amount to "an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." 490 U.S. at 617-18. At this point, the state court has entered no judgment, final or otherwise, against Nike, and Nike has suffered no "direct, specific, and concrete injury." Accordingly, Nike lacks Article III standing to seek review in this Court under *ASARCO*.

Although in its current procedural posture this case is not justiciable in this Court, if Nike is found liable in state court (which remains to be determined at trial), it can appeal from the resulting final judgment and then raise its federal claim. This is in notable contrast to *ASARCO*, where, had the Court denied certiorari, the petitioners would have had "to commence a new action in federal court to vindicate their rights under federal law," an action that could have been allowed only "at the cost of much disrespect to state-court proceedings and judgments." *Id* at 623. Again, therefore, it would be an unwarranted extension of *ASARCO* to apply it here.

II. The Court has no jurisdiction in this case, because the California Supreme Court's decision overruling Nike's demurrer is not a "final judgment."

This Court's jurisdiction to review decisions arising from the state courts is limited to "[f]inal judgments or decrees." 28 U.S.C. § 1257(a) (Opp. App. 2a). The statute "establishes a firm final judgment rule," which "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (citation omitted). In this case, the California Supreme Court's decision overruling Nike's demurrer and remanding for further proceedings did not effectively determine the entire litigation, as required by the finality rule. And while this Court has recognized narrowly defined exceptions to that rule, "[t]his case fits within no exceptional category." *Id.* at 84. Hence, there is no "final judgment" here, and the Court lacks jurisdiction at this stage of the proceedings. In addition, because the case is still in its initial pleading stage, the Court would have no developed factual record on which to consider the constitutional issues.

A. The California Supreme Court's decision did not effectively determine the entire litigation.

The relevant aspect of the finality rule here is that "a state-court decision is not final unless and until it has effectively determined the entire litigation." *Jefferson*, 522 U.S. at 84. Thus, the Court has long held that there is no final judgment where the state court has overruled a demurrer, or sustained a demurrer with leave to amend. *See Missouri & Kan. Interurban Ry. v. City of Olathe*, 222 U.S. 185, 186 (1911); *Clark v. City of Kansas City*, 172 U.S. 334, 336, 338 (1899); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-11 (1892); *McComb v. County Comm'rs of Knox County, Ohio*, 91 U.S. 1, 2 (1875). The California Supreme Court, by reversing the trial court's ruling sustaining Nike's demurrer to

the first amended complaint, overruled the demurrer. See *supra* at 3-4. The court's decision has thus paved the way for the completion of the pleading stage, for the conduct of discovery, and finally, "[a]bsent settlement or further dispositive motions," *Jefferson*, 522 U.S. at 81, for the trial. Hence, the decision has not "effectively determined the entire litigation," *id.* at 84, and there is no "final judgment."

B. The California Supreme Court's decision does not fit within any of the exceptions to the finality rule.

In a "limited set of situations," the Court has "found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *Jefferson*, 522 U.S. at 82 (internal quotation marks omitted). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court "divided cases of this kind into four categories." *Florida v. Thomas*, 532 U.S. 774, 121 S.Ct. 1905, 1909 (2001). The California Supreme Court's decision does not fit into any of these categories.

(1) In the first category, "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* (internal quotation marks omitted); *see, e.g.*, *Cox*, 420 U.S. at 479 (explaining that jurisdiction existed in *Mills v. Alabama*, 384 U.S. 214 (1966), because defendant "had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground"). Here, however, the California Supreme Court remanded the case for purposes of litigation and trial, and Nike has not conceded liability.

(2) In the second category, the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Florida v. Thomas*, 121 S.Ct. at 1909 (internal quotation marks omitted). That is not so here, because respondent may fail to establish Nike's liability. *See,*

e.g., *Jefferson*, 522 U.S. at 82 ("Resolution of the state-law claims could effectively moot the federal-law question raised here.").

(3) In the third category, "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Florida v. Thomas*, 121 S.Ct. at 1909 (internal quotation marks omitted). But if Nike is ever found liable, it can seek this Court's review of its federal claim "once the state-court litigation comes to an end." *Jefferson*, 522 U.S. at 82-83.

(4) In the fourth category, two conditions must be met for a case to be excepted from the finality rule: (a) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings"; and (b) "refusal immediately to review the state-court decision might seriously erode federal policy." *Florida v. Thomas*, 121 S.Ct. at 1910 (internal quotation marks omitted). If a case fails to meet either condition, it is not within the fourth category.

(a) As shown by the cases satisfying the first condition, reversal must necessarily put an end to the relevant cause of action. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) (reversal of state court's decision that reliance on predicate acts of distributing obscene material did not violate First Amendment "would bar further prosecution on the RICO counts at issue here"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179 (1988) (reversal of state court's decision that federal law permitted additional state workers'-compensation award "would preclude any further proceedings"); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (reversal of state court's decision that state statute did not conflict with Federal Arbitration Act would "terminate litigation of the merits of this dispute"); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (reversal of state court's

decision that federal labor law did not preempt state proceedings "would terminate the state-court action"); *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (*per curiam*) (were Court to reverse state court's decision rejecting applicability of "federal defense of selective enforcement, there would be no further proceedings in the state courts in this case"); *Cox*, 420 U.S. at 486 (were Court to reverse state court's decision and "hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends"). Unlike the cited cases, this condition is not met here.

A reversal by this Court would mean that the first amended complaint was insufficient under the First Amendment and thus that the California Supreme Court should have sustained Nike's demurrer. But that would not necessarily preclude further litigation on respondent's unfair-competition and false-advertising causes of action. Contrary to Nike's erroneous assertion that the "constitutional questions presented . . . are agreed by all to be outcome determinative," Pet. 28-29, under California law respondent would have the opportunity to cure the defect identified by this Court by filing a second amended complaint, *see* Cal. Civ. Pro. Code § 472a(c) (Opp. App. 5a); Cal. R. Ct. 325(e) (Opp. App. 6a); *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal.4th 26, 39, 960 P.2d 513, 519 (1998) ("If a complaint does not state a cause of action, but there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted.").

For example, even though the issue was neither raised by Nike nor addressed by the California Supreme Court, Nike contends that the court's "holding that businesses may be held *strictly liable* for misstatements they may make regarding issues of social importance conflicts with this Court's precedents." Pet. 9 (emphasis added); also *id.* 4, 24, 25, 27, 29. If this Court were to accept Nike's contention, it might agree with the California Supreme Court that the first

amended complaint adequately alleges that Nike's statements are commercial speech, but hold that commercial speakers cannot be found liable for false statements of fact absent proof of some level of culpability. If the Court reversed on the ground that the first amended complaint does not adequately allege that Nike should have known that the statements at issue were false, respondent could file a second amended complaint with the requisite allegations, and litigation on the same causes of action would continue with an additional element of culpability.

(b) To be within the fourth category of exceptions to the finality rule, a case must also meet the second condition: that the absence of immediate review by this Court would seriously erode some important federal policy. *See, e.g., Flynt*, 451 U.S. at 622 (noting that cases meeting this condition have "involved identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in the state courts"). This condition is not met here either.

It is not enough to meet this condition that Nike relies on a First Amendment claim for its defense. In *Laredo Newspapers, Inc. v. Foster*, 429 U.S. 1123 (1977), the Court denied certiorari because there was "no final judgment within the meaning of 28 U.S.C. § 1257." That was a libel case in which the trial court had entered summary judgment for the defendant newspaper on the basis of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but the state supreme court had reversed and remanded for trial to resolve issues of fact as to whether the plaintiff was in the public-official or public-figure category and to apply "a negligence standard in defamation actions instituted by private individuals." *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 820 (Tex. 1976). As with the newspaper's First Amendment claim in *Laredo Newspapers*, the factual predicate of Nike's First Amendment claim consists of false statements of fact. This

Court has made clear that "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Thus, Nike must show that immediate review of the decision below is necessary to prevent erosion of constitutional policy, even though the statements at issue have "no constitutional value."

Nike tries to show this by claiming that "'a rule that would impose strict liability' on a speaker 'for false factual assertions' regarding a matter of public concern 'would have an undoubted "chilling" effect'" on protected speech. Pet. 25 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988), a libel case where the speaker was a publisher and the issue was speech related to public figures). Thus, Nike claims that the California Supreme Court's decision is overly broad and, on that basis, concludes that the decision will chill protected speech. But Nike's claim fails because it is not based on the court's actual decision.

As set forth *infra* at 18-21, the California Supreme Court ruled that particular false statements of fact are subject to regulation *only* if the speaker is engaged in commerce; if the speaker directs its speech to an intended commercial audience; if the speech consists of "representations of fact" about the speaker's own "business operations, products, or services"; and if the speaker makes these factual representations "for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." Pet. App. 18a-19a. As the court emphasized, these requirements are consistent with this Court's explanation for denying protection to false or misleading commercial speech: "the truth of commercial speech is 'more easily verifiable by its disseminator' and . . . commercial speech, being motivated by the desire for economic profit, is less likely to be chilled by proper regulation." *Id.* 20a (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976)).

Thus, when the California Supreme Court's actual decision is considered — holding that commercial speakers can be liable only for making false or misleading factual statements "for the purpose of promoting sales" of their own products — it is evident that rather than chilling protected speech, the decision will deter false or misleading commercial speech. Accordingly, Nike has failed to show that the absence of immediate review will seriously erode constitutional policy.

C. This case is in its initial pleading stage and lacks a developed factual record.

Whether particular statements are properly classified as commercial or noncommercial speech is an issue that generally requires nuanced analysis, turning as it does on disputed questions of fact, such as exactly what statements were made and in what context. As the Court has often emphasized in considering constitutional questions, where context is critical, it is important to ensure "a full development of the relevant facts." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986); *see id.* at 542 n.5 ("We have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication. See, e.g., *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120-127 (1981)."); *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims."); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues."); *Gospel Army v. City of Los Angeles*, 331 U.S. 543, 548 (1947) ("[E]xperience demonstrates that particularly in constitutional cases issues turn upon factual presentation."). But this case is still in the initial pleading stage, and thus it lacks even the most minimal factual record.

The factual record here consists entirely of the allegations of the first amended complaint. The parties have taken no

depositions, filed no factual declarations, declared no experts. Because there has been no trial, there is no trial testimony and no findings of fact by the trial court; and the question of remedies has yet to be reached. Thus, the Court would have to consider the constitutional issues in this case based solely on allegations that are merely assumed to be true for purposes of pleading.

III. The California Supreme Court properly classified the statements at issue as commercial speech for purposes of laws regulating false advertising and other forms of commercial deception.

Because the California Supreme Court's decision is not fairly represented in the petition, it is necessary to summarize that court's analysis and holding before responding to Nike's contentions.

The court stated that its holding was "based on decisions of the United States Supreme Court," Pet. App. 2a, and scrutiny of the opinion confirms that it was firmly grounded on this Court's decisions. The court first examined this Court's decisions concerning the regulation of commercial speech, *id.* 8a-11a, especially in relation to the rule that "commercial speech that is false or misleading is not entitled to First Amendment protection and 'may be prohibited entirely,'" *id.* 10a (citation omitted). Turning to the reasons given by this Court for the distinction between commercial and noncommercial speech, the court noted, first, that the truth of commercial speech "'may be *more easily verifiable by its disseminator* than . . . news reporting or political commentary,'" *id.* 11a-12a (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24); second, that "commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation," Pet. App. 12a; and third, that regulation

of commercial speech serves the state's interest in preventing "commercial harms," *id.* 12a-13a.

The court then considered carefully this Court's decisions distinguishing commercial from noncommercial speech. *Id.* 13a-16a. The court concluded that, while this Court "has not adopted an all-purpose test" to make this distinction, a "close reading" of this Court's decisions suggested "a limited-purpose test." *Id.* 17a. This test would be used for the purpose of deciding "whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception." *Id.* (emphasis deleted); also *id.* 1a-2a, 19a, 20a, 21a, 23a, 29a-30a. The test requires "consideration of three elements: the speaker, the intended audience, and the content of the message." *Id.* 17a-18a.

First, the speaker must be acting as a commercial speaker. *Id.* 18a-19a. A commercial speaker is "someone engaged in commerce," that is, "the production, distribution, or sale of goods or services." *Id.* 18a. Second, the intended or target audience must be "actual or potential buyers or customers of the speaker's goods or services," or persons acting for them, "or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." *Id.* 18a. In articulating these requirements, the court drew on its preceding analysis of this Court's cases, in particular on *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

Third, "the factual content of the message should be commercial in character." This means that the speech must consist of "representations of fact" about the speaker's "business operations, products, or services" that are "made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." *Id.* 19a, 20a. In stating this requirement, the court drew particularly on *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v.*

Florida Dept. of Bus. & Prof. Regulation, 512 U.S. 136 (1995); *Bolger*, 463 U.S. 60; and *Virginia State Bd. of Pharmacy*, 425 U.S. 748. The court emphasized that its specification of the "content" element was consistent with this Court's reasons (noted *supra* at 18) for denying protection to false or misleading commercial speech, because those reasons assume that "commercial speech consists of factual statements," that the statements describe matters within the speaker's own knowledge, and that the statements "are made for the purpose of financial gain." Pet. App. 20a.

The court then applied these requirements to the statements by Nike at issue in this case, concluding that they "were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." *Id.* 23a. The court found that the first element was met because Nike was engaged in commerce and acting as a commercial speaker. *Id.* 21a. The court found that the second element, "an intended commercial audience," was met because Nike's "intended audience was primarily the buyers of its products." *Id.* 23a. Thus, the court pointed out that "Nike's letters to university presidents and directors of athletic departments were addressed directly to actual and potential purchasers of Nike's products." *Id.* 21a. In addition, the court noted the first amended complaint's allegations that "Nike's press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike's products," since Nike made the statements at issue "'to maintain and/or increase its sales and profits.'" *Id.*

The court also found that the third element, "representations of fact of a commercial nature," was met because "Nike was making factual representations about its own business operations." *Id.* 22a. Thus, "[i]n speaking to consumers about working conditions and labor practices in

the factories where its products are made, Nike addressed matters within its own knowledge" and could "readily verify the truth" of these factual statements. *Id.* Furthermore, "Nike engaged in speech that is particularly hardy or durable." Thus, the first amended complaint alleged that "Nike's purpose in making these statements . . . was to maintain its sales and profits," and the court therefore concluded that regulation to prevent false and misleading speech "is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories." *Id.*

In sum, the California Supreme Court's decision is fully consistent with this Court's prior rulings. Accordingly, the petition fails to raise issues worthy of this Court's review.

A. The decision below does not conflict with this Court's cases defining commercial speech.

Nike contends that the statements at issue are not commercial speech under any of three tests. Pet. 11. First, Nike claims that the statements "obviously" did not propose a commercial transaction "in any respect." *Id.* In fact, the court below relied on this Court's references to commercial speech as, typically, "speech proposing a commercial transaction" in establishing the required elements of a commercial speaker speaking to a commercial audience. Pet. App. 18a; see *supra* at 19. Moreover, Nike's statements proposed commercial transactions by conveying to consumers that they should buy its athletic shoes because, for example, the shoes are made by factory workers whose working conditions comply with "applicable local laws and regulations governing occupational health and safety." See *supra* at 4-5.

Second, Nike claims that the statements at issue do not satisfy the first two factors — advertising and product reference — utilized in *Bolger*, 463 U.S. at 66-67. Pet. 11-12. In fact, the court below relied on *Bolger* in specifying each of the elements required for commercial speech. Pet. App. 13a-15a, 18a-19a; see *supra* at 19-20. Moreover, as to

the first *Bolger* factor, the statements at issue were just as much advertising for Nike and its products as an informational pamphlet was advertising for the company and its products in *Bolger*. 463 U.S. at 62 n.4. As to the second factor, since the statements gave consumers specific product information (namely, the conditions under which Nike's athletic shoes are made), the statements were just as much references to a specific product as the informational pamphlet was in *Bolger*. *Id.* at 66 n.13. Under *Bolger*, as the court below noted, "product references" include "statements about the manner in which the products are manufactured, distributed, or sold." Pet. App. 19a.

Nike also accuses the court below of "holding" that the third *Bolger* factor—acting with economic motivation—is "sufficient." Pet. 12. In fact, the court clearly stated the exact opposite: that *Bolger* "rejected the notion that any of these factors is *sufficient* by itself," Pet. App. 14a, and that *Bolger* "indicated that economic motivation is relevant but not conclusive," *id.* 28a. Moreover, as set forth *supra* at 19, the speaker's "purpose of promoting sales" is not sufficient under the court's decision, but only one of its multiple requirements.

Third, Nike claims that the statements at issue did not "'relate[] solely to the economic interests of the speaker and its audience,'" because Nike was concerned both with "the individual purchasing decisions" of its audience and with "the prospect of legislation restricting multinational investment and production." Pet. 12 (citation omitted). This claim correctly admits what the first amended complaint alleges: that Nike made the statements at issue for the purpose of selling shoes. See *supra* at 4-5. But Nike has no basis in the first amended complaint for its additional assertion that, in making the statements at issue, it was also concerned with "the prospect of legislation." Thus, this claim raises no issue for this Court.

Finally, Nike contends that the court below was "in error" in suggesting that "its decision is tantamount to forbidding the mislabeling of a product." Pet. 14. In fact, the court did not make that suggestion, but rather made the important point that "regulation of Nike's speech about working conditions in factories where Nike products are made is consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices." Pet. App. 22a. The court cited statutes prohibiting "false or misleading statements about where a product was made" or "by whom." *Id.* 22a-23a. Several of the cited statutes prohibit false representations whether on product labels or not. *See* 15 U.S.C. § 1125(a); Cal. Bus. & Prof. Code § 17569 (Opp. App. 1a, 4a).

B. The decision below does not conflict with *Thornhill v. Alabama* or *Thomas v. Collins.*

Nike contends that the decision below conflicts with *Thornhill v. Alabama*, 310 U.S. 88 (1940), and *Thomas v. Collins*, 323 U.S. 516 (1945), Pet. 15-18, because, according to Nike, those cases hold that "statements in the course of a labor dispute are entitled to full First Amendment protection," *id.* 6. But the first amended complaint alleges that Nike, acting as a commercial speaker, directed the statements at issue to a commercial audience for the purely commercial purpose of selling shoes; it did not make the statements as a contestant in a labor dispute or as part of a dispute between an employer and its employees. See *supra* at 4-5. Hence, this contention raises no issue for this Court.

In addition, Nike's conclusion is wrong: the speech of labor disputants does *not* receive "full First Amendment protection." As the Court observed in *Virginia State Bd. of Pharmacy*, for example, in comparing "speech in the special context of labor disputes" with commercial speech: "The speech of labor disputants, of course, is subject to a number

of restrictions." 425 U.S. at 762-63 & 763 n.17. Thus, like commercial speech, the speech of labor disputants is protected by the First Amendment, but nevertheless can be regulated.

Finally, Nike's contention fails because, as the California Supreme Court pointed out, *Thornhill* and *Thomas* do not suggest that "the state lacks the authority to prohibit false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations." Pet. App. 24a-25a.

C. The decision below does not conflict with this Court's cases prohibiting "viewpoint discrimination."

Nike contends that the decision below conflicts with this Court's cases prohibiting "viewpoint discrimination," Pet. 19-22, which, according to Nike, require "an equality of status in the field of ideas" and an equal opportunity for "all points of view," *id.* 20 (internal quotation marks omitted). But as alleged in the first amended complaint, the statements at issue are specific statements of fact about the conditions under which Nike's shoes are manufactured, not expressions of "ideas" or "points of view." See *supra* at 4-5. The California Supreme Court made this point by noting that "the regulations in question do not suppress points of view but instead suppress false and misleading statements of fact." Pet. App. 26a. Thus, this contention raises no issue for this Court either.

In addition, this Court has made clear that "there can be *no constitutional objection* to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson*, 447 U.S. at 563 (emphasis added). Hence, as the court below emphasized, "a law that prohibits only such unprotected speech cannot violate

constitutional free speech provisions." Pet. App. 27a. California's unfair-competition and false-advertising laws are precisely such laws: they apply only to speech satisfying the court's requirements for commercial speech, see *supra* at 19-20, which, as the court said, is speech that "concerns facts material to commercial transactions," Pet. App. 27a. Thus, contrary to Nike's suggestion, these laws regulate false and misleading commercial speech only because of its "'constitutionally proscribable content.'" Pet. 21 (citation omitted).

Nike also claims that the decision below permits suit under these laws against Nike, a commercial speaker, for its false statements of fact about the working conditions in the factories manufacturing its shoes, while "immuniz[ing] from suit" the noncommercial speakers who disclosed the working conditions. *Id.* But the California Supreme Court did not "immunize" noncommercial speakers for false statements of fact about these conditions. On the contrary, the court pointed out that noncommercial speakers are subject to suit for the injurious falsehood of their factual statements (e.g., as product disparagement or trade libel). See Pet. App. 27a. The court noted that liability would require proof of the speaker's knowledge (or reckless disregard) of the statements' falsity, citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984), but damages could be awarded against the speaker for harm caused to the company, which is a remedy that is not available against Nike here.

D. The decision below does not conflict with this Court's cases concerning commercial speech that is "inextricably intertwined" with noncommercial speech.

Nike contends that the decision below conflicts with this Court's cases concerning commercial speech that is "inextricably intertwined" with noncommercial speech. Pet. 22-23. The basis for this contention is Nike's claim that it "was under a '*practical* compulsion' . . . to discuss its

operations," *id.* 22 (citation omitted), and that "as a practical matter" it must refer "to its own products and practices," *id.* 23. But the first amended complaint does not support the claim that Nike was under a "practical" compulsion to combine any of the particular statements at issue with any statements of noncommercial speech. See *supra* at 4-5. On the contrary, as alleged in the first amended complaint, the statements at issue were *not* "inextricably intertwined" with noncommercial speech. *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) ("*No law of man or of nature makes it impossible* [to convey the particular commercial and noncommercial messages separately]. *Nothing in the resolution prevents* the speaker from conveying . . . these noncommercial messages, and *nothing in the nature of things requires* them to be combined with commercial messages.") (emphasis added).

E. The decision below does not impermissibly chill protected speech.

Nike contends that the decision below impermissibly "chills protected speech far beyond California's borders." Pet. 23-30 (quoting section heading, *id.* 23). As explained *supra* at 16-17, Nike claims that the decision is overly broad and, on that basis, concludes that it will chill protected speech. But Nike's claim is not based on the actual decision, and thus Nike has no basis for this claim.

Nike also denies that "the questions presented could be ventilated in other jurisdictions, much less that a conflict would later emerge for this Court to resolve." Pet. 29. Whether that is correct of Nike's second Question Presented is impossible to say, because that question is too vaguely stated to permit a comparison with other jurisdictions. But Nike's first Question Presented concerns whether statements in certain circumstances are commercial speech, and that question could of course arise in any jurisdiction with "unfair trade practice" or "false advertising laws." *Id.*

Finally, Nike claims to establish its own "extraordinary chilling effect" by asserting that "Nike has substantially restricted its communications on social issues," including not releasing "publicly" its "next annual" Corporate Responsibility Report, which describes its actions on "matters such as labor compliance, community affairs, sustainable development, and workplace programs." *Id.* 28. As of the date of this opposition, however, one of Nike's public web sites on the Internet contains discussions in various formats of these very issues, including those that are the subject of the statements at issue in this case, and contains in full Nike's first Corporate Responsibility Report, released in October 2001. See <*http://nikebiz.com*>, under topic headings such as "Global Citizenship: Community Affairs, Environment, Manufacturing Practices, Reporting"; "News: Press Releases"; and "Frequently Asked Questions: Labor Practices."

CONCLUSION

For these reasons, the Court should deny Nike's petition for a writ of certiorari.

Respectfully submitted,

Patrick J. Coughlin
Randi Dawn Bandman
Albert H. Meyerhoff
Frank J. Janecek, Jr.
MILBERG WEISS BERSHAD HYNES & LERACH LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Paul R. Hoeber
Counsel of Record
221 Pine Street, Suite 600
San Francisco, CA 94104
(415) 217-3800

Alan M. Caplan
Philip Neumark
Roderick P. Bushnell
April M. Strauss
BUSHNELL, CAPLAN & FIELDING, LLP
221 Pine Street, Suite 600
San Francisco, CA 94104

November 14, 2002

APPENDIX

Lanham Act § 43(a), 15 U.S.C. § 1125(a)

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrep resents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

28 U. S. C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Business and Professions Code § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

California Business and Professions Code § 17203

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

California Business and Professions Code § 17204

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17500

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made

or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

California Business and Professions Code § 17535

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17569

It is unlawful to barter, trade, sell, or offer for sale or trade, any article represented as made by authentic American Indian labor or workmanship, unless the basic article was produced wholly by American Indian labor or workmanship.

Any article bearing a trademark or label registered by Indian persons, groups, bands, tribes, pueblos, or communities with the Indian Arts and Crafts Board in Washington, D.C., or with the American Indian Historical Society, Incorporated, in San Francisco, California, shall be presumed to be authentic.

Only those articles bearing a registered trademark or label of authentic Indian labor or workmanship may be deemed an art or craft of authentic Indian labor or workmanship.

California Code of Civil Procedure § 472

Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment.

California Code of Civil Procedure § 472a(c)

When a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed. When a demurrer is stricken pursuant to Section 436 and there is no answer filed, the court shall allow an answer to be filed on terms that are just.

California Code of Civil Procedure § 472c(a)

When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.

California Rules of Court 325(e)

Following a ruling on a demurrer, unless otherwise ordered, leave to answer or amend within 10 days shall be deemed granted, except for actions in forcible entry, forcible detainer or unlawful detainer in which case five calendar days shall be deemed granted.

California Rules of Court 976(d)

Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part.