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Corporate Speech Under Fire: Has Nike Finally Done It?

*Victoria Dizik Teremenko**

I. INTRODUCTION

Picture the scenario of an in-house attorney for a large corporation, “Big Shoe, Inc.,” that produces athletic gear and sponsors athletic events. This corporation is worldwide and its products are manufactured in the United States, Indonesia, and Mexico. Big Shoe provides athletic shoes for athletes like Michael Jordan and University of Michigan football players. The corporation’s CEO and a few directors will be present at an upcoming press conference in Los Angeles and they come to the attorney’s office for a quick meeting before leaving for the airport. Big Shoe has made headlines lately due to rumors of unsafe, “sweatshop” factory conditions in Indonesia and Mexico. Although the client has since denied the allegations, at the upcoming press conference it may face more questions, more criticism. Big Shoe has come to the attorney for advice about what issues it should discuss and how it should answer questions regarding labor practices. The directors of Big Shoe are shocked by the allegations and are sure they are false. One of the directors has even prepared a public statement he wants to make to the world letting everyone know that Big Shoe does not condone “sweatshop” conditions of labor and instead, the corporation promotes above minimum wage salaries, 40 hour working weeks and has an age limit of 18 for applicants.

The attorney’s decision is a difficult one: either advise the corporation to tell its side of the story and defend itself against rumors or advise pure silence. Big Shoe’s safest option is silence in order to avoid any lawsuits. Although it may seem ridiculous to any attorney and to the corporate officers, the threat of liability for false advertising, if the client accidentally makes a false or misleading statement, is too great. Big Shoe’s CEO and its directors should put away their public statement and sit in silence while being questioned and criticized by the media and Big Shoe consumers. Unless questioned about

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a new line of shoes and their color, Big Shoe is better off remaining quiet than acquiring liability for a slight mistake or a misstatement.

The general feeling in our society today is mistrust for corporations, which began with the Enron controversy and has extended to telecommunications corporations and other industry leaders. The public has become more skeptical not only about the validity of business practices of corporations as a whole, but also those of the officers and directors. Courts have taken actions based on this mistrust, such as ordering auditing of these corporations through the use of external accounting firms. Recently the courts have even gone as far as curtailing corporate speech.

This article will discuss the current status of corporate speech, its diminishing protection and implications of societal mistrust on the future of large corporations. Part II will define and discuss commercial and noncommercial corporate speech in light of past Supreme Court cases and a recent California Supreme Court decision, and will analyze commercial and noncommercial speech. Part III will argue that corporate speech is more like noncommercial speech than commercial speech. Based on that analysis, Part III will also provide guidelines for practitioners of how to avoid liability if corporate speech receives the lesser protection given to commercial speech. Part IV will present the negative impact of allowing corporate speech lesser protection than noncommercial speech.

II. BACKGROUND

The constitutional status of corporate speech hangs in limbo as a result of the recent Supreme Court decision in *Nike, Inc. v. Kasky*.¹ In *Nike*, the Supreme Court granted certiorari to review a California Supreme Court decision, which held that public statements made by California corporations, whether regarding products and services, or issues of public concern, such as labor practices, are all considered commercial speech and thus receive a lower level of First Amendment protection.² Based on *Kasky v. Nike, Inc.*, corporate speech viewed as a whole, regardless of its content, is entitled to the protection granted to advertisements.³ The Court granted certiorari to decide two questions:

[first,] 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

1. 123 S. Ct. 2554 (2003).

2. *Id.* at 2555 (citing *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002)).

3. 45 P.3d 243 (Cal. 2002).

consumers' opinions about the business as good corporate citizen and thereby affect their purchasing decisions"; second,] even 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, permits subjecting speakers to the decision reached by the court below."⁴

The Court held that "(1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257;⁵ (2) neither party had standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force in this case."⁶ Therefore, the California Supreme Court corporate speech decision stands unaffected.

The following sections will define corporate speech, noncommercial speech and commercial speech, and will discuss the relevant cases in an attempt to decipher this complex area of constitutional law.

A. Corporate Speech

Corporate speech, first recognized as its own entity in 1978,⁷ has since grown and developed. Three cases, *First National Bank of Boston v. Bellotti*,⁸ *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,⁹ and *Kasky v. Nike*¹⁰ define and explain how courts have historically treated this form of expression.

1. *First National Bank of Boston v. Bellotti*¹¹

Bellotti was the first case where the Supreme Court considered a state statute that directly targeted and restricted corporate speech.¹² The Supreme Court struck down a state law that prohibited corporations from making expenditures to influence elections other than those "materially affecting any of the property, business, or assets of the corporation."¹³ The Supreme Court rejected the idea that speech

4. *Nike*, 123 S. Ct. at 2555.

5. *Id.* The federal statute limits the Supreme Court's jurisdiction to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a) (2003).

6. *Nike*, 123 S. Ct. at 2555.

7. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

8. *Id.*

9. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1 (1986).

10. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2003).

11. *Bellotti*, 435 U.S. 765.

12. *Id.* at 767. Justice Powell, who delivered the opinion of the Court, noted that, "[t]he issue presented in this context is one of first impression in this Court." *Id.*

13. *Id.* at 795 (citing MASS. GEN. LAWS ANN., ch. 55, § 8 (1977)).

otherwise protected by the First Amendment lost that protection because of the speaker's corporate identity.¹⁴

In *Bellotti*, national banking associations and business corporations brought action to challenge the constitutionality of a Massachusetts criminal statute prohibiting them from making contributions or expenditures to influence the outcome of a vote on any question submitted to voters other than questions materially affecting the business or assets of the corporation.¹⁵ The Supreme Court considered whether the statute abridged the expression that the First Amendment was meant to protect.¹⁶

The Supreme Court held that the statute violated the appellant's speech was "at the heart of First Amendment protection."¹⁷ The Court reasoned that the freedom of speech and press embraces the liberty to discuss publicly and truthfully the matters of public concern without restraint or fear of punishment.¹⁸ The Court held that the

14. *Id.* at 784. The Supreme Court held:

We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within that protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.

Id.

15. *Id.* at 765. The statute in question, referred to by the Court as § 8, provided as follows: no corporation carrying on the business of a bank, trust, surety indemnity, safe deposit, insurance . . . no business corporation incorporated under the laws of or doing business in the commonwealth . . . shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding . . . or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of the individuals shall be deemed materially to affect the property, business or assets of the corporation.

Id. at 767 (citing MASS. GEN. LAWS ANN., ch. 55, § 8 (1977)).

16. *Id.* at 771 (citing *First Nat'l Bank of Boston v. Bellotti*, 359 N.E.2d 1262, 1269 (Mass. 1977)). The Supreme Court first reviewed the issue of:

whether business corporations, such as the appellants, have First Amendment rights coexisting with those of natural persons The court found its answer in the contours of a corporation's constitutional right, as a 'person' under the Fourteenth Amendment, not to be deprived of property without due process of law As an incident of such protection, corporations also possess certain rights of speech and expression under the First Amendment.

Bellotti, 435 U.S. at 771. (quoting *Bellotti*, 359 N.E.2d at 1269-70).

Thus, the California Supreme Court held, "only when a general political issue materially affects a corporation's business property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public." *Id.* at 785 (quoting *Bellotti*, 359 N.E.2d at 1270).

17. *Belotti*, 435 U.S. at 776.

18. *Id.* Justice Powell wrote, "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable

referendum issue that the corporations wished to address fell within that description because it would have affected the economy of the state.¹⁹ Justice Powell added, “[i]t is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”²⁰

The Court next analogized the appellant’s argument to “press cases”, such as *Mills v. Alabama*²¹ and *Saxbe v. Washington Post Company*,²² which emphasized “the special and constitutionally recognized role of [the press] to [inform] and educat[e] the public, offering criticism and proving a forum for discussion and debate.”²³ The Court held that similar to the press cases, the Court’s decisions involving corporations are based not only on the role of the First Amendment in fostering individual self-expression, but also in affording public access to discussion, debate, and the dissemination of ideas and information.²⁴

In analyzing governmental interests in creating the Massachusetts statute in question, the Supreme Court employed strict scrutiny analysis.²⁵ The Court held that the state may prevail only if it can show a “subordinating interest which is compelling.”²⁶ Even if the state can show such an interest, it must employ means that are narrowly tailored to “avoid unnecessary abridgment.”²⁷ The first argument that the State advanced was the state’s interest in sustaining an active role of the individual citizen in the electoral process and preventing the decline of the citizen’s confidence in the government.²⁸ The Court

the members of society to cope with the exigencies of their period.” *Id.* at 776 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940)).

19. *Id.* The appellants wished to address the issue of the enactment of a graduated personal income tax that they believed would have adverse effects of the economy of the State. *Id.* The Court held that the importance of this referendum to the people of the state and its government is not disputed, although its merits are subject to sharp disagreement. *Id.*

20. *Id.* at 777 (adding that, “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual”). *Id.*

21. *Mills v. Alabama*, 384 U.S. 214 (1966).

22. *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974).

23. *Bellotti*, 435 U.S. at 781 (citing *Mills*, 384 U.S. at 219; *Saxbe*, 417 U.S. at 863-864).

24. *Id.* at 782 (citing *Red Lion Broad. v. FCC*, 395 U.S. 367, 389-390 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967)). Justice Powell added that even those communications that based solely on the individual’s right to express himself may contribute to educating the public.

25. *Id.* at 786. The Court stated that the constitutionality of § 8 prohibition of corporate speech “turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction on the freedom of speech.” *Id.*

26. *Id.* (quoting *Bates v. City of Little Rock*, 361 U.S. 516 (1960)).

27. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

28. *Id.* at 787.

held that no matter how weighty these interests may seem in the context of the elections, they are not served by the limitations on corporations enacted in the Massachusetts statute.²⁹ The Court further stated that there had been “no showing that the relative voice of corporations has been overwhelming, or even significant, in influencing [state elections] or that there has been any threat to the confidences of the citizen[s] in [the] government.”³⁰ The Court added that the mere fact that advocacy may influence the public is not a reason to suppress it.³¹

The State’s second argument in sustaining the statute was to protect the interests and rights of shareholders whose views differ from those expressed by management on behalf of the corporation.³² The Court responded that the statute is both underinclusive and overinclusive in dealing with this concern.³³ The statute was held to be underinclusive because while it prohibited expenditures with respect to a referendum, it permitted activity with respect to defeating or passing legislation.³⁴ The statute did not prohibit corporations from expressing their views though expenditure of corporate funds on a public issue until it became the subject of a referendum.³⁵ Also, the statute was underinclusive because it excluded those organizations or entities that may hold an interest or membership and resources comparable to corporations, such as labor unions.³⁶

29. *Bellotti* 435 U.S. at 787-8 n.26. The Court held:

In addition to prohibiting corporate contributions and expenditures for the purpose of influencing the vote on a ballot question submitted to the voters, § 8 also proscribed corporate contributions or expenditures “for the purpose of aiding, promoting or preventing the nomination of election of any person to public office, or aiding, promoting, or antagonizing the interests of any political party.”

Id. (quoting MASS. GEN. LAWS ANN., ch. 55, § 8 (1977)). Although this statute is like many other state and federal laws regulating corporate participation in partisan candidate elections due to concerns of corruption of elected representatives, the issue in this case is different because it concerns corporations’ rights in a different context of participation, the right to speak on issues of public interest. *Id.* at 788.

30. *Id.* at 790 n.28. The record from the 1972 referendum election shows that three of the appellants each contributed \$3,000 to the “opposition” committee.

31. *Id.* at 790. Powell added that the concept that the government may restrict speech of some elements of our society in order to enhance the voice of others is inconsistent with the First Amendment guarantees. *Id.* at 791 (citing *Buckley*, 424 U.S. at 48-9).

32. *Id.* at 787. The state argued that the statute served this interest by “preventing the use of corporate resources in furtherance of views with which some shareholders may disagree.” *Id.* at 792-793.

33. *Id.* at 793.

34. *Id.*

35. *Bellotti*, 435 U.S. at 793. The Court claimed that either way corporate funds are spent on a public issue, during a referendum or not, the displeasure of disapproving shareholders is not likely to be different.

36. *Id.* The Court specifically pointed at exclusion under § 8 of such entities as business trusts, labor unions, and real estate investment trusts.

The statute was held to be overinclusive because it prohibited a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously agreed to make such expenditures.³⁷ The Court stated, that even assuming protection of shareholders is a compelling state interest, it did not find a substantially relevant correlation between the governmental interest asserted and the state's action to prohibit the appellants from speaking.³⁸ Therefore, the Supreme Court held that because the Massachusetts statute was unjustified by a compelling state interest, it must be invalidated.³⁹

2. *Pacific Gas & Electric Co. v. Public Utilities Commission*⁴⁰

In *Pacific Gas*, the Supreme Court addressed the issue of whether the California Public Utilities Commission may require a privately owned utility company, Pacific Gas & Electric Company ("Pacific Gas"), to include in its billing envelopes speech of a third party with which the private company disagreed.⁴¹

Before the litigation arose, Pacific Gas had been distributing a newsletter with its monthly billing envelope for 62 years.⁴² The newsletter, entitled *Progress*, reached over three million customers.⁴³ It included political editorials, featured stories on matters of public interest, tips on energy conservation, and regular information about utility services and bills.⁴⁴

In 1980, Turn Utility Rate Normalization ("Turn"), an intervenor in a ratemaking proceeding before California's Public Utility Commission, urged the Commission to prevent Pacific Gas from using the billing envelopes to distribute political editorials because Pacific Gas customers should not "bear the expense of appellant's own political speech."⁴⁵ The Commission decided that the envelope space that Pa-

37. *Id.* at 794. The Court held that acting through their power to elect the board of directors or voting to enact protective provisions in the corporation's charter, shareholders are presumed competent to protect their own interest. In addition, minority shareholders generally have access to judicial remedies of a derivative suit to challenge corporate disbursement. *Id.*

38. *Id.* at 795 (citing *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)).

39. *Id.*

40. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1 (1986).

41. *Id.* at 4.

42. *Id.* at 5.

43. *Id.*

44. *Id.* For example, the December 1984 issue of *Progress* included a story on Pacific Gas's payment options, recipes for holiday dishes and a feature on the company's efforts to help bald eagles in the Pit River area of California. The content of *Progress* also contained discussions regarding merits of recently passed and pending legislation in Congress. *Id.*

45. *Id.*

cific Gas used to distribute *Progress* was property of the taxpayers.⁴⁶ The Commission then permitted Turn to use that extra space four times a year in the billing envelope to raise funds and communicate with customers, and rejected Pacific Gas's objections that it owned the extra space used by Turn.⁴⁷

The Supreme Court reversed the Commission's findings based on the theory of corporate speech, holding that a corporation has a First Amendment right not to help spread a message with which it disagrees.⁴⁸ The majority reasoned that the constitutional guarantee of free speech "serves significant societal interests" wholly apart from the speaker's interest in self-expression.⁴⁹ By protecting those who wish to enter the marketplace of ideas free from government attack, the First Amendment protects the public interest in receiving information.⁵⁰ The Court further held that the identity of the speaker is not decisive in determining whether speech is protected.⁵¹ Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster.⁵²

The Court held that *Progress* was entitled to full protection of the First Amendment because its speech extended beyond speech that

46. *Pacific Gas*, 475 U.S. at 5. The Commission reasoned that envelope, postage costs, and any other costs of mailing bills are a necessary part of providing utility services to the customer. *Id.* However, due to the nature of postal rates, extra space existed in these billing envelopes. *Id.* This extra space was generated by taxpayer funds and was not intended or necessary item of rate base. *Id.* If the space was unused, it was reasoned to unjustly enrich Pacific Gas and deprive the ratepayers of the value of that space. Therefore, the extra space in the envelope was deemed ratepayer property (citing App. To Juris. Statement A-3). *Id.* at 6.

47. *Id.* at 6. The Commission reasoned that, "[o]ur goal. . . is to change the present system to one that uses the space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayer will benefit more from exposure to a variety of views than they will from only that of PG & E." *Id.* (citing App. To Juris. Statement A-66, A 1-17).

48. *Id.* at 7.

49. *Id.* at 8 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

50. *Id.* (citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

51. *Id.* (citing *Bellotti*, 435 U.S. at 783).

52. *Id.* (citing *Bellotti*, 435 U.S. at 783). Justice Powell, joined by the Chief Justice, Justice Brennan, and Justice O'Connor, added that:

Thus, in *Bellotti*, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum. Similarly, in *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 544 (1980), we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such a prohibitions limited the range of information and ideas to which the public is exposed (citing *Bellotti*, 435 U.S. 765; *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 533-535 (1980)).

Id.

proposes a business transaction⁵³ and included discussions of “matters of public concern” that the First Amendment protects and encourages.⁵⁴

In considering the issue of compelling Pacific Gas to include Turn’s materials, the Court held that compelled access “both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.”⁵⁵ The Court added that corporations, as individuals, have a right to speak, and within that right, a choice not to speak.⁵⁶ Speech does not lose its protection because of the corporate identity of the speaker.⁵⁷

Lastly, the Court rejected Turn’s argument that the Commission’s order was a permissible time, place and manner regulation since “it serve[d] a significant governmental interest and [left] ample alternative channels for communication.”⁵⁸ For a time, place, or manner regulation to be valid it must be neutral as to the content of the speech to be regulated.⁵⁹ The Court concluded that the Commission’s order burdened Pacific Gas’s First Amendment rights because the order forced it to associate with views of other speakers, and because it selected those speakers on the basis of their viewpoints.⁶⁰ Thus, the order was unconstitutional because it was not a narrowly tailored means of furthering a compelling state interest and was not a valid time, place, or manner regulation.⁶¹

53. *Pacific Gas*, 475 U.S. at 5. Note that this statement by the Court serves the purpose of fulfilling the definition of commercial speech. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

54. *Id.* at 9 (citing *Thornhill*, 310 U.S. at 101).

55. *Id.* The Court added that these impermissible effects are not remedied by the Commission’s definition of the relevant taxpayer property rights. *Id.*

56. *Id.* at 16 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). *Tornillo* involved a challenge to a Florida right of reply statute, which provided that if a newspaper attacked a candidate’s character, the candidate could demand that the newspaper print a reply of equal prominence and space. *Tornillo*, 418 U.S. at 244-45. The Court held that the right of reply statute violated the newspaper’s right to speak in two ways: one, that it triggered an obligation to permit other speakers with whom the newspaper disagreed to use its facilities to spread their own message; and two, the statute deterred newspapers from speaking out because it forced the newspapers to disseminate opponents views, and thus penalized their own expression.). *Id.*

57. *Pacific Gas*, 475 U.S. at 16 (citing *Bellotti*, 435 U.S. at 783).

58. *Id.* at 20 (citing *Consolidated Edison*, 447 U.S. at 535).

59. *Id.* at 20 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Court held that the State’s asserted interest in exposing Pacific Gas’s customers to a variety of view points is not and does not assert to be a content neutral interest. *Id.*

60. *Id.*

61. *Id.* The Court made the decision under strict scrutiny that for a state statute to be constitutional, the government must assert a compelling state interest and the statute must be narrowly tailored to further that compelling interest. A regulation of speech may be constitutional if it is content neutral and merely restrains the time, place, and manner of the action and there are alternative means of communication for the speaker.

3. *Nike Inc. v. Kasky*⁶²

Nike, Inc. v. Kasky, the most recent corporate speech case in front of the Supreme Court, left the doctrine in limbo based on the California Supreme Court's decision.⁶³ Nike, Inc., a marketer of athletic shoes and sports apparel, has grown into a large multinational enterprise through a favorable brand image, a distinctive logo, sponsorship agreements with celebrity athletes, and contracts for the manufacture of its products in countries with low labor costs.⁶⁴ The majority of Nike products are manufactured in China, Vietnam, Thailand, and Indonesia; components involving more complex technology are manufactured in South Korea or Taiwan.⁶⁵

Nike has tried to promote the appearance and reality of good working conditions in Asian factories producing its products.⁶⁶ To assure compliance, Nike employs accounting firms that conduct spot checks of labor and environmental conditions.⁶⁷ One such investigation was conducted by Andrew Young, a former U.S. ambassador to the United Nations that allegedly found no evidence of illegal or unsafe working conditions at foreign Nike factories.⁶⁸

Nonetheless, Nike was heavily criticized between 1996 and 1997 when a series of reports surfaced regarding the working conditions in its factories and were in sharp contrast with the report published by Young.⁶⁹ For instance, reports published by the Hong Kong Christian Industrial Committee alleged that in three Chinese factories there were violations of minimum wage laws, employment of children under

62. *Nike*, 123 S. Ct. 2554 (2003).

63. *Id.*

64. *Kasky v. Nike*, 93 Cal. Rptr. 2d 854, 855-56 (Cal. Ct. App. 2000), *rev'd*, 45 P.3d 243 (Cal. 2002). In 1997, Nike reported annual revenues of \$9.2 billion dollars, with annual expenditures for advertising and marketing for almost \$1 billion dollars. *Kasky*, 45 P.3d at 247.

65. *Kasky v. Nike*, 93 Cal. Rptr. 2d at 856. The Appellate Court noted that the record indicates that between 300,000 and 500,000 workers are employed in Asian factories producing Nike products. *Id.* South Korean and Taiwanese companies that manufacture the products under contract with Nike own Nike's actual production facilities. *Id.* Most of the workers who make Nike products are women under the age of 24. *Kasky*, 45 P.3d at 247.

66. *Kasky v. Nike*, 93 Cal. Rptr. 2d at 856. Since March 1993, all contractors and subcontractors working with Nike, Inc. are required to sign a Memorandum of Understanding that commits them to comply with local laws regarding minimum wage, overtime, child labor, holidays and vacations, insurance benefits, working conditions, and other similar matters and to retain records documenting their compliance. *Kasky*, 45 P.3d at 248.

67. *Kasky v. Nike*, 93 Cal. Rptr. 2d at 856.

68. *Id.* In 1997, Nike retained a consulting firm co-chaired by Andrew Young, a former ambassador to the United Nations, to carry out an independent evaluation of the labor practices in Asian Nike factories. *Id.* After visiting twelve factories, Young issued a report that commented favorably on working conditions in these facilities and found no evidence of abuse or mistreatment of workers. *Id.*

69. *Id.*

16 years of age, had 11-12 hour work days, compulsory overtime, and exposure to dangerous levels of dust and toxic fumes.⁷⁰ Such reports put Nike under an unusual degree of public scrutiny as a company “exemplifying a perceived a social evil associated with economic globalization - the exploitation of young female workers in poor countries.”⁷¹

Nike responded by implementing a public relations campaign that defended its labor practices and attempted to portray the corporation as being in the front line of responsible corporations maintaining adequate labor standards in foreign factories.⁷² Press releases responded to sweatshop allegations, addressed women’s issues, stressed Nike’s code of conduct and denied exploitation of underage workers.⁷³ Nike company officials wrote letters to the presidents and athletic directors of those colleges sponsoring Nike products that defended the corporation’s labor practices.⁷⁴ Nike also tried to rebut specific charges in letters to editors of major newspapers and nonprofit organizations.⁷⁵

In *Kasky*, the plaintiff, Marc Kasky, an attorney, alleged that Nike and several of its officers had committed actual fraud and deceit by making misleading and untrue statements about its labor conditions on behalf of the company.⁷⁶ In addition, Kasky alleged that Nike

70. *Id.* Another accounting firm’s spot audit of a large Vietnamese factory, which was leaked to the press by a disgruntled employee, reported widespread violations of local regulations and atmospheric pollution causing respiratory problems in 77 percent of the workers. *Id.* An investigator for the Vietnam Labor Watch reported evidence of widespread abuse and a “pervasive ‘sense of desperation’ from 35 interviews with Vietnamese workers.” *Id.* An Australian organization also published another highly critical evaluation of Nike’s factories in Indonesia. *Id.*

71. *Id.* (citing Manning, *Tracks Across the Globe - Nike’s Global Machine Goes on Trial*, THE OREGONIAN OF PORTLAND, Nov. 9, 1997, at A1 (branding the Nike production system “an international human rights incident.”). A North Carolina newspaper article asked, “But who wants to enjoy products made on the backs of human misery”? *Nike’s Swoosh: A Symbol of Money and Misery*, THE NEWS AND RECORD OF GREENSBORO, Nov. 13, 1997, at A14. The New York Times printed a series of eight articles between 1996 and 1997, reporting “grim conditions” and widespread human rights abuses in Nike factories. *Id.* A CBS television report contrasted complaints of a Vietnamese worker with disclaimers by Nike officials. *Id.*

72. *Kasky*, 93 Cal Rptr. 2d at 857.

73. *Id.* A lengthy press release entitled “Nike’s Production Primer” answered a series of allegations with detailed information and specific sources. *Id.* Another release highlighted the favorable Young report and invited readers to consult on-line. *Id.*

74. *Kasky v. Nike, Inc.*, 45 P.3d 243, 302 (Cal. 2002). Nike said that workers who make Nike products are protected from physical and sexual abuse, that they are paid in accordance with applicable local laws and regulations governing wages and hours, that they are paid on average double the applicable local minimum wage, that they receive a “living wage,” that they receive free meals and health care, and that their working conditions are in compliance with applicable local laws and regulations governing occupational health and safety. *Id.*

75. *Id.*

76. *Id.* Kasky alleged that Nike and individual defendants, Philip Knight, Thomas Clarke, Mark Parker, Stephen Gomez, and David Taylor, officers and/or directors of Nike, made false

made a false claim that the Young report proves *Nike* is doing a good job and “operating morally.”⁷⁷

Kasky’s complaint alleged four causes of action, all violating the California Business and Professions Code, and the Unfair Competition Law.⁷⁸ The first and second causes of action against Nike are based on negligent misrepresentation and intentional and/or reckless misrepresentation, in violation of the Business and Professions Code, in order to maintain or increase its sales and profits.⁷⁹ The third cause of action alleged unfair business practices and the fourth alleged false advertising, both also in violation of the Business and Professions

and misleading statements because of their negligence and carelessness, “with knowledge or reckless disregard” of California laws prohibiting false and misleading statements. *Id.*

Kasky was able to bring suit because any person acting for the interests of the “general public” may bring action for restitution or injunctive relief under the California’s Unfair Competition Law. Kasky was not required to allege any injury to himself. CAL. BUS. AND PROFESSIONS CODE § 17204 (2003). The California Business and Professions Codes § 17204 states:

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

Id.

Kasky specifically alleged that in the course of this public relation campaign, Nike made a series of six misinterpretations regarding its labor practices: (1) “that workers who make Nike products are . . . not subjected to corporal punishment and/or sexual abuse;” (2) “that Nike products are made in accordance with applicable governmental laws and regulations governing wages and hours;” (3) “that Nike products are made in accordance with applicable laws and regulations governing health and safety conditions;” (4) “that Nike pays average line-workers double the minimum wage in Southeastern Asia;” (5) “that workers who produce NIKE products receive free meals and health care;” and (6) “that Nike guarantees a ‘living wage’ for all workers who make Nike products.” *Kasky*, 93 Cal. Rptr. 2d at 857.

77. *Kasky v. Nike*, 93 Cal. Rptr. 2d at 857.

78. *Id.* The California Business and Professions Code defines “unfair competition” to include any “unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the BUSINESS AND PROFESSIONS CODE.” CAL. BUS. PROF. CODE § 17200 (2003).

79. *Kasky*, 93 Cal. Rptr. 2d at 857. The first and second causes of action, based on negligent misrepresentation and intentional or reckless misrepresentation, alleged that Nike engaged in an unlawful business practice in violation of the California Business and Professions Code § 17200 by making the above misrepresentations “[I]n order to maintain and/or increase its sales and profits . . . through its, advertising, promotional campaigns, public statements and marketing.” *Id.* (referring to CAL. BUS. PROF. CODE § 17200 (2003)).

Code.⁸⁰ The remedy Kasky sought was an injunction ordering Nike to “disgorge all monies” that it acquired by the alleged unlawful and unfair practices, to undertake a court approved public information campaign to correct the misinformation the public received via Nike’s false advertising, and to “cease [m]isrepresenting the working conditions under which Nike products are made”⁸¹ In response, Nike claimed that its speech was fully protected by the First Amendment, and thus it could not be sued for fraud or misrepresentations.⁸²

The California Supreme Court held that Nike’s speech was not fully protected because it is commercial speech, and thus the corporation may be liable for its false speech.⁸³ The court first discussed noncommercial and commercial speech under the United States Constitution,

80. *Id.* The third cause of action alleged unfair business practices within meaning of § 17200, and the fourth cause of action alleged false advertising in violation of Business and Professions Code section 17500. Section 17500 states that it is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both that imprisonment and fine. CAL. BUS. PROF. CODE § 17500 (2003).

81. *Kasky*, 93 Cal. Rptr. 2d at 857; CAL. BUS. & PROFESSIONS CODE § 17535 (2003). Section 17535 states:

Any person, corporation, firm, partnership, joint stock company or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of receiver, as may be necessary to prevent the use or employment by any person, corporation, partnership, joint stock company, or any other association or organization of any practices which violates this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members, or the general public.

Id.

82. *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002).

83. *Id.* at 247 (applying established principles of appellate review, the California Supreme Court assumed in the opinion that the allegations asserted by the appellant, Kasky, were true).

pointing out that noncommercial speech is entitled to full First Amendment protection, and that a content-based regulation is constitutional only if it is narrowly tailored to promote a compelling government interest.⁸⁴ Commercial speech, on the other hand, the Court reasoned, may be regulated if there is a “reasonable fit” between the government’s purpose and means chosen to achieve it.⁸⁵

The court then discussed regulation of false or misleading speech.⁸⁶ It stated that because there is no constitutional value in false statements of fact, they may be regulated, and even banned.⁸⁷ However, the court noted that some false or misleading speech is entitled to First Amendment protection in the political arena to eliminate risk of censorship.⁸⁸

After analyzing Supreme Court commercial speech decisions, the California Supreme Court created a limited-purpose test to be used for the purpose of deciding whether speech is commercial or noncommercial.⁸⁹ Based on this test, it concluded that when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, in order to categorize a particular statement as commercial or noncommercial, it must consider if: (1) the speaker is someone likely to be engaged in commerce, (2) the intended audience is likely to be actual or potential buyers or customers, or persons likely to repeat the message or influence buyers or customers, and (3) the content of the mes-

84. *Id.* at 251 (citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000)). A content-based regulation can withstand strict scrutiny only if it is narrowly tailored to promote a compelling government interest. *Id.*

85. *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980)). For commercial speech to be regulated, as discussed in *Central Hudson*, the speech must concern lawful activity and not be misleading. *Id.* Next, the court must ask whether the asserted government interest is substantial. *Id.* If both inquiries yield positive answers, then the court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Id.* The Supreme Court clarified in *State University v. Fox* that the regulation should not be more extensive than necessary—does not require the government to adopt the least restrictive means, but instead only requires a “reasonable fit” between the government’s purpose and means chosen to achieve it. *State Univ. v. Fox*, 492 U.S. 469, 480 (1989).

86. *Kasky*, 45 P.3d at 251.

87. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985)). In *Dun & Bradstreet*, Justice Powell stated that when speech “concerns no public issue” and is “wholly false and clearly damaging,” it “warrants no special protection” under the First Amendment. *Dun & Bradstreet*, 472 U.S. at 762.

88. *Kasky*, 45 P.3d at 251 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 495 (1995); *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964)).

89. *Id.* at 256. In its analysis, the court stated that it created the test because neither the Supreme Court nor the California Supreme Court has adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment or the state constitution. *Id.* at 255.

sage is commercial in character.⁹⁰ If the three elements are present, then the speech is commercial and thus receives a lower level of First Amendment protection.⁹¹

The court then proceeded to apply the limited purpose test to statements in controversy made by Nike officials.⁹² The court held that the first element of the test, a commercial speaker, is satisfied because Nike and its officers are engaged in commerce, as manufacturing and selling athletic apparel.⁹³ The court held that the second element of the test, an intended commercial audience, is also satisfied because Nike press releases and letters were addressed to college and university athletic departments who are actual and potential buyers of Nike products.⁹⁴ The court then finally held that the third element, the content of the message being commercial in nature, is also met.⁹⁵ The court reasoned that in describing its own labor policies and labor conditions in its Asian factories, Nike was making factual representations of its own business operations, which were commercial in nature.⁹⁶ The court reasoned that this information was in Nike's own knowledge and it was in a position to readily verify the truth of any factual assertions it made on these topics.⁹⁷

90. *Id.* at 252. The court then cited the Supreme Court decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, where the Court held that commercial speech may be prohibited because the truth of commercial speech is "more verifiable by its disseminator," and because commercial speech is profit driven, it is less likely than noncommercial speech to be chilled by government regulation. *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1975)). The *Board of Pharmacy* court reasoned that commercial speech consists of actual statements and that those statements describe matters within the personal knowledge of the speaker and are made for the purpose of financial gain. *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1975))

91. *Kasky*, 45 P.3d at 252.

92. *Id.* at 258.

93. *Id.* (holding that Nike and its officers are engaged in commerce because they manufacture, import, distribute, and sell consumer goods, such as athletic shoes and apparel).

94. *Id.* *Kasky* also alleged that Nike's press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential buyers of Nike products. *Id.* Specifically, *Kasky* alleged that Nike made these statements about its labor practices to maintain or increase its sales and profits. *Id.*

95. *Id.*

96. *Id.* Nike addressed matters within its own knowledge, i.e., discussing wages paid to factory employees, hours they worked, the way they were treated, and whether environmental conditions under which they worked violated local health and safety laws. *Id.*

97. *Kasky v. Nike, Inc.*, 45 P.3d 243, 258 (Cal. 2002). To justify its decision, the court then reasoned that when Nike made those statements to consumers, it engaged in speech that was "hardy and durable." *Id.* The court stated that because Nike's purpose in making these statements was to maintain its sales and profits, regulation aimed at preventing false and misleading speech is unlikely to deter Nike from speaking truthfully or at all about labor conditions and practices in its Asian factories. *Id.* Such a regulation may merely make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements. *Id.* The court added that

Finally, the court reasoned that the government could regulate speech about working conditions in factories where Nike products are produced because the government has authority to regulate commercial transactions for the protections of consumers to prevent false and misleading commercial practices.⁹⁸ For the purposes of categorizing Nike's speech as commercial or noncommercial, the court felt that it did not matter that Nike was responding to charges publicly raised by others and was thus participating in a public debate.⁹⁹ It held that Nike's speech was not removed from the category of commercial speech because it was intermingled with noncommercial speech.¹⁰⁰ The court reasoned that although policy questions, such as the degree to which domestic companies should be responsible for working conditions in foreign factories, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic globalization in general, are noncommercial speech,¹⁰¹ Nike may not immunize itself from liability in making false or misleading statements by making references to public issues.¹⁰²

such an incentive to verify information given to the public will serve the purpose of commercial speech by "insuring that the stream of commercial information flow[s] cleanly as well as freely." *Id.* (citing *Virginia Pharmacy*, 425 U.S. at 772).

98. *Kasky*, 45 P.3d at 251. The court explained that trade regulation laws have traditionally sought to suppress and prevent not only false or misleading statements about products or services but also false and misleading statements regarding where certain products are made. *Id.* (citing CAL. BUS. PROF. CODE § 17533.7 (2003), which makes it unlawful to sell a product falsely labeled as "Made in U.S.A.").

99. *Id.* at 260. The court illustrates its point by citing to *National Commission on Egg Nutrition v. FTC*, where a trade association denied there was scientific evidence that eating eggs increased the risk of heart and circulatory disease. *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. (1977)). The Seventh Circuit held that these statements were commercial speech subject to regulation by the Federal Trade Commission to the extent that these statements were false or misleading. *Id.* The respondents argued that such statements were noncommercial because they concerned a debate on a matter of great public interest. *Id.* The court responded that, "the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which false advertising relates." *Id.* at 163.

100. *Kasky*, 45 P.3d at 260.

101. *Id.* (noting that regulation of noncommercial speech would require strict scrutiny).

102. The court also rejected Nike's argument that regulating its speech to suppress false and misleading statements is impermissible because it disfavors Nike's point of view and favors the view of Nike's critics. *Id.* The court argued that the regulations in question do not suppress one point of view, but merely suppress false and misleading speech. *Id.* Moreover, the court added that differential treatment of speech based on the identity of the speaker is inherent, as was articulated in Supreme Court decisions in commercial speech cases. *Id.* The court reasoned that their decision in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. *Id.* It means only that when a business enterprise, to promote and defend its sales and profits, makes a factual representation about its own products or operations, it must speak truthfully. *Id.* The court added that it did not consider this an intolerable burden to impose on the business community. *Id.*

The Supreme Court granted certiorari to hear this landmark case.¹⁰³ In a per curiam decision, it dismissed the writ based on two jurisdictional issues and in an effort to avoid premature adjudication of a novel constitutional question.¹⁰⁴ The Court held that the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257;¹⁰⁵ neither party had standing to invoke the jurisdiction of a federal court; and the reasons for avoiding premature adjudication of novel constitutional questions apply with special force in this case.¹⁰⁶

The first jurisdictional problem the Court analyzed was the fact that California Supreme Court never entered a final judgment, a requirement for appellate review to be granted.¹⁰⁷ The Supreme Court reasoned that because an opinion on the merits in this case could take a number of different paths, it is not clear whether reversal of the California Supreme Court would preclude any further litigation on the relevant cause of action in the state proceedings to come.¹⁰⁸ Also, it was not clear to the Court whether reaching the merits of Nike's

103. *Nike v. Kasky*, 123 S. Ct. 2554, 2555 (2003). The Court also emphasized that this lawsuit is still at a preliminary stage, and that whether any false representations were made is an issue that is yet to be resolved. *Id.*

104. *Id.*

105. 28 U.S.C. § 1257 states,

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

28 U.S.C. § 1257 (2003).

106. *Id.*

107. Congress has granted the Supreme Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had renders a final judgment or decree. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). A literal interpretation of the statute would preclude review whenever further proceedings remain to be determined in a state court, "no matter how disassociated from the only federal issue" in the case. *Id.* In the past the Court has rejected such a "mechanical" construction of the statute, and accepted jurisdiction in certain exceptional "situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). In *Cox*, the Court recognized that in many of such exceptional circumstances the "additional proceedings anticipated in the lower state courts . . . would not require the decision of other federal questions that might also require review by the Court at a later date." *Id.* Nike argued that this case fits within the fourth category of those mentioned in *Cox*, where "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review" might prevail on nonfederal grounds, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state-court decision might seriously erode federal policy." *Kasky*, 123 S. Ct. at 2556 (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975)).

108. *Kasky*, 123 S. Ct. at 2557 (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975)).

claims would serve the goal of judicial efficiency because if the Court were to decide on the issues presented, it would have likely resulted in a piecemeal review of the First Amendment issues at hand.¹⁰⁹

The second reason why the Supreme Court felt that it lacked jurisdiction to hear Nike's claim was that neither party had standing to invoke federal jurisdiction.¹¹⁰ Without alleging that Kasky has any personal stake in the outcome of this case, he is proceeding as a private attorney general seeking to enforce two California statutes on behalf of the general public of the State of California.¹¹¹ He has not asserted any federal claim; even if he had attempted to do so, he could not invoke the jurisdiction of a federal court because he failed to allege any injury to himself that is "distinct and palpable."¹¹² Thus, Kasky does not have standing.¹¹³

The Supreme Court also held that Nike did not have standing because plaintiffs in the original action had no standing to sue under the principles governing the federal courts.¹¹⁴ Therefore the Supreme Court may only exercise its jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.¹¹⁵ In this case, the requisites of a case or controversy are not met.¹¹⁶

The third reason why the Court felt that it appropriately decided to dismiss the writ of certiorari was based on the importance and difficulty of the First Amendment issue raised in this case.¹¹⁷ Due to the

109. *Id.*

110. Article III gives the federal courts jurisdiction over only "cases and controversies," and the doctrine of standing to identify those disputes, which are appropriately resolved through the judicial process. U.S. CONST. art. III.

111. *Kasky*, 123 S. Ct. at 2557. See also *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

112. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

113. The Court held that since federal rules of "justiciability" would have applied in state courts, this suit would have been "dismissed at the outset." *Id.* at 2557 (citing *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989)).

114. Nike, relying on *Asarco*, contended that it has standing to bring the case to this Court. *Kasky*, 123 S.Ct. at 2557. In *Asarco*, a group of taxpayers brought a suit in state court seeking a declaration that the State's law on mineral leases on state lands was invalid. *Asarco*, 490 U.S. at 611-12. After the Arizona Supreme Court granted plaintiffs a declaratory judgment holding that the state law governing mineral leases is invalid, the defendants sought to invoke the jurisdiction of the Supreme Court. *Id.* The Supreme Court held that the defendants had standing to invoke the jurisdiction of the federal courts and the state proceedings had resulted in a final judgment because the state court finally decided the federal issue. *Id.*

115. *Kasky*, 123 S. Ct. at 2558 (citing *Asarco, Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989)).

116. *Id.*

117. The Court quoted Justice Brandeis, who famously observed that the Court has developed, "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed

novelty and importance of the constitutional issues presented, the Court did not want to anticipate a question of constitutional law in advance of the necessity of deciding it.¹¹⁸ The Court reasoned that this case presented a blending of commercial speech, noncommercial speech, and debate on issues of public concern.¹¹⁹ If the allegations of intentional misstatements are true, the regulatory interest in protecting the public may be high as there is no constitutional value in false statements.¹²⁰ But, such communications were part of an ongoing debate that not only concerned Nike, but also labor practices by other large corporations.¹²¹ The Court felt that to correctly answer the issues posed in this case there must be a study of the factual record rather than a review of allegations posed by Kasky.¹²²

Justices Breyer and Kennedy dissented to the delay of the decision by the Court and the delay in deciding this important constitutional issue.¹²³ They disagreed because the questions presented directly concern the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevented the Court from deciding those questions now, and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on.¹²⁴ They argued that an action to enforce California's laws that discourage certain kinds of speech

upon it for decision." *Id.* (citing *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (concurring opinion)).

118. *Id.*

119. As the Court stated:

Further complicating the novel First Amendment issues in this case is the fact that Nike seeks to challenge the constitutionality of the private attorney general provisions of California's Unfair Competition Law and False Advertising Law. It apparently did not raise this specific challenge below. Whether the scope of protection afforded to Nike's speech should differ depending on whether the speech is challenged in a public or a private enforcement action, it is a difficult and important question that the Court believed would benefit from further development in a lower court. U.S. CONST. amend. I.

Id.

120. The Court reasoned on the one hand, such regulatory interest was high because if the communications contained misstatements, those direct communications with customers and potential customers were intended to generate sales and possibly to maintain or enhance the market value of Nike stocks. *Kasky*, 123 S. Ct. at 2558.

121. The Court reasoned that on the other hand, knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. *Kasky*, 123 S. Ct. 2559. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance. *Id.* (referring to Brief of Amici Curiae Exxon Mobil et al. at 2; Brief of Amici Curiae Pfizer, Inc., at 11-12).

122. The Court added that the development of such a factual record may contribute in a positive way to the public debate. *Kasky*, 123 S. Ct. at 2558.

123. *Id.* at 2559. Justice Kennedy also dissented to the decision to dismiss the writ of certiorari as improvidently granted. *Id.*

124. *Id.* at 2560.

amounts to more than just a genuine, future threat.¹²⁵ It is a present reality, one that discourages Nike from engaging in speech.¹²⁶ It thereby creates “injury in fact” and that injury is directly “traceable” to Kasky’s pursuit of this lawsuit.¹²⁷ And this Court’s decision, if favorable to Nike, can “redress” that injury.¹²⁸

B. *Non-Commercial Speech*

The First Amendment of the United States Constitution states, “Congress shall make no law abridging the freedom of speech.”¹²⁹ The framers commentary on freedom of speech focuses entirely on the importance of free speech to self-government, the ability to criticize government officials, and autonomy.¹³⁰ The framers also recognized the importance of the freedom of speech and press to assure that the American electorate receives a continuous flow of accurate information about political candidates.¹³¹

Political speech, also referred to as noncommercial speech, has traditionally received fullest protection by the United States Constitution.¹³² Therefore, content based regulations of political speech are subject to strict scrutiny, which requires that the regulation be narrowly tailored and must promote a compelling government interest.¹³³ Content neutral regulations of political speech, such as laws regulating the time, place, and manner of speech, are subject to intermediate scrutiny, which considers (1) whether the regulation of speech is content-neutral, (2) whether the regulation is narrowly tailored to serve a significant government interest, and (3) whether this regulation leaves open an alternative channel of communication.¹³⁴ The following cases, *New York Times v. Sullivan*,¹³⁵ and *United States v. Playboy Entertainment Group, Inc.*,¹³⁶ illustrate the protection that noncommercial speech has traditionally received.

125. *Id.*

126. *Id.*

127. *Kasky*, 123 S. Ct. at 2560.

128. *Id.*

129. U.S. CONST. amend. I.

130. Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 632 (1990) (citing Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), reported in 5 THE FOUNDERS’ CONSTITUTION 122 (P. Kurkland & R. Lerner eds. 1987)).

131. *Id.* (citing *Report on the Virginia Resolution*, Jan. 1800, reprinted in 5 THE FOUNDERS’ CONSTITUTION, 141, 145 (P. Kurkland & R. Lerner eds. 1987)).

132. Jonathan A. Loeb & Jeffrey A. Sklar, *The California Supreme Court’s New Test for Commercial Speech*, 25 L.A. LAW. 13 (2002) (citing U.S. CONST. amend. I).

133. *Id.* at 13 (citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000)).

134. *Id.* at 13 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

135. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

136. *Playboy*, 529 U.S. at 813.

1. *New York Times Company v. Sullivan*¹³⁷

Noncommercial speech was discussed in *New York Times v. Sullivan*.¹³⁸ The issue the Court considered was whether constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct.¹³⁹ In *Sullivan*, four African American clergy men took out a full page advertisement in the *New York Times* on March 29, 1960 entitled 'Heed Their Rising Voices.'¹⁴⁰ The advertisement spoke of African American students in the south, particularly Montgomery, that have engaged in non-violent demonstrations in affirmation of the right to live as guaranteed by the First Amendment, but that had been arrested and had tear gas thrown at them by the police.¹⁴¹ The advertisement also alleged that the police ringed the Alabama State College Campus where these demonstrations took place and padlocked the dining hall to starve the students into submission.¹⁴² Sullivan, the then elected Commissioner of the City of Montgomery, claimed that references to police referred to him because he supervised the Police Department and made a written demand on the *New York Times* to retract the advertisement.¹⁴³ The *New York Times* refused.¹⁴⁴ Instead, the *Times* wrote him a letter questioning why he thought the advertisement reflected on him.¹⁴⁵ Sullivan filed a libel suit a few days later.¹⁴⁶

137. 376 U.S. 254 (1964).

138. *Id.*

139. *Id.* at 256. The Court stated that this was the first time such an issue was considered. *Id.*

140. *Id.* The advertisement further charged that in the students' efforts to uphold their right to live in human dignity, as guaranteed by the U.S. Constitution and Bill of Rights, they are being met by an unprecedented wave of terror by those who would "deny and negate that document which the whole world looks upon as setting the pattern for modern freedom." *Id.* at 256.

141. *Id.* at 257. The text of the advertisement concluded with an appeal for funds for three purposes: one, support of the student movement; two, the struggle for the right to vote; three, legal defense of Martin Luther King, Jr., leader of the movement, against perjury indictment that was then pending in Montgomery. *Id.*

142. *Id.*

143. Sullivan and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner. *Sullivan*, 376 U.S. at 254.

144. *Id.* at 261.

145. *Id.* The response to Sullivan from the N.Y. Times stated that, "we are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." *Id.* The *Times*, however, subsequently published a retraction upon the demand of Governor Patterson of Alabama. *Id.*

146. *Id.* Alabama law at that time denied a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand, for a public retraction and the defendant fails or refuses to comply. *Id.* (citing ALA. CODE, TIT. 7, § 914 (1964)).

The Court, in its analysis, recognized that some of the statements in the advertisement were not accurate descriptions of events that occurred in Montgomery, but they still deserved First Amendment protection.¹⁴⁷ The Supreme Court held that the publication at issue was not a commercial advertisement because it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives were matters of highest interest and concern.¹⁴⁸ The Court held that it could not place such a handicap upon the freedom of expression.¹⁴⁹ If the allegedly libelous statement would otherwise be constitutionally protected, they do not forfeit that protection just because they were published in the form of a paid advertisement.¹⁵⁰

The Court further discussed the general proposition that freedom of expression regarding public issues is secured by the First Amendment.¹⁵¹ The Court stated, “[t]he constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and societal changes desired by the people.”¹⁵² The maintenance of the opportunity for free political discussion is essential to democracy and the constitution.¹⁵³ Thus, the Court stated that it considered *Sullivan* “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp at-

147. *Id.* at 263. The Alabama Supreme Court held that because the message at issue was placed on a paid advertisement, it was commercial speech and thus is not protected. *Id.* The Supreme Court reversed based on the doctrine of protection granted to noncommercial speech. *Id.*

148. *Id.* at 266. The Court added that the fact that Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Id.* Any other conclusion would discourage newspapers from carrying editorial advertisements of this type, which would close an outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities but who wish to exercise their freedom of speech. *Id.*

149. *Sullivan*, 376 U.S. at 254.

150. *Id.* at 266.

151. *Id.* at 269. The Court stated that, “[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.” *Id.*

152. *Id.* at 269 (citing *Roth v. United States*, 354 U.S. 476, 484).

153. *Id.* (citing *Stromberg v. California*, 283 U.S. 359, 369). The *Stromberg* Court held that, “maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Stromberg*, 283 U.S. at 369.

tacks on the government and public officials.”¹⁵⁴ The advertisement at issue was deemed an expression of grievance and protest on one of the major public issues of that period of time, and thus qualified for constitutional protection.¹⁵⁵

The Court then considered the alleged falsity of the advertisement.¹⁵⁶ The Court held that an erroneous statement is inevitable in free debate and that it must be protected if freedom of expression is to have “breathing space” that it needs to survive.¹⁵⁷

2. *United States v. Playboy Entertainment Group, Inc.*¹⁵⁸

The doctrine of free speech was also discussed in *United States v. Playboy*.¹⁵⁹ This case presented a challenge to Section 505 of the Telecommunications Act of 1996 that required cable operators who provide channels primarily dedicated to sexually oriented programming either to scramble sexually explicit channels, fully blocks those channels, or limit their transmission to hours when children were unlikely to be viewing.¹⁶⁰ Playboy Entertainment Group challenged the statute as being unnecessarily restrictive and content based, violating the First Amendment.¹⁶¹

The Court held that although Playboy’s programming consists of sexually explicit material and such material is unwanted in homes with children, the statute in question was content based and that speech is defined by its content.¹⁶² Thus, this statute could be upheld only if it

154. *Sullivan*, 376 U.S. at 270. The Court added that the question is whether the advertisement forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of Sullivan. *Id.*

155. *Id.*

156. *Id.* at 271.

157. *Id.* at 272 (citing *NAACP v. Button*, 371 U.S. 415, 445 (1963)). The Court added that if neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less adequate. *Id.* at 273.

158. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

159. *Id.*

160. *Id.* at 806. Communications Act of 1934, 47 U.S.C.A. §§ 505, 560, 561(a)(1994 ed., Supp. III). The statutory time set for the scrambling was between 10 P.M. and 6 A.M. Even before enactment of the statute, signal scrambling was already in use. Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs. Scrambling, however, was not always precise and therefore, both audio and visual portions of the programs might be seen or heard, a phenomenon known as “signal bleed.” The purpose of § 505 was to shield children from hearing or seeing images resulting from the signal bleed. *Playboy*, 529 U.S. at 806.

161. *Playboy*, 529 U.S. at 807.

162. *Id.* at 811. The Court held that the statute is content based because it applies only to channels primarily dedicated to “sexually explicit adult programming or other programming that is indecent.” *Id.* The statute was unconcerned with signal bleed from any other channels. *Id.*

satisfied strict scrutiny.¹⁶³ Based on precedent, if a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling state interest.¹⁶⁴ If a less restrictive alternative that would serve the government interest is available, the legislature must use that alternative.¹⁶⁵ The Court generally held that if the purpose of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails.¹⁶⁶

The Court held that “[w]e are expected to protect our own sensibilities simply by averting [our] eyes.”¹⁶⁷ Thus, if a viewer is offended, he can merely avert his eyes.¹⁶⁸ Even though the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify the widespread restriction on speech.¹⁶⁹ The Court further stated that even where speech is indecent when it enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.¹⁷⁰

The Court also recognized that only a fine line exists between speech unconditionally guaranteed and speech that may be legitimately regulated, suppressed, or punished.¹⁷¹ Error in marking that line exacts an extraordinary cost.¹⁷² The Court further argued that, [i]t is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas of influences without Government interferences or control.¹⁷³

163. *Id.* at 813 (citing *Sable Communications, Inc., v. FCC*, 492 U.S. 115, 126 (1989)).

164. *Id.*

165. *Id.* (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that CDA’s Internet indecency provision burden on adult speech is unacceptable of less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve)).

166. *Playboy*, 529 U.S. at 813.

167. *Id.* (citing *Cohen v. California*, 403 U.S. 15, 21 (1971) (The Court added that it is not suggesting that the government must be indifferent to unwanted, indecent speech that comes into the home without parental consent. But the speech here is protected and the question is, which standard the government must meet in order to restrict it.)).

168. *Id.*

169. *Id.* The Court recognized that cable television, like broadcast media, presents unique problems that may justify restrictions that would be unacceptable in other contexts. *Id.* But, the Court held that as they consider a content-based regulation, the standard is strict scrutiny. *Id.*

170. *Id.*

171. *Id.* at 817 (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

172. *Playboy*, 529 U.S. at 817.

173. *Id.* The Court considered a philosophical argument that the Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. *Id.* The Constitution says that these judgments are for the

The Court concluded that if television broadcasts can expose children to risk of exposure to indecent materials, even in their own homes and without parental consent, there is a problem the government can address.¹⁷⁴ But it must do so in a way consistent with the First Amendment principles.¹⁷⁵

C. Commercial Speech

The commercial speech doctrine is presently a controversial and confusing subject.¹⁷⁶ The boundaries that separate commercial speech from public discourse reflect sociological judgments about whether particular forms of communication are valued merely as information or as forms of democratic participation.¹⁷⁷ Commercial speech has generally been defined as speech that does “no more than propose a commercial transaction.”¹⁷⁸ The following cases, *Virginia State Board of Pharmacy et al., v. Virginia Citizens Consumer*¹⁷⁹ and *Bolger v. Youngs Drug Products Corp.*¹⁸⁰ discuss this complicated subject. .

In 1976, the United States Supreme Court reversed its longstanding conclusion that the government, without any restraints, may regulate purely commercial advertising.¹⁸¹ The Supreme Court also held that commercial speech is not wholly outside the protection of the First and Fourteenth Amendments.¹⁸²

individual to make, and not for the government, even with mandate or approval of the majority. *Id.*

174. *Id.* at 826. The Court concluded that basic principles of speech were at stake in this case. *Id.* It held, “when the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the [G]overnment merely because the law can somehow be described as a burden rather than outright suppression.” *Id.*

175. *Id.* at 827 (holding that here the government has not met the burden the First Amendment imposes, the burden of satisfying the strict scrutiny analysis).

176. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

177. *Id.* at 1. In his article, Post explores how the Court makes judgments as to whether speech is commercial in nature or is part of public discourse. *Id.* He discusses the distinction between the constitutional function of commercial speech and noncommercial speech, argues why the state may impose overbroad regulations, and establishes prior restraints within domain of commercial speech, but not within the domain of public discourse. *Id.*

178. *Id.* at 3 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

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

180. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

181. Post, *supra* note 176, at 1 (citing *State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). According to Post, this announcement generated the “commercial speech” doctrine, a “notoriously unstable and contentious domain of First Amendment jurisprudence.” *Id.* He argues that the Supreme Court, in striving to create a usable definition, has sought to create a doctrine that “rests heavily on the commonsense distinction between speech proposing a commercial transaction and other varieties of speech.” *Id.* at 3 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

182. *Virginia Pharmacy*, 425 U.S. at 748.

1. *Virginia State Board of Pharmacy et al., v. Virginia Citizens Consumer*¹⁸³

In *Virginia Pharmacy*, the Court analyzed whether the flow of drug price information may be enjoyed by pharmacists and also by the public receiving the information.¹⁸⁴ The Pharmacy Board claimed that the Virginia statute that prohibited pharmacists from advertising their prices and discounts was unconstitutional.¹⁸⁵

To analyze whether there is a First Amendment exception for commercial speech, communication such as, "I will sell you the X prescription drug at the Y price," the Supreme Court first defined what commercial speech is not.¹⁸⁶ First, the Court stated that speech does not lose full protection because money is spent to protect it, as in a paid advertisement in one form or another, because then all paid advertisements would be commercial speech.¹⁸⁷ Second, the Court stated that speech is fully protected even though it is carried in a form that is sold for profit and even if it involves a solicitation to purchase, because then books and newspapers would be commercial speech.¹⁸⁸ Finally, the Court stated that it is not speech on a commercial subject, or else business section editorials would be commercial speech; it isn't even factual speech on a commercial subject or else business section news reporting would be commercial speech.¹⁸⁹

The Court then stated although an advertiser's interest may be purely economic, that does not disqualify him from First Amendment protection.¹⁹⁰ The Court reasoned that society has a strong interest in

183. *Id.*

184. *Id.* at 756.

185. *Id.* at 749-750. The portion of the statute in question, VA. CODE ANN. § 54-524.35 (1974), provided that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he "(3) publishes, advertises or promotes, directly or indirectly, in any matter whatsoever, any amount, price, fee, premium, discount, rebate or credit terms. . . for any drugs which may be dispensed only by prescription." *Id.*

186. *Id.* at 761. The Court began its analysis of the case as, "[o]ur pharmacist does not wish to editorialize on any subject, cultural, philosophical, or litical. He does not wish to report any particular newsworthy fact, or to make generalized observations even about commercial matters. The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.' Our question, then, is whether this communication is wholly outside the protection of the First Amendment." *Id.*

187. *Virginia Pharmacy*, 425 U.S. at 761 (citing *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964)).

188. *Id.* The Court reasoned that if speech is sold for profit or involves solicitation to purchase was considered commercial speech, then most books and newspapers would consist of commercial speech. *Id.*

189. *Id.*

190. *Id.* at 762. The Court explained that the interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employer and employee are pro-

the free flow of information.¹⁹¹ Even though an advertisement may be entirely commercial, it may be of general public interest.¹⁹² It also added that First Amendment interests in the free flow of information could be found to outweigh the countervailing interests of the State.¹⁹³ The Court also held that where a speaker exists, the protection is afforded to the communication, to its source, and to its recipients.¹⁹⁴ Where there is a right to advertise, there is a reciprocal right to receive the advertising.¹⁹⁵ Although the advertiser's interest is a purely economic one, the Court held that it should not disqualify him from First Amendment protection.¹⁹⁶

The Supreme Court, however, added that commercial speech may receive protection only if it concerns a lawful activity and is not misleading.¹⁹⁷ It reasoned that commercial speech may be regulated to insure that the flow of information is truthful and legitimate commercial information.¹⁹⁸ The Court reasoned that such regulation is constitutional because the truth of commercial speech is easier to verify by its disseminator than news reporting or political commentary, because the advertiser himself knows more about his product than anyone else.¹⁹⁹ Also, commercial speech is more durable than other kinds of speech because of commercial profits.²⁰⁰ Thus, there is less chance that it will be chilled by government regulation and foregone entirely.²⁰¹

ted by the First Amendment when they express themselves on the merits of the dispute to influence the outcome. *Id.*

191. *Id.* at 764.

192. *Id.* (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertisements stated that referral services for abortions were available); *Fur Info. & Fashion Council, Inc. v. E.F. Timme & Son*, 364 F. Supp. 16 (S.D.N.Y. 1973), (manufacturer of artificial furs promoted his product as an alternative to the extinction by his competitors of fur-bearing animals)). *Id.*

193. *Virginia Pharmacy*, 425 U.S. at 755 (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *rev'd*, *State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

194. *Id.* at 756 (citing *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (upholding the First Amendment rights of citizens to receive political publications sent from abroad)).

195. *Id.*

196. *Id.* at 761-763.

197. *Id.* at 771. The Court explained that untruthful speech, commercial or noncommercial, has never been protected for its own sake. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Much commercial speech is not provably false or wholly false, but only deceptive and/or misleading. *Id.* The government is not prohibited from insuring that the stream of commercial information can flow freely. *Id.*

198. *Virginia Pharmacy*, 425 U.S. at 771.

199. *Id.* at 772.

200. *Id.* The Court distinguished commercial speech from noncommercial speech that the Court had considered in cases such as *Sullivan and Dun & Bradstreet*. *Id.*

201. *Id.* The Court added that attributes such as these, the objectivity and hardness of commercial speech, make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. *Id.*

2. *Bolger v. Youngs Drug Products Corp.*²⁰²

In *Youngs Drug*, a manufacturer and distributor of contraceptives brought an action challenging a federal statute which prohibited unsolicited mailing of contraceptive advertisements.²⁰³ *Youngs Drug* publicized the availability and desirability of its products by various methods, such as fliers and pamphlets.²⁰⁴ In 1979 the Postal Service brought allegations of unsolicited mailing of contraceptive advertisements against *Youngs Drug* and warned them that their mailings violated the federal statute at issue before the Court.²⁰⁵ *Youngs Drug* then brought an action for declaratory and injunctive relief claiming that the statute violated their First Amendment rights.²⁰⁶

The Court held that the State's ban on such mailings violated the First Amendment.²⁰⁷ The Court recognized that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.²⁰⁸ But, the government has no right to restrict expression because of its message, its ideas, its subject matter, or its content.²⁰⁹ Content-based restrictions will be upheld only in the most extraordinary situations.²¹⁰ But, regulation of commercial speech based on content is less problematic based on the greater potential for deception or confusion, as in the context of false

202. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

203. *Youngs Drug*, 463 U.S. at 61. The statute at issue, Tit. 39 U.S.C. § 3001(e)(2) states that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs." *Id.*

204. *Youngs Drug*, 463 U.S. at 62. In district court, *Youngs Drug* offered examples of its informational pamphlets. The first, entitled "Condoms and Human Sexuality", was a 12-page pamphlet that described the use, manufacture, desirability, and descriptions of various Trojan brand condoms manufactured by *Youngs Drug*. *Id.* The second pamphlet, entitled "Plain Talk About Venereal Disease," discussed at length the problems of this sexually transmitted disease, the use, and advantages of condoms in preventing venereal disease. *Id.*

205. *Id.* at 63.

206. *Id.*

207. The Court held that all the mailings in the case are entitled to the "qualified but nonetheless substantial protection accorded to commercial speech." *Id.* at 68.

208. *Id.* at 65. The Court cited *Bigelow v. Virginia*, 421 U.S. 809 (1975), where the Court first extended First Amendment protection to commercial speech. *Id.* It further explained that the "Court's decisions have recognized the 'commonsense' distinction between speech proposing a commercial transaction that is subject to government regulation, and other varieties of speech." *Id.* at 64 (citing *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 455-456 (1978)).

209. *Youngs Drug*, 463 U.S. at 65 (citing *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972)).

210. *Id.* The Court was referring to noncommercial speech, where in order to sustain a content based restriction, the regulation had to pass the test of strict scrutiny. *Id.* (referring to *Consol. Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538-39 (1980)).

advertising.²¹¹ Thus, content-based restrictions on commercial speech are permitted.²¹²

An issue before the Court was first to determine whether the proposed mailings were to be analyzed as commercial or noncommercial speech.²¹³ The Court realized that such mailings must be examined carefully to ensure that speech deserving greater constitutional protection is not inadvertently suppressed.²¹⁴ The Court first held that the mere fact that the pamphlets were advertisements did not compel the conclusion that they are commercial speech.²¹⁵ Second, the Court added that the reference to a specific product does not by itself render the pamphlets commercial speech.²¹⁶ Third, the Court held that the fact that Youngs Drug has an economic motivation for mailing pamphlets would be clearly insufficient by itself to turn the materials into commercial speech.²¹⁷

The Court held that flyers consisting primarily of price and quantity type information, or discussions of various brands of condoms and specific recommendations, are properly characterized as commercial speech.²¹⁸ Therefore, the Court concluded that advertisers may enjoy First Amendment protection but should not be permitted to gain immunity for false or misleading product information from government regulation by including references to public issues.²¹⁹ The protections

211. *Youngs Drug*, 463 U.S. at 65.

212. *Id.* The Court noted that their decisions have displayed a greater willingness to permit content-based restrictions when the expression at issue fell in certain special and limited categories, such as libel (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)); fighting words (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). *Id.*

213. *Id.*

214. *Youngs Drug* contended that its proposed mailings constituted fully protected speech, and thus § 3001(e)(2) was an impermissible content-based restriction on their expression. *Id.* at 66.

215. *Id.* (citing *New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964)).

216. *Id.* at 66 (citing *Associated Students v. Attorney General*, 368 F. Supp. 11, 24 (1973)).

217. *Id.* (citing *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975)).

218. *Id.* at 67. The Court held that the informational pamphlets are properly characterized as commercial speech even though they contain discussions of important public issues, such as venereal disease and family planning. *Id.* at 68. The Court stated that it has made it clear in the past that advertising linking product to current public debate is not entitled to First Amendment protection given to noncommercial speech. *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980)).

219. *Youngs Drug*, 463 U.S. at 68. The Court further held that a company has full range of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980)).

available for commercial expression depend on the expression and the governmental interests served by the regulation.²²⁰

The Court also discussed whether the governmental interest in prohibiting the mailing of unsolicited contraceptive advertisements is a substantial one.²²¹ The fact that the protected speech may be offensive to some does not justify its suppression.²²² The Court held that the statute is unconstitutional because it denied people truthful information bearing on their ability to discuss birth control and to make informed decisions in this area.²²³ Thus, the Court concluded that the justifications offered by the Government were insufficient to warrant the sweeping prohibition on mailing unsolicited contraceptive advertisements.²²⁴

III. ANALYSIS

A. Corporate Speech Analysis

Corporate speech that concerns issues of public debate is more like noncommercial than commercial speech. Therefore, Nike's speech was more like the noncommercial speech in the above listed cases and thus should receive utmost First Amendment protection.

First, the Supreme Court in *Bellotti* and *Pacific Gas* concluded that corporate speech deserved full protection under the First Amendment.²²⁵ In *Bellotti*, the Court analyzed the corporate publication referendum issue as noncommercial speech because of its potential effects on the economy of the state.²²⁶ Justice Powell added, "It is the type of speech indispensable to decision making in a democracy, and

220. *Id.* at 69. In the case of contraceptive advertising, the Court held that it not only implicated substantial individual and societal interests in the free flow of information, but also related to activity that is protected from unwarranted state interference. *Id.*

221. *Id.* at 68. The Court reasoned that if the government interest is substantial, then it must determine whether the regulation directly advances the asserted government interest, and whether it is not more extensive than necessary to serve that interest. *Id.* at 69.

222. *Id.* at 71.

223. *Id.* The Court held that it declined to recognize a distinction between commercial and noncommercial speech that would "render this interest a sufficient justification for a prohibition of commercial speech." *Id.* at 72.

224. *Id.* at 75. The Court reasoned that § 3001(e)(2) was defective for several reasons. One, that the statute only provides limited support for the government interests asserted because it may be assumed that parents already exercise substantial control over the disposition of the mail once it enters the mailboxes. *Id.* at 73. Two, the statute is defective because it denies parents truthful information bearing on their ability to discuss birth control and make informed decisions about family planning. *Id.* at 74.

225. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Pac. Gas & Elec. Co. v. Pub. Util's Comm'n of Cal.*, 475 U.S. 1 (1986).

226. *Bellotti*, 435 U.S. at 776. The appellants wished to address the issue of the enactment of a graduated personal income tax that they believed would have adverse effects of the economy of

this is no less true because the speech comes from a corporation rather than an individual.²²⁷ In *Nike*, Nike's speech about its labor practices can be analogized to First National Bank's speech concerning electoral referendum because labor standards are as major public issue as is the economy of the state.²²⁸ In *Bellotti*, the Court gave the corporation's speech utmost protection because it concerned the economy of the state, a major public issue.²²⁹ Thus, in *Nike*, Nike's speech should be given utmost protection as well.

The Court next analogized the corporations' argument to "press cases", such as *Mills v. Alabama*²³⁰ and *Saxbe v. Washington Post CO.*,²³¹ that emphasize the special and constitutionally recognized role of the press to inform and educate the public, offering criticism and providing a forum for discussion.²³² The Court held that similarly to the press cases, the Court's decisions involving corporations are based not only on the role of the First Amendment in fostering individual self-expression, but also in affording public access to discussion, debate, and the dissemination of ideas and information.²³³

Similar to *Kasky*, Nike's speech can be analogized to speech by the media because it was informing and educating the public about foreign labor practices and standards.²³⁴ By speaking, Nike was affording the public access to discussion and debate.²³⁵ Without such speech, there would be no discussions about corporate practices abroad.²³⁶

In *Pacific Gas*, the Court held that *Progress* was entitled to full protection of the First Amendment because its speech extended beyond speech that merely proposed a business transaction and included discussion of matters of public concern that the First Amendment pro-

the State. *Id.* The Court held that the importance of this referendum to the people of the state and its government is not disputed, although its merits are subject to sharp disagreement. *Id.*

227. *Id.* at 717. Justice Powell further added that, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual." *Id.*

228. See *Kasky v. Nike, Inc.*, 123 S.Ct. 2554; *Bellotti*, 435 U.S. at 765.

229. *Bellotti*, 435 U.S. at 795.

230. *Mills v. Alabama*, 384 U.S. 214 (1966).

231. *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974).

232. *Bellotti*, 435 U.S. at 782 (citing *Mills v. Alabama*, 384 U.S. 214 (1966); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974)).

233. *Id.* at 782 (citing *Red Lion Broad. v. FCC*, 395 U.S. 367, 389-90 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967)). Justice Powell added that even those communications that based solely on the individual's right to express himself may contribute to educating the public. *Id.*

234. *Kasky*, 123 S. Ct. at 2554.

235. See *Id.* at 2554.

236. *Id.* See also *Kasky*, 123 S. Ct. at 2559 (Breyer, J. & O'Connor, J. dissenting).

pects and encourages.²³⁷ Similarly in *Kasky*, Nike's speech went beyond that of proposing a business transaction.²³⁸ Its speech was not to sell shoes or promote its name.²³⁹ Nike spoke to discuss its labor practices in Asia and to defend itself from the criticism it had received from various international human rights groups.²⁴⁰

The analysis the Supreme Court used in analyzing noncommercial speech cases can also be applied to *Kasky*. In *Sullivan*, the Supreme Court overturned the Alabama Supreme Court decision that held that because a message was placed on a paid advertisement, it was deemed commercial speech and thus was not protected.²⁴¹ The Supreme Court held that the New York Times advertisement was not commercial speech because it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives were matters of highest interest and concern.²⁴² The Court reasoned that placing a handicap upon an allegedly libelous statement that would otherwise be protected was unconstitutional.²⁴³ In *Kasky*, the California Supreme Court saw Nike's speech as advertising, and thus lacking full First Amendment protection.²⁴⁴ Similarly to *Sullivan*, in *Kasky* the issue of labor practices is one of the major public issues of its time, and Nike's speech was addressing it and thus should be given utmost constitutional protection.

The *Sullivan* Court then considered the alleged falsity of the advertisement.²⁴⁵ The Court held that an erroneous statement is inevitable

237. *Pacific Gas*, 475 U.S. at 9 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)).

238. *Kasky v. Nike, Inc.*, 45 P.2d 243, 248 (Cal. 2002).

239. *Id.*

240. *Id.* Nike said that workers who make Nike products are protected from physical and sexual abuse, that they are paid in accordance with applicable local laws and regulations governing wages and hours, that they are paid on average double the applicable local minimum wage, that they receive a "living wage," that they receive free meals and health care, and that their working conditions are in compliance with applicable local laws and regulations governing occupational health and safety. *Id.*

241. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964).

242. *Id.* at 266. The Court added that the fact that Times paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Id.* Any other conclusion would discourage newspapers from carrying editorial advertisements of this type, which would close an outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities but who wish to exercise their freedom of speech. *Id.*

243. *Id.* at 266.

244. *Kasky*, 45 P.3d at 260. The California Supreme Court held that Nike's speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech. *Id.*

245. *Sullivan*, 376 U.S. at 271.

in free debate and that it must be protected if freedom of expression is to have the “breathing space” that it needs to survive.²⁴⁶ In *Kasky*, although Nike’s speech may potentially be misleading, mistakes are inevitable and in order to have an uninhibited free public debate, its speech must be given “breathing space” that it needs. Otherwise, without such protection corporate speech will not survive.

Nike’s speech may be contrasted to the speech in *Virginia Pharmacy* and *Youngs Drug* where the Court held that the companies’ speech was commercial speech and granted a lower level of protection than it gave in noncommercial speech cases.²⁴⁷ In *Virginia Pharmacy* the corporations sought to legalize the flow of drug price information to be enjoyed by pharmacists and by the public.²⁴⁸ In *Kasky*, on the other hand, Nike is not litigating to have permission to market its prices and discounts. Nike’s speech about labor practices goes beyond that of merely advertising prices and discounts. Nike’s speech involves an area of major public concern and nowhere in its public campaign does it talk about its prices and discounts typical to commercial speech.

In *Youngs Drug*, a manufacturer and distributor of contraceptives brought action challenging a federal statute prohibiting unsolicited mailing of contraceptive advertisements.²⁴⁹ The manufacturer publicized the availability and desirability of its products by various methods, such as flyers and pamphlets.²⁵⁰ In the pamphlets *Youngs Drug* expressly discussed different types of product’s quality and prices.²⁵¹ The Court correctly analyzed the manufacturer’s speech as commercial because the purpose of the flyers was to inform the public in order to promote a transaction.²⁵² In *Kasky* on the other hand, Nike’s speech goes beyond that of discussing its products and promoting the sales of its products. The purpose of its speech was to inform the pub-

246. *Id.* at 272 (citing *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

247. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1975); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983).

248. *Virginia Pharmacy*, 425 U.S. at 750.

249. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 61 (1983). The statute at issue, § 3001(e)(2) stated that “[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs” *Id.*

250. *Id.* at 62.

251. In the district court, *Youngs Drug* offered examples of its informational pamphlets. *Id.* The first, entitled “Condoms and Human Sexuality,” was a 12-page pamphlet that described the use, manufacture, desirability, and descriptions of various Trojan brand condoms manufactured by *Youngs Drug*. *Id.* The second pamphlet, entitled “Plain Talk About Venereal Disease,” discussed at length the problems of this sexually transmitted disease, the use and advantages of condoms in preventing venereal disease. *Id.*

252. *Id.* at 69.

lic about its labor practices, and that went beyond the purpose of trying to sell shoes.²⁵³

B. *Practitioner Guidelines*

Corporate speech that concerns matters of public concern and debate should be given the same protection as noncommercial speech. However, given that the Supreme Court did not grant corporate speech that protection, there are certain guidelines that practitioners should follow to keep their corporate clients litigation free.

First, and the most obvious piece of advice, when a corporate officer is speaking about the corporation, make sure he tells the truth. If there is a fact that he is unsure of, advise him to say that he does not know even if he is 75% sure. Unless there is guarantee that a certain statement is 100% accurate, he may be putting his company at liability for a false advertising suit.

Second, avoid making a controversial statement or statement based on a study, such as concerning health effects of a product, unless required to do so by the industry. The effects of making such a statement can be demonstrated by *National Commission on Egg Nutrition v. Federal Trade Commission*.²⁵⁴ In this case, the Federal Trade Commission ("FTC"), acting pursuant to its power to prohibit false and misleading advertising, entered an order directing the National Commission on Egg Nutrition ("NCEN") to stop disseminating advertisements containing statements to the effect that there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease.²⁵⁵ To achieve this goal, NCEN began an advertising and public relations campaign to convey the message that eggs are harmless and beneficial for human nutrition.²⁵⁶ The FTC asked for an injunction and filed a complaint charging the NCEN with having violated the FTC Act by placing false and misleading newspaper advertisements.²⁵⁷ The NCEN claimed that the statements it made were true,

253. *Kasky v. Nike, Inc.*, 45 P.3d 248 (Cal. 2000).

254. *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d. 157 (7th Cir. 1977).

255. NCEN, a trade association, was formed by members of the egg industry to counteract anti-cholesterol attacks on eggs that resulted in declining per capita egg consumption. *Id.* at 158. The FTC also prohibited making statements similar to the statement described above and the right to make other statements conditional by the order. *Id.*

256. *Id.* NCEN acted through placing advertisements containing statements with respect to the relationship between eating eggs and heart and circulatory disease that the FTC claimed were false and misleading. *Id.*

257. *Id.* (FTC brought suit under §§ 5, 12 of the FTC Act, 15 U. S.C. 45, 52 (1983)).

but even if they were misleading, the FTC's order infringes upon its First Amendment rights.²⁵⁸

The evidence that the FTC used in arguing that NCEN's statements were based on a diet/heart disease hypothesis that was a result of a large body of clinical-pathological, experimental and epidemiological studies.²⁵⁹ The NCEN did not challenge these studies, rather it relied upon the testimony of its own expert witnesses that some scientists and doctors did not agree with and claimed that their opinions are not direct evidence that the number of eggs consumed does not increase the risk of heart disease.²⁶⁰ The Court held that, "NCEN has done more than espouse one side of a genuine controversy . . . It has made statements denying the existence of scientific evidence[,] which the record clearly shows does exist. These statements are, therefore, false and misleading."²⁶¹

The lesson to be learned from the NCEN's mistake is that unless a substantial number of studies exist that have been subject to sufficient publication and peer review, an attorney should advise his corporate client to not make statements based on unsubstantiated studies to avoid false advertising suits. Agencies and corporations, especially those that are food producers and or manufacturers, are safer relying on government-accepted studies when advertising to avoid liability.

Third, information that directly pertains to the company's product or rate structure can be freely advertised (as long as accurate). A good example of this suggestion is *Central Hudson Gas & Electric*

258. *Egg Nutrition*, 570 F.2d. at 160.

259. *Id.* at 160. The administrative law judge, after describing these studies, added that they were conducted using scientific methodologies, were performed by competent and highly regarded investigators, have been reported in recognized scientific journals after peer review, and have been generally accepted by experts in the field and by the scientific community. *Id.*

260. *Id.* at 161.

261. *Id.* In response to the First Amendment argument, the court held that advertising that is false, deceptive, or misleading is subject to restraint. *Id.* at 162 (adding that since the advertiser knows his product and has commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech). The Court argued that the public and private benefits from commercial speech are based on confidence in its accuracy and reliability. *Id.* (adding that leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena). NCEN argued that its speech is not commercial speech because it does more than merely propose a commercial transaction because it contains expression of opinion on an important and controversial public issue. *Id.* Thus NCEN claimed that its speech was like the paid advertisements in *New York Times v. Sullivan*. In response, the Court held that the NCEN's statements were not phrased as statements of opinion, but rather denied existence of evidence to induce people to buy eggs. *Id.* at 163. The Court further held that the nature of the communication does not change when a group of sellers joins in advertising their common product. *Id.*

Corporation v. Public Service Commission of New York.²⁶² In *Central Hudson*, an electric utility corporation brought suit to challenge the constitutionality of a New York regulation that banned the promotional advertising of its services and rates.²⁶³

The Court held that the government may regulate advertising that is false or misleading, but if the communication is neither of these two, the government action is circumscribed.²⁶⁴ The government regulatory technique may extend only as far as the interest it serves and cannot completely suppress information when narrower restrictions on expression would serve its interests as well.²⁶⁵ The Court concluded that *Central Hudson's* promotional advertising constituted protected speech that was valuable to consumers who must decide whether to use the monopoly service or turn to an alternative energy source, and how much of it to purchase.²⁶⁶

Based on *Central Hudson*, corporations are free to advertise competing products and even promote their own product over another. This may not be taken as far as saying that one product is better than the competitors without substantial and government accepted studies

262. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

263. *Central Hudson*, 447 U.S. at 560. The Commission ordered electric utility companies to cease all advertising that promoted the use of electricity. *Id.* Its order was based on findings that New York State did not have sufficient fuel stocks or sources of supply to furnish all customer demands for the 1973-1974 winter. *Id.* Three years later when the fuel shortage eased, the Commission wanted to continue the ban on promotional advertising. *Id.* *Central Hudson* opposed the ban on First Amendment grounds. *Id.* The Court developed a test, the *Central Hudson* test, to determine whether restrictions on commercial speech violate the First Amendment. *Id.* The first element of the test is to determine whether the expression is protected by the First Amendment. *Id.* at 561. For commercial speech to come within that provision, it must at least concern a lawful activity and not be misleading. *Id.* Next, one must ask whether the asserted governmental interest is substantial. *Id.* If both inquiries yield positive answers, then one must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest. *Id.*

The Court reasoned that the First Amendment as applied to the States through the Fourteenth Amendment protects commercial speech from unwarranted governmental regulation. *Id.* Commercial speech not only serves the economic interest of the speaker but also assists consumers and furthers the societal interests to disseminate information. *Id.* The Court in the past had rejected a paternalistic view that allowed government to suppress or regulate commercial speech. *Id.* The Court has held that people will perceive their own best interests only if they are well informed, and the best means to achieve that end is to open the channels of communication rather than to close them. *Id.* Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. *Id.* at 562 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977)).

264. *Id.* at 564.

265. *Id.* at 565 (holding that the State cannot regulate speech that poses no danger to the asserted state interest).

266. *Id.* at 585.

to avoid suits for false advertising. So a practitioner may advise his client to promote his company's product freely.

Fourth, information that pertains to the company's policies or product labeling information may be freely advertised based on *Rubin v. Coors Brewing Company*.²⁶⁷ In *Coors Brewing*, a brewer brought a First Amendment action seeking an injunction against a subsection of the Federal Alcohol Administration Act (FAAA) that prohibited beer labels from displaying alcohol content.²⁶⁸ Coors Brewing Company (Coors) applied to the Bureau of Alcohol, Tobacco and Firearms (BATF) for approval of proposed labels and advertisements that disclosed alcohol content of its beer.²⁶⁹ BATF rejected the application based on the Federal Alcohol Administration Act that prohibited disclosure of the alcohol content of beer on labels or in advertising.²⁷⁰

Coors argued that there were less restrictive alternatives available that would be less intrusive on its First Amendment rights.²⁷¹ Coors also argued that it only wanted to disclose truthful, verifiable, and non-misleading factual information about the alcohol content.²⁷² The Court noted that although the First Amendment does not protect all commercial speech, the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system" because it informs the public to make decisions that drive the economy.²⁷³ A consumer's interest in the free flow of commercial information may be as intense, if not even more intense, than his interest in that day's urgent political debate.²⁷⁴

The lesson that can be learned from this decision is that a corporation may feel free to advertise its product information and compete on it. Also, if a corporation wanted to disclose truthful and verifiable policy information it may do so without worrying about incurring liability.

267. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 495 (1995).

268. *Id.* at 478; 27 U.S.C. §§ 201-219a (1987).

269. *Rubin*, 514 U.S. at 479.

270. *Id.* The Government felt the band was necessary to suppress the threat of "strength wars" among brewers, who, without the regulation, would seek to compete in the marketplace based on the potency of their beer. *Id.*

271. *Id.* at 485.

272. *Id.* at 486. Coors argued that Congress actually intended the FAAA to prevent brewers from making inaccurate claims concerning alcohol content, rather than preventing strength wars. *Id.* at 484.

273. *Id.* at 486.

274. *Id.* at 481-482 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763 (1976)). The Court then applied the *Central Hudson* test, and rejected the government's claim due to a lack of credible evidence that labels would promote strength wars or lead to alcoholism. *Id.* at 485 (explaining how the test was applied and how the Court arrived at its ruling).

IV. IMPACT

The first and main impact of the California Supreme Court decision and lack of a decision by the Supreme Court on Nike is that when Nike tries to defend itself from attacks, it does not have the same First Amendment protection its critics enjoy.²⁷⁵ Because Nike competes in the marketplace of ideas and the marketplace of manufactured goods, it does not get the same level of protection because its speech is considered commercial.²⁷⁶ Since Nike sells athletic products and its defense against critics may help sell those athletic products, the California Supreme Court asserts that Nike may not freely engage in the debate or run the risk of lawsuits under California's unfair competition and false advertising laws should it ever make a factual claim that turns out to be inaccurate.²⁷⁷ According to the California Supreme Court decision, if Nike utters a factual misstatement, unlike its critics, it may be sued for restitution, civil penalties, and injunctive relief under these statutes.²⁷⁸

The overall impact of the decision is that corporate attorneys will advise their corporate clients not to speak at all if they are at risk of being sued every time they may answer a public concern. The result of this is that the public will be in the dark about corporate practices and will no longer be able to monitor and criticize business practices. Corporations, in turn, will not know how to improve or serve their consumers better because they will only have input from internal sources that may not be as objective as the general public. Although there is a general notion of mistrust in our society that makes large corporations an easy target, the end result will only backfire. Silence will lead to further abuse and lack of public debate about corporate practices.

The corporate form has beneficial social purposes for individuals.²⁷⁹ Viewing corporations from a social and economic perspective, the corporate form serves an important democratic function in "facilitating the personal self-realization of the individuals who have made the vol-

275. *Kasky v. Nike, Inc.*, 45 P.3d 243, 264 (Cal. 2002). Judge Chin of the California Supreme Court was one of the dissenters of the court's opinion. He argued that First and Fourteenth Amendments "embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 263 (citing *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

276. *Id.* at 263.

277. *Id.* at 264.

278. *Id.* Chin argued that handicapping one side of the debate on important, worldwide issues as labor standards, is "both ill considered and unconstitutional." *Id.* at 263.

279. Martin Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

untary choice to make use of it.”²⁸⁰ Also, regardless of the expressions source, corporate speech has the effect of aiding self-realization of the recipients of that expression.²⁸¹ The Court in *Thornhill* stated that:

[I]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.²⁸²

Nike’s speech, in an attempt to influence public opinion on economic globalization and international labor rights and working conditions, gives the public insight and perspective into the debate.²⁸³

Another major consequence of this decision is that based on fear of being sued, corporations will not inform their shareholders in annual corporate reports about policy changes, or additions.²⁸⁴ “Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to ‘steer wider of the unlawful zone.’”²⁸⁵ This concern is not purely theoretical.²⁸⁶ Nike says without contradiction that because of this lawsuit it has decided “to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media.”²⁸⁷ It adds that it has not released its annual Corporate Responsibility Report, has decided not to pursue a listing in the Dow Jones Sustainability Index, and has refused “dozens of invitations . . . to speak on corporate responsibility issues.”²⁸⁸

280. *Id.* at 237. Redish argues that, “[o]ne should view corporate speech, then, as a form of indirect or catalytic self-realization, no less valuable than the more obvious and direct modes of self development and thus fully consistent with the purposes served by the constitutional protection of speech.” *Id.*

281. *Id.* (arguing that this “obvious fact [is] often mystifyingly ignored by commentators who wrongly reject constitutional protection for corporate speech”). *Id.*

282. *Kasky*, 45 P.3d at 266 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940)).

283. *Id.* at 267 (arguing that this speech should be fully protected as “essential to free government” (citing *Thornhill*, 310 U.S. 88, 95 (1940))).

284. *Id.* at 268. Justice Breyer, with whom Justice O’Connor joined in dissent, criticized that the majority decision will result in negative consequences not only for Nike, but also its shareholders. *Id.*

285. *Id.* at 268 (citing *New York Times v. Sullivan*, 376 U.S. 254, 289 (1964)).

286. *Id.* The dissent adds these facts to demonstrate the negative consequences of the California and Supreme Court decisions. *Id.*

287. *Id.*

288. *Id.*

There are several benefits in allowing Nike's speech full protection. First, in addition to furthering positive values of free expression, regardless of the corporate speaker's motive for the expression, corporate speech may serve a vital role in checking for potential governmental abuses.²⁸⁹ Second, regardless of Nike's economic motivation, the public has a right to receive information on matters of public concern from both sides of the debate.²⁹⁰ Freedom of speech presupposes a willing speaker, and protection is afforded to the communication, its source, and its recipient.²⁹¹

Third, Nike's speech is not traditional commercial speech.²⁹² Traditional commercial speech has been held by the Supreme Court to do no more than "propose a commercial transaction."²⁹³ But in this case, Nike's speech went beyond that criterion because it provided information vital to a public debate on international labor rights and reform.²⁹⁴ Its press releases and letters were not pretextual, but prompted by accusations and public criticism.²⁹⁵ In the least, this case illustrates circumstances where commercial speech is inextricably intertwined with noncommercial speech.²⁹⁶ Nike could not realistically discuss its general policy on employee rights and working conditions without referring to the labor practices of its overseas manufacturers, its products, and how they are made.²⁹⁷ Attempting to separate out the commercial and noncommercial components of its speech would be "artificial and impractical."²⁹⁸ Based on the majority's decision Nike is not the only one that loses - the public does too.²⁹⁹

289. Redish, *supra* note 279, at 237. Redish and Wasserman argue that although this role has traditionally belonged to the media, it is widely recognized today that the media has failed to perform that function effectively and thus the private corporate sector may perform that government checking function due to its built-in incentives of the corporate form. *Id.*

290. *Kasky v. Nike, Inc.*, 45 P.3d 243, 263 (Cal. 2002).

291. *Id.*

292. *Id.*

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

294. *Kasky*, 45 P.3d at 248.

295. *Id.* at 266 (pointing out that it was noted that Nike did not use any of its product labels, packaging, advertising, or other media directly to reach its actual or potential consumers. Nike's speech did not merely include references to public issues. Nike's practices and policies were the actual public issue. Its "discussion of controversial issues strikes at the heart of the freedom to speak." *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980)).

296. *Id.* (citing *Riley v. Nat'l Fed'n of the Blind*, 487 US 781 (1988)).

297. *Id.* at 270 (J. Chin argued that Nike's allegedly commercial statements about its labor practices cannot be separated from its noncommercial statements about a public issue because its labor practices are the public issue).

298. *Id.* (citing *Riley v. Nat'l Fed'n of the Blind*, 487 US 781, 796 (1988)).

299. *Id.*

Fourth, with the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of advertising, the gap between commercial and noncommercial speech is shrinking.³⁰⁰ The Supreme Court recognized the existence of the political-economic intersection in *Bellotti*, when it held that otherwise protected expression did not lose its protected status just because its source was a corporation.³⁰¹

Another major negative impact of *Kasky* is the California Supreme Court's limited purpose test.³⁰² First, rather than identifying commercial speech by its content, the limited purpose test distinguishes commercial speech from noncommercial speech by using the identity of the speaker and the intended audience.³⁰³ The impact of making the identity of the speaker dispositive is that speech by someone engaged in commerce that relates to the speaker's business operations, products or services may receive less protection only based on his identity.³⁰⁴ Therefore, the California Court has singled corporate speakers out and unconstitutionally favors certain speakers over others.³⁰⁵ Under the new test, only corporate speakers are held strictly liable for false and misleading representations pursuant to the California Unfair Competition Laws,³⁰⁶ while other speakers who make the same representations may face no such liability, regardless of the context of their statements.³⁰⁷

300. *Kasky*, 45 P.3d at 268. Examples of the intersection between commercial and noncommercial speech includes scientific, political, and religious speech. *Id.*

301. Redish, *supra* note 281, at 236 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

302. *Kasky*, 45 P.3d at 255.

303. Redish, *supra* note 279, at 271 (citing *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2000)).

304. *Id.* (adding that this contravenes the Supreme Court's holding in *Pacific Gas* where the Court held that, "[t]he identity of the speaker is not decisive in determining whether speech is protected.").

305. *Id.* at 273 (arguing that the First Amendment does not permit favoritism toward certain speakers "based on the identity of the interests that [the speaker] may represent." (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978))).

306. *Id.* (citing CAL. BUS. PROF. CODE §§ 17204, 17535).

307. *Id.* Charles Wilson, President of General Motors, in 1953 boldly asserted that, "what was good for our county was good for General Motors, and vice versa." Redish, *supra* note 279, at 235. He expressed the controversial political and economic theory that does not differentiate between the interests of the public and private spheres (noting Professor Charles Lindblom stated that the government and businesses share "the major leadership roles in the politico-economic order." Charles E. Lindblom, *POLITICS AND MARKETS*, 179 (1977)). He also recognized the indisputable fact of modern political life, that the health and welfare of the private corporate world has immeasurable impact on the health and welfare of the government, and vice versa. *Id.* at 236. He asked the readers the following questions based on his theory of the indisputability of the intersection between governmental and corporate interests:

Who, one could reasonably ask, has a greater interest in what actions the government takes with regard to the economy than corporations, who very survival may well turn

Second, the limited purpose-test stifles the ability of speakers engaged in commerce to participate in debates over public issues.³⁰⁸ The California test renders any public representation of fact by a corporate speaker about that speaker's products commercial speech.³⁰⁹ A corporation's product, however, includes the corporation itself.³¹⁰ Corporations are regularly bought and sold, thus corporations market not only their products but also themselves.³¹¹ Because all corporate speech about a public issue reflects on the corporate image and affects the business goodwill and sale value, the limited purpose test makes all such speech commercial.³¹² By subjecting all corporate speech about business operations, products, and services to strict liability, the majority's limited purpose test unconstitutionally chills a corporation's ability to participate in a debate over matters of public concern.³¹³ Also, because the corporation could never be sure whether its truthful statements may deceive or confuse the public, thus incurring significant burden and expense in litigating the issue, a lot of valuable information that a corporation would otherwise provide will remain unpublished.³¹⁴

on the success or failure of those actions? Who possesses more firsthand knowledge and expertise on issues relevant to potential government regulation of private economic activity? To exclude corporate expression from the scope of free speech protection would unwisely eliminate from public debate a substantial amount of relevant and potentially vital information and opinion on issues of great importance to the public. *Id.* at 235 (citing excerpts from Two Wilson Hearings Before Senate Committee of Defense Appointments, N. Y. TIMES, Jan. 24, 1953).

In 1953, Wilson was President Eisenhower's nominee to be Secretary of Defense. *Id.* After Wilson made that comment, he was subjected to ridicule and criticism in political and intellectual circles for greedily equating his company's own private economic concerns with those of national interest. *Id.*

308. *Id.* at 243 (arguing that speech on public issues is essential for self government and to ensure uninhibited debate on public issues, some false or misleading speech must be tolerated). *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

309. Redish, *supra* note 281, at 272.

310. *Id.*

311. *Id.* (adding that business goodwill is an important asset of every corporation and contributes significantly to the sale value of the corporation).

312. *Id.* (citing *Kasky v. Nike, Inc.*, 45 P.3d 243, 260 (Cal. 2002)).

313. *Id.* (noting the "chilling effect is exacerbated by the breadth of § 17204 and § 17535, which prohibit not only false advertising but also advertising which although true, is either actually misleading or which has the capacity, likelihood, or tendency to deceive or confuse the public. This broad definition of actionable speech puts a corporation 'at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning.' The judge later suggested that if the government is concerned with protecting consumers from fraud, it can create a narrower false advertising law that could permit the states to bar all false or misleading advertising about the characteristics of a product or services, as the product's efficacy, quality, value or safety. This way, corporate speech will not be undermined by threat of liability").

314. *Kasky*, 45 P.3d at 273.

V. CONCLUSION

Based on the above analysis, until the Supreme Court reviews this case or a similar case and finally reverses the California Supreme Court's ruling in *Kasky*, when advising business clients on how to publicly address issues that the client may consider noncommercial, attorneys should notify the client that the safest choice is silence.³¹⁵ The "heart of the First Amendment's protection" lies in "the liberty to discuss publicly and truthfully all matters of public concern . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to enable the members of society to cope with the exigencies of their period."³¹⁶ Americans, as consumers or labor critics, have a right to be able to hear information from as many sources as possible and make choices about who to believe and what products to buy. Such freedoms may become a thing of the past if censorship continues. And that is a sad thing.

315. Loeb, *supra* note 132, at 16.

316. *Bellotti*, 435 U.S. at 776 (quoting *Thornhill v. Alabama*, 310 U.S. at 101-102). The *Thornhill* court noted that the exigencies of the colonial period that gave birth to the First Amendment, centered around freedom from oppressive administration of government, but, in the industrial society of 1940, the same constitutionally protected "area of free discussion" embraced the dissemination of information about labor disputes. *Id.* By the same logic, the labor practices of foreign contractors of domestic companies come within the "exigencies" of our time. *Id.*

