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 FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; and BRIEF *AMICI CURIAE* OF THIRTY-TWO LEADING NEWSPAPERS, MAGAZINES, BROADCASTERS, AND MEDIA-RELATED PROFESSIONAL ASSOCIATIONS (LISTED ON THE INSIDE COVER) IN SUPPORT OF PETITIONERS

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November 15, 2002

LIST OF *AMICI*

ABC, Inc.
American Booksellers Foundation for Free Expression
American Business Media
Association of American Publishers, Inc.
Belo Corp.
Bloomberg L.P.
CBS Broadcasting Inc.
Cable News Network L.P. LLLP
The California First Amendment Coalition
California Newspaper Publishers Association
The Copley Press, Inc.
Ethical Corporation
Forbes, Inc.
Fox Entertainment Group, Inc.
The Hearst Corporation
Magazine Publishers of America, Inc.
The McClatchy Company
National Association of Broadcasters
National Broadcasting Company, Inc.
The New York Times Company
Newspaper Association of America
Newsweek, Inc.
PR Newswire Association LLC
Reed Elsevier Inc.
Reporters Committee for Freedom of the Press
The Seattle Times Company
Silha Center for the Study of Media Ethics and the Law
Society of Professional Journalists
SRiMedia PLC
Time Inc.
Tribune Company
The Washington Post Company

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Because Respondent has refused to consent to the filing of *Amici*'s brief, *Amici* ABC, Inc.; American Booksellers Foundation for Free Expression; American Business Media; Association of American Publishers, Inc.; Belo Corp.; Bloomberg L.P.; CBS Broadcasting, Inc.; Cable News Network L.P. LLLP; The California First Amendment Coalition; California Newspaper Publishers Association; The Copley Press, Inc.; Ethical Corporation; Forbes, Inc.; Fox Entertainment Group, Inc.; The Hearst Corporation; Magazine Publishers of America, Inc.; The McClatchy Company; National Association of Broadcasters; National Broadcasting Company, Inc.; The New York Times Company; Newspaper Association of America; Newsweek, Inc.; PR Newswire Association LLC; Reed Elsevier Inc.; Reporters Committee for Freedom of the Press; The Seattle Times Company; Silha Center for the Study of Media Ethics and the Law at the University of Minnesota; Society of Professional Journalists; SRiMedia PLC; Time Inc.; Tribune Company; and The Washington Post Company, hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amici curiae* brief in support of Nike, Inc., et al.'s Petition for a Writ of Certiorari. The brief *amici curiae* immediately follows this motion.

Amici are leading newspapers, magazines, broadcasters, internet providers and other media-related organizations and professional associations in California and the United States, as well as overseas. Most *Amici* or their members customarily report on issues concerning businesses' services and operations.

Amici share a common interest in enforcing the First Amendment's prohibition against governmental interference in public debates, even when those debates relate to corp-

orations. Indeed, many *Amici* are actively reporting on the globalization controversy that is at the center of this case, and most of Nike's communications to the press at issue here were sent to them. Because *Amici* believe that the California Supreme Court's extension of the "commercial speech" doctrine to such communications impermissibly threatens their ability to report on issues concerning corporate America, they respectfully seek leave to file a brief *amici curiae* in support of Petitioners.

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INTEREST OF *AMICI CURIAE*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, and media-related organizations and professional associations in the United States and abroad.[1] They share an interest in enforcing the First Amendment's prohibition against governmental interference in public debates. Indeed, many *Amici* are actively reporting on the globalization controversy that is at the center of this case, and most of Nike's communications to the press at issue here were sent to them. Because the California Supreme Court's extension of the "commercial speech" doctrine impermissibly substitutes state regulation for traditional methods of media coverage and public debate, *Amici* respectfully submit this brief in support of the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The California Supreme Court's decision poses a serious and immediate threat to the media's ability to report on important issues regarding corporate America. Even a cursory review of prominent press coverage from the past few years reveals a vast array of corporate speech – on issues ranging from race discrimination to environmental sustainability to product health and safety – that would now be subject to California's new "commercial speech" dragnet. If the decision below is not reversed, business representatives will be deterred from speaking to the press about these and other public issues. This chilling effect will deprive the public of access to important information and the clash of competing viewpoints that undergirds the First Amendment.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

2. Extending the definition of commercial speech to corporate statements about publicly debated business operations also is unnecessary. When a business practice becomes a matter of public concern, the media scrutinize corporate speech and typically place potentially misleading statements into context. That is exactly what happened in this case. In these circumstances – when the press already provides consumers with competing information and time to reflect on it – the First Amendment prohibits states from making speakers on either side of the debate strictly liable for potentially deceptive or factually inaccurate statements.

I. THE CALIFORNIA SUPREME COURT'S DECISION, IF ALLOWED TO STAND, WILL INHIBIT THE MEDIA'S ABILITY TO REPORT ON ISSUES OF PUBLIC CONCERN REGARDING CORPORATE AMERICA.

A. The California Supreme Court's Definition of Commercial Speech Vastly Enlarges the Realm of Corporate Statements Subject to Regulation.

The scope of *Kasky*'s new definition of commercial speech is staggering. According to the California Supreme Court, speech is now "commercial" if it (i) is made by someone engaged in commerce "or someone acting on behalf of a person so engaged," Pet. App. 18a, such as an individual spokesperson or a trade association; (ii) is likely to reach potential buyers or customers; and (iii) involves descriptions of "business operations," employment or manufacturing policies, or other attempts to "enhance[] the image of [a company's] product or of its manufacturer or seller." Pet. App. 19a-20a. Petitioners amply explain why this test is inconsistent with this Court's precedent, *see* Pet. 10-15, but *Amici* wish to highlight three aspects of this new doctrine.

First, although this Court has "usually defined" commercial speech as that which "does no more than propose a

commercial transaction" to consumers, *United States v. United Foods*, 533 U.S. 405, 409 (2001), the California Supreme Court explicitly held that commercial speech includes statements directed solely to reporters or newspaper editors in their capacities as newsgatherers. Pet. App. 4a, 18a. The California Supreme Court thus ruled that a business may be sued for consumer protection violations based on answers given to reporters' questions, press releases, op-ed pieces or "editorial advertisements," regardless of whether the business's speech is printed or appears as part of a news story that includes opposing viewpoints.

Second, although this Court has held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation omitted), the California Supreme Court ruled that "it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate" on an issue of intense national and international interest. Pet. App. 25a. In the California Supreme Court's view, when public debate turns to a corporation's services or "business operations," the corporation, but not its critics, may be punished if its defense of its practices turns out to be false or misleading. Pet. App. 25a-27a. Indeed, under *Kasky*'s through-the-looking-glass view of commercial speech, the *more* intense the media debate is regarding a company's business practice, the *more* likely it is that a company's statements will be subject to regulation. This is because issues regarding a company's business operations that are hotly debated naturally are more likely to affect purchasing decisions and the company's bottom line, and thus the company's joinder in the debate is more likely to be motivated in part by a desire to "maintain[] . . . profits and sales." Pet. App. 25a.

Third, the California Supreme Court held that corporate communications to the media need not be false or even

purposely or negligently misleading in order to be actionable. Pet. App. 7a. The Court ruled that such speech is unlawful – regardless of the speaker's intent or the public's actual knowledge – if it is "actually misleading *or* [it] has a capacity, likelihood *or* tendency to deceive *or* confuse the public." Pet. App. 7a (quoting *Leoni v. State Bar*, 704 P.2d 183, 194 (Cal. 1985)) (emphasis added); *see also Cortez v. Purolator Air Filtration Prods.*, 999 P.2d 706, 717 (Cal. 2000) (strict liability for deceptive practice under unfair trade practices law); *Chern v. Bank of Am.*, 544 P.2d 1310, 1316 (Cal. 1976) (same under false advertising law). This standard seemingly holds businesses strictly liable for mere "spin." If an executive or trade association granting an interview portrays a controversial business practice in the most favorable light – perhaps by omitting certain background details – then the statements may well have a "capacity . . . to deceive or confuse the public," thereby making them unlawful. What is more, it makes no difference whether the resulting media story clarifies these corporate statements or combines them with other speakers' allegations to create a balanced news story. As evidenced by Respondent's allegations in this case, it is the corporation's raw speech that provides the basis for punishment under California law, regardless of whether the media repeat it or place it into context.

B. Application of These Expanded Consumer Regulations Will Impair the Media's Ability to Cover Numerous Issues of Intense Public Concern.

Accurate and useful reporting depends on considering all sides of an issue. When a public debate concerns a company's business operations, attaining such a complete picture requires newsgatherers to get information not only from interest groups and the company's detractors, but also from the company itself. The First Amendment's protection of the press, in fact, "rests on the assumption" that gathering and disseminating "information from diverse and

antagonistic sources" will best serve the public welfare. *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Reporters who fail to obtain corporations' statements on issues involving their businesses may overlook key aspects of those issues, rendering their stories incomplete. Reporters may even shelve such stories for fear of publishing something that is too one-sided. At a minimum, news stories that fail at least to impart the view of each opposing party are more likely to be deemed untrustworthy or biased.

The *Kasky* decision will seriously hamper the media's ability to obtain these critical business-oriented statements. As a general rule, any law that "impose[s] strict liability on [speakers] for false factual assertions" regarding public issues has "an undoubted 'chilling' effect" on valuable speech. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *accord New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964). This Court has held that the threat of liability has the same effect in the corporate context. If states could punish corporate speech on any public issue that "materially affected" the company's profitability:

> [m]uch valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk [those penalties]. . . . In addition, the burden and expense of litigating the issue – especially when what must be established is a complex and amorphous economic relationship – would unduly impinge on the exercise of the constitutional right. [T]he free dissemination of ideas [might] be the loser.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 n.21 (1978) (quotation omitted). California's expansion of the commercial speech doctrine presents these same risks.

Because issues concerning companies' "business operations" are increasingly fundamental to the world's social and political landscape, the withdrawal of corporate voices on those issues from the media would deprive the public of vital information. Nike, for example, is not the only multinational corporation whose labor policies in third world countries have been the focus of public scrutiny. An executive from another company, Cutter & Buck, responded to allegations that its garments were made in overseas "sweatshops" by telling the media that "I have no objection to outside monitoring because I have every confidence our factories would pass." Les Blumenthal, *The News Tribune*, April 15, 1997, at B4. Labor organizations have sued the company, alleging that its executive's statement amounted to false advertising in the same way that Nike's speech did. First Amended Complaint ¶¶ 95 & 125, *Union of Needletrades Indus. & Textile Employees, et al. v. The Gap, Inc., et al.*, No. 300474 (Ca. Super. Sept. 23, 1999).

Media coverage of corporations' business operations, of course, goes far beyond labor policies in developing countries. Civil rights groups recently have alleged that several companies' practices of stocking different merchandise or requiring different forms of payment in predominantly minority communities amounts to invidious racial discrimination. When asked to explain why its "no check" policy appeared to be limited to stores in predominantly black neighborhoods, an executive for the parent company of KB Toys stated that despite using "check-acceptance services designed to screen for problem checks" in the pertinent stores, fraudulent check rates still "can be as high as 20 percent." Stephanie Stroughton, *Suit Alleges Bias by KB Toys*, Wash. Post, Dec. 16, 1999, at A1. Although facts like these are critical to the public debate over whether such retail "red-lining" practices are wrong and should be prohibited, the *Kasky* doctrine would hold that businesses contribute information to this debate at their own peril.

Similarly, it was accepted wisdom prior to *Kasky* that "[i]f a real scientific debate about the health impact of a product exists, the manufacturer would retain a fully protected [First Amendment] right to comment on that debate" outside of its direct advertisements and product labels, "even though the likely and intended impact of the comment on the listener would be the creation of a desire to purchase that product." Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433, 1453 (1990). A passage from a recent magazine cover story evinces this principle:

> David Ludwig, director of the Obesity Program at Children's Hospital in Boston, says his research shows that "for every additional serving of soft drinks a day, a child's risk of becoming obese increases by 60 percent." Ludwig's soft drink study also suggests that calories from sugar-sweetened drinks do not seem to be as filling as calories from other foods. Soon after Ludwig's results hit the media, studies paid for by the National Soft Drink Association used government data to show that soft drinks do not cause obesity. "If you go through all the scientific evidence, you see there is no link between consumption and obesity," says Sean McBride of the NSDA. . . . This debate is only the beginning.

Amanda Spake & Mary Brophy Marcus, *The Fattening of America*, U.S. News & World Report, Aug. 19, 2002, at 46.[2]

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[2] A similar debate is occurring in Oregon over a proposal to adopt a state law requiring labeling of genetically engineered foods. Interest groups supporting the initiative have asserted that food companies are creating "Frankenfood" – that is, "something we can't control" – and that they are "like little kids playing with a chemistry set in a back bedroom." Brad

Because food and beverage manufacturers' speech on health-related issues undoubtedly is in part driven by product image and economics, *Kasky* would restrict speech on one side of these disputes, thereby inhibiting the media's ability to compare both viewpoints in order to ferret out the truth.

There also is a heated public debate regarding sustainable environmental practices and whether people should support companies that harvest or treat natural resources in certain ways. Environmental groups, for instance, have called on consumers and chefs to boycott swordfish and sea bass on the ground that the seafood industry is over-fishing those species. But the industry says that boycotts are unnecessary because fishing companies' new, self-imposed quotas are sufficient to protect the ecosystem. Carolyn Jung, *Activists, Industry Debate Reason for Swordfish Comeback,* San Jose Mercury News, Oct. 16, 2002, at 1; Beth Daley, *Sea Bass Overfishing Tests Industry's Policing Ability,* Boston Globe, Aug. 21, 2002, at A1. Such give-and-take is critical to developing effective policies not only for oceans and rivers, but also for the world's forests and mines. *See, e.g.*, Glen Martin, *Redwood Logging Firm Recognized for Sustainable Practices,* S.F. Chron., Nov. 17, 2000, at A11; Terry McCarthy, *Plumbing the Pasture,* Time, July 16, 2001, at 22. Yet "as public concern about the environment grows, there is an increasing acceptance in executive suites that industrial reform" concerning a wide range of practices "can be good for the environment *and* good for profits." Eric Roston, *New War on Waste,* Time, Aug. 26, 2002, at A28 (emphasis added). Hence, the economic component of these sustainability debates apparently makes them subject to the *Kasky* doctrine.

Cain, *Labels for Genetically Altered Food Put to Vote,* Seattle Times, Aug. 12, 2002, at B2. A spokesman for food manufacturers responded that genetic alterations are "in all kinds of food, and there's never been a single case of illness or any other problem." *Id.*

Finally, some important public debates occur between two businesses. Last year, Bridgestone/Firestone alleged that "the real problem" in accidents involving Ford Explorers derived from unsafe vehicles, while Ford "vehemently insist[ed] it [was] a tire problem." Terril Yue Jones, *Bridgestone Rejects Wider Recall Request,* L.A. Times, July 20, 2001, at B1. Although these companies' public descriptions of their safety tests were driven partly by a desire to protect their profitability, *id.*, they also imparted vital information to consumers in the automotive market. Under *Kasky*, however, such differing corporate statements provide fodder not only for tort lawsuits, but for "false advertising" claims as well. This type of threat may well deter the release of contemporaneous safety-related information the next time around, perhaps regarding air travel. *See* Sally B. Donnelly, *Just Plane Dangerous,* Time, Aug. 13, 2001 (dispute between airline and its repair company). Even if a company honestly believes its contested practice is safe or lawful, the prospect of immediate nuisance lawsuits – not to mention additional *Kasky*-based claims if a jury later disagrees with the company's public assessment of its practice, *see* Pet. App. 22a – could be too high a price to pay for defending it in the media.

There can be no doubt, in sum, that *Kasky* threatens to transform the way that the media report on a vast array of public issues. Businesses, big and (perhaps even more so) small, will be deterred from speaking on issues concerning their operations, or they will offer only bland, indisputable claims. Spontaneous interviews also will be far less informative, for any alert business will rely on carefully crafted statements designed to keep it out of court. When newsworthy companies are themselves media entities – such as AOL Time Warner, the ultimate parent of *Amicus* CNN – the *Kasky* decision presents still more difficulties, for such media organizations will potentially be subject to legal claims arising out of their coverage that their competitors will not. The result of all this will be far less public information

regarding corporate issues, to the detriment both of businesses' supporters and their critics.

The reverberations of this information withdrawal will be felt not only in this country, but abroad as well. Many European countries encourage, and France requires, corporations to disclose information detailing their various social and environmental practices. European media entities such as *Amici* SRiMedia and *Ethical Corporation* magazine collect these "corporate social responsibility" reports, and publish evaluations of them to assist overseas investment funds and individuals in putting their money into sustainable and responsible companies. *See* App. 4a, 8a. The chilling effect of *Kasky* will deprive these publishers of this information and deter its distribution, which, ironically, is designed to facil-itate support for the very type of corporate behavior that Respondent professes to support.

C. The Chilling Effect of this New Regulatory Regime Was Fully Anticipated and Already Has Begun.

The threat of liability under *Kasky* is so serious that businesses already have begun to constrict their lines of communication with the press. One business report advises companies that "[u]nless and until the U.S. Supreme Court reviews *Kasky* . . . [t]he safest course may be to make no reference at all to one's products, services, or business operations – but that may amount to saying nothing at all when one's industry is under general attack. When silence is not an option, responsive public relations statements must be made with utmost care and diligence." Jonathan A. Loeb & Jeffrey A. Sklar, *Be Careful When Your Company Speaks*, AGS&K Business Report, *at* www.alschuler.com/print/brsum02.html. Another business journal urges corporate executives to devise "preventative systems" for vetting corporate communications and campaigns, "even those that are 'defensive' in nature," and to "proceed more cautiously to

avoid negligent misstatements of fact that might otherwise occur in the rush to respond to a public relations crisis." Richard O. Faulk, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 16 No. 21 Andrews Del. Corp. Litig. Rep. 11 (2002); *accord* Roger Parloff, *Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak Their Minds*, Fortune, Sept. 2, 2002, at 102 (describing need for businesses to alter behavior as a result of *Kasky*).

These actions should come as no surprise to the California Supreme Court or to Respondent's supporters. The majority below acknowledged "that application of [its ruling] may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements." Pet. App. 22a. Making speakers more "cautious" is simply a euphemism for chilling speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). That is exactly what environmental and labor groups supporting Respondent are hoping for. One "corporate watchdog group" has explained that "[i]f this case is successful, it could undermine the greenwashing strategies of a lot of corporations that attempt to promote a positive environmental or social image to undermine their critics and minimize the damage done to their brand." Josh Richman, *Greenwashing on Trial*, MotherJones.com, Feb. 23, 2001, *at* www.motherjones.com/web_exclusives/features/news/greenwash.html (quoting Joshua Karliner, Executive Director of Corpwatch). After the California Supreme Court's decision was announced, an editorial that was widely circulated on anti-globalization websites declared that "[t]he ruling was a victory for the public interest and groups taking on powerful corporations and their image-makers." Jeff Milchen, *Bill of Rights Freedoms Belong to People, Not Corporations*, Pac. News Serv., May 14, 2002, *at* www.news.pacificnews.org/news/view_article.html?article_id=300. The *Kasky* decision, in other words, benefits anti-globalization groups' public relations campaigns, not consumers.

This Court has confronted a situation like this before. The litigation that culminated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), also "was a weapon in a political struggle." Anthony Lewis, New York Times v. Sullivan *Reconsidered*, 83 Colum. L. Rev. 603, 605 (1983). That case, which, like part of this one, was based on an "editorial advertisement" purchased in a newspaper, was "part of a concerted strategy" designed to chill press coverage of the desegregationists' side of the civil rights movement. Fred D. Gray, *The* Sullivan *Case: A Direct Product of the Civil Rights Movement*, 42 Case W. Res. L. Rev. 1223, 1226 (1992). And like this case, the decision under review in *Sullivan* came from a state supreme court in a region on the leading edge of one side of the public debate. It used one state's law effectively to regulate media coverage throughout the nation. *See* Lewis, *supra*, at 605.

One generation ago, this Court held in *Sullivan* that imposing strict liability in "one of the major public issues of our time" for speech containing falsehoods would undercut the First Amendment's basic purpose of assuring "uninhibited, robust, and wide-open" debate on such issues. 376 U.S. at 270-71. It is imperative that this Court grant certiorari now to ensure that the decision of the California Supreme Court is not allowed single handedly to dry up information on one side of another major public debate, this time over corporate globalization.

II. EXPANSION OF THE COMMERCIAL SPEECH DOCTRINE BEYOND STATEMENTS THAT DO "NO MORE THAN PROPOSE A COMMERCIAL TRANSACTION" IS UNNECESSARY BECAUSE MEDIA COVERAGE ADEQUATELY INFORMS CONSUMERS REGARDING COMPANIES' CONTROVERSIAL BUSINESS PRACTICES.

The California Supreme Court's expansion of the commercial speech doctrine not only threatens to hamper

media coverage of public issues regarding corporate America, but it also does so for no good reason. One of this Court's principal justifications for curtailing the level of protection afforded to commercial speech is that such speech typically affords consumers little time or ability to scrutinize its truthfulness. While that logic may sometimes make sense in the realm of product labels and advertisements, it lacks any force whatsoever when the corporate speech at issue is directed toward the media in the context of an extended public debate. Indeed, the very press coverage of Nike that forms the backdrop of this case demonstrates that the media serve as an effective watchdog over corporate press releases and more than adequately scrutinize companies' assertions regarding controversial business operations.

A. Corporate Communication with the Media, Unlike Other Corporate Speech, Permits Public Scrutiny and Counterspeech.

This Court has explained that "[i]n assessing the potential for overreaching and undue influence" of speech, "the mode of communication makes all the difference." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988). Hence, one of the main reasons that this Court affords commercial speech less First Amendment protection than other speech is that the public often "lacks sophistication" or access to the information necessary to evaluate a manufacturer's claim. *In re R.M.J.*, 455 U.S. 191, 200 (1982) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977)). When a company asserts that its product contains a certain ingredient, for example, that claim may not provide any realistic opportunity for factual or political debate. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). Consumers, therefore, "may respond to [false advertisements] before there is time for more speech and considered reflection to minimize the risks of being misled." *Id.* Even within the realm of commercial

speech, this Court has held that statements that are "more conducive to reflection and the exercise of choice on the part of the consumer" receive incrementally more First Amendment protection. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985) (print advertisements more protected than personal solicitations); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58 (1978) (same).

A corollary of this Court's inability-to-reflect rationale is that false or misleading speech in the "commercial" context may be regulated because it "lacks the value that sometimes inheres in false or misleading political speech." *Rubin*, 514 U.S. at 496 (Stevens, J., concurring). The usual rule is that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *Sullivan*, 376 U.S. 279 n.19 (quoting John Stuart Mill, On Liberty 15 (Blackwell ed. 1947)); *see also Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("the remedy to be applied" to false political speech "is more speech, not enforced silence"). But in the sphere of product advertising, the predominant goal is sales, not knowledge, and the time frame is short, not long. Thus, this Court has held that the regulation of misleading commercial speech prevents "uninformed acquiescence," *Edenfield v. Fane*, 507 U.S. 761, 774-75 (1993), because "the consumer is not expected to have the competence or access to information needed to question the advertiser's claim." Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 156 (1996).

The California Supreme Court's extension of the commercial speech doctrine in this case rips the doctrine completely away from this underpinning. The decision holds that a business's speech is "commercial" even if it pertains merely to a company's social "image," Pet. App. 19a-20a,

rather than to any actual product, and even if it pertains to an extended media debate, rather than an ephemeral purchasing decision. This extension is wholly unjustified.

This Court has long recognized that the press is "a mighty catalyst in . . . informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). This is because the media do more than simply provide an empty vessel for third parties to disseminate their speech. *See Branzburg v. Hayes*, 408 U.S. 665, 729 (Stewart, J., dissenting). Rather, it is a core function of the press to scrutinize statements that it receives, as well as to investigate their statements' veracity and to set them beside the counterspeech of other interested parties. Thus, when a news organization receives a company's press release regarding its business operations, the organization can bring independent judgment to bear on the accuracy of the release. If the company's assertions are not credible, the media can decline to run any story on the subject, and sometimes does. But when responsible media entities do publish controversial claims by businesses, they make sure to contrast those claims with independent analysis or opponents' counterclaims. *Cf. Gertz*, 418 U.S. at 344 (press provides means of "counter-act[ing] false statements" regarding public figures). Unlike the typical advertising scenario, in short, potentially misleading corporate press releases in the course of a public debate are tempered by their clash with competing speech.

Even when the media reprint a business's speech in an op-ed or an editorial advertisement, that speech is very likely to be responsive to, or challenged by, other articles in the same publication. In contrast to advertisements that directly propose commercial transactions, companies usually do not take the trouble to purchase space to discuss their *business operations* unless those operations are the subject of considerable public debate. Certainly that was the case with Nike. Consequently, as with press releases, the media arm

the public with the resources for full reflection on business practices discussed in op-eds and editorial advertisements.

Not only is the press effective in evaluating corporate speech and in unmasking misleading claims regarding issues of public concern; it is the preferred means of doing so. "[S]elf-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *Bellotti*, 435 U.S. at 777 n.12 (quoting *Associated Press*, 326 U.S. at 20). Accordingly, "[t]he very purpose of the First Amendment is to foreclose [the government] from assuming guardianship of the public mind" through unnecessarily regulating the content of public debate. *Riley v. National Federation of the Blind*, 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring)). Whenever the press presents the public with adequate information to assess the accuracy of a speaker's claim, "*the people* in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of the conflicting arguments." *Bellotti*, 435 U.S. at 791 (emphasis added). False statements in this context often highlight the truth.

These same default rules apply to corporate speech on public issues. Companies that comment on such issues outside of direct advertisements enjoy the First Amendment's "full panoply of protections," regardless of their motivations for doing so. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983); *see also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (power company has unrestricted First Amendment right to comment on debate over nuclear power). Indeed, in holding in *Bellotti* that corporations have an unfettered right to speak out on proposed legislation that would affect their finances, this Court made it plain that even when such speech is merely reprinted in an editorial advertisement, the public "may consider . . . the credibility of the advocate. But if there be

any danger that the people cannot evaluate the information and arguments advanced by [a business], it is a danger contemplated by the Framers of the First Amendment." *Id.* at 791-92. They believed that a commercial motivation – such as a "creditor[]" or "manufacturing" interest – was perfectly legitimate, and that liberty and sound social policy would best be achieved by allowing a free press and an inquisitive public to weigh the unrestrained expression of *all* interested parties. Federalist No. 10 (Madison), at 58-60 (J. Cooke ed. 1961); *see also* Gordon S. Wood, The Radicalism of the American Revolution 336-37 (1992) (Framers encouraged open pursuit of all interests, including commercial interests).

The *Kasky* decision pretermits this entire process of ventilation and reflection. It holds that the moment a company sends a press release or letter to the media that offers a potentially misleading portrayal of the company's business operations, the company may be sued and held liable. It does not matter whether the media ever print the company's statements or, if they do, whether they place those statements in context or beside assertions refuting them. This holding impermissibly substitutes state regulation of the content of public debate for media scrutiny and counterspeech.

What is more, the ruling handicaps the business side of all public debates regarding business issues, by "licens[ing] one side of a debate to fight freestyle, while requiring the other side to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Especially in these circumstances, "the First Amendment is plainly offended." *Bellotti*, 435 U.S. at 785-86. Businesses and their representatives have just as much a right to speak out on any public issue as do interest groups and politicians, whose motivations for speaking are often just as selfish and whose reputations for unadorned veracity are often just as suspect. And the media are just as capable of evaluating and investigating speech from corporate sources as from anyone else.

B. The Media Coverage of Nike at the Center of this Case Confirms that Subjecting Its Speech to Consumer Protection Laws Is Unnecessary and Inappropriate.

The record and the press coverage related to this case underscore the imprudence of the California Supreme Court's decision. Although the purported linchpin of Respondent's complaint is that Nike has deceived the public by making misleading statements to the press regarding its business operations, Respondent himself acknowledges that "[t]he media have continued to expose Nike's actual practices." First Amended Complaint (Petitioners' Lodging) ¶ 19; *see also id.* Exs. F-L (collecting such articles). Indeed, a review of contemporaneous press coverage of Nike reveals that every single one of Nike's allegedly misleading statements either was never reported or was challenged by counterspeech in the same media outlet. This is what one would expect regarding an issue of intense public concern, and it leaves one at a loss as for why state regulation is necessary or appropriate in this area.

Respondent complains about three statements that Nike made in press releases. The first one, that the average line-workers' wage in Asian facilities is "double the government-mandated minimum," Compl. ¶ 46, did not generate any immediate press reports. When it did, media generally asserted in the same articles that Nike's claim was potentially misleading. *See* Elisabeth Malkin, *Pangs of Conscience: Sweatshops Haunt U.S. Consumers,* Business Week, July 29, 1996, at 46 ("Nike Chief Executive Philip H. Knight defends the Indonesian operations, saying that sneaker assemblers in Indonesia earn an average of double the minimum wage. But that's because they have no choice but to do overtime."); Stephanie Salter, *Decent Wages for Nike Workers? Just Do It,* S.F. Chron., June 27, 1996, at A19 (noting that developing countries "deliberately set [minimum wages] below the

subsistence level" and that a human rights group asserted that Nike pressured developing countries into denying overtime and keeping worker pay artificially low).

Coverage of Nike's two other allegedly misleading press releases followed a similar pattern of point and counterpoint. Respondent complains about Nike's statement that it provided "free meals" to its employees. Compl. ¶ 52. But when a typical press account repeated Nike's assertion, it also noted that other groups, "on the other hand, are concerned about persistent reports of exploitative conditions." Andy Zipser, *Nike: Shareholders Will Be Sweating It Out, Too*, Barron's, Sept. 16, 1996, at 10. Nike's third contested statement – that it guarantees "a living wage for all workers," Compl. ¶ 62 – responded to newspaper articles suggesting that Nike mistreated its workers. *See* Steven Greenhouse, *Nike Supports Women In Its Ads, But Not Its Factories, Groups Say*, N.Y. Times, Oct. 26, 1997, at A30; Dottie Enrico, *Women's Groups Pressure Nike on Labor Practices*, USA Today, Oct. 27, 1997, at B2. When another media entity printed a story based on Nike's responsive press release, it also included an assertion from an interest group that "Nike's workers in Vietnam could 'barely afford three meals a day let alone transportation, rent, clothing, health care, and much more.' " *Nike's Treatment of Women Overseas Assailed; Spokesman Defends Pay*, Dallas Morning News, Nov. 2, 1997, at A44.

Nike's letters to the editor and editorial advertisements that Respondent complains of also met with vigorous concurrent counterspeech. Nike's letter to the *San Francisco Chronicle, see* Compl. ¶ 27, appeared in the same day's newspaper as an article claiming that "Nike's hypocrisy knows no bounds." Tim Keown, *Hypocrisy is Nike's Sole Purpose*, S.F. Chron., Dec. 14, 1997, at E1. Nike's letter to the editor of *The New York Times*, Compl. ¶ 52, appeared amidst several scathing editorials concerning Nike's business

practices. *See, e.g.*, Bob Herbert, *Nike's Pyramid Scheme*, N.Y. Times, June 10, 1996, at A17; Bob Herbert, *Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, at A29; Bob Herbert, *From Sweatshops to Aerobics*, N.Y. Times, June 24, 1996, at A15; Bob Herbert, *Trampled Dreams,* July 12, 1996, at A27. Nike's editorial advertisement asserting that it was "doing a good job" and "operating morally," Compl. ¶ 56, appeared during this same time period and on the same day (June 24, 1997) as one of Mr. Herbert's columns.

In light of all of this contemporaneous press coverage, it is difficult to understand how consumers could have been deceived by any inaccuracies in Nike's speech. At the very least, any person who wished to factor Nike's labor practices into her purchasing decisions would have been alerted that serious allegations had been leveled against Nike and that Nike's credibility was being questioned. If consumers believed Nike's statements, it was not because they lacked the ability to reflect on the ongoing controversy or because they lacked access to "more speech" challenging Nike's assertions. *See Rubin*, 514 U.S. at 496 (Stevens, J., concurring); *Ohralik*, 436 U.S. at 457-58. Nor was it because any party's false statements did not "make a valuable contribution to the debate" by triggering additional investigation and corrective speech. *Sullivan*, 376 U.S. 279 n.19. In the classic mode of public discourse on a controversial issue, the media ventilated competing claims and provided the people with information that allowed them to ascertain their own conclusions.

The California Supreme Court's decision that such press coverage is somehow inadequate tramples basic First Amendment principles and demands review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Appendix B]

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APPENDIX A

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations that gather and report news to the public. ABC Produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20*, and *Nightline*.

American Booksellers Foundation for Free Expression is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books. It disseminates information about dangers to free expression on its website, www.abffe.com. ABFFE also publishes a monthly newsletter, which it distributes to subscribers, and makes other publications available to the public through its on-line store. ABFFE has hundreds of bookseller members who are located from coast to coast.

American Business Media, founded in 1906, is the business-to-business industry association for global information providers that represent magazines, websites, trade shows, conferences, newsletters, and other media. These member companies reach an audience of more than 88.9 million professionals and generate more than $239 billion in industry revenues.

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

Belo Corp. is a media company with a diversified, market-leading group of television broadcasting, newspaper publishing, cable news and interactive media operations in the United States. Belo owns nineteen television stations that reach 13.9% of U.S. television households, and publishes four daily newspapers with a combined daily circulation of approximately 900,000 and a combined Sunday circulation of almost 1.3 million in the United States. In addition, Belo owns or operates six cable news channels. Belo's Internet subsidiary, Belo Interactive, Inc., includes thirty-four internet websites, several interactive alliances and a broad range of internet-based products.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of 1600 reporters in eighty-seven bureaus around the world, including two in California. Bloomberg News publishes more than 4000 news stories each day, electronically delivering business, financial and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional System, a proprietary desktop system. Bloomberg News also operates as a wire service, distributing business news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite television news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100 book titles a year; Bloomberg Magazines, which publishes twelve different magazines each month; and Bloomberg.Com, which is read by the investing public more than 300 million times each month.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as *60 Minutes* and *48 Hours*. CBS owns and

operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

Cable News Network L.P., LLLP, a division of Turner Broadcasting System, Inc., an AOL Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than 1 billion people in more than 212 countries and territories.

The California First Amendment Coalition, established in 1988, is a California nonprofit public benefit corporation and a 501(c)(3) charitable organization whose purpose is to "promote and defend the people's right to know." Its board of directors includes representatives of the California Newspaper Publishers Association, California Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, and Associated Press News Executives Council, as well as public members with experience in government agencies, citizen interest groups and higher education.

California Newspaper Publishers Association is a trade association representing about 500 daily and weekly newspapers. The CNPA, for well over a century, has stood in defense of the rights guaranteed by the First Amendment.

The Copley Press, Inc. publishes nine daily newspapers, including *The San Diego Union-Tribune*, that regularly cover national and international news and operates an international news service.

Ethical Corporation publishes a monthly magazine by the same name in London, England that is distributed in Europe and throughout the world. The magazine is dedicated to delivering independent analysis, comment, news, and case studies from around the world in the area of corporate citizenship and social responsibility. *Ethical Corporation* magazine is read by over 40,000 business professionals and senior executives in large companies who are responsible for social and environmental issues.

Forbes, Inc. is the publisher of *Forbes*, the nation's leading business magazine and its international edition, *Forbes Global*, which together reach a worldwide audience of nearly five million readers. The company also publishes *Forbes FYI*, the irreverent lifestyle supplement. Other company divisions include: Forbes.com, the company's Internet business; Forbes Management Conference Group; Forbes Custom Communications partners; and American Heritage, publisher of *American Heritage* magazine and two quarterlies, *American Legacy* and *American Heritage of Invention & Technology*.

Fox Entertainment Group, Inc., through its subsidiaries, owns and operates the Fox News Channel, the Fox Broadcasting Company television network, and thirty-five local broadcast television stations that gather, produce and report news to the public.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The newspapers have a combined average circulation of 1,400,000 daily and 1,900,000 Sunday.

National Association of Broadcasters ("NAB"), organized in 1922, is a nonprofit incorporated trade organization that serves and represents radio and television stations and networks. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning commercial activities and the activities of government.

National Broadcasting Company, Inc. is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the internet and other distribution channels.

The New York Times Company publishes *The New York Times,* a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily circulation in the United States and a wide range of non-daily U.S. newspapers.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally.

PR Newswire Association LLC, whose website is www.prnewswire.com, provides electronic distribution, targeting and measurement services on behalf of some 40,000 customers worldwide who seek to reach the news media, the investment community and the general public with their up-to-the-minute, full-text news developments. Established in 1954, PR Newswire has offices in fourteen countries and routinely sends its customers' news to outlets in 135 countries in twenty-seven languages. Utilizing the latest in communications technology, PR Newswire content is considered a mainstay among news reporters and investors as well as increasing numbers of private individuals.

Reed Elsevier Inc. is a prominent publisher of information products and services for the business, professional and academic communities, including scientific journals,

legal, educational, medical and business information, refrence books and textbooks, and business magazines.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

The Seattle Times Company publishes four newspapers in the State of Washington: *The Seattle Times*, Washington's most widely circulated daily newspaper; the *Yakima Herald-Republic*; the *Walla Walla Union Bulletin*; and *The Issaquah Press*. It also publishes four newspapers in Maine: the *Portland Press Herald/Maine Sunday Telegram*, Maine's largest daily newspaper; the *Kennebec Journal*; the central Maine *Morning Sentinel*; and the *Coastal Journal.*

Silha Center for the Study of Media Ethics and the Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media.

Society of Professional Journalists works to improve and protect journalism. The organization is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

SRiMedia PLC, based in London, England, collects, analyzes and publishes corporate governance news, a substantial portion of which is related to topics of "corporate social responsibility" (CSR). It operates a website, www.srimedia.com, that reaches about 100,000 users who are located principally in Europe and the United States, but who also are in Asia, Australia, and Africa. SRiMedia also distributes targeted email bulletins. SRiMedia's CSR reportage addresses often-controversial issues such as human rights practices, labor relations, and environmental sustainability, and it is designed to provide information to investment organizations and individual investors who wish, as many Europeans do, to invest in socially responsible companies. SRiMedia's publications also are read by corporations interested in adopting or improving their CSR policies.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly*.

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers including the *Los Angeles Times, Chicago Tribune, Baltimore Sun, Newsday, Orlando Sentinel,* and *Hartford Courant*; owns and operates twenty-four major market television stations including KCPQ and KTWB (Seattle), KXTL (Sacramento), KTLA (Los Angeles), and KSWB (San Diego), and two radio stations; and operates a network of local and national news and information websites throughout the United States.

The Washington Post Company publishes the newspaper *The Washington Post*, a daily newspaper with a nationwide daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

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