Silencing Corporate Speakers: The California Supreme Court’s Broad New Definition of Commercial Speech Goes Unchecked

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I. INTRODUCTION

Society places a high value on the freedom of speech and the U.S. Supreme Court has developed a jurisprudence that is highly protective of the freedom of speech. Yet not all speech is entitled to equal treatment under the Constitution. The U.S. Supreme Court has carved out entirely unprotected categories of speech and extended only lesser protection to other categories. The result is a rough hierarchy in which “[c]ore political speech occupies the highest, most protected position; commercial speech and non-obscene, sexually explicit speech . . . [are in the middle] . . . as sort of second-class expression; [and] obscenity and fighting words receive the least protection of all.” This Note will explore the commercial speech doctrine. It will do so in light of the following: 1) the U.S. Supreme Court’s commercial speech jurisprudence; 2) the California Supreme Court’s decision in Kasky v. Nike; the U.S. Supreme Court’s dismissal of the writ of certiorari in the case; and 4) Nike’s decision to settle with Kasky rather than pursue the case further in the California courts. This Note focuses on the Kasky case because the case strained and further confused the distinction between commercial and non-commercial speech. This, however, was bound to happen in a world where advertising “is more and more an art form instead of a direct proposal” to sell product X at price Y.

1. “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I. The due process clause of the Fourteenth Amendment makes the First Amendment’s prohibition applicable to the states.
4. R.A.V., 505 U.S. at 422 (Stevens, J., concurring in judgment). Justice Stevens notes that the majority’s holding that proscribable speech cannot be regulated based on subject matter, “[p]erversely . . . gives fighting words greater protection than is afforded commercial speech.” Id. at 423.
6. 45 P.3d 243 (Cal. 2002).
7. Stephanie Kang, Nike Settles Case with an Activist for $1.5 Million, WALL ST. J., Sept. 15, 2003, at A10 (quoting a statement made by New York University law professor Burt Neuborne that the area of commercial speech is “completely confused”).
The question in *Kasky* was whether various statements Nike made in response to criticism of its labor practices were commercial speech and therefore subject to California’s unfair competition and false advertising laws. In answering this question, the California Supreme Court developed a broad new definition of commercial speech and concluded that Nike’s speech was commercial. This Note finds that the rationales traditionally offered to justify lesser protection for commercial speech do not justify the sweeping limitations imposed on corporate speech by the broad definition of the California Supreme Court. This Note recommends, in light of the underlying facts of *Kasky*, a narrow definition of corporate speech—a definition that only encompasses speech proposing a commercial transaction or speech regarding price, quality, availability, or suitability of products or services.

II. BACKGROUND

A. Bigelow v. Virginia: The Beginning of a New Trend

*Bigelow v. Virginia*\(^{10}\) was the first time the U.S. Supreme Court had addressed commercial speech since *Chrestensen v. Chrestensen*.\(^{11}\) In *Chrestensen*, the Court expressed the traditional view that advertising is not protected by the First Amendment, holding that a New York City ordinance banning commercial handbills was a “reasonable regulation of the manner in which commercial advertising [can] be distributed.”\(^{12}\) In *Bigelow*, however, the Court was adamant that *Chrestensen* “[did] not support any sweeping proposition that advertising is unprotected per se.”\(^{13}\) The Court insisted that the holding of *Chrestensen* was limited and did not support the proposition that statutes regulating commercial speech are “immune from constitutional challenge.”\(^{14}\)

In reversing Bigelow’s criminal conviction under a Virginia statute for running an advertisement in his newspaper for an abortion referral service in New York, the Court said that advertisements are not like fighting words and obscenity, which are forms of speech without constitutional protection.\(^{15}\) “[T]he relationship of speech to the marketplace of products . . . does not make it valueless in the marketplace of ideas.”\(^{16}\) Instead, the extent of protection afforded depends upon the “value” of the speech vis à vis the public interest allegedly served by the regulation.\(^{17}\) Because of the “diverse motives,
means, and messages” conveyed by advertising, some advertisements are more “commercial” than others. Thus the level of protection afforded advertisements may vary depending on the circumstances and the type of regulation.18

B. Extending First Amendment Protection to Purely Commercial Speech: Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council

Shortly after the Court decided Bigelow, it decided another commercial speech case: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*19 Unlike Bigelow, *Virginia Pharmacy* involved speech that was unambiguously proposing commercial transactions. In *Virginia Pharmacy,* the question “whether there is a First Amendment exception for ‘commercial speech’ [was] squarely before [the Court].”20

*Virginia Pharmacy* involved a state law making it unprofessional conduct for a pharmacist, licensed by the state, to advertise prescription drug prices.21 The lawsuit was initiated by a consumer group claiming that “the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising . . . .”22 The Pharmacy Board, relying on *Chrestensen* and *Breard v. Alexandria,23* countered that advertisement of prescription drug prices was purely commercial speech and therefore not entitled to First Amendment protection. Although the Court conceded that there was some support for the Pharmacy Board’s position in *Chrestensen, Breard,* and *Bigelow* (if the *Bigelow* decision was limited to its facts), the Court insisted that, since *Breard,* it has “never denied protection on the ground that the speech in issue was ‘commercial speech.’ ”24

The Court dismissed the Pharmacy Board’s argument that the advertising ban protected consumers from unscrupulous pharmacists who would use advertising to their own advantage and drive scrupulous pharmacists out of business. The Court believed that Virginia’s ban was a “highly paternalistic approach”25 to consumer protection and that the state could more than adequately ensure high professional standards among pharmacists through licensing procedures.26 The Court concluded that purely commercial speech was entitled to some First Amendment protection because of society’s “strong

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18. Id. In his dissent, Justice Rehnquist criticized the majority’s consideration of the content of the advertisement. Id. at 831. Rehnquist argued that the subject of the advertisement should not make a difference. Id. Rehnquist believed that the advertisement at issue was “a classic commercial proposition directed toward the exchange of services rather than the exchange of ideas.” Id.


20. Id. at 760-61.

21. Id. at 750-51 (quoting Va. CODE ANN. § 54524.35 (1974)). The broad scope of this law apparently made some pharmacists so tight-lipped about drug prices that they even refused to quote drug prices over the phone. Id. at 752.

22. Id. at 753-54.


24. Id. at 759.

25. Id. at 770.

26. Id.
interest in the free flow of commercial information."27 Commercial information can be of public interest and the free flow of this information is essential “for proper allocation of resources in a free enterprise system . . . .”28 Therefore a state may not “completely suppress the dissemination of concededly truthful [commercial] information about entirely lawful activity, fearful of the information’s effect upon its disseminators and its recipients.”29

C. The Standard of Scrutiny for Regulation of Commercial Speech: Central Hudson Gas and Electric Corp. v. Public Service Commission of New York

The issue in Central Hudson Gas and Electric Corp. v. Public Service Commission30 was whether a state regulation prohibiting promotional advertising by a public utility violated the First and Fourteenth Amendments.31 The Court stated that, while it has rejected the “highly paternalistic view that government has complete power to suppress or regulate commercial speech,”32 it believes there is a distinction between “speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”33 Because commercial speech occurs in an area “traditionally subject to government regulation,”34 commercial speech is accorded less protection by the Constitution than other “constitutionally guaranteed expression.”35

The majority opinion used two different definitions of commercial speech. The Court first defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”36 The Court subsequently refers to commercial

27. Id. at 764. As in Bigelow, Justice Rehnquist dissented. In his dissent, Justice Rehnquist chastised the Court for substituting its judgment for that of the Virginia legislature on this important matter of social and economic regulation instead of applying deferential rational basis review à la Williamson v. Lee Optical Co., 348 U.S. 483 (1955), Virginia Pharmacy, 425 U.S. at 784. He also argued that the First Amendment was intended to protect discussion of “political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.” Id. at 787. Justice Rehnquist concluded, “I do not believe that the First Amendment mandates the Court’s ‘open door policy’ toward . . . commercial advertising.” Id. at 790.
28. Id. at 765.
29. Id. at 773.
31. “Congress shall make no law . . .  abridging the freedom of speech . . . .” U.S. CONST. amend. I. The due process clause of the Fourteenth Amendment makes the First Amendment’s prohibition applicable to the states.
32. Central Hudson, 447 U.S. at 562.
33. Id.
34. Id. The Court is making the point that while commercial transactions are traditionally subject to government regulation, speech is not.
35. Id. at 563. The Court points out that while the First Amendment generally prohibits content-based speech regulations, content-based regulations of commercial speech are permissible for two reasons: 1) “commercial speakers have extensive knowledge of both the market and their products” such that they are in a position to know “the accuracy of their messages and the lawfulness of the underlying activity” and 2) commercial speech, “the offspring of economic self-interest, is a hardy breed of expression.” Id. at 564 n.6. Therefore, commercial speech is unlikely to be chilled by government regulations. Central Hudson, 447 U.S. at 564 n.6.
36. Id. at 561 (emphasis added).
speech as “speech proposing a commercial transaction.”

Justice Stevens, joined by Justice Brennan, expressed concern in his concurring opinion about the Court’s use of broad definitions of commercial speech: “[I]t is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.” Stevens argued that the Court’s first definition of commercial speech (expression related solely to the economic interests of the speaker and its audience) was “unquestionably too broad” and that the second definition (commercial speech is speech proposing a commercial transaction) would be too broad if construed to encompass “the entire range of communication that is embraced within the term ‘promotional advertising.’”

Concluding that the Constitution provides less protection to commercial speech than other varieties of speech, the Court laid out a four-part analysis for determining whether a government regulation of commercial speech violates the First Amendment. The first step in the analysis is to determine whether the commercial expression at issue is protected by the First Amendment. Commercial speech that is misleading or proposes an illegal activity is not entitled to protection. All other commercial speech, however, is entitled to at least some protection. The second step is to determine whether the government interest asserted in support of the regulation is substantial. The third step is to decide whether the regulation directly advances the government’s substantial interest. The final step involves determining whether the regulation “is not more extensive than necessary” to achieve the government’s purpose. In short, a regulation of commercial speech that does not mislead or propose an illegal transaction is constitutional if it directly advances a substantial government interest in a manner that is “not more extensive than necessary.”

Applying the four-part analysis to the Public Service Commission’s ban on

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37. Id. at 562.
38. Id. at 579.
39. Id. at 580.
40. Central Hudson, 447 U.S. at 580.
41. In his dissent, Justice Rehnquist criticized the majority for extending First Amendment protection to commercial speech: “I remain of the view that the Court unlocked a Pandora’s Box when it ‘elevated’ commercial speech to the level of traditional political speech by according it First Amendment protection . . . .” Id. at 598. Justice Rehnquist believed that the majority’s decision unlocked a Pandora’s Box because:

[t]he line between ‘commercial speech,’ and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since Virginia Pharmacy.

Id.
42. Id. at 566.
43. Id. at 563. The reason for this distinction is that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.” Central Hudson, 447 U.S. at 563.
44. Id. at 566.
45. Id. at 566.
46. Id. In Board of Trustees of the State University of New York v. Fox, the Court clarified the meaning of “not more extensive than necessary.” 492 U.S. 469 (1989). Not more extensive than necessary does not mean that government must use the least restrictive alternative. Instead it means “a fit that is not necessarily perfect, but reasonable . . . .” Id. at 480.
47. Central Hudson, 447 U.S. at 563.
promotional advertising by utilities, the Court concluded that the utility’s advertising was protected by the First Amendment.\textsuperscript{48} Proceeding to steps two through four, the Court determined that the government had a substantial interest and the regulation directly advanced that interest but the regulation was more extensive than necessary. Therefore, the regulation was unconstitutional.\textsuperscript{49}

\textit{D. An Attempt to Define Commercial Speech: Bolger v. Youngs Drug Products}

In \textit{Bolger v. Youngs Drug Products},\textsuperscript{50} the Court attempted to define commercial speech more precisely than merely defining it as speech proposing a commercial transaction\textsuperscript{51} or speech which is “related solely to the economic interest of the speaker and its audience.”\textsuperscript{52} The case involved a manufacturer’s challenge of a federal statute prohibiting the mailing of unsolicited contraceptive advertisements. The manufacturer argued that the mailings were fully protected by the First Amendment while the government insisted that the mailings were commercial speech. The Court felt compelled to address the problem of distinguishing commercial from non-commercial speech because the manufacturer’s information pamphlet did more than merely propose a commercial transaction.\textsuperscript{53}

The Court found that three factors are relevant to distinguishing commercial speech from non-commercial speech: 1) whether the speech is in the form of an advertisement; 2) whether the speech refers to a specific product; and 3) whether there is an economic motivation for the speech.\textsuperscript{54} Although no one of these factors alone is sufficient to classify speech as commercial, “[t]he combination of \textit{all} these characteristics, provides strong support for the . . . conclusion” that the speech is commercial.\textsuperscript{55} The Court did not discuss whether two of the three factors would be sufficient. Instead, the Court focused on the fact that speech can be commercial despite containing a discussion of public issues.\textsuperscript{56} “[A]dvertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”\textsuperscript{57} The Court also noted that economic motivation alone would “clearly be insufficient . . . to turn materials into commercial speech.”\textsuperscript{58}

The Court determined that Youngs’ informational pamphlets were commercial speech even though one of the pamphlets discussed condoms generally without a specific reference to Youngs’ condoms in particular because the fact “[t]hat a product is referred to generally does not . . . remove it from the realm of commercial speech.”\textsuperscript{59} This is

\begin{footnotes}
\item[48] Id. at 566-68.
\item[49] Id. at 571-72.
\item[50] 463 U.S. 60 (1983).
\item[52] \textit{Central Hudson}, 447 U.S. at 561.
\item[53] \textit{Bolger}, 463 U.S. at 65-66.
\item[54] Id. at 66-67.
\item[55] Id. at 67.
\item[56] Id. at 67-68.
\item[57] Id. at 68 (quoting \textit{Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of N.Y.}, 447 U.S. 557, 563 n.5 (1980)).
\item[58] \textit{Bolger}, 463 U.S. at 67.
\item[59] Id. at 67 n.13. The only reference to the manufacturer was on the bottom of the last page of the pamphlet.
\end{footnotes}
particularly true if a company has control of the market for a product such that it “may be able to promote the product without reference to its own brand names.”

Despite ruling that the manufacturer’s pamphlets were commercial speech, the Court applied the test announced in Central Hudson, and held the challenged statute unconstitutional.

E. Questioning the Doctrine: 44 Liquormart v. Rhode Island

In 44 Liquormart v. Rhode Island, a unanimous Court struck down Rhode Island’s complete ban on advertising the prices of alcoholic beverages. Although the speech at issue was clearly commercial and the judgment unanimous, no one rationale won the support of a majority. Notably, a plurality of the Court (Justices Ginsberg, Kennedy, Stevens, and Thomas) advocated strict review for at least some regulations of commercial speech.

Justice Stevens (joined by Justices Kennedy and Ginsburg) argued that less strict review is justified when a state regulates commercial speech to protect consumers from commercial harms, but where (as here) “a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to preservation of a fair bargaining process [i.e., preventing commercial harm], there is far less reason to depart from the rigorous review that the First Amendment generally demands.”

According to Justice Stevens, complete bans on truthful commercial speech pose “special dangers” that “cannot be explained away by appeals to the ‘commonsense distinctions that exist between commercial and non-commercial speech.’” Furthermore, complete bans on truthful, non-misleading speech rarely serve to protect consumers from commercial harms. Instead, such bans “hinder consumer choice” and “impede debate over central issues of public policy.”

Although Justice Stevens applied strict scrutiny to the Rhode Island ban, he concluded that the ban could not even pass the Central Hudson test.

Justice Thomas, in his concurring opinion, argued that the Central Hudson test should not be applied in cases like this one where “the government’s asserted interest is

60. Id. After concluding that Youngs’ pamphlets were commercial speech, the Court applied the Central Hudson test and found that the regulation was more extensive than necessary.


62. In addition to prohibiting all price advertising by vendors licensed by the state of Rhode Island and out-of-state manufacturers, wholesalers, and shippers of alcoholic beverages, Rhode Island law prohibited the media from publishing or broadcasting advertisements for alcoholic beverages—including references to prices of alcohol in other states. Id. at 489-90.

63. Note that the parties stipulated that the proposed advertising “did not concern an illegal activity and presumably would not be false or misleading.” Id. at 493.

64. Id. at 501.

65. Id. at 502 (quoting Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)). The “commonsense” distinctions Justice Stevens is referring to are: 1) that commercial speech is more objective/more readily verified than non-commercial speech (i.e., there are false claims but there are no false ideas) and 2) commercial speech is more durable/hardier than non-commercial speech because it is economically motivated. Stevens argued that despite these distinctions, “[r]egulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective [in chilling speech] because they aim at durable messages.” 44 Liquormart v. Rhode Island, 517 U.S. 484, 502 (1996).

66. Id. at 503.

67. Id. at 507.
to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace."\textsuperscript{68} In such cases, the government’s interest is "\textit{per se} illegitimate and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘non-commercial’ speech."\textsuperscript{69} More generally, Justice Thomas argued that he cannot find a “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than non-commercial speech“\textsuperscript{70} and that none of the arguments the Court has offered for distinguishing between commercial speech justify restrictions on otherwise legal information. Consequently, Justice Thomas advocated a return to the doctrine of \textit{Virginia Pharmacy}: “all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.”\textsuperscript{71}

Justice O’Connor, joined by the Chief Justice Rehnquist and Justices Souter and Breyer, concurred in the judgment but would have simply applied the \textit{Central Hudson} test to the Rhode Island ban.\textsuperscript{72} Justice O’Connor was willing to assume that Rhode Island’s ban directly advanced its interest in promoting temperance.\textsuperscript{73} Turning to the fourth prong, Justice O’Connor found the fit between Rhode Island’s ban on advertising and its temperance goal unreasonable due to the existence of numerous other methods (such as taxes or minimum prices) of promoting temperance that do not restrict speech. Justice O’Connor concluded that because the ban failed the \textit{Central Hudson} test, the Court did not need to consider replacing the \textit{Central Hudson} test.\textsuperscript{74}

\section*{III. KASKY V. NIKE}

\textbf{A. The Underlying Controversy of the Kasky Case}

Beginning in 1996, Nike was struck by a storm of criticism of its labor practices in its overseas factories. Critics, including \textit{New York Times} columnist Bob Herbert, claimed “that working conditions in Nike’s overseas factories were dangerous, workers were mistreated and underpaid, and child labor was used.”\textsuperscript{75} Nike vigorously responded to the accusations because the company has long sought to “foster the appearance and reality of good working conditions in the Asian factories producing its products.”\textsuperscript{76} Nike’s public relations campaign included letters to collegiate athletic directors, letters to newspaper editors, and press releases.\textsuperscript{77} In particular, Nike countered reports in the media with the results of inspections conducted by Andrew Young,\textsuperscript{78} whom Nike had hired to conduct

\begin{thebibliography}{9}
\bibitem{68} Id. at 518.
\bibitem{69} Id.
\bibitem{70} \textit{44 Liquormart}, 517 U.S. at 522
\bibitem{71} Id. at 526.
\bibitem{72} Recall, again, that the parties stipulated that the first two prongs of the \textit{Central Hudson} test were met.
\bibitem{73} “Temperance” in this context means moderation in or abstinence from alcoholic beverages. \textit{44 Liquormart}, 517 U.S. at 490 n.4.
\bibitem{74} Id. at 532.
\bibitem{75} Fisher, \textit{supra} note 8, at 27.
\bibitem{76} Kasky \textit{v.} Nike, Inc., 93 Cal. Rptr. 2d 854, 856 (Cal. Ct. App. 2000) (holding that the misrepresentations Nike made about its employment practice were within the realm of expression protected by the First Amendment).
\bibitem{77} Dobrusin, \textit{supra} note 3, at 1141.
\bibitem{78} Andrew Young is a former U.S. ambassador to the United Nations.
\end{thebibliography}
an independent evaluation of working conditions in its factories. Nike purchased full-page advertisements in several major newspapers to publicize Andrew Young’s report.

B. Kasky’s Complaint

In 1998, Marc Kasky, a San Francisco consumer activist, brought a private attorney general’s action against Nike and five of Nike’s corporate officers alleging that statements Nike made in the course of its public relations campaign launched in response to criticism of its labor practices violated California’s false advertising and unfair trade practice laws. Kasky sought an injunction ordering Nike to “disgorge all monies that it acquired by the alleged unfair practices, [and] to undertake a court-approved public information campaign to remedy the misinformation . . . .” Kasky also sought attorneys’ fees.

C. The Legal Basis for Kasky’s Complaint: Private Attorney General’s Action Pursuant to California’s Unfair Competition and False Advertising Law

Kasky was able to bring this suit despite a lack of personal harm pursuant to Sections 17204 (for unfair competition) and 17525 (for false advertising) of California’s Business and Professions Code. These sections empower any state resident to bring a private attorney general’s action on behalf of the citizens of California without alleging any personal harm. This section thus eliminates “all doctrines of standing, causation, and injury” thereby allowing “anyone breathing and in the state of California to sue.”

California’s Unfair Competition law (Section 17200 et seq of the California Business and Professions Code) broadly defines unfair competition as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . .” Every word within the section is broadly defined. For example, a “business practice” does not have to be anything in particular. A business practice can be

79. Kasky, 93 Cal. Rptr. 2d at 856.
80. Fisher, supra note 8, at 28.
81. See infra Part III.C (discussing California’s false advertising law (CAL. BUS. & PROF. CODE § 17500 et seq (West 1997)) and California’s unfair competition law (CAL. BUS. & PROF. CODE § 17200 et seq (West 1997))).
83. CAL. BUS. & PROF. CODE § 17204, § 17525 (West 1997).
84. Fisher, supra note 8, at 28; see also CAL. BUS. & PROF. CODE § 17204 (West 1997).
86. Adam Liptak, Nike Move Ends Case Over Firms’ Free Speech, N.Y. TIMES, Sept. 13, 2003, at A8 (discussing a California’s Supreme Court ruling that allows an unharmed citizen, acting as a private attorney general, to enforce California false advertising law).
87. CAL. BUS. & PROF. CODE § 17200 (West 1997).
88. Wheaton, supra note 85, at 425.
the business’ general conduct—including advertising. An “act” can be a single past act. Any “act” or practice that violates a local, state or federal statute is unlawful for purposes of Section 17200. “Unfair” however, is not limited to that which is unlawful but instead covers any otherwise lawful and non-fraudulent practice except those explicitly deemed lawful by the state legislature. Furthermore, an act or practice is “fraudulent” if “members of the public are likely to be deceived.” Because Section 17200 does not require proof of either intent to deceive or actual deception, section 17200 imposes strict liability.

Section 17500 defines advertising broadly to include any statement, conveyed by any manner or means, with “intent directly or indirectly” to sell goods or services. Section 17500 has been interpreted by the courts to “prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or has a capacity, likelihood or tendency to deceive or confuse the public.” Thus, all that is required to make a claim under Section 17500 is a showing “that members of the public are likely to be deceived.”

D. Procedural History

Nike moved to dismiss Kasky’s suit. It argued that “its statements did not fit the U.S. Supreme Court’s definition of commercial speech—speech that ‘does no more than propose a commercial transaction’—and so should receive” full protection under the First Amendment. Both the trial and appellate courts granted Nike’s motion to dismiss, concluding that Nike’s statements were “part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment.” Despite losses in the lower courts, Kasky persisted by seeking review in the California Supreme Court solely on the ground that the Court of Appeals erred in deeming Nike’s speech fully protected rather than commercial.

E. The California Supreme Court

The California Supreme Court reversed the lower courts, ruling that Nike’s speech was commercial speech and remanded the case for further proceedings. The court

89. Id.
90. Id.
91. Id. at 426.
92. Id. at 427.
94. Id. at 428-29.
95. Id. at 425.
96. CAL. BUS. & PROF. CODE § 17500 (West 1997).
98. Id. (quoting Comm. on Children’s Television, Inc. v. Gen. Foods Corp., 673 P.2d 660 (Cal. 1983)).
99. Liptak, supra note 86 (Citations omitted).
explicitly stated that its decision pertained solely to the issue of the nature of Nike’s speech. The court insisted that its decision should be construed merely to hold that Kasky’s complaint was sufficient to survive Nike’s motion to dismiss on grounds that the speech was fully protected by the First Amendment and not a ruling on whether Nike’s speech was false or misleading.

Because the U.S. Supreme Court has not developed an all-purpose test for distinguishing between commercial and non-commercial speech, the California Supreme Court fashioned a three factor “limited-purpose test” loosely based on the Court’s reasoning in Bolger. This test is to be used “when a court must decide whether particular speech may be subjected to laws aimed at false advertising or other forms of commercial deception . . . .” The California Supreme Court’s three factors included: the identity of the speaker, the intended audience, and the content of the message. The rationale behind the first and second factors is the fact that all of the U.S. Supreme Court’s commercial speech cases have involved “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.” This factor, the California Court asserts, is consistent with the U.S. Supreme Court’s characterization of commercial speech as “speech proposing a commercial transaction.” The third factor, the content of the message, is the California Supreme Court’s variation on the Bolger Court’s “product references.” The California Court does not think that “product references” are limited to statements about price and quality but includes “statements about the manner in which the products are manufactured, distributed or sold . . . or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product.” Thus, under the California Supreme Court’s definition, commercial speech encompasses “factual representations about the business operations, products, or services of the speaker . . . made for purposes of sales of, or other commercial transactions in, the speaker’s products or services.”

The California Court concluded that Nike’s speech satisfied all three elements of the limited-purpose test. The first element (a commercial speaker) was satisfied because Nike and its officers and directors are engaged in commerce. Nike’s speech satisfied the second element because it addressed (both directly and indirectly) potential purchasers of Nike’s products. Nike directly addressed potential purchasers when it wrote to

102. Id. at 262.
103. Id. at 262.
105. Kasky, 45 P.3d at 256.
106. Id.
107. Id. The intended audience of commercial speech includes not only “actual or potential buyers or customers of the speaker’s goods or services” but also “persons acting for actual or potential buyers or customers” and, most notably, “persons (such as reporters or reviewers) likely to repeat the message or otherwise influence actual or potential buyers or customers.” Id.
108. Id.
109. Kasky, 45 P.3d at 257.
110. Id.
111. Id.
112. Id. at 258.
113. Id.
collegiate athletic departments, who are “major purchasers of athletic shoes and apparel.”\(^{114}\) The court found that while Nike’s press releases and letters to newspaper editors were ostensibly directed toward the general public, they were intended to reach and influence potential Nike customers.\(^ {115}\) The court’s conclusion was based upon a statement in a letter to the editor in which Nike wrote, “[d]uring the shopping season, we encourage shoppers to remember that Nike is the industry’s leader in improving factory conditions.”\(^ {116}\) The court found that the third factor was satisfied because Nike’s speech described its own labor and business practices. Thus the court concluded that Nike’s speech was commercial because Nike was acting as a commercial speaker—its intended audience was primarily the buyers of its products—and the statements consisted of factual representations about its own business operations.\(^ {117}\)

The court rejected Nike’s claim that its speech was entitled to protection because it concerned a matter of public debate.\(^ {118}\) The court was not persuaded by past cases\(^ {119}\) in which the U.S. Supreme Court held that speech concerning matters of public debate were non-commercial because those cases were decided thirty years before the “modern” commercial speech cases of Bigelow and Virginia Pharmacy.\(^ {120}\) The court concluded that “Nike’s speech [was] not removed from the category of commercial speech because it [was] intermingled with non-commercial speech” or because Nike was responding to charges.\(^ {121}\) Furthermore, the U.S. Supreme Court “has never held that commercial speech must have as its only purpose the advancement of an economic transaction . . . .”\(^ {122}\)

### F. On to the U.S. Supreme Court: Nike v. Kasky

Following the California Supreme Court’s decision, Nike petitioned for and received a writ of certiorari to the U.S. Supreme Court. The Court granted certiorari to decide two questions: 1) “whether a corporation participating in a public debate may ‘be subjected to liability for factual inaccuracies on the theory that its statements are “commercial speech” because they might affect consumers’ opinions about the business as a good corporate citizen and thereby affect their purchasing decisions’”\(^ {123}\) and 2) assuming Nike’s statements were in fact commercial speech, “whether the ‘First Amendment . . . permit[s] subjecting speakers to the legal regime approved by that court in the decision below.’”\(^ {124}\) After reviewing twenty-one amicus briefs in support of Nike on the merits,\(^ {125}\) nine in

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\(^{114}\) Kasky, 45 P.3d at 258.

\(^{115}\) Id.

\(^{116}\) Id. Unfortunately the court did not give the name of the newspaper in which this letter appeared.

\(^{117}\) Id. at 259.

\(^{118}\) Id. The court rejected Nike’s argument that its speech was non-commercial “because, when Nike made the [allegedly false] statements defending its labor practices, the nature and propriety of those practice had already become a matter of public interest and debate.” Kasky, 45 P.3d at 259.


\(^{120}\) Kasky, 45 P.3d at 260.

\(^{121}\) Id.

\(^{122}\) Id. at 261.


\(^{124}\) Id.

\(^{125}\) Nine amicus briefs were filed in support of Nike’s petition for certiorari. It is interesting to note that both large corporations (e.g., Exxon Mobile, Microsoft) and civil liberties groups (groups not known for having common interests) filed briefs in support of Nike. For a complete list of “Briefs and Other Materials” filed in
support of Kasky, and hearing oral arguments in the case, the Court decided by a six-to-three vote that certiorari was improvidently granted.\textsuperscript{126}

While the decision of the Court was issued per curiam, Justices Stevens and Ginsburg, joined in part by Justice Souter, wrote a concurring opinion explaining that they voted to dismiss the writ of certiorari for three reasons. The first reason was that the California Supreme Court’s denial of Nike’s motion to dismiss was not a final decision within the meaning of 28 U.S.C. § 1257 (2000).\textsuperscript{127} The justices recognized that the Court has departed from strict adherence to that statute in rare circumstances in which a state’s highest court had finally determined a federal issue and remanded the case for further proceedings pursuant to state law.\textsuperscript{128} However, the justices were not persuaded by Nike’s argument that its case presented a situation where the Court’s reversal of the state court’s ruling on a federal issue would preclude the need for further litigation because “an opinion on the merits of the case could take any one of a number of different paths,” some of which would not preclude the need for further litigation.\textsuperscript{129}

The justices’ second reason was that neither Kasky nor Nike had standing to invoke the jurisdiction of the federal courts.\textsuperscript{130} Kasky clearly lacked standing because he had neither injury nor a federal claim. The justices found that Nike could have standing despite Kasky’s lack thereof, if the decision of the California Supreme Court constituted a final judgment on Nike’s First Amendment rights.\textsuperscript{131} However, the California court’s decision was not a final decision on Nike’s First Amendment rights. Instead, the court “merely held that [Kasky’s] complaint was sufficient to survive Nike’s demurrer and to allow the case to go forward.”\textsuperscript{132}

The justices’ third reason, joined by Justice Souter, was that “the reasons for avoiding premature adjudication of novel constitutional questions apply with special force in this case.”\textsuperscript{133} The three justices believed that the case presented “novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance”\textsuperscript{134} and therefore it would be imprudent for the Court to rule on this issue based upon “mere unproven allegations in a pleading.”\textsuperscript{135} The justices opined that, if the allegations in Kasky’s complaint are true, “[t]he regulatory interest in protecting market participants from being misled by such misstatements is of the highest order.”\textsuperscript{136} If, however, Kasky’s allegations are false, and Nike was participating in a public debate, “[t]he interest in protecting such participants [as Nike] from the chilling effect of the prospect of

\textsuperscript{126} Nike, 123 S. Ct. 2554 (per curiam).
\textsuperscript{127} Id. at 2555; 28 U.S.C. § 1257 provides that the U.S. Supreme Court may review, by writ of certiorari, “final judgments rendered by the highest court of a State in which a decision could be had . . . .”
\textsuperscript{128} Nike, 123 S. Ct. at 2555-56.
\textsuperscript{129} Id. at 2557 (Stevens, J., concurring).
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 2558 (Stevens, J., concurring).
\textsuperscript{132} Id.
\textsuperscript{133} Nike, 123 S. Ct. at 2555 (Stevens, J., concurring).
\textsuperscript{134} Id. at 2558 (Stevens, J., concurring).
\textsuperscript{135} Id. at 2559 (Stevens, J., concurring).
\textsuperscript{136} Id.
expensive litigation is therefore also a matter of great importance."\textsuperscript{137}

Justices Kennedy, Breyer, and O'Connor dissented from the Court’s decision to dismiss the writ. Although Justice Kennedy did not explain his reasons for dissenting, Justice Breyer, joined by Justice O’Connor, explained his reasoning. According to Justice Breyer, the Court could have and should have decided the case because the issues of the case, “directly concern[ed] the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevents us from deciding those questions . . . and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue easier to decide later on.”\textsuperscript{138}

Turning to the merits of the case, Justice Breyer, argued that “three sets of circumstances when taken together—circumstances of format, content, and regulatory context—warrant treating the regulations of the speech at issue differently from regulations of purer forms of commercial speech such as simple product advertisements.”\textsuperscript{139} Taking the statement by Nike least likely to warrant full First Amendment Protection (a letter from Nike to University presidents and athletic directors), Justice Breyer concluded that although the letter contained commercial aspects, those aspects were inextricably intertwined with the non-commercial speech that dominated the letter. He noted that the letter was not in a traditional advertising format, and it did not propose a commercial transaction. Instead “the letter’s content makes clear that . . . it concerns a matter that is of significant public interest and active controversy . . . .”\textsuperscript{140} Therefore, the letter is distinguishable in “form and content from the more purely ‘commercial speech’ described by prior cases.”\textsuperscript{141} As to the regulatory context, Justice Breyer found California’s regulations went beyond traditional speech regulations by giving private individuals authority to “impose ‘false advertising’ liability even though they themselves have suffered no harm.”\textsuperscript{142}

Justice Breyer would have applied heightened scrutiny to California’s regulations. The regulations would not have survived under heightened scrutiny for “there is no reasonable ‘fit’” between the burden imposed on speech and the government’s interests.\textsuperscript{143} Justice Breyer opined that if the Court were to reach the merits of the case “it would hold that heightened scrutiny applies; that, under the circumstances here, California’s delegation of enforcement authority to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it.”\textsuperscript{144}

\textsuperscript{137}. \textit{Id.}
\textsuperscript{138}. \textit{Nike}, 123 S. Ct. at 2560 (Breyer, J., dissenting).
\textsuperscript{139}. \textit{Id.} at 2566 (Breyer, J., dissenting).
\textsuperscript{140}. \textit{Id.}
\textsuperscript{141}. \textit{Id.}
\textsuperscript{142}. \textit{Id.} (referring to sections 17204 and 17535 of the California Business and Professions Code).
\textsuperscript{143}. \textit{Nike}, 123 S. Ct. at 2566. Justice Breyer noted that although the government’s interest in maintaining an “honest” marketplace is an important and legitimate government objective, “a private ‘false advertising’ action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech.” \textit{Id.} at 2566-67.
\textsuperscript{144}. \textit{Id.} at 2568 (Breyer, J., dissenting).
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G. Out with a Whimper

Three months after the Court’s dismissal of the writ of certiorari (in September 2003), Nike decided to bring nearly five years of litigation to a close by settling with Kasky for $1.5 million. Under the settlement, Nike agreed to pay $1.5 million over three years to the Fair Labor Association (FLA). In a joint statement, the parties said that supporting the FLA was preferable to continuing litigation. Neither party would say whether Nike would pay Kasky’s legal fees. Kasky was apparently satisfied with the outcome. According to Kasky’s lawyer, “[t]he main thing Mr. Kasky wanted was a change in practices by Nike, which happened.”

IV. ANALYSIS


Six justices of the U.S. Supreme Court believed that Kasky presented novel First Amendment questions regarding corporate speech on issues of public importance. Justices Souter, Ginsburg, and Stevens believed that the novel features of the case counseled against the Court deciding it in the absence of a full record (based merely on pleadings). Justices O’Connor and Breyer, on the other hand, believed the novel questions raised by the case counseled against delaying the Court’s review.

1. The Parties

The Kasky case differs from prior commercial speech cases because of the parties involved. In prior cases, the contest has been between a private party or parties seeking relief from a government prohibition on speech and a government entity. Kasky, however, involved a private citizen seeking to enforce a restraint on speech against another private party.

2. The Speech

The speech at issue in Kasky differs from the speech in past cases in form and substance. The speech at issue in Kasky was statements Nike made in a variety of formats—including statements Nike made in newspaper editorials, letters, press releases, a pamphlet, postings on its website, as well as statements reported in newspaper articles. Unlike the speech at issue in past commercial speech cases, Nike’s statements did not mention the price, availability, or suitability of Nike’s products. The statements did not urge the purchase of any Nike product. Instead, Nike’s statements were about its labor practices and moral scruples. Nike was accused of being “an immoral company, generating great profits on the back of Third World labor.” The accusations “generated

146. Liptak, supra note 86.
147. Kang, supra note 7.
148. Pet’r’s Br. at *2, Nike v. Kasky, Inc., 132 S. Ct. 2554 (2003) (No. 02-575) (2003 WL 898993). See also Bob Herbert, In America; Nike’s Pyramid Scheme, N.Y. TIMES, June 10, 1996, at A17 (likening Nike’s business structure to a pyramid scheme with multimillionaire celebrities endorsing the products and the company’s CEO, Phillip Knight, at the top and “legions of young Asians, mostly women, who work like slaves.”
a storm of media scrutiny and editorial coverage, rendering Nike a lightening rod for already crackling critiques of economic globalization.” Nike’s response to the deluge of accusations was that it “does act morally because its investments produce substantial economic and political benefits for workers and because it puts its best effort towards ensuring that employees at its contract facilities are paid fairly and treated well.”

3. The Claim

In prior cases, the speech at issue was presumed to be truthful, non-misleading speech. The harm alleged by the advocate of the restriction stemmed from the topic of the speech, not from the truth or accuracy of the speech itself. The U.S. Supreme Court has been highly critical of regulations of truthful non-misleading speech. Some justices (such as Stevens, Kennedy, Ginsburg, Breyer, and Thomas) have advocated strict review of such regulations.

In Kasky, the claim was that Nike’s speech was false or misleading commercial speech. The alleged harm stemmed not from the topic of the speech, but from the incompleteness or untruthfulness of content. Although the California Supreme Court claimed it was merely deciding whether or not Nike’s statements were commercial speech, it appears that the court “overplayed the deference due” to Kasky’s claim that Nike’s statements were false or misleading and that this influenced both the court’s reasoning and conclusion.

4. The Law

The law in Kasky is unlike the law involved in prior commercial speech cases. Prior cases have dealt primarily with bans on advertising: Virginia Pharmacy addressed a to support “the crushing weight of Mr. Knight’s multinational enterprise”).

149. Fisher, supra note 8, at 1.
150. At one point, Nike “found itself responding on a daily, and even hourly basis to claims that it was operating sweatshops in supposedly slave-labor conditions. Its representatives were regularly deluged by press inquiries for comment on new reports scheduled for immediate release.” Pet’r’s Br. at *2-*3, Nike (No. 02-575).
151. See also Philip H. Knight, Nike Pays Good Wages to Foreign Workers, N.Y. Times, June 21, 1996, (letter to the editor) at A26 (stating that Nike is genuinely concerned about conditions in its overseas factories and arguing that “the best way out of poverty for [underdeveloped] countries is through exports of light manufactured goods that provide the base for more skilled production”).
152. For example, in 44 Liquormart, “[t]he parties stipulated . . . that petitioners’ proposed ads do not concern illegal activity and presumably would not be false or misleading.” 44 Liquormart v. Rhode Island, 517 U.S. 484, 493 (1996).
154. See supra Part II.E.
155. Dobrusin, supra note 3, at 1139. The court said, “[t]he issue here is whether defendant corporation’s false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions.” Kasky v. Nike, Inc., 45 P.3d 243, 247 (Cal. 2002).
156. Dobrusin, supra note 3, at 1139.
ban on advertising of prescription drug prices; *Central Hudson* involved a ban on promotional advertising by a utility; *Bolger* concerned a ban on mailing unsolicited advertisements for contraceptives; and *44 Liquormart* was a ban on advertisements for alcoholic beverages. In *Kasky*, the laws at issue are the state’s general false advertising and unfair competition laws.

A unique feature of California’s false advertising and unfair competition law is that it eliminates all issues of standing, causation, and injury, thereby enabling any state resident to bring a private attorney general’s action on behalf of the citizens of California without alleging any personal harm. No other state in the union has this sort of law. This unique feature of California law appears to have been key to the U.S. Supreme Court’s decision to dismiss the writ of certiorari. Justices Ginsburg and Stevens wrote that the parties’ lack of Article III standing was one of three independently sufficient reasons for dismissing the writ of certiorari. Justices Ginsburg, Stevens, and Breyer suggested that Nike’s failure to bring a specific challenge to the constitutionality of California’s unique private attorney general enforcement mechanism below weighed into their conclusion that the Court should dismiss the writ.

**B. California’s Broad New Definition of Commercial Speech: A Departure from the U.S. Supreme Court’s Commercial Speech Jurisprudence**

Although the justices expressing their views on the *Kasky* case did not agree on whether the Court should decide the case at this point, all agreed that the decision below raised important and novel First Amendment questions about the ability of corporate speakers to weigh into public debates—particularly when the speaker’s business practices are involved in that debate. These questions emerged from the fact that the California Supreme Court’s broad definition of commercial speech opens the door to corporate liability for inaccuracies uttered in the course of public debate. The California Supreme Court’s definition of commercial speech encompasses nearly all corporate speech which, in turn, makes the speech subject to California’s false advertising and unfair competition laws.

**1. California’s Definition: A Departure from the U.S. Supreme Court’s Characterization of the Distinction Between Commercial and Non-Commercial Speech**

**a. The California Definition**

The California Supreme Court defined commercial speech based on the identity of

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161. See supra Part II.C (discussing California’s unfair competition and false advertising laws).
163. Nike v. Kasky, Inc., 123 S. Ct. 2554, 2559 n.5 (2003) (noting that Nike’s argument that the scope of protection afforded should differ depending on whether the speech is challenged by the state or a private citizen, although a difficult and important argument, would benefit from further development below).
164. Liptak, supra note 86.
the speaker, the intended audience, and the content of the message. The audience of a commercial message includes “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 content of a commercial message is any factual statement that may affect consumers’ purchasing decisions. When these elements are combined, the California Court’s definition encompasses “everything said by anyone ‘engaged in commerce,’ to an ‘intended audience’ of ‘potential . . . customers’ or ‘persons (such as reporters . . .)’ likely to influence actual or potential customers, that conveys factual information about the speaker ‘likely to influence consumers in their commercial decisions.’”

Because this definition does not require that the speech propose a commercial transaction, the definition appears to be a departure from the U.S. Supreme Court’s characterization of the distinction between commercial speech and other varieties of speech. California’s definition also appears to be a departure from the U.S. Supreme Court’s characterization of commercial speech as “expression related solely to the economic interests of the speaker and the audience.” The California definition encompasses statements by businesses only tangentially related to consumers’ economic interests.

b. The California Supreme Court’s Definition of Commercial Speech Is Not Reconcilable with the U.S. Supreme Court’s Decision in Bolger v. Youngs Drug

The California Supreme Court’s three-factor limited-purpose test is supposedly inspired by Bolger. The U.S. Supreme Court’s three factor test considered: 1) advertising format; 2) reference to a specific product; and 3) economic motivation. The California Court’s test departs from and substantially expands the Bolger test. First, economic motivation is not a factor in the California Court’s analysis. Instead, the identity of the speaker is a proxy for economic motivation. Under the California test, speakers engaged in commerce are assumed to have an economic motivation. The implication of this is that whenever the speaker is a business, this prong of the test will be satisfied. Second, the analysis does not take the format of the speech into account. The California Court claimed to find nothing in the U.S. Supreme Court’s commercial speech decisions indicating that format is essential to a determination that particular speech is commercial in character. Total disregard for the format of the speech, however, means that statements by Nike “about labor conditions in its Southeast Asia factories have no more protection under the First Amendment than a supermarket flyer advertising Nike

166. Id.
167. Id. at 262.
171. Id. at 66-67.
172. Kasky, 45 P.3d at 257.
‘Shox’ shoes for $69.”173 Third, whereas the Bolger test considered a specific product reference necessary for a finding of commercial content, the California test merely requires that the content be “likely to influence consumers in their commercial decisions.”174 Facts likely to influence consumers do not have to be related in any way to the price, quality, availability, or suitability of the firm’s products. Thus, “statements by commercial entities on nearly every public issue—from a company’s diversity policy to its community relations efforts to its political activities—all of which can be said to ‘matter in making consumer choices’”175 are, therefore, classified as commercial speech.

2. California’s Limited Purpose Test Is Not Supported by the Traditional Rationales for Distinguishing Between Commercial and Non-Commercial Speech

The U.S. Supreme Court did not carve out the category of commercial speech for lesser protection; instead the Court extended First Amendment protection to encompass speech the government had been able to regulate with impunity pursuant to the government’s power to regulate commerce.176 Although the Court extended First Amendment protection to commercial speech, it believed there were three reasons for affording it lesser protection: 1) commercial speech is more readily verified than non-commercial speech;177 2) commercial speech is harder and less likely to be chilled by regulation;178 and 3) the government’s interest in protecting consumers from “commercial messages” such as “misleading, deceptive, or aggressive sales practices.”179 Although the California Supreme Court cited the same rationales for distinguishing between commercial and non-commercial speech in its opinion, its broad definition is not supported by these rationales.180

a. More Readily Verified

It is reasonable to require corporate speakers to verify price, availability, and suitability information regarding their products and services because this information “is entirely within the speaker’s control and is publicly disseminated not on short notice but in advertisements generally planned well in advance.”181 California’s definition of commercial speech, however, encompasses statements made to reporters, reviewers, or

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173. Pet’r’s Br. at *21, Nike (No. 02-575).
174. Kasky, 45 P.3d at 262.
176. Alex Kozinski & Stuart Banner, Who’s Afraid of Commercial Speech?, 76 VA. L. REV. 627 (1990) (arguing that commercial speech should have full First Amendment protection).
177. Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976). It is often assumed that commercial speech addresses characteristics of products or services that can be objectively determined whereas non-commercial speech is expression of ideas, opinions, or beliefs, which may not even be capable of being true or false. Id. But see Kozinski & Banner, supra note 176, at 636 (arguing that “[t]he idea that commercial speech is more objective than other forms of speech does not survive the most rudimentary reality-check”).
anyone “likely to repeat the message to or otherwise influence actual or potential buyers.” Corporations have no way to ensure that these messages are accurately and completely repeated by reporters, reviewers, and others likely to repeat messages or influence consumers.

b. Hardier/Less Likely to be Chilled by Regulation

Advertising is presumed to be hardy because it is essential to the generation of commercial profits. “Expression on matters of corporate responsibility,” however, while of interest to the public, has “a much more tenuous connection to a corporation’s economic success than its commercial ‘advertising.’” Because “the durability of speech is not purely a function of the economic interest behind it; other interests can be just as strong as economics, sometimes stronger.” The combined effect of California’s broad definition and regulatory regime is to chill corporate speech that has a “less direct impact on its bottom line.”

c. Protecting Consumers from Commercial Harms

In 44 Liquormart, the U.S. Supreme Court noted, “[i]t is the State’s interest in protecting consumers from ‘commercial harms’ that provides ‘the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.’” The “commercial harms” the Court has in mind when it uses the term are “misleading, deceptive, or aggressive sales practices.” Under California’s definition, statements by a corporation are commercial “whenever they involve the company’s business practices and might influence consumers . . . .” The California court’s expansive notion of what constitutes commercial content brings statements by businesses only indirectly related to commercial transactions within the category of commercial speech. A definition of commercial speech that encompasses speech on topics only indirectly related to commercial transactions merely because some consumers may rely on that information cannot be justified on the grounds of protecting consumers from commercial harm.

182. Kasky, 45 P.3d at 256.
185. Pet’t’s Br. at *41, Nike (No. 02-575).
186. Kozinski & Banner, supra note 176, at 637.
189. 44 Liquormart, 517 U.S. at 501. Note that making a company look more ethical to consumers than it really is is not a commercial harm. See Pet. for a Writ of Cert. at *13, Nike (No. 02-575) (2002 WL 32101098).
V. RECOMMENDATION

In light of the Kasky case, this Note recommends a narrow definition of commercial speech (e.g., commercial speech is speech proposing a commercial transaction or speech addressing the qualities of a product such as price, quality, availability, or suitability). The Kasky case illustrates why a narrow definition of commercial speech is preferable to a broader definition. First, the Kasky case demonstrates that a corporation’s speech on matters of public concern (including statements about the corporation’s business, labor, and production practices) does not threaten the commercial harms that the U.S. Supreme Court has relied upon (and the California Supreme Court claims to rely on in Kasky) to justify distinguishing between commercial and non-commercial speech. Second, a broad definition of commercial speech chills corporate speech and prevents the marketplace of ideas from doing its job of sorting fact from fiction.

In Kasky there was no risk of commercial harm resulting from Nike’s participation in the public debate over its labor practices. When a corporation, addressing a matter of public concern, makes statements in established channels of public discussion and debate about business operations, there is no need for government regulation because this corporate speech can and will be answered by speech.191 “If there be time to expose through discussion the falsehood and fallacies . . . [of speech,] . . . the remedy to be applied is more speech, not enforced silence.”192 Recall that Kasky developed out of allegations in the press against Nike. Nike responded to those allegations, and the press, in turn, responded to Nike’s response. This is a classic example of speech answering speech. The events demonstrate why a narrow definition is preferable—a corporation’s participation in public debate will elicit a discussion capable of remedying any falsehood or fallacy that could cause consumer harm. Furthermore, adoption and application of a broad definition of commercial speech in the name of consumer protection constitutes the paternalistic approach to consumer protection the U.S. Supreme has repeatedly condemned: “[i]n case after case following Virginia Bd. of Pharmacy, the Court, and individual Members of the Court, have continued to stress . . . the anti-paternalistic premises of the First Amendment . . . [and] the near impossibility of severing ‘commercial’ speech from speech necessary to democratic decisionmaking . . . .”193

There was no risk of consumer harm resulting from Nike’s participation in the public debate over its labor practices. A simple content-neutral consumer fraud statute prohibiting false representations about a product or services offers consumers protection.194 Thus, instead of attempting to broaden the definition of commercial speech to take into account “the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries,”195 a better
option is a narrow definition of commercial speech and content-neutral regulations to address commercial harms arising from expression falling outside a narrow definition of commercial speech.

The aftermath of *Kasky* demonstrates that an overly broad definition of commercial speech has a chilling effect on commercial speech. The broad definition of corporate speech espoused by the California Supreme Court in *Kasky* makes it “hard to imagine how a company could engage in meaningful public debate on any issue, whether or not the issue directly affects its business, without the company’s statements being deemed commercial.”196 This definition (particularly when combined with California’s unfair business practices and false advertising law)197 chills corporate speech by making silence the prudent choice for corporate speakers.198 Because of *Kasky*, Nike has limited its public statements and stopped releasing its annual “corporate responsibility report” to the public.199 Nike’s counsel and the author of an amicus brief supporting Nike on behalf of Exxon Mobil, Bank of America, and Microsoft, have said that the California Supreme Court’s sweeping definition of commercial speech means that corporations will be unable to participate in public debate without taking a chance on being hauled into court in California.200

VI. CONCLUSION

Under the California Supreme Court’s definition of commercial speech, virtually all corporate speech is commercial speech. Whenever the speaker is a business, all three prongs of the California test will almost always be met. The first prong will be satisfied because corporations tend to be engaged in commerce. The second prong will be met because the intended audience of a corporate message can rarely avoid including actual or potential buyers or customers. The third prong will be met unless the message is unrelated to the corporation itself. The implication of this test is that silence is the safest option because “only the purest political speech by a business will be deemed noncommercial”201 under the California test.

The California court’s sweeping definition of commercial speech seems to be in direct conflict with our society’s and our law’s protective stance on the freedom of speech. The California court’s test to identify commercial speech is a departure from the U.S. Supreme Court’s commercial speech jurisprudence202 and is unsupported by the traditional reasons for distinguishing between commercial and non-commercial speech: commercial harms.203 The definition is contrary to our “profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open,”204 because it encourages businesses to remain silent rather than comment on

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197. See Part II.C; see also Wheaton, *supra* note 85.
200. *Id.*
203. See Part IV.B.2.
issues of public concern. Because the U.S. Supreme Court dismissed the writ of certiorari and Nike (perhaps weary from nearly five years of litigating a motion to dismiss) chose settlement, the California Supreme Court’s broad new definition of commercial speech went unchecked.