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# Comments: Just [Can't] Do It: The Supreme Court of California Overly Restricted Nike's First Amendment Rights in Holding That Its Public Statements Were Commercial Speech

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## JUST [CAN'T] DO IT: THE SUPREME COURT OF CALIFORNIA OVERLY RESTRICTED NIKE'S FIRST AMENDMENT RIGHTS IN HOLDING THAT ITS PUBLIC STATEMENTS WERE COMMERCIAL SPEECH

### I. INTRODUCTION

Have you ever been Niked? According to an October 17, 1996 report on CBS's *48 Hours*, to be "Niked" means to have one worker take out his or her aggression on a fellow worker.<sup>1</sup> The CBS exposé reported that Nike's factories in Vietnam were forcing workers to function under "sweatshop" conditions.<sup>2</sup> Employees were "paid below minimum wage, work[ed] exhausting hours and sometimes face[d] physical abuse—all to create the hottest and most popular athletic shoe in the world."<sup>3</sup>

In response to public criticism and the unfavorable report, Nike publicized its existing code of conduct, developed in the early 1990s to ensure compliance with local employment laws in its foreign factories.<sup>4</sup> Despite Nike's intentions in creating the code—"to guarantee a humane workplace"—an audit revealed that forty of fifty employees interviewed had never read the code, forty-eight worked longer than permitted by law, and that levels of the toxic chemical toluene were dangerously high.<sup>5</sup> As a second method of defense, Nike, "for the purpose of maintaining and increasing its sales and profits,"<sup>6</sup> published various news releases, advertisements, and letters to newspaper editors regarding its factory conditions.<sup>7</sup>

In opposition to the advertising campaign, Marc Kasky filed suit against Nike under a California consumer protection law that permits any citizen to formally accuse businesses of disseminating misleading or false statements to the public.<sup>8</sup> California's law gives standing to

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1. *48 Hours: Nike Sweatshops* (CBS television broadcast, Oct. 17, 1996), available at <http://store.cbs.com/video.php?itemID=4481&showID=1>.

2. *Id.*

3. *Id.*

4. Roger Parloff, *Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak Their Minds. Will the Supreme Court Let It Stand?*, FORTUNE, Sept. 2, 2002, at 102. The code of conduct was "a statement of aspirational goals its contractors were supposed to live up to." *Id.*

5. *Id.*

6. *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002), cert. granted, 537 U.S. 1099 (2003), and cert. dismissed, 123 S. Ct. 2554 (2003).

7. Tony Mauro, *Let Nike Speak Up for Itself*, USA TODAY, Oct. 14, 2002, at A15.

8. James Kilpatrick, *The Right to Free Speech and Tennis Shoes*, TULSA WORLD, Dec. 2, 2002, at A9. "[P]rovisions of California law [sic] authorize a private individual, acting as a 'private attorney general,' effectively to prosecute a

citizens who have not been injured; in all other states, however, Kasky would not have a valid cause of action. Nike prevailed in the lower courts;<sup>9</sup> the Supreme Court of California, however, overturned the judgments and found for Kasky.<sup>10</sup>

Thereafter, Nike appealed to the Supreme Court of the United States.<sup>11</sup> The Court granted certiorari to decide two questions:

(1) whether a corporation participating in a public debate may “be subjected to liability for factual inaccuracies on the theory that its statements are ‘commercial speech’ because they might affect consumers’ opinions about the business as a good corporate citizen and thereby affect their purchasing decisions”; and (2) assuming the California Supreme Court properly characterized such statements as commercial speech, whether the “First Amendment, as applied to the states through the Fourteenth Amendment, permit[s] subjecting speakers to the legal regime approved by that court in the decision below.”<sup>12</sup>

Ultimately, the Court dismissed the writ of certiorari “as improvidently granted”<sup>13</sup> without deciding whether corporate publicity, which may be less than completely accurate, is entitled to full First Amendment protection.<sup>14</sup>

Because the California ruling was upheld, corporations in any public debate will now need to balance the desire to speak freely against the risk of severe court-imposed sanctions.<sup>15</sup> The California ruling means that critics of Nike’s business practices can say anything, but Nike’s participation in public statements or debate would be stifled.<sup>16</sup> Unfortunately, “[a]t a time when business needs to be more, not less, transparent, this will encourage [corporations] to withdraw from public debate and provide only the bare minimum of information on any subject.”<sup>17</sup>

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business for unfair competition or false advertising.” Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2559 (Breyer, J., dissenting). See also CAL. BUS. & PROF. CODE §§ 17200, 17204, 17500, 17535 (West 1997).

9. Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 863 (Cal. Ct. App. 2000), *rev’d*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *and cert. dismissed*, 123 S. Ct. 2554 (2003).
10. Kasky, 45 P.3d at 247.
11. Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003).
12. *Id.* at 2555.
13. *Id.*
14. Shannon McCaffrey, *Supreme Court Will Test Nike’s Defense: The Justices Will Hear the Case of the Sneaker Maker, Who an Activist Says Stretched the Truth*, PHILA. INQ., Jan. 11, 2003, at A3.
15. Parloff, *supra* note 4, at 102.
16. Mauro, *supra* note 7, at A15.
17. Alex Benady, *Nike’s Supreme Fight on Free Speech*, TIMES OF LONDON, Sept. 23, 2002, § 3 (Business), at 4.

This case was perhaps the Supreme Court's "most important case in years on the free speech rights of companies."<sup>18</sup> Despite the potential impact of this case on worldwide industry, the Court's failure to overturn the California ruling will "'chill' the exercise of free speech rights"<sup>19</sup> and cause corporations and other speakers to "censor their own expression well beyond what the law may constitutionally demand."<sup>20</sup>

This comment will first examine the extent of First Amendment protection provided to commercial speech, the tests used to analyze commercial speech, and explain the California law that allowed Marc Kasky to file suit as a private individual. Second, this comment will investigate the potential impact of the Court's decision on corporate communications today and in the future. Finally, it will report on the procedural history and current status of the case, and the status of commercial speech as a whole.

## II. BACKGROUND FACTS AND LEGAL DOCTRINES

### A. *Commercial Speech Is Protected by the First Amendment Only When It Is Found Not to be False or Misleading*<sup>21</sup>

Commercial speech includes paid advertisements and product labels that describe food as "low fat," "chocolaty," or "new and improved."<sup>22</sup> In other words, commercial speech is speech that companies use to sell their products to the public.<sup>23</sup> Commercial speech differs from political speech, which is completely protected by the First Amendment, because it can be, and usually is, regulated by the government.<sup>24</sup>

Over the years, the Supreme Court has used three tests to determine when speech is commercial. The first test applies limited First Amendment protection to speech promoting commercial transactions. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court overturned a state statute that prohibited the display and distribution of prescription drug information.<sup>25</sup> The Court stated that First Amendment protection is not completely lost on commercial speech just because the particular speech is in a form that involves solicitation and profit.<sup>26</sup> In order to support a market-

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18. *Supreme Court to Hear Case on Commercial Speech: California Suit Accuses Nike of False Statements About Overseas Factories*, HOUSTON CHRON., Jan. 11, 2003, at 6.

19. *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2568 (2003) (Breyer, J., dissenting).

20. *Id.* at 2569.

21. *See Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

22. *See Parloff*, *supra* note 4, at 108.

23. *See id.*

24. *Id.*

25. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

26. *Id.* at 761.

place of ideas where the consuming public can make informed economic decisions, some protection must be afforded to commercial speech.<sup>27</sup> The function of commercial speech is to propose a transaction; therefore, even though it does not get full First Amendment protection, commercial speech does deserve some protection.<sup>28</sup> As a result, the state may only regulate techniques that are false, deceptive, or misleading.<sup>29</sup>

The second test requires consideration of economic motivation, advertising format, and specific reference to a product before determining if the utterance is commercial speech.<sup>30</sup> In *Bolger v. Youngs Drug Products Corp.*, the U.S. Postal Service refused to deliver a contraceptives manufacturer's unsolicited advertisements.<sup>31</sup> The Supreme Court found that the Postal Service's actions were unconstitutional because they violated the manufacturer's First Amendment rights.<sup>32</sup> From a constitutional standpoint, the Court reasoned that "[t]he fact that protected speech may be offensive to some persons does not justify its suppression," and that anyone who was offended by the objectionable mailings could simply choose not to look at them or throw them away.<sup>33</sup> Moreover, addressing the specific content of the mailing, the Court stated that advertisements implicating "substantial individual and societal interests are particularly deserving of some First Amendment protection."<sup>34</sup>

The Court also applied what is listed below as the third test—the *Central Hudson test*<sup>35</sup>—and noted that "[t]he protection available for [a] particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."<sup>36</sup> The Court opined that economic motivation for mailing advertisements, combined with other characteristics, "provides strong support . . . that the informational pamphlets are properly characterized as commercial speech"<sup>37</sup> and deserving of the "protection accorded to commercial speech."<sup>38</sup>

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27. *Id.* at 765.

28. *See id.* at 761, 771 (observing that states can regulate the "time, place, and manner" of commercial speech, but the content is protected by the First Amendment).

29. *Id.* at 771-72.

30. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

31. *Id.* at 63.

32. *Id.* at 75.

33. *Id.* at 71-72.

34. *See id.* at 69 (noting that the advertisements were entitled to First Amendment protection partially because contraception "is protected from unwarranted state interference").

35. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

36. *Bolger*, 463 U.S. at 68 (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563).

37. *Id.* at 67.

38. *Id.* at 68.

The third test for commercial speech is multi-leveled and is related solely to a speaker's economic interests.<sup>39</sup> In *Central Hudson Gas & Electric v. Public Service Commission of New York*, the Public Service Commission attempted to control advertising that promoted the use of electricity.<sup>40</sup> The Court developed a four-part test that applies intermediate level scrutiny to commercial speech.<sup>41</sup>

The first step of the *Central Hudson* analysis asks "whether the expression is protected by the First Amendment."<sup>42</sup> In order for a statement to be protected by the First Amendment it "must concern [a] lawful activity and not be misleading."<sup>43</sup> The second step asks whether the government has a substantial interest in regulating the activity.<sup>44</sup> The third question asks if the regulation directly advances the governmental interest.<sup>45</sup> The fourth and last step in the analysis addresses whether the regulation is more excessive than necessary to serve the governmental interest expressed in the regulation.<sup>46</sup>

In *Kasky v. Nike, Inc.*, the Supreme Court of California primarily focused on the *Central Hudson* test.<sup>47</sup> The *Virginia State Board of Pharmacy* and *Bolger* tests were the first to be developed and are more general versions of the first and second prongs found in the *Central Hudson* test.<sup>48</sup> For purposes of this comment, the tests were separated to provide emphasis on their origin.

*B. California State Law Prohibits False and Misleading Advertising and Provides Consumers with the Ability to Enforce State Law*<sup>49</sup>

California is the only state that has extended its law against false and misleading advertising by businesses to allow private suits concerning a company's public statements.<sup>50</sup> The law was "designed to punish used-car salesmen who pitch clunkers as dreamboats, or manufacturers who bill foreign-made goods as 'made in the USA.'"<sup>51</sup> Businesses found violating the California law could suffer sanctions ranging from

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39. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

40. *Id.* at 558.

41. *See id.* at 566; *see also* *Kasky v. Nike, Inc.*, 45 P.3d 243, 251 (Cal. 2002) (noting that the Court "articulated an intermediate-scrutiny test" in *Central Hudson*).

42. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See Kasky v. Nike, Inc.*, 45 P.3d 243, 251-54 (Cal. 2002).

48. *See* Parloff, *supra* note 4, at 108 ("Originally the Court's definition of commercial speech was narrow: speech that does 'no more than propose a commercial transaction.' But with the onset of more subtle, varied, and sophisticated advertising techniques, that definition was broadened.")

49. Mauro, *supra* note 7, at A15.

50. David G. Savage, *Nike Takes Ad Liability Case to High Court*, L.A. TIMES, Oct. 15, 2002, at B6.

51. Mauro, *supra* note 7, at A15.

being enjoined from making similar statements in the future, to giving up profits made in connection with speech that is the subject of a lawsuit.<sup>52</sup>

C. *Nike's Commercial Speech Began on Television and Ended in the Courtroom*

In October 1996, CBS's *48 Hours* aired an exposé addressing "sweatshop" conditions in Nike's factories in Vietnam.<sup>53</sup> According to the broadcast, employees were "paid below minimum wage, work[ed] exhausting hours and sometimes face[d] physical abuse—all to create the hottest and most popular athletic shoe in the world."<sup>54</sup> Nike responded to the claims by issuing press releases and sending letters to newspaper editors, athletic department directors, and university presidents.<sup>55</sup>

Nike's campaign to defend its labor practices in foreign countries spurred Marc Kasky, a California activist,<sup>56</sup> to take advantage of the state's broad unfair competition law.<sup>57</sup> Kasky claimed that Nike's advertisements were not political speech aimed at counteracting negative press, but instead, were deceitful advertisements used to promote product sales.<sup>58</sup> As such, even if Nike's statements were unintentionally misleading, Kasky argued that the company should be punished because the California unfair competition statute does not require a malicious intent to deceive the public.<sup>59</sup>

The Court of Appeal of California affirmed the trial court's decision in favor of Nike.<sup>60</sup> The court held that Nike's communications were part of the public debate regarding Nike's business practices.<sup>61</sup> The

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52. *Business Eye on Nike Appeal*, N.Z. HERALD, Sept. 5, 2002, at C2.

53. *48 Hours*, *supra* note 1.

54. *Id.*

55. *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 857 (Cal. Ct. App. 2000), *rev'd*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *and cert. dismissed*, 123 S. Ct. 2554 (2003).

56. *See Parloff*, *supra* note 4, at 108. Previously, Kasky settled false advertising disputes with Perrier regarding its "spring water," and with Pillsbury Co. labeling vegetables harvested in Mexico as "San Francisco style." *Id.*

57. *See Kilpatrick*, *supra* note 8, at A9 (stating that the California law "makes it a criminal misdemeanor to disseminate any statement 'which is untrue or misleading' and . . . permits any citizen to sue for enforcement").

58. *Free Speech for Nike*, WASH. POST, Aug. 25, 2002, at B6.

59. *See Parloff*, *supra* note 4, at 104 (explaining that court sanctions could include a return of profits earned as a result of the misleading statements, the running of an additional campaign to correct the misunderstandings, and/or Kasky's attorneys' fees).

60. *Kasky*, 93 Cal. Rptr. 2d at 863 ("Our analysis of the press releases and letters as forming part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment compels the conclusion that the trial court properly sustained the defendants' demurrer without leave to amend.").

61. *Id.* at 860.

court opined that when issues are of public importance, the truth of the statements involved in the debate are irrelevant because the public will decide what to believe.<sup>62</sup> Citing the "famous words" of Judge Learned Hand, the court stated:

[T]he First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."<sup>63</sup>

The court of appeal also noted that, just because Nike's speech had an economic motive, it did not mean that it was no longer significant to the intended audience.<sup>64</sup> "The purpose of [Nike's] communications was not merely to sell shoes but to change minds. The protection of efforts to change minds is the very essence of free speech."<sup>65</sup>

The Supreme Court of California reversed the court of appeal, holding that Nike's advertising campaign was commercial speech and, therefore, not entitled to full First Amendment protection.<sup>66</sup> The court held that corporate public statements aimed at maintaining or increasing sales and profits, or in response to allegations regarding poor working conditions, are commercial speech and can be regulated to prevent consumer deception.<sup>67</sup> The Supreme Court of California concluded that Nike's response to the *48 Hours* exposé was commercial speech because the direct recipients of the information were previous and potential buyers of the company's products.<sup>68</sup> Nike's factual statements about its business operations, according to the court, were entitled to less constitutional protection because Nike was capable of verifying the accuracy of the statements.<sup>69</sup> Although the Supreme Court of California concluded that Nike's speech was "commercial speech for purposes of applying state laws barring false and misleading commercial messages,"<sup>70</sup> it did not decide whether that speech was indeed false or misleading, and it remanded the matter to the intermediate appellate court for further proceedings consistent with its opinion.<sup>71</sup>

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62. *See id.* at 861.

63. *Id.* (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

64. *See id.* at 862 ("[C]ommercial motivation does not transform noncommercial speech into commercial speech.") (quoting *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1186 (1986)).

65. *Free Speech for Nike*, *supra* note 58, at B6.

66. *Kasky v. Nike, Inc.*, 45 P.3d 243, 262-63 (Cal. 2002).

67. *Id.* at 262.

68. *Id.* at 258-59.

69. *See id.* at 259. The converse argument is that "[f]actual errors are part of any robust back-and-forth and do not generally nullify the constitutional protection afforded to speech." *Free Speech for Nike*, *supra* note 58, at B6.

70. *Kasky*, 45 P.3d at 247.

71. *Id.* at 262-63.



On October 16, 2002, Nike submitted its petition for certiorari to the United States Supreme Court.<sup>72</sup> Central to Nike's argument was that the public was entitled to information regarding issues of general concern, and the California ruling prevents dissemination of information that will lead to informed decision making.<sup>73</sup> Kasky filed his reply brief on November 15, 2002.<sup>74</sup> In January 2003, the Court decided to grant certiorari and heard oral arguments on April 23, 2003.<sup>75</sup>

Two primary issues controlled oral arguments: (1) did Nike's communications meet the requirements of commercial speech; and (2) does the California law under which Kasky filed his suit unconstitutionally turn private citizens into "private attorneys general" by allowing anyone to bring a false advertising claim without suffering any actual harm?<sup>76</sup>

Justice O'Connor was pushing for a clear definition of commercial speech and advertising, while Justice Scalia found the definition irrelevant as long as Nike's campaign was misleading.<sup>77</sup> These questions were equalized by Justice Breyer when he stated: "[i]t's both [commercial and non-commercial speech] if you try to sell a product and make a statement important to the public debate."<sup>78</sup> Justice Breyer continued to summarize the difficult issue before the Court by stating that "[t]he government 'has the right to regulate unfair, deceptive advertising' to protect consumers from being duped . . . . On the other hand, 'the [First] Amendment is designed to protect all participants in a public debate.'"<sup>79</sup>

Nike's argument began with Harvard University law professor Laurence Tribe stating that the letters written by Nike and sent to athletic directors, assuring them that the company did not engage in unfair labor practices, were not commercial speech because the letters were not addressed to specific customers.<sup>80</sup> U.S. Solicitor General Theodore B. Olson appeared on behalf of the United States, as amicus curiae, supporting Nike.<sup>81</sup> In strong support of previous arguments

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72. Petition for Writ of Certiorari, *Kasky v. Nike, Inc.*, 2002 WL 32101098 (No. 02-575).

73. *See id.* at \*9.

74. Respondent's Brief in Opposition, *Nike, Inc. v. Kasky*, 2002 WL 32101066 (No. 02-575).

75. *See Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003).

76. Bill Mears, *Supreme Court Looks at Free Speech Rights of Corporate America: Opponents Square Off Over Nike Case*, (June 27, 2003), at [www.cnn.com/2003/LAW/04/23/scotus.free.speech/index.html](http://www.cnn.com/2003/LAW/04/23/scotus.free.speech/index.html).

77. *Id.*

78. *Id.*

79. David G. Savage, *Justices Urged to Reject Suit Against Nike: The California Case Before the U.S. Supreme Court Will Test the Boundary Between Corporate Free Speech and False Advertising*, L.A. TIMES, Apr. 24, 2003, at A20.

80. Charles Lane, *Supreme Court Considers Nike's 'Free Speech'*, WASH. POST, Apr. 24, 2003, at E2.

81. *Id.*

made to the Court,<sup>82</sup> Olson urged the Court to avoid attempting to define the differences between commercial and non-commercial speech, and instead to declare the California unfair competition law unconstitutional.<sup>83</sup> Olson, and his arguments on behalf of the Bush Administration, focused on the realistic fear that the California law transforms “anyone with a whim and a grievance and a filing fee . . . [into] a government-licensed censor.”<sup>84</sup> Comments made by Justice Ginsburg echoed the concerns voiced by Olson.<sup>85</sup>

Ultimately, on June 26, 2003, in a per curiam decision, the Supreme Court decided to dismiss the grant of certiorari that it granted only six months earlier.<sup>86</sup> Concurring Justice Stevens justified the Court's decision to avoid taking a stand on the future of commercial speech by stating that: (1) the Supreme Court of California had not entered a final judgment; (2) neither Nike nor Marc Kasky had standing to bring the suit to federal court; and (3) any decision made by the Court would be premature.<sup>87</sup> Justice Stevens believed the Supreme Court of California decision to be interlocutory, and that some of Nike's disputed communications might be classified as commercial, while others might be non-commercial.<sup>88</sup> Without clear categorization, Justice Stevens reasoned that there is a possibility that additional federal questions could arise during further state proceedings, thereby making any decision by the Supreme Court of California not final.<sup>89</sup>

The dissent responded by pointing to the fact that the Supreme Court of California made its final decision, admitting that there was nothing left to decide on “*that*” issue of federal importance.<sup>90</sup> The dissent supported its disagreement with the majority's decision by citing previous examples wherein the Supreme Court made a final determination of similar holdings by the Supreme Court of California.<sup>91</sup> The dissent also explained that a reversal of the Supreme Court of California would be a final decision that would allow the court of appeal decision to stand as law in the state.<sup>92</sup> Additionally, the dissent predicted that when the case returned to California for further adjudi-

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82. See *infra* note 149 and accompanying text.

83. Lane, *supra* note 80, at E2.

84. *Id.*

85. Robert S. Greenberger, *Bush Administration Backs Nike in High Court Case*, WALL ST. J., Apr. 24, 2003, at A12.

86. Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2554 (2003) (per curiam) (dismissing writ of certiorari as improvidently granted).

87. *Id.* at 2555 (Stevens, J., concurring).

88. *Id.* at 2556-57 (Stevens, J., concurring).

89. *Id.* at 2556 (Stevens, J., concurring).

90. *Id.* at 2563 (Breyer, J. and O'Connor, J., dissenting).

91. *Id.* at 2563-64 (Breyer, J. and O'Connor, J., dissenting) (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975)).

92. *Id.* at 2564 (Breyer, J. and O'Connor, J., dissenting) (stating that “[a]n outright reversal of the California Supreme Court would reinstate the judg-

cation, the court would "simply seek to determine whether Nike's statements were false or misleading, and perhaps whether Nike was negligent in making those statements."<sup>93</sup>

The majority's second reason for dismissing the writ of certiorari was that neither party had federal standing.<sup>94</sup> The Court found that Kasky lacked standing because by acting as a private attorney general for the state of California, he had neither a federal claim nor had he suffered any actual injury.<sup>95</sup> The Court also found that Nike lacked standing because the Supreme Court of California's decision was not a "final judgment alerting tangible legal rights."<sup>96</sup> The dissent agreed that Kasky lacked standing because he did not suffer an "injury in fact."<sup>97</sup> The dissent disagreed with respect to Nike, however, because standing applies to the plaintiff who brought the action to federal court, not the plaintiff that sued in state court.<sup>98</sup> The dissent noted that, "Nike, the state-court defendant—not Kasky, the plaintiff—has brought the case to this Court [a]nd Nike has standing to complain here of Kasky's actions. . . . These actions threaten Nike with 'injury in fact.'"<sup>99</sup>

As its last justification for dismissal, the majority stated that a decision at this juncture would be premature.<sup>100</sup> The majority recognized the uniqueness and importance of the First Amendment issue presented in this case,<sup>101</sup> but warned that a detailed answer to such a significant constitutional issue should not be announced until after analysis of a complete factual record is established.<sup>102</sup> In rebuttal, the dissent cited *Cox Broadcasting System v. Cohn*, stating, "a refusal immediately to review the state-court decision might seriously erode federal policy."<sup>103</sup> The dissenting Justices also recognized the "chilling" effect on speech feared by so many individuals, and corporate and government entities in the wake of the California ruling.<sup>104</sup>

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ment of the California intermediate court, which affirmed dismissal of the complaint without leave to amend.").

93. *Id.* at 2563 (Breyer, J. and O'Connor, J., dissenting). After the Supreme Court dismissal, the parties settled out of court. *See infra* note 214 and accompanying text.

94. *Kasky*, 123 S. Ct. at 2557.

95. *Id.*

96. *Id.* at 2558.

97. *Id.* at 2560-61 (Breyer, J. and O'Connor, J., dissenting).

98. *Id.* (Breyer, J. and O'Connor, J., dissenting). The dissent stated that "[s]ince Nike, not Kasky, now seeks to bring this case to federal court, why should Kasky's standing problems make a critical difference?" *Id.*

99. *Id.* at 2560.

100. *Id.* at 2555, 2558.

101. *Id.* at 2558.

102. *Id.* at 2559.

103. *Id.* at 2562, 2568 (Breyer, J. and O'Connor, J., dissenting) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975)).

104. *See infra* Part III.A; *see also Kasky*, 123 S. Ct. at 2567-69.

In its conclusion, the majority admitted that a more elaborate factual record might, in fact, add to the public debate that Nike is trying to protect, but thought it wise not to make a decision addressing the current marketplace of ideas at this stage in the process.<sup>105</sup>

### III. ANALYSIS

#### A. *Corporate Expression of Commercial Speech Will Never be the Same*

The impact of the Supreme Court of California's decision will be felt far beyond the shores of the United States.<sup>106</sup> For example, European businesses are required to publish "social responsibility" reports.<sup>107</sup> Social responsibility reports encourage active communication between businesses and stakeholders by requiring complete disclosure of corporate information to the public.<sup>108</sup> These businesses will find it more difficult than American businesses to refrain from sanctioned public debate because they must comply with the governing corporate communication regulations.<sup>109</sup> It will be difficult to adhere to the regulations, not because of the specifics published in the reports, but because the self-proclaiming statements are at risk of being interpreted as misleading. For example, Nike lists in its fiscal year 2001 Corporate Responsibility Report eight different ways that it hopes to aid environmental protection.<sup>110</sup> It is possible, but hopefully unlikely, that this list could be viewed as an advertisement trying to gather support from environmentalists as product consumers. Under current California law, this type of interpretation would lead to litigation or sanctions. Interpreting corporate responsibility reports as product advertisements is exactly what companies that publish such reports, whether by choice or under mandate, are trying to avoid.

In an effort to illustrate the far-reaching impact of this case, on March 3, 2003, SRI Media and CoreRatings Limited, both British media groups, filed an amicus brief in support of Nike with the United States Supreme Court.<sup>111</sup> In contrast to the specific concerns about this case, Elliot Schrage, former senior vice president of global affairs

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105. *Kasky*, 123 S. Ct. at 2559.

106. *See Just Don't Say It: To What Extent Do Companies Have the Right to Free Speech?*, *ECONOMIST*, Dec. 14, 2002, at 59 [hereinafter *Just Don't Say It II*].

107. *Id.*

108. *SRI Media PLC and CoreRatings Limited File Legal Brief with the United States Supreme Court in Nike v. Kasky*, PRIMEZONE MEDIA NETWORK, Mar. 3, 2003, available at 2003 WL 4409829 [hereinafter *SRI Media PLC and CoreRatings Limited File Legal Brief*].

109. *Just Don't Say It II*, *supra* note 106, at 59.

110. *Nike, Inc., FY 2001 Corporate Responsibility Report*, at 6, at <http://www.nike.com/nikebiz/nikebiz.jhtml?page=29&item=fy01>.

111. *SRI Media PLC and CoreRatings Limited File Legal Brief*, *supra* note 108.

at Gap, argued, "too much attention is paid to individual statutes at the expense of the bigger global picture."<sup>112</sup> He stated:

One could argue that the focus on U.S. legal standards, and cases like *Kasky* involving the Alien Tort claims, is misplaced. If Nike says on its website "Our factories never violate local laws," and customers in Britain can sue Nike based on that website, then Nike is going to change its statements regardless of the outcome of the *Kasky* case.<sup>113</sup>

In 2001, France enacted a new regulation, the Nouvelles Régulations Economiques (NRE), which requires all nationally listed businesses to release their social and environmental information to the public.<sup>114</sup> Under the law developed in *Kasky*, if the report contains a false or misleading statement and the company does business in the State of California, the foreign company could be punished for violating California law. California law does not make exceptions for companies, foreign or domestic, that are required to produce social responsibility reports. As stated by Peter Clarke, Director of SRI Media:

We are gravely concerned about the potential 'chilling' effect of the California decision upon European business enterprises who may find that their [Corporate Social Responsibility] communications, even though issued from Europe to a European media audience and made in compliance with European law, might well land them in a California Court because of the extra-territorial reach of the decision.<sup>115</sup>

In light of the California ruling, all corporate communications to the public will be considered advertising and will be subject to strict judicial scrutiny.<sup>116</sup> As "advertising," the communications would be considered commercial speech and may be subjected to a lesser level of First Amendment protection.<sup>117</sup> Regardless of the issue the business is addressing, the California court categorized all business communications with the public that could result in product purchases as commercial advertising.<sup>118</sup> "In doing so, it authorized the suppression of those public statements and the seizure of the speaker's profits,

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112. Sarah Murray, *Legal Case for Doing the Right Thing*, FIN. TIMES, Mar. 31, 2003, at P17, available at 2003 WL 16398005.

113. *Id.* (quoting Elliot Schrage).

114. Julie Gorte, Letters to the Editor, *Make Social Disclosure Mandatory*, FIN. TIMES, Dec. 19, 2002, at P12, available at 2002 WL 104188281.

115. *SRI Media PLC and CoreRatings Limited File Legal Brief*, *supra* note 108.

116. See Benady, *supra* note 17, at 4.

117. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

118. *Nike Set to Ask Appeal from Supreme Court*, WOMENSWEAR, Aug. 2, 2002, available at 2002 WL 10886292.

whenever a jury deems the statements potentially incomplete or otherwise misleading."<sup>119</sup> The decision might stop corporate communications within California because any resident could bring a company "to its knees unless it persuades a jury that everything [the company] said was error-free and omitted nothing."<sup>120</sup>

Kasky will have a large geographic impact not because Nike is a well-known company, or even because of its home base.<sup>121</sup> The impact of the case is global because "[i]f your communication is received in California . . . and you're doing business there—which means every *Fortune 500* company—you have to immediately worry, right now, about any public statements you make about your company's practices."<sup>122</sup> Every company performing a business transaction within the State of California is bound by the laws of that state, and thereby governed by the outcome of *Kasky*.<sup>123</sup> This ruling even impacts businesses that post information on their website about labor and business practices, or their opinion on a public dispute.<sup>124</sup>

After *Kasky*, it will be necessary for lawyers to take a more active role in the review and issuance of press releases.<sup>125</sup> "Lawyers can no longer be passive editors . . . . Instead, they must challenge their public relations colleagues as to whether the potential marketing gains of a release justify the inevitable litigation risks."<sup>126</sup> Corporate lawyers will now have the additional responsibility of ensuring that their companies do not disseminate anything more than the most basic business practice information.<sup>127</sup> After this ruling, businesses in California will have to think carefully before using the media to respond to employment charges.<sup>128</sup> Instead, businesses will have no choice but to respond in court, and could suffer severe financial loss because the public will pass judgment before a court even hears the case.<sup>129</sup>

The *Kasky* decision could result in "the death of commercial public relations in California . . . effectively gag[ging] any business that

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119. *Id.*

120. Benady, *supra* note 17, at 4.

121. Parloff, *supra* note 4, at 104. In fact, Nike is headquartered in Oregon. *Id.*

122. *Id.*

123. *See id.*

124. *See id.* at 104, 106.

125. *See* David Graulich, *Press Release: Write in Haste . . . Repent*, NAT'L L.J., Oct. 14, 2002, at D12.

126. *Id.*

127. *See* Mike McKee, *Nike Hires Big Guns to Pursue PR Policy Statements Case*, LEGAL INTELLIGENCER, Aug. 5, 2002, at 4. "The net effect of this novel ruling . . . is to make it extremely dangerous for virtually any business or other organization to utter anything beyond the most innocuous and vaporous generalities about its practices, whether in this country or abroad." *Id.* (quoting Professor Laurence Tribe, Harvard Law School).

128. Steven C. Bahls & Jane Easter Bahls, *Shut Up Already!*, ENTREPRENEUR, Sept. 2002, at 88.

129. *See id.*

makes a public statement which is heard in California."<sup>130</sup> Kathy Cripps, President of the U.S. Council of Public Relations Firms, commented that the California law will limit how public relations departments do business, and even limit the amount of business they receive because companies will no longer wish to participate in public debate.<sup>131</sup>

As Judge Chin stated in his dissent in *Kasky*, "[h]andicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate."<sup>132</sup> Others have commented that this "law will stifle companies and other [organizations] from making public statements on any subject, even if they are only matters of opinion. . . ."<sup>133</sup> "California is the fifth-largest market in the world. Few corporations can afford to [jeopardize] their operations there."<sup>134</sup>

*B. Nike is Proving to Have Many More "Friends of the Court" Than Marc Kasky*

Within seven weeks of the Court granting certiorari, more than a dozen companies and private organizations filed briefs in support of Nike's position.<sup>135</sup> As previously mentioned, the U.K. media groups SRI Media and CoreRatings Limited filed an amicus brief in support of Nike and open corporate communication.<sup>136</sup> CBS, the network that originally aired the "sweatshop exposé,"<sup>137</sup> in addition to Microsoft, CNN, the New York Times, and the U.S. Chamber of Commerce, filed an amicus brief with the Court in support of Nike.<sup>138</sup>

Surprisingly, voices of concern came not only from corporate America, nor additional California residents eager to file their own lawsuits, but from Congress.<sup>139</sup> Ohio Representative Dennis Kucinich circulated a petition asking members to support Marc Kasky.<sup>140</sup> According to Representative Kucinich, if Nike were to win, the definitions of commercial and political speech would be negatively redefined.<sup>141</sup> All five of Oregon's representatives signed a letter urg-

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130. Benady, *supra* note 17, at 4 (quoting Professor Laurence Tribe, Harvard Law School).

131. *Id.*

132. *Kasky v. Nike, Inc.*, 45 P.3d 243, 263 (Cal. 2002) (Chin, J., dissenting).

133. Benady, *supra* note 17, at 4.

134. *Id.* (quoting Professor Laurence Tribe, Harvard Law School).

135. Boaz Herzog, *Debate Erupts Over Nike Free-Speech Case*, OREGONIAN, Mar. 26, 2003, at E2.

136. *See supra* note 111 and accompanying text.

137. *See Bahls, supra* note 128, at 88.

138. *Just Don't Say It II, supra* note 106, at 59.

139. *See Herzog, supra* note 135, at E2.

140. *Id.*

141. *See id.* "[T]he case 'could reshape constitutional definitions of commercial and political speech, giving corporations unprecedented freedom to make

ing Congress not to support Kucinich's petition, stating that his arguments "fail to tell the whole story."<sup>142</sup> The Oregon Representatives wrote that only with a "full, open and transparent debate about these issues . . . [will] consumers receive complete and accurate information."<sup>143</sup> The definitions of commercial and political speech as we know them today could change after *Kasky*, but this should be viewed as a positive advancement towards better communication between businesses and consumers.<sup>144</sup>

Other amicus briefs filed with the Court came both from corporations and public relations firms.<sup>145</sup> In a combined amicus brief filed by Exxon Mobil, Microsoft, Morgan Stanley, and Glaxo Smith Kline, the companies argued two points.<sup>146</sup> First, they argued that Nike's statements did not fit within the definition of commercial speech because they did not cause a "commercial harm" severe enough to warrant a lack of First Amendment protection.<sup>147</sup> Second, the companies argued that Nike had standing to appear before the Supreme Court.<sup>148</sup>

The companies contended that speech is determined to be a matter of public concern through analysis of its content, form, and context.<sup>149</sup> They argued that the context of Nike's speech, regarding issues involving labor practices in developing countries, addresses issues of great modern day concern.<sup>150</sup> Nike's communication took shape in the form of media stories, letters to editors, and letters to athletic di-

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*false and misleading statements in advertisements, newspaper editorials, and other venues.'*" *Id.*

142. *Id.*

143. See Herzog, *supra* note 135, at E2.

144. See *supra* Part III.A.

145. See, e.g., Brief of the Center for the Advancement of Capitalism as Amicus Curiae Supporting the Petitioners, Nike, Inc. v. Kasky, 537 U.S. 1099 (2003) (No. 02-575) (urging the Supreme Court to abolish the commercial speech doctrine); Brief of Amici Curiae the Association of National Advertising, Inc., the American Advertising Federation, and the American Association of Advertising Agencies in Support of Petitioners, Nike, Inc. v. Kasky, 537 U.S. 1099 (2003) (No. 02-575) (stating that Nike's speech was not commercial, the California court's decision would have a chilling effect on corporate communications, and Kasky did not have standing to sue because he suffered no harm); Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners, Nike, Inc. v. Kasky, 537 U.S. 1099 (2003) (No. 02-575) (arguing that the California ruling would suppress speech on important public policy issues and that commercial speech analysis should apply only to products or services offered for sale).

146. Brief of Exxon Mobil, Microsoft, Morgan Stanley, and Glaxo Smith Kline as Amici Curiae in Support of Petitioners at 3-5, Nike, Inc. v. Kasky, 537 U.S. 1099 (2003) (No. 02-575).

147. *Id.* at 5-21.

148. *Id.* at 21-27.

149. *Id.* at 5-6.

150. *Id.* at 6.



rectors, all of which are established venues for public debate.<sup>151</sup> They further argued that, “[l]ike any other speaker, a corporation may be expected to make only those statements of fact that it believes to be true. But whether a particular statement of fact is ‘true’ is often a matter of legitimate dispute [within a forum for public debate].”<sup>152</sup> The government cannot regulate speech under the shield of the First Amendment merely because it prefers one side of the debate to the other.<sup>153</sup> Furthermore, “[a]pplying the commercial speech regime to a corporation’s statements on matters of public concern would drastically curtail valuable speech on vital issues of the day.”<sup>154</sup>

Addressing the issue of standing, the companies argued that Nike could invoke the Supreme Court’s authority to set aside the California court’s ruling because the ruling denied Nike a federal right—the First Amendment right to speak on matters of public concern.<sup>155</sup> They further argued that Nike had standing before the Court based on its ability to show actual injury—the company had been forced to defend its past speech in an ongoing lawsuit, and it could show that its speech was chilled by the threat of more lawsuits.<sup>156</sup>

Another amicus brief, filed by forty leading newspapers, magazines, broadcasters, wire-services, and media-related professional and trade associations (the “News Agencies”), on behalf of Nike, focused on the potentially devastating impact of the California decision.<sup>157</sup> The brief stated that “[e]ven 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 personal health and safety—that would now be subject to California’s new strict liability dragnet.”<sup>158</sup>

First, the News Agencies argued that the Supreme Court of California unreasonably broadened the scope of commercial speech, allowing it to encompass speech directed solely to reporters or editors in their functional capacities as news gatherers.<sup>159</sup> The state court ruling provides for businesses to be “sued for consumer protection violations based on answers given to reporters’ questions, press releases,

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151. *Id.* at 7.

152. *Id.* at 9.

153. *Id.* at 13.

154. *Id.* at 21.

155. *Id.* at 21-22. “The California statutes cause Nike injury-in-fact by forcing the company to defend its past speech in an ongoing lawsuit that the First Amendment forbids, and by chilling the company’s future speech through the threat of more such forbidden lawsuits.” *Id.* at 23.

156. *Id.*

157. *See* Brief Amici Curiae of Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations in Support of Petitioners at 4, *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003) (No. 02-575).

158. *Id.* at 1.

159. *Id.* at 4.

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."<sup>160</sup> The News Agencies argued that if the California ruling were allowed to stand, it would impose strict-liability on businesses, while allowing their critics to comment freely.<sup>161</sup> They also pointed out that the more often a business responds with "no comment," the more likely a story will be shelved for being one-sided.<sup>162</sup> As such, fearing liability, very few business-related stories will be published for public knowledge.<sup>163</sup>

Second, the News Agencies contended that the commercial speech restriction on business communications takes away some of the responsibility enjoyed by the media.<sup>164</sup> Advertisements that propose commercial transactions are subject to less than First Amendment protection because the consumer has no means to verify the message.<sup>165</sup> When a business is reporting on internal practices, however, the media acts as a source for verification, because the public is provided with commentary on both sides of the issue, allowing each consumer to make an informed decision.<sup>166</sup>

Pfizer, Inc. submitted an amicus brief to the Court that cited the valuable contribution that corporate discussions add to the marketplace of ideas.<sup>167</sup> It also offered the Court alternatives, should it decide to uphold the California court.<sup>168</sup> First, Pfizer asked the Court to implement a "Right of Reply," allowing businesses to respond to public accusations regarding their products, services, or business operations.<sup>169</sup> The "Right of Reply" would be fully protected by the First Amendment, thereby protecting the speaker and adding to the debate for the listener.<sup>170</sup> Only criticism by a third party would trigger the "Right of Reply," rendering it unlikely that a commercial speaker would induce criticism in order to launch a false or misleading reply.<sup>171</sup>

Pfizer's second suggestion was that the Court clarify its *Central Hudson* analysis to make it clear that a determination that speech is false or

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160. *Id.* at 4-5.

161. *Id.* at 6.

162. *Id.* at 15.

163. *Id.*

164. *Id.* at 17.

165. *Id.* at 18.

166. *Id.* at 20. The media acts as a screening device for the public, deciding whether to publish potentially misleading information at all, and if it does, whether to publish that information with contrasting viewpoints. *See id.*

167. *See* Brief of Amicus Curiae Pfizer Inc. in Support of Petitioners at 1-3, *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003) (No. 02-575).

168. *Id.*

169. *Id.* at 21.

170. *Id.*

171. *Id.* at 23.

misleading is not a *per se* violation that results in immediate sanction without further analysis.<sup>172</sup> It stated:

[A]llegations that the speech at issue is false or misleading should not create an absolute exception to the need to examine the strength of the government's consumer protection interest in the specific circumstances, the means by which that interest is advanced, the potential for less restrictive measures to alleviate any legitimate concerns about deception, and the countervailing risk of suppressing truthful speech of "public value."<sup>173</sup>

Pfizer urged the Court to reverse the California decision, and set forth a rule stating that a determination or allegation that a business communication is false or misleading should be the beginning of the First Amendment analysis, not the end.<sup>174</sup>

*C. Amicus Briefs Supporting Marc Kasky Favor Far-Reaching Consumer Rights and a Strict Interpretation of Commercial Speech*

The amicus brief submitted by the National Association of Consumer Advocates (NACA) primarily focused on the validity of the California unfair competition law.<sup>175</sup> The NACA conceded that the California law is unusual, but argued that uniqueness in a state law does not make it unconstitutional.<sup>176</sup> The NACA contended that if the Solicitor General's argument is upheld, then numerous federal statutes would be declared unconstitutional as well.<sup>177</sup> The brief cited the Truth in Lending Act and the Fair Debt Collection Practices Act as examples of statutes that do not require the individual to prove actual harm.<sup>178</sup> The NACA, however, failed to disclose to the Court what standard of proof the individual must meet in order to prevail.<sup>179</sup> Using the Truth in Savings Act as an example of why actual injury is not required, the NACA stated that when there are limited resources for

172. *Id.* at 25.

173. *Id.*

174. *Id.* at 28.

175. See Brief for the National Association of Consumer Advocates as Amicus Curiae Supporting Respondent at 1-2, *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003) (No. 02-575).

176. *Id.* at 5.

177. *Id.* at 5-6. The Solicitor General's "Question Presented" is whether the First Amendment precludes a private party to challenge deceptive statements "if the private party himself did not rely on those statements . . . or suffer any actual injury by reason of such reliance." The Solicitor General proposes the question be answered in the negative. *Id.*

178. *Id.* at 6; see also Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A) (2001); Fair Debt Collection Practices Act, 15 U.S.C. § 1692(K)(a)(2)(A) (2001).

179. See Brief for the Nat'l Ass'n of Consumer Advocates, *supra* note 175, at 6 (citing numerous cases where the claimant prevailed without proving actual injury, but not examining the burden of proof on the parties or the elements needed to make a case on either side of the issue).

enforcement, it might be more cost-effective to leave enforcement to "individuals in the private sector who stand to profit from efficiently detecting and prosecuting . . . violations."<sup>180</sup> In many states, however, where the individual is empowered to act as an enforcer instead of a wronged consumer, the damage award is limited to an injunction, not monetary damages.<sup>181</sup>

Also in support of *Kasky*, Congressional Representatives submitted a brief supporting the distinction between commercial and non-commercial speech.<sup>182</sup> Their brief reminded the Court of its recognition in *Central Hudson* that there is a "commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."<sup>183</sup> The representatives countered Nike's "speech chilling" argument with the contention that "Nike's strong economic incentive to maintain and expand sales of its products, even in the face of anti-sweatshop criticism, will ensure that it will continue speaking out about its labor practices."<sup>184</sup> Although the representatives recognized that commercial speech is "less likely than other forms of speech to be inhibited by proper regulation,"<sup>185</sup> they failed to cite any circumstance in which a corporation had not halted or censored its public communications in fear of court sanctions. The representatives failed to illustrate with certainty that corporate communications will not change after *Kasky*. How can the entire public relations industry be wrong?

*D. Because the California Ruling was Upheld, Kasky's Original Suit was Remanded to State Court to Investigate the Truth of Nike's Statements*

The only issue decided by the Supreme Court of California in *Kasky* was whether Nike's advertising campaign constituted commercial speech.<sup>186</sup> The court did not decide the issue whether the statements were actually false or misleading.<sup>187</sup> Because the Supreme Court dismissed the writ of certiorari, thus upholding California's ruling that Nike's speech was commercial, the case was remanded to the state court where the actual text of the advertisements would have been

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180. *Id.* at 7; see also Truth in Savings Act, 12 U.S.C. §§ 4308-09 (2001).

181. See Brief for the Nat'l Ass'n of Consumer Advocates, *supra* note 175, at 7-8. "[M]any states authorize some form of remedy for deceptive advertising without all of the 'traditional' requirements described by the Solicitor General." *Id.*

182. See Amicus Curiae in Support of Respondent by Members of the United States Congress, Representatives Dennis J. Kucinich, Bernard Sanders, Corrine Brown, and Bob Filner at 1, Nike, Inc. v. Kasky, 537 U.S. 1099 (2003) (No. 02-575).

183. *Id.* at 3-4 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980)).

184. *Id.* at 5.

185. *Id.* at 5-6 (quoting Friedman v. Rogers, 440 U.S. 1, 10 (1979)).

186. *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

187. *Id.* at 262.

scrutinized for false or misleading information.<sup>188</sup> If the content had been found to be false, the court would have imposed sanctions that would have begun a new era in corporate communications.<sup>189</sup>

For a period spanning more than twenty years, the Supreme Court Justices have struggled to define commercial speech and sent conflicting signals to the public, illustrating the need for the Court to clearly outline the level of protection that should be afforded commercial speech.<sup>190</sup> Over the years, the Court has awarded increasing protection to commercial speech.<sup>191</sup> Justices Scalia and Thomas previously voiced their concern over the *Central Hudson* test and the level of Constitutional protection afforded commercial speech.<sup>192</sup> Justice Thomas argued, "it is time to erase the distinction between commercial and political speech altogether and give full First Amendment protection to both."<sup>193</sup> Others have commented that "[i]f there's any inner core of the First Amendment, it would be that the Amendment prohibits the government from weighing in in a fashion that favors one viewpoint over another."<sup>194</sup> If commercial speech is merged with political speech so that it has complete protection, then businesses will be able to continue communicating freely with the public because not every statement placed into the marketplace of ideas will be interpreted as an advertisement.<sup>195</sup>

By dismissing the writ of certiorari, the Court failed to answer questions that "directly concern the freedom of Americans to speak about public matters in public debate," and delay in answering such questions "may inhibit the exercise of constitutionally protected rights of free speech without making the commercial speech issue significantly easier to decide later on."<sup>196</sup> Without more specific answers as to what

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188. *Id.* at 262-63.

189. *See id.* at 250; *see also* CAL. BUS. & PROF. CODE §§ 17500, 17535 (West 1997).

190. *See* Gina Holland, *High Court to Weigh Nike Free-Speech Case*, BRADENTON HERALD, Jan. 11, 2003, at 1. *See also* Parloff, *supra* note 4, at 110. "The Supreme Court of the United States has not addressed . . . the boundary between commercial speech and other forms of speech in many, many years, and the existing precedents are extremely vague." *Id.* (quoting Professor Robert Post, Univ. of Cal. at Berkeley, School of Law).

191. *See* Mauro, *supra* note 7; *see also* David G. Savage, *Justices to Hear Nike Free-Speech Claim*, L.A. TIMES, Jan. 11, 2003, at C1 (stating that "Justice Clarence Thomas, a conservative, and Justice John Paul Stevens, a liberal, have called for greater free-speech protection of advertising.>").

192. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part) ("I share Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it.>").

193. Mauro, *supra* note 7, at A15.

194. Parloff, *supra* note 4, at 110 (quoting Walter Dellinger, Nike attorney and former acting Solicitor General).

195. *See id.*

196. *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2560 (2003) (Breyer, J., dissenting).

is defined as commercial speech, the California ruling "may well 'chill' the exercise of free speech rights."<sup>197</sup>

Another alternative for corporate communication has surfaced and been endorsed by Nike CEO, Philip Knight.<sup>198</sup> It requires the dissemination of "audited corporate and social responsibility statements," including information about work conditions and environmental issues.<sup>199</sup> Any false or misleading statements in these reports would be punishable, but it is unclear who would enforce it, what the punishment would be, or how these audited statements would differ from those that originally led to the suit against Nike.<sup>200</sup> It is important to note that after the California decision in *Kasky*, Nike decided not to publicly release its "corporate social responsibility" report.<sup>201</sup>

*E. Corporate America and the Public Relations Industry React With Surprise and Concern to the Court's Decision*

"[T]he Supreme Court—out of intellectual laziness or reckless indifference—has unwisely given trial lawyers the power to curb and to tax free speech."<sup>202</sup> Companies are concerned about their rights in the wake of the *Nike* ruling, including a freedom of speech double standard, where individuals can say anything and corporations must stay silent or risk a lawsuit.<sup>203</sup> The large economic risk that businesses face when forced to choose between silence and the courtroom, amounts to a tax on corporate free speech.<sup>204</sup> This "tax" will have a chilling effect on open debate.<sup>205</sup>

Every advertiser's public relations campaign will be affected by this case.<sup>206</sup> Corporations and businesses will undergo a self-inflicted gag order and drop out of important public debates.<sup>207</sup> The gag order might extend well beyond the United States, because British companies with U.S. affiliations warn that their websites must be monitored; even a British website could be subjected to California long-arm jurisdiction.<sup>208</sup>

The chilling effect that *Kasky* will have on free speech, unless the issue reaches the Supreme Court again in a few years, will dramatically

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197. *Id.* at 2568 (Breyer, J., dissenting).

198. See Parloff, *supra* note 4, at 110.

199. *Id.*

200. *Id.*

201. See *Just Don't Say It II*, *supra* note 106.

202. Robert J. Samuelson, *The Tax on Free Speech*, NEWSWEEK, July 14, 2003, at 41.

203. See *id.* This author suggests that failure to immediately strike down the California ruling could lead to censorship of public comments. *Id.*

204. *Id.*

205. *Id.*

206. See *Nike Faces Legal Challenge to its Freedom of Speech*, CAMPAIGN, July 11, 2003, at 12.

207. Sandy Brown, *For Corporate Speech, the Other Shoe is Yet to Drop: Issue in Limbo After Supreme Court Dismisses Nike Case*, ADWEEK, June 30, 2003, at 7.

208. See *Nike Faces Legal Challenge to its Freedom of Speech*, *supra* note 206, at 12.

impact public debate. If, under California law, or subsequent federal law, public relations materials were deemed commercial speech, the public would hear "distorted views and the press would only hear one side of the argument regarding difficult and important issues."<sup>209</sup> In short, the marketplace of ideas as we know it today would cease to exist.

On June 27, 2003, the day after the Supreme Court dismissed the writ of certiorari, the economic market felt the sting of stifling commercial speech when Nike's stock fell six percent.<sup>210</sup> Since the Court's decision, Nike has investigated the possibility of cutting back its public relations activities.<sup>211</sup> The company, however, is not allowing the lack of a final ruling from the Supreme Court change everything it does; Nike will continue to endorse athletes in exchange for their communication of a message to the public.<sup>212</sup> How Nike will communicate that message, to what audience, and whether it will lead Nike to court is a question that remains unanswered.

#### IV. CONCLUSION

CBS had no idea how its routine television exposé on Nike's business practices would impact the future of worldwide communication. By dismissing the writ of certiorari, the Supreme Court ran the risk of significantly hindering public debate and corporate communications in general. In deciding to hear the case, many originally hoped that the tests for commercial speech would either be redefined, or the distinction would be erased entirely.<sup>213</sup> There is still a distinct possibility that global commercial speech will change; but we will have to wait to find out its ultimate fate. For now, individuals like Marc Kasky are free to say anything they want about a corporation, but no one will know the accuracy of those comments. Further delaying a detailed analysis of commercial speech, but in an attempt to improve the workplace environment, Nike and Kasky settled their dispute in September 2003.<sup>214</sup> It was reported that both parties agreed that a settlement would be more beneficial than future litigation to factory workers

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209. Douglas Quenqua, *U.S. Supreme Court Opts Not to Rule on Nike PR Case*, BRAND REPUBLIC, June 28, 2003, at 1.

210. Chris Ayres, *Nike Faces Trial for Lying*, TIMES OF LONDON, June 28, 2003, at 20.

211. *Nike Goes for Retro Cred in \$305m Deal to Buy Converse*, BRAND REPUBLIC, July 11, 2003, at 1.

212. See Matthew Garrahan, *How to Keep Doing it All Over the World*, FIN. TIMES, Aug. 5, 2003, at 10.

213. See *supra* Part III.A.

214. Press Release, Nike, Inc. and Kasky Announce Settlement of Kasky v. Nike First Amendment Case (Sept. 12, 2003), at <http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2003&month=09&letter=f> (last visited Jan. 23, 2004).

around the globe.<sup>215</sup> As stated by the plaintiff's attorney, Patrick Coughlin:

Ultimately, both Nike and Mr. Kasky agreed that this resolution benefits two key groups: factory workers and consumers worldwide. Given the [Fair Labor Association's] collaboration across a wide spectrum of companies, universities and [non-governmental organizations], it is an excellent vehicle for Nike to further develop its corporate responsibility efforts and allow interested consumers to measure the performance of Nike and other companies through public reporting. Mr. Kasky is satisfied that this settlement reflects Nike's commitment to positive change where factory workers are concerned.<sup>216</sup>

Settlement might have been the best outcome for the parties named in the suit, but there remains a high level of concern over the impact of the California ruling.<sup>217</sup> The primary concern coming from corporations, media and non-government organizations alike, is that they cannot include company publicity within their annual social responsibility reports.<sup>218</sup> A general fear of publicity within businesses that communicate within California will impact future communications, whether there is a court case in the near future or not. Nike is continuing its fight for "corporate transparency,"<sup>219</sup> but it will take another attack on corporate communications to bring commercial speech back into the United States Supreme Court arena.

*Alyssa L. Paladino*

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215. *Id.* Nike has agreed to make additional workplace-related program investments (augmenting the company's existing expenditures on monitoring, etc.) totaling \$1.5 million. Nike's contribution will go to the Washington, D.C. based Fair Labor Association (FLA) for program operations and worker development programs focused on education and economic opportunity. *Id.*

216. *Id.*

217. *See id.*

218. *Id.*

219. *Id.*