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COMMERCIAL SPEECH BASICS

The U.S. Constitution – The First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Central Hudson Opinion

U.S. Supreme Court
CENTRAL HUDSON GAS & ELEC. v. PUBLIC SERV. COMM'N, 447 U.S. 557
(1980) 447 U.S. 557
APPEAL FROM THE COURT OF APPEALS OF NEW YORK.
No. 79-565.

Held:

A regulation of appellee New York Public Service Commission which completely bans an electric utility from advertising to promote the use of electricity violates the First and Fourteenth Amendments.

> *(a) Although the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression, nevertheless the First Amendment protects commercial speech from unwarranted governmental regulation. For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial. If both inquires yield positive answers, it must then be decided whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Pp. 561-566.*
>
> *(b) In this case, it is not claimed that the expression at issue is either inaccurate or unlawful activity. Nor is appellant electrical utility's promotional advertising unprotected commercial speech merely because appellant holds a monopoly over the sale of electricity in its service area. Since monopoly over the supply of a product provides no protection from competition with substitutes for that product, advertising by utilities is just as valuable to consumers as advertising by unregulated firms, and there is no indication that appellant's decision to advertise was not based on the belief that consumers were interested in the advertising. Pp. 566-568.*
>
> *(c) The State's interest in energy conservation is clearly substantial and is directly advanced by appellee's regulations. The State's further interest in preventing inequities in appellant's rates based on the assertion that successful promotion of consumption in "off-peak" periods would create extra costs that would, because of appellant's rate structure, be borne by all consumers through higher overall rates is also substantial. The latter interest does not, however, provide a constitutionally adequate reason for restricting protected speech because the link between the advertising prohibition and appellant's rate structure is, at most, tenuous. Pp. 568-569. [447 U.S. 557, 558]*

(d) Appellee's regulation, which reaches all promotional advertising regardless of the impact of the touted service on overall energy use, is more extensive than necessary to further the State's interest in energy conservation which, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests. Pp. 569-571.

47 N. Y. 2d 94, 390 N. E. 2d 749, reversed.
POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, post, p. 572. BLACKMUN, J., post, p. 573, and STEVENS, J., post, p. 579, filed opinions concurring in the judgment, in which BRENNAN, J., joined. REHNQUIST, J., filed a dissenting opinion, post, p. 583.

MR. JUSTICE POWELL delivered the opinion of the Court.

The case presents the question whether a regulation of the Public Service Commission of the state of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I
In December 1973, the Commission, appeals here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris. [447 U.S. 557, 559] Statement 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter." Id., at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses "into two broad categories: promotional advertising intended to stimulate the purchase of utility services and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." 1 App. to Juris. Statement 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commissioner's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing powerplants. Id., at 37a. And since oil dealers are not under the Commissioner's jurisdiction and [447 U.S. 557, 560] thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the

Commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption. Ibid.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Ibid. (emphasis in orginal). Information advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." Id., at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost, 2 the Commission feared that additional power would be priced below the actual cost of generation. The additional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments. 3 The Commission's [447 U.S. 557, 561] order was upheld by the trial court and at the intermediate appellate level. 4 The New York Court of Appeals affirmed. It found little value to advertising in "the noncompetitive market in which electric corporations operate." Consolidated Edison Co. v. Public Service Comm'n, 47 N. Y. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power," the court denied that "promotional advertising of electricity might contribute to society's interest in `informed and reliable' economic decisionmaking." Ibid. The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. Id., at 110, 390 N. E. 2d, at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, 444 U.S. 962 (1979), and now reverse.

II

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976); Bates v. State Bar of Arizona 433 U.S. 350, 363 -364 (1977); Friedman v. Rogers, 440 U.S. 1, 11 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Virginia Pharmacy Board, 425 U.S., at 761 -762. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible [447 U.S. 557, 562] dissemination of information. In applying the First

Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." Id., at 770; see Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Bates v. State Bar of Arizona, supra, at 374.

Nevertheless, our decisions have recognized "the `commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455 -456 (1978); see Bates v. State Bar of Arizona, supra, at 381; see also Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 38-39 (1979). 5 The [447 U.S. 557, 563] Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. 436 U.S., at 456 , 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, Friedman v. Rogers, supra, at 13, 15-16; Ohralik v. Ohio State Bar Assn., supra, at 464-465, or [447 U.S. 557, 564] commercial speech related to illegal activity, Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973). 6

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both Bates and Virginia Pharmacy Board, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in Virginia Pharmacy Board that "[t]he advertising ban does not directly affect professional standards one way or the other." 425 U.S., at 769 . In Bates, the Court overturned an advertising prohibition that

was designed to protect the "quality" of a lawyer's work. [447 U.S. 557, 565] "Restraints on advertising . . . are an ineffective way of deterring shoddy work." 433 U.S., at 378 . 7

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." In re Primus, 436 U.S. 412, 438 (1978). 8 The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see First National Bank of Boston v. Bellotti, supra, at 794-795, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. For example, in Bates the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like might be required" in promotional materials. 433 U.S., at 384 . See Virginia Pharmacy Board, supra, at 773. And in Carey v. Population Services International, 431 U.S. 678, 701 -702 (1977), we held that the State's "arguments . . . do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that [447 U.S. 557, 566] the State could implement more carefully drawn restrictions. See id., at 712 (POWELL, J., concurring in part and in judgment); id., at 716-717 (STEVENS, J., concurring in part and in judgment). 9

In commercial speech cases, then, a **four-part analysis** has developed. 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.

III

We now apply this **four-step analysis** for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

…

The Central Hudson Test

The Central Hudson test recognizes the constitutionality of regulations restricting advertising that concerns an illegal product or service, or which is deceptive. For all other restrictions on commercial speech, however, the Court's test requires that the government show that the regulation directly advances an important interest and is no more restrictive of speech than necessary.

Questions

What are the four points of the Central Hudson test?

Under the Central Hudson test, should regulations and restrictions regarding gaming advertisements be permitted?

What factors are relevant to such an analysis as it applies to gaming?

ORIGINS OF FEDERAL RESTRICTIONS

Postal Restrictions

Since 1895, the federal government has played a role in the restriction of interstate advertising and promotion. In 1895, the federal prohibition on the interstate transportation or importation into the United States of lottery tickets and prize lists was adopted. Postal regulations were adopted prohibiting the distribution of lottery materials and advertisements.

18 U.S.C. § 1302. Mailing lottery tickets or related matter

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined under this title or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

Broadcast Media Restrictions

In 1934, the federal government's prohibition on the advertising of lotteries was expanded, as part of the Communications Act of 1934. The stated purpose was to create uniform postal and broadcast rules and to eliminate the radio stations' competitive advantage over newspapers resulting from the postal prohibitions against mailing newspapers that contained lottery advertisements. On the Congressional floor, the anti-lottery language was adopted without debate.

18 U.S.C. § 1304. Broadcasting lottery information

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

47 C.F.R. §73.1211 Broadcast of lottery information.

(a) No licensee of an AM, FM, television, or Class A television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes. (18 U.S.C. 1304, 62 Stat. 763).

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or other thing of value is awarded to any person whose

selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or other thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question. (See 21 FCC 2d 846).

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to an advertisement, list of prizes or other information concerning:

(1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or any other State which conducts such a lottery. (18 U.S.C. 1307(a); 102 Stat. 3205).

(2) Fishing contests exempted under 18 U.S. Code 1305 (not conducted for profit, i.e., all receipts fully consumed in defraying the actual costs of operation).

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)

(4) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section, that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization (18 U.S.C. 1307(a); 102 Stat. 3205); or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization. (18 U.S.C. 1307(a); 102 Stat. 3205).

(d)(1) For purposes of paragraph (c) of this section, "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting events or contests.

(2) For purposes of paragraph (c)(4)(i) of this section, the term ''not-for-profit organization'' means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

QUESTIONS

How does this affect casino advertising?

Should there be exceptions?

(1) state-run lottery games 18 U.S.C. §1307 (a)(1);
(2) horse racing and off-track betting;
(3) lotteries run by non-profit organizations 18 U.S.C. §1307 (a)(2)(A);
(4) promotional lotteries that are occasional and ancillary to another primary business 18 U.S.C. §1307 (a)(2)(B);
(5) gaming conducted by an Indian tribe pursuant to the Indian Gaming Regulatory Act ; and
(6) winner-take-all poker tournaments[1].

How does this effect sweepstakes?

How do you think the FCC distinguishes sweepstakes from gambling?

[1] The FCC held that a winner-take-all elimination poker tournament is not a lottery, thought the same logic does not apply to slot tournaments. The apparent difference is the amount of skill involved in poker as opposed to slot machine play. The FCC was not persuaded that "the advantage gained from the ability to play quickly is not sufficient to change a slot machine tournament from a game primarily of chance to a game primarily of skill." Calnevar Broadcasting, Inc., 8 F.C.C.R. 32 (1992).

DIRECT vs. INDIRECT ADVERTISING & THE FCC

The FCC has consistently held that broadcasts for traditional lotteries, absent a statutory exemption, violated both its regulations and federal law. For example, in Liability of i.B. Broadcasting, the FCC assessed a $1,000 fine against i.B. for broadcasting announcements promoting a lottery. The announcement stated "the Five Jokers Club is raffling a Mustang and the chance is only one dollar and you don't have to be present to win." The station claimed its manager made the decision to broadcast because he did not believe the announcement concerned a lottery. The FCC rejected this argument and found the required Section 1304 elements of chance, price and consideration to be present.

Indirect promotion of a lottery is not actionable under Section 1304. To be indirect, the broadcast cannot mention or promote the lottery, but may result in the listener being exposed to the lottery through other means. In the context of casino gambling, this means that a casino can promote its non-gaming activities even though it results in persons visiting the casino and being exposed to its casino games.

The FCC interpretation of what can be advertised is limited. The only reference that a gambling establishment can make to its gambling activity is the use of "gambling" words in its name, such as THE LUCKY DOG CASINO or THE BIG BUCKS GAMBLING HALL. In KCFX, Inc., the FCC distinguished the use of the word "casino" in the establishment's name, from its use in a sentence. Therefore, a station could use the Sam's Town Casino, but not "[a] place called Sam's Town. It's a casino." In effect, the FCC held the word casino cannot be used "standing alone."

This FCC position has been consistently applied in other cases. In DR. Partners, the FCC fined a station for a television commercial that showed an automobile with the words "Bonanza Casino, Live Entertainment 4720 N. Virginia St. The friendliest casino in Reno, NV." The FCC held that the words "friendliest casino" promoted a lottery. It reiterated that the word casino could only be broadcast as "part of the legal name of a multipurpose establishment." The FCC found unpersuasive that an exception should exist for use of the word "casino" in a service mark. It stated "if, a phrase promotes lottery activities, it does not fall beyond the scope of lottery proscriptions by being part of a service mark type of a slogan." Even use of the word "casino" in a sentence to refer to the establishment is prohibited. For example, a casino may not state "[t]his is what you've been waiting for a hotel/casino that loves to party."

Casinos often attempt to insert suggestive language or actions to indirectly promote their gambling activities. The FCC, however, has uniformly held such approaches directly promote a lottery. In *KCFX, Inc*., the FCC fined a FM radio station for airing a commercial for a casino that contained the words "take a chance. Yea. Everybody wins when you do the Flamingo." In *NAL re: DR. Partners*, a station was fined for lyrics in a casino commercial that included "play with us, stay with us." The

FCC, however, has approved the term “Vegas-style excitement” in the context of promoting the non-lottery related activities of an establishment such as entertainment.

Besides words, the FCC has rejected commercials where the background noise suggests that gambling activities are taking place. For example, a commercial for a casino/hotel where persons hears the familiar winning bells and sounds from slot machines would probably be prohibited by the commission.

Questions

How would you counsel a casino client regarding the development of a national advertising campaign?

Where do you think the line should be drawn?

The Posadas Court Opinion

U.S. Supreme Court
POSADAS de PUERTO RICO ASSOC. v. TOURISM CO., 478 U.S. 328 (1986)
478 U.S. 328
POSADAS de PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN v. TOURISM COMPANY OF PUERTO RICO ET AL.
APPEAL FROM THE SUPREME COURT OF PUERTO RICO
No. 84-1903.

Argued April 28, 1986.
Decided July 1, 1986.

JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we address the facial constitutionality of a Puerto Rico statute and regulations restricting advertising of casino gambling aimed at the residents of Puerto Rico. Appellant Posadas de Puerto Rico Associates, doing business in Puerto Rico as Condado Holiday Inn Hotel and Sands Casino, filed suit against appellee Tourism Company of Puerto Rico in the Superior Court of Puerto Rico, San Juan Section. Appellant [478 U.S. 328, 331] sought a declaratory judgment that the statute and regulations, both facially and as applied by the Tourism Company, impressibly suppressed commercial speech in violation of the First Amendment and the equal protection and due process guarantees of the United States Constitution. 1 The Superior Court held that the advertising restrictions had been unconstitutionally applied to appellant's past conduct. But the court adopted a narrowing construction of the statute and regulations and held that, based on such a construction, both were facially constitutional. The Supreme Court of Puerto Rico dismissed an appeal on the ground that it "d[id] not present a substantial constitutional question." We postponed consideration of the question of jurisdiction until the hearing on the merits. 474 U.S. 917 (1985). We now hold that we have jurisdiction to hear the appeal, and we affirm the decision of the Supreme Court of Puerto Rico with respect to the facial constitutionality of the advertising restrictions.

In 1948, the Puerto Rico Legislature legalized certain forms of casino gambling. The Games of Chance Act of 1948, Act No. 221 of May 15, 1948 (Act), authorized the playing of roulette, dice, and card games in licensed "gambling rooms." 2, codified, as amended, at P. R. Laws Ann., Tit. 15, 71 (1972). Bingo and slot machines were later added to the list of authorized games of chance under the Act. See Act of June 7, 1948, No. 21, 1 (bingo); Act of July 30, 1974, No. 2, pt. 2, 2 (slot machines). The legislature's intent was set forth in the Act's Statement of Motives: [478 U.S. 328, 332]

> "The purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income." Games of Chance Act of 1948, Act No. 221 of May 15, 1948, 1.

The Act also provided that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." 8, codified, as amended, at P. R. Laws Ann., Tit. 15, 77 (1972).

The Act authorized the Economic Development Administration of Puerto Rico to issue and enforce regulations implementing the various provisions of the Act. See 7(a), codified, as amended, at P. R. Laws Ann., Tit. 15, 76a (1972). Appellee Tourism Company of Puerto Rico, a public corporation, assumed the regulatory powers of the Economic Development Administration under the Act in 1970. See Act of June 18, 1970, No. 10, 17, codified at P. R. Laws Ann., Tit. 23, 671p (Supp. 1983). The two regulations at issue

in this case were originally issued in 1957 for the purpose of implementing the advertising restrictions contained in 8 of the Act. Regulation 76-218 basically reiterates the language of 8. See 15 R. & R. P. R. 76-218 (1972). Regulation 76a-1(7), as amended in 1971, provides in pertinent part:

> "No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by [478 U.S. 328, 333] the Tourism Development Company of the advertisement to be submitted in draft to the Company." 15 R. & R. P. R. 76a-1(7) (1972).

In 1975, appellant Posadas de Puerto Rico Associates, a partnership organized under the laws of Texas, obtained a franchise to operate a gambling casino and began doing business under the name Condado Holiday Inn Hotel and Sands Casino. 2 In 1978, appellant was twice fined by the Tourism Company for violating the advertising restrictions in the Act and implementing regulations. Appellant protested the fines in a series of letters to the Tourism Company. On February 16, 1979, the Tourism Company issued to all casino franchise holders a memorandum setting forth the following interpretation of the advertising restrictions:

> "This prohibition includes the use of the word `casino' in matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paper holders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public in Puerto Rico." App. 7a.

Pursuant to this administrative interpretation, the Tourism Company assessed additional fines against appellant. The Tourism Company ordered appellant to pay the outstanding total of $1,500 in fines by March 18, 1979, or its gambling franchise would not be renewed. Appellant continued to protest the fines, but ultimately paid them without seeking judicial review of the decision of the Tourism Company. In July 1981, appellant was again fined for violating the advertising restrictions. Faced with another threatened nonrenewal [478 U.S. 328, 334] of its gambling franchise, appellant paid the $500 fine under protest. 3

...

Because this case involves the restriction of pure commercial speech which does "no more than propose a commercial transaction," Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976), 7 our First Amendment analysis is guided by the general principles identified in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 -638 (1985). Under Central Hudson, commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the First Amendment applies to the particular kind of commercial speech at issue, then the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. 447 U.S., at 566 .

The particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not [478 U.S. 328, 341] misleading or fraudulent, at least in the abstract. We must therefore proceed to the three remaining steps of the Central Hudson analysis in order to determine whether Puerto Rico's advertising restrictions run afoul of the First Amendment. The first of these three steps involves an assessment of the strength of the government's interest in restricting the speech. The interest at stake in this case, as determined by the Superior Court, is the reduction of demand for casino gambling by the residents of Puerto Rico. Appellant acknowledged the existence of this interest in its February 24, 1982, letter to the Tourism Company. See App. to Juris. Statement 2h ("The legislators wanted the tourists to flock to the casinos to gamble, but not our own people"). The Tourism Company's brief before this Court explains the legislature's belief that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." Brief for Appellees 37. These are some of the very same concerns, of course, that have motivated

the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest. Cf. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54 (1986) (city has substantial interest in "preserving the quality of life in the community at large").

The last two steps of the Central Hudson analysis basically involve a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. Step three asks the question whether the challenged restrictions on commercial speech "directly advance" the government's asserted interest. In the instant case, the answer to this question is clearly "yes." The Puerto Rico Legislature obviously [478 U.S. 328, 342] believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view. See Central Hudson, supra, at 569 ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales"); cf. Metromedia, Inc. v. San Diego, 453 U.S. 490, 509 (1981) (plurality opinion of WHITE, J.) (finding third prong of Central Hudson test satisfied where legislative judgment "not manifestly unreasonable").

Appellant argues, however, that the challenged advertising restrictions are underinclusive because other kinds of gambling such as horse racing, cockfighting, and the lottery may be advertised to the residents of Puerto Rico. Appellant's argument is misplaced for two reasons. First, whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling "directly advance" the legislature's interest in reducing demand for games of chance. See id., at 511 (plurality opinion of WHITE, J.) ("[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising"). Second, the legislature's interest, as previously identified, is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling. According to the Superior Court, horse racing, cockfighting, "picas," or small games of chance at fiestas, and the lottery "have been traditionally part of the Puerto Rican's roots," so that "the legislator could have been more flexible than in authorizing more sophisticated games [478 U.S. 328, 343] which are not so widely sponsored by the people." App. to Juris. Statement 35b. In other words, the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico. 8 In our view, the legislature's separate classification of casino gambling, for purposes of the advertising ban, satisfies the third step of the Central Hudson analysis.

We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the Central Hudson analysis, namely, whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest. The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico. See also n. 7, infra; cf. Oklahoma Telecasters [478 U.S. 328, 344] Assn. v. Crisp, 699 F.2d 490, 501 (CA10 1983), rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). Appellant contends, however, that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it. We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct. Cf. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585 (DC 1971) (three-judge court) ("Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking"), summarily aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972); Dunagin v. City of Oxford, Miss., 718

F.2d 738, 751 (CA5 1983) (en banc) ("We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers"), cert. denied, 467 U.S. 1259 (1984).

In short, we conclude that the statute and regulations at issue in this case, as construed by the Superior Court, pass muster under each prong of the Central Hudson test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim. 9 [478 U.S. 328, 345]

Appellant argues, however, that the challenged advertising restrictions are constitutionally defective under our decisions in Carey v. Population Services International, 431 U.S. 678 (1977), and Bigelow v. Virginia, 421 U.S. 809 (1975). In Carey, this Court struck down a ban on any "advertisement or display" of contraceptives, 431 U.S., at 700 -702, and in Bigelow, we reversed a criminal conviction based on the advertisement of an abortion clinic. We think appellant's argument ignores a crucial distinction between the Carey and Bigelow decisions and the instant case. In Carey and Bigelow, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, t***he Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to [478 U.S. 328, 346] completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and Carey and Bigelow are hence inapposite.***

Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, see, e. g., Cal. Penal Code Ann. 647(b) (West Supp. 1986) (prohibiting soliciting or engaging in act of prostitution), to legalization of the product or activity with restrictions on stimulation of its demand on the other hand, see, e. g., Nev. Rev. Stat. 244.345(1), (8) (1986) (authorizing licensing of houses of prostitution except in counties with more than 250,000 population), 201.430, 201.440 (prohibiting advertising of houses of prostitution "[i]n any public theater, on the public streets of any city or town, or on any public highway," [478 U.S. 328, 347] or "in [a] place of business"). 10 To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Appellant's final argument in opposition to the advertising restrictions is that they are unconstitutionally vague. In particular, appellant argues that the statutory language, "to advertise or otherwise offer their facilities," and "the public of Puerto Rico," are not sufficiently defined to satisfy the requirements of due process. Appellant also claims that the term "anunciarse," which appears in the controlling Spanish version of the statute, is actually broader than the English term "to advertise," and could be construed to mean simply "to make known." Even assuming that appellant's argument has merit with respect to the bare statutory language, however, we have already noted that we are bound by the Superior Court's narrowing construction of the statute. Viewed in light of that construction, and particularly with the interpretive assistance of the implementing regulations as [478 U.S. 328, 348] modified by the Superior Court, we do not find the statute unconstitutionally vague.

For the foregoing reasons, the decision of the Supreme Court of Puerto Rico that, as construed by the Superior Court, 8 of the Games of Chance Act of 1948 and the implementing regulations do not facially violate the First Amendment or the due process or equal protection guarantees of the Constitution, is affirmed. 11

It is so ordered.

Footnotes

[Footnote 1] We have held that Puerto Rico is subject to the First Amendment Speech Clause, Balzac v. Porto Rico, 258 U.S. 298, 314 (1922), the Due Process Clause of either the Fifth or the Fourteenth Amendment, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 -669, n. 5 (1974), and the equal protection guarantee of either the Fifth or the Fourteenth Amendment, Examining Board v. Flores de Otero, 426 U.S. 572, 599 -601 (1976). See generally Torres v. Puerto Rico, 442 U.S. 465, 468 -471 (1979).

[Footnote 2] The hotel was purchased in 1983 by Williams Electronics Corporation, is now organized as a public corporation under Delaware law as Posadas de Puerto Rico Associates, Inc., and does business in Puerto Rico as Condado Plaza Hotel and Casino.

[Footnote 3] News of the Tourism Company's decision to levy the fine against appellant reached the New Jersey Gaming Commission, and caused the Commission to consider denying a petition filed by appellant's parent company for a franchise to operate a casino in that State.

[Footnote 4] In addition to its decision concerning the advertising restrictions, the Superior Court declared unconstitutional a regulation, 15 R. & R. P. R. 76a-4(e) (1972), that required male casino patrons to wear dinner jackets while in the casino. The court described the dinner jacket requirement as "basically a condition of sex" and found that the legislature "has no reasonable interest which would warrant a dissimilar classification" based on sex. See App. to Juris. Statement 35b-36b.

[Footnote 5] Under Puerto Rico law, the notice of appeal apparently was due in the Clerk's Office by 5 p.m. on the 30th day following the docketing of the Superior Court's judgment. Supreme Court of Puerto Rico Rule 48(a). The certificate of the Acting Chief Clerk of the Supreme Court of Puerto Rico indicates that appellant's notice of appeal was filed at 5:06 p.m. on the 30th day.

[Footnote 6] A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico. See Diaz v. Gonzalez, 261 U.S. 102, 105 -106 (1923) (Holmes, J.) ("This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here").

[Footnote 7] The narrowing construction of the statute and regulations announced by the Superior Court effectively ensures that the advertising restrictions cannot be used to inhibit either the freedom of the press in Puerto Rico to report on any aspect of casino gambling, or the freedom of anyone, including casino owners, to comment publicly on such matters as legislation relating to casino gambling. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 -638, n. 7 (1985) (noting that Ohio's ban on advertising of legal services in Dalkon Shield cases "has placed no general restrictions on appellant's right to publish facts or express opinions regarding Dalkon Shield litigation"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (emphasizing that "nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment"); Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 35, n. 125 (1979) (such "`political' dialogue is at the core of . . . the first amendment").

[Footnote 8] The history of legalized gambling in Puerto Rico supports the Superior Court's view of the legislature's intent. Casino gambling was prohibited in Puerto Rico for most of the first half of this century. See Puerto Rico Penal Code, 299, Rev. Stats. and Codes of Porto Rico (1902). The Puerto Rico Penal Code of 1937 made it a misdemeanor to deal, play, carry on, open, or conduct "any game of faro, monte, roulette, fantan, poker, seven and a half, twenty one, hoky-poky, or any game of chance played with cards, dice or any device for money, checks, credit, or other representative of value." See P. R. Laws Ann., Tit. 33, 1241 (1983). This longstanding prohibition of casino gambling stood in stark contrast to the Puerto Rico Legislature's early legalization of horse racing, see Act of Mar. 10, 1910, No. 23, repealed, Act of Apr. 13, 1916, No. 28, see P. R. Laws Ann., Tit. 15, 181-197 (1972 and Supp. 1985); "picas," see Act of Apr. 23, 1927, No. 25, 1, codified, as amended, at P. R. Laws Ann., Tit. 15, 80 (1972); dog racing, see Act of Apr. 20, 1936, No. 35, repealed, Act of June 4, 1957, No. 10, 1, see P. R. Laws Ann., Tit. 15, 231 (1972) (prohibiting dog racing); cockfighting, see Act of Aug. 12, 1933, No. 1, repealed, Act of May 12, 1942, No. 236, see P. R. Laws Ann., Tit. 15, 292-299 (1972); and the Puerto Rico lottery, see J. R. No. 37, May 14, 1934, repealed, Act of May 15, 1938. No. 212 see P. R. Laws Ann. Tit 15. 111-128 (1972 and Supp. 1985).

[Footnote 9] It should be apparent from our discussion of the First Amendment issue, and particularly the third and fourth prongs of the Central Hudson [478 U.S. 328, 345] test, that appellant can fare no better under the equal protection guarantee of the Constitution. Cf. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 55 , n. 4 (1986). If there is a sufficient "fit" between the legislature's means and ends to satisfy the concerns of the First Amendment, the same "fit" is surely adequate under the applicable "rational basis" equal protection analysis. See Dunagin v. City of Oxford, Miss., 718 F.2d 738, 752-753 (CA5 1983) (en banc), cert. denied, 467 U.S. 1259 (1984). JUSTICE STEVENS, in dissent, asserts the additional equal protection claim, not raised by appellant either below or in this Court, that the Puerto Rico statute and regulations impressibly discriminate between different kinds of publications. Post, at 359-360. JUSTICE STEVENS misunderstands the nature of the Superior Court's limiting construction of the statute and regulations. According to the Superior Court, "[i]f the object of [an] advertisement is the tourist, it passes legal scrutiny." See App. to Juris. Statement 40b. It is clear from the court's opinion that this basic test applies regardless of whether the advertisement appears in a local or nonlocal publication. Of course, the likelihood that a casino advertisement appearing in the New York Times will be primarily addressed to tourists, and not Puerto Rico residents, is far greater than would be the case for a similar advertisement appearing in the San Juan Star. But it is simply the demographics of the two newspapers' readerships, and not any form of "discrimination" on the part of the Puerto Rico Legislature or the Superior Court, which produces this result.

[Footnote 10] See also 15 U.S.C. 1335 (prohibiting cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission"), upheld in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (DC 1971), summarily aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972); Fla. Stat. 561.42(10)-(12) (1985) (prohibiting all signs except for one sign per product in liquor store windows); Mass. Gen. Laws 138:24 (1974) (authorizing Alcoholic Beverages Control Commission to regulate liquor advertising); Miss. Code Ann. 67-1-85 (Supp. 1985) (prohibiting most forms of liquor sign advertising), upheld in Dunagin v. City of Oxford, Miss., supra; Ohio Rev. Code Ann. 4301.03(E), 4301.211 (1982) (authorizing Liquor Control Commission to regulate liquor advertising and prohibiting off-premises advertising of beer prices), upheld in Queensgate Investment Co. v. Liquor Control Comm'n, 69 Ohio St. 2d 361, 433 N. E. 2d 138, appeal dism'd for want of a substantial federal question, 459 U.S. 807 (1982); Okla. Const., Art. 27, 5, and Okla. Stat., Tit. 37, 516 (1981) (prohibiting all liquor advertising except for one storefront sign), upheld in Oklahoma Telecasters Assn. v. Crisp, 699 F.2d 490 (CA10 1983), rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Utah Code Ann 32-7-26 to 32-7-28 (1974) (repealed 1985) (prohibiting all liquor advertising except for one storefront sign).

[Footnote 11] JUSTICE STEVENS claims that the Superior Court's narrowing construction creates an impressible "prior restraint" on protected speech, because that court required the submission of certain casino advertising to appellee for its prior approval. See post, at 361. This argument was not raised by appellant either below or in this Court, and we therefore express no view on the constitutionality of the particular portion of the Superior Court's narrowing construction cited by JUSTICE STEVENS.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The Puerto Rico Games of Chance Act of 1948, Act No. 221 of May 15, 1948, legalizes certain forms of casino gambling in Puerto Rico. Section 8 of the Act nevertheless prohibits gambling casinos from "advertis[ing] or otherwise offer[ing] their facilities to the public of Puerto Rico." 8, codified, as amended, at P. R. Laws Ann., Tit. 15, 77 (1972). Because neither the language of 8 nor the applicable regulations define what constitutes "advertis[ing] or otherwise offer[ing gambling] facilities to the public of Puerto Rico," appellee Tourism Company was found to have applied the Act in an arbitrary and confusing manner. To ameliorate this problem, the Puerto Rico Superior Court, to avoid a declaration of the unconstitutionality of 8, construed it to ban only advertisements or offerings directed to the residents of Puerto Rico, and listed examples of the kinds of advertisements that the court considered permissible under the Act. I doubt that this interpretation will assure that arbitrary and unreasonable [478 U.S. 328, 349] applications of 8 will no longer occur. 1 However, even assuming that appellee will now enforce 8 in a nonarbitrary manner, I do not believe that Puerto Rico constitutionally may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity.

I

It is well settled that the First Amendment protects commercial speech from unwarranted governmental regulation. See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 -762 (1976). "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561 -562 (1980). Our decisions have recognized, however, "the `common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455 -456 (1978). We have therefore held that the 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). Thus, while the First Amendment ordinarily prohibits regulation of speech [478 U.S. 328, 350] based on the content of the communicated message, the government may regulate the content of commercial speech in order to prevent the dissemination of information that is false, deceptive, or misleading, see Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985); Friedman v. Rogers, 440 U.S. 1, 14 -15 (1979); Ohralik, supra, at 462, or that proposes an illegal transaction, see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). We have, however, consistently invalidated restrictions designed to deprive consumers of accurate information about products and services legally offered for sale. See e. g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (lawyer's services); Carey v. Population Services International, 431 U.S. 678, 700 -702 (1977) (contraceptives); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) (housing); Virginia Pharmacy Board, supra (pharmaceuticals); Bigelow v. Virginia, 421 U.S. 809 (1975) (abortions).

I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity. Commercial speech is considered to be different from other kinds of protected expression because advertisers are particularly well suited to evaluate "the accuracy of their messages and the lawfulness of the underlying activity," Central Hudson, 447 U.S., at 564 , n. 6, and because "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not `particularly susceptible to being crushed by overbroad regulation.'" Ibid. (quoting Bates, supra, at 381); see also Friedman, supra, at 10; Virginia Pharmacy Board, supra, at 772, n. 24. These differences, we have held, "justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion, and these differences explain why doctrines designed to prevent `chilling' of protected speech are inapplicable to commercial [478 U.S. 328, 351] speech." Central Hudson, supra, at 578 (BLACKMUN, J., concurring in judgment); see Linmark Associates, Inc., supra, at 98; Virginia Pharmacy Board, supra, at 772, n. 24. However, no differences between commercial and other kinds of speech justify protecting commercial speech less

extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities.

> "Even though `commercial' speech is involved, [this kind of restriction] strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. . . . [T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them." Central Hudson, supra, at 574-575 (BLACKMUN, J., concurring in judgment).

See also Note, Constitutional Protection of Commercial Speech, 82 Colum. L. Rev. 720, 750 (1982) ("Regulation of commercial speech designed to influence behavior by depriving citizens of information . . . violates basic [First Amendment] principles of viewpointand public-agenda-neutrality"). Accordingly, I believe that where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.

II

The Court, rather than applying strict scrutiny, evaluates Puerto Rico's advertising ban under the relaxed standards normally used to test government regulation of commercial speech. Even under these standards, however, I do not [478 U.S. 328, 352] believe that Puerto Rico constitutionally may suppress all casino advertising directed to its residents. The Court correctly recognizes that "[t]he particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent." Ante, at 340-341. Under our commercial speech precedents, Puerto Rico constitutionally may restrict truthful speech concerning lawful activity only if its interest in doing so is substantial, if the restrictions directly advance the Commonwealth's asserted interest, and if the restrictions are no more extensive than necessary to advance that interest. See Zauderer, supra, at 638; In re R. M. J., 455 U.S. 191, 203 (1982); Central Hudson, supra, at 564. While tipping its hat to these standards, the Court does little more than defer to what it perceives to be the determination by Puerto Rico's Legislature that a ban on casino advertising aimed at resident is reasonable. The Court totally ignores the fact that commercial speech is entitled to substantial First Amendment protection, giving the government unprecedented authority to eviscerate constitutionally protected expression.

A

The Court asserts that the Commonwealth has a legitimate and substantial interest in discouraging its residents from engaging in casino gambling. According to the Court, the legislature believed that "`[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.'" Ante, at 341 (quoting Brief for Appellees 37). Neither the statute on its face nor the legislative history indicates that the Puerto Rico Legislature thought that serious harm would result if residents were allowed to engage in [478 U.S. 328, 353] casino gambling; 2 indeed, the available evidence suggests exactly the opposite. Puerto Rico has legalized gambling casinos, and permits its residents to patronize them. Thus, the Puerto Rico Legislature has determined that permitting residents to engage in casino gambling will not produce the "serious harmful effects" that have led a majority of States to ban such activity. Residents of Puerto Rico are also permitted to engage in a variety of other gambling activities including horse racing, "picas," cockfighting, and the Puerto Rico lottery all of which are allowed to advertise freely to residents. 3 Indeed, it is surely not farfetched to suppose [478 U.S. 328, 354] that the legislature chose to restrict casino advertising not because of the "evils" of casino gambling, but because it preferred that Puerto Ricans spend their gambling dollars on the Puerto Rico lottery. In any event, in light of the legislature's determination that serious harm will not result if residents are permitted and encouraged

to gamble, I do not see how Puerto Rico's interest in discouraging its residents from engaging in casino gambling can be characterized as "substantial," even if the legislature had actually asserted such an interest which, of course, it has not. Cf. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 715 (1984) (Oklahoma's selective regulation of liquor advertising "suggests limits on the substantiality of the interests it asserts"); Metromedia, Inc. v. San Diego, 453 U.S. 490, 532 (1981) (BRENNAN, J., concurring in judgment) ("[I]f billboards alone are banned and no further steps are contemplated or likely, the commitment of the city to improving its physical environment is placed in doubt").

The Court nevertheless sustains Puerto Rico's advertising ban because the legislature could have determined that casino gambling would seriously harm the health, safety, and welfare of the Puerto Rican citizens. Ante, at 344. 4 This [478 U.S. 328, 355] reasoning is contrary to this Court's long-established First Amendment jurisprudence. When the government seeks to place restrictions upon commercial speech, a court may not, as the Court implies today, simply speculate about valid reasons that the government might have for enacting such restrictions. Rather, the government ultimately bears the burden of justifying the challenged regulation, and it is incumbent upon the government to prove that the interests it seeks to further are real and substantial. See Zauderer, 471 U.S., at 641 ; In re R. M. J., 455 U.S., at 205 -206; Friedman, 440 U.S., at 15 . In this case, appellee has not shown that "serious harmful effects" will result if Puerto Rico residents gamble in casinos, and the legislature's decision to legalize such activity suggests that it believed the opposite to be true. In short, appellees have failed to show that a substantial government interest supports Puerto Rico's ban on protected expression.

B

Even assuming that appellee could show that the challenged restrictions are supported by a substantial governmental interest, this would not end the inquiry into their constitutionality. See Linmark Associates, 431 U.S., at 94 ; Virginia Pharmacy Board, 425 U.S., at 766 . Appellee must still demonstrate that the challenged advertising ban directly advances Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling. Central Hudson, 447 U.S., at 564 . The Court proclaims that Puerto Rico's legislature "obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." Ante, at 341-342. However, even assuming that an advertising ban would effectively reduce residents' [478 U.S. 328, 356] patronage of gambling casinos, 5 it is not clear how it would directly advance Puerto Rico's interest in controlling the "serious harmful effects" the Court associates with casino gambling. In particular, it is unclear whether banning casino advertising aimed at residents would affect local crime, prostitution, the development of corruption, or the infiltration of organized crime. Because Puerto Rico actively promotes its casinos to tourists, these problems are likely to persist whether or not residents are also encouraged to gamble. Absent some showing that a ban on advertising aimed only at residents will directly advance Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling, Puerto Rico may not constitutionally restrict protected expression in that way.

C

Finally, appellees have failed to show that Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling "cannot be protected adequately by more limited regulation of appellant's commercial expression." Central Hudson, supra, at 570. Rather than suppressing constitutionally protected expression, Puerto Rico could seek directly to address the specific harms thought to be associated with casino gambling. Thus, Puerto Rico could continue carefully to monitor casino operations to guard against "the development of corruption, and the infiltration of organized crime." Ante, at 341. It could vigorously enforce its criminal statutes to combat "the increase in local crime [and] the fostering of prostitution." Ibid. It could establish limits on the level of permissible betting, or promulgate additional [478 U.S. 328, 357] speech designed to discourage casino gambling among residents, in order to avoid the "disruption of moral and cultural patterns," ibid., that might result if residents were to engage in excessive casino gambling. Such measures would directly address the problems appellee associates with casino gambling, while

avoiding the First Amendment problems raised where the government seeks to ban constitutionally protected speech.

The Court fails even to acknowledge the wide range of effective alternatives available to Puerto Rico, and addresses only appellant's claim that Puerto Rico's legislature might choose to reduce the demand for casino gambling among residents by "promulgating additional speech designed to discourage it." Ante, at 344. The Court rejects this alternative, asserting that "it is up to the legislature to decide whether or not such a `counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." Ibid. This reasoning ignores the commands of the First Amendment. Where the government seeks to restrict speech in order to advance an important interest, it is not, contrary to what the Court has stated, "up to the legislature" to decide whether or not the government's interest might be protected adequately by less intrusive measures. Rather, it is incumbent upon the government to prove that more limited means are not sufficient to protect its interests, and for a court to decide whether or not the government has sustained this burden. See In re R. M. J., supra, at 206; Central Hudson, supra, at 571. In this case, nothing suggests that the Puerto Rico Legislature ever considered the efficacy of measures other than suppressing protected expression. More importantly, there has been no showing that alternative measures would inadequately safeguard the Commonwealth's interest in controlling the harmful effects allegedly associated with casino gambling. Under [478 U.S. 328, 358] these circumstances, Puerto Rico's ban on advertising clearly violates the First Amendment. 6

The Court believes that Puerto Rico constitutionally may prevent its residents from obtaining truthful commercial speech concerning otherwise lawful activity because of the effect it fears this information will have. However, "[i]t is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." Virginia Pharmacy Board, 425 U.S., at 770 . "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." First National Bank v. Bellotti, 435 U.S. 765, 791 (1978). The First Amendment presupposes that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them." Virginia Pharmacy Board, supra, at 770. "[I]f there be any danger that the people cannot evaluate . . . information . . . it is a danger contemplated by the Framers of the First Amendment." Bellotti, supra, at 792; see also Central Hudson, 447 U.S., at 562 ("[T]he First Amendment presumes that some accurate information is better than no information at all"). Accordingly, I would hold that Puerto Rico may not suppress the dissemination of truthful information about entirely lawful activity merely to keep its residents ignorant. The Court, however, would allow Puerto Rico to do just that, thus dramatically shrinking the scope of First Amendment protection available to commercial speech, and giving government officials unprecedented authority to [478 U.S. 328, 359] eviscerate constitutionally protected expression. I respectfully dissent.

[Footnote 1] Beyond the specific areas addressed by the Superior Court's "guidelines," 8 must still be applied on a case-by-case basis; a casino advertisement "passes legal scrutiny" if "the object of the advertisement is the tourist." App. to Juris. Statement 40b. Appellee continues to insist that a newspaper photograph of appellant's slot machines constituted an impressible "advertisement," even though it was taken at a press conference called to protest legislative action. See Brief for Appellees 48. Thus, even under the narrowing construction made by the Superior Court, appellee would interpret 8 to prohibit casino owners from criticizing governmental policy concerning casino gambling if such speech is directed to the Puerto Rico residents who elect government officials, rather than to tourists.

[Footnote 2] The Act's Statement of Motives says only that "[t]he purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance . . . and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income." Games of Chance Act of 1948, Act No. 221 of May 15, 1948, 1. There is no suggestion that discouraging residents from patronizing gambling casinos would further Puerto Rico's interests in developing tourism, ensuring safeguards for tourists, or producing additional revenue.

[Footnote 3] The Court seeks to justify Puerto Rico's selective prohibition of casino advertising by asserting that "the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico." Ante, at 343. Nothing in the record suggests that the legislature believed this to be the case. Appellee has failed to show that casino gambling presents risks different from those associated with other gambling activities, such that Puerto Rico might, consistently with the First Amendment, choose to suppress only casino advertising directed to its residents. Cf. Metromedia, Inc. v. San Diego, 453 U.S. 490, 534 , n. 12 (1981) (BRENNAN, J., concurring in judgment) (The First Amendment "demands more than a rational basis for preferring one kind of commercial speech over another"); Schad v. Mount Ephraim, 452 U.S. 61, 73 (1981) ("The [government] has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems . . . more significant that those associated with various permitted uses"). For this reason, I believe that Puerto Rico's selective advertising ban also violates appellant's rights under the Equal Protection Clause. In rejecting appellant's equal protection claim, the Court erroneously uses a "rational basis" [478 U.S. 328, 354] analysis, thereby ignoring the important First Amendment interests implicated by this case. Cf. Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

[Footnote 4] The Court reasons that because Puerto Rico could legitimately decide to prohibit casino gambling entirely, it may also take the "less intrusive step" of legalizing casino gambling but restricting speech. Ante, at 346. According to the Court, it would "surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban [casino gambling] but deny to the legislature the authority to forbid the stimulation of demand for [casino gambling]" by banning advertising. Ibid. I do not agree that a ban on casino advertising is "less intrusive" than an outright prohibition of such activity. A majority of States have chosen not to legalize casino gambling, and we have never suggested that this might be unconstitutional. However, having decided to legalize casino gambling, Puerto Rico's decision to ban truthful speech concerning entirely lawful activity raises serious First Amendment problems. Thus, [478 U.S. 328, 355] the "constitutional doctrine" which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint it is called the First Amendment.

[Footnote 5] Unlike the Court, I do not read the fact that appellant has chosen to litigate the case here to necessarily indicate that appellant itself believes that Puerto Rico residents would respond to casino advertising. In light of appellees' arbitrary and capricious application of 8, appellant could justifiably have believed that, notwithstanding the Superior Court's "narrowing" construction, its First Amendment rights could be safeguarded effectively only if the Act was invalidated on its face.

[Footnote 6] The Court seeks to buttress its holding by noting that some States have regulated other "harmful" products, such as cigarettes, alcoholic beverages, and legalized prostitution, by restricting advertising. While I believe that Puerto Rico may not prohibit all casino advertising directed to its residents, I reserve judgment as to the constitutionality of the variety of advertising restrictions adopted by other jurisdictions.

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The Court concludes that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." Ante, at 345-346. Whether a State may ban all advertising of an activity that it permits but could prohibit such as gambling, prostitution, or the consumption of marijuana or liquor is an elegant question of constitutional law. It is not, however, appropriate to address that question in this case because Puerto Rico's rather bizarre restraints on speech are so plainly forbidden by the First Amendment.

Puerto Rico does not simply "ban advertising of casino gambling." Rather, Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed. Moreover, the prohibitions, as now construed by the Puerto Rico courts, establish a regime of prior restraint and articulate a standard that is hopelessly vague and unpredictable.

With respect to the publisher, in stark, unabashed language, the Superior Court's construction favors certain identifiable publications and disfavors others. If the publication (or medium) is from outside Puerto Rico, it is very favored indeed. "Within the ads of casinos allowed by this regulation figure . . . movies, television, radio, newspapers, and trade magazines which may be published, taped, or filmed in the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourists." App. to Juris. Statement 38b-39b. If the publication is native to Puerto Rico, however the San Juan Star, for instance it is subject to a far more rigid system of [478 U.S. 328, 360] restraints and controls regarding the manner in which a certain form of speech (casino ads) may be carried in its pages. Unless the Court is prepared to uphold an Illinois regulation of speech that subjects the New York Times to one standard and the Chicago Tribune to another, I do not understand why it is willing to uphold a Puerto Rico regulation that applies one standard to the New York Times and another to the San Juan Star.

With respect to the audience, the newly construed regulations plainly discriminate in terms of the intended listener or reader. Casino advertising must be "addressed to tourists." Id., at 38b. It must not "invite the residents of Puerto Rico to visit the casino." Ibid. The regulation thus poses what might be viewed as a reverse privileges and immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans. 1 But nothing so fancy is required to recognize the obvious First Amendment problem in this kind of audience discrimination. I cannot imagine that this Court would uphold an Illinois regulation that forbade advertising "addressed" to Illinois residents while allowing the same advertiser to communicate his message to visitors and commuters; we should be no more willing to uphold a Puerto Rico regulation that forbids advertising "addressed" to Puerto Rico residents.

With respect to the message, the regulations now take one word of the English language "casino" and give it a special opprobrium. Use of that suspicious six-letter word is permitted only "where the trade name of the hotel is used even though it may contain a reference to the casino." Id., at 39b. The regulations explicitly include an important provision [478 U.S. 328, 361] "that the word casino is never used alone nor specified." Ibid. (The meaning of "specified" perhaps italicization, or boldface, or all capital letters is presumably left to subsequent case-by-case adjudication.) Singling out the use of a particular word for official sanctions raises grave First Amendment concerns, and Puerto Rico has utterly failed to justify the disfavor in which that particular six-letter word is held.

With respect to prior restraint, the Superior Court's opinion establishes a regime of censorship. In a section of the opinion that the majority fails to include, ante, at 335, the court explained:

> "We hereby authorize the publicity of the casinos in newspapers, magazines, radio, television or any other publicity media, of our games of [chance] in the exterior with the previous approval of the Tourism Company regarding the text of said ad, which must be submitted in draft to the Company. Provided, however, that no photographs, or pictures may be approval of the Company." App. to Juris. Statement 38b (emphasis added).

A more obvious form of prior restraint is difficult to imagine.

With respect to vagueness, the Superior Court's construction yields no certain or predictable standards for Puerto Rico's suppression of particular kinds of speech. Part of the problem lies in the delineation of permitted speech in terms of the audience to which it is addressed. The Puerto Rico court stated that casino ads within Puerto Rico are permissible "provided they do not invite the residents of Puerto Rico to visit the casino, even though such announcements may incidentally reach the hands of a resident." Id., at 38b. At oral argument, Puerto Rico's counsel stated that a casino advertisement in a publication with 95% local circulation perhaps the San Juan Star might actually be permissible, so [478 U.S. 328, 362] long as the advertisement "is addressed to tourists and not to residents." Tr. of Oral Arg. 26. Then again, maybe not. Maybe such an ad would not be permissible, and maybe there would be considerable uncertainty about the nature of the required "address." For the Puerto Rico court was not particularly concerned with the precise limits of the oddly selective ban on public speech that it was announcing. The court noted: "Since a clausus enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal

restriction must be measured in light of the public policy of promoting tourism." App. to Juris. Statement 40b. And in a passage that should chill, not only would-be speakers, but reviewing courts as well, the Superior Court expressly noted that there was nothing immutable about its supposedly limiting and saving construction of the restraints on speech: "These guide-regulations may be amended in the future by the enforcing agency pursuant to the dictates of the changing needs and in accordance with the law and what is resolved herein." Id., at 42b. 2 [478 U.S. 328, 363]

The general proposition advanced by the majority today that a State may prohibit the advertising of permitted conduct if it may prohibit the conduct altogether bears little resemblance to the grotesquely flawed regulation of speech advanced by Puerto Rico in this case. 3 The First Amendment surely does not permit Puerto Rico's frank discrimination among publications, audiences, and words. Nor should sanctions for speech be as unpredictable and haphazardous as the roll of dice in a casino.

I respectfully dissent.

[Footnote 1] Perhaps, since Puerto Rico somewhat ambivalently regards a gambling casino as a good thing for the local proprietor and an evil for the local patrons, the ban on local advertising might be viewed as a form of protection against the poison that Puerto Rico uses to attract strangers into its web. If too much speech about the poison were permitted, local residents might not only partake of it but also decide to prohibit it.

[Footnote 2] The unpredictable character of the censorship envisioned by the Superior Court is perhaps illustrated by its decision, apparently sua sponte, Tr of Oral Arg. 43, to invalidate a regulation that required male patrons of casinos to wear dinner jackets. See ante, at 337, n. 4. The Superior Court explained: "The classification that we do find suspicious, and which came to our attention during the course of this cause of action, ACAA v. Enrique Bird Pinero, C. A. 1984 Number 46, is the one made in section 4(e) of the Gaming Regulation (15 R. R. P. R. Sec. 76-a4[e]) requiring that the male tourist wear a jacket within the casino. On one hand, Puerto Rico is a tropical country. Adequate informal wear, such as the guayabera, is in tune with our climate and allows the tourist to enjoy himself without extreme, and in our judgment unconstitutional, restrictions on his stay on the Island. On the other hand, said requirement does not improve at all the elegant atmosphere that prevails in our casinos, since the male player may be forced to wear a horribly sewn jacket, so prepared to prevent people from taking them, which to a certain point is degrading for the man and discriminatory, since women are allowed into the casino without any type of requirement for formal wear. The Honorable Supreme Court in Figueroa Ferrer, [478 U.S. 328, 363] supra, stated: `parliaments are not the only necessary agents of social change' and `when you try to maintain a constitutional scheme alive, to preserve it in harmony with the realities of a country, the court's principal duty is to legislate towards that end, with the tranquility and circumspection which its role within our governmental system demands, without exceeding the framework of its jurisdiction.' To save the constitutionality of the Law under our consideration, we must bend the requirement of formal wear since this is basically a condition of sex and the State has no reasonable interest which would warrant a dissimilar classification." App. to Juris. Statement 35b-36b. Apparently, the Superior Court felt that Puerto Rico's unique brand of local censorship, like the guayabera, was "in tune" with Puerto Rico's climate; it is the obligation of this Court, however, to evaluate the regulations from a more universal perspective.

[Footnote 3] Moreover, the Court has relied on an inappropriate major premise. The fact that Puerto Rico might prohibit all casino gambling does not necessarily mean that it could prohibit residents from patronizing casinos that are open to tourists. Even under the Court's reasoning, discriminatory censorship cannot be justified as a less restrictive form of economic regulation unless discriminatory regulation is itself permissible. [478 U.S. 328, 364]

Questions

What is at issue in Posadas?

How does the court apply the Central Hudson test?

How does the court justify its opinion?

What is the apparent bright line rule presented by the opinion?

Is the court right?

EDGE BROADCASTING COURT OPINION

UNITED STATES and Federal Communications Commission, Petitioners,
v.
EDGE BROADCASTING COMPANY.
Supreme Court of the United States
No. 92-486.
Argued April 21, 1993.
Decided June 25, 1993.

Justice WHITE delivered the opinion of the Court, except as to Part III-D.[2]

FN* In this case we must decide whether federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery, are, as applied to respondent, consistent with the First Amendment.

I

While lotteries have existed in this country since its founding, States have long viewed them as a hazard to their citizens and to the public interest, and have long engaged in legislative efforts to control this form of gambling. Congress has, since the early 19th century, sought to assist the States in controlling lotteries. See, e.g., Act of Mar. 2, 1827, § 6, 4 Stat. 238; Act of July 27, 1868, § 13, 15 Stat. 194, 196; Act of June 8, 1872, § 149, 17 Stat. 283, 302. In 1876, Congress made it a crime to deposit in the mails any letters or circulars concerning lotteries, whether illegal or chartered by state legislatures. See Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90, codified at Rev.Stat. § 3894 (2d ed. 1878). This Court rejected a challenge to the 1876 Act on First Amendment grounds in Ex parte Jackson, 96 U.S. 727, 24 L.Ed. 877 (1878). In response to the persistence of lotteries, particularly the Louisiana Lottery, Congress closed a loophole allowing the advertisement of lotteries in newspapers in the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465, codified at Supp. to Rev.Stat. § 3894 (2d ed. 1891), and this Court upheld that Act against a First Amendment challenge in In re Rapier, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed. 93 (1892). When the Louisiana Lottery moved its operations to Honduras, Congress passed the Act of Mar. 2, 1895, 28 Stat. 963, 18 U.S.C. § 1301, which outlawed the transportation of lottery tickets in interstate or foreign commerce. This Court upheld the constitutionality of that Act against a claim that it exceeded Congress' power under the Commerce Clause in Lottery Case, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903). This federal antilottery legislation remains in effect. See 18 U.S.C. § § 1301, 1302.

[2] Justice O'CONNOR joins Parts I, II, III-A, III-B, and IV of this opinion. Justice SCALIA joins all but Part III-C of this opinion. Justice KENNEDY joins Parts I, II, III-C, and IV of this opinion. Justice SOUTER joins all but Parts III-A, III-B, and III-D of this opinion.

After the advent of broadcasting, Congress extended the federal lottery control scheme by prohibiting, in § 316 of the Communications Act of 1934, 48 Stat. 1064, 1088, the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." 18 U.S.C. § 1304, as amended by the Charity Games Advertising Clarification Act of 1988, Pub.L. 100-625, § 3(a)(4), 102 Stat. 3206. [FN1] In 1975, Congress amended the statutory scheme to allow newspapers and broadcasters to advertise staterun lotteries if the newspaper is published in or the broadcast station is licensed to a State which conducts a state-run lottery. See 18 U.S.C. § 1307 (1988 ed., Supp. III). [FN2] This exemption was enacted "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." S.Rep. No. 93-1404, p. 2 (1974). See also H.R.Rep. No. 93-1517, p. 5 (1974), U.S.Code Cong. & Admin.News 1974, p. 7007.

FN1. Title 18 U.S.C. § 1304 (1988 ed., Supp. III) provides:

"Broadcasting lottery information

"Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

FN2. Title 18 U.S.C. § 1307 (1988 ed. and Supp. III) provides in relevant part:

"Exceptions relating to certain advertisements and other information and to State-conducted lotteries

"(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to-

"(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is-

"(A) contained in a publication published in that State or in a State which conducts such a lottery; or

"(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

"(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is-

"(A) conducted by a not-for-profit organization or a governmental organization; or

"(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization."

North Carolina does not sponsor a lottery, and participating in or advertising nonexempt raffles and lotteries is a crime under its statutes. N.C.Gen.Stat. § § 14-

289 and 14-291 (1986 and Supp.1992). Virginia, on the other hand, has chosen to legalize lotteries under a state monopoly and has entered the marketplace vigorously.

Respondent, Edge Broadcasting Company (Edge), owns and operates a radio station licensed by the Federal Communications Commission (FCC) to Elizabeth City, North Carolina. This station, known as "Power 94," has the call letters WMYK-FM and broadcasts from Moyock, North Carolina, which is approximately three miles from the border between Virginia and North Carolina and considerably closer to Virginia than is Elizabeth City. Power 94 is one of 24 radio stations serving the Hampton Roads, Virginia, metropolitan area; 92.2% of its listening audience are Virginians; the rest, 7.8%, reside in the nine North Carolina counties served by Power 94. Because Edge is licensed to serve a North Carolina community, the federal statute prohibits it from broadcasting advertisements for the Virginia lottery. Edge derives 95% of its advertising revenue from Virginia sources, and claims that it has lost large sums of money from its inability to carry Virginia lottery advertisements.

Edge entered federal court in the Eastern District of Virginia, seeking a declaratory judgment that, as applied to it, § § 1304 and 1307, together with corresponding FCC regulations, violated the First Amendment to the Constitution and the Equal Protection Clause of the Fourteenth, as well as injunctive protection against the enforcement of those statutes and regulations.

The District Court recognized that Congress has greater latitude to regulate broadcasting than other forms of communication. App. to Pet. for Cert. 14a15a. The District Court construed the statutes not to cover the broadcast of noncommercial information about lotteries, a construction that the Government did not oppose. With regard to the restriction on advertising, the District Court evaluated the statutes under the established four-factor test for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980):

"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."

Assuming that the advertising Edge wished to air would deal with the Virginia lottery, a legal activity, and would not be misleading, the court went on to hold that the second and fourth Central Hudson factors were satisfied: the statutes were supported by a substantial governmental interest, and the restrictions were no more extensive than necessary to serve that interest, which was to discourage participating in lotteries in States that prohibited lotteries. The court held, however, that the statutes, as applied to Edge, did not directly advance the asserted governmental interest, failed the Central Hudson test in this respect, and hence

could not be constitutionally applied to Edge. A divided Court of Appeals, in an unpublished per curiam opinion, [FN3] affirmed in all respects, also rejecting the Government's submission that the District Court had erred in judging the validity of the statutes on an "as applied" standard, that is, determining whether the statutes directly served the governmental interest in a substantial way solely on the effect of applying them to Edge. Judgt. order reported at 956 F.2d 263 (CA4 1992).

FN3. We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion.

Because the court below declared a federal statute unconstitutional and applied reasoning that was questionable under our cases relating to the regulation of commercial speech, we granted certiorari. 506 U.S. 1032, 113 S.Ct. 809, 121 L.Ed.2d 683 (1992). We reverse.

II

The Government argues first that gambling implicates no constitutionally protected right, but rather falls within a category of activities normally considered to be "vices," and that the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement; it argues that we therefore need not proceed with a Central Hudson analysis. The Court of Appeals did not address this issue and neither do we, for the statutes are not unconstitutional under the standards of Central Hudson applied by the courts below.

III

For most of this Nation's history, purely commercial advertising was not considered to implicate the constitutional protection of the First Amendment. See Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). In 1976, the Court extended First Amendment protection to speech that does no more than propose a commercial transaction. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Our decisions, however, have recognized the " 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-456, 98 S.Ct. 1912, 1918-1919, 56 L.Ed.2d 444 (1978). The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression. Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477, 109 S.Ct. 3028, 3033, 106 L.Ed.2d 388 (1989); Central Hudson, supra, 447 U.S., at 563, 100 S.Ct., at 2350; Ohralik, supra, 436 U.S., at 456, 98 S.Ct., at 1918.

In Central Hudson, we set out the general scheme for assessing government restrictions on commercial speech. Supra, 447 U.S., at 566, 100 S.Ct., at 2351. Like the courts below, we assume that Edge, if allowed to, would air nonmisleading advertisements about the Virginia lottery, a legal activity. As to the second Central Hudson factor, we are quite sure that the Government has a substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy

of States that permit lotteries. As in Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), the activity underlying the relevant advertising--gambling--implicates no constitutionally protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether. As will later be discussed, we also agree that the statutes are no broader than necessary to advance the Government's interest and hence the fourth part of the Central Hudson test is satisfied.

The Court of Appeals, however, affirmed the District Court's holding that the statutes were invalid because, as applied to Edge, they failed to advance directly the governmental interest supporting them. According to the Court of Appeals, whose judgment we are reviewing, this was because the 127,000 people who reside in Edge's nine-county listening area in North Carolina receive most of their radio, newspaper, and television communications from Virginia-based media. These North Carolina residents who might listen to Edge "are inundated with Virginia's lottery advertisements" and hence, the court stated, prohibiting Edge from advertising Virginia's lottery "is ineffective in shielding North Carolina residents from lottery information." This "ineffective or remote measure to support North Carolina's desire to discourage gambling cannot justify infringement upon commercial free speech." App. to Pet. for Cert. 6a, 7a. In our judgment, the courts below erred in that respect.

A

The third Central Hudson factor asks whether the "regulation directly advances the governmental interest asserted." 447 U.S., at 566, 100 S.Ct., at 2351. It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity. Even if there were no advancement as applied in that manner--in this case, as applied to Edge--there would remain the matter of the regulation's general application to others--in this case, to all other radio and television stations in North Carolina and countrywide. The courts below thus asked the wrong question in ruling on the third Central Hudson factor. This is not to say that the validity of the statutes' application to Edge is an irrelevant inquiry, but that issue properly should be dealt with under the fourth factor of the Central Hudson test. As we have said, "[t]he last two steps of the Central Hudson analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." Posadas, supra, 478 U.S., at 341, 106 S.Ct., at 2976.

We have no doubt that the statutes directly advanced the governmental interest at stake in this case. In response to the appearance of statesponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries. This it did not do. Neither did it permit stations such as Edge, located in a non-lottery State, to carry lottery ads if their signals reached into a State that sponsors lotteries; similarly, it did not forbid stations in a lottery State such as Virginia from carrying lottery ads if their signals reached into an adjoining State such as North Carolina where lotteries were illegal. Instead of favoring either the lottery or the nonlottery State, Congress opted to support the anti-gambling policy of a State like North

Carolina by forbidding stations in such a State from airing lottery advertising. At the same time it sought not to unduly interfere with the policy of a lottery sponsoring State such as Virginia. Virginia could advertise its lottery through radio and television stations licensed to Virginia locations, even if their signals reached deep into North Carolina. Congress surely knew that stations in one State could often be heard in another but expressly prevented each and every North Carolina station, including Edge, from carrying lottery ads. Congress plainly made the commonsense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling. This congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies Central Hudson, the interest which the courts below did not fully appreciate. It is also the interest that is directly served by applying the statutory restriction to all stations in North Carolina; and this would plainly be the case even if, as applied to Edge, there were only marginal advancement of that interest.

B

Left unresolved, of course, is the validity of applying the statutory restriction to Edge, an issue that we now address under the fourth Central Hudson factor, i.e., whether the regulation is more extensive than is necessary to serve the governmental interest. We revisited that aspect of Central Hudson in Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), and concluded that the validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place, or manner restrictions. Id., at 477-478, 109 S.Ct., at 3033-3034. We made clear in Fox that our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable. Id., at 480, 109 S.Ct., at 3035. This was also the approach in Posadas, 478 U.S., at 344, 106 S.Ct., at 2978.

We have no doubt that the fit in this case was a reasonable one. Although Edge was licensed to serve the Elizabeth City area, it chose to broadcast from a more northerly position, which allowed its signal to reach into the Hampton Roads, Virginia, metropolitan area. Allowing it to carry lottery ads reaching over 90% of its listeners, all in Virginia, would surely enhance its revenues. But just as surely, because Edge's signals with lottery ads would be heard in the nine counties in North Carolina that its broadcasts reached, this would be in derogation of the substantial federal interest in supporting North Carolina's laws making lotteries illegal. In this posture, to prevent Virginia's lottery policy from dictating what stations in a neighboring State may air, it is reasonable to require Edge to comply with the restriction against carrying lottery advertising. In other words, applying the restriction to a broadcaster such as Edge directly advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policy of lottery States like Virginia. We think this would be the case even if it were true, which it is not, that applying the general statutory restriction to Edge, in

isolation, would no more than marginally insulate the North Carolinians in the North Carolina counties served by Edge from hearing lottery ads.

In Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), we dealt with a time, place, or manner restriction that required the city to control the sound level of musical concerts in a city park, concerts that were fully protected by the First Amendment. We held there that the requirement of narrow tailoring was met if "the **...** regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," provided that it did not burden substantially more speech than necessary to further the government's legitimate interests. Id., at 799, 109 S.Ct., at 2758 (internal quotation marks omitted). In the course of upholding the restriction, we went on to say that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." Id., at 801, 109 S.Ct., at 2759.

The Ward holding is applicable here, for we have observed that the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context and that it would be incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech. Fox, supra, 492 U.S., at 477, 478, 109 S.Ct., at 3033. Ward thus teaches us that we judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery States, not by the extent to which it furthers the Government's interest in an individual case.

This is consistent with the approach we have taken in the commercial speech context. In Ohralik v. Ohio State Bar Assn., 436 U.S., at 462, 98 S.Ct., at 1921, for example, an attorney attacked the validity of a rule against solicitation "not facially, but as applied to his acts of solicitation." We rejected the appellant's view that his "as applied" challenge required the State to show that his particular conduct in fact trenched on the interests that the regulation sought to protect. We stated that in the general circumstances of the appellant's acts, the State had "a strong interest in adopting and enforcing rules of conduct designed to protect the public." Id., at 464, 98 S.Ct., at 1923. This having been established, the State was entitled to protect its interest by applying a prophylactic rule to those circumstances generally; we declined to require the State to go further and to prove that the state interests supporting the rule actually were advanced by applying the rule in Ohralik's particular case.

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), is not to the contrary. While treating Fane's claim as an as applied challenge to a broad category of commercial solicitation, we did not suggest that Fane could challenge the regulation on commercial speech as applied only to himself or his own acts of solicitation.

C

We also believe that the courts below were wrong in holding that as applied to Edge itself, the restriction at issue was ineffective and gave only remote support to the Government's interest.

As we understand it, both the Court of Appeals and the District Court recognized that Edge's potential North Carolina audience was the 127,000 residents of nine North Carolina counties, that enough of them regularly or from time to time listen to Edge to account for 11% of all radio listening in those counties, and that while listening to Edge they heard no lottery advertisements. It could hardly be denied, and neither court below purported to deny, that these facts, standing alone, would clearly show that applying the statutory restriction to Edge would directly serve the statutory purpose of supporting North Carolina's antigambling policy by excluding invitations to gamble from 11% of the radio listening time in the nine-county area. Without more, this result could hardly be called either "ineffective," "remote," or "conditional," see Central Hudson, 447 U.S., at 564, 569, 100 S.Ct., at 2350, 2353. Nor could it be called only "limited incremental support," Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983), for the Government interest, or thought to furnish only speculative or marginal support. App. to Pet. for Cert. 24a, 25a. Otherwise, any North Carolina radio station with 127,000 or fewer potential listeners would be permitted to carry lottery ads because of its marginal significance in serving the State's interest.

Of course, both courts below pointed out, and rested their judgment on the fact, that the 127,000 people in North Carolina who might listen to Edge also listened to Virginia radio stations and television stations that regularly carried lottery ads. Virginia newspapers carrying such material also were available to them. This exposure, the courts below thought, was sufficiently pervasive to prevent the restriction on Edge from furnishing any more than ineffective or remote support for the statutory purpose. We disagree with this conclusion because in light of the facts relied on, it represents too limited a view of what amounts to direct advancement of the governmental interest that is present in this case.

Even if all of the residents of Edge's North Carolina service area listen to lottery ads from Virginia stations, it would still be true that 11% of radio listening time in that area would remain free of such material. If Edge is allowed to advertise the Virginia lottery, the percentage of listening time carrying such material would increase from 38% to 49%. We do not think that Central Hudson compels us to consider this consequence to be without significance.

The Court of Appeals indicated that Edge's potential audience of127,000 persons were "inundated" by the Virginia media carrying lottery advertisements. But the District Court found that only 38% of all radio listening in the nine-county area was directed at stations that broadcast lottery advertising. [FN4] With respect to television, the District Court observed that American adults spend 60% of their media consumption time listening to television. The evidence before it also indicated that in four of the nine counties served by Edge, 75% of all television viewing was directed at Virginia stations; in three others, the figure was between 50 and 75%; and in the remaining two counties, between 25 and 50%. Even if it is assumed that all of these stations carry lottery advertising, it is very likely that a

great many people in the nine-county area are exposed to very little or no lottery advertising carried on television. Virginia newspapers are also circulated in Edge's area, 10,400 daily and 12,500 on Sundays, hardly enough to constitute a pervasive exposure to lottery advertising, even on the unlikely assumption that the readers of those newspapers always look for and read the lottery ads. Thus the District Court observed only that "a significant number of residents of [the nine-county] area listens to" Virginia radio and television stations and read Virginia newspapers. App. to Pet. for Cert. 25a (emphasis added).

FN4. It would appear, then, that 51% of the radio listening time in the relevant nine counties is attributable to other North Carolina stations or other stations not carrying lottery advertising.

Moreover, to the extent that the courts below assumed that § § 1304 and 1307 would have to effectively shield North Carolina residents from information about lotteries to advance their purpose, they were mistaken. As the Government asserts, the statutes were not "adopt[ed] **...** to keep North Carolina residents ignorant of the Virginia Lottery for ignorance's sake," but to accommodate non-lottery States' interest in discouraging public participation in lotteries, even as they accommodate the countervailing interests of lottery States. Reply Brief for Petitioners 11. Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. Fox, 492 U.S., at 480, 109 S.Ct., at 3034. Here, as in Posadas de Puerto Rico, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. See Posadas, 478 U.S., at 344, 106 S.Ct., at 2978. See also Central Hudson, supra, 447 U.S., at 569, 100 S.Ct., at 2353. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes. See 15 U.S.C. § 1335. See also Queensgate Investment Co. v. Liquor Control Comm'n, 69 Ohio St.2d 361, 366, 433 N.E.2d 138, 142 (alcohol advertising), app. dism'd for want of a substantial federal question, 459 U.S. 807, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Thus, even if it were proper to conduct a Central Hudson analysis of the statutes only as applied to Edge, we would not agree with the courts below that the restriction at issue here, which prevents Edge from broadcasting lottery advertising to its sizable radio audience in North Carolina, is rendered ineffective by the fact that Virginia radio and television programs can be heard in North Carolina. In our

view, the restriction, even as applied only to Edge, directly advances the governmental interest within the meaning of Central Hudson.

D

Nor need we be blind to the practical effect of adopting respondent's view of the level of particularity of analysis appropriate to decide its case. Assuming for the sake of argument that Edge had a valid claim that the statutes violated Central Hudson only as applied to it, the piecemeal approach it advocates would act to vitiate the Government's ability generally to accommodate States with differing policies. Edge has chosen to transmit from a location near the border between two jurisdictions with different rules, and rests its case on the spillover from the jurisdiction across the border. Were we to adopt Edge's approach, we would treat a station that is close to the line as if it were on the other side of it, effectively extending the legal regime of Virginia inside North Carolina. One result of holding for Edge on this basis might well be that additional North Carolina communities, farther from the Virginia border, would receive broadcast lottery advertising from Edge. Broadcasters licensed to these communities, as well as other broadcasters serving Elizabeth City, would then be able to complain that lottery advertising from Edge and other similar broadcasters renders the federal statute ineffective as applied to them. Because the approach Edge advocates has no logical stopping point once state boundaries are ignored, this process might be repeated until the policy of supporting North Carolina's ban on lotteries would be seriously eroded. We are unwilling to start down that road.

IV

Because the statutes challenged here regulate commercial speech in a manner that does not violate the First Amendment, the judgment of the Court of Appeals is

Reversed.

Justice SOUTER, with whom Justice KENNEDY joins, concurring in part.

I agree with the Court that the restriction at issue here is constitutional, under our decision in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), even if that restriction is judged "as applied to Edge itself." Ante, at 2706. I accordingly believe it unnecessary to decide whether the restriction might appropriately be reviewed at a more lenient level of generality, and I take no position on that question.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

Three months ago this Court reaffirmed that the proponents of a restriction on commercial speech bear the burden of demonstrating a "reasonable fit" between the legislature's goals and the means chosen to effectuate those goals. See Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416, 113 S.Ct. 1505, 1510, 123 L.Ed.2d 99 (1993). While the " 'fit' " between means and ends need not be perfect, an infringement on constitutionally protected speech must be " 'in proportion to the interest served.' " Id., at 417, n. 12, 113 S.Ct., at 1510, n. 12 (quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989)). In my opinion, the Federal Government's selective ban on lottery advertising unquestionably flunks that test; for the means chosen by the

Government, a ban on speech imposed for the purpose of manipulating public behavior, is in no way proportionate to the Federal Government's asserted interest in protecting the antilottery policies of nonlottery States. Accordingly, I respectfully dissent.

As the Court acknowledges, the United States does not assert a general interest in restricting state-run lotteries. Indeed, it could not, as it has affirmatively removed restrictions on use of the airwaves and mails for the promotion of such lotteries. See ante, at 2701. Rather, the federal interest in this case is entirely derivative. By tying the right to broadcast advertising regarding a state-run lottery to whether the State in which the broadcaster is located itself sponsors a lottery, Congress sought to support nonlottery States in their efforts to "discourag[e] public participation in lotteries." Ante, at 2701, 2707. [FN1]

FN1. At one point in its opinion, the Court identifies the relevant federal interest as "supporting North Carolina's laws making lotteries illegal." Ante, at 2705. Of course, North Carolina law does not, and, presumably, could not, bar its citizens from traveling across the state line and participating in the Virginia lottery. North Carolina law does not make the Virginia lottery illegal. I take the Court to mean that North Carolina's decision not to institute a state-run lottery reflects its policy judgment that participation in such lotteries, even those conducted by another State, is detrimental to the public welfare, and that 18 U.S.C. § 1307 (1988 ed. and Supp. III) represents a federal effort to respect that policy judgment.

Even assuming that nonlottery States desire such assistance from the Federal Government--an assumption that must be made without any supporting evidence--I would hold that suppressing truthful advertising regarding a neighboring State's lottery, an activity which is, of course, perfectly legal, is a patently unconstitutional means of effectuating the Government's asserted interest in protecting the policies of nonlottery States. Indeed, I had thought that we had so held almost two decades ago.

In Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), this Court recognized that a State had a legitimate interest in protecting the welfare of its citizens as they ventured outside the State's borders. Id., at 824, 95 S.Ct., at 2234. We flatly rejected the notion, however, that a State could effectuate that interest by suppressing truthful, nonmisleading information regarding a legal activity in another State. We held that a State "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." Id., at 824-825, 95 S.Ct., at 2234. To be sure, the advertising in Bigelow related to abortion, a constitutionally protected right, and the Court in Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), relied on that fact in dismissing the force of our holding in that case, see id., at 345, 106 S.Ct., at 2979. But even a casual reading of Bigelow demonstrates that the case cannot fairly be read so narrowly. The fact that the information in the advertisement related to abortion was only one factor informing the Court's determination that there were substantial First Amendment interests at stake in the State's attempt to suppress truthful advertising about a legal activity in another State:

"Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience--not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the [organization advertising abortion-related services] in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also the activity advertised pertained to constitutional interests." Bigelow, 421 U.S., at 822, 95 S.Ct., at 2232. [FN2]

FN2. The analogy to Bigelow and this case is even closer than one might think. The North Carolina General Assembly iscurrently considering whether to institute a state-operated lottery. See 1993 N.C.S. Bill No. 11, 140th Gen. Assembly. As with the advertising at issue in Bigelow, then, advertising relating to the Virginia lottery may be of interest to those in North Carolina who are currently debating whether that State should join the ranks of the growing number of States that sponsor a lottery. See infra, at ----.

Bigelow is not about a woman's constitutionally protected right to terminate a pregnancy. [FN3] It is about paternalism, and informational protectionism. It is about one State's interference with its citizens' fundamental constitutional right to travel in a state of enlightenment, not government-induced ignorance. Cf. Shapiro v. Thompson, 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1330, 22 L.Ed.2d 600 (1969). [FN4] I would reaffirm this basic First Amendment principle. In seeking to assist nonlottery States in their efforts to shield their citizens from the perceived dangers emanating from a neighboring State's lottery, the Federal Government has not regulated the content of such advertisements to ensure that they are not misleading, nor has it provided for the distribution of more speech, such as warnings or educational information about gambling. Rather, the United States has selected the most intrusive, and dangerous, form of regulation possible--a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens. Unless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure surely cannot withstand scrutiny under the First Amendment.

FN3. If anything, the fact that underlying conduct is not constitutionally protected increases, not decreases, the value of unfettered exchange of information across state lines. When a State has proscribed a certain product or service, its citizens are all the more dependent on truthful information regarding the policies and practices of other States. Cf. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 332, n. 31, 113 S.Ct. 753, 792, n. 31, 122 L.Ed.2d 34 (1993) (STEVENS, J., dissenting). The alternative is to view individuals as more in the nature of captives of their respective States than as free citizens of a larger polity.

FN4. "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." Passenger Cases, 7 How. (48 U.S.) 283, 492, 12 L.Ed. 702 (1849).

No such interest is asserted in this case. With barely a whisper of analysis, the Court concludes that a State'sinterest in discouraging lottery participation by its citizens is surely "substantial"--a necessary prerequisite to sustain a restriction on commercial speech, see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)--because gambling "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether," ante, at 2703.

I disagree. While a State may indeed have an interest in discouraging its citizens from participating in state-run lotteries, [FN5] it does not necessarily follow that its interest is "substantial" enough to justify an infringement on constitutionally protected speech, [FN6] especially one as draconian as the regulation at issue in this case. In my view, the sea change in public attitudes toward state-run lotteries that this country has witnessed in recent years undermines any claim that a State's interest in discouraging its citizens from participating in state-run lotteries is so substantial as to outweigh respondent's First Amendment right to distribute, and the public's right to receive, truthful, nonmisleading information about a perfectly legal activity conducted in a neighboring State.

FN5. A State might reasonably conclude, for example, that lotteries play on the hopes of those least able to afford to purchase lottery tickets, and that its citizens would be better served by spending their money on more promising investments. The fact that I happen to share these concerns regarding state-sponsored lotteries is, of course, irrelevant to the proper analysis of the legal issue.

FN6. See, e.g., Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, n. 13, 113 S.Ct. 1505, 1510, n. 13, 123 L.Ed.2d 99 (1993) (noting that restrictions on commercial speech are subject to more searching scrutiny than mere "rational basis" review).

While the Court begins its opinion with a discussion of the federal and state efforts in the 19th century to restrict lotteries, it largely ignores the fact that today hostility to state-run lotteries is the exception rather than the norm. Thirty-four States and the District of Columbia now sponsor a lottery. [FN7] Three more States will initiate lotteries this year. [FN8] Of the remaining 13 States, at least 5 States have recently considered or are currently considering establishing a lottery. [FN9] In fact, even the State of North Carolina, whose antilottery policies the Federal Government's advertising ban are purportedly buttressing in this case, is considering establishing a lottery. See 1993 N.C.S. Bill No. 11, 140th Gen. Assembly. According to one estimate, by the end of this decade all but two States (Utah and Nevada) will have state-run lotteries. [FN10]

FN7. Selinger, Special Report: Marketing State Lotteries, City and State 14 (May 24, 1993).

FN8. Ibid.

FN9. See, e.g., 1993 Ala.H. Bill No. 75, 165th Legislature--Regular Sess.; 1993 Miss.S.Concurrent Res. No. 566, 162d Legislature--Regular Sess.; 1993 N.M.S. Bill No. 141, 41st Legislature--First Regular Sess.; 1993 N.C.S. Bill No. 11, 140th Gen. Assembly; 1993 Okla.H.Bill No. 1348, 44th Legislature--First Regular Sess.

FN10. Selinger, supra.

The fact that the vast majority of the States currently sponsor a lottery, and that soon virtually all of them will do so, does not, of course, preclude an outlier State from following a different course and attempting to discourage its citizens from partaking of such activities. But just as the fact that "the vast majority of the 50 States **...** prohibit[ed] casino gambling" purported to inform the Court's conclusion in Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S., at 341, 106 S.Ct., at 2976, that Puerto Rico had a "substantial" interest in discouraging such gambling, the national trend in the opposite direction in this case surely undermines the United States' contention that nonlottery States have a "substantial" interest in discouraging their citizens from traveling across state lines and participating in a neighboring State's lottery. The Federal Government and the States simply do not have an overriding or "substantial" interest in seeking to discourage what virtually the entire country is embracing, and certainly not an interest that can justify a restriction on constitutionally protected speech as sweeping as the one the Court today sustains.

I respectfully dissent.

Questions

What are the facts of Edge?

How does the prevailing opinion treat Edge?

Is Edge compatible with Posadas?

44 LIQUORMART COURT OPINION

SUPREME COURT OF THE UNITED STATES

No. 94–1140

44 LIQUORMART, INC. AND PEOPLES SUPER LIQUOR STORES, INC., PETITIONERS *v.* RHODE ISLAND AND RHODE ISLAND LIQUOR STORES ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[May 13, 1996]

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, VII, and VIII, an opinion with respect to Parts III and V, in which JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, an opinion with respect to Part VI, in which JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE GINSBURG join, and an opinion with respect to Part IV, in which JUSTICE KENNEDY and JUSTICE GINSBURG join.

Last Term we held that a federal law abridging a brewer's right to provide the public with accurate information about the alcoholic content of malt beverages is unconstitutional. *Rubin* v. *Coors Brewing Co.*, 514 U. S. ___, ___ (1995) (slip op., at 14). We now hold that Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is also invalid. Our holding rests on the conclusion that such an advertising ban is an abridgment of speech protected by the First Amendment and that it is not shielded from

constitutional scrutiny by the Twenty-first Amendment.[3]

In 1956, the Rhode Island Legislature enacted two separate prohibitions against advertising the retail price of alcoholic beverages. The first applies to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibits them from "advertising in any manner whatsoever" the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street.[4] The second statute applies to the Rhode Island news media. It contains a categorical prohibition against the publication or broadcast of any advertisements—even those referring to sales in other States—that "make reference to the price of any alcoholic beverages."[5]

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[3]Although the text of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press," the Amendment applies to the States under the Due Process Clause of the Fourteenth Amendment. See *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 855, n. 1 (1982); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936); *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925).

[4]Rhode Island Gen. Laws §3–8–7 (1987) provides:

"Advertising price of malt beverages, cordials, wine or distilled liquor.—No manufacturer, wholesaler, or shipper from without this state and no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department."

Regulation 32 of the Rules and Regulations of the Liquor Control Administrator provides that no placard or sign that is visible from the exterior of a package store may make any reference to the price of any alcoholic beverage. App. 2 to Brief for Petitioners.

[5]Rhode Island Gen. Laws §3–8–8.1 (1987) provides:

"Price advertising by media or advertising companies unlawful.—No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of

> In two cases decided in 1985, the Rhode Island Supreme Court reviewed the constitutionality of these two statutes. In *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A. 2d 729 (R. I.), a liquor retailer located in Westerly, Rhode Island, a town that borders the State of Connecticut, having been advised that his license would be revoked if he advertised his prices in a Connecticut paper, sought to enjoin enforcement of the first statute. Over the dissent of one Justice, the court upheld the statute. It concluded that the statute served the substantial state interest in "`the promotion of temperance.'"[6] *Id.*, at 737. Because the plaintiff failed to prove that the statute did not serve that interest, the court held that he had not carried his burden of establishing a violation of the First Amendment. In response to the dissent's argument that the court had placed the burden on the wrong party, the majority reasoned that the Twenty-first

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business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor . . . ." The statute authorizes the liquor control administrator to exempt trade journals from its coverage. *Ibid.*

[6]"We also have little difficulty in finding that the asserted governmental interests, herein described as the promotion of temperance and the reasonable control of the traffic in alcoholic beverages, are substantial. We note, parenthetically, that the word `temperance' is oftentimes mistaken as a synonym for `abstinence.' It is not. Webster's Third New International Dictionary (1961) defines `temperance' as `moderation in or abstinence from the use of intoxicating drink.' The Rhode Island Legislature has the authority, derived from the state's inherent police power, to enact a variety of laws designed to suppress intemperance or to minimize the acknowledged evils of liquor traffic. Thus, there can be no question that these asserted interests are indeed substantial. *Oklahoma Telecasters Association* v. *Crisp*, 699 F. 2d at 500." *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A. 2d, at 733–734.

In her dissent in *Rhode Island Liquor Stores Assn.* v. *Evening Call Pub. Co.*, 497 A. 2d 331 (R. I. 1985), Justice Murray suggested that the advertising ban was motivated, at least in part, by an interest in protecting small retailers from price competition. *Id.*, at 342, n. 10. This suggestion is consistent with the position taken by respondent Rhode Island Liquor Stores Association in this case. We, however, accept the State Supreme Court's identification of the relevant state interest served by the legislation.

Amendment gave the statute "`an added presumption [of] validity.'" *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A. 2d, at 732. Although that presumption had not been overcome in that case, the State Supreme Court assumed that in a future case the record might "support the proposition that these advertising restrictions do not further temperance objectives." *Id.,* at 734.

In *Rhode Island Liquor Stores Assn.* v. *Evening Call Pub. Co.*, 497 A. 2d 331 (R. I. 1985), the plaintiff association[7] sought to enjoin the publisher of the local newspaper in Woonsocket, Rhode Island, from accepting advertisements disclosing the retail price of alcoholic beverages being sold across the state line in Millville, Massachusetts. In upholding the injunction, the State Supreme Court adhered to its reasoning in the *Pastore* case and rejected the argument that the statute neither "directly advanced" the state interest in promoting temperance, nor was "more extensive than necessary to serve that interest" as required by this Court's decision in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557, 563 (1980). It assumed the existence of other, "perhaps more effective means" of achieving the State's "goal of temperance", but concluded that it was "not unreasonable for the State of Rhode Island to believe that price advertising will result in increased sales of alcoholic beverages generally." *Rhode Island Liquor Stores Assn.* v. *Evening Call Pub. Co.*, 497 A. 2d, at 336.

I

Petitioners 44 Liquormart, Inc. (44 Liquormart), and Peoples Super Liquor Stores, Inc. (Peoples), are licensed retailers of alcoholic beverages. Petitioner 44 Liquormart operates a store in Rhode Island and petitioner Peoples operates several stores in Massachusetts that are patronized by Rhode Island residents. Peoples uses alcohol price advertising extensively in Massachusetts, where such advertising is permitted, but Rhode Island newspapers and other media outlets have refused to accept such ads.

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[7]The plaintiff in that case is a respondent in this case and has filed other actions enforcing the price advertising ban. See *id.*, at 333.

Complaints from competitors about an advertisement placed by 44 Liquormart in a Rhode Island newspaper in 1991 generated enforcement proceedings that in turn led to the initiation of this litigation. The advertisement did not state the price of any alcoholic beverages. Indeed, it noted that "State law prohibits advertising liquor prices." The ad did, however, state the low prices at which peanuts, potato chips, and Schweppes mixers were being offered, identify various brands of packaged liquor, and include the word "WOW" in large letters next to pictures of vodka and rum bottles. Based on the conclusion that the implied reference to bargain prices for liquor violated the statutory ban on price advertising, the Rhode Island Liquor Control Administrator assessed a $400 fine.

After paying the fine, 44 Liquormart, joined by Peoples, filed this action against the administrator in the Federal District Court seeking a declaratory judgment that the two statutes and the administrator's implementing regulations violate the First Amendment and other provisions of federal law. The Rhode Island Liquor Stores Association was allowed to intervene as a defendant and in due course the State of Rhode Island replaced the administrator as the principal defendant. The parties stipulated that the price advertising ban is vigorously enforced, that Rhode Island permits "all advertising of alcoholic beverages excepting references to price outside the licensed premises," and that petitioners' proposed ads do not concern an illegal activity and presumably would not be false or misleading. *44 Liquour Mart, Inc.* v. *Racine*, 829 F. Supp. 543, 545 (R. I. 1993). The parties disagreed, however, about the impact of the ban on the promotion of temperance in Rhode Island. On that question the District Court heard conflicting expert testimony and reviewed a number of studies.

In his findings of fact, the District Judge first noted that there was a pronounced lack of unanimity among researchers who have studied the impact of advertising on the level of consumption of alcoholic beverages. He referred to a 1985 Federal Trade Commission study that found no evidence that alcohol advertising significantly affects alcohol abuse. Another study indicated that Rhode Island ranks in the upper 30% of States in per capita consumption of alcoholic beverages;

alcohol consumption is lower in other States that allow price advertising. After summarizing the testimony of the expert witnesses for both parties, he found "as a fact that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *Id.*, at 549.

As a matter of law, he concluded that the price advertising ban was unconstitutional because it did not "directly advance" the State's interest in reducing alcohol consumption and was "more extensive than necessary to serve that interest." *Id.*, at 555. He reasoned that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it and that the Twenty-first Amendment did not shift or diminish that burden. Acknowledging that it might have been reasonable for the state legislature to "assume a correlation between the price advertising ban and reduced consumption," he held that more than a rational basis was required to justify the speech restriction, and that the State had failed to demonstrate a reasonable "`fit" between its policy objectives and its chosen means. *Ibid.*

The Court of Appeals reversed. It found "inherent merit" in the State's submission that competitive price advertising would lower prices and that lower prices would produce more sales. 39 F. 3d 5, 7 (CA1 1994). Moreover, it agreed with the reasoning of the Rhode Island Supreme Court that the Twenty-first Amendment gave the statutes an added presumption of validity. *Id.*, at 8. Alternatively, it concluded that reversal was compelled by this Court's summary action in *Queensgate Investment Co.* v. *Liquor Control Comm'n of Ohio*, 459 U. S. 807 (1982). See 39 F. 3d, at 8. In that case the Court dismissed the appeal from a decision of the Ohio Supreme Court upholding a prohibition against off-premises advertising of the prices of alcoholic beverages sold by the drink. See *Queensgate Investment Co.* v. *Liquor Control Comm'n of Ohio*, 69 Ohio St. 2d 361, 433 N. E. 2d 138 (1982).

Queensgate has been both followed and distinguished in subsequent cases reviewing

the validity of similar advertising bans.[8] We are now persuaded that the importance of the First Amendment issue, as well the suggested relevance of the Twenty-first Amendment, merits more thorough analysis than it received when we refused to accept jurisdiction of the *Queensgate* appeal. We therefore granted certiorari. 514 U. S. ___ (1995).

II

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. See J. Wood, The Story of Advertising 21, 45–69, 85 (1958); J. Smith, Printers and Press Freedom 49 (1988). Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

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[8]In *Dunagin* v. *Oxford*, 718 F. 2d 738 (CA5 1983), the Fifth Circuit distinguished our summary action in *Queensgate* in considering the constitutionality of a sweeping state restriction on outdoor liquor advertising. The Court explained that *Queensgate* did not control because it involved a far narrower alcohol advertising regulation. *Id.*, at 745–746. By contrast, in *Oklahoma Telecasters Assn.* v. *Crisp*, 699 F. 2d 490, 495–497 (CA10 1983), rev'd on other grounds *sub nom.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 697 (1984), the Tenth Circuit relied on *Queensgate* in considering a prohibition against broadcasting alcohol advertisements. The Court of Appeals concluded that *Queensgate* stood for the proposition that the Twenty-first Amendment gives the State greater authority to regulate liquor advertising than the First Amendment would otherwise allow. 699 F. 2d, at 495–497.

Other than the two Rhode Island Supreme Court decisions upholding the constitutionality of the statutes at issue in this case, only one published state court opinion has considered our summary action in *Queensgate* in passing on a liquor advertising restriction. See *Michigan Beer & Wine Wholesalers Assn.* v. *Attorney General*, 142 Mich. App. 294, 370 N. W. 2d 328 (1985). There, the Michigan Court of Appeals concluded that *Queensgate* did not control because it involved a far narrower restriction on liquor advertising than the one that Michigan had imposed. 142 Mich. App., at 304–305, 370 N. W. 2d, at 333–335.

Franklin, An Apology for Printers, June 10, 1731, reprinted in 2 Writings of Benjamin Franklin 172 (1907).

In accord with the role that commercial messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services. In the early years, the common law, and later, statutes, served the consumers' interest in the receipt of accurate information in the commercial market by prohibiting fraudulent and misleading advertising. It was not until the 1970's, however, that this Court held that the First Amendment protected the dissemination of truthful and nonmisleading commercial messages about lawful products and services. See generally Kozinski & Banner, The Anti-History and Pre-History of Commercial Speech, 71 Texas L. Rev. 747 (1993).

In *Bigelow* v. *Virginia,* 421 U. S. 809 (1975), we held that it was error to assume that commercial speech was entitled to no First Amendment protection or that it was without value in the marketplace of ideas. *Id.*, at 825–826. The following Term in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976), we expanded on our holding in *Bigelow* and held that the State's blanket ban on advertising the price of prescription drugs violated the First Amendment.

Virginia Pharmacy Bd. reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages. We explained:

> "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the

> aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Id.*, at 765.[9]

The opinion further explained that a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the `professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

On the basis of these principles, our early cases uniformly struck down several broadly based bans on truthful, nonmisleading commercial speech, each of which served ends unrelated to consumer protection.[10] Indeed, one of those cases expressly

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[9]By contrast, the First Amendment does not protect commercial speech about unlawful activities. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973).

[10]See *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 355 (1977) (ban on lawyer advertising); *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700 (1977) (ban on contraceptive advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 92–94 (1977) (ban on `For Sale' signs); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976) (ban on prescription drug prices); *Bigelow* v. *Virginia*, 421 U. S. 809, 825 (1975) (ban on abortion advertising). Although *Linmark* involved a prohibition against a particular means of advertising the sale of one's home, we treated the restriction as if it were a complete ban because it did not leave open "satisfactory" alternative channels of communication. 431 U. S., at 92–94.

likened the rationale that *Virginia Pharmacy Bd.* employed to the one that Justice Brandeis adopted in his concurrence in *Whitney* v. *California*, 274 U. S. 357 (1927). See *Linmark Associates*, *Inc.* v. *Willingboro*, 431 U. S. 85, 97 (1977). There, Justice Brandeis wrote, in explaining his objection to a prohibition of *political* speech, that "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney*, 274 U. S., at 377; see also *Carey* v. *Population Services Int'l*, 431 U. S. 678, 701 (1977) (applying test for suppressing political speech set forth in *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969)).

At the same time, our early cases recognized that the State may regulate some types of commercial advertising more freely than other forms of protected speech. Specifically, we explained that the State may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive," *Virginia Pharmacy Bd.*, 425 U. S., at 772, n. 24, and that it may restrict some forms of aggressive sales practices that have the potential to exert "undue influence" over consumers. See *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 366 (1977).

Virginia Pharmacy Bd. attributed the State's authority to impose these regulations in part to certain "commonsense differences" that exist between commercial messages and other types of protected expression. 425 U. S., at 771, n. 24. Our opinion noted that the greater "objectivity" of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones, *ibid.* and that the greater "hardiness" of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation, *ibid.*

Subsequent cases explained that the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is "linked inextricably" to those transactions. *Friedman* v. *Rogers*, 440 U. S. 1, 10, n. 9 (1979); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978) (commercial speech "occurs in an area traditionally subject to government regulation . . ."). As one commentator has explained: "The entire commercial speech doctrine,

after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." L. Tribe, American Constitutional Law §12–15, p. 903 (2d ed. 1988). Nevertheless, as we explained in *Linmark*, the State retains less regulatory authority when its commercial speech restrictions strike at "the substance of the information communicated" rather than the "commercial aspect of [it]—with offerors communicating offers to offerees." See *Linmark* 431 U. S., at 96; *Carey* v. *Population Services Int'l*, 431 U. S. 678, 701, n. 28 (1977).

In *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557 (1980), we took stock of our developing commercial speech jurisprudence. In that case, we considered a regulation "completely" banning all promotional advertising by electric utilities. *Ibid.* Our decision acknowledged the special features of commercial speech but identified the serious First Amendment concerns that attend blanket advertising prohibitions that do not protect consumers from commercial harms.

Five Members of the Court recognized that the state interest in the conservation of energy was substantial, and that there was "an immediate connection between advertising and demand for electricity." *Id.*, at 569. Nevertheless, they concluded that the regulation was invalid because the Commission had failed to make a showing that a more limited speech regulation would not have adequately served the State's interest. *Id.*, at 571.[11]

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[11]In other words, the regulation failed the fourth step in the four-part inquiry that the majority announced in its opinion. It wrote:

"In commercial speech cases, then, a four-part analysis has developed. 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." *Central Hudson*, 447 U. S., at 566.

In reaching its conclusion, the majority explained that although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Id.*, at 566, n. 9. In those circumstances, "a ban on speech could screen from public view the underlying governmental policy." *Ibid.* As a result, the Court concluded that "special care" should attend the review of such blanket bans, and it pointedly remarked that "in recent years this Court has not approved a blanket ban on commercial speech unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Ibid.*[12]

III

As our review of the case law reveals, Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them. See *Rubin* v. *Coors Brewing Co.*, 514 U. S., at ___–___ (slip op., at 1–3) (STEVENS, J., concurring in judgment).

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining

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[12]The Justices concurring in the judgment adopted a somewhat broader view. They expressed "doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to `dampen' the demand for or use of the product." *Id.*, at 574. Indeed, Justice Blackmun believed that even "though `commercial' speech is involved, such a regulation strikes at the heart of the First Amendment." *Ibid.*

process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Sound reasons justify reviewing the latter type of commercial speech regulation more carefully. Most obviously, complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, see *Kovacs* v. *Cooper*, 336 U. S. 77, 89 (1949), are particularly dangerous because they all but foreclose alternative means of disseminating certain information.

Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression. For example, in *Linmark*, 431 U. S., at 92–94, we concluded that a ban on "For Sale" signs was "content based" and failed to leave open "satisfactory" alternative channels of communication; see also *Virginia Pharmacy Bd.*, 425 U. S., at 771. Moreover, last Term we upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers. *Florida Bar* v. *Went For It, Inc.*, 515 U. S. ___, ___–___ (1995) (slip op., at 15–16).[13]

The special dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the "commonsense distinctions" that exist between commercial and noncommercial speech. *Virginia Pharmacy Bd.*, 425 U. S., at 771, n. 24. Regulations that suppress the truth are no less

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[13]"Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. See generally Rule 4–7.2(a), Rules Regulating The Florida Bar (`[A] lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards, and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4–7.4'); *The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar—Advertising Issues*, 571 So 2d, at 461." *Florida Bar* v. *Went For It, Inc.*, 515 U. S., at ___ (slip op., at 15–16).

troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the "greater objectivity" nor the "greater hardiness" of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference. *Ibid.*

It 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." *Cincinnati* v. *Discovery Network, Inc.,* 507 U. S. 410, 426 (1993). Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms.[14] Instead, such bans often serve only to obscure an "underlying governmental policy" that could be implemented without regulating speech. *Central Hudson*, 447 U. S., at 566, n. 9. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy. See *id.*, at 575 (Blackmun, J., concurring in judgment).[15]

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. *Linmark*, 431 U. S., at 96. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government

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[14]In *Discovery Network*, we held that the city's categorical ban on commercial newsracks attached too much importance to the distinction between commercial and noncommercial speech. After concluding that the aesthetic and safety interests served by the newsrack ban bore no relationship whatsoever to the prevention of commercial harms, we rejected the State's attempt to justify its ban on the sole ground that it targeted commercial speech. See 507 U. S., at 428.

[15]This case bears out the point. Rhode Island seeks to reduce alcohol consumption by increasing alcohol price; yet its means of achieving that goal deprives the public of their chief source of information about the reigning price level of alcohol. As a result, the State's price advertising ban keeps the public ignorant of the key barometer of the ban's effectiveness: The alcohol beverages' prices.

perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products:

> "The commercial market-place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment. See *Virginia State Bd. of Pharmacy*, *supra*, at 762." *Edenfield* v. *Fane*, 507 U. S. 761, 767 (1993).

See also *Linmark*, 431 U. S. at 96 (1977); *Rubin* v. *Coors Brewing Co.*, 514 U. S., at ___ (STEVENS, J., concurring in judgment); Tribe, American Constitutional Law §12–2, at 790, and n. 11.

IV

In this case, there is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product. There is also no question that the ban serves an end unrelated to consumer protection. Accordingly, we must review the price advertising ban with "special care," *Central Hudson*, 447 U. S., at 566, n. 9, mindful that speech prohibitions of this type rarely survive constitutional review. *Ibid.*

The State argues that the price advertising prohibition should nevertheless be upheld because it directly advances the State's substantial interest in promoting temperance, and because it is no more extensive than necessary. Cf. *Central Hudson*, 447 U. S., at 566. Although there is some confusion as to what Rhode Island means by temperance, we assume that the State asserts an interest in reducing alcohol consumption.[16]

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[16]Before the District Court, the State argued that it sought to reduce consumption among irresponsible drinkers. App. 67. In its brief to this Court, it equates its interest in promoting temperance with an interest in reducing alcohol consumption among all drinkers. See, *e.g.*, Brief for Respondents 28. The Rhode Island Supreme Court has characterized the

> In evaluating the ban's effectiveness in advancing the State's interest, we note that a commercial speech regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U. S., at 564. For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so "to a material degree." *Edenfield*, 507 U. S., at 771; see also *Rubin* v. *Coors Brewing Co.*, 514 U. S., at ___ (slip op., at 8–9). The need for the State to make such a showing is particularly great given the drastic nature of its chosen means—the wholesale suppression of truthful, nonmisleading information. Accordingly, we must determine whether the State has shown that the price advertising ban will *significantly* reduce alcohol consumption.
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> We can agree that common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising,[17] will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. Despite the absence of proof on the point, we can even agree with the State's contention that it is reasonable to assume that demand, and hence consumption throughout the market, is somewhat lower whenever a higher, noncompetitive price level prevails. However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban

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State's interest in "promoting temperance" as both "the state's interest in reducing the consumption of liquor," *S&S Liquormart*, *Inc.* v. *Pastore*, 497 A. 2d 729, 734 (1985), and the State's interest in discouraging "excessive consumption of alcoholic beverages." *Id.* at 735. A state statute declares the ban's purpose to be "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R. I. Gen. Laws § 3–1–5 (1987).

[17]See, *e.g.*, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 735 (1988) (considering restriction on price advertising as evidence of Sherman Act violation); *United States* v. *Sealy, Inc.*, 388 U. S. 350, 355 (1967) (same); *Blackburn* v. *Sweeney*, 53 F. 3d 825, 828 (CA7 1995) (considering restrictions on the location of advertising as evidence of Sherman Act violation).

will significantly advance the State's interest in promoting temperance.

Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, 829 F. Supp., at 546, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce market-wide consumption.[18] Indeed, the District Court's considered and uncontradicted finding on this point is directly to the contrary. *Id.*, at 549.[19] Moreover, the evidence suggests that the abusive drinker will probably not be deterred by a marginal price increase, and that the true alcoholic may simply reduce his purchases of other necessities.

In addition, as the District Court noted, the State has not identified what price level would lead to a significant reduction in alcohol consumption, nor has it identified the amount that it believes prices

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[18]The appellants' stipulation that they each expect to realize a $100,000 benefit per year if the ban is lifted is not to the contrary. App. 47. The stipulation shows only that the appellants believe they will be able to compete more effectively for existing alcohol consumers if there is no ban on price advertising. It does not show that they believe either the number of alcohol consumers, or the number of purchases by those consumers, will increase in the ban's absence. Indeed, the State's own expert conceded that "plaintiffs' expectation of realizing additional profits through price advertising has no necessary relationship to increased overall consumption." 829 F. Supp., at 549.

Moreover, we attach little significance to the fact that some studies suggest that people budget the amount of money that they will spend on alcohol. 39 F. 3d 5, 7 (CA1 1994). These studies show only that, in a competitive market, people will tend to search for the cheapest product in order to meet their budgets. The studies do not suggest that the amount of money budgeted for alcohol consumption will remain fixed in the face of a market-wide price increase.

[19]Although the Court of Appeals concluded that the regulation directly advanced the State's interest, it did not dispute the District Court's conclusion that the evidence suggested that, at most, a price advertising ban would have a marginal impact on overall alcohol consumption. *Id.*, at 7–8; cf. *Michigan Beer & Wine Wholesalers Assn.* v. *Attorney General*, 142 Mich. App., at 311, 370 N. W. 2d, at 336 (explaining that "any additional impact on the level of consumption attributable to the absence of price advertisements would be negligible").

would decrease without the ban. *Ibid.* Thus, the State's own showing reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous.

As is evident, any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of "speculation or conjecture" that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. *Edenfield*, 507 U. S., at 770.[20] Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.

The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. 829 F. Supp., at 549. Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.

As a result, even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a "reasonable fit" between its abridgment of speech and its temperance goal. *Board of Trustees, State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989); see also *Rubin* v. *Coors Brewing Co.*, 514 U. S., at ___ (slip op., at 15) (explaining that defects in a federal ban on alcohol advertising are "further highlighted by the availability of alternatives that would prove

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[20]Outside the First Amendment context, we have refused to uphold alcohol advertising bans premised on similarly speculative assertions about their impact on consumption. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 715–716 (1984) (holding ban pre-empted by Federal Communications Commission regulations); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U. S. 97 (1980) (holding ban violated the Sherman Act). It would be anomalous if the First Amendment were more tolerant of speech bans than federal regulations and statutes.

less intrusive to the First Amendment's protections for commercial speech"); *Linmark*, 431 U. S., at 97 (suggesting that the State use financial incentives or counter-speech, rather than speech restrictions, to advance its interests). It necessarily follows that the price advertising ban cannot survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech. *Central Hudson*, 447 U. S., at 566, n. 9.

V

The State responds by arguing that it merely exercised appropriate "legislative judgment" in determining that a price advertising ban would best promote temperance. Relying on the *Central Hudson* analysis set forth in *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), and *United States* v. *Edge Broadcasting Co.*, 509 U. S. ___ (1993), Rhode Island first argues that, because expert opinions as to the effectiveness of the price advertising ban "go both ways," the Court of Appeals correctly concluded that the ban constituted a "reasonable choice" by the legislature. 39 F. 3d, at 7. The State next contends that precedent requires us to give particular deference to that legislative choice because the State could, if it chose, ban the sale of alcoholic beverages outright. See *Posadas*, 478 U. S., at 345–346. Finally, the State argues that deference is appropriate because alcoholic beverages are so-called "vice" products. See *Edge*, 509 U. S. ___ (slip op., at ___); *Posadas*, 478 U. S., at 346–347. We consider each of these contentions in turn.

The State's first argument fails to justify the speech prohibition at issue. Our commercial speech cases recognize some room for the exercise of legislative judgment. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 507–508 (1981). However, Rhode Island errs in concluding that *Edge* and *Posadas* establish the degree of deference that its decision to impose a price advertising ban warrants.

In *Edge*, we upheld a federal statute that permitted only those broadcasters located in States that had legalized lotteries to air lottery advertising. The statute was designed to regulate advertising about an activity that had been deemed

illegal in the jurisdiction in which the broadcaster was located. 509 U. S., at ___ (slip op., at 14–15). Here, by contrast, the commercial speech ban targets information about entirely lawful behavior.

Posadas is more directly relevant. There, a five-Member majority held that, under the *Central Hudson* test, it was "up to the legislature" to choose to reduce gambling by suppressing in-state casino advertising rather than engaging in educational speech. *Posadas*, 478 U. S., at 344. Rhode Island argues that this logic demonstrates the constitutionality of its own decision to ban price advertising in lieu of raising taxes or employing some other less speech-restrictive means of promoting temperance.

The reasoning in *Posadas* does support the State's argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. The casino advertising ban was designed to keep truthful, nonmisleading speech from members of the public for fear that they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw. See *Posadas*, 478 U. S., at 351 (Brennan, J., dissenting).

Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available. See *Posadas*, 478 U. S., at 350 (Brennan, J., dissenting) (listing cases); Kurland, Posadas de Puerto Rico v. Tourism Company: "`Twas Strange, `Twas Passing Strange; `Twas Pitiful, `Twas Wondrous Pitiful," 1986 S. Ct. Rev. 1, 12–15.

Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach. Instead, in keeping with our prior holdings, we conclude that a state legislature does

not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate. As we explained in *Virginia Pharmacy Bd.*, "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U. S., at 770.

We also cannot accept the State's second contention, which is premised entirely on the "greater-includes-the-lesser" reasoning endorsed toward the end of the majority's opinion in *Posadas*. There, the majority stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U. S., at 345–346. It went on to state that "*because* the government could have enacted a wholesale prohibition of [casino gambling] it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Id.*, at 346. The majority concluded that it would "surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." *Ibid.* On the basis of these statements, the State reasons that its undisputed authority to ban alcoholic beverages must include the power to restrict advertisements offering them for sale.

In *Rubin* v. *Coors Brewing Co.*, 514 U. S. ___ (1995), the United States advanced a similar argument as a basis for supporting a statutory prohibition against revealing the alcoholic content of malt beverages on product labels. We rejected the argument, noting that the statement in the *Posadas* opinion was made only after the majority had concluded that the Puerto Rican regulation "survived the *Central Hudson* test." 514 U. S., at ___, n. 2 (slip op., at 5, n. 2). Further consideration persuades us that the "greater-includes-the-lesser" argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.

> Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial *activity* is "greater" than its power to ban truthful, nonmisleading commercial *speech*. Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold.[21] Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. In short, we reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily "greater" than the power to suppress speech about it.
>
> As a matter of First Amendment doctrine, the *Posadas* syllogism is even less defensible. The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.
>
> These basic First Amendment principles clearly apply to commercial speech; indeed, the *Posadas* majority impliedly conceded as much by applying the *Central Hudson* test. Thus, it is no answer that commercial speech concerns products and services that the government may freely regulate. Our decisions from *Virginia Pharmacy Bd.* on have made plain that a State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods. The distinction that our cases have consistently drawn

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[21]"Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime." The International Thesaurus of Quotations 646 (compiled by R. Tripp 1970).

between these two types of governmental action is fundamentally incompatible with the absolutist view that the State may ban commercial speech simply because it may constitutionally prohibit the underlying conduct.[22]

That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. See, *e.g.*, *Frost & Frost Trucking Co.* v. *Railroad Comm'n of Cal.*, 271 U. S. 583, 594 (1926). In *Perry* v. *Sindermann,* 408 U. S. 593 (1972), relying on a host of cases applying that principle during the preceding quarter-century, the Court explained that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Id.*, at 597. That teaching clearly applies to state attempts to regulate commercial speech, as our cases striking down bans on truthful, nonmisleading speech by licensed professionals attest. See, *e.g.*, *Bates* v. *State Bar of Ariz.*, 433 U. S., at 355; *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976).

Thus, just as it is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance, we think it equally clear that its power to ban the sale of liquor entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product. As the entire Court apparently now

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[22]It is also no answer to say that it would be "strange" if the First Amendment tolerated a seemingly "greater" regulatory measure while forbidding a "lesser" one. We recently held that although the government had the power to proscribe an entire category of speech, such as obscenity or so-called fighting words, it could not limit the scope of its ban to obscene or fighting words that expressed a point of view with which the government disagrees. *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992). Similarly, in *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410 (1993), we assumed that States could prevent all newsracks from being placed on public sidewalks, but nevertheless concluded that they could not ban only those newsracks that contained certain commercial publications. *Id.*, at 428.

agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.

Finally, we find unpersuasive the State's contention that, under *Posadas* and *Edge*, the price advertising ban should be upheld because it targets commercial speech that pertains to a "vice" activity. The appellees premise their request for a so-called "vice" exception to our commercial speech doctrine on language in *Edge* which characterized gambling as a "vice". *Edge*, 507 U. S., at ___ (slip op., at ___); see also *Posadas*, 478 U. S., at 346–347. The respondents misread our precedent. Our decision last Term striking down an alcohol-related advertising restriction effectively rejected the very contention respondents now make. See *Rubin* v. *Coors Brewing Co.*, 514 U. S., at ___, ___, n. 2.

Moreover, the scope of any "vice" exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity". Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the "vice" label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice. See Kurland, 1986 S. Ct. Rev., at 15. For these reasons, a "vice" label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.

VI

From 1919 until 1933, the Eighteenth Amendment to the Constitution totally prohibited "the manufacture, sale, or transportation of intoxicating liquors" in the United States and its territories. Section 1 of the Twenty-first Amendment repealed that prohibition, and §2 delegated to the several States the power to prohibit commerce in, or the use of, alcoholic

beverages.[23] The States' regulatory power over this segment of commerce is therefore largely "unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 138 (1939).

As is clear, the text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions. Nevertheless, Rhode Island argues, and the Court of Appeals agreed, that in this case the Twenty-first Amendment tilts the First Amendment analysis in the State's favor. See 39 F. 3d, at 7–8.

In reaching its conclusion, the Court of Appeals relied on our decision in *California* v. *LaRue,* 409 U. S. 109 (1972).[24] In *LaRue*, five Members of the Court relied on the Twenty-first Amendment to buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. See *id.,* at 118–119. We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment.

Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the *LaRue* opinion regardless of whether alcoholic beverages are involved. *Id.*, at 118; see, *e.g.*, *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976);

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[23]"Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U. S. Const., Amdt. 21, §2.

[24]The State also relies on two *per curiam* opinions that followed the 21st Amendment analysis set forth in *Larue.* See *New York State Liquor Authority* v. *Bellanca,* 452 U. S. 714 (1981), and *Newport* v. *Iacobucci,* 479 U. S. 92 (1986).

Barnes v. *Glen Theatre, Inc.,* 501 U. S. 560 (1991). As we recently noted: "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin* v. *Coors Brewing Co.*, 514 U. S., at ___, n. 2 (slip op., at 4, n. 2).

Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment. As we explained in a case decided more than a decade after *LaRue*, although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc.* v. *Crisp,* 467 U. S. 691, 712 (1984). That general conclusion reflects our specific holdings that the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause, *id.,* at 712; *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U. S. 97, 112–114 (1980), the Establishment Clause, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982), or the Equal Protection Clause, *Craig* v. *Boren*, 429 U. S. 190, 209 (1976). We see no reason why the First Amendment should not also be included in that list. Accordingly, we now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment. The Twenty-first Amendment, therefore, cannot save Rhode Island's ban on liquor price advertising.

VII

Because Rhode Island has failed to carry its heavy burden of justifying its complete ban on price advertising, we conclude that R. I. Gen. Laws §§3–8–7 and 3–8–8.1, as well as Regulation 32 of the Rhode Island Liquor Control Administration, abridge speech in violation of the First Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

GREATER NEW ORLEANS BROADCASTING

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., etc., et al.,
Petitioners,
v.
UNITED STATES, et al.
No. 98-387.
Argued April 27, 1999.
Decided June 14, 1999.

Justice STEVENS delivered the opinion of the Court.

Federal law prohibits some, but by no means all, broadcast advertising of lotteries and casino gambling. In United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), we upheld the constitutionality of 18 U.S.C. § 1304 as applied to broadcast advertising of Virginia's lottery by a radio station located in North Carolina, where no such lottery was authorized. Today we hold that § 1304 may not be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal.

I

Through most of the 19th and the first half of the 20th centuries, Congress adhered to a policy that not only discouraged the operation of lotteries and similar schemes, but forbade the dissemination of information concerning such enterprises by use of the mails, even when the lottery in question was chartered by a state legislature. [FN1] Consistent with this Court's earlier view that commercial advertising was unprotected by the First Amendment, see *Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 86 L.Ed. 1262 (1942), we found that the notion that "lotteries **...** are supposed to have a demoralizing influence upon the people" provided sufficient justification for excluding circulars concerning such enterprises from the federal postal system, Ex parte Jackson, 96 U.S. 727, 736-737, 24 L.Ed. 877 (1878). We likewise deferred to congressional judgment in upholding the similar exclusion for newspapers that contained either lottery advertisements or prize lists. In re Rapier, 143 U.S. 110, 134-135, 12 S.Ct. 374, 36 L.Ed. 93 (1892); see generally Edge, 509 U.S., at 421-422, 113 S.Ct. 2696; Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903). The current versions of these early antilottery statutes are now codified at 18 U.S.C. § § 1301-1303.

FN1. See, e.g., Act of Mar. 2, 1895, 28 Stat. 963 (prohibiting the transportation in interstate or foreign commerce, and the mailing of, tickets and advertisements for lotteries and similar enterprises); Act of Mar. 2, 1827, § 6, 4 Stat. 238 (restricting the participation of postmasters and assistant postmasters in the lottery business); Act of July 27, 1868, § 13, 15 Stat. 196 (prohibiting the mailing of any letters or circulars concerning lotteries or similar enterprises); Act of July 12, 1876, § 2, 19 Stat. 90 (repealing an 1872 limitation of the mails prohibition to letters and circulars

concerning "illegal" lotteries); Anti-Lottery Act of 1890, § 1, 26 Stat. 465 (extending the mails prohibition to newspapers containing advertisements or prize lists for lotteries or gift enterprises).

Congress extended its restrictions on lottery-related information to broadcasting as communications technology made that practice both possible and profitable. It enacted the statute at issue in this case as § 316 of the Communications Act of 1934, 48 Stat. 1088. Now codified at 18 U.S.C. § 1304 ("Broadcasting lottery information"), the statute prohibits radio and television broadcasting, by any station for which a license is required, of

"any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes."

The statute provides that each day's prohibited broadcasting constitutes a separate offense punishable by a fine, imprisonment for not more than one year, or both. Ibid. Although § 1304 is a criminal statute, the Solicitor General informs us that, in practice, the provision traditionally has been enforced by the Federal Communications Commission (FCC), which imposes administrative sanctions on radio and television licensees for violations of the agency's implementing regulation. See 47 CFR § 73.1211 (1998); Brief for Respondents 3. Petitioners now concede that the broadcast ban in § 1304 and the FCC's regulation encompasses advertising for privately owned casinos--a concession supported by the broad language of the statute, our precedent, and the FCC's sound interpretation. See FCC v. American Broadcasting Co., 347 U.S. 284, 290-291, and n. 8, 74 S.Ct. 593, 98 L.Ed. 699 (1954).

During the second half of this century, Congress dramatically narrowed the scope of the broadcast prohibition in § 1304. The first inroad was minor: In 1950, certain not-for-profit fishing contests were exempted as "innocent pastimes **...** far removed from the reprehensible type of gambling activity which it was paramount in the congressional mind to forbid." S.Rep. No. 2243, 81st Cong., 2d Sess., 2 (1950); see Act of Aug. 16, 1950, ch. 722, 64 Stat. 451, 18 U.S.C. § 1305.

Subsequent exemptions were more substantial. Responding to the growing popularity of state-run lotteries, in 1975 Congress enacted the provision that gave rise to our decision in Edge, 509 U.S., at 422-423, 113 S.Ct. 2696; Act of Jan. 2, 1975, 88 Stat.1916, 18 U.S.C. § 1307; see also § 1953(b)(4). With subsequent modifications, that amendment now exempts advertisements of state-conducted lotteries from the nationwide postal restrictions in § § 1301 and 1302, and from the broadcast restriction in § 1304, when "broadcast by a radio or television station licensed to a location in **...** a State which conducts such a lottery." § 1307(a)(1)(B); see also § § 1307(a)(1)(A), (b)(1). The § 1304 broadcast restriction remained in place, however, for stations licensed in States that do not conduct lotteries. In Edge, we held that this remaining restriction on broadcasts from nonlottery States, such as North Carolina, supported the "laws against gambling" in those jurisdictions and properly advanced the "congressional policy of balancing the interests of lottery and nonlottery States." 509 U.S., at 428, 113 S.Ct. 2696.

In 1988, Congress enacted two additional statutes that significantly curtailed the coverage of § 1304. First, the Indian Gaming Regulatory Act (IGRA), 102 Stat. 2467, 25 U.S.C. § 2701 et seq., authorized Native American tribes to conduct various forms of gambling--including casino gambling--pursuant* to tribal-state compacts if the State permits such gambling "for any purpose by any person, organization, or entity." § 2710(d)(1)(B). The IGRA also exempted "any gaming conducted by an Indian tribe pursuant to" the Act from both the postal and transportation restrictions in 18 U.S.C. § § 13011302, and the broadcast restriction in § 1304. 25 U.S.C. § 2720. Second, the Charity Games Advertising Clarification Act of 1988, 18 U.S.C. § 1307(a)(2), extended the exemption from § § 1301-1304 for state-run lotteries to include any other lottery, gift enterprise, or similar scheme--not prohibited by the law of the State in which it operates--when conducted by: (i) any governmental organization; (ii) any not-for-profit organization; or (iii) a commercial organization as a promotional activity "clearly occasional and ancillary to the primary business of that organization." There is no dispute that the exemption in § 1307(a)(2) applies to casinos conducted by state and local governments. And, unlike the 1975 broadcast exemption for advertisements of and information concerning state-conducted lotteries, the exemptions in both of these 1988 statutes are not geographically limited; they shield messages from § 1304's reach in States that do not authorize such gambling as well as those that do.

A separate statute, the 1992 Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 et seq., proscribes most sports betting and advertising thereof. Section 3702 makes it unlawful for a State or tribe "to sponsor, operate, advertise, promote, license, or authorize by law or compact"--or for a person "to sponsor, operate, advertise, or promote, pursuant to the law or compact" of a State or tribe--any lottery or gambling scheme based directly or indirectly on competitive games in which amateur or professional athletes participate. However, the Act also includes a variety of exemptions, some with obscured congressional purposes: (i) gambling schemes conducted by States or other governmental entities at any time between January 1, 1976, and August 31, 1990; (ii) gambling schemes authorized by statutes in effect on October 2, 1991; (iii) gambling "conducted exclusively in casinos" located in certain municipalities if the schemes were authorized within 1 year of the effective date of the Act and, for "commercial casino gaming scheme[s]," that had been in operation for the preceding 10 years pursuant to a state constitutional provision and comprehensive state regulation applicable to that municipality; and (iv)gambling on parimutuel animal racing or jai-alai games. § 3704(a); see also 18 U.S.C. § § 1953(b)(1)(3) (regarding interstate transportation of wagering paraphernalia). These exemptions make the scope of § 3702's advertising prohibition somewhat unclear, but the prohibition is not limited to broadcast media and does not depend on the location of a broadcast station or other disseminator of promotional materials.

Thus, unlike the uniform federal antigambling policy that prevailed in 1934 when 18 U.S.C. § 1304 was enacted, federal statutes now accommodate both progambling and antigambling segments of the national polity.

II

Petitioners are an association of Louisiana broadcasters and its members who operate FCC-licensed radio and television stations in the New Orleans metropolitan area. But for the threat of sanctions pursuant to § 1304 and the FCC's companion regulation, petitioners would broadcast promotional advertisements for gaming available at private, for-profit casinos that are lawful and regulated in both Louisiana and neighboring Mississippi. [FN2] According to an FCC official, however, "[u]nder appropriate conditions, some broadcast signals from Louisiana broadcasting stations may be heard in neighboring states including Texas and Arkansas," 3 Record 628, where private casino gambling is unlawful.

FN2. See, e.g., La.Rev.Stat. Ann. § § 27:2, 27:15B(1), 27:4227:43, 27:44(4), 27:44(10)-27:44(12) (West 1999); Miss.Code Ann. § § 75-76-3, 97-33-25 (1972); see also La.Rev.Stat. Ann. § § 27:202B-27:202D, 27:205(4), 27:205(12)-27:205(14), 27:210B (West 1999).

Petitioners brought this action against the United States and the FCC in the District Court for the Eastern District of Louisiana, praying for a declaration that § 1304 and the FCC's regulation violate the First Amendment as applied to them, and for an injunction preventing enforcement of the statute and the rule against them. After noting that all parties agreed that the case should be decided on their cross-motions for summary judgment, the District Court ruled in favor of the Government. 866 F.Supp. 975, 976 (1994). The court applied the standard for assessing commercial speech restrictions set out in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and concluded that the restrictions at issue adequately advanced the Government's "substantial interest (1) in protecting the interest of nonlottery states and (2) in reducing participation in gambling and thereby minimizing the social costs associated therewith." 866 F.Supp., at 979. The court pointed out that federal law does not prohibit the broadcast of all information about casinos, such as advertising that promotes a casino's amenities rather than its "gaming aspects," and observed that advertising for state-authorized casinos in Louisiana and Mississippi was actually "abundant." Id., at 980.

A divided panel of the Court of Appeals for the Fifth Circuit agreed with the District Court's application of Central Hudson, and affirmed the grant of summary judgment to the Government. 69 F.3d 1296, 1298 (1995). The panel majority's description of the asserted governmental interests, although more specific, was essentially the same as the District Court's:

"First, section 1304 serves the interest of assisting states that restrict gambling by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate. The second asserted governmental interest lies in discouraging public participation in commercial gambling, thereby minimizing the wide variety of social ills that have historically been associated with such activities." Id., at 1299.

The majority relied heavily on our decision in Posadas de Puerto Rico Associates v. Tourism Co. of P. R., 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), see 69 F.3d, at 1300-1302, and endorsed the theory that, because gambling

is in a category of "vice activity" that can be banned altogether, "advertising of gambling can lay no greater claim on constitutional protection than the underlying activity," id., at 1302. In dissent, Chief Judge Politz contended that the many exceptions to the original prohibition in § 1304-and that section's conflict with the policies of States that had legalized gambling--precluded justification of the restriction by either an interest in supporting anticasino state policies or "an independent federal interest in discouraging public participation in commercial gambling." Id., at 13031304.

While the broadcasters' petition for certiorari was pending in this Court, we decided 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Because the opinions in that case concluded that our precedent both preceding and following Posadas had applied the Central Hudson test more strictly, 517 U.S., at 509-510, 116 S.Ct. 1495 (opinion of STEVENS, J.); id., at 531-532, 116 S.Ct. 1495 (O'CONNOR, J., concurring in judgment)--and because we had rejected the argument that the power to restrict speech about certain socially harmful activities was as broad as the power to prohibit such conduct, see id., at 513-514, 116 S.Ct. 1495 (opinion of STEVENS, J.); see also Rubin v. Coors Brewing Co., 514 U.S. 476, 482-483, n. 2, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995)--we granted the broadcasters' petition, vacated the judgment of the Court of Appeals, and remanded the case for further consideration. 519 U.S. 801, 117 S.Ct. 39, 136 L.Ed.2d 3 (1996).

On remand, the Fifth Circuit majority adhered to its prior conclusion. 149 F.3d 334 (1998). The majority recognized that at least part of the Central Hudson inquiry had "become a tougher standard for the state to satisfy," 149 F.3d, at 338, but held that § 1304's restriction on speech sufficiently advanced the asserted governmental interests and was not "broader than necessary to control participation in casino gambling," id., at 340. Because the Court of Appeals for the Ninth Circuit reached a contrary conclusion in Valley Broadcasting Co. v. United States, 107 F.3d 1328, cert. denied, 522 U.S. 1115, 118 S.Ct. 1050, 140 L.Ed.2d 114 (1998), as did a Federal District Court in Players, International, Inc. v. United States, 988 F.Supp. 497 (N.J.1997), we again granted the broadcasters' petition for certiorari. 525 U.S. 1097, 119 S.Ct. 863, 142 L.Ed.2d 716 (1999). We now reverse.

III

In a number of cases involving restrictions on speech that is "commercial" in nature, we have employed Central Hudson's four-part test to resolve First Amendment challenges:

"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." 447 U.S., at 566, 100 S.Ct. 2343.

In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. Edenfield v. Fane, 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993); Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71, and n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

The four parts of the Central Hudson test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three. Partly because of these intricacies, petitioners as well as certain judges, scholars, and amici curiae have advocated repudiation of the Central Hudson standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech. [FN3] As the opinions in 44 Liquormart demonstrate, reasonable judges may disagree about the merits of such proposals. It is, however, an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground. See United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). In this case, there is no need to break new ground. Central Hudson, as applied in our more recent commercial speech cases, provides an adequate basis for decision.

FN3. See, e.g., Pet. for Cert. 23; Brief for Petitioners 10; Reply Brief for Petitioners 18-20; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 526-528, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (THOMAS, J., concurring); Kozinski & Banner, Who's Afraid of Commercial Speech?, 76 Va. L.Rev. 627 (1990); Brief for Association of National Advertisers, Inc., as Amicus Curiae 3-4; Brief for American Advertising Federation as Amicus Curiae 2.

IV

All parties to this case agree that the messages petitioners wish to broadcast constitute commercial speech, and that these broadcasts would satisfy the first part of the Central Hudson test: Their content is not misleading and concerns lawful activities, i.e., private casino gambling in Louisiana and Mississippi. As well, the proposed commercial messages would convey information--whether taken favorably or unfavorably by the audience-about an activity that is the subject of intense public debate in many communities. In addition, petitioners' broadcasts presumably would disseminate accurate information as to the operation of market competitors, such as pay-out ratios, which can benefit listeners by informing their consumption choices and fostering price competition. Thus, even if the broadcasters' interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader. See Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-765, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 96-97, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); Bigelow v. Virginia, 421 U.S. 809, 822, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

The second part of the Central Hudson test asks whether the asserted governmental interest served by the speech restriction is substantial. The Solicitor General identifies two such interests: (1) reducing the social costs associated with "gambling" or "casino gambling," and (2) assisting States that "restrict gambling" or "prohibit casino gambling" within their own borders. [FN4] Underlying Congress' statutory scheme, the Solicitor General contends, is the judgment that gambling contributes to corruption and organized crime; underwrites bribery, narcotics trafficking, and other illegal conduct; imposes a regressive tax on the poor; and "offers a false but sometimes irresistible hope of financial advancement." Brief for Respondents 15-16. With respect to casino gambling, the Solicitor General states that many of the associated social costs stem from "pathological" or "compulsive" gambling by approximately 3 million Americans, whose behavior is primarily associated with "continuous play" games, such as slot machines. He also observes that compulsive gambling has grown along with the expansion of legalized gambling nationwide, leading to billions of dollars in economic costs; injury and loss to these gamblers as well as their families, communities, and government; and street, white-collar, and organized crime. Id., at 16-20.

FN4. Brief for Respondents 12, 15, 28. We will concentrate on the Government's contentions as to "casino gambling": They are the focus of the Government's argument and are more closely linked to the speech regulation at issue, thereby providing a more likely basis for upholding § 1304 as applied to these broadcasters and their proposed messages.

We can accept the characterization of these two interests as "substantial," but that conclusion is by no means self-evident. No one seriously doubts that the Federal Government may assert a legitimate and substantial interest in alleviating the societal illsrecited above, or in assisting like-minded States to do the same. Cf. Edge, 509 U.S., at 428, 113 S.Ct. 2696. But in the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits. [FN5] Despite its awareness of the potential social costs, Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts, but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities. See, e.g., 18 U.S.C. § § 1307, 1953(b); 25 U.S.C. § § 2701-2702, 2710(d); 28 U.S.C. § 3704(a). That Congress has generally exempted state-run lotteries and casinos from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States. Indeed, in Edge we identified the federal interest furthered by § 1304's partial broadcast ban as the "congressional policy of balancing the interests of lottery and nonlottery States." 509 U.S., at 428, 113 S.Ct. 2696. Whatever its character in 1934 when § 1304 was adopted, the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal.

FN5. Some form of gambling is legal in nearly every State. Government Lodging 192. Thirty-seven States and the District of Columbia operate lotteries. Ibid.; National Gambling Impact Study Commission, Staff Report: Lotteries 1 (1999). As of

1997, commercial casino gambling existed in 11 States, see North American Gaming Report 1997, Int'l Gaming & Wagering Bus., July 1997, pp. S4-S31, and at least 5 authorize statesponsored video gambling, see Del.Code Ann., Tit. 29, § § 4801, 4803(f)-(g), 4820 (1974 and Supp.1997); Ore.Rev.Stat. § 461.215 (1998); R.I. Gen. Laws § 42-61.2-2(a) (1998); S.D. Const., Art. III, § 25 (1999); S.D. Comp. Laws Ann. § § 42-7A-4(4), (11A) (1991); W. Va.Code § 29-22A-4 (1999). Also as of 1997, about half the States in the Union hosted Class III Indian gaming (which may encompass casino gambling), including Louisiana, Mississippi, and four other States that had private casinos. United States General Accounting Office, Casino Gaming Regulation: Roles of Five States and the National Indian Gaming Commission 4-6 (May 1998) (including Indian casino gaming in five States without approved compacts); cf. National Gambling Impact Study Commission, Staff Report: Native American Gaming 2 (1999) (hereinafter Native American Gaming) (noting that 14 States have on-reservation Indian casinos, and that those casinos are the only casinos in 8 States). One count by the Bureau of Indian Affairs tallied 60 tribes that advertise their casinos on television and radio. Government Lodging 408, 435-437 (3 App. in Player's Int'l, Inc. v. United States, No. 98-5127 (C.A.3)). By the mid-1990's, tribal casino-style gambling generated over $3 billion in gaming revenue--increasing its share to 18% of all casino gaming revenue, matching the total for the casinos in Atlantic City, New Jersey, and reaching about half the figure for Nevada's casinos. See Native American Gaming 2; Government Lodging 407, 423-429.

Of course, it is not our function to weigh the policy arguments on either side of the nationwide debate over whether and to what extent casino and other forms of gambling should be legalized. Moreover, enacted congressional policy and "governmental interests" are not necessarily equivalents for purposes of commercial speech analysis. See Bolger, 463 U.S., at 70-71, 103 S.Ct. 2875. But we cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General. See Edenfield, 507 U.S., at 768, 113 S.Ct. 1792; 44 Liquormart, 517 U.S., at 531, 116 S.Ct. 1495 (O'CONNOR, J., concurring in judgment). Even though the Government has identified substantial interests, when we consider both their quality and the information sought to be suppressed, the crosscurrents in the scope and application of § 1304 become more difficult for the Government to defend.

V

The third part of the Central Hudson test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield, 507 U.S., at 770-771 113 S.Ct. 1792. Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." Central Hudson, 447 U.S., at 564, 100 S.Ct. 2343. We have observed that "this requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not

themselves justify a burden on commercial expression.' " Rubin, 514 U.S., at 487, 115 S.Ct. 1585, quoting Edenfield, 507 U.S., at 771, 113 S.Ct. 1792.

The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest--"a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." Fox, 492 U.S., at 480, 109 S.Ct. 3028 (internal quotation marks omitted); see 44 Liquormart, 517 U.S., at 529, 531, 116 S.Ct. 1495 (O'CONNOR, J., concurring in judgment). On the whole, then, the challenged regulation should indicate that its proponent " 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), quoting Fox, 492 U.S., at 480, 109 S.Ct. 3028.

As applied to petitioners' case, § 1304 cannot satisfy these standards. With regard to the first asserted interest-alleviating the social costs of casino gambling by limiting demand--the Government contends that its broadcasting restrictions directly advance that interest because "promotional" broadcast advertising concerning casino gambling increases demand for such gambling, which in turn increases the amount of casino gambling that produces those social costs. Additionally, the Government believes that compulsive gamblers are especially susceptible to the pervasiveness and potency of broadcast advertising. Brief for Respondents 33-36. Assuming the accuracy of this causal chain, it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest. While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another. More important, any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce. See n. 5, supra. And, as the Court of Appeals recognized, the Government fails to "connect casino gambling and compulsive gambling with broadcast advertising for casinos"--let alone broadcast advertising for non-Indian commercial casinos. 149 F.3d, at 339. [FN6]

FN6. The Government cites several secondary sources and declarations that it put before the Federal District Court in New Jersey and, as an alternative to affirming the judgment below, requests a remand so that it may have another chance to build a record in the Fifth Circuit. Remand is inappropriate for several reasons. First, the Government had ample opportunity to enter the materials it thought relevant after we vacated the Fifth Circuit's first ruling and remanded for reconsideration in light of 44 Liquormart. Second, the Government's evidence did not convince the New Jersey court that § 1304 could be constitutionally applied in

circumstances similar to this case, see Players Int'l, Inc. v. United States, 988 F.Supp. 497, 502-503, 506-507 (1997), and most of the sources that the Government cited in the New Jersey litigation were also presented to the Fifth Circuit, see Supplemental Brief for Appellees in No. 9430732(CA5), pp. iv-v. Indeed, the Government presented sources to the Fifth Circuit not provided to the New Jersey court, and the Fifth Circuit relied on material that the Government had not proffered. In any event, as we shall explain, additional evidence to support the Government's factual assertions in this Court cannot justify the scheme of speech restrictions currently in effect.

We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under Central Hudson, however, because the flaw in the Government's case is more fundamental: The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it. See Rubin, 514 U.S., at 488, 115 S.Ct. 1585. Under current law, a broadcaster may not carry advertising about privately operated commercial casino gambling, regardless of the location of the station or the casino. 18 U.S.C. § 1304; 47 CFR § 73.1211(a) (1998). On the other hand, advertisements for tribal casino gambling authorized by state compacts--whether operated by the tribe or by a private party pursuant to a management contract--are subject to no such broadcast ban, even if the broadcaster is located in, or broadcasts to, a jurisdiction with the strictest of antigambling policies. 25 U.S.C. § 2720. Government-operated, nonprofit, and "occasional and ancillary" commercial casinos are likewise exempt. 18 U.S.C. § 1307(a)(2).

The FCC's interpretation and application of § § 1304 and 1307 underscore the statute's infirmity. Attempting to enforce the underlying purposes and policy of the statute, the FCC has permitted broadcasters to tempt viewers with claims of "Vegas-style excitement" at a commercial "casino," if "casino" is part of the establishment's proper name and the advertisement can be taken to refer to the casino's amenities, rather than directly promote its gaming aspects. [FN7] While we can hardly fault the FCC in view of the statute's focus on the suppression of certain types of information, the agency's practice is squarely at odds with the governmental interests asserted in this case.

FN7. See, e.g., Letter to DR Partners, 8 FCC Rcd 44 (1992); In re WTMJ, Inc., 8 FCC Rcd 4354 (1993) (disapproving of the phrase "Vegas style games"); see also 2 Record 493, 497-498 (Mass Media Bureau letter to Forbes W. Blair, Apr. 10, 1987) (concluding that a proposed television commercial stating that the "odds for fun are high" at the sponsor's establishment would be lawful); id., at 492, 500-501.

From what we can gather, the Government is committed to prohibiting accurate product information, not commercial enticements of all kinds, and then only when conveyed over certain forms of media and for certain types of gambling--indeed, for only certain brands of casino gambling--and despite the fact that messages about the availability of such gambling are being conveyed over the airwaves by other speakers.

Even putting aside the broadcast exemptions for arguably distinguishable sorts of gambling that might also give rise to social costs about which the Federal Government is concerned--such as state lotteries and parimutuel betting on horse and dog races, § 1307(a)(1)(B); 28 U.S.C. § 3704(a)-the Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos. The Government cites revenue needs of States and tribes that conduct casino gambling, and notes that net revenues generated by the tribal casinos are dedicated to the welfare of the tribes and their members. See 25 U.S.C. § § 2710(b)(2)(B), (d)(1)(A)(ii), (2)(A). Yet the Government admits that tribal casinos offer precisely the same types of gambling as private casinos. Further, the Solicitor General does not maintain that government-operated casino gaming is any different, that States cannot derive revenue from taxing private casinos, or that any one class of casino operators is likely to advertise in a meaningfully distinct manner from the others. The Government's suggestion that Indian casinos are too isolated to warrant attention is belied by a quick review of tribal geography and the Government's own evidence regarding the financial success of tribal gaming. See n. 5, supra. If distance were determinative, Las Vegas might have remained a relatively small community, or simply disappeared like a desert mirage.

Ironically, the most significant difference identified by the Government between tribal and other classes of casino gambling is that the former is "heavily regulated." Brief for Respondents 38. If such direct regulation provides a basis for believing that the social costs of gambling in tribal casinos are sufficiently mitigated to make their advertising tolerable, one would have thought that Congress might have at least experimented with comparable regulation before abridging the speech rights of federally un regulated casinos. While Congress' failure to institute such direct regulation of private casino gambling does not necessarily compromise the constitutionality of § 1304, it does undermine the asserted justifications for the restriction before us. See Rubin, 514 U.S., at 490-491, 115 S.Ct. 1585. There surely are practical and nonspeech-related forms of regulation-including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements--that could more directly and effectively alleviate some of the social costs of casino gambling.

We reached a similar conclusion in Rubin. There, we considered the effect of conflicting federal policies on the Government's claim that a speech restriction materially advanced its interest in preventing so-called "strength wars" among competing sellers of certain alcoholic beverages. We concluded that the effect of the challenged restriction on commercial speech had to be evaluated in the context of the entire regulatory scheme, rather than in isolation, and we invalidated the restriction based on the "overall irrationality of the Government's regulatory scheme." Id., at 488, 115 S.Ct. 1585. As in this case, there was "little chance" that the speech restriction could have directly and materially advanced its aim, "while other provisions of the same Act directly undermine[d] and counteract[ed] its effects." Id., at 489, 115 S.Ct. 1585. Coupled with the availability of other regulatory options which could advance the asserted interests "in a manner less intrusive to

[petitioners'] First Amendment rights," we found that the Government could not satisfy the Central Hudson test. Id., at 490491, 115 S.Ct. 1585.

Given the special federal interest in protecting the welfare of Native Americans, see California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216-217, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), we recognize that there may be valid reasons for imposing commercial regulations on non-Indian businesses that differ from those imposed on tribal enterprises. It does not follow, however, that those differences also justify abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors. For the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct. 44 Liquormart, 517 U.S., at 509-511, 116 S.Ct. 1495 (opinion of STEVENS, J.); see id., at 531532, 116 S.Ct. 1495 (O'CONNOR, J., concurring in judgment); Rubin, 514 U.S., at 483, n. 2, 115 S.Ct. 1585. It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone. Fox, 492 U.S., at 480, 109 S.Ct. 3028. And to the extent that the purpose and operation of federal law distinguishes among information about tribal, governmental, and private casinos based on the identity of their owners or operators, the Government presents no sound reason why such lines bear any meaningful relationship to the particular interest asserted: minimizing casino gambling and its social costs by way of a (partial) broadcast ban. Discovery Network, 507 U.S., at 424, 428, 113 S.Ct. 1505. Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment. Cf. Carey v. Brown, 447 U.S. 455, 465, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 777, 784-785, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

The second interest asserted by the Government--the derivative goal of "assisting" States with policies that disfavor private casinos--adds little to its case. We cannot see how this broadcast restraint, ambivalent as it is, might directly and adequately further any state interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar federal interest.

Furthermore, even assuming that the state policies on which the Federal Government seeks to embellish are more coherent and pressing than their federal counterpart, § 1304 sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills that one could reasonably hope such a ban to eliminate. The Government argues that petitioners' speech about private casino gambling should be prohibited in Louisiana because, "under appropriate conditions," 3 Record 628, citizens in neighboring States like Arkansas and Texas (which hosts tribal, but not private, commercial casino gambling) might hear it and make rash or costly decisions. To be sure, in order to achieve a broader objective such regulations may incidentally, even deliberately, restrict a certain amount of speech not thought to contribute significantly to the dangers with which the Government is concerned. See Fox, 492 U.S., at 480, 109 S.Ct. 3028; cf. Edge, 509 U.S., at 429-430, 113 S.Ct. 2696. [FN8] But

Congress' choice here was neither a rough approximation of efficacy, nor a reasonable accommodation of competing state and private interests. Rather, the regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all. Considering the manner in which § 1304 and its exceptions operate and the scope of the speech it proscribes, the Government's second asserted interest provides no more convincing basis for upholding the regulation than the first.

FN8. As we stated in Edge: "[A]pplying the restriction to a broadcaster such as [respondent] directly advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policies of lottery States like Virginia **...** .[W]e judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery States." 509 U.S., at 429-430, 113 S.Ct. 2696. The Government points out that Edge hypothesized that Congress "might have" held fast to a more consistent and broader antigambling policy by continuing to ban all radio or television advertisements for state-run lotteries, even by stations licensed in States with legalized lotteries. Id., at 428, 113 S.Ct. 2696. That dictum does not support the validity of the speech restriction in this case. In that passage, we identified the actual federal interest at stake; we did not endorse any and all nationwide bans on nonmisleading broadcast advertising related to lotteries. As the Court explained, "Instead of favoring either the lottery or the nonlottery State, Congress opted to" accommodate the policies of both; and it was "[t]his congressional policy of balancing the interests of lottery and nonlottery States" that was "the substantial governmental interest that satisfie[d] Central Hudson." Ibid.

VI

Accordingly, respondents cannot overcome the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct. Edenfield, 507 U.S., at 767, 113 S.Ct. 1792. Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, see Edge, 509 U.S., at 428, 113 S.Ct. 2696, this might be a different case. But under current federal law, as applied to petitioners and the messages that they wish to convey, the broadcast prohibition in 18 U.S.C. § 1304 and 47 CFR § 73.1211 (1998) violates the First Amendment. The judgment of the Court of Appeals is therefore

Reversed.

Chief Justice REHNQUIST, concurring.

Title 18 U.S.C. § 1304 regulates broadcast advertising of lotteries and casino gambling. I agree with the Court that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies," ante, at 1933, that it violates the First Amendment. But, as the Court observes: "There surely are practical and nonspeech-related forms of regulation--including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino

premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements--that could more directly and effectively alleviate some of the social costs of casino gambling." Ante, at 1934.

Were Congress to undertake substantive regulation of the gambling industry, rather than simply the manner in which it may broadcast advertisements, "exemptions and inconsistencies" such as those in § 1304 might well prove constitutionally tolerable. "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (citations omitted).

But when Congress regulates commercial speech, the Central Hudson test imposes a more demanding standard of review. I agree with the Court that that standard has not been met here, and I join its opinion.

Justice THOMAS, concurring in the judgment.

I continue to adhere to my view that "[i]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the Central Hudson test should not be applied because "such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (opinion concurring in part and concurring in judgment). Accordingly, I concur only in the judgment.

ENFORCEABILITY OF 18 U.S.C. § 1302

Application of 18 U.S.C. § 1302 to prohibit the mailing of truthful advertising concerning lawful gambling operations (except as to state-operated lotteries in some circumstances) would violate the First Amendment. Accordingly, the Department of Justice will refrain from enforcing the statute with respect to such mailings.

LETTER TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

This is to inform you of the Department of Justice's determination that, in light of governing Supreme Court precedent, the Department cannot constitutionally continue to apply 18 U.S.C. § 1302 to prohibit the mailing of truthful information or advertisements concerning certain lawful gambling operations.

I.

The central opinion that informs the Department's decision is Greater New Orleans Broadcasting Ass'n v. United States, 119 S. Ct. 1923 (1999). In that case, an association of Louisiana broadcasters and its members challenged the constitutionality of the federal statute prohibiting the broadcasting of information concerning lotteries and other gambling operations. The statute in question, 18 U.S.C. § 1304 (1994), provides in relevant part:

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States . . . any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined under this title or imprisoned not more than one year, or both.

The broadcasters sought permission to broadcast advertisements

for lawful casino gambling in Louisiana and Mississippi. The Supreme Court held that the First Amendment prohibits application of § 1304 "to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal." 119 S. Ct. at 1926.

The Court reviewed the constitutionality of § 1304 under the "commercial speech" test of Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). See Greater New Orleans, 119 S. Ct. at 1930. Under that test, when a government regulation restricts truthful speech proposing lawful commercial activity, the court must "ask whether the asserted governmental interest is substantial." Central Hudson, 447 U.S. at 566. If the interest is substantial, the court determines whether the regulation "directly advances the governmental interest asserted" and whether it "is not more extensive than is necessary to serve that interest." Id. As the Court observed in Greater New Orleans, "the Government bears the burden of identifying a substantial interest and justifying the challenged restriction." 119 S. Ct. at 1930.

In the Greater New Orleans case, the government identified two basic governmental interests served by § 1304: minimizing the social costs associated with gambling or casino gambling by reducing demand, and "assisting States that 'restrict gambling' or 'prohibit casino gambling' within their borders." 119 S. Ct. at 1931-1932. The Supreme Court determined that, as applied to truthful advertising for lawful casino gambling by broadcasters located in states that permit such gambling, § 1304 does not directly advance either interest and is an impermissibly restrictive means of serving those interests. Id. at 1932-1936.

As to the government's interest in minimizing the social costs of casino gambling by reducing consumer demand, the Supreme Court concluded that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies

that the Government cannot hope to exonerate it." Id. at 1933. The Court pointed to the various exceptions that Congress has engrafted onto § 1304 over the years, particularly the exception for broadcast advertisements for Indian gambling (see 25 U.S.C. § 2720 (1994)). The Court concluded that by permitting advertisements for Indian casino gambling and certain other kinds of gambling to be broadcast on a nationwide basis, Congress had effectively made it impossible for § 1304 to accomplish its original goal of minimizing the social costs of gambling by reducing consumer demand. In addition, the Court noted that Congress could have employed various "practical and nonspeech-related forms of [casino gambling] regulation," such as restrictions on casino admission and credit, that "could more directly and effectively alleviate some of the social costs of casino gambling." Id. at 1934.

The Court also determined that the other asserted governmental interest, that of assisting States that restrict casino gambling, "adds little to [the government's] case." Id. at 1935. First, the statutory exceptions that prevented § 1304 from directly and materially advancing the federal government's interest in minimizing the social costs of casino gambling were equally inimical to the efforts of non-casino states: "We cannot see how this broadcast restraint, ambivalent as it is, might directly and adequately further any state interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar federal interest." Id. (emphasis added). Second, the Court concluded that § 1304 "sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills that one could reasonably hope such a ban to eliminate." Id. The Court reasoned that prohibiting casino gambling advertisements in all States in order to protect the interests of non-casino States is "neither a rough approximation of efficacy, nor a reasonable accommodation of competing State and private interests." Id.

The Court concluded by stating:

Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, see [United States v.] Edge [Broadcasting Co.], 509 U.S. [418,] 428 [(1993)], this might be a different case. But under current federal law, as applied to petitioners and the messages that they wish to convey, the broadcast prohibition in 18 U.S.C. § 1304 and 47 CFR § 73.1211 (1998) violates the First Amendment.
Id. at 1936.

II.

After the Greater New Orleans decision was issued, the Department was required to consider whether the application of § 1304 to the broadcasting of truthful advertisements for lawful casino gambling violates the First Amendment, regardless of whether the statute is applied to broadcasts originating in States that permit casino gambling (as was the case in Greater New Orleans) or in States that do not. This question arose in the case of Players International, Inc. v. United States, 988 F. Supp. 497 (D.N.J. 1997), appeal pending, No. 98-5127 (3d Cir. 1999). In a supplemental brief submitted to the Third Circuit on behalf of the United States, the Justice Department observed that "while the Court's holding in Greater New Orleans is confined to broadcasts originating in casino gambling States, the Court's reasoning indicates that Section 1304, as currently written, cannot constitutionally be applied to broadcasts originating in non-casino States either." See Supplemental Brief for the Appellants at 6 (emphasis in original), Players Int'l, Inc. v. United States (No. 98-5127) ("U.S. Brief"). This view reflected the conclusion that the same deficiencies and inconsistencies that the Court in Greater New Orleans held to undermine the government interests there were also present when the statute was applied to broadcasts

originating in non-casino States.

As noted above, the Court in Greater New Orleans found that § 1304 did not directly advance the government's interest in minimizing the social costs of casino gambling because the statutory exceptions to §1304, particularly the exception for Indian gambling, preclude the statute from meaningfully reducing public demand for casino gambling. See 119 S. Ct. at 1933-35. The exception for Indian gambling is *nationwide* in scope: advertisements for Indian gambling may be broadcast in every State, including States that prohibit private casino gambling. See 25 U.S.C. § 2720. The same is true of the other statutory exceptions to § 1304 except for the one covering state lotteries. See 18 U.S.C. § 1307(a) (1994). As a result, the Department determined that there is no reason to believe that § 1304 is any more effective in minimizing the social costs of casino gambling for residents of non-casino States than it is for residents of casino States. See U.S. Brief at 7.

The Court in Greater New Orleans also held that § 1304 was an impermissibly restrictive means of dealing with the social costs associated with casino gambling because those costs "could [be] more directly and effectively alleviate[d]" by "nonspeech-related forms of regulation." 119 S. Ct. at 1934. The Department concluded that this determination, too, is equally applicable with respect to broadcasts originating in non-casino States. If measures such as "a prohibition or supervision of gambling on credit" are more effective than §1304 with respect to gamblers who live in States that permit casino gambling, as the Court found, they would appear to be equally effective as to gamblers who visit from non-casino States. Id.

Finally, the Department decided that the Court's conclusion in Greater New Orleans that the federal goal of assisting non-casino States "adds little to [the] case," id. at 1935, also holds true with

respect to the application of § 1304 to broadcasts originating in non-casino States themselves. The Court stressed the fact that the "ambivalent" federal advertising restriction, with its exceptions for Indian gambling and other gambling activities, cannot "directly and adequately further any state interest in dampening consumer demand for casino gambling. . . ." Id. That reasoning would rebut the argument that the application of § 1304 in non-casino States directly advances the anti-gambling policies of those States.

Given these considerations, the Department's brief in Players asserted that § 1304 may not constitutionally be applied to broadcasters who broadcast truthful advertisements for lawful casino gambling, regardless of whether the broadcasters are located in a State that permits casino gambling or one that does not. In conjunction with the filing of that brief, the Solicitor General notified both Houses of Congress that the Department is no longer defending the constitutionality of § 1304 as applied to such broadcasts. See Letters from Seth P. Waxman, Solicitor General, U.S. Department of Justice, to Hon. J. Dennis Hastert, Speaker of the House, U.S. House of Representatives, and to Hon. Patricia Mack Bryan, Senate Legal Counsel, U.S. Senate (Aug. 6, 1999).

III.

In light of the Greater New Orleans decision, the U.S. Postal Service was faced with the question whether that opinion might also render unconstitutional certain applications of 18 U.S.C. § 1302, which prohibits the mailing of essentially the same kind of gambling-related matter covered by the analogous broadcast restrictions of 18 U.S.C. § 1304. Section 1302 provides in relevant part:

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

. . . .

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, ...

. . . .

Shall be fined under this title or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

The Postal Service therefore wrote the Department of Justice seeking its guidance as to whether § 1302 remained constitutionally enforceable.[1] The Service's letter stated: "Without some interpretation on this point the Postal Service will be in a position of receiving requests for mailing services and for interpretations of both our mailing requirements statutes and the criminal statute, which should be guided by the Department of Justice." The Service further expressed the view that, in light of the Greater New Orleans decision, § 1302 "is now indefensible in federal court." Letter from Elizabeth P. Martin, Chief Counsel, Consumer Protection Law, U.S. Postal Service, to Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel (Oct. 19, 1999).

After thorough consideration of the matter, I have concluded that the application of 18 U.S.C. § 1302 to the mailing of truthful advertising concerning lawful gambling operations (except as to state-operated lotteries in some circumstances, see p.8, infra) would be unconstitutional. I have further concluded that, because

of such unconstitutionality, the Department should no longer enforce the statute against such mailings.

As reflected in the text of the respective statutes, § 1302 imposes restrictions on mailed communications regarding gambling or lottery matter that are nearly identical to those imposed by § 1304 with respect to broadcast communications on the same subject matter. Further, § 1302 is subject to the same weakening exceptions that the Supreme Court considered fatal to § 1304's constitutionality in Greater New Orleans. I therefore find no reasonable basis for distinguishing the provisions of § 1302 from those of § 1304 with respect to the constitutional question presented here. The former's restrictions against the mailing of truthful information concerning lawful gambling activities conflict with First Amendment standards for the same reasons that apply to the latter's restrictions against broadcasting the same kind of information.

A.

Just as the First Amendment applies to the governmental restrictions on broadcasting challenged in Greater New Orleans and Players, it applies, as well, to the governmental restrictions on the dissemination of information through the mails that are at issue here. See, e.g., Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (federal statute prohibiting unsolicited mailing of contraceptive advertisements held to be an unconstitutional restriction on commercial speech); Blount v. Rizzi, 400 U.S. 410, 416 (1971) (invalidating administrative restrictions on mailing of obscene matter and quoting Justice Holmes dissent in Milwaukee Soc. Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921): "The United States may give up the post office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues."); Lamont v. Postmaster General, 381 U.S. 301 (1965) (statute requiring Post

Office to obtain authorization from addressee before delivering certain designated types of mail violates the addressee's First Amendment rights). As the Court observed in United States Postal Service v. Greenburgh Civic Associations, 453 U.S. 114 (1981), "[h]owever broad the postal power conferred by Article I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution."

The Supreme Court has indicated that federal government restrictions on postal communications involving commercial speech are to be evaluated using the same test applicable to broadcast communications involving commercial speech. The leading case is Bolger, in which the Court held that the provisions of 39 U.S.C. § 3001(e)(2), prohibiting the mailing of unsolicited advertisements for contraceptives, were unconstitutional as applied to the informational pamphlets at issue. In so holding, the Court applied precisely the same four-part test from Central Hudson for restrictions on commercial speech that it applied to the broadcast communications at issue in Greater New Orleans. See 463 U.S. at 68-69. I therefore conclude that the Central Hudson test is applicable to 18 U.S.C. § 1302, and with the same results reached in Greater New Orleans, insofar as that statute prohibits the mailing of truthful advertising concerning lawful gambling operations.

The Court's reasoning in Greater New Orleans with respect to § 1304 is directly applicable to § 1302. The mailing prohibition of § 1302, like the broadcasting prohibition of § 1304, does not directly advance the federal government's interest in minimizing the social costs of casino gambling because it is subject to the very same nationwide statutory exceptions that the Supreme Court held fatally undermined the constitutionality of § 1304's analogous prohibitions against the broadcast of gambling advertisements. See 18 U.S.C. § 1307; 25 U.S.C. § 2720 ("sections 1301, 1302, 1303,

and 1304 of title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter"). Thus, advertisements for State-conducted lotteries, Indian gaming operations, and the additional exemptions authorized by the Charity Games Advertising Clarification Act of 1988, 18 U.S.C. § 1307(a)(2), are exempted from the mailing provisions of § 1302 as well as from the broadcast provisions of § 1304. Accordingly, for the reasons set forth by the Supreme Court in Greater New Orleans, § 1302, like § 1304, cannot constitutionally be applied to prohibit the transmission of truthful information or advertisements concerning lawful gambling activities.[2]

This conclusion is not intended to address the question whether Congress could amend applicable statutory law in this area in a manner that would conform to the governing constitutional standards. As the Supreme Court explained in Greater New Orleans with reference to the restrictions on broadcast advertising contained in 18 U.S.C. § 1304, "[h]ad the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, this might be a different case." 119 S. Ct. at 1936 (citation omitted). The Department is unable to conclude, however, that existing federal law respecting the mailing of information or advertisements concerning legal gambling (apart from State-operated lotteries) is any more satisfactory in this respect than the broadcast restrictions invalidated in Greater New Orleans.

B.

In assessing the impact of Greater New Orleans on §1302's prohibitions against mailing of gaming information, I consider it important to emphasize that many significant applications of the statute should remain unaffected by that decision. Because the Department is not persuaded that the Greater New Orleans holding renders § 1302 unconstitutional in all its applications, my decision

to restrict future enforcement of the statute is limited in scope. See United States v. Grace, 461 U.S. 171, 180-82 (1983). The Department continues to regard § 1302 as enforceable in a number of significant applications.

First, my non-enforcement decision is limited to mailed information and advertisements concerning lawful gambling activities. Neither the Department nor the Postal Service asserts that § 1302 is inapplicable to, or unenforceable against, the mailing of advertisements for illegal gambling activities, and nothing in Greater New Orleans establishes that § 1302 would be unconstitutional as applied to such advertising. See 119 S. Ct. at 1930; see also 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 n.7 (1996).

Second, my decision applies only with respect to truthful, nonmisleading gambling advertisements. Neither the Department nor the Postal Service suggests that the First Amendment entitles anyone to mail false or misleading advertising. The Supreme Court repeatedly has held that false and misleading advertising is not protected by the First Amendment, and Greater New Orleans does not suggest otherwise. See 119 S. Ct. at 1930; Central Hudson, 447 U.S. at 566.

Third, the mailings covered by my decision do not include advertisements concerning state-operated lotteries. The regulatory regime for state lottery advertising is different from that for advertising for other forms of lawful gambling: read together, 18 U.S.C. §§ 1302 and 1307(a)(1)(A) prohibit the mailing of advertisements for state lotteries contained in publications published in non-lottery States, while expressly exempting the mailing of such lottery advertisements contained in publications that are published in a lottery State. In United States v. Edge Broadcasting Co., 509 U.S. 418, 428 (1993), the Supreme Court expressly upheld the constitutionality of the corresponding

provisions of 18 U.S.C. §§ 1304 and 1307(a) that apply to broadcasters in non-lottery States and stressed that such application properly advanced the "congressional policy of balancing the interests of lottery and nonlottery States."

Finally, I note that this non-enforcement decision does not extend to the application of § 1302 insofar as that section applies to the use of the mails for the actual conduct or operation of gambling activities through the mails, as distinguished from informational or advertisement mailings. Rather, this decision applies only to the enforcement of § 1302 with respect to truthful informational mailings or advertisements concerning lawful gambling.

CONCLUSION

For the foregoing reasons, and subject to the above-stated qualifications, I have determined that the application of 18 U.S.C. § 1302 to prohibit the mailing of truthful, nonmisleading information or advertisements concerning lawful gambling operations would be unconstitutional. Accordingly, the Department will refrain from enforcing the statute with respect to such mailings.

FOOTNOTES:

1. Letter from Elizabeth P. Martin, Chief Counsel, Consumer Protection, U.S. Postal Service, for Josh Hochberg, Chief-Fraud Section, Criminal Division, U.S. Department of Justice, Re: Interpretation of Greater New Orleans Broadcasting Assoc., Inc. (Aug. 10, 1999).

2. Prior to the Supreme Court's opinion in Greater New Orleans, two district courts had rejected First Amendment challenges to § 1302 brought by a magazine that carried advertisements for lotteries and casinos, Aimes Publications, Inc. v. U.S. Postal Service, No. 86-1434, 1988 WL 19618 (D.D.C. 1988), and by an association of newspapers whose members wished to carry lottery advertising, Minnesota Newspaper Ass'n, Inc. v. Postmaster General, 677 F. Supp. 1400 (D. Minn. 1987) (§ 1302 held constitutional as applied to lottery advertisements, but unconstitutional as applied to mailing of newspapers containing prize lists), vacated as moot, 490 U.S. 225 (1989). Because both of these decisions are grounded upon the courts' finding that the statute directly advances the government interests in minimizing the social costs associated with gambling, or supporting the policies of States that restrict or prohibit gambling, see 1988 WL 19618 at *3 and 677 F. Supp. at 1404-05, they cannot be reconciled with the subsequent holding in Greater New Orleans that the efficacy of the attempt to advance those interests is undercut by the statutory exemptions that permit the nationwide promotion of various kinds of gambling.

NEVADA REGULATIONS

5.011 Grounds for disciplinary action. The board and the commission deem any activity on the part of any licensee, his agents or employees, that is inimical to the public health, safety, morals, good order and general welfare of the people of the State of Nevada, or that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action by the board and the commission in accordance with the Nevada Gaming Control Act and the regulations of the board and the commission. Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operation:

1. Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry.

2. Permitting persons who are visibly intoxicated to participate in gaming activity.

3. Complimentary service of intoxicating beverages in the casino area to persons who are visibly intoxicated.

4. Failure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty and inoffensiveness, including, but not limited to, advertising that is false or materially misleading.

Filed 5/2/02

IN THE SUPREME COURT OF CALIFORNIA

MARC KASKY,	)	
	)	
Plaintiff and Appellant,	)	
	)	S087859
v.	)	
	)	Ct.App. 1/1 A086142
NIKE, INC., et al.,	)	
	)	San Francisco County
Defendants and Respondents.	)	Super. Ct. No. 994446
_____	)	

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 state and federal Constitutions. 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. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885; accord, *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 807; *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 957.)

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.[1] 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.

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[1] Except as otherwise noted, unlabeled section references are to the Business and Professions Code.

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 it failed to state facts sufficient to constitute a cause of action against Nike and that the relief plaintiff was seeking "is absolutely barred by the First Amendment to the United States Constitution and Article I, section 2(a) of the California 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 and state constitutional free speech guarantees. After considering the arguments and authorities submitted by the parties, the court took the matter under submission and later 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 and by article I, section 2 of the California 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 constitutional free speech provisions. The court stated that this determination "compels the conclusion that the trial court properly sustained the defendants' demurrer without leave to amend." 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. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.)

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. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) 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. (*Cel-Tech Communications, Inc. v. Los*

Angeles Cellular Telephone Co., supra, at p. 180.) 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." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565.) "This court has repeatedly recognized the importance of these private enforcement efforts." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126.)

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." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* 20 Cal.4th at p. 179; see §§ 17203, 17206; *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268.) An order for restitution may require the defendant "to surrender all money obtained through an unfair business practice" including "all profits earned as a result of an unfair business practice." (*Kraus v. Trinity Management Services, Inc., supra*, 23 Cal.4th at p. 127.)

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. (*Ibid*.) 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. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210.) 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." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.) 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.' " (*Committee on Children's Television, Inc. v. General Foods Corp., supra*, 35 Cal.3d at p. 211; accord, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

III. CONSTITUTIONAL PROTECTIONS FOR SPEECH

A. Federal Constitution

1. Constitutional text and its application to state laws

The United States Constitution's First Amendment, part of the Bill of Rights, 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. (*McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 336, fn. 1.)

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* (1975) 421 U.S. 809, 825.) 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* (1976) 425 U.S. 748, 770.) 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." (*Id.* at p. 765.)

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.* (1983) 463 U.S. 60, 64-65 (*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. (*United*

States v. Playboy Entertainment Group, Inc. (2000) 529 U.S. 803, 813; *Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530, 540.)

"By contrast, regulation of commercial speech based on content is less problematic." (*Bolger, supra,* 463 U.S. at p. 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* (1980) 447 U.S. 557 (*Central Hudson*) 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; accord, *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, __ [121 S.Ct. 2404, 2421]; *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999) 527 U.S. 173, 183.) 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* (1989) 492 U.S. 469, 480.)

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. (1974) 418 U.S. 323, 340.) For this reason, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." (*Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, 425 U.S. at p. 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" (*Herbert v. Lando* (1979) 441 U.S. 153, 172) and thereby to give freedom of expression the " 'breathing space' " it needs to survive (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 513). Thus, "some false and misleading statements are entitled to First Amendment protection in the political realm." (*Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 495 (conc. opn. of Stevens, J.).)

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* (1985) 472 U.S. 749, 762 (plur. opn. of Powell, J.) [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." (*In re R.M.J.* (1982) 455 U.S. 191, 203; see also *Edenfield v. Fane* (1993) 507 U.S. 761, 768 [observing that "the State may ban commercial expression that is fraudulent or deceptive without further justification"]; *Bolger*, *supra*, 463 U.S. at p. 69 [observing that "[t]he State may deal effectively with false, deceptive, or misleading sales techniques"]; *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 638 [observing that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"]; *Central Hudson*, *supra*, 447 U.S. at p. 566 [stating that for commercial speech to

come within First Amendment protection "it . . . must . . . not be misleading"]; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383 [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. (*In re R.M.J., supra,* 455 U.S. at p. 203; *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 150.) 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." (*Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy*, *supra*, at p. 152; see also *Peel v. Attorney Reg. & Disciplinary Comm'n* (1990) 496 U.S. 91, 100; *In re R.M.J., supra,* at p. 203.)

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 (conc. opn. of Stewart, J.); see also *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 496, 501 (plur. opn. of Stevens, J.).) 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." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24.) 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." (*Id.* at pp. 771-772.)

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." (*Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, 425 U.S. at p. 772, fn. 24, italics added; see also *id*. at p. 777 (conc. opn. of Stewart, J.) [stating that "[t]he advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression"]; accord, *44 Liquormart, Inc. v. Rhode Island*, *supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, *supra*, 472 U.S. at p. 758, fn. 5 (plur. opn. of Powell, J.); *Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at p. 504, fn. 22.)

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. (*Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, 425 U.S. at p. 772, fn. 24 [stating that "since advertising is the *Sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely"]; accord, *44 Liquormart*,

Inc. v. Rhode Island, *supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Board of Trustees, State Univ. of N.Y. v. Fox*, *supra*, 492 U.S. at p. 481; *Dun & Bradstreet, Inc. v. Greenmoss Builders, supra,* 472 U.S. at p. 758, fn. 5 (plur. opn. of Powell, J.).)

Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is " 'linked inextricably' to those transactions." (*44 Liquormart, Inc. v. Rhode Island, supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Edenfield v. Fane*, *supra*, 507 U.S. at p. 767; *Friedman v. Rogers* (1979) 440 U.S. 1, 10, fn. 9.) 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.* (1993) 507 U.S. 410, 426), 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" (*id.* at p. 426, fn. 21). (See also *Rubin v. Coors Brewing Co.*, *supra*, 514 U.S. at p. 496 (conc. opn. of Stevens, J.) [stating that "[t]he evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explains why we tolerate more governmental regulation of this speech than of most other speech"].)

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 p. 562; *Bolger*, *supra*, 463 U.S. at p. 66.) Although in one case the court said that this description was "the test for identifying commercial speech" (*Board of Trustees, State Univ. of N.Y. v. Fox*, *supra*, 492

U.S. at pp. 473-474), 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 (*Rubin v. Coors Brewing Co., supra,* 514 U.S. at pp. 481-482), 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) (*Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra*, 512 U.S. at p. 142).

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." (*Id.* at p. 62, fn. omitted.) The court noted that these pamphlets did not merely propose commercial transactions. (*Id.* at p. 66.) 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. (*Ibid.*, citing *New York Times Co. v. Sullivan, supra*, 376 U.S. at pp. 265-266.) 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. (*Bolger, supra*, at pp. 66-67.) 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. (*Id.* at p. 67.)

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." (*Bolger, supra,* 463 U.S. at p. 67, fn. 14.)

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." (*Bolger, supra,* 463 U.S. at p. 66, fn. 13.)

Thus, although the court in *Bolger, supra,* 463 U.S. 60, 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." (*Bolger, supra,* 463 U.S. at pp. 67-68, fn. omitted; accord, *Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. 469, 475; *Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at p. 637, fn. 7; see also *Greater New Orleans Broadcasting v. U.S., supra,* 527 U.S. at p. 184 [recognizing that commercial speech may concern a "subject of intense public debate"].)

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." (*Edenfield v. Fane, supra,* 507 U.S. at p. 765; see also *Cincinnati v. Discovery Network, Inc., supra,* 507 U.S. at p. 419 [recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"]; *Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at p. 637 [stating that "the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps"].) Justice Stevens in particular has remarked that "the borders of the commercial speech category are not nearly as clear as the Court has assumed" (*Rubin v. Coors Brewing Co., supra,* 514 U.S. at p. 493 (conc. opn. of Stevens, J.)), 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." (*Id.* at p. 494 (conc. opn. of Stevens, J.).)

B. The State Constitution

1. Constitutional text

The California Constitution's article I, entitled the Declaration of Rights, guarantees freedom of speech in subdivision (a) of section 2. It provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).)

2. Scope of the state constitutional provision

The state Constitution's free speech provision is "at least as broad" as (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490) and in some ways is broader than (*id*. at p. 491; *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1041) the comparable provision of the federal Constitution's First Amendment.

3. Commercial speech protection under the state Constitution

The state Constitution's free speech provision, which provides that "[e]very person may freely speak . . . *on all subjects*" (Cal. Const., art. I, § 2, subd. (a), italics added), protects commercial speech, at least when such speech is "in the form of truthful and nonmisleading messages about lawful products and services." (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 493.) This court has indicated, however, that our state Constitution does not prohibit the imposition of sanctions for misleading commercial advertisements. (*In re Morse* (1995) 11 Cal.4th 184, 200, fn. 4.) Allowing such sanctions is consistent with the text of the state constitutional provision, which makes anyone who "abuse[s]" the right of freedom of speech "responsible" for the misconduct. (Cal. Const., art. I, § 2, subd. (a); see *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 746.) Our Courts of Appeal have held that neither the UCL nor the false advertising law on its face violates the state Constitution's free speech provision as an impermissible regulation of commercial speech. (*People v. Superior Court (Olson)* (1979) 96

Cal.App.3d 181, 195, cert. den. (1980) 446 U.S. 935; accord, *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1230, fn. 10.)

This court has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech. In our most recent decision on this point, *Leoni v. State Bar, supra,* 39 Cal.3d 609 (*Leoni*), this court addressed whether an attorney's solicitation of clients by means of allegedly misleading mass mailings and information was protected by the free speech provisions of the United States and California Constitutions. We used the same analysis for both constitutional provisions. (*Id.* at p. 614, fn. 2.) To determine whether the attorney's mailings were commercial or noncommercial speech, we relied on the three factors that the United States Supreme Court had used in *Bolger, supra,* 463 U.S. 60: advertising format, product references, and economic motivation. After concluding that two of these factors were present (because the mailings referred specifically to the attorney's services and the attorney had an economic motivation in sending them), we concluded that the presence of these two factors was sufficient to make the mailings commercial speech for purposes of the free speech protections of both the federal and the state Constitutions. (*Leoni, supra,* at pp. 623-624.)

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, nor has this court adopted such a test under the state Constitution, nor do we propose to do so here. 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 (e.g., *Central Hudson, supra,* 447 U.S. at p. 562), 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. (*Bolger, supra,* 463 U.S. at pp. 66-67.) 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 v. Sullivan, supra,* 376 U.S. 254, which concerned a newspaper advertisement seeking contributions for civil rights causes, the court cautioned, however, that presentation in advertising format does not necessarily establish that a message is commercial in character. (*Bolger, supra,* at p. 66.) 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., supra,* 514 U.S. 476 [statement of alcohol content on beer bottle label]; *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. 136 [statements on an attorney's letterhead and business cards describing attorney's qualifications]; *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748 [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 & Professional Regulation, Bd. of Accountancy, supra*, 512 U.S. 136 [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. (*Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, 425 U.S. at p. 772, fn. 24.) 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, supra,* 463 U.S. 60, 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, and in *Leoni, supra,* 39 Cal.3d 609, this court held that an attorney's mailings were commercial speech even though they were not in the form of an advertisement. (See also *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. 136 [accepting as commercial speech statements on an attorney's letterhead and business cards].) 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 executives, employees, or subcontractors. 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, at least as alleged in the first amended complaint, 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." (*Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, 425 U.S. at pp. 772.)

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 (see § 17533.7 [making it unlawful to sell a product falsely labeled as "Made in U.S.A."]; 15 U.S.C. § 1125(a) [allowing damages for "false designation of origin"]), or by whom (see § 17520 et seq. [prohibiting false representation of product as made by blind workers]; § 17569 [prohibiting false representation of product "as made by authentic American Indian labor or workmanship"]; Lab. Code, § 1010 et seq. [prohibiting false labeling about the kind, character, or nature of labor employed in product's manufacture]).

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. (Dis. opn. of Chin, J., *post*, at p. 6; dis. opn. of Brown, J., *post*, at pp. 4, 7-9.) 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." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra*, 425 U.S. at p. 763.) 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." (*Id.* at p. 765; see also *Greater New Orleans Broadcasting Assn., Inc. v. United States, supra*, 527 U.S. at p. 184 [observing that the commercial speech at issue there concerned "an activity that is the subject of intense debate in many communities"].)

In her dissent, Justice Brown states that our logic "erroneously assumes that false or misleading commercial speech . . . can never be speech about a public issue." (Dis. opn. of Brown, J., *post*, at p. 9.) On the contrary, we assume that commercial speech frequently and even normally addresses matters of public concern. The reason that it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" of commercial speech is not that such speech concerns matters of lesser public interest or value, but rather that commercial speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24; accord, *Lorillard Tobacco Co. v. Reilly, supra,* 533 U.S. at p. __ [121 S.Ct. at p. 2433].)

In support of their argument that speech about issues of public importance or controversy must be considered noncommercial speech, our dissenting colleagues cite *Thomas v. Collins* (1945) 323 U.S. 516, and *Thornhill v. State of Alabama* (1940) 310 U.S. 88. The United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in *Bigelow v. Virginia, supra,* 421 U.S. 809, and *Va. Pharmacy Bd. V. Va. Consumer Council, supra,* 425 U.S. 748. Moreover, neither decision addressed the validity of a law prohibiting false or misleading speech. To the extent they hold that truthful and nonmisleading speech about commercial matters of public importance is entitled to constitutional protection, they are consistent with the modern commercial speech doctrine and with the decision we reach today. We find nothing in either decision suggesting that the state lacks the authority to prohibit false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations.

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. The point is illustrated by a decision of a federal court of appeals about statements by a trade association denying there was scientific evidence that eating eggs increased the risk of heart and circulatory disease. (*National Commission on Egg Nutrition v. Federal Trade Commission* (7th Cir. 1977) 570 F.2d 157, 159, cert. den. (1978) 439 U.S. 821.) The court held that these statement were commercial speech subject to regulation by the Federal Trade Commission (FTC) to the extent the statements were false or misleading, even though the trade association made the statements "to counteract what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption.' " (*Id.* at p. 159.) Responding to the argument that the statements were noncommercial because they concerned a debate on a matter of great public interest, the federal court of appeals responded that "the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates." (*Id.* at p. 163.)

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. (See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n, supra*, 447 U.S. 530.) But Nike may not "immunize false or misleading product information from government regulation simply by including references to public issues." (*Bolger, supra*, 463 U.S. at p. 68, fn. omitted.) 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 the Blind of North Carolina* (1988) 487 U.S. 781 (*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. (*Board of Trustees, State Univ. of N.Y. v. Fox, supra*, 492 U.S. at p. 474, italics omitted.) 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. (See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. at p. 513 [so treating unflattering statements in a consumer magazine's review of high fidelity speakers].) 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. (*In re R.M.J., supra,* 455 U.S. at p. 203.) 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." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra*, 425 U.S. at p. 772, fn. 24; accord, *Lorillard Tobacco Co. v. Reilly, supra,* 533 U.S. at p. __ [121 S.Ct. at p. 2433].)

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.

We now disapprove as ill-considered dicta two statements of this court in *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501. There we remarked that commercial speech is speech "which has but one purpose—to advance an economic transaction," and we suggested that "an advertisement informing the public that the cherries for sale at store X were picked by union workers" would be noncommercial speech. (*Id.* at p. 511.)

As we have explained, the United States Supreme Court has indicated that economic motivation is relevant but not conclusive and perhaps not even necessary. (*Bolger, supra*, 463 U.S. at p. 67 & fn. 14.) The high court has never held that commercial speech must have as its *only* purpose the advancement of an economic transaction, and it has explained instead that commercial speech may be intermingled with noncommercial speech. (*Id.* at pp. 67-68.) An advertisement primarily intended to reach consumers and to influence them to buy the speaker's products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers.

Nor is speech exempt from the category of commercial speech because it relates to the speaker's labor practices rather than to the price, availability, or quality of the speaker's goods. An advertisement to the public that cherries were picked by union workers is commercial speech if the speaker has a financial or commercial interest in the sale of the cherries and if the information that the cherries had been

picked by union workers is likely to influence consumers to buy the speaker's cherries. Speech is commercial in its content if it is likely to influence consumers in their commercial decisions. For a significant segment of the buying public, labor practices do matter in making consumer choices.

B. The California Constitution

In the few cases in which this court has addressed the distinction between commercial and noncommercial speech, we have not articulated a separate test for determining what constitutes commercial speech under the state Constitution, but instead we have used the tests fashioned by the United States Supreme Court. For example, in *Leoni, supra,* 39 Cal.3d 609, we used the three-factor test the high court had articulated in *Bolger, supra,* 463 U.S. 60, and we concluded that the speech in question was commercial speech because two of the three factors were present. So also here, we perceive no need to articulate a separate test for commercial speech under the state Constitution. Having concluded that the speech at issue is commercial speech under the federal Constitution, we now reach the same conclusion under the California Constitution.

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.

Sprinkled with references to a series of children's books about wizardry and sorcery, Justice Brown's dissent itself tries to find the magic formula or incantation that will transform a business enterprise's factual representations in defense of its own products and profits into noncommercial speech exempt from our state's consumer protection laws. As we have explained, however, such representations, when aimed at potential buyers for the purpose of maintaining sales and profits, may be regulated to eliminate false and misleading statements because they are readily verifiable by the speaker and because regulation is unlikely to deter truthful and nonmisleading speech.

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. Because the demurrers of Nike and the individual defendants were based on multiple grounds, further proceedings on the demurrers may be required in the Court of Appeal, the superior court, or both. Our decision on the narrow issue before us on review does not foreclose those proceedings.

The judgment of the Court of Appeal is reversed, and the matter is remanded to that court for further proceedings consistent with this opinion.

KENNARD, J.

WE CONCUR:

GEORGE, C.J.
WERDEGAR, J.
MORENO, J.

DISSENTING OPINION BY 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 . . . .' " (*Garrison v. Louisiana* (1964) 379 U.S. 64, 75 (*Garrison*), quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.) "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." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340, fn. omitted.)

While Nike's critics have taken full advantage of their right to " 'uninhibited, robust, and wide-open' " debate (*Garrison*, *supra*, 379 U.S. at p. 75), 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 (Bus. & Prof. Code, § 17200 et seq.) and false advertising law (Bus. & Prof. Code, § 17500 et seq.), 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. (Maj. opn., *ante*, at pp. 6-8.)

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. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." (*Garrison*, *supra*, 379 U.S. at p. 73.) 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." (*Riley v. National Federation of Blind* (1988) 487 U.S. 781, 791 (*Riley*).)

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.[1] "[W]here . . .

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[1] I take no sides in this public debate. Who is right and who is wrong is not for me, or the majority, to decide. It is for the public—fully informed as the First Amendment guarantees—to judge. (*Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at pp. 339-340.)

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." (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 785-786 (*Bellotti*), fn. omitted.)

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

The United States Supreme Court has emphasized that economic motivation—in this case, Nike's desire to sell athletic products—is not a dispositive factor in determining whether certain speech is commercial. (*Bolger v. Youngs Drug Products Corp*. (1983) 463 U.S. 60, 67 (*Bolger*).) In deciding the scope of the constitutional protection of corporate speech, the high court struck down a Massachusetts criminal statute that proscribed corporations from giving campaign contributions to influence the vote on a referendum materially affecting the corporation's property, business, or assets. (*Bellotti, supra,* 435 U.S. 765.) Corporate speech, the high court noted, did not deserve less protection simply because of its source. "The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." (*Id.* at p. 778.) In Nike's case, based on the majority's holding, it does.

As the Court of Appeal below noted, given Nike's powerful corporate image and industry stronghold, the private company "exemplifi[ed] the perceived evils or benefits of labor practices associated with the processes of economic globalization." Nike, in effect, became the "poster child" in the international campaign for labor rights and reform (see, e.g., Note, *Now Playing: Corporate Codes of Conduct in the Global Theater: Is Nike Just Doing It*? (1998) 15 Ariz. J. Intl. & Comp. L. 905), and Nike's labor practices became relevant in a much broader

and public context. Though expressions on labor disputes have been afforded full First Amendment protection (see *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 762 (*Va. Pharmacy Bd.*), and cited cases; *Thornhill v. Alabama* (1940) 310 U.S. 88, 101-103 (*Thornhill*)), the majority loses sight of the full protections afforded this speech in the face of Nike's corporate identity. (*Bellotti, supra*, 435 U.S. at p. 778.) And because of this myopia, the public loses.

The public at large, in addition to Nike's actual and intended customers, has the right to receive information from both sides of this international debate. "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." (*Va. Pharmacy Bd.*, *supra*, 425 U.S. at p. 756, fn. omitted.) The First Amendment serves an "informational purpose" that guarantees "the public access to discussion, debate, and the dissemination of information and ideas." (*Bellotti, supra*, 435 U.S. at p. 782, fn. 18; *id*. at p. 783; see *Bigelow v. Virginia* (1975) 421 U.S. 809, 822 (*Bigelow*).) Thus, not only Nike, but all of us, are the poorer for the majority's assault on free speech.

In striking down Virginia's attempt to ban a newspaper advertisement announcing the availability of legal New York abortions, the high court noted: "The advertisement . . . did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message . . . involve the exercise of the freedom of communicating information and disseminating opinion. [¶] Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—*not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia*. . . . Thus, in this case, appellant's First Amendment interests coincided with the constitutional

interests of the general public." (*Bigelow*, *supra*, 421 U.S. at p. 822, fn. omitted, italics added; *Jacoby v. State Bar* (1977) 19 Cal.3d 359, 370-371 [following *Bigelow*]; cf. *Bolger*, *supra*, 463 U.S. at p. 68 [company may not "immunize false or misleading product information from government regulation simply by including references to public issues"].)

Here, Nike's statements regarding its labor practices in China, Thailand, and Indonesia provided vital information on the very 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 actual or potential customers. Rather, Nike responded to the negative publicity through press releases, letters to newspapers, and letters to university presidents and athletic directors. (Cf. *Bolger*, *supra*, 463 U.S. 60 [contraceptive manufacturer's informational pamphlets included with advertisements deemed commercial speech].) 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. (*Bolger*, *supra*, 463 U.S. at p. 67.) "Viewed in its entirety, [Nike's speech] conveyed information of potential interest and value to a diverse audience . . . ." (*Bigelow*, *supra*, 421 U.S. at p. 822.)

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.[2] The high court has stated that traditional commercial speech is speech that

[2] While the majority correctly observes that in this constitutional analysis, "the very first question is whether the speech that the law regulates is entitled to First

" 'does "no more than propose a commercial transaction." ' " (*Va. Pharmacy Bd., supra*, 425 U.S. at p. 762; *Bolger, supra*, 463 U.S. at p. 66; see also *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 473; *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 637; but see *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 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. As the Court of Appeal below observed, "[i]nformation about the labor practices at Nike's overseas plants . . . constitute[d] data relevant to a controversy of great public interest in our times."

Contrary to the majority's assertions (see maj. opn., *ante*, at p. 29), 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 p. 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. (*Id.* at p. 66.) The court made clear that most of the mailings fell

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Amendment protection at all" (maj. opn., *ante*, at p. 31), it conflates this question with the issue whether commercial speech may be regulated, the latter a foregone conclusion. (*Bolger, supra*, 463 U.S. at p. 65.) Advocating what it calls a "limited-purpose" definition of commercial speech (maj. opn., *ante*, at pp. 20, 29), the majority proposes that a company's factual statements about its products or services are commercial and subject to regulation if these statements are "false or misleading." (*Id*. at p. 31.) In other words, the majority concludes "a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions." (*Ibid*.) Whether a company's statements are allegedly false or misleading does not determine the threshold question at issue in this case—whether the speech is commercial or noncommercial. (See *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 566.)

"within the core notion of commercial speech—'speech which does "no more than propose a commercial transaction." ' " (*Ibid*.) 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." (*Id*. at p. 68.)

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* (1980) 447 U.S. 530 (*Consolidated Edison*).) 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." (*Id*. at p. 535.) Despite Consolidated Edison's obvious economic incentive in promoting the use of nuclear power, the high court did not consider, must 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.[3] That is simply not the case here.

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[3] The phrase " 'does "no more than propose a commercial transaction" ' " (*Bolger*, *supra*, 463 U.S. at p. 66) "must be understood to reflect judgments about 'the character of the expressive activity' at issue judgments that necessarily entail an assessment of the nature and constitutional significance of the larger social practice within which that activity is embedded. That is why commercial speech cannot be transformed into public discourse merely by altering its content to insert assertions about matters of public concern." (Post, *The Constitutional Status of Commercial Speech* (2000) 48 U.C.L.A. L.Rev. 1, 18-19, fns. omitted.)

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." (*Bolger*, *supra*, 463 U.S. at p. 68.) 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." (*Consolidated Edison*, *supra*, 447 U.S. at p. 535.)

At the very least, this case typifies the circumstance where commercial speech and noncommercial speech are "inextricably intertwined." (*Riley*, *supra*, 487 U.S. at p. 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. (*Id*. at p. 789.) 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." (*Id*. at p. 796.) 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." (*Ibid*.)

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 p. 796, citing *Thomas v. Collins* (1945) 323 U.S. 516, 540-541 (*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. (*Thomas*, *supra*, 323 U.S. at pp. 533-534.) 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.' " (*Id*. at p. 532, quoting *Thornhill*, *supra*, 310 U.S. at pp. 102, 103.)[4]

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.' [Citation.]" (*Thomas*, *supra*, 323 U.S. at p. 532, quoting *Thornhill*, *supra*, 310 U.S. at p. 102.) 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

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[4] Contrary to the majority's suggestion (maj. opn., *ante*, at p. 27), the fact that the high court decided both *Thornhill*, *supra*, 310 U.S. 88, and *Thomas*, *supra*, 323 U.S. 516, before its seminal cases on commercial speech, does not make these earlier cases' affirmation of fundamental principles on First Amendment protection less pertinent. Indeed, the high court relied, in part, on *Thornhill*, *supra*, 310 U.S. at page 102, in *Va. Pharmacy Bd*., *supra*, 425 U.S. at page 762, to conclude that "[t]he interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome."

insight and perspective into the debate. This speech should be fully protected as "essential to free government." (*Thornhill, supra,* 310 U.S. at p. 95.)

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" (maj. opn., *ante*, at p. 30, italics added)—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. (*Riley, supra*, 487 U.S. at p. 796.) Contrary to the majority's suggestion (maj. opn., *ante*, at pp. 29-30), 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." (*Riley, supra*, 487 U.S. at p. 796)

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. (*Bellotti, supra*, 435 U.S. at pp. 785-786.) 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." (*Thornhill, supra*, 310 U.S. at p. 95.)

Because I would give *both* sides in this important public controversy the full protection that our Constitution guarantees, I respectfully dissent.

CHIN, J.

I CONCUR:

BAXTER, J.

DISSENTING OPINION BY BROWN, J.

I respectfully dissent.

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* (1990) 76 Va. L.Rev. 627, 627.) 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.* (1993) 507 U.S. 410, 419 (*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. (*Id.* at pp. 420-423.) Instead, the difference is a matter of " 'common[]sense' " (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456 (*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.* (1983) 463 U.S. 60, 66, fn. omitted (*Bolger*).) Consistent with these pronouncements, the United States Supreme Court has expressly refused to define the elements of commercial speech. (See *id.* at p. 67, fn. 14.) 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* (2000) 48 UCLA L.Rev. 1, 7.)

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." (Maj. opn., *ante*, at p. 20.) 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. (*Central Hudson Gas & Ele. Corp. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 562-563 (*Central Hudson*).) 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" (*Edenfield v. Fane* (1993) 507 U.S. 761, 768), but may not do the same to fraudulent or deceptive speech in " 'matters of public concern' " (*Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 758-759 (plur. opn. of Powell, J.) (*Dun & Bradstreet*), quoting *First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 776 (*Bellotti*)).

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. (See, e.g., Kozinski & Banner, *Who's Afraid of Commercial Speech*, *supra*, 76 Va. L.Rev. at pp. 639-648; Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech* (1990) 43 Vand. L.Rev. 1433, 1449-1454.) Indeed, the recent commissioning of a Fay Weldon novel by the jewelry company Bulgari as a marketing ploy highlights this blurring of commercial and noncommercial speech. (See Arnold, *Making Books: Placed Products, and Their Cost*, N.Y. Times (Sept. 13, 2001) p. E3, col. 1.)

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 constitutional free speech

analysis under the state and federal Constitutions." (Maj. opn., *ante*, at p. 1.) If Nike's press releases, letters and other documents are commercial speech, then the application of Business and Professions Code sections 17204 and 17535[1]—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. (See *Thomas v. Collins* (1945) 323 U.S. 516, 534-535.) Thus, the commercial elements of Nike's statements are "inextricably intertwined" with their noncommercial elements. (*Riley v. National Federation of Blind* (1988) 487 U.S. 781, 796 (*Riley*).) 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. (See, e.g., Kozinski & Banner, *The Anti-History and Pre-History of Commercial Speech* (1993) 71 Tex.

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[1] All further statutory references are to the Business and Professions Code.

L.Rev. 747; Kozinski & Banner, *Who's Afraid of Commercial Speech*, *supra*, 76 Va. L.Rev. at p. 627; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression* (1971) 39 Geo. Wash. L.Rev. 429.) Even some justices on the high court have recently questioned the validity of the distinction between commercial and noncommercial speech. (See *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 522 (conc. opn. of Thomas, J.) ["I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech"]; *id*. at p. 517 (conc. opn. of Scalia, J.) ["I share Justice Thomas's discomfort with the *Central Hudson* test"].) Nonetheless, the high court has apparently declined to abandon it. (See, e.g., *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999) 527 U.S. 173, 183 (*Greater New Orleans Broadcasting*) [applying the *Central Hudson* test to restrictions on commercial speech].) 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" (maj. opn., *ante*, at p. 24); (2) "an intended commercial audience" (*ibid*.); and (3) "representations of fact of a commercial nature" (*ibid*.). 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." (*Id*. at p. 20.) 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." (*Ibid*.) 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." (*Id.* at p. 21.)

Although the majority constructed this limited-purpose test from its "close reading of the high court's commercial speech decisions" (maj. opn., *ante*, at p. 20), it conveniently dismisses those decisions that cast doubt on its formulation. As explained below, 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 Ariz.* (1977) 433 U.S. 350, 363, italics added (*Bates*), quoting *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 761 (*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. (See maj. opn., *ante*, at p. 20.) 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 & Electric Co. v. Public Utilities Comm'n* (1986) 475 U.S. 1, 8 (plur. opn. of Powell, J.) (*Pacific Gas*

& Electric)), and "speech does not lose its protection because of the corporate identity of the speaker" (*id*. at p. 16). 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." (*Id.* at p. 8, quoting *Bellotti*, *supra*, 435 U.S. at p. 783.) 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." (*Bellotti*, at p. 777, italics added.) 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. (See maj. opn., *ante*, at p. 20.) As a result, speech by "someone engaged in commerce" may receive less protection solely because of the speaker's identity. (*Ibid.*) 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 United States Supreme Court precedent. (See *Pacific Gas & Electric*, *supra*, 475 U.S. at p. 8 (plur. opn. of Powell, J.).)

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 United States 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* (1940) 310 U.S. 88, 102.) "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* (1964) 376 U.S. 254, 269 (*New York Times*).) "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection" (*Connick v. Myers* (1983) 461 U.S.

138, 145), because such speech "is more than self-expression; it is the essence of self-government" (*Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75). "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 . . . .' " (*Consolidated Edison Co. v. Public Serv. Comm'n of New York* (1980) 447 U.S. 530, 534 (*Consolidated Edison*), quoting *Cohen v. California* (1971) 403 U.S. 15, 24.) Thus, the First Amendment "both fully protects and implicitly encourages" public debate on " 'matters of public
concern.' " (*Pacific Gas & Electric*, *supra*, 475 U.S. at p. 9 (plur. opn. of Powell, J.), quoting *Thornill v. Alabama*, *supra*, 310 U.S. at p. 101.)

To ensure "uninhibited, robust, and wide-open" "debate on public issues" (*New York Times*, *supra*, 376 U.S. at p. 270), 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" (*Va. Consumer Council*, *supra*, 425 U.S. at p. 771), "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters" (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 341 (*Gertz*)). 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' . . . ." (*New York Times*, *supra*, 376 U.S. at pp. 271-272, quoting *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 433.) 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* (1988) 485 U.S. 46, 52), "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" (*Garrison v. Louisiana*, *supra*, 379 U.S. at p. 74).

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." (Maj. opn., *ante*, at p. 12.) 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." (Maj. opn., *ante*, at p. 21.) 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. (See *Thornhill v. Alabama*, *supra*, 310 U.S. at p. 102.) 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 pp. 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. (See maj. opn., *ante*, at pp. 20-26.) 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. (See maj. opn., *ante*, at pp. 28-29.)

In so doing, the majority violates a basic principle of First Amendment law. (*Consolidated Edison*, *supra*, 447 U.S. at p. 535 [restrictions on the means by which a corporation "may participate in the public debate" "strike[] at the heart of the freedom to speak"].) 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. (See *Garrison v. Louisiana*, *supra*, 379 U.S. at p. 74.) The chilling effect is exacerbated by the breadth of sections 17204 and 17535, which "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.*' " (Maj. opn., *ante*, at p. 8, italics added, quoting *Leoni v. State Bar* (1985) 39 Cal.3d 609, 626 (*Leoni*).) This broad definition of actionable speech puts a corporation "at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning." (*Thomas v. Collins*, *supra*, 323 U.S. at p. 535.) Because the corporation could never be sure whether its truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue, "[m]uch valuable information which a corporation might be able to provide would remain unpublished . . . ." (*Bellotti*, *supra*, 435 U.S. at p. 785, fn. 21.) As the United States

Supreme Court has consistently held, such a result violates the First Amendment. (*Ibid.*)

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." (*Pacific Gas & Electric*, *supra*, 475 U.S. at p. 14 (plur. opn. of Powell, J.), quoting *Buckley v. Valeo* (1976) 424 U.S. 1, 49 & fn. 55.) The First Amendment does not permit favoritism toward certain speakers "based on the identity of the interests that [the speaker] may represent." (*Bellotti*, *supra*, 435 U.S. at p. 784.) Indeed, "self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " (*Id.* at p. 777, fn. 12, quoting *Associated Press v. United States* (1945) 326 U.S. 1, 20.) 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.

III

The majority's limited-purpose test is not only problematic in light of controlling high court precedent, the test appears to conflict with the analysis used by other courts in analogous contexts. These conflicts belie the majority's claim of doctrinal consistency and underscore the illusory nature of its so-called solution to the commercial speech quandary.

For example, the majority opinion conflicts with *Gordon & Breach Science Publishers v. AIP* (S.D.N.Y. 1994) 859 F.Supp. 1521 (*Gordon & Breach*). In

Gordon & Breach, the defendant, a nonprofit publisher of scientific journals, published scientific articles touting its journals as "both less expensive and more scientifically important than those of for-profit publishers such as" the plaintiff. (*Id.* at p. 1525.) The defendant, as part of an advertising campaign designed to promote its journals, touted and defended the conclusions of these articles by, among other things, issuing press releases and writing letters to the editor responding to attacks on these articles. (*Id.* at pp. 1526-1527.) In light of these promotional activities, the plaintiff sued the defendant for false advertising under the Lanham Trademark Act (15 U.S.C. § 1125(a)) and New York law.

In determining whether the defendant's advertising campaign constituted commercial speech, the district court identified the following dilemma: how to characterize "speech which, from one perspective, presents the aspect of protected, noncommercial speech addressing a significant public issue, but which, from another perspective, appears primarily to be speech 'proposing a commercial transaction.' " (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1539.) After analyzing the relevant United States Supreme Court precedent, the court concluded that the articles, press releases and letters to the editor constituted noncommercial speech fully protected by the First Amendment. (See *id.* at pp. 1543-1544.)[2] According to the court, this speech fell "too close to core First Amendment values to be considered 'commercial advertising or promotion' under the Lanham Act." (*Id.* at p. 1544.)

Application of the majority's test would, however, result in a different outcome. The defendant was engaged in commerce; it sold journals. The intended audience was undoubtedly potential customers. The articles, press releases and

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[2] The court did find that the defendant's distribution of preprints of the articles to potential customers and its repeated dissemination of the conclusions of these articles to potential customers constituted commercial speech. (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

letters contained representations of fact about the defendant's products—its journals. Thus, they contain the three elements of commercial speech identified by the majority. The majority would therefore classify this speech as commercial speech even though it constitutes "fully protected commentary on an issue of public concern." (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

Similarly, the majority's test creates a conflict with *Oxycal Laboratories, Inc. v. Jeffers* (S.D.Cal. 1995) 909 F.Supp. 719. In *Oxycal*, the defendants published a book that denigrated the plaintiffs' products while promoting the defendants' products. The defendants allegedly promoted the book in an effort to boost the sales of their own products. The plaintiffs sued, alleging false advertising. (See *id*. at pp. 720-721.) Finding this case easy, the court concluded that the book was noncommercial speech because there were "sufficient noncommercial motivations" notwithstanding the commercial motivations. (*Id*. at pp. 724-725.) To the extent the book contained commercial elements promoting the defendants' products, these commercial elements were "intertwined" with and secondary to the noncommercial elements. (*Id*. at p. 725.)

Once again, the majority's test would yield a contrary result. The defendants were engaged in commerce, and the intended audience for the book was potential consumers. The book contained representations of fact about the defendants' products, and the defendants undoubtedly made these representations for the purpose of promoting their products. Thus, under the majority's test, the book was commercial speech, and the defendants would have been strictly liable for any false or misleading statements about their products in the book.

Although we are not bound by these decisions, they are instructive and highlight the deficiencies in the majority's limited-purpose test for commercial speech. In divining a new test for commercial speech, the majority finds a deceptively simple answer to a complicated question. Unfortunately, the answer is

flawed. By failing to recognize that a speaker's business operations, products, or services may be matters of public concern, the majority ignores controlling principles of First Amendment law. As a result, the majority erroneously draws a bright line when "a broader and more nuanced inquiry" is required. (*Gordon & Breach, supra,* 859 F.Supp. at p. 1537; see also *id*. at p. 1540, fn. 7.)

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, as the majority correctly notes, 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." (*Bolger, supra*, 463 U.S. at p. 66, fn. 11.) 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. (*Central Hudson, supra*, 447 U.S. at p. 563, fn. 5.) 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. (See *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 474 (*Fox*) [speaker did not have to combine its sales pitch for Tupperware with its home economics lessons].) 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. (*Riley*, *supra*, 487 U.S. at p. 796.) 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." (*Ibid.*) In such cases, courts must apply the "test for fully protected expression" rather than the test for commercial speech.[3] (*Ibid.*)

Although the United States Supreme Court has mostly found this intertwining of commercial and noncommercial speech in the charitable solicitation context,[4] it

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[3] The majority's attempts to distinguish *Riley* are not persuasive. First, "charitable solicitations" *do* "involve factual representations about a product or service that is offered for sale" (maj. opn., *ante*, at p. 29), where, as in *Riley*, the charitable solicitations are made by professional fundraisers who solicit contributions for a fee (see *Riley*, *supra*, 487 U.S. at pp. 874-785). Second, *Fox* does not preclude the application of *Riley* in this case. (See maj. opn., *ante*, at pp. 29-30.) It *is* "impossible for Nike to address" certain public issues without addressing its own labor practices (maj. opn., *ante*, at p. 30), because these practices are the public issue and symbolize the current debate over overseas labor exploitation and economic globalization (see, *post*, at pp. 17-20).

[4] (See, e.g., *Riley*, *supra*, 487 U.S. at p. 796; *Secretary of State of Md. v. J. H. Munson Co.* (1984) 467 U.S. 947, 959-960; *Village of Schaumburg v. Citizens for Better Environ.* (1980) 444 U.S. 620, 632; see also *Meyer v. Grant* (1988) 486 U.S. 414, 422, fn. 5 [finding the solicitation of signatures for a petition to be noncommercial speech].)

has also done so in a factual context analogous to the one presented here. In *Thomas v. Collins*, *supra*, 323 U.S. 516,[5] 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. (*Id.* at pp. 536-537.) 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. (See *id*. at pp. 535-536.) "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." (*Id.* at p. 535.) 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." (*Ibid.*)

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

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[5] The majority contends *Thomas* and *Thornhill* are not relevant because "[t]he United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in *Bigelow v. Virginia* [(1975)] 421 U.S. 809, and *Va.* [*Consumer Council*], *supra*, 425 U.S. 748." (Maj. opn., *ante*, at p. 27.) The majority, however, conveniently neglects to mention that both *Bigelow* and *Va. Consumer Council* cite *Thomas* and *Thornhill* with approval. (See *Va. Consumer Council*, *supra*, 425 U.S. at pp. 758-759 [citing *Thomas* as a case where the court "has stressed that communications to which First Amendment protection was given were not 'purely commercial' "]; *id*. at pp. 757, 762; *Bigelow*, *supra*, 421 U.S. at p. 816.) Thus, the United States Supreme Court, in developing the commercial speech doctrine, did not intend to overrule or diminish the relevance of *Thomas* and *Thornhill*. In any event, the binding effect of a high court opinion does not diminish with age.

"offers no security for free discussion." (*Thomas v. Collins, supra,* 323 U.S. at p. 535.) "In these conditions," making such a distinction "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." (*Ibid.*) "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." (*Id.* at pp. 536-537.)

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.[6] Given these facts, Nike's overseas

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6 (See, e.g., Cleeland, *Market Savvy Students Give Sweatshop Fight the College Try*, L.A. Times (Apr. 22, 1999) p. C1 ["a half-dozen universities have adopted stringent codes of conduct for manufacturers of apparel that bear their logos; many more are reexamining their policies"]; Martinez, *Student Protests Unlikely to Kill UA-Nike Deal*, Ariz. Daily Star (Jan. 25, 1998) p. 1B ["Hundreds of UA students have signed a petition protesting the university's impending contract with Nike because of alleged human rights abuses in the company's factories overseas"]; *Stepping Up Nike Criticism*, Newsday (Nov. 10, 1997) p. A22 ["More than 50 lawmakers yesterday called on Nike Inc. to improve labor standards in Third World factories and to employ more people in the United States"]; Stancill, *Students to Keep Pressure on Nike*, Raleigh News & Observer (Nov. 8, 1997) p. B1 [students signing and circulating petitions against Nike]; Jeffcott, *Consumer Power Takes on Brand Names, Big Retailers* (Sept. 7, 1997) 21 Catholic New Times 14, 15 [as part of the global movement to end sweatshops, various groups are pressuring "city councils to adopt 'no sweat resolutions' " directed at multinational companies like Nike]; Himelstein, *Going Beyond City*

labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore "entitled to special protection." (*Connick v. Myers*, *supra*, 461 U.S. at p. 145.) 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. (See *Riley*, *supra*, 487 U.S. at p. 796.) As such, these representations must be fully protected as noncommercial speech in the factual context presented here. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 535-536.)

The majority's assertion that Nike's representations about its overseas labor practices are distinct from its comments on "policy questions" is simply wrong. (Maj. opn., *ante*, at p. 28.) 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, or the merits and effects of economic 'globalization' generally . . . ." (Maj. opn, *ante*, at pp. 28-29.) The majority, however, conveniently forgets that Nike's overseas labor practices *are* the public issue. (See, *ante*, at pp. 17-18.) Thus, general statements about overseas labor exploitation and economic globalization do not provide Nike with a meaningful way to participate in the public debate over *its* overseas labor practices. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537.)

Even if the majority correctly characterizes the public issues implicated by Nike's press releases and letters, its assertion is still wrong. In light of the

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Limits?, Business Week (July 7, 1997) p. 98 [at least 10 cities have passed no-sweatshop ordinances directed at multinational companies like Nike]; Klein, *Just Doing It Lands Nike in Ethical Hot Water*, Toronto Star (Feb. 24, 1997) p. A19 [city council passes resolution banning the use of child-made Nike soccer balls].)

sophisticated media campaign directed at Nike's overseas labor practices and the close association between Nike's labor practices and the public debate over overseas labor exploitation and economic globalization, Nike could not comment on these public issues without discussing its own labor practices. Indeed, Nike could hardly condemn exploitation of overseas workers and discuss the virtues of economic globalization without implying that it helps overseas workers and does not exploit them. By limiting Nike to "innocuous and abstract discussion," the majority has effectively destroyed Nike's "right of public discussion." (*Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537.) Under these circumstances, Nike no longer "has the full panoply of protections available to its direct comments on public issues . . . ." (*Bolger*, *supra*, 463 U.S. at p. 68, fn. omitted.) Accordingly, the factual representations in Nike's press releases and letters are fully protected under current First Amendment jurisprudence. (See *Thomas v. Collins*, at pp. 536-537; *Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

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."[7] (*Pittsburgh*

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[7] (See, e.g., *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 536 [oral, written, graphic, or pictorial advertisements for smokeless tobacco and cigars]; *Greater New Orleans Broadcasting*, *supra*, 527 U.S. at p. 176 [radio broadcasts of promotional ads for casino gambling]; *44 Liquormart, Inc. v. Rhode Island*, *supra*, 517 U.S. at pp. 492-493 (plur. opn. of Steven, J.) [ads referencing the price of alcohol products]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 [parties conceded that labels on alcohol products listing alcohol content was commercial speech]; *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 138 [ads and promotional communications listing professional affiliations of attorney]; *United States v. Edge Broadcasting Co.* (1993) 509 U.S. 418, 421 [radio broadcasts advertising lotteries]; *Edenfield v. Fane*, *supra*, 507 U.S. at pp. 763-764 [in-person solicitations for business by certified public accountants]; *Discovery Network*, *supra*, 507 U.S. at pp. 416, 424 [parties conceded that magazines were commercial speech]; *Posadas de Puerto*

Press, *supra*, 413 U.S. at p. 385.) 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. (See *Fox*, *supra*, 492 U.S. at p. 474 [sales pitch for Tupperware was not an indispensable part of the noncommercial speech about home economics]; *Zauderer v. Office of Disciplinary Council* (1985) 471 U.S. 626, 637, fn. 7 [client solicitations were separable from noncommercial statements describing legal rights].) 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. (See, *ante*, at pp. 17-20.) 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

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Rico Assoc. v. Tourism Co. (1986) 478 U.S. 328, 330 [casino ads]; *In re R.M.J.* (1982) 455 U.S. 191, 196-197 [print ads and professional announcement cards]; *Central Hudson*, *supra*, 447 U.S. at p. 562, fn. 5 [ads "clearly intended to promote sales"]; *Friedman v. Rogers* (1979) 440 U.S. 1, 11 [trade name]; *Ohralik*, *supra*, 436 U.S. at p. 454 [in-person solicitation of business by lawyer]; *Bates*, *supra*, 433 U.S. at p. 354 [ads containing pricing information]; *Va. Consumer Council*, *supra*, 425 U.S. at pp. 760-761 [ads containing drug prices]; *Pittsburgh Press Co. v. Human Relations Comm'n* (1973) 413 U.S. 376, 379 [job ads].)

noncommercial speech. (See *Riley, supra*, 487 U.S. at p. 796; *Thomas v. Collins, supra*, 323 U.S. at pp. 536-537; *Gordon & Breach, supra*, 859 F.Supp. at p. 1544.)

Finally, *Bolger*, the primary case relied on by the majority, is distinguishable. In *Bolger*, a contraceptive manufacturer wished to mail, among other things, informational pamphlets that discussed the problem of venereal disease and the benefits of condoms and referenced the manufacturer. The United States Postal Service banned the mailings, and the manufacturer challenged the constitutionality of the ban. (See *Bolger, supra*, 463 U.S. at pp. 62-63.) In assessing the constitutionality of the ban, the United States Supreme Court concluded that the informational pamphlets constituted commercial speech "notwithstanding the fact that they contain discussions of important public issues." (*Id.* at pp. 67-68, fn. omitted.) Unlike Nike's overseas business operations, however, the products at issue in *Bolger* had not become a public issue. Moreover, in the factual context of *Bolger*, the manufacturer could have commented on the issues of venereal disease and family planning through avenues other than promotional mailings and without referencing its own products. By contrast, Nike has *no* other avenue for defending its labor practices, given the breadth of sections 17204 and 17535 (see maj. opn., *ante*, at pp. 7-8), and Nike cannot comment on the issues of labor exploitation and economic globalization without referencing its own labor practices (see, *ante*, at pp. 19-20). Given these differences, *Bolger* does not compel the majority's conclusion.

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.

V

The majority attempts to refute the application of the inextricably intertwining doctrine by factually distinguishing *Thomas* and *Thornhill*. The majority's proposed distinction, however, exposes a major flaw in its analysis. According to the majority, *Thomas* and *Thornhill* do not control because they neither address "the validity of a law prohibiting false or misleading speech" (maj. opn., *ante*, at p. 27) nor bar states from prohibiting "false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations" (*id*. at p. 28). The majority apparently finds this distinction persuasive because it previously concluded that Nike's speech is only "commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." (*Id*. at p. 26.)

Although the logic is difficult to follow, the majority apparently characterizes corporate speech as commercial or noncommercial based on whether the speech is false or misleading. Such an outcome, however, betrays a fundamental misunderstanding of the issue presented in this case. As the majority acknowledges, state laws may only prohibit false or misleading speech if that speech is commercial. Thus, the critical question is whether the speech at issue is commercial or noncommercial speech. Whether the statutes at issue are "designed to prevent false advertising and other forms of commercial deception" has no bearing on this question. (Maj. opn., *ante*, at p. 26.) The majority's assertion that Nike's statements are commercial speech because the application of false advertising laws is at issue therefore makes no sense. (See *ibid*.) Indeed, the majority begs the question by making false or misleading corporate speech commercial speech because it is false or misleading.

VI

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.

For example, the United States Supreme Court could develop an intermediate category of protected speech where commercial and noncommercial elements are closely intertwined. In light of the conflicting constitutional principles at play, this intermediate category could receive greater protection than commercial speech but less protection than noncommercial speech. Under such an approach, false or misleading speech that falls within the intermediate category could be actionable so long as states do not impose liability without fault. (Cf. *Gertz*, *supra*, 418 U.S. at p. 347 ["so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"].)

Alternatively, the court could abandon its blanket rule permitting the proscription of all false or misleading commercial speech. Instead, the court could devise a test for determining whether governmental restrictions on false or misleading speech with commercial elements survive constitutional scrutiny. In doing so, the court could develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate without allowing consumer fraud to run rampant.

Even if these suggestions are unworkable or problematic, the practical realities of today's commercial world require a new " 'accommodation between [First Amendment] concern[s] and the limited state interest present in the context of' " strict liability actions targeting speech with inextricably intertwined commercial and noncommercial elements. (*Dun & Bradstreet*, *supra*, 472 U.S. at p. 756 (plur. opn. of Powell, J.), quoting *Gertz*, *supra*, 418 U.S. at p. 343.) The high court long ago recognized that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." (*Bigelow v. Virginia*, *supra*, 421 U.S. at p. 826.) Given the growing intersection between advertising and noncommercial speech, such as political, literary, scientific and artistic expression, this observation is equally cogent where the commercial speech is false or misleading.

I realize the task is not easy. Indeed, Justice Scalia has recently alluded to the intractability of the problem. (See *44 Liquormart v. Rhode Island*, *supra*, 517 U.S. 484, 518 (conc. opn. of Scalia, J.) ["I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it"].) 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.

For example, such an accommodation could permit states to bar *all* false or misleading representations about the characteristics of a product or service—i.e., the efficacy, quality, value, or safety of the product or service—without justification even if these characteristics have become a public issue. In such a situation, the governmental interest in protecting consumers from fraud is especially strong because these representations address the fundamental questions asked by every consumer when he or she makes a buying decision: does the product or service work well and reliably, is the product or service harmful and is the product or service worth the cost? Moreover, these representations are the traditional target of false advertising laws. Thus, the strong governmental interest in this context trumps any First Amendment concerns presented by a blanket prohibition on such false or misleading representations.

By contrast, the governmental interest in protecting against consumer fraud is less strong if the representations are unrelated to the characteristics of the product or service. In some situations involving these representations, the First Amendment concerns *may* trump this governmental interest. A blanket prohibition of false or misleading representations in such a situation would be unconstitutional because the prohibition may stifle the ability of businesses to comment on public issues. Indeed, this case offers a prime example. Making Nike strictly liable for any false or misleading representations about its labor practices stifles Nike's ability to participate in a public debate *initiated by others*. Accommodating the competing interests in this context precludes the blanket prohibition favored by the majority. Although strict liability is inappropriate, an actual malice standard may be too high because these representations undoubtedly influence some consumers in their buying decisions, and the government has a strong interest in minimizing consumer

deception. Thus, a well-crafted test could give states the flexibility to define the standard of liability for false or misleading misrepresentations in this context so long as the standard is not strict liability.[8] (Cf. *Gertz*, *supra*, 418 U.S. at p. 347.)

VII

The majority accuses me of searching for my own "magic formula or incantation" because I urge a reevaluation of the commercial speech doctrine. (Maj. opn, *ante*, at p. 33.) To this charge, I plead guilty. Unlike the majority who finds nothing unsettling about doctrinal incoherence, I readily acknowledge that some wizardry may be necessary if courts are to adapt the commercial speech doctrine to the realities of today's commercial world. Unfortunately, Merlin and Gandalf are busy, so the United States Supreme Court will have to fill the gap.

Although I make these magical references in jest, my point is serious: the commercial speech doctrine needs and deserves reconsideration and this is as good a place as any to begin. I urge the high court to do so here.

BROWN, J.

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[8] States may, however, adopt a strict liability standard for false and misleading representations unrelated to the characteristics of a product or service where the representations are not inextricably tied to a public issue.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion Kasky v. Nike, Inc.

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Original Appeal
Original Proceeding
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Syllabus

NIKE, INC., ET AL. *v.* KASKY

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 02–575. Argued April 23, 2003—Decided June 26, 2003

Certiorari dismissed. Reported below: 27 Cal. 4th 939, 45 P. 3d 243.

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Thomas C. Goldstein*, *Amy Howe*, *Walter Dellinger*, *David J. Brown*, and *James N. Penrod.*

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, *Jeffrey P. Minear*, and *Jeffrey A. Lamken.*

Paul R. Hoeber argued the cause for respondent. With him on the brief were *Alan M. Caplan*, *Roderick P. Bushnell*, *Patrick J. Coughlin*, *Randi Dawn Bandman*, *Albert H. Meyerhoff*, and *Sylvia Sum.**

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*Briefs of *amici curiae* urging reversal were filed for ABC Inc. et al. by *Bruce E. H. Johnson*, *P. Cameron DeVore*, *Kelli L. Sager*, *Henry S. Hoberman*, *Theresa A. Chmara*, *Richard M. Schmidt, Jr.*, *David A. Schulz*, *R. Bruce Rich*, *Jonathan Bloom*, *Susanna M. Lowy*, *Anthony M. Bongiorno*, *Harold W. Fuson, Jr.*, *Jonathan R. Donnellan*, *Stuart D. Karle*, *Barbara W. Wall*, *Jack N. Goodman*, *James M. Lichtman*, *Neal A. Jackson*, *George Freeman*, *René P. Milam*, *Henry Z. Horbaczewski*, *Lucy A. Dalglish*, *Jane E. Kirtley*, *Bruce W. Sanford*, *Robin Bierstedt*, *Karlene W. Goller*, and *Eric N. Lieberman;* for the American Civil Liberties Union et al. by *Mark J. Lopez*, *Steven R. Shapiro*, and *Ann Brick;* for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold;* for the Arthur W. Page Society et al. by *Bruce P. Keller* and *Michael R. Potenza;* for the Association of National Advertising, Inc., et al. by *Howard J. Rubin* and *Cory Greenberg;* for the Business Roundtable by *Carter G. Phillips*, *Alan Charles Raul*, and *Joseph R. Guerra;* for the Center for Individual Freedom by *Erik S. Jaffe* and *Renee L. Giachino;* for the Center for the Advancement of Capitalism by *Thomas A. Bowden;* for the Chamber of Commerce of the United States of America by *Kenneth W. Starr*, *Richard A.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

Cordray, and *Robin S. Conrad;* for the Civil Justice Association of California by *Fred J. Hiestand;* for Defenders of Property Rights et al. by *Nancie G. Marzulla* and *Roger J. Marzulla;* for ExxonMobil et al. by *David H. Remes;* for the National Association of Manufacturers by *Andrew L. Frey*, *Andrew H. Schapiro*, *Kenneth S. Geller*, *David M. Gossett*, *Martin H. Redish*, *Jan S. Amundson*, and *Quentin Riegel;* for the Pacific Legal Foundation et al. by *Deborah J. La Fetra;* for Pfizer Inc. by *Bert W. Rein*, *Jeffrey B. Kindler*, and *Steven C. Kany;* for the Product Liability Advisory Council, Inc., by *Steven G. Brody;* for SRiMedia et al. by *Thomas H. Clarke, Jr.;* for the Thomas Jefferson Center for the Protection of Free Expression et al. by *Robert M. O'Neil* and *J. Joshua Wheeler;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel Medeiros*, State Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, *Herschel T. Elkins*, Senior Assistant Attorney General, and *Ronald A. Reiter*, Supervising Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Gregg D. Renkes* of Alaska, *Terry Goddard* of Arizona, *Richard Blumenthal* of Connecticut, *Charles J. Crist, Jr.*, of Florida, *Lisa Madigan* of Illinois, *Richard Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Anabelle Rodríguez* of Puerto Rico, *Lawrence E. Long* of South Dakota, *William H. Sorrell* of Vermont, and *Darrell V. McGraw, Jr.*, of West Virginia; for the Campaign Legal Center by *Trevor Potter;* for the Consumer Attorneys of California by *Sharon J. Arkin;* for Domini Social Investments LLC et al. by *James E. Pfander;* for Global Exchange by *William Aceves;* for the National Association of Consumer Advocates by *Robert M. Bramson;* for Public Citizen by *Alan B. Morrison*, *Allison M. Zieve*, *Scott L. Nelson*, and *David C. Vladeck;* for ReclaimDemocracy.org by *Brenda Wright*, *Lisa J. Danetz*, *John C. Bonifaz*, and *Bonita Tenneriello;* for the Sierra Club et al. by *Patrick Gallagher* and *Thomas McGarity;* and for Representative Dennis J. Kucinich et al. by *Erwin Chemerinsky* and *Catherine Fisk.*

William Perry Pendley and *Joseph F. Becker* filed a brief for the Mountain States Legal Foundation as *amicus curiae.*

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, and with whom JUSTICE SOUTER joins as to Part III, concurring.

Beginning in 1996, Nike was besieged with a series of allegations that it was mistreating and underpaying workers at foreign facilities. See App. to Pet. for Cert. 3a. Nike responded to these charges in numerous ways, such as by sending out press releases, writing letters to the editors of various newspapers around the country, and mailing letters to university presidents and athletic directors. See *id.*, at 3a–4a. In addition, in 1997, Nike commissioned a report by former Ambassador to the United Nations Andrew Young on the labor conditions at Nike production facilities. See *id.*, at 67a. After visiting 12 factories, "Young issued a report that commented favorably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers." *Ibid.*

In April 1998, respondent Marc Kasky, a California resident, sued Nike for unfair and deceptive practices under California's Unfair Competition Law, Cal. Bus. & Prof. Code Ann. § 17200 *et seq.* (West 1997), and False Advertising Law, § 17500 *et seq.* Respondent asserted that "in order to maintain and/or increase its sales," Nike made a number of "false statements and/or material omissions of fact" concerning the working conditions under which Nike products are manufactured. Lodging of Petitioners 2 (¶ 1). Respondent alleged "no harm or damages whatsoever regarding himself individually," *id.*, at 4–5 (¶ 8), but rather brought the suit "on behalf of the General Public of the State of California and on information and belief," *id.*, at 3 (¶ 3).

Nike filed a demurrer to the complaint, contending that respondent's suit was absolutely barred by the First Amendment. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. App. to Pet. for Cert. 80a–81a. Respondent appealed, and the California Court of Appeal affirmed, holding that Nike's statements

"form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment." *Id.*, at 79a. The California Court of Appeal also rejected respondent's argument that it was error for the trial court to deny him leave to amend, reasoning that there was "no reasonable possibility" that the complaint could be amended to allege facts that would justify any restrictions on what was—in the court's view—Nike's "noncommercial speech." *Ibid.*

On appeal, the California Supreme Court reversed and remanded for further proceedings. The court held that "[b]ecause 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, . . . [the] messages are commercial speech." 27 Cal. 4th 939, 946, 45 P. 3d 243, 247 (2002). However, the court emphasized that the suit "is still at a preliminary stage, and that whether any false representations were made is a disputed issue that has yet to be resolved." *Ibid.*

We granted certiorari to decide two questions: (1) whether a corporation participating in a public debate may "be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions"; and (2) even assuming the California Supreme Court properly characterized such statements as commercial speech, whether the "First Amendment, as applied to the states through the Fourteenth Amendment, permit[s] subjecting speakers to the legal regime approved by that court in the decision below." Pet. for Cert. i. Today, however, the Court dismisses the writ of certiorari as improvidently granted.

In my judgment, the Court's decision to dismiss the writ of certiorari is supported by three independently sufficient

reasons: (1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U. S. C. § 1257; (2) neither party has standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.

I

The first jurisdictional problem in this case revolves around the fact that the California Supreme Court never entered a final judgment. Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a final judgment or decree. See *ibid.* A literal interpretation of the statute would preclude our review whenever further proceedings remain to be determined in a state court, "no matter how dissociated from the only federal issue" in the case. *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945). We have, however, abjured such a "mechanical" construction of the statute, and accepted jurisdiction in certain exceptional "situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975).[1]

Nike argues that this case fits within the fourth category of such cases identified in *Cox*, which covers those cases in which "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review" might prevail on nonfederal grounds, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,"

[1] Notably, we recognized in *Cox* that in most, if not all, of these exceptional situations, the "additional proceedings anticipated in the lower state courts . . . would not require the decision of other federal questions that might also require review by the Court at a later date." 420 U. S., at 477.

and "refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 482–483. In each of the three cases that the Court placed in the fourth category in *Cox*, the federal issue had not only been finally decided by the state court, but also would have been finally resolved by this Court whether the Court agreed or disagreed with the state court's disposition of the issue. Thus, in *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963), the federal issue was whether the National Labor Relations Board had exclusive jurisdiction over the controversy; in *Mercantile Nat. Bank at Dallas* v. *Langdeau*, 371 U. S. 555 (1963), the federal issue was whether a special federal venue statute applied to immunize the defendants in a state-court action; and in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), the federal issue was whether a Florida statute requiring a newspaper to carry a candidate's reply to an editorial was constitutional. In *Cox* itself, the federal question was whether the State could prohibit the news media from publishing the name of a rape victim. In none of those cases would the resolution of the federal issue have been affected by further proceedings.

In Nike's view, this case fits within the fourth *Cox* category because if this Court holds that Nike's speech was noncommercial, then "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." 420 U. S., at 482–483; see also Reply Brief for Petitioners 4; Reply to Brief in Opposition 4–5. Notably, Nike's argument assumes that all of the speech at issue in this case is either commercial or noncommercial and that the speech therefore can be neatly classified as either absolutely privileged or not.

Theoretically, Nike is correct that we could hold that *all* of Nike's allegedly false statements are absolutely privileged even if made with the sort of "malice" defined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), thereby precluding any further proceedings or amendments that might over-

come Nike's First Amendment defense. However, given the interlocutory posture of the case before us today, the Court could also take a number of other paths that would neither preclude further proceedings in the state courts, nor finally resolve the First Amendment questions in this case. For example, if we were to affirm, Nike would almost certainly continue to maintain that some, if not all, of its challenged statements were protected by the First Amendment and that the First Amendment constrains the remedy that may be imposed. Or, if we were to reverse, we might hold that the speech at issue in this case is subject to suit only if made with actual malice, thereby inviting respondent to amend his complaint to allege such malice. See Tr. of Oral Arg. 42–43. Or we might conclude that some of Nike's speech is commercial and some is noncommercial, thereby requiring further proceedings in the state courts over the legal standards that govern the commercial speech, including whether actual malice must be proved.

In short, because an opinion on the merits in this case could take any one of a number of different paths, it is not clear whether reversal of the California Supreme Court would "be preclusive of any further litigation on the relevant cause of action [in] the state proceedings still to come." *Cox*, 420 U. S., at 482–483. Nor is it clear that reaching the merits of Nike's claims now would serve the goal of judicial efficiency. For, even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely. See *Flynt* v. *Ohio*, 451 U. S. 619, 621 (1981) *(per curiam)* (noting that in most, if not all, of the cases falling within the four *Cox* exceptions, there was "no probability of piecemeal review with respect to federal issues"). Accordingly, in my view, the judgment of the California Supreme Court does not fall within the fourth *Cox* exception and cannot be regarded as final.

II

The second reason why, in my view, this Court lacks jurisdiction to hear Nike's claims is that neither party has standing to invoke the jurisdiction of the federal courts. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 154–155 (1990) ("Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process"). Without alleging that he has any personal stake in the outcome of this case, respondent is proceeding as a private attorney general seeking to enforce two California statutes on behalf of the general public of the State of California. He has not asserted any federal claim; even if he had attempted to do so, he could not invoke the jurisdiction of a federal court because he failed to allege any injury to himself that is "distinct and palpable." *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). Thus, respondent does not have Article III standing. For that reason, were the federal rules of justiciability to apply in state courts, this suit would have been "dismissed at the outset." *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 617 (1989).[2]

Even though respondent would not have had standing to commence suit in federal court based on the allegations in the complaint, Nike—relying on *ASARCO*—contends that it has standing to bring the case to this Court. See Reply Brief for Petitioners 5. In *ASARCO*, a group of taxpayers brought a suit in state court seeking a declaration that the State's law on mineral leases on state lands was invalid. After the Arizona Supreme Court "granted plaintiffs a declaratory judgment that the state law governing mineral

[2] Because the constraints of Article III do not apply in state courts, see *ASARCO*, 490 U. S., at 617, the California courts are free to adjudicate this case.

leases is invalid," 490 U. S., at 611,[3] the defendants sought to invoke the jurisdiction of this Court. In holding that the defendants had standing to invoke the jurisdiction of the federal courts, we noted that the state proceedings had "resulted in a final judgment altering tangible legal rights," *id.*, at 619, and we adopted the following rationale:

> "When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met." *Id.*, at 623–624.

The rationale supporting our jurisdictional holding in *ASARCO*, however, does not extend to this quite different case. Unlike *ASARCO*, in which the state-court proceedings ended in a declaratory judgment invalidating a state law, no "final judgment altering tangible legal rights" has been entered in the instant case. *Id.*, at 619. Rather, the California Supreme Court merely held that respondent's complaint was sufficient to survive Nike's demurrer and to allow the case to go forward. To apply *ASARCO* to this case would effect a drastic expansion of *ASARCO*'s reasoning, extending it to cover an interlocutory ruling that merely allows a trial to proceed.[4] Because I do not believe such a

[3] The Arizona Supreme Court also remanded the case for the trial court to determine what further relief might be appropriate. See *id.*, at 611. Thus, while leaving open the question of remedy on remand, the state-court judgment in *ASARCO* finally decided the federal issue. See *id.*, at 612 (holding that the federal issues had been adjudicated by the state court and that the remaining issues would not give rise to any further federal question).

[4] JUSTICE BREYER would extend *ASARCO*—which provides an exception to our normal standing requirement—to encompass not merely a defendant's challenge to an adverse state-court judgment but also a

significant expansion of *ASARCO* is warranted, my view is that Nike lacks the requisite Article III standing to invoke this Court's jurisdiction.

III

The third reason why I believe this Court has appropriately decided to dismiss the writ as improvidently granted centers around the importance of the difficult First Amendment questions raised in this case. As Justice Brandeis famously observed, the Court has developed, "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (concurring opinion). The second of those rules is that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. *Id.*, at 346–347. The novelty and importance of the constitutional questions presented in this case provide good reason for adhering to that rule.

This case presents 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.[5] See *post*, at 676–678. On the one hand,

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defendant's motion to dismiss a state-court complaint alleging that semicommercial speech was false and misleading. See *post*, at 668–670 (dissenting opinion). Regardless of whether the "speech-chilling injury" associated with the defense of such a case may or may not outweigh the benefit of having a public forum in which the defendant may establish the truth of the contested statements, such an unprecedented expansion would surely change the character of our standing doctrine, greatly extending *ASARCO*'s reach.

[5] Further complicating the novel First Amendment issues in this case is the fact that in this Court Nike seeks to challenge the constitutionality of the private attorney general provisions of California's Unfair Competition Law and False Advertising Law. It apparently did not raise this specific challenge below. Whether the scope of protection afforded to Nike's speech should differ depending on whether the speech is challenged in a

if the allegations of the complaint are true, direct communications with customers and potential customers that were intended to generate sales—and possibly to maintain or enhance the market value of Nike's stock—contained significant factual misstatements. The regulatory interest in protecting market participants from being misled by such misstatements is of the highest order. That is why we have broadly (perhaps overbroadly) stated that "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974). On the other hand, the communications were part of an ongoing discussion and debate about important public issues that was concerned not only with Nike's labor practices, but with similar practices used by other multinational corporations. See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 2. Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance. See, *e. g.*, Brief for ExxonMobil et al. as *Amici Curiae* 2; Brief for Pfizer Inc. as *Amicus Curiae* 11–12. That is why we have provided such broad protection for misstatements about public figures that are not animated by malice. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

Whether similar protection should extend to cover corporate misstatements made about the corporation itself, or whether we should presume that such a corporate speaker knows where the truth lies, are questions that may have to be decided in this litigation. The correct answer to such questions, however, is more likely to result from the study of a full factual record than from a review of mere unproven allegations in a pleading. Indeed, the development of such

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public or a private enforcement action, see *post*, at 678, is a difficult and important question that I believe would benefit from further development below.

a record may actually contribute in a positive way to the public debate. In all events, I am firmly convinced that the Court has wisely decided not to address the constitutional questions presented by the certiorari petition at this stage of the litigation.

Accordingly, I concur in the decision to dismiss the writ as improvidently granted.

JUSTICE KENNEDY, dissenting.

I dissent from the order dismissing the writ of certiorari as improvidently granted.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, dissenting.

During the 1990's, human rights and labor groups, newspaper editorial writers, and others severely criticized the Nike corporation for its alleged involvement in disreputable labor practices abroad. See Lodging of Petitioners 7–8, 96–118, 127–162, 232–235, 272–273. This case focuses upon whether, and to what extent, the First Amendment protects certain efforts by Nike to respond—efforts that took the form of written communications in which Nike explained or denied many of the charges made.

The case arises under provisions of California law that authorize a private individual, acting as a "private attorney general," effectively to prosecute a business for unfair competition or false advertising. Cal. Bus. & Prof. Code Ann. §§ 17200, 17204, 17500, 17535 (West 1997). The respondent, Marc Kasky, has claimed that Nike made false or misleading commercial statements. And he bases this claim upon statements that Nike made in nine specific documents, including press releases and letters to the editor of a newspaper, to institutional customers, and to representatives of nongovernmental organizations. Brief for Respondent 5.

The California Court of Appeal affirmed dismissal of Kasky's complaint without leave to amend on the ground that

"the record discloses noncommercial speech, addressed to a topic of public interest and responding to public criticism of Nike's labor practices." App. to Pet. for Cert. 78a. The Court of Appeal added that it saw "no merit to [Kasky's] scattershot argument that he might still be able to state a cause of action on some theory allowing content-related abridgement of noncommercial speech." *Id.*, at 79a.

Kasky appealed to the California Supreme Court. He focused on the commercial nature of the communications at issue, while pointing to language in this Court's cases stating that the First Amendment, while offering protection to truthful commercial speech, does not protect false or misleading commercial speech, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 563 (1980). Kasky did not challenge the lower courts' denial of leave to amend his complaint. He also conceded that, if Nike's statements fell outside the category of "commercial speech," the First Amendment protected them and "the ultimate issue is resolved in Nike's favor." Appellant's Brief on the Merits in No. S087859 (Cal.), p. 1; accord, Appellant's Reply Brief in No. S087859 (Cal.), pp. 1–2.

The California Supreme Court held that the speech at issue falls within the category of "commercial speech." Consequently, the California Supreme Court concluded, the First Amendment does not protect Nike's statements insofar as they were false or misleading—regardless of whatever role they played in a public debate. 27 Cal. 4th 939, 946, 969, 45 P. 3d 243, 247, 262 (2002). Hence, according to the California Supreme Court, the First Amendment does not bar Kasky's lawsuit—a lawsuit that alleges false advertising and related unfair competition (which, for ease of exposition, I shall henceforth use the words "false advertising" to describe). The basic issue presented here is whether the California Supreme Court's ultimate holding is legally correct. Does the First Amendment permit Kasky's false advertising "prosecution" to go forward?

After receiving 34 briefs on the merits (including 31 *amicus* briefs) and hearing oral argument, the Court dismisses the writ of certiorari, thereby refusing to decide the questions presented, at least for now. In my view, however, the questions presented directly concern the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevents us from deciding those questions now, and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on. Under similar circumstances, the Court has found that failure to review an interlocutory order entails "an inexcusable delay of the benefits [of appeal] Congress intended to grant." *Mills* v. *Alabama*, 384 U. S. 214, 217 (1966). I believe delay would be similarly wrong here. I would decide the questions presented, as we initially intended.

I

Article III's "case or controversy" requirement does not bar us from hearing this case. Article III requires a litigant to have "standing"—*i. e.*, to show that he has suffered "injury in fact," that the injury is "fairly traceable" to actions of the opposing party, and that a favorable decision will likely redress the harm. *Bennett* v. *Spear*, 520 U. S. 154, 162 (1997) (internal quotation marks omitted). Kasky, the state-court plaintiff in this case, might indeed have had trouble meeting those requirements, for Kasky's complaint specifically states that Nike's statements did not harm Kasky personally. Lodging of Petitioners 4–5 (¶ 8). But Nike, the state-court defendant—not Kasky, the plaintiff—has brought the case to this Court. And Nike has standing to complain here of Kasky's actions.

These actions threaten Nike with "injury in fact." As a "private attorney general," Kasky is in effect enforcing a state law that threatens to discourage Nike's speech. See Cal. Bus. & Prof. Code Ann. §§ 17204, 17535 (West 1997). This Court has often found that the enforcement of such a

law works constitutional injury even if enforcement proceedings are not complete—indeed, even if enforcement is no more than a future threat. See, *e. g.*, *Houston* v. *Hill*, 482 U. S. 451, 459, n. 7 (1987) (standing where there is " 'a genuine threat of enforcement' " against future speech); *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974) (same). Cf. *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785, n. 21 (1978) (The "burden and expense of litigating [an] issue" itself can "unduly impinge on the exercise of the constitutional right"); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 52–53 (1971) (plurality opinion) ("The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough"). And a threat of a civil action, like the threat of a criminal action, can chill speech. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 278 (1964) ("Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law' ").

Here, of course, an action to enforce California's laws—laws that discourage certain kinds of speech—amounts to more than just a genuine, future threat. It is a present reality—one that discourages Nike from engaging in speech. It thereby creates "injury in fact." *Supra*, at 667. Further, that injury is directly "traceable" to Kasky's pursuit of this lawsuit. And this Court's decision, if favorable to Nike, can "redress" that injury. *Ibid.*

Since Nike, not Kasky, now seeks to bring this case to federal court, why should Kasky's standing problems make a critical difference? In *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 618 (1989), this Court specified that a defendant *with* standing may complain of an adverse state-court judgment, even if the *other* party—the party who brought the suit in state court and obtained that judgment—would have lacked standing to bring a case in federal court. See also *Virginia* v. *Hicks*, *ante*, at 120–121.

In *ASARCO*, state taxpayers (who ordinarily lack federal "standing") sued a state agency in state court, seeking a judgment declaring that the State's mineral leasing procedures violated federal law. See 490 U. S., at 610. ASARCO and other mineral leaseholders intervened as defendants. *Ibid.* The plaintiff taxpayers obtained a state-court judgment declaring that the State's mineral leasing procedures violated federal law. The defendant mineral leaseholders asked this Court to review the judgment. And this Court held that the leaseholders had standing to seek reversal of that judgment here.

The Court wrote:

> "When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari [1] if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where [2] the requisites of a case or controversy are also met." *Id.*, at 623–624 (bracketed numbers added).

No one denies that "requisites of a case or controversy" other than standing are met here. But is there "direct, specific, and concrete injury"?

In *ASARCO* itself, such "injury" consisted of the threat, arising out of the state court's determination, that the defendants' leases *might* later be canceled (if, say, a third party challenged those leases in later proceedings and showed they were not "made for 'true value' "). *Id.*, at 611–612, 618. Here that "injury" consists of the threat, arising out of the state court's determination, that defendant Nike's speech on public matters might be "chilled" immediately and legally restrained in the future. See *supra*, at 668. Where is the meaningful difference?

I concede that the state-court determination in *ASARCO* was more "final" in the sense that it unambiguously ordered a declaratory judgment, see 490 U. S., at 611–612 (finding that two exceptions to normal finality requirements applied), while the state-court determination here, where such declaratory relief was not sought, takes the form of a more intrinsically interlocutory holding, see *ante*, at 662, and n. 4 (STEVENS, J., concurring). But with respect to "standing," what possible difference could that circumstance make? The state court in *ASARCO* finally resolved federal questions related to state leasehold procedures; the state court here finally resolved the basic free speech issue—deciding that Nike's statements constituted "commercial speech" which, when "false or misleading," the government "may entirely prohibit," 27 Cal. 4th, at 946, 45 P. 3d, at 247. After answering the basic threshold question, the state court in *ASARCO* left other, more specific questions for resolution in further potential or pending proceedings, 490 U. S., at 611–612. The state court here did the same.

In *ASARCO*, the relevant further proceedings might have taken place in a new lawsuit; here they would have taken place in the same lawsuit. But that difference has little bearing on the likelihood of injury. Indeed, given the nature of the speech-chilling injury here and the fact that it is likely to occur immediately, I should think that constitutional standing in this case would flow from standing in *ASARCO a fortiori*.

II

No federal statute prevents us from hearing this case. The relevant statute limits our jurisdiction to "*[f]inal judgments or decrees* rendered by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257(a) (emphasis added). But the California Supreme Court determination before us, while technically an interim decision, is a "final judgment or decree" for purposes of this statute.

That is because this Court has interpreted the statute's phrase "final judgment" to refer, in certain circumstances, to a state court's final determination of a federal issue, even if the determination of that issue occurs in the midst of ongoing litigation. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975). In doing so, the Court has said that it thereby takes a "*pragmatic* approach," not a "mechanical" approach, to "determining finality." *Id.*, at 477, 486 (emphasis added). And it has set forth several criteria that determine when an interim state-court judgment is "final" for purposes of the statute, thereby permitting our consideration of the federal matter at issue.

The four criteria relevant here are those determining whether a decision falls within what is known as *Cox*'s "fourth category" or "fourth exception." They consist of the following:

> (1) "the federal issue has been finally decided in the state courts";
>
> (2) in further pending proceedings, "the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court";
>
> (3) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and
>
> (4) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 482–483.

Each of these four conditions is satisfied in this case.

A

Viewed from *Cox*'s "pragmatic" perspective, "the federal issue has been finally decided in the state courts." *Id.*, at

482, 486. The California Supreme Court considered nine specific instances of Nike's communications—those upon which Kasky says he based his legal claims. Brief for Respondent 5. These include (1) a letter from Nike's Director of Sports Marketing to university presidents and athletic directors presenting "facts" about Nike's labor practices; (2) a 30-page illustrated pamphlet about those practices; (3) a press release (posted on Nike's Web site) commenting on those practices; (4) a posting on Nike's Web site about its "code of conduct"; (5) a document on Nike's letterhead sharing its "perspective" on the labor controversy; (6) a press release responding to "[s]weatshop [a]llegations"; (7) a letter from Nike's Director of Labor Practices to the Chief Executive Officer of YWCA of America, discussing criticisms of its labor practices; (8) a letter from Nike's European public relations manager to a representative of International Restructuring Education Network Europe, discussing Nike's practices; and (9) a letter to the editor of The New York Times taking issue with a columnist's criticisms of Nike's practices. *Ibid.;* see also Lodging of Petitioners 121–125, 182–191, 198–230, 270, 285, 322–324. The California Supreme Court then held that all this speech was "commercial speech" and consequently the "governmen[t] may entirely prohibit" that speech if it is "false or misleading." 27 Cal. 4th, at 946, 45 P. 3d, at 247.

The California Supreme Court thus "finally decided" the federal issue—whether the First Amendment protects the speech in question from legal attack on the ground that it is "false or misleading." According to the California Supreme Court, nothing at all remains to be decided with respect to *that* federal question. If we permit the California Supreme Court's decision to stand, in all likelihood this litigation will now simply seek to determine whether Nike's statements were false or misleading, and perhaps whether Nike was negligent in making those statements—matters involving questions of California law.

I concede that some other, possibly related federal constitutional issue *might* arise upon remand for trial. But some such likelihood is always present in ongoing litigation, particularly where, as in past First Amendment cases, this Court reviews interim state-court decisions regarding, for example, requests for a temporary injunction or a stay pending appeal, or (as here) denial of a motion to dismiss a complaint. *E. g.*, *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)* (denial of a stay pending appeal); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971) (temporary injunction); *Mills* v. *Alabama*, 384 U. S. 214 (1966) (motion to dismiss).

Some such likelihood was present in *Cox* itself. The *Cox* plaintiff, the father of a rape victim, sued a newspaper in state court, asserting a right to damages under state law, which forbade publication of a rape victim's name. The trial court, believing that the statute imposed strict liability on the newspaper, granted summary judgment in favor of the victim. See *Cox Broadcasting Corp.* v. *Cohn*, 231 Ga. 60, 64, 200 S. E. 2d 127, 131 (1973), rev'd, 420 U. S. 469 (1975). The State Supreme Court affirmed in part and reversed in part. That court agreed with the plaintiff that state law provided a cause of action and that the cause of action was consistent with the First Amendment. 231 Ga., at 64, 200 S. E. 2d, at 131. However, the State Supreme Court disagreed about the standard of liability. Rather than strict liability, the standard, it suggested, was one of "wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." *Ibid.* And it remanded the case for trial. The likelihood that further proceedings would address federal constitutional issues—concerning the relation between, for instance, the nature of the privacy invasion, the defendants' state of mind, and the First Amendment—would seem to have been far higher there than in any further proceedings here. Despite that likelihood, and because the State Supreme Court held in effect that the First Amend-

ment did not protect the speech at issue, this Court held that its determination of *that* constitutional question was "plainly final." *Cox*, 420 U. S., at 485. California's Supreme Court has made a similar holding, and its determination of the federal issue is similarly "final."

B

The second condition specifies that, in further proceedings, the "party seeking review here"—*i. e.*, Nike—"might prevail on the merits on nonfederal grounds." *Id.*, at 482. If Nike shows at trial that its statements are neither false nor misleading, nor otherwise "unfair" under California law, Cal. Bus. & Prof. Code Ann. §§17200, 17500 (West 1997), it will show that those statements did not constitute unfair competition or false advertising under California law—a nonfederal ground. And it will "prevail on the merits on nonfederal grounds," *Cox*, 420 U. S., at 482. The second condition is satisfied.

C

The third condition requires that "reversal of the state court on the federal issue . . . be preclusive of any further litigation on the relevant cause of action." *Id.*, at 482–483. Taken literally, this condition is satisfied. An outright reversal of the California Supreme Court would reinstate the judgment of the California intermediate court, which affirmed dismissal of the complaint without leave to amend. *Supra*, at 665–666. It would forbid Kasky to proceed insofar as Kasky's state-law claims focus on the nine documents previously discussed. And Kasky has conceded that his claims rest on statements made in those documents. Brief for Respondent 5.

I concede that this Court might not reverse the California Supreme Court outright. It might take some middle ground, neither affirming nor fully reversing, that permits this litigation to continue. See *ante*, at 659–660 (STEVENS, J., concurring). But why is that possibility relevant? The

third condition specifies that "*reversal*"—not some *other* disposition—will preclude "further litigation."

The significance of this point is made clear by our prior cases. In *Cox*, this Court found jurisdiction despite the fact that it *might* have chosen a middle First Amendment ground—perhaps, for example, precluding liability (for publication of a rape victim's name) where based on negligence, but not where based on malice. And such an intermediate ground, while producing a judgment that the State Supreme Court decision was erroneous, would have permitted the litigation to go forward. Cf. Brief for Appellants in *Cox Broadcasting Corp.* v. *Cohn*, O. T. 1973, No. 73–938, p. 68, n. 127 (arguing that "'summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection'"). Similarly in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), the Court might have held that the Constitution permits a State to require a newspaper to carry a candidate's reply to an editorial—but only *in certain circumstances*—thereby potentially leaving a factual issue whether those circumstances applied. Cf. Brief for Appellant in *Miami Herald Publishing Co.* v. *Tornillo*, O. T. 1973, No. 73–797, pp. 26–27, and n. 60 (noting that the State Supreme Court based its decision in part on a conclusion, unsupported by record evidence, that control of mass media had become substantially concentrated). One can imagine similar intermediate possibilities in virtually every case in which the Court has found this condition satisfied, including those involving technical questions of statutory jurisdiction and venue, cf. *ante*, at 659 (STEVENS, J., concurring).

Conceivably, one might argue that the third condition is *not* satisfied here despite literal compliance, see *supra*, at 674 and this page, on the ground that, from a pragmatic perspective, outright reversal is not a very realistic possibility. But that proposition simply is not so. In my view, the probabilities are precisely the contrary, and a true reversal is a highly realistic possibility.

To understand how I reach this conclusion, the reader must recall the nature of the holding under review. The California Supreme Court held that certain specific communications, exemplified by the nine documents upon which Kasky rests his case, fall within that aspect of the Court's commercial speech doctrine that says the First Amendment protects only *truthful* commercial speech; hence, to the extent commercial speech is false or misleading, it is unprotected. See *supra*, at 666.

The Court, however, has added, in commercial speech cases, that the First Amendment "'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.'" *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 534 (1980); accord, *Central Hudson*, 447 U. S., at 562–563, n. 5. And in other contexts the Court has held that speech on matters of public concern needs "'breathing space'"—potentially incorporating certain false or misleading speech—in order to survive. *New York Times*, 376 U. S., at 272; see also, *e. g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974); *Time, Inc.* v. *Hill*, 385 U. S. 374, 388–389 (1967).

This case requires us to reconcile these potentially conflicting principles. In my view, a proper resolution here favors application of the last mentioned public-speech principle, rather than the first mentioned commercial-speech principle. Consequently, I would apply a form of heightened scrutiny to the speech regulations in question, and I believe that those regulations cannot survive that scrutiny.

First, the communications at issue are not purely commercial in nature. They are better characterized as involving a mixture of commercial and noncommercial (public-issue-oriented) elements. The document *least* likely to warrant protection—a letter written by Nike to university presidents and athletic directors—has several commercial characteristics. See Appendix, *infra* (reproducing pages 190 and 191 of Lodging of Petitioners). As the California Supreme Court

implicitly found, 27 Cal. 4th, at 946, 45 P. 3d, at 247, it was written by a "commercial speaker" (Nike), it is addressed to a "commercial audience" (potential institutional buyers or contractees), and it makes "representations of fact about the speaker's own business operations" (labor conditions). *Ibid.* See, *e. g.*, *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 66–67 (1983).

But that letter also has other critically important and, I believe, predominant noncommercial characteristics with which the commercial characteristics are "inextricably intertwined." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988). For one thing, the letter appears outside a traditional advertising format, such as a brief television or newspaper advertisement. It does not propose the presentation or sale of a product or any other commercial transaction, *United States* v. *United Foods, Inc.*, 533 U. S. 405, 409 (2001) (describing this as the "usua[l]" definition for commercial speech). Rather, the letter suggests that its contents might provide "information useful in discussions" with concerned faculty and students. Lodging of Petitioners 190. On its face, it seeks to convey information to "a diverse audience," including individuals who have "a general curiosity about, or genuine interest in," the public controversy surrounding Nike, *Bigelow* v. *Virginia*, 421 U. S. 809, 822 (1975).

For another thing, the letter's content makes clear that, in context, it concerns a matter that is of significant public interest and active controversy, and it describes factual matters related to that subject in detail. In particular, the letter describes Nike's labor practices and responds to criticism of those practices, and it does so because those practices themselves play an important role in an existing public debate. This debate was one in which participants advocated, or opposed, public collective action. See, *e. g.*, Lodging of Petitioners 143 (article on student protests), 232–236 (fact sheet with "Boycott Nike" heading). See generally *Roth* v.

United States, 354 U. S. 476, 484 (1957) (The First Amendment's protections of speech and press were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes"). That the letter is factual in content does not argue against First Amendment protection, for facts, sometimes facts alone, will sway our views on issues of public policy.

These circumstances of form and content distinguish the speech at issue here from the more purely "commercial speech" described in prior cases. See, *e. g.*, *United Foods*, *supra*, at 409 (commercial speech "usually defined as speech that does *no more than* propose a commercial transaction" (emphasis added)); *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 473–474 (1989) (describing this as "the test"); *Central Hudson*, 447 U. S., at 561 (commercial speech defined as "expression related *solely* to the economic interests of the speaker and its audience" (emphasis added)). The speech here is unlike speech—say, the words "dolphin-safe tuna"—that commonly appears in more traditional advertising or labeling contexts. And it is unlike instances of speech where a communication's contribution to public debate is peripheral, not central, cf. *id.*, at 562–563, n. 5.

At the same time, the regulatory regime at issue here differs from traditional speech regulation in its use of private attorneys general authorized to impose "false advertising" liability even though they themselves have suffered no harm. See Cal. Bus. & Prof. Code Ann. §§ 17204, 17535 (West 1997). In this respect, the regulatory context is unlike most traditional false advertising regulation. And the "false advertising" context differs from other regulatory contexts—say, securities regulation—where a different balance of concerns calls for different applications of First Amendment principles. Cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456–457 (1978).

These three sets of circumstances taken together—circumstances of format, content, and regulatory context—warrant

treating the regulations of speech at issue differently from regulations of purer forms of commercial speech, such as simple product advertisements, that we have reviewed in the past. And, where all three are present, I believe the First Amendment demands heightened scrutiny.

Second, I doubt that this particular instance of regulation (through use of private attorneys general) can survive heightened scrutiny, for there is no reasonable "fit" between the burden it imposes upon speech and the important governmental "'interest served,'" *Fox*, *supra*, at 480. Rather, the burden imposed is disproportionate.

I do not deny that California's system of false advertising regulation—including its provision for private causes of action—furthers legitimate, traditional, and important public objectives. It helps to maintain an honest commercial marketplace. It thereby helps that marketplace better allocate private goods and services. See *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 765 (1976). It also helps citizens form "intelligent opinions as to how [the marketplace] ought to be regulated or altered." *Ibid.*

But 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—at least if extended to encompass the type of speech at issue under the standards of liability that California law provides, see Cal. Bus. & Prof. Code Ann. §§ 17200, 17500 (West 1997) (establishing regimes of strict liability, as well as liability for negligence); *Cortez* v. *Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 181, 999 P. 2d 706, 717 (2000) (stating that California's unfair competition law imposes strict liability). The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute

a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm. Cf. *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 134–135 (1992); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 67–71 (1963).

That threat means a commercial speaker must take particular care—considerably more care than the speaker's noncommercial opponents—when speaking on public matters. A large organization's unqualified claim about the adequacy of working conditions, for example, could lead to liability, should a court conclude after hearing the evidence that enough exceptions exist to warrant qualification—even if those exceptions were unknown (but perhaps should have been known) to the speaker. Uncertainty about how a court will view these, or other, statements, can easily chill a speaker's efforts to engage in public debate—particularly where a "false advertising" law, like California's law, imposes liability based upon negligence or without fault. See *Gertz*, 418 U. S., at 340; *Time*, 385 U. S., at 389. At the least, they create concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not. See *First Nat. Bank*, 435 U. S., at 785–786; see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995).

At the same time, it is difficult to see why California needs to permit such actions by private attorneys general—at least with respect to speech that is not "core" commercial speech but is entwined with, and directed toward, a more general public debate. The Federal Government regulates unfair competition and false advertising in the absence of such suits. 15 U. S. C. § 41 *et seq.* As far as I can tell, California's delegation of the government's enforcement authority to private individuals is not traditional, and may be unique, Tr. of Oral Arg. 42. I do not see how "false advertising"

regulation could suffer serious impediment if the Constitution limited the scope of private attorney general actions to circumstances where more purely commercial and less public-debate-oriented elements predominate. As the historical treatment of speech in the labor context shows, substantial government regulation can coexist with First Amendment protections designed to provide room for public debate. Compare, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–620 (1969) (upholding prohibition of employer comments on unionism containing threats or promises), with *Thomas* v. *Collins*, 323 U. S. 516, 531–532 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940).

These reasons convince me that it is likely, if not highly probable, that, if this Court were to reach the merits, 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.

Returning to the procedural point at issue, I believe this discussion of the merits shows that not only will "reversal" of the California Supreme Court "on the federal issue" prove "preclusive of any further litigation on the relevant cause of action," *Cox*, 420 U. S., at 482–483, but also such "reversal" is a serious possibility. Whether we take the words of the third condition literally or consider the circumstances pragmatically, that condition is satisfied.

D

The fourth condition is that "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 483. This condition is met because refusal immediately to review the state-court decision before us will "seriously erode" the federal constitutional policy in favor of free speech.

If permitted to stand, the state court's decision may well "chill" the exercise of free speech rights. See *id.*, at 486; *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46, 56 (1989). Continuation of this lawsuit itself means increased expense, and, if Nike loses, the results may include monetary liability (for "restitution") and injunctive relief (including possible corrective "counterspeech"). See, *e. g.*, *Cel-Tech Communications, Inc.* v. *Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 179, 973 P. 2d 527, 539 (1999); *Consumers Union of U. S., Inc.* v. *Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 971–972, 6 Cal. Rptr. 2d 193, 197–198 (1992). The range of communications subject to such liability is broad; in this case, it includes a letter to the editor of The New York Times. The upshot is that commercial speakers doing business in California may hesitate to issue significant communications relevant to public debate because they fear potential lawsuits and legal liability. Cf. *Gertz*, *supra*, at 340 (warning that overly stringent liability for false or misleading speech can "lead to intolerable self-censorship"); *Time*, *supra*, at 389 ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone' ").

This concern is not purely theoretical. Nike says without contradiction that because of this lawsuit it has decided "to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media." Brief for Petitioners 39. It adds that it has not released its annual Corporate Responsibility Report, has decided not to pursue a listing in the Dow Jones Sustainability Index, and has refused "dozens of invitations . . . to speak on corporate responsibility issues." *Ibid.* Numerous *amici*—including some who do not believe that Nike has fully and accurately explained its labor practices—argue that California's decision will "chill" speech and

thereby limit the supply of relevant information available to those, such as journalists, who seek to keep the public informed about important public issues. Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 2–3; Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 10–12; Brief for ABC Inc. et al. as *Amici Curiae* 6–13; Brief for Pfizer Inc. as *Amicus Curiae* 10–14.

In sum, all four conditions are satisfied here. See *supra*, at 671. Hence, the California Supreme Court's judgment falls within the scope of the term "final" as it appears in 28 U. S. C. § 1257(a), and no statute prevents us from deciding this case.

III

There is no strong prudential argument against deciding the questions presented. Compare *ante*, at 663–664 (STEVENS, J., concurring), with *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). These constitutional questions are not easy ones, for they implicate both free speech and important forms of public regulation. But they arrive at the threshold of this case, asking whether the Constitution permits this private attorney general's lawsuit to go forward on the basis of the pleadings at hand. This threshold issue was vigorously contested and decided, adverse to Nike, below. Cf. *Yee* v. *Escondido*, 503 U. S. 519, 534–535 (1992). And further development of the record seems unlikely to make the questions presented any easier to decide later.

At the same time, waiting extracts a heavy First Amendment price. If this suit goes forward, both Nike and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. See *Time*, 385 U. S., at 389; *Gertz*, 418 U. S., at 340. That is what a "chilling effect" means. It is present here.

IV

In sum, I can find no good reason for postponing a decision in this case. And given the importance of the First Amendment concerns at stake, there are strong reasons not to do so. The position of at least one *amicus*—opposed to Nike on the merits of its labor practice claims but supporting Nike on its free speech claim—echoes a famous sentiment reflected in the writings of Voltaire: 'I do not agree with what you say, but I will fight to the end so that you may say it.' See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 3. A case that implicates that principle is a case that we should decide.

I would not dismiss as improvidently granted the writ issued in this case. I respectfully dissent from the Court's contrary determination.

APPENDIX TO OPINION OF BREYER, J.

What follows is a copy of the letter to university presidents and athletic directors at issue in this case, Lodging of Petitioners 190–191:

June 18, 1996

Dear President and Director of Athletics,

As most of you have probably read, heard or seen, NIKE, Inc. has recently come under attack from the Made in the USA Foundation, and other labor organizers, who claim that child labor is used in the production of its goods. While you may also be aware that NIKE has gone on the record to categorically deny these allegations as completely false and irresponsible, I would like to extend the courtesy of providing you with many of the facts that have been absent from the media discourse on this issue. I hope you will find this information useful in discussions with faculty and students who may be equally disturbed by these charges.

First and foremost, wherever NIKE operates around the globe, it is guided by principles set forth in a code of conduct that binds its production subcontractors to a signed Memorandum of Understanding. This Memorandum strictly prohibits child labor, and certifies compliance with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal opportunity provisions.

NIKE enforces its standards through daily observation by staff members who are responsible for monitoring adherence to the Memorandum. NIKE currently employs approximately 800 staff members in Asia alone to oversee operations. Every NIKE subcontractor knows that the enforcement of the Memorandum includes systematic, unannounced evaluation by third-party auditors. These thorough reviews include interviews with workers; examination of safety equipment and procedures, review of free health-care facilities, investigation of worker grievances and audits of payroll records.

Furthermore, over the past 20 years we have established long-term relationships with select subcontractors, and we believe that our sense of corporate responsibility has influenced the way they conduct their business. After all, it is incumbent upon leaders like NIKE to ensure that these violations do not occur in our subcontractor's factories.

NIKE, INC. ONE BOWERMAN DRIVE, BEAVERTON, OR 97005-6453 TEL:503-671-6453 FAX:503-671-6300

Appendix to opinion of BREYER, J.

June 18, 1996
Page 2

We have found over the years that, given the vast area of our operations and the difficulty of policing such a network, some violations occur. However, we have been proud that in all material respects the code of conduct is complied with. The code is not just word. We live by it. NIKE is proud of its contribution in helping to build economies, provide skills, and create a brighter future for millions of workers around the world.

As a former Director of Athletics, and currently the Director of Sports Marketing at NIKE, I am indeed sensitive to these issues. I would be more than happy to make myself available to either discuss the issues and/or receive any opinions or insights you may have. We are committed to the world of sports and all that it stands for. I remain at your disposal.

Kindest regards.

Steve Miller

Steve Miller
Director
NIKE Sports Marketing

SM:en

cc: Phillip H. Knight
Donna Gibbs
Kit Morris
Erin Patton