WHAT IS COMMERCIAL SPEECH? THE ISSUE NOT DECIDED IN *NIKE V. KASKY*

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May a company selling tuna fish tell consumers—in advertisements, letters to environmental groups, and elsewhere—that its tuna is caught in a dolphin-safe manner, when company officials know that the company's nets regularly capture and kill dolphins? May a cosmetics company tell consumers—through advertisements, letters to department stores, and otherwise—that it does not test its products on animals, even though it knows that it regularly uses animal testing in a way that many of its customers would find repugnant? May an agricultural company tell consumers that its products are organic when it knows that it uses pesticides and herbicides that would not fit anyone's definition of organic? May a manufacturer represent that its products were "made in the United States" or produced with union labor, when it knows those statements are untrue?

The issue in *Nike, Inc. v. Kasky*[1] was whether the First Amendment protects a company's making false factual statements about its products, likely to matter greatly to some consumers in their purchasing decisions, in an effort to increase sales. An individual sued Nike, alleging that Nike made false and misleading statements regarding its labor practices in press releases, letters to newspapers, and letters to university presidents and athletic directors. The statements were made in response to a series of broad-

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[1] 123 S. Ct. 2554 (2003) (dismissing the case as certiorari having been improvidently granted).

cast and print media reports alleging that, in factories in China, Vietnam, and Indonesia where Nike products are made, workers are paid less and required to work longer hours than permitted under applicable law and were subjected to verbal and physical abuse and unsafe working conditions. The complaint alleged, in part, that Nike's statements regarding its labor practices were knowingly false. The trial court dismissed the suit on demurrer, holding that the First Amendment protected Nike's speech even if it was false and misleading. The California Supreme Court reversed.[2]

The California Supreme Court held that Nike's speech was commercial speech that could be punished under state false advertising and unfair competition laws. It reasoned that Nike's speech was commercial speech rather than constitutionally protected political speech because three factors were met. First, the speaker, Nike and its officers, engaged in commerce. Nike is a commercial speaker communicating a commercial message.[3] Specifically, it "manufacture[s], import[s], distribute[s], and sell[s] consumer goods in the form of athletic shoes and apparel."[4] Second, the intended audience was composed largely of actual and potential purchasers of Nike products. The letters that Nike sent to the colleges were "addressed directly to actual and potential purchasers of Nike's products"[5] and the letters to newspaper editors were statements to "maintain and/or increase its sales and profits."[6] And, third, the content of the speech consisted of representations of fact of a commercial nature that were intended to maintain and increase sales of Nike products.[7] The court noted that by "describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations" with the aim of increasing its sales.[8]

When the United States Supreme Court granted Nike's petition for certiorari, Nike argued that its speech, even if false, was absolutely protected by the First Amendment because it was political (since it concerned sweatshops) rather than commercial speech (such as statements about price or ingredients). The position taken by Nike and its amici in the United States Supreme Court failed to recognize that consumers may care more about the conditions un-

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[2] Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).
[3] *Id.* at 258.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

der which goods are produced—whether the tuna is caught in a dolphin-safe manner, whether cosmetics are tested in a "cruelty-free" way, whether the produce is organic, whether the shoe company produces its products in "sweatshops" with inadequate wages and working conditions—than the price, ingredients, or caloric content.

The Supreme Court dismissed the writ as improvidently granted. The Court was correct to dismiss *Nike v. Kasky* without reaching this issue. In fact, in our amicus brief to the Supreme Court, we urged that the case be dismissed for exactly the reasons given by Justice Stevens: Kasky did not have an injury sufficient to satisfy Article III's standing requirement and there was no final judgment by the California courts.[9] But the result of the dismissal was that the important underlying issue in the case was unresolved. The settlement of the case means that some other litigation will need to be the occasion for addressing and resolving the constitutional questions presented by *Nike v. Kasky*.

In this Article, we make two major points. First, we describe and defend the line between commercial and noncommercial speech and show that Nike's speech was safely on the commercial side of the line. Factual statements by a manufacturer to consumers about its products with the objective of increasing sales are and should be considered commercial speech. Second, we argue that the distinction between commercial and noncommercial speech should be maintained and that the Court should not impose the heightened scienter requirement that Nike advocated. Our focus in this Article, and this Symposium, is *Nike v. Kasky*. But the case is a vehicle for examining difficult, unresolved, and important issues of First Amendment law.

I. FACTUAL STATEMENTS BY A MANUFACTURER TO CONSUMERS ABOUT ITS PRODUCTS WITH THE OBJECTIVE OF INCREASING SALES ARE COMMERCIAL SPEECH

A. The Reasons for According Commercial Speech Reduced First Amendment Protection

The Supreme Court has consistently held that commercial speech is a distinct category of expression that is not afforded the same First Amendment protection as noncommercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[10] the Court "recognized 'the "commonsense" distinction be-

[9] *See* Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2557 (2003) (Stevens, J., concurring).
[10] 447 U.S. 557 (1980).

tween speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'"[11] The Court expressly declared that "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[12]

Commercial speech should be regarded as a distinct category of expression for three reasons. First, "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator" because the speaker provides "information about a specific product or service that he himself provides and presumably knows more about than anyone else."[13] Second, commercial speech is less easily chilled because commercial speakers have an economic incentive to speak which counteracts any chilling effect that might occur from regulation.[14] Third, "[t]he interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech."[15] False commercial speech causes economic harms to consumers who are deceived into buying products and services that do not meet their needs or expectations. As Justice Stevens observed: "The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech."[16]

All of these concerns were implicated in *Nike v. Kasky*. First, Nike was in the best position to know about the conditions under which its products were manufactured. Nike made much in its brief of the difficulty of overseeing its far-flung network of contractors around the globe.[17] But as compared to consumers, it still has far better access to the evidence concerning the working conditions in places where its products are made. Moreover, surely the distinction between commercial and noncommercial speech cannot rest on the size or the subcontracting practices of a seller of products. If Nike were to lie to its customers about the quality of its shoes or the materials from which they are made, it should enjoy no greater constitutional protection from a false advertising suit than a small company. Because California's Unfair Competition

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[11] *Id.* at 562 (citation omitted).

[12] *Id.* at 562-63.

[13] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

[14] *Id.*

[15] Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 n.21 (1993).

[16] Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J., concurring).

[17] *See* Brief for the Petitioners at 40, Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003) (No. 02-575).

Law[18] and False Advertising Law[19] do not impose strict liability, the appropriate way to deal with the truth of Nike's assertions is in a defense, not by granting it blanket constitutional protection.

Second, Nike's strong economic incentive to maintain and expand sales of its products, even in the face of anti-sweatshop criticism, will ensure that it will continue speaking out about its labor practices. Nike argued in its brief that the prospect of liability might or did chill the company's speech and that it had refrained from some speech.[20] But *nothing* in the record of the case supported that factual assertion and no court made findings about it. Moreover, the question of whether a particular regulation is likely to chill protected speech needs to be made on more than an ad hoc basis. Examination of the spectrum of cases involving allegedly false advertising shows that there is no reason to believe that companies will be chilled in speaking out on general issues for fear of false advertising suits when they make false statements about their products or processes. The Supreme Court long has noted that commercial speech is unlikely to be chilled. In fact, the Court has nearly directly refuted Nike's contention when it observed: "Commercial speech, because of its importance to business profits, and because it is carefully calculated, is also less likely than other forms of speech to be inhibited by proper regulation."[21]

The third rationale for less regulation of commercial speech—the government's interest in preventing commercial harms—was also implicated in *Nike*. California's law exists to protect consumers from exactly the harms alleged in Kasky's complaint: a company intentionally and recklessly making false statements out of a desire to increase its sales among consumers who care about the conditions under which the goods are produced.

B. The Line Between Commercial and Noncommercial Speech

Not only were the policies underlying the commercial speech doctrine implicated by Nike's statements, its statements to consumers about its products were commercial speech under the governing *Bolger* test. The Supreme Court, in *Bolger v. Youngs Drug Products Corp.*,[22] identified three characteristics that distinguish commercial from noncommercial speech: (1) whether the communication is an advertisement; (2) whether it concerns a product;

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[18] CAL. BUS. & PROF CODE §§ 17200-209 (West 2000).
[19] *Id.* at §§ 17500-509 (West 2000).
[20] Brief for the Petitioners at 38-39, *Nike* (No. 02-575).
[21] Friedman v. Rogers, 440 U.S. 1, 10 (1979).
[22] 463 U.S. 60 (1983).

and (3) whether the speaker has an economic motivation.[23] In addition, the Court has explicitly held that the fact that the speech concerns public issues is not sufficient to take it out of the realm of commercial speech, for to do so would enable a company "to immunize false or misleading product information from government regulation simply by including references to public issues."[24]

All three elements of the *Bolger* test are met by Nike's speech. First, many of Nike's statements that formed the basis for Kasky's complaint were in the form of paid advertisements. Nike "took out full-page advertisements in major U.S. newspapers (*New York Times*, *Washington Post*, *U.S.A. Today*, *San Francisco Chronicle*, etc.)."[25] The rest of Nike's statements, although not in the form of paid advertisements, were part of a public relations campaign designed to sell products. As discussed below, the form of the communication should not be determinative of whether it is commercial speech. If Nike sent letters to university presidents and athletic directors inaccurately describing the price of its products or falsely describing their quality, there would be no dispute as to whether those letters constituted commercial speech even though not in the traditional form of a paid advertisement. These were not statements by Nike officials as part of a debate on a college campus or on a TV news show or in an interview with a print or broadcast journalist; these statements were part of Nike's public relations campaign. In an era when corporations increasingly see news coverage as a form of PR, and news shows as crucial forum in their advertising and public relations campaigns, the line between news and advertising is blurred. But that does not mean that the line should not or does not exist. Nike's statements were on the PR side of that line.

The second element of the *Bolger* test was thus likewise met: The statements were about Nike's products and how they were produced. Nike's statements were not about general working conditions in the apparel industry; the statements were specifically about the conditions under which Nike products are made. Nike was not opining on the desirability of sweatshops as a form of economic development in Southeast Asia, or even generally on whether its practices were good or bad for its workers or the countries in which they live. Rather, it made factual statements about

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[23] *Id.* at 66-67.

[24] *Id.* at 68 (citation omitted).

[25] First Amended Complaint at ¶ 56, Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002) (No. 994446).

its practices to actual and prospective consumers for the purpose of selling its products.

Third, Nike indisputably had an economic motivation. Nike made the factual statements about its labor practices with the objective of persuading consumers to buy its products. College presidents and athletic directors are an important part of Nike's business. Letters to them, and paid advertisements in newspapers, stating that the products were produced under safe and lawful conditions, were not about debating globalization; they plainly were aimed to ensure continued sales.

Perhaps because of the weakness of its arguments that its speech was noncommercial under established law, Nike advocated a new and much narrower test for commercial speech than the Court articulated in *Bolger*. Nike contended that commercial speech is speech that does "'no more than propose a commercial transaction'" and that is "'related solely to the economic interests of the speaker and its audience.'"[26] The approach that Nike proposed before the Supreme Court would substantially narrow the current definition of commercial speech. It would jeopardize federal and state deceptive practices and false advertising laws by allowing companies to make intentionally false factual statements about their products with the goal of increasing sales.

Part of Nike's argument was to argue for a narrower test for commercial speech, and part of its argument strategy was to challenge the way its speech was characterized both in Kasky's complaint (which was taken as true since the case was dismissed on the pleadings) and in the lower court. As Nike characterized the facts, its statements were mere expressions of opinion on matters of public concern. The problem with this strategy was that it was contrary to the facts. Nike's statements were not expressions of opinion about the desirability of using sweatshops or of globalization. It was not political speech intended to influence public policy. It was not speaking generally about labor practices in Southeast Asia, or about the effect of globalization on Third World economic development. Rather, the entire focus of Kasky's complaint was on the false *factual* statements made by Nike in an effort to increase sales of its products. As the Supreme Court powerfully observed: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *But there is no constitutional value*

[26] Brief for the Petitioners at 22, Nike, Inc. v. Kasky (No. 02-575) (citations omitted).

in false statements of fact."[27] As the California Supreme Court recognized, if Nike's ads and letters defended globalization generally, or argued that its practices were beneficial to the workers in Asia, its speech would be protected. Thus, Nike is wrong to state that California law prohibits it from speaking out "on nearly *every* public issue—from a company's diversity policy to its community relations efforts to its political activities."[28] It can offer its positions on public issues freely. But Nike's speech was not a general opinion about an issue of public interest; it was speaking about the specific practices under which its *own products* are made.

C. False Speech About a Product's "Moral" Qualities Is Nevertheless Commercial Speech

All agree that when it comes to commercial speech "it is the interest of the listener that is paramount, rather than that of the speaker."[29] Consumers have a variety of concerns when they buy products, and concerns about the conditions under which products are made are entitled to no less protection than concerns about price. Nike, in its brief to the Supreme Court, attempted to dismiss these consumer concerns as mere "moral judgments that only indirectly affect consumer behavior"[30] or that "affect[] purchasing choices only secondarily, if at all."[31] It asserted that those concerns bear "only a tangential relation to commercial transactions."[32] The ACLU, in its amicus brief, labeled the concerns as merely "political," though it conceded that such concerns may indeed affect consumer behavior,[33] and would limit false advertising laws to statements about price, safety, quality, or the "essential purpose or function" of a product.[34] Nike and the ACLU were wrong as a matter of fact and as a matter of First Amendment law.

As the Solicitor General noted in its amicus brief to the Supreme Court, the concerns of consumers cannot be so easily dismissed.[35] For instance, Jewish consumers who observe kosher dietary laws may care more about the conditions under which food

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[27] Gertz v. Welch, 418 U.S. 323, 339–40 (1974) (emphasis added).

[28] Brief for the Petitioners at 27, *Nike* (No. 02-575).

[29] Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner at 7, *Nike* (No. 02-575).

[30] Brief for the Petitioners at 19, *Nike* (No. 02-575).

[31] *Id.* at 36.

[32] *Id.*

[33] *See* Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner at 4, *Nike* (No. 02-575).

[34] *Id.* at 13; *see also* Brief for the Petitioners at 35, *Nike* (No. 02-575).

[35] Brief for the United States as Amicus Curiae Supporting Petitioners at 27-28, *Nike* (No. 02-575).

products are made (i.e., under rabbinic supervision, or not involving work on Saturdays) than about price. Their "moral" concerns about products likely have a greater and more direct impact on their buying than so-called "economic" concerns. Yet, false assertions about whether a product is kosher—whether on the product label, in paid advertising, in letters to consumers, or even in newspapers—would, under Nike's test, be beyond the reach of state false advertising laws. Similarly, false assertions by a company about whether its products are produced without pesticides or in other environmentally sustainable methods would be beyond regulation, even though many consumers prioritize whether a product is organic over its price. Many consumers would pay more for tuna caught in a dolphin-safe manner, or for cosmetics produced without animal testing, or for goods made in the United States, or for sneakers made in humane working conditions. Nike and its amici were wrong in assuming that these concerns are less important to consumers than other aspects of a product and its price.

The efforts of Nike and its amicus, the ACLU, to distinguish statements about price, safety, or "the essential functions" of a product are entirely subjective. Who is to say who decides what are the "essential" aspects of a product? For some, dolphin-safe tuna may be more important than whether tuna is packed in water or oil. There is no principled reason to accord different constitutional protection to an auto manufacturer's false statements about the injuries suffered by passengers in its cars, as opposed to statements about the injuries suffered by passengers in other cars involved in the crash or injuries suffered by workers who manufacture them. Consumer concerns about the safety of products should not receive less constitutional solicitude than consumer concerns about the safety of products to others, to the environment, or to workers.

Nor can this distinction be justified by saying that harms to consumers concerned about anything other than price, quality, or safety are non-"commercial" and thus not within the legitimate scope of government regulation of commerce.[36] Consumers who are misled about which companies to patronize suffer a commercial harm within the meaning of the Supreme Court's precedents.[37] Consumers who are misled in purchasing products based on false statements about whether they contain pork suffer financial loss

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[36] Nike made this argument in its brief to the Supreme Court. Brief for the Petitioners at 35, *Nike* (No. 02-575).

[37] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (plurality opinion) (discussing the government's interest in protecting consumers in their spending decisions).

whether they avoid pork for reasons of allergy, religious belief, or scruples about the slaughtering of hogs. The First Amendment should grant no less protection to consumers who avoid beef produced under certain conditions for fear of "mad cow" disease than those who avoid beef out of concerns for the welfare of cows or of those who raise and slaughter them. Consumers who avoid products produced without rabbinic supervision need to make informed purchasing decisions just as do consumers who avoid products produced in sweatshops. Their motives for buying or eschewing products are irrelevant; false factual statements that might influence their buying are commercial harms and they are well within the power of states to regulate.

Nothing but Nike's or the ACLU's own political preferences justifies treating consumers with humanitarian or environmental concerns with less solicitude and respect than consumers who count calories or pennies. As the Solicitor General argued in its brief to the Supreme Court, sellers should not be able fraudulently to command the premium prices that consumers will pay for environmentally friendly products any more than sellers can command premium prices for false statements about quantity or quality.[38]

The range of legitimate consumer concerns that may motivate buying is vast. Consumers who are concerned about the testing of products on animals, or about whether a product is organic, or about whether tuna is caught using dolphin-safe nets, or whether goods are made by union labor, would, under Nike's test, be unprotected. Some consumers may choose one brand of lemonade or pasta sauce over another based on the manufacturer's claim that it donates some percentage of the profits from the sale of its foods to charity. Others may care about the fuel efficiency of automobiles because of the expense, while some care because of their concerns about the environment or excessive dependence on foreign oil.

The heart of the distinction that Nike sought to draw between "moral" or "political" concerns about products and "economic" ones is that all noneconomic concerns about products will be protected by the marketplace of ideas.[39] That is simply not true. The commercial speech doctrine is premised on the Court's longstanding belief that the truth about a company's products and facilities will not emerge if the seller can lie about it. Consumers do not have access to the seller's facility and do not have the time to investigate the truth of the dozens or hundreds of claims they read or

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[38] Brief for the United States as Amicus Curiae Supporting Petitioners at 28, *Nike* (No. 02-575).

[39] Brief for the Petitioners at 34, *Nike* (No. 02-575).

hear about products every day. While it is true that when the characteristics of some products become controversial—whether cigarettes cause cancer, or SUVs pollute more than autos, or ground beef was produced in a way that increases the chance it will contain nerve tissue—it is more likely that the truth of some sellers' claims may be tested. But, according to Nike's own admission, its products are made in 900 factories in 51 countries, making it impossible for consumers of Nike products to know what goes on there. Moreover, there are dozens of companies that manufacture and sell athletic products and thousands that make and sell clothing generally. The fact that Nike's practices have received public attention should not allow it and all other clothing manufacturers blanket immunity from false advertising liability. The line between commercial and noncommercial speech cannot be based on a subjective, ad hoc, and changing assessment of which issues have sufficient political salience as to make consumer protection laws unnecessary.

Not only was Nike's effort to distinguish between commercial and political speech about products based on the preferences of consumers without support in law or logic, it would also be impossible to administer. If an auto manufacturer were to make false assertions in newspapers about the mileage of its SUVs, its speech would be commercial speech as regards consumers concerned only about fuel efficiency for cost reasons, but not as regards consumers concerned about fuel efficiency because of the effect on the environment or on American dependence on foreign oil. Statements to consumers who are allergic to pesticides could be regulated, but the same statement to those who avoid them because of the effect of pesticide spraying on agricultural workers could not. A false statement about whether there was meat within a product would be commercial speech if directed to consumers who avoid eating meat for health reasons, but not if it was directed to those who do so out of concern for the welfare of animals.

D. References to Specific Products and Format of Speech Are Not Determinative

Nike argued further to the Supreme Court that false statements of fact about its factory conditions are constitutionally protected so long as they contain no reference to its specific products.[40] This argument is mistaken because Nike's statements obviously concerned its products, even though they did not single out

[40] Brief for the Petitioners at 24, *Nike* (No. 02-575).

any particular one. A cosmetics company that runs a series of advertisements claiming that all of its products are manufactured without animal testing surely is engaging in commercial speech even if it does not mention specific lipsticks or eye makeup that it sells.

Under the California Supreme Court's rule, companies remain free to speak out about the benefits of animal testing, the desirability of using pesticides, or any other issue. They simply cannot make false factual statements about their own practices. Under Nike's approach, Congress and the states would be powerless to prohibit intentionally false advertisements by a company about whether its products are made without use of testing on animals or without use of any pesticides. A restaurant could lie about whether its kitchen is kosher, so long as it did not mention any particular product.

Whether speech is commercial speech is not determined by the format. Statements about a product by a manufacturer to prospective consumers are commercial speech even if they are not paid advertisements or on the product label, and even if they do not concern the price, quantity, or quality of the product. If Nike put leaflets under the doors in college students' dorms concerning the price and characteristics of its sneakers, no one would deny that this was commercial speech even though it was not a paid advertisement. If Nike had written to college athletic directors and made false assertions that the stitching on its shoes was strong, its statements would indisputably be deemed commercial speech. If it sent letters to assure prospective consumers that its working conditions ensured high quality products, its statements would be regarded as commercial. The reason is that the statements were to induce customers to buy its products. Nike's statements that gave rise to the *Kasky* litigation were no different.

Nike argued that the California Supreme Court's test for commercial speech was wrong because it failed to distinguish between speech made in an obviously commercial format—like a paid advertisement—and speech made in a less obviously commercial format—like letters to consumers or letters to newspapers. The distinction Nike seeks to draw, however, would protect both too much and too little speech, and the test for commercial speech used by the California Supreme Court is completely consistent with the Supreme Court's decisions as well as with the underlying reasons why commercial speech is treated as a distinct category of expression under the First Amendment.

First, regardless of format, an important distinction between commercial and noncommercial speech is whether the speaker is a person or entity "engaged in commerce."[41] It is highly relevant, although not determinative, that the speech was by an entity engaged in commerce, rather than by someone running for office, attacking or defending legislation, or implementing a law or policy.

Second, the California Supreme Court correctly emphasized that the "intended audience [of commercial speech] is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers."[42] Nike's speech was directed at buyers of its products, including universities and individual consumers.

Third, "the factual content of the message should be commercial in character"[43] in that "it is likely to influence consumers in their commercial decisions."[44] Kasky's complaint is concerned with the false factual statements made by Nike; not its expression of political opinions. Nike's statements were commercial in that their sole purpose was to increase sales of its products.

The core of Nike's criticism of the California Supreme Court's test for commercial speech was that it would give businesses less protection under the First Amendment than the speech of the businesses' critics. In particular, Nike and its amici argued to the Supreme Court that Nike's statements must be treated as noncommercial speech lest Nike critics receive greater First Amendment protection for their criticism of the company's products than the company receives for its defense of its products. In fact, however, the opposite is true. To accept Nike's position would give it *greater* protection than those criticizing its practices.

If Nike's critics make false statements about it and its products, then Nike can bring a suit for defamation and product defamation. The Supreme Court has allowed corporations to sue for defamation to protect their business reputation.[45] Tort law in every state permits corporations to bring actions for defamation and for product disparagement.[46] Whether Nike would need to prove ac-

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[41] Kasky v. Nike, Inc., 45 P.3d 243, 258 (Cal. 2002).

[42] *Id.* at 256.

[43] *Id.*

[44] *Id.* at 261.

[45] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (allowing a business to sue a credit reporting agency for defamation where the agency mistakenly reported that the business had filed for bankruptcy).

[46] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 561 (1965) (addressing defamation of corporations); El Meson Espanol v. NYM Corp., 521 F.2d 737 (2d Cir. 1975) (dismissing an action for libel where a New Jersey business sued a magazine for listing a street outside the

tual malice or only negligence will depend on whether corporations are characterized as public or private figures, and whether its statements are of public concern.[47] But Nike undoubtedly may sue its critics who make false statements about Nike and its products.

By contending that its expression is political speech protected by the First Amendment, Nike implicitly asserted that it cannot be held liable under the First Amendment even if its statements were intentional falsehoods. In the political arena, false speech is generally protected so long as it does not constitute a tort such as defamation or false light.[48] If Nike's speech is regarded as political expression and as such is protected by the First Amendment despite its falsity, then Nike would have *greater* protection than its critics. Further, although Nike argued that the truth about its products will emerge in the marketplace of ideas, Nike's critics are quite likely to be chilled by the threat of product defamation suits. Indeed, anti-sweatshops activists have been the subject of defamation suits in California.[49]

II. FALSE COMMERCIAL SPEECH SHOULD NOT BE PROTECTED BY THE FIRST AMENDMENT

The *Nike* litigation not only raised the question of the proper definition of commercial speech; Nike also sought to address whether actual malice, negligence, or strict liability is the appropriate standard for liability for false advertising. As we explain below, *Nike v. Kasky* was a poor vehicle for deciding this question. The scienter issue was not presented by the pleadings or ruled on by the lower courts. More broadly, however, we argue that false commercial speech, which has long been subject to state and federal regulation, should remain so.

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owner's restaurant as a prevalent area for narcotics trafficking); Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 152 F.2d 493 (7th Cir. 1945) (discussing an Illinois corporation's suit for libel against a union for disparaging remarks made in a union publication).

[47] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974) (describing standards of proof in defamation cases).

[48] *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (holding that in order to recover for false light invasion of privacy, plaintiff needed to prove that the defendant published its reports with knowledge of falsity or reckless disregard of the truth).

[49] *See, e.g.*, Fashion 21, Inc. v. Garment Workers Ctr., No. BC269427 (Cal. App. Dep't Super., filed March 6, 2002), appeal and petition for writ of mandate pending (Cal. Ct. App. Nos. B163114, B159788) (complaint for libel and unfair competition alleging anti-sweatshop activists defamed the company by protesting wage and hour law violations in flyers and at rallies and other organized protest activities).

A. The Scienter Requirement

Nike argued in its brief that the California law imposes strict liability for false advertising and that instead "actual malice" is the appropriate standard for liability.[50] The issue of scienter, however, was not ruled on by the California Supreme Court. The California Supreme Court did not hold, as Nike implied, that there is strict liability for false advertising under the California unfair competition law.[51] Quite the contrary, the California Supreme Court did not discuss the issue of scienter at all because its decision focused entirely on whether Nike's expression was commercial speech under the United States and California Constitutions.

Moreover, Kasky's complaint expressly alleged intentional and knowing false statements by Nike. Paragraph 30 of the First Amended Complaint stated: "Nike has represented that its products are manufactured in compliance with applicable laws and regulations requiring wages and overtime. The representations are intentionally and/or recklessly misleading and deceptive and/or were negligently made."[52] Indeed, the complaint alleged throughout that Nike intentionally and knowingly made false statements concerning the production of its products. For example, Paragraph 80 of the First Amended Complaint stated that "Nike's misrepresentations were made with knowledge or with reckless disregard of the laws of California prohibiting false and misleading statements."[53]

Because the California Supreme Court decided this case on a grant of a demurrer by the California Superior Court, all of the allegations of the complaint had to be accepted as true on appeal.[54] Thus, as the issue was framed in the United States Supreme Court, because Nike's speech was made with actual malice, any decision about whether the Constitution prohibits liability for false commercial statements based on anything less than actual malice would have been dicta.

Finally, apart from the Nike litigation, when the Supreme Court ultimately confronts the issue of scienter required for false commercial speech, it should hold that in this area liability can be based on intentional, reckless, or negligent false statements of fact intended to sell products to consumers. The government has a crucial interest in ensuring that commercial speech is accurate so that

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[50] Brief for the Petitioners at 43, Nike, Inc. v. Kasky (No. 02-575).

[51] CAL. BUS. & PROF CODE §§ 17200-17209 (West 2000).

[52] First Amended Complaint at ¶ 30, Kasky v. Nike, Inc. (No. 994446).

[53] *Id.* at ¶ 80.

[54] *See, e.g.*, Stevenson v. Superior Court, 941 P.2d 1157, 1158-59 (1997) (allegations of complaint are accepted as true in considering a demurrer).

consumers can rely upon it. As the Supreme Court stated: "[T]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely."[55]

The actual malice standard urged by Nike[56] would impose a very strict standard on government or private plaintiffs bringing actions for false commercial speech. In light of the crucial interest in preventing false commercial speech, a company should be required to exercise due care and thus should be potentially liable if its false statements were uttered intentionally, knowingly, recklessly, or negligently.

B. False Commercial Speech Is Unprotected by the First Amendment

The Supreme Court has long held that "the State may ban commercial expression that is fraudulent or deceptive without further justification."[57] Thus, it is firmly established that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."[58] For commercial speech to come within First Amendment protection "it . . . must . . . not be misleading."[59]

Although the Supreme Court has recognized the need for some protection for false political expression,[60] it has expressly rejected such protection for false commercial speech. The Court explained in *Bates v. State Bar of Arizona*: "[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena."[61] Commercial speech is protected so as to provide consumers with important information. False commercial speech is unprotected because it does not serve this interest. As the Supreme Court explained, "the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking."[62] In short, false political speech is protected because it contributes to the flow of ideas and because the market-

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[55] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72 (1976).

[56] Brief for the Petitioners at 43, Nike, Inc. v. Kasky (No. 02-575).

[57] Edenfield v. Fane, 507 U.S. 761, 768 (1993) (citation omitted).

[58] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) (citation omitted).

[59] Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[60] N.Y. Times v. Sullivan, 376 U.S. 254, 271-72 (1964) (holding constitutional protection of speech does not turn on the truth of the matter discussed).

[61] 433 U.S. 350, 383 (1977).

[62] *Va. Bd. of Pharmacy*, 425 U.S. 748, 781 (1976).

place of ideas will lead to the truth. False commercial speech does neither.

Nike's position, if ultimately accepted by the Supreme Court, will put in jeopardy a vast array of federal, state, and local laws designed to protect consumers. For example, under the position taken by Nike and its amici, a company could not be sued for false advertising if it falsely posted "Going Out of Business Sale" signs to attract customers. Nike would view the sign as non-commercial speech because it is not about a specific product and is not about its essential characteristics. Yet, such false advertising clearly would run afoul of section 45 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[63] Nike's position would make many, if not most, applications of this statute unconstitutional.

Indeed, Nike's position would make countless state and federal consumer protection laws unconstitutional. For example, California law prohibits false or misleading statements about whether products were made by blind workers,[64] American Indians,[65] or union labor.[66] Under the position taken by Nike, all of these laws would be unconstitutional because such claims, in Nike's view, do not constitute commercial speech. Likewise, state laws designed to provide accurate information to consumers about environmental claims in advertisements are, in Nike's view, also unconstitutional. California, for example, enacted a statute providing: "It is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied."[67] But Nike and its amici would deny the government the power to ensure accurate statements by companies concerning the consequences of their actions for the environment.

Federal law makes it unlawful to disseminate false advertising by mail or other means that directly or indirectly induces consumers to purchase food, drugs, services, or cosmetics.[68] Nike's position would make it unconstitutional to apply this law to false statements by companies concerning whether their food was organic or whether their drugs and cosmetics were tested in a "cruelty free" manner. Laws ensuring accurate food labels would become similarly vulnerable.

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[63] 15 U.S.C. § 45 (2000).
[64] CAL. BUS. & PROF. CODE § 17522 (West 2000).
[65] *Id.* at § 17569.
[66] CAL. LAB. CODE § 1012 (West 2000).
[67] CAL. BUS. & PROF. CODE § 17850.5(a) (West 2000).
[68] 15 U.S.C. § 52 (2000).

The list of laws endangered by Nike's position is endless. Countless consumer protection laws seek to provide prospective customers with accurate information about products. But Nike's approach would place many claims beyond the reach of government regulation and, in fact, would immunize the speakers from liability.

CONCLUSION

Line drawing is always difficult. But the difficulty of drawing a line is not a reason to abandon the effort entirely. In the context of current First Amendment law, line drawing often is determinative of whether speech can be punished. For example, false commercial speech can be prohibited and punished by the government, but false political speech generally cannot be outlawed or punished. Therefore, the definition of what constitutes commercial speech is crucial in determining whether there can be civil or criminal liability for speech. *Nike v. Kasky* was a potentially important case because it focused on exactly the question of whether Nike's advertisements and speech should have been regarded as commercial or political speech.

The Supreme Court's dismissal of *Nike v. Kasky* and its subsequent settlement end that litigation, but offer no resolution of the underlying issue. Lower courts, and ultimately the Supreme Court, will need to grapple with exactly the question posed and not resolved by the Supreme Court.

Lines are always best drawn with reference to the underlying purposes to be served. The goal of treating commercial speech as a distinct category is to allow the government to regulate and prohibit advertising to protect consumers. From this perspective, the California Supreme Court got it exactly right: A company's false statements about its product should be regarded as commercial speech unprotected by the First Amendment.