MARC KASKY v. NIKE, INC.

SUPREME COURT OF CALIFORNIA
45 P.3d 243 (2002)

OPINION: KENNARD, J.

Acting on behalf of the public, plaintiff brought this action seeking monetary and injunctive relief under California laws designed to curb false advertising and unfair competition. Plaintiff alleged that defendant corporation, in response to public criticism, and to induce consumers to continue to buy its products, made false statements of fact about its labor practices and about working conditions in factories that make its products. Applying established principles of appellate review, we must assume in this opinion that these allegations are true.

The issue here is whether defendant corporation's false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the federal Constitution. Resolution of this issue is important because commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and because governments may entirely prohibit commercial speech that is false or misleading.

Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages. Because the Court of Appeal concluded otherwise, we will reverse its judgment.

Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully. Unlike our dissenting colleagues, we do not consider this a remarkable or intolerable burden to impose on the business community. We emphasize that this lawsuit is still at a preliminary stage, and that whether any false representations were made is a disputed issue that has yet to be resolved.

I. FACTS

This case comes before us after the superior court sustained defendants' demurrers to plaintiff's first amended complaint. We therefore begin by summarizing that complaint's allegations, accepting the truth of the allegations, as we must, for the limited purposes of reviewing the superior court's ruling.

A. *Allegations of the First Amended Complaint*

Plaintiff Marc Kasky is a California resident suing on behalf of the general public of the State of California under Business and Professions Code sections 17204 and *17535*. Defendant Nike, Inc. (Nike) is an Oregon corporation with its principal place of business in that state; Nike is

authorized to do business in California and does promote, distribute, and sell its products in this state. The individual defendants (Philip Knight, Thomas Clarke, Mark Parker, Stephen Gomez, and David Taylor) are officers and/or directors of Nike.

Nike manufactures and sells athletic shoes and apparel. In 1997, it reported annual revenues of $ 9.2 billion, with annual expenditures for advertising and marketing of almost $ 1 billion. Most of Nike's products are manufactured by subcontractors in China, Vietnam, and Indonesia. Most of the workers who make Nike products are women under the age of 24. Since March 1993, under a memorandum of understanding with its subcontractors, Nike has assumed responsibility for its subcontractors' compliance with applicable local laws and regulations concerning minimum wage, overtime, occupational health and safety, and environmental protection.

Beginning at least in October 1996 with a report on the television news program *48 Hours*, and continuing at least through November and December of 1997 with the publication of articles in the Financial Times, the New York Times, the San Francisco Chronicle, the Buffalo News, the Oregonian, the Kansas City Star, and the Sporting News, various persons and organizations alleged that in the factories where Nike products are made workers were paid less than the applicable local minimum wage; required to work overtime; allowed and encouraged to work more overtime hours than applicable local law allowed; subjected to physical, verbal, and sexual abuse; and exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local occupational health and safety regulations.

In response to this adverse publicity, and for the purpose of maintaining and increasing its sales and profits, Nike and the individual defendants made statements to the California consuming public that plaintiff alleges were false and misleading. Specifically, Nike and the individual defendants 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. Nike and the individual defendants made these statements in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes. Nike also bought full-page advertisements in leading newspapers to publicize a report that GoodWorks International, LLC, had prepared under a contract with Nike. The report was based on an investigation by former United States Ambassador Andrew Young, and it found no evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, and Indonesia.

Plaintiff alleges that Nike and the individual defendants made these false and misleading statements because of their negligence and carelessness and "with knowledge or reckless disregard of the laws of California prohibiting false and misleading statements."

B. *Superior Court Proceedings*

Based on these factual allegations, plaintiff's first amended complaint sought relief in the form of restitution requiring Nike to "disgorge all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice," and relief in the form of an injunction requiring Nike to "undertake a Court-approved public information campaign" to correct any false or

misleading statement, and to cease misrepresenting the working conditions under which Nike products are made. Plaintiff also sought reasonable attorney fees and costs and other relief that the court deemed just and proper.

Nike demurred to the first amended complaint on grounds, among others, that the relief plaintiff was seeking "is absolutely barred by the First Amendment to the United States Constitution." The individual defendants separately demurred to the first amended complaint on the same grounds.

On January 7, 1999, the superior court held a hearing on defendants' demurrers. At the hearing, the court stated that it considered the crucial question to be whether Nike's allegedly false and misleading statements noted in the first amended complaint constituted commercial or noncommercial speech, because the answer to this question would determine the amount of protection the statements would receive under the federal constitution free speech guarantee. The court sustained the demurrers without leave to amend. Plaintiff appealed from the judgment dismissing the complaint.

C. *Court of Appeal Proceedings*

The Court of Appeal affirmed the judgment. Like the superior court, the appellate court identified as the crucial issue whether Nike's allegedly false and misleading statements were commercial or noncommercial speech for purposes of analyzing the protections afforded by the First Amendment to the federal Constitution. Also like the superior court, the appellate court concluded that Nike's statements were noncommercial speech and therefore subject to the greatest measure of protection under the constitution. The court stated that this determination "compels the conclusion that the trial court properly sustained the defendants' demurrer." We granted plaintiff's petition for review.

II. CALIFORNIA LAWS PROHIBITING CONSUMER DECEPTION

A. *The Unfair Competition Law*

California's unfair competition law (UCL) (§ 17200 et seq.) defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (§ 17500 et seq.)]." (§ 17200.) The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.

The UCL's scope is broad. By defining unfair competition to include any "*unlawful* . . . business act or practice" (§ 17200 , italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. Here, for instance, plaintiff's first amended complaint alleged that Nike and the individual defendants violated the UCL by committing actual fraud as defined in and prohibited by *Civil Code section 1572* and deceit as defined in and prohibited by *Civil Code sections 1709* and *1710*. By defining unfair competition to include also any "*unfair or fraudulent* business act or practice" (§ 17200, italics added), the UCL sweeps within its scope acts and practices not specifically proscribed by any other law. Plaintiff's first amended complaint also alleged a UCL violation of this type.

Not only public prosecutors, but also "any person acting for the interests of . . . the general public," may bring an action for relief under the UCL. (§ 17204.) Under this provision, a private

plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." "This court has repeatedly recognized the importance of these private enforcement efforts."

In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are "generally limited to injunctive relief and restitution." An order for restitution is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken."

B. *The False Advertising Law*

California's false advertising law (§ 17500 et seq.) makes it "unlawful for any person, . . . corporation . . ., or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . 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 . . . ." (§ 17500.) Violation of this provision is a misdemeanor. As with the UCL, an action for violation of the false advertising law may be brought either by a public prosecutor or by "any person acting for the interests of itself, its members or the general public," and the remedies available to a successful private plaintiff include restitution and injunctive relief. (§ 17535.)

C. *Common Features of the UCL and the False Advertising Law*

This court has recognized that "[a]ny violation of the false advertising law . . . necessarily violates" the UCL. We have also recognized that these laws prohibit "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.' "

III. CONSTITUTIONAL PROTECTION FOR SPEECH

1. *Federal Constitutional text and its application to state laws*

The United States Constitution's First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." (U.S. Const., 1st Amend.) Although by its terms this provision limits only Congress, the United States Supreme Court has held that the Fourteenth Amendment's due process clause makes the freedom of speech provision operate to limit the authority of state and local governments as well.

2. *Constitutional protection of commercial speech*

Although advertising has played an important role in our nation's culture since its early days, and although state regulation of commercial advertising and commercial transactions also has a long history, it was not until the 1970's that the United States Supreme Court extended First Amendment protection to commercial messages. In 1975, the Court declared that it was error to assume "that advertising, as such, was entitled to no First Amendment protection." *Bigelow v.*

Virginia, 421 U.S. 809, 825 (1975). The next year, the Court held that a state's complete ban on advertising prescription drug prices violated the First Amendment. *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 770 (1976). The High Court observed that "the free flow of commercial information is indispensable" not only "to the proper allocation of resources in a free enterprise system" but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered."

3. *Tests for commercial and noncommercial speech regulations*

"[T]he [federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 64-65 (1983) (*Bolger*).

For noncommercial speech entitled to full First Amendment protection, a content-based regulation is valid under the First Amendment only if it can withstand strict scrutiny, which requires that the regulation be narrowly tailored (that is, the least restrictive means) to promote a compelling government interest.

"By contrast, regulation of commercial speech based on content is less problematic." *Bolger, supra,* 463 U.S. at 65. To determine the validity of a content-based regulation of commercial speech, the United States Supreme Court has articulated an intermediate-scrutiny test. The Court first articulated this test in *Central Hudson Gas & Elec. v. Public Serv. Comm'n,* 447 U.S. 557 (1980), and has since referred to it as the *Central Hudson* test. The Court explained the components of the test this way: "At the outset, we must determine whether the expression is protected by the First Amendment. *For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading*. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we 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.* at p. 566 (italics added). The Court has clarified that the last part of the test--determining whether the regulation is not more extensive than "necessary"--does not require the government to adopt the least restrictive means, but instead requires only a "reasonable fit" between the government's purpose and the means chosen to achieve it. *Board of Trustees, State Univ. of N. Y. v. Fox,* 492 U.S. 469, 480 (1989).

4. *Regulation of false or misleading speech*

"[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974). For this reason, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." (*Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. at 771.)

Nevertheless, in some instances the First Amendment imposes restraints on lawsuits seeking damages for injurious falsehoods. It does so "to eliminate the risk of undue self-censorship and the suppression of truthful material" and thereby to give freedom of expression the " 'breathing space' " it needs to survive. *New York Times Co. v. Sullivan,* 376 U.S. 254, 272 (1964). Thus, "some false and misleading statements are entitled to First Amendment protection in the political realm."

But the United States Supreme Court has explained that the First Amendment's protection for false statements is not universal. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (Powell, J., plurality opinion) [stating that when speech "concerns no public issue" and is "wholly false and clearly damaging," it "warrants no special protection" under the First Amendment].) In particular, commercial speech that is false or misleading is not entitled to First Amendment protection and "may be prohibited entirely." See *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) [stating that "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena"].)

With regard to misleading commercial speech, the United States Supreme Court has drawn a distinction between, on the one hand, speech that is actually or inherently misleading, and, on the other hand, speech that is only potentially misleading. Actually or inherently misleading commercial speech is treated the same as false commercial speech, which the state may prohibit entirely. By comparison, "[s]tates may not completely ban potentially misleading speech if narrower limitations can ensure that the information is presented in a nonmisleading manner."

As one Supreme Court Justice has remarked, "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." *Va. Pharmacy Bd. v. Va. Consumer Council, supra*, 425 U.S. at p. 781 (Stewart, J., concurring opinion). Thus, the High Court has acknowledged that state laws may require a commercial message to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." In the Court's words, "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely."

5. *Reasons for the distinction*

The United States Supreme Court has given three reasons for the distinction between commercial and noncommercial speech in general and, more particularly, for withholding First Amendment protection from commercial speech that is false or actually or inherently misleading.

First, "[t]he truth of commercial speech . . . may be *more easily verifiable by its disseminator* than . . . news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."

Second, commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation.

Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is " 'linked inextricably' to those transactions." The High Court has identified "preventing commercial harms" as "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech" *Cincinnati v. Discovery Network, Inc.*,507 U.S. 410, 426 (1993), and it has explained that "[t]he interest in preventing commercial harms justifies more intensive regulation of commercial

speech than noncommercial speech even when they are intermingled in the same publications."

6. *Distinguishing commercial from noncommercial speech*

The United States Supreme Court has stated that the category of commercial speech consists at its core of " 'speech proposing a commercial transaction.' " *Central Hudson, supra*, 447 U.S. at 562. Although in one case the Court said that this description was "the test for identifying commercial speech," in other decisions the Court has indicated that the category of commercial speech is not limited to this core segment. For example, the Court has accepted as commercial speech a statement of alcohol content on the label of a beer bottle, as well as statements on an attorney's letterhead and business cards identifying the attorney as a CPA (certified public accountant) and CFP (certified financial planner).

Bolger, supra, 463 U.S. 60, presented the United States Supreme Court with the question whether a federal law prohibiting the mailing of unsolicited advertisements for contraceptives violated the federal Constitution's free speech provision as applied to certain mailings by a corporation that manufactured, sold, and distributed contraceptives. One category of mailings consisted of "informational pamphlets discussing the desirability and availability of prophylactics in general or [the corporation's] products in particular." The Court noted that these pamphlets did not merely propose commercial transactions. Although the pamphlets were conceded to be advertisements, that fact alone did not make them commercial speech because paid advertisements are sometimes used to convey political or other messages unconnected to a product or service or commercial transaction. (Citing *New York Times Co. v. Sullivan.)* The Court also found that references to specific products and the economic motivation of the speaker were each, considered in isolation, insufficient to make the pamphlets commercial speech. The Court concluded, however, that the *combination* of these three factors--advertising format, product references, and commercial motivation--provided "strong support" for characterizing the pamphlets as commercial speech.

In two important footnotes, the High Court provided additional insight into the distinction between commercial and noncommercial speech. In one footnote, the Court gave this caution: "[We do not] mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech."

In the other footnote, after observing that one of the pamphlets at issue discussed condoms in general without referring specifically to the corporation's own products, the Court said: "That a product is referred to generically does not, however, remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names. Or a trade association may make statements about a product without reference to specific brand names."

Thus, although the Court in *Bolger*, identified three factors--advertising format, product references, and commercial motivation--that in combination supported a characterization of commercial speech in that case, the Court not only rejected the notion that any of these factors is *sufficient* by itself, but it also declined to hold that all of these factors in combination, or any one of them individually, is *necessary* to support a commercial speech characterization.

The High Court also cautioned, as it had in past cases, that statements may properly be categorized as commercial "notwithstanding the fact that they contain discussions of important public issues," and that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech," explaining further that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."

Since its decision in *Bolger, supra,* 463 U.S. 60, the United States Supreme Court has acknowledged that "ambiguities may exist at the margins of the category of commercial speech." Justice Stevens in particular has remarked that "the borders of the commercial speech category are not nearly as clear as the Court has assumed" and he has suggested that the distinction cannot rest solely on the form or content of the statement, or the motive of the speaker, but instead must rest on the relationship between the speech at issue and the justification for distinguishing commercial from noncommercial speech. In his words, "any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead."

IV. ANALYSIS

A. *The United States Constitution*

The United States Supreme Court has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment. A close reading of the High Court's commercial speech decisions suggests, however, that it is possible to formulate a limited-purpose test. We conclude, therefore, 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,* categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.

In typical commercial speech cases, the *speaker* is likely to be someone engaged in commerce--that is, generally, the production, distribution, or sale of goods or services--or someone acting on behalf of a person so engaged, and the *intended audience* 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, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. Considering the identity of both the speaker and the target audience is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which concerned a speaker engaged in the sale or hire of products or services conveying a message to a person or persons likely to want, and be willing to pay for, that product or service. The High Court has frequently spoken of commercial speech as speech proposing a commercial transaction, thus implying that commercial speech typically is communication between persons who engage in such transactions.

In *Bolger*, moreover, the Court stated that in deciding whether speech is commercial, two relevant considerations are advertising format and economic motivation. These considerations imply that commercial speech generally or typically is directed to an audience of persons who

may be influenced by that speech to engage in a commercial transaction with the speaker or the person on whose behalf the speaker is acting. Speech in advertising format typically, although not invariably, is speech about a product or service by a person who is offering that product or service at a price, directed to persons who may want, and be willing to pay for, that product or service. Citing *New York Times Co. v. Sullivan*, the Court cautioned, however, that presentation in advertising format does not necessarily establish that a message is commercial in character. Economic motivation likewise implies that the speech is intended to lead to commercial transactions, which in turn assumes that the speaker and the target audience are persons who will engage in those transactions, or their agents or intermediaries.

Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services. This is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which has involved statements about a product or service, or about the operations or qualifications of the person offering the product or service. (See, e.g., Rubin v. Coors Brewing Co. [statement of alcohol content on beer bottle label]; *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* [statements on an attorney's letterhead and business cards describing attorney's qualifications]; *Va. Pharmacy Bd. v. Va. Consumer Council* [advertisements showing prices of prescription drugs].)

This is also consistent with the third *Bolger* factor--product references. By "product references," we do not understand the United States Supreme Court to mean only statements about the price, qualities, or availability of individual items offered for sale. Rather, we understand "product references" to include also, for example, statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product. Similarly, references to services would include not only statements about the price, availability, and quality of the services themselves, but also, for example, statements about the education, experience, and qualifications of the persons providing or endorsing the services. (See, e.g., *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* [statements on an attorney's letterhead and business cards describing attorney's training and qualifications].) This broad definition of "product references" is necessary, we think, to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller.

Our understanding of the content element of commercial speech is also consistent with the reasons that the United States Supreme Court has given for denying First Amendment protection to false or misleading commercial speech. The High Court has stated that false or misleading commercial speech may be prohibited because the truth of commercial speech is "more easily verifiable by its disseminator" and because commercial speech, being motivated by the desire for economic profit, is less likely than noncommercial speech to be chilled by proper regulation. This explanation assumes that commercial speech consists of factual statements and that those

statements describe matters within the personal knowledge of the speaker or the person whom the speaker is representing and are made for the purpose of financial gain. Thus, this explanation implies that, at least in relation to regulations aimed at protecting consumers from false and misleading promotional practices, commercial speech must consist of factual representations about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services. The United States Supreme Court has never decided whether false statements about a product or service of a competitor of the speaker would properly be categorized as commercial speech. Because the issue is not presented here, we offer no view on how it should be resolved.

Apart from this consideration of the identities of the speaker and the audience, and the contents of the speech, we find nothing in the United States Supreme Court's commercial speech decisions that is essential to a determination that particular speech is commercial in character in the context of a consumer protection law intended to suppress false or deceptive commercial messages. Although in *Bolger*, the United States Supreme Court noted that the speech at issue there was in a traditional advertising format, the Court cautioned that it was not holding that this factor would always be necessary to the characterization of speech as commercial. Thus, advertising format is by no means essential to characterization as commercial speech.

Here, the first element--a commercial speaker--is satisfied because the speakers--Nike and its officers and directors--are engaged in commerce. Specifically, they manufacture, import, distribute, and sell consumer goods in the form of athletic shoes and apparel.

The second element--an intended commercial audience--is also satisfied. Nike's letters to university presidents and directors of athletic departments were addressed directly to actual and potential purchasers of Nike's products, because college and university athletic departments are major purchasers of athletic shoes and apparel. Plaintiff has 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 purchasers of Nike's products. Specifically, plaintiff has alleged that Nike made these statements about its labor policies and practices "to maintain and/or increase its sales and profits." To support this allegation, plaintiff has included as an exhibit a letter to a newspaper editor, written by Nike's director of communications, referring to Nike's labor policies practices and stating that "[c]onsumers are savvy and want to know they support companies with good products and practices" and that "[d]uring the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions."

The third element--representations of fact of a commercial nature--is also present. In 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. In speaking to consumers about working conditions and labor practices in the factories where its products are made, Nike addressed matters within its own knowledge. The wages paid to the factories' employees, the hours they work, the way they are treated, and whether the environmental conditions under which they work violate local health and safety laws, are all matters likely to be within the personal knowledge of Nike. Thus, Nike was in a position to readily verify the truth of any factual assertions it made on these topics.

In speaking to consumers about working conditions in the factories where its products are made, Nike engaged in speech that is particularly hardy or durable. Because Nike's purpose in making these statements was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories. To the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by "insuring that the stream of commercial information flow[s] cleanly as well as freely."

Finally, government regulation of Nike's speech about working conditions in factories where Nike products are made is consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices. Trade regulation laws have traditionally sought to suppress and prevent not only false or misleading statements about products or services in themselves but also false or misleading statements about where a product was made, or by whom.

Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception. Whether these statements could properly be categorized as commercial speech for some other purpose, and whether these statements could properly be categorized as commercial speech if one or more of these elements was not fully satisfied, are questions we need not decide here.

Nike argues that its allegedly false and misleading statements were not commercial speech because they were part of "an international media debate on issues of intense public interest." In a similar vein, our dissenting colleagues argue that the speech at issue here should not be categorized as commercial speech because, when Nike made the statements defending its labor practices, the nature and propriety of those practices had already become a matter of public interest and public debate. This argument falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy. As the United States Supreme Court has explained, commercial speech commonly concerns matters of intense public and private interest. The individual consumer's interest in the price, availability, and characteristics of products and services "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." And for the public as whole, information on commercial matters is "indispensable" not only "to the proper allocation of resources in a free enterprise system" but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered."

For purposes of categorizing Nike's speech as commercial or noncommercial, it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate. Here, Nike's speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech. To the extent Nike's press releases and letters discuss policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards

domestic companies ought to observe in such factories, or the merits and effects of economic "globalization" generally, Nike's statements are noncommercial speech. Any content-based regulation of these noncommercial messages would be subject to the strict scrutiny test for fully protected speech. But Nike may not "immunize false or misleading product information from government regulation simply by including references to public issues." Here, the alleged false and misleading statements all relate to the commercial portions of the speech in question--the description of actual conditions and practices in factories that produce Nike's products--and thus the proposed regulations reach only that commercial portion.

Asserting that the commercial and noncommercial elements in Nike's statement were "inextricably intertwined," our dissenting colleagues maintain that it must therefore be categorized as noncommercial speech, and they cite in support the United States Supreme Court's decision in *Riley v. National Federation of Blind* (*Riley*). That decision concerned regulation of charitable solicitations, a category of speech that does not fit within our limited-purpose definition of commercial speech because it does not involve factual representations about a product or service that is offered for sale. More importantly, the High Court has since explained that in *Riley* "the commercial speech (if it was that) was 'inextricably intertwined' because the state law required it to be included" and that commercial and noncommercial messages are not "inextricable" unless there is some legal or practical compulsion to combine them. No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.

We also reject Nike's argument that regulating its speech to suppress false and misleading statements is impermissible because it would restrict or disfavor expression of one point of view (Nike's) and not the other point of view (that of the critics of Nike's labor practices). The argument is misdirected because the regulations in question do not suppress points of view, but instead suppress false and misleading statements of fact. As we have explained, to the extent Nike's speech represents expression of opinion or points of view on general policy questions such as the value of economic "globalization," it is noncommercial speech subject to full First Amendment protection. Nike's speech loses that full measure of protection only when it concerns facts material to commercial transactions--here, factual statements about how Nike makes its products.

Moreover, differential treatment of speech about products and services based on the identity of the speaker is inherent in the commercial speech doctrine as articulated by the United States Supreme Court. A noncommercial speaker's statements criticizing a product are generally noncommercial speech, for which damages may be awarded only upon proof of both falsehood and actual malice. A commercial speaker's statements in praise or support of the same product, by comparison, are commercial speech that may be prohibited entirely to the extent the statements are either false or actually or inherently misleading. To repeat, the justification for this different treatment, as the High Court has explained, is that when a speaker promotes its own products, it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" because the described speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation."

Our dissenting colleagues are correct that the identity of the speaker is usually not a proper

consideration in regulating speech that is entitled to First Amendment protection, and that a valid regulation of protected speech may not handicap one side of a public debate. But to decide whether a law regulating speech violates the First Amendment, the very first question is whether the speech that the law regulates is entitled to First Amendment protection at all. As we have seen, commercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions.

We conclude, accordingly, that here the trial court and the Court of Appeal erred in characterizing as noncommercial speech, under the First Amendment to the federal Constitution, Nike's allegedly false and misleading statements about labor practices and working conditions in factories where Nike products are made.

V. CONCLUSION

As the United States Supreme Court has explained, false and misleading speech has no constitutional value in itself and is protected only in circumstances and to the extent necessary to give breathing room for the free debate of public issues. Commercial speech, because it is both more readily verifiable by its speaker and more hardy than noncommercial speech, can be effectively regulated to suppress false and actually or inherently misleading messages without undue risk of chilling public debate. With these basic principles in mind, we conclude that when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.

In concluding, contrary to the Court of Appeal, that Nike's speech at issue here is commercial speech, we do not decide whether that speech was, as plaintiff has alleged, false or misleading, nor do we decide whether plaintiff's complaint is vulnerable to demurrer for reasons not considered here. The judgment of the Court of Appeal is reversed, and the matter is remanded to that court for further proceedings consistent with this opinion.

DISSENT: CHIN, J.

I respectfully dissent. Nike, Inc. (Nike), is a major international corporation with a multibillion-dollar enterprise. The nature of its labor practices has become a subject of considerable public interest and scrutiny. Various persons and organizations have accused Nike of engaging in despicable practices, which they have described sometimes with such caustic and scathing words as "slavery" and "sweatshop." Nike's critics and these accusations receive full First Amendment protection. And well they should. "The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .' " "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."

While Nike's critics have taken full advantage of their right to " 'uninhibited, robust, and wide-open' " debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's

critics enjoy. Why is this, according to the majority? Because Nike competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods. And because Nike sells shoes--and its defense against critics may help sell those shoes--the majority asserts that Nike may not freely engage in the debate, but must run the risk of lawsuits under California's unfair competition law and false advertising law, should it ever make a factual claim that turns out to be inaccurate. According to the majority, if Nike utters a factual misstatement, unlike its critics, it may be sued for restitution, civil penalties, and injunctive relief under these sweeping statutes.

Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate. The state, "even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."

In its pursuit to regulate Nike's speech--in hope of prohibiting false and misleading statements--the majority has unduly trammeled basic constitutional freedoms that form the foundation of this free government. "[W]here . . . suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."

I. IRRESPECTIVE OF NIKE'S ECONOMIC MOTIVATION, THE PUBLIC HAS A RIGHT TO RECEIVE INFORMATION ON MATTERS OF PUBLIC CONCERN

Nike's statements regarding its labor practices in China, Vietnam, and Indonesia provided vital information on the public controversy concerning using low-cost foreign labor to manufacture goods sold in America. Nike's responses defended against adverse reports that its overseas manufacturers committed widespread labor, health, and safety law violations. Far from promoting the sale of its athletic products, Nike did not include this information through product labels, inserts, packaging, or commercial advertising intended to reach only Nike's customers. Rather, Nike responded to the negative publicity through press releases, letters to newspapers, and letters to university presidents and athletic directors. To the extent Nike may have been financially motivated to defend its business and livelihood against these attacks, this motivation is not dispositive in identifying speech as commercial. "Viewed in its entirety, [Nike's speech] conveyed information of potential interest and value to a diverse audience . . . ."

II. NIKE'S SPEECH IS NOT TRADITIONAL COMMERCIAL SPEECH

Indeed, characterizing Nike's speech here as commercial speech is inconsistent with the High Court's constitutional jurisprudence for yet another reason. The High Court has stated that traditional commercial speech is speech that "does 'no more than propose a commercial transaction.' " *Va. Pharmacy Bd., supra,* 425 U.S. at 762; but see *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at 561 [commercial speech is "expression related solely to the economic interests of the speaker and its audience"].) In this case, Nike's speech here went beyond proposing a commercial transaction. It provided information vital to the public debate on international labor rights and reform.

Contrary to the majority's assertions, the High Court's restriction--"advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" (*Bolger, supra,* 463 U.S. at 68*)*--does not apply here. In *Bolger*, the

informational mailings, though containing issues of public concern such as venereal disease and family planning, were at bottom commercial speech directed at selling contraceptives. The Court made clear that most of the mailings fell "within the core notion of commercial speech--'speech which does "no more than propose a commercial transaction." ' " To the extent that some mailings discussed public concerns, the High Court cautioned that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."

In a case decided before *Bolger*, the High Court held that a utility company's monthly electric bill inserts advocating the use of nuclear power could not be regulated under the First and Fourteenth Amendments. *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980). In *Consolidated Edison*, the High Court did not address whether the inserts constituted commercial speech. Rather, it concluded that the utility commission's regulation banning the inserts "limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak." Despite Consolidated Edison's obvious economic incentive in promoting the use of nuclear power, the High Court did not consider, much less determine, whether the inserts placed in electric bills amounted to commercial speech.

The High Court's concern in *Bolger, supra, 463 U.S. 60,* therefore, was that advertisers refrain from inserting information on public issues *as a pretext* to avoid regulations governing their commercial speech. That is simply not the case here. Nike's speech--in the form of press releases and letters defending against accusations about its overseas labor practices--was not in any sense pretextual, but prompted and necessitated by public criticism. As noted, Nike did not use product labels, packaging, advertising, or other media intended to directly reach its actual or potential customers. Nike's speech did not "simply . . . include[] references to public issues." Nike's labor practices and policies, and in turn, its products, *were* the public issue. Its "discussion of controversial issues strikes at the heart of the freedom to speak."

At the very least, this case typifies the circumstance where commercial speech and noncommercial speech are "inextricably intertwined." *Riley, supra,* 487 U.S. at 796. In *Riley*, the High Court held that a North Carolina statute regulating solicitation of charitable contributions affected protected speech and was not narrowly tailored to meet the state's interest in protecting charities from fraud. As relevant here, the Court observed that even if a professional fundraiser's speech amounted to commercial speech, "we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." It further held that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression."

Notwithstanding the fact that *Riley* dealt with charitable solicitations, which are not involved in this case, the High Court relied, in part, on a case that provides insight here. (*Riley, supra,* 487 U.S. at 796, citing *Thomas v. Collins,* 323 U.S. 516, 540-541 (1945) (*Thomas*).) In *Thomas,* which did not deal with solicitation of property or funds, the High Court addressed the issue whether a union organizer's speech soliciting members was protected by the First Amendment,

and whether a registration requirement in order to speak was constitutionally impermissible. Answering *yes* to both questions, the High Court cautioned that a state's regulation, "whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly. This Court has recognized that 'in 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.' "

This case resembles *Thomas* in that Nike's speech provided information " 'concerning the conditions in [the manufacturing] industry' " and thereby used " 'the processes of popular government to shape the destiny of modern industrial society.' Nike, which came to the forefront of the international labor abuse debate, provided relevant information about its labor practices in its overseas plants. Nike's speech, in an attempt to influence public opinion on economic globalization and international labor rights and working conditions, gave the public insight and perspective into the debate. This speech should be fully protected as "essential to free government."

The majority's attempt to parse out Nike's noncommercial speech--"*to the extent* Nike's speech represents expression of opinion or points of view on general policy questions . . . it is noncommercial speech"--is both unavailing and unhelpful. Even assuming that Nike's factual statements regarding how its products are made constitute commercial speech, that speech is "inextricably intertwined" with its noncommercial speech. Contrary to the majority's suggestion, Nike realistically could not discuss its general policy on employee rights and working conditions and its views on economic globalization *without* reference to the labor practices of its overseas manufacturers, Nike products, and how they are made. Attempting to parse out the commercial speech from the noncommercial speech in this context "would be both artificial and impractical."

III. CONCLUSION

The majority today refuses to honor a fundamental commitment and guarantee that both sides in a public debate may compete vigorously--and equally--in the marketplace of ideas. The First Amendment ensures the freedom to speak on matters of public interest by *both* sides, not just one judicially favored. Sadly, Nike is not the only one who loses here--the public does, too. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion." Because I would give *both* sides in this important public controversy the full protection that our Constitution guarantees, I respectfully dissent.

BROWN, J., dissenting

I

In 1942, the United States Supreme Court, like a wizard trained at Hogwarts, waved its wand and "plucked the commercial doctrine out of thin air." (Kozinski & Banner, *Who's Afraid of*

Commercial Speech, 76 Va. L.Rev. 627, 627 (1990).) Unfortunately, the Court's doctrinal wizardry has created considerable confusion over the past 60 years as it has struggled to define the difference between commercial and noncommercial speech. The United States Supreme Court has, in recent years, acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (*Discovery Network*). After tracing the various definitions of commercial speech used over the years, the Court conceded that no "categorical definition of the difference between" commercial and noncommercial speech exists. Instead, the difference is a matter of " 'common[]sense,' " *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978) (*Ohralik*)), and restrictions on speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (*Bolger*). Consistent with these pronouncements, the United States Supreme Court has expressly refused to define the elements of commercial speech. Indeed, "the impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship." Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L.Rev. 1, 7 (2000).

Despite this chaos, the majority, ostensibly guided by *Bolger*, has apparently divined a new and simpler test for commercial speech. Under this "limited-purpose test," "categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." Unfortunately, the majority has forgotten the teachings of H.L. Mencken: "every human problem" has a "solution" that is "neat, plausible, and wrong." (Mencken, Prejudices: Second Series (1977 reprint) p. 148.) Like the purported discovery of cold fusion over a decade ago, the majority's test for commercial speech promises much, but solves nothing. Instead of clarifying the commercial speech doctrine, the test violates fundamental principles of First Amendment jurisprudence by making the level of protection given speech dependent on the identity of the speaker--and not just the speech's content--and by stifling the ability of certain speakers to participate in the public debate. In doing so, the majority unconstitutionally favors some speakers over others and conflicts with the decisions of other courts.

Contrary to the majority's belief, our current First Amendment jurisprudence defies any simple solution. Under the commercial speech doctrine currently propounded by the United States Supreme Court, all speech is *either* commercial or noncommercial, and commercial speech receives less protection than noncommercial speech. The doctrine further assumes that all commercial speech is the *same* under the First Amendment. Thus, all commercial speech receives the *same* level of lesser protection. The state may therefore ban *all* commercial speech "that is fraudulent or deceptive without further justification," but may not do the same to fraudulent or deceptive speech in " 'matters of public concern.' "

This simple categorization presupposes that commercial speech is wholly distinct from noncommercial speech and that all commercial speech has the same value under the First Amendment. The reality, however, is quite different. With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking. As several commentators have observed, examples of the intersection between

commercial speech and various forms of noncommercial speech, including scientific, political and religious speech, abound.

Although the world has become increasingly commercial, the dichotomous nature of the commercial speech doctrine remains unchanged. The classification of speech as commercial or noncommercial determines the level of protection accorded to that speech under the First Amendment. Thus, the majority correctly characterizes the issue as "whether defendant corporation's false statements are commercial or noncommercial speech for purposes of free speech analysis." If Nike's press releases, letters and other documents are commercial speech, then the application of *Business and Professions Code sections 17204* and *17535*--which establish strict liability for false and misleading ads--is constitutional. Otherwise, it is not.

Constrained by this rigid dichotomy, I dissent because Nike's statements are more like noncommercial speech than commercial speech. Nike's 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. Indeed, under the circumstances presented in this case, Nike could hardly engage in a general discussion on overseas labor exploitation and economic globalization without discussing its own labor practices. Thus, the commercial elements of Nike's statements are "inextricably intertwined" with their noncommercial elements. This court should therefore "apply [the] test for fully protected expression" notwithstanding the majority's specious distinctions of the relevant case law. Under this test, a categorical ban on all false and misleading statements made by Nike about its labor practices violates the First Amendment.

Although this result follows from controlling United States Supreme Court precedent, I believe the commercial speech doctrine, in its current form, fails to account for the realities of the modern world--a world in which personal, political, and commercial arenas no longer have sharply defined boundaries. My sentiments are not unique; many judges and academics have echoed them. Even some justices on the High Court have recently questioned the validity of the distinction between commercial and noncommercial speech. Nonetheless, the High Court has apparently declined to abandon it. Given that the United States Supreme Court is not prepared to start over, we must try to make the commercial speech doctrine work--warts and all. To this end, I believe the High Court needs to develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate while minimizing consumer fraud.

II

According to the majority, all speech containing the following three elements is commercial speech: (1) "a commercial speaker;" (2) "an intended commercial audience;" and (3) "representations of fact of a commercial nature." The first element is satisfied whenever the speaker is engaged in "the production, distribution, or sale of goods or services" "or someone acting on behalf of a person so engaged." The second element is satisfied whenever the intended audience is "actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." The third element is satisfied whenever "the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial

transactions in, the speaker's products or services."

Although the majority constructed this limited-purpose test from its "close reading of the High Court's commercial speech decisions," it conveniently dismisses those decisions that cast doubt on its formulation. A closer review of the relevant case law reveals that the majority's test for commercial speech contravenes long-standing principles of First Amendment law.

First, the test flouts the very essence of the distinction between commercial and noncommercial speech identified by the United States Supreme Court. "If commercial speech is to be distinguished, it 'must be distinguished *by its content*.' " *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977) (*Bates*), quoting *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 761 (1976) (*Va. Consumer Council*). Despite this caveat, the majority distinguishes commercial from noncommercial speech using two criteria wholly unrelated to the speech's content: the identity of the speaker and the intended audience. In doing so, the majority strays from the guiding principles espoused by the United States Supreme Court.

Second, the test contravenes a fundamental tenet of First Amendment jurisprudence by making the identity of the speaker potentially dispositive. As the United States Supreme Court stated long ago, "[the] identity of the speaker is not decisive in determining whether speech is protected," *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986), and "speech does not lose its protection because of the corporate identity of the speaker." This is because corporations and other speakers engaged in commerce "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." Thus, "[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." Despite these admonitions, the majority has made the identity of the speaker a significant, and potentially dispositive, factor in determining the scope of protection accorded to speech under the First Amendment. As a result, speech by "someone engaged in commerce" may receive less protection solely because of the speaker's identity. Indeed, the majority's limited-purpose test makes the identity of the speaker dispositive whenever the speech at issue relates to the speaker's business operations, products, or services, in contravention of Supreme Court precedent.

Third, the test violates the First Amendment by stifling the ability of speakers engaged in commerce, such as corporations, to participate in debates over public issues. The Supreme Court has broadly defined public issues as those issues "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). "[S]peech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection" because such speech "is more than self-expression; it is the essence of self-government" "The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .' " Thus, the First Amendment "both fully protects and implicitly encourages" public debate on " 'matters of public concern.' "

To ensure "uninhibited, robust, and wide-open" "debate on public issues" (*New York Times)*, the United States Supreme Court has recognized that some false or misleading speech must be tolerated. Although "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake," "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." The "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' . . . ." Because "a rule that would impose strict liability on a" speaker "for false factual assertions" in a matter of public concern "would have an undoubted 'chilling' effect" on speech "that does have constitutional value," (*Hustler Magazine v. Falwell,* 485 U.S. 46, 52 (1985)), "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."

The majority contends its limited-purpose test for commercial speech does not violate these principles because false or misleading commercial speech may be prohibited "entirely." This logic is, however, faulty, because it erroneously assumes that false or misleading commercial speech as defined by the majority can never be speech about a public issue. Under the majority's test, the content of commercial speech is limited only to representations regarding "business operations, products, or services." But business operations, products, or services may be public issues. For example, a corporation's business operations may be the subject of public debate in the media. These operations may even be a political issue as organizations, such as state, local, or student governments, propose and pass resolutions condemning certain business practices. Under these circumstances, the corporation's business operations undoubtedly become a matter of public concern, and speech about these operations merits the full protection of the First Amendment. Indeed, the United States Supreme Court has long recognized that speech on a public issue may be inseparable from speech promoting the speaker's business operations, products or services. (See *Thomas v. Collins, supra*, 323 U.S. at 535-536 [recognizing that a union representative could not discuss the benefits of unionism without hawking the union's services].)

The majority, however, creates an overbroad test that, taken to its logical conclusion, renders all corporate speech commercial speech. As defined, the test makes any public representation of fact by a speaker engaged in commerce about that speaker's products made for the purpose of promoting that speaker's products commercial speech. A corporation's product, however, includes the corporation itself. Corporations are regularly bought and sold, and corporations market not only their products and services but also themselves. Indeed, business goodwill is an important asset of every corporation and contributes significantly to the sale value of the corporation. Because all corporate speech about a public issue reflects on the corporate image and therefore affects the corporation's business goodwill and sale value, the majority's test makes all such speech commercial notwithstanding the majority's assertions to the contrary.

In so doing, the majority violates a basic principle of First Amendment law. By subjecting all corporate speech about business operations, products and services to the strict liability provisions of sections 17204 and 17535, the majority's limited-purpose test unconstitutionally chills a corporation's ability to participate in the debate over matters of public concern.

Finally, in singling out speakers engaged in commerce and restricting their ability to participate

in the public debate, the majority unconstitutionally favors certain speakers over others. Corporations "have the right to be free from government restrictions that abridge [their] own rights in order to 'enhance the relative voice' of [their] opponents." The First Amendment does not permit favoritism toward certain speakers "based on the identity of the interests that [the speaker] may represent." Indeed, "self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " The majority, however, does just that. Under the majority's test, only speakers engaged in commerce are strictly liable for their false or misleading representations pursuant to sections 17204 and 17535. Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements. Neither United States Supreme Court precedent nor our precedent countenances such favoritism in doling out First Amendment rights.

IV

Of course, my rejection of the majority's limited-purpose test does not resolve the central issue in this case: What level of protection should be accorded to Nike's speech under the First Amendment? To answer this question, this court must determine whether Nike's speech is commercial or noncommercial speech. Following the existing framework set up by the United States Supreme Court, I would conclude that Nike's speech is more like noncommercial speech than commercial speech because its commercial elements are inextricably intertwined with its noncommercial elements. Thus, I would give Nike's speech the full protection of the First Amendment.

When determining whether speech is commercial or noncommercial, courts must "ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." In following this philosophy in cases involving hybrid speech containing both commercial and noncommercial elements, the United States Supreme Court has assessed the separability of these elements to determine the proper level of protection. If the commercial elements are separable from the noncommercial elements, then the speech is commercial and receives lesser protection. Thus, advertising that merely "links a product to a current public debate" is still commercial speech notwithstanding its noncommercial elements. Where the speaker may comment on a public issue without promoting its products or services, the speech is also commercial, even if the speaker combines a commercial message with a noncommercial message. Indeed, "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, at p. 68.

The United States Supreme Court has, however, recognized that commercial speech may be "inextricably intertwined" with noncommercial speech in certain contexts. Where regulation of the commercial component of certain speech would stifle otherwise protected speech, "we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical." In such cases, courts must apply the "test for fully protected expression" rather than the test for commercial speech.

Although the United States Supreme Court has mostly found this intertwining of commercial and noncommercial speech in the charitable solicitation context, it has also done so in a factual context analogous to the one presented here. In *Thomas v. Collins, supra*, 323 U.S. 516, the United States Supreme Court held that a speech made by a union representative promoting the

union's services and inviting workers to join constituted noncommercial speech fully protected by the First Amendment. Although the Court acknowledged that the speech promoted the services of the union and sought to solicit new members, it found that these commercial elements were inextricably intertwined with the noncommercial elements addressing a public issue--unionism. "The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest attachment to the union by becoming a member." Indeed, "whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation."

Finding that the commercial elements of the union representative's speech should be accorded the full protection of the First Amendment, the Court concluded that distinguishing between the speech's commercial and noncommercial elements "offers no security for free discussion." "In these conditions," making such a distinction "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. A restriction so destructive of the right of public discussion . . . is incompatible with the freedoms secured by the First Amendment."

This case presents a similar scenario because Nike's overseas labor practices have become a public issue. According to the complaint, Nike faced a sophisticated media campaign attacking its overseas labor practices. As a result, its labor practices were discussed on television news programs and in numerous newspapers and magazines. These discussions have even entered the political arena as various governments, government officials and organizations have proposed and passed resolutions condemning Nike's labor practices. Given these facts, Nike's overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore "entitled to special protection." Because Nike could not comment on this public issue *without* discussing its overseas labor practices, the commercial elements of Nike's representations about its labor practices were inextricably intertwined with their noncommercial elements. As such, these representations must be fully protected as noncommercial speech.

The majority's assertion that Nike's representations about its overseas labor practices are distinct from its comments on "policy questions" is simply wrong. The majority contends Nike can still comment on the policy issues implicated by its press releases and letters because it can generally discuss "the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories." The majority, however, conveniently forgets that Nike's overseas labor practices *are* the public issue. Thus, general statements about overseas labor exploitation do not provide Nike with a meaningful way to participate in the public debate over *its* overseas labor practices.

By limiting Nike to "innocuous and abstract discussion," the majority has effectively destroyed Nike's "right of public discussion." Under these circumstances, Nike no longer "has the full panoply of protections available to its direct comments on public issues . . . ." Accordingly, the factual representations in Nike's press releases and letters are fully protected under current First Amendment jurisprudence.

Such a conclusion is consistent with the commercial speech decisions of the United States Supreme Court. Most of these decisions involve core commercial speech that does "no more than propose a commercial transaction." Because speech that just proposes a commercial transaction, by definition, only promotes the sale of a product or service and does not address a public issue, these decisions are inapposite.

The United States Supreme Court decisions finding hybrid speech containing both commercial and noncommercial elements to be commercial are also distinguishable. In these cases, the Court found that the commercial elements of the speech were separable from its noncommercial elements and were therefore unnecessary for conveying the noncommercial message. Because the commercial message was merely linked to--and not inextricably intertwined with--the noncommercial message, the Court concluded that restrictions on the commercial message would not stifle the speaker's ability to engage in protected speech. As explained above, this case is different. Nike's overseas business operations have become the public issue, and Nike cannot comment on important public issues like overseas worker exploitation and economic globalization without implicating its own labor practices. Thus, the commercial elements of Nike's press releases, letters, and other documents were inextricably intertwined with their noncommercial elements, and they must be fully protected as noncommercial speech.

Constrained by the United States Supreme Court's current formulation of the commercial speech doctrine, I would therefore conclude that Nike's press releases, letters, and other documents defending its overseas labor practices are noncommercial speech. Based on this conclusion, I would find the application of sections 17204 and 17535 to Nike's speech unconstitutional. Accordingly, I would affirm the judgment of the Court of Appeal.

In today's world, the difference between commercial and noncommercial speech is not black and white. Due to the growing politicization of commercial matters and the increased sophistication of advertising campaigns, the intersection between commercial and noncommercial speech has become larger and larger. As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the voices of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity.

Rather than continue down this path, I believe the High Court must reassess the commercial speech doctrine and develop a more nuanced inquiry that accounts for the realities of today's commercial world. Without abandoning the categories of commercial and noncommercial speech, the Court could develop an approach better suited to today's world by recognizing that not all speech containing commercial elements should be equal in the eyes of the First Amendment. I realize the task is not easy. Nonetheless, a new accommodation of the relevant constitutional concerns is possible, and the United States Supreme Court can and should devise a more nuanced approach that guarantees the ability of speakers engaged in commerce to participate in the public debate without giving these speakers free rein to lie and cheat.

Note: The Supreme Court initially agreed to review the decision in *Nike v. Kasky* during the 2002-2003 Term. However, after oral argument in the case, the Court dismissed the case on June 26, 2003 because the plaintiff lacked federal court standing.