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IN THE SUPREME COURT OF THE UNITED STATES

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NIKE, INC. , ET AL. , :

Petitioners :

v. : No. 02-575

MARC KASKY. :

- - - - -X

Washington, D. C.

Wednesday, April 23, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m

APPEARANCES:

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Petitioners.

THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D. C. ; on behalf of the United States, as amicus curiae, supporting the Petitioners.

PAUL R. HOEBER, ESQ., San Francisco, California; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 02-575, Nike, Inc. versus Marc Kasky.

5 Mr. Tribe.

6 ORAL ARGUMENT OF LAURENCE H. TRIBE

7 ON BEHALF OF THE PETITIONERS

8 MR. TRIBE: Mr. Chief Justice, and may it please
9 the Court:

10 In the mid-1990s there was, of course, an
11 intense debate on the pros and cons of globalization, and
12 of the impact of companies like Nike on workers in the
13 Third World, where Nike contracted out much of its
14 production to some 900 factories in 51 countries with over
15 600,000 employees.

16 Now, the critics, many from pro-labor groups,
17 denounced Nike as the chief exemplar of the evils of
18 globalization, arguing that Nike was simply shifting
19 production to places where it could exploit the workforce
20 and act in ways that were illegal and immoral, and the
21 critics took much of their documentation from the media.

22 Of course, Nike disagreed, using the same media
23 venues as the critics had used to document what it thought
24 were the connections between its presence and activities
25 in countries like South Korea and Vietnam and the

1 development of technological expertise in those countries,
2 as well as the expansion of job opportunities there, and
3 also arguing that it had put in place significant
4 safeguards against abuse.

5 Products were mentioned only in response to
6 people who said, well, look, this product is made in
7 such-and-such country and it's exploitative, and Nike
8 would have a press release, or it -- sometimes it would be
9 an op ed saying no, you've got the wrong country, this
10 product is made in such-and-such other place. These were
11 letters to the editor, pamphlets. It was on the Internet,
12 correspondence.

13 As you might expect, the critics talked back.
14 There was a lively political dialogue about the realities
15 of the Third World and Nike's role in it, a little hard to
16 separate the two, when, as the dissenter below, one of the
17 dissenters below said Nike had become the poster child for
18 the evils, supposedly, of globalization, so not
19 surprisingly the debate was inconclusive.

20 The surprise came when the story took an unusual
21 turn, unusual at least in our system of Government. One
22 of the Nike critics, Marc Kasky, asked the California
23 courts to endorse his view and to hold that the statements
24 that Nike was putting out were false or were misleading.
25 He invoked California's unfair competition law and the

1 false advertising law that it included, which gives anyone
2 standing, so Mr. Kasky certainly qualified, to sue another
3 person or corporation, here Nike and its officers, for
4 making any statement in a newspaper or other publication
5 such, it goes on to say, or any advertising device,
6 including over the Internet, concerning any circumstance
7 or matter of fact connected with anything the speaker
8 intends to sell if the statement is untrue or misleading,
9 and the California Supreme Court has read that to cover
10 anything that might mislead the public.

11 The plaintiff, empowered to sue by the Business
12 and Professions Code 17204 on behalf of, quote, the
13 general public, unquote, did not, under California
14 decisional law, have to allege or prove falsity -- it
15 could be an omission that made something misleading -- he
16 didn't have to allege or prove reliance by or injury to
17 anyone, or any particular level of fault. An inadvertent
18 omission will suffice under the Day decision.

19 QUESTION: Well, certainly some omissions, even
20 though not technically false, could be false in their --
21 in what they convey.

22 MR. TRIBE: Certainly, Mr. Chief Justice, and,
23 in fact, one of the suggestions made by the California
24 Supreme Court for how a company could engage in this
25 debate without any problem is simply omit all the facts

1 that might connect it to the situation, and that kind of
2 omission, it would be certainly alleged, would be
3 misleading, so the only solution that Nike is given is,
4 talk in vague generalities.

5 I don't deny, Mr. Chief Justice, that there can
6 be cases and there can even be fraud cases, though it's
7 hard, given the pleading requirements of the fraud tort,
8 that do rest on omissions, but I'm just suggesting how --
9 how capacious -- how capacious this is.

10 The relief that is available and was requested
11 by Mr. Kasky includes, and I don't think we should forget
12 the importance of this, an adjudication that the defendant
13 is guilty of an unlawful business practice, and in Nike's
14 case that would be no small matter. I mean, it would be
15 said you're guilty of exploiting women and children in the
16 Third World, guilty as charged, and not being honest about
17 it, a scarlet letter more damning than the label of
18 National Labor Relations Act violator that this Court a
19 year ago in B&K versus NLRB treated as so grave a blot on
20 the reputation of a company that it mustn't be imposed for
21 activity within the First Amendment zone without giving
22 the defendant significant leeway.

23 Secondly, there is available a court-ordered
24 injunction both prohibitory and mandatory in one case
25 involving the Alta-Dena Dairy in California under this

1 statute. The Consumers Union of the United States brought
2 the suit as a Private Attorney General against a dairy
3 that had been putting out its products of raw milk saying
4 they were just as nutritious and healthy as pasteurized
5 milk, and the remedy was a 10-year mandate of corrective
6 speech, as it were, corrective education.

7 QUESTION: To -- to make them realize that raw
8 milk was not as good as pasteurized milk?

9 MR. TRIBE: Well, I guess to make some people --
10 this -- that's what the statute says, that some people
11 might have been misled. Needless to say, the kind of show
12 trial that would be involved in this case is a lot more
13 expensive than that one.

14 That case, by the way, took 54 days to try,
15 44 witnesses, there were 40,000 pages of exhibits, at the
16 end a restitutionary order of \$100,000 was given, and in
17 that case the Attorney General joined the suit, he
18 collected the restitution --

19 QUESTION: Do -- do we have a case in which we
20 say that a -- a civil scheme -- I -- I suppose there are
21 some criminal remedies here, but let's just think about
22 this as a civil scheme, that a civil scheme of this type
23 is so burdensome, so extensive that it chills speech and
24 is therefore invalid? I -- I --

25 MR. TRIBE: Well, I suppose Bantam Books --

1 QUESTION: We -- we have plenty of cases that
2 the criminal laws are either vague or overly broad and
3 that they chill speech. What about in the civil context?

4 MR. TRIBE: I think Bantam Books comes to mind.

5 QUESTION: Yes.

6 MR. TRIBE: And there it was less than this, it
7 was simply you were on a list of books. It seems to me
8 that the Court in the National Labor Relations Act context
9 itself took the position in B&K that chilling effect was
10 important, and what about defamation?

11 I mean, the central meaning of New York Times v.
12 Sullivan and Gertz and, you know, and Time v. Hill is that
13 even when you have someone who is harmed, reputational
14 harm, concrete harm, so that the regulation of speech is
15 simply ancillary to vindicating tangible interest, even
16 there the chilling effect is so great that even though
17 there's no positive value in false statements you have to
18 put a burden -- it's a matter of public interest.

19 QUESTION: You would have to say that this
20 complaint and the adjudicatory system it wished to invoke
21 chills speech, therefore the complaint must be dismissed.

22 I mean, is that the remedy you're --

23 MR. TRIBE: Well, essentially that's right,
24 that --

25 QUESTION: Well, Mr. Tribe, this --

1 MR. TRIBE: -- this trial itself is
2 illegitimate.

3 QUESTION: -- this -- but this Court has said
4 that even though commercial speech concerns a public
5 issue, it's still commercial speech --

6 MR. TRIBE: Yes.

7 QUESTION: -- and we've applied a different test
8 to commercial speech.

9 MR. TRIBE: Yes, Justice O'Connor.

10 QUESTION: We said that in Central Hudson, we
11 said that in Bolger.

12 MR. TRIBE: Yes.

13 QUESTION: How do you distinguish those?

14 MR. TRIBE: Well, let me say two things, Justice
15 O'Connor. First of all the Court has never said that the
16 Constitution and its First Amendment are wholly invisible
17 to commercial speech, that is, if you're going after
18 commercial harms, then there's a lower standard for
19 commercial speech, the four-part Central Hudson test.
20 Discovery Network made clear that if you're coming at it
21 from a different angle, commercial speech is just as good
22 as anything else.

23 R. A. V., I think, dispelled the notion that the
24 Constitution has these blind spots and, indeed, the whole
25 approach of the Court below and of Mr. Kasky was, we don't

1 even have to deal with your First Amendment arguments --

2 QUESTION: Well, do you -- you take the view
3 that --

4 MR. TRIBE: -- because it's misleading
5 commercial speech.

6 QUESTION: -- none of the things alleged in the
7 complaint meet the commercial speech test set out in
8 Central Hudson?

9 MR. TRIBE: Actually, we --

10 QUESTION: Not one of them?

11 MR. TRIBE: That's right, Justice O'Connor, we
12 don't think any of them do, but even if they did, this
13 scheme --

14 QUESTION: What part do they take?

15 MR. TRIBE: Well, actually, they don't come
16 close in general, and I think the best way to illustrate
17 that is to look not at the various verbal formulas that
18 have been used by this Court in terms of whether it's
19 advertising format, whether it's -- in one case I think
20 Justice Stevens talked about something being
21 transaction-driven, but look at the example that this
22 court gave in Central Hudson when it was addressing the
23 question, when we allow greater regulation of speech that
24 is closely connected with the Government's power to
25 regulate commercial transactions we're not in any way

1 limiting your ability directly to comment.

2 The example that was given was the pamphlet from
3 the Con Ed case. That was an example of direct comment,
4 and you look at the pamphlet which was in the joint
5 appendix in -- in that case, and it turns out the pamphlet
6 is a detailed set of statements about why nuclear power is
7 safer, better, cheaper, better for our independence, and
8 you know what, Con Ed had a nuclear power plant, Indian
9 Point, they clearly had an economic interest in promoting
10 that view, and that's the closest any of these statements
11 by Nike come --

12 QUESTION: No, no, but there's another -- think
13 in your mind of two documents. Document 1 is the letter
14 that Nike sent to the -- the athletic managers.

15 MR. TRIBE: Yes.

16 QUESTION: And then put that side by side with
17 the document in the Bolger case, and --

18 MR. TRIBE: Yes.

19 QUESTION: -- that's the -- the discussion of
20 venereal disease.

21 MR. TRIBE: Right.

22 QUESTION: Now, what -- now, I -- you have to
23 write an opinion, let's say --

24 MR. TRIBE: Yes.

25 QUESTION: -- that says the difference between

1 these is?

2 MR. TRIBE: Is that the letter to the university
3 presidents and to the athletic departments of these
4 universities, which is Exhibit R at page 190 of the
5 lodging, is an extended argument about why the claims
6 against Nike are unfounded. It is not in any of its -- it
7 doesn't have Air Jordans on it --

8 QUESTION: And then the letter about the --

9 MR. TRIBE: -- the way Trojan condoms were --
10 condoms were at the end of that --

11 QUESTION: Yes.

12 MR. TRIBE: -- submission, and in the Bolger
13 case again, I think if I were writing such an opinion I
14 would say, in Bolger we again reiterated the formula that
15 had been used in Central Hudson and gave as an example of
16 something that was not commercial speech the promotional
17 pamphlet. That -- that was sent to some -- you know who
18 it was sent to? It was sent only to the customers of
19 Con Ed. It was an insert in the bills, so there's no
20 doubt that that was speech that had as its audience only
21 those people who purchased from Con Ed, whereas in this
22 case, these guys are not direct purchasers, and moreover,
23 and I think decisively, that's the closest that anything
24 in this case comes to commercial speech.

25 QUESTION: And as long as we're writing

1 distinctions --

2 MR. TRIBE: Yes. I think --

3 QUESTION: -- how do I write this distinction?

4 MR. TRIBE: Well --

5 QUESTION: The FTC -- sorry, if you're not
6 finished.

7 MR. TRIBE: I'm sorry. I was only going to add
8 that Mr. Kasky, even though he has standing to do a great
9 deal --

10 QUESTION: Yes.

11 MR. TRIBE: -- does not have standing to sue on
12 behalf of the athletic directors, it turns out, because
13 the California courts in the Rosenbluth case in 2002 said
14 that this is a law where you're supposed to represent the
15 public, not sophisticated organizations, because they
16 might have their own interests, so to the closest this
17 case comes --

18 QUESTION: Is it supposed to be like the
19 Attorney General, Mr. Tribe --

20 QUESTION: But Mr. Tribe, as I understand it --

21 MR. TRIBE: I'm sorry.

22 QUESTION: This sets up a Private Attorney
23 General so this -- Mr. Kasky is representing the public,
24 but you've been talking about the great breadth of this
25 statute, and I understand all that, but where -- at just

1 the threshold, the cases were thrown out in the lower
2 courts because they said there's no circumstances, there's
3 nothing you can narrow this complaint down to, not one
4 piece of literature.

5 MR. TRIBE: Yes, it's --

6 QUESTION: Nothing, not one, and the -- the
7 problem with this case is that it comes to us at such a
8 preliminary stage. There's been nothing like a trial,
9 there's been no narrowing of anything, so am I right in
10 thinking that to prevail you would have to show that none
11 of these, that there's not one that would survive past a
12 motion to dismiss?

13 MR. TRIBE: No, Justice Ginsburg, I think that's
14 not right, because what the court of appeals said in this
15 case -- and its opinion I think merits reading. It's at
16 least as good as the dissents in the California Supreme
17 Court.

18 What it said was, not that we can't pick and
19 choose somewhere in this pile of scattered material, as it
20 described it, something that under a different scheme
21 might be permissible. What we hold is impermissible is
22 making the courts pawns in a public debate and having what
23 amounts to -- they didn't use the phrase, show trial, but
24 essentially they were saying a trial in which you, in
25 effect, put on trial such a large and massive question and

1 hopeless mix of fact and opinion as the impact on the
2 Third World of this large company.

3 Now --

4 QUESTION: What's -- what is your best reason
5 for saying this is a show trial? In other words, you want
6 a new category, and I had thought your best reason was,
7 and -- and I want to know whether you agree with me or
8 whether there's something better --

9 MR. TRIBE: Yes.

10 QUESTION: I thought your best reason was that
11 there is no, no need for any allegation and in fact no
12 allegation that anyone among the plaintiffs or among
13 the -- the class on behalf of which they sue, the public,
14 was injured in any demonstrable way. Is that the point?

15 MR. TRIBE: That --

16 QUESTION: Is that what the show trial thing --

17 MR. TRIBE: That's probably the single strongest
18 point, and let me connect it with a broader theme, because
19 in Discovery Network, when this Court talked about the
20 fact that commercial speech is a category that's relevant
21 when you're going after commercial harm, in a sense to
22 protect consumers from fraud of one kind or another, in
23 the reputation area it is again not speech alone you're
24 going after. You're trying to vindicate certain interests
25 in not being harmed. You have to have someone whose

1 reputation is harmed.

2 QUESTION: Suppose a California regulatory
3 agency signed its name as the plaintiff to this -- to this
4 complaint.

5 MR. TRIBE: Well, I think simply adding a name
6 wouldn't necessarily solve the problem. The Attorney
7 General of California put his arm around the Consumer's
8 Union in the Alta-Dena case, but in this case you need
9 a --

10 QUESTION: No, no, but -- but we have -- we have
11 some cases, like the Egg Commission case and so forth --

12 MR. TRIBE: Right.

13 QUESTION: -- where the FTC or the FDA --

14 MR. TRIBE: Right.

15 QUESTION: -- has I, think, a certain standing.
16 It doesn't have to show injury to itself.

17 MR. TRIBE: That's right, but it does have to
18 show, the statutes are written to require it to show that
19 there is an area of legitimate regulatory concern.
20 Consumers might be fooled into believing, by the Egg
21 Nutrition Council, that cholesterol is good for your
22 heart, and they're trying to protect them.

23 QUESTION: Well, you know what we're -- you know
24 what we're going to hear next, that the Californians are
25 very interested in this.

1 MR. TRIBE: Well, first of all, if they're very
2 interested they can do a number of things. They can pass
3 something like -- Congress passed the Dolphin Protection
4 Act saying, if you really care about dolphins, then
5 whenever a can of tuna is sold, it can't use the phrase,
6 dolphin-friendly, unless certain things are met.
7 California did this with ozone at one point and then it
8 repealed the ozone-friendly law.

9 But giving a company an idea of what it has to
10 disclose and what the issues are going to be is very
11 different from saying, well, here we are, we're sitting
12 here and waiting until somebody --

13 QUESTION: And again -- and again, your best
14 case for this is Bantam Books, or --

15 MR. TRIBE: Well, I -- no, I think the
16 defamation line of cases is even better, because at a
17 minimum they show that you have to have someone who's
18 harmed, and you have to have deliberate or reckless
19 falsehood. Imagine a law --

20 QUESTION: Why isn't -- why isn't it -- going
21 back to Justice Kennedy's question, why shouldn't it be
22 sufficient to say that when it is the State rather than
23 any citizen, self-selected, who brings this suit, we would
24 at least depend upon some State --

25 MR. TRIBE: Yes.

1 QUESTION: -- political responsibility --

2 MR. TRIBE: Yes.

3 QUESTION: -- and accountability as -- as our --
4 our safeguard, and we would let that go forward because we
5 don't think there's enough risk of improper chilling?

6 The distinction is, when anybody can walk in --

7 MR. TRIBE: Right.

8 QUESTION: -- there's no accountability. Why
9 isn't that the line to draw?

10 MR. TRIBE: Well, it seems to me, Justice
11 Souter, that's a line enough to reverse this decision, but
12 let me just imagine --

13 QUESTION: Why, when it wasn't raised below?
14 One of the problems is, if you were going to take out this
15 Private Attorney General, you would be saying this statute
16 is unconstitutional, pro tonto. That wasn't argued below.
17 It didn't surface 'til this Court.

18 MR. TRIBE: It was. It was, Justice Ginsburg.
19 On pages 12 to 14 of our reply brief we detailed the
20 sequence, and if you look back at the briefs in the
21 California Supreme Court the arguments, all of the First
22 Amendment arguments were made, but they didn't get to
23 first base in that court because it said, hey, misleading
24 commercial speech gets no protection.

25 QUESTION: Where was the notice --

1 MR. TRIBE: I was going to give an example --

2 QUESTION: Where was the notice to the
3 California Attorney General that the statute was being,
4 the constitutionality of that statute was being attacked
5 with regard to the Private Attorney General here?

6 MR. TRIBE: It was only as applied, Justice
7 Ginsburg. That is, it does not suggest -- these laws have
8 been on the books since the '30s, and we're not suggesting
9 that they have to be scrapped. It's the innovative --

10 QUESTION: I thought that -- that Justice
11 Souter's question to you was --

12 MR. TRIBE: Yes.

13 QUESTION: -- isn't what infects these laws,
14 that -- that you are allowing a champion --

15 MR. TRIBE: Yes.

16 QUESTION: -- who has no public accountability,
17 and it doesn't -- I don't see how that comes to be an
18 as-applied challenge.

19 MR. TRIBE: Well, Justice Ginsburg, it's an
20 as-applied challenge, because these laws, if applied only
21 in cases where harm is alleged and where a court says, to
22 solve the problem we're going to require that it be
23 proved, that is, it would be the California courts that
24 would have to redesign the system to fix it, wouldn't be
25 unconstitutional.

1 I wanted to get --

2 QUESTION: I thought that the question that was
3 put to you is, isn't this statute infirm in every instance
4 where you have a Private Attorney General?

5 MR. TRIBE: Who alleges no harm, and --

6 QUESTION: Well, that's what the statute says.

7 MR. TRIBE: Well, I think it has to be -- I -- I
8 think it probably is, but I think that the reason that
9 it's not cured, although I agree very much with the
10 position the Solicitor General takes that that's the
11 deepest disease, even if it's taken out, imagine a law
12 that said, if you utter a defamatory statement that is
13 knowingly false, we're going to impose a gag order. Even
14 if the Attorney General administered it, you'd need to
15 have a possible victim

16 I mean, if someone says bad things about William
17 Shakespeare, and the State of California decides that it
18 is going to have a general, floating power to correct
19 speech not connected with the regulatory responsibilities
20 of any agency like the FTC or the -- or the SEC, but a
21 free-floating power to correct speech, we think that would
22 be constitutionally infirm, but in this case, in any
23 event, it doesn't come close to commercial speech.

24 QUESTION: Is your position that, as I
25 understand it, that even if this action were brought by

1 a -- a public agency it would still be impermissible?

2 MR. TRIBE: In -- in this forum, where the
3 public agency didn't need to allege, was not administering
4 a regulatory program to protect people, I -- I think --

5 QUESTION: Would you say the same thing if, that
6 it would be also impermissible for a public agency to
7 investigate to determine whether or not the statements
8 were true or false?

9 MR. TRIBE: To have an investigation, no. I
10 think that the freedom of speech includes the freedom to
11 have public as well as private debate. That's what this
12 is about.

13 QUESTION: So that you -- you would agree a
14 public agency could investigate the charges here to
15 determine whether they are true or false. Could a -- in a
16 private action, could a private party engage in discovery
17 to find out whether they were true or false?

18 MR. TRIBE: Well, of course, in this case
19 discovery is the name of the game, it would become a
20 massive thing.

21 QUESTION: Yes.

22 MR. TRIBE: I think that if we are right that
23 this action dies aborning, if it's like the statute in
24 Cox v. Cohn itself, where it was simply an impermissible
25 thing, and where no trial would cure the problem, then you

1 don't get to that difficulty, but if it's a legitimate
2 trial, if the law were redesigned, very broad discovery
3 might be permissible.

4 I'm a little worried about reserving some time,
5 but I -- I don't want to leave you in mid-air --

6 QUESTION: You -- You'd better reserve now, or
7 you won't have any to reserve.

8 MR. TRIBE: I will do just that, Mr. Chief
9 Justice. Thank you.

10 QUESTION: Very well.

11 General Olson.

12 ORAL ARGUMENT OF THEODORE B. OLSON
13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE PETITIONERS

15 GENERAL OLSON: Mr. Chief Justice, and may it
16 please the Court:

17 California has transferred its governmental
18 authority to regulate marketplace communications to anyone
19 and everyone who possesses the price of the filing fee.
20 Unelected, unaccountable private enforcers, uninhibited by
21 established notions of concrete harm or public duty, have
22 the power to advance their own agendas or personal
23 ideological battles by launching complex, burdensome, and
24 expensive litigation. The in terrorem effect and
25 potential for abuse is difficult to overstate.

1 This case can and should, we submit, be
2 evaluated according to the means used to regulate speech
3 in California, not the content of that speech. The Court
4 and several of the Justices on this Court have explicitly
5 and repeatedly acknowledged that it is exceedingly
6 difficult, if not impossible, to draw bright lines that
7 segregate marketplace speech according to its content into
8 two separate, mutually exclusive hemispheres, commercial
9 and not commercial. These issues arise in an infinite
10 array of contexts. The speakers are imaginative and
11 creative, and rigid, permanent, constitutional
12 categorization is neither advisable nor necessary.

13 If the commercial-noncommercial dichotomy is
14 employed in this case, and in others, either alternative
15 has undesirable consequences. Valuable marketplace
16 speech -- and this Court has repeatedly stressed that
17 speech in the marketplace of commerce is valuable. It's
18 valuable to consumers, but either it becomes
19 noncommercial, making it difficult for Government to
20 regulate to protect the integrity of the marketplace, or
21 it then is characterized as commercial, which can open the
22 day -- open the way to regimes such as California's, where
23 anyone with a whim or a grievance and a filing fee can
24 become a Government-licensed censor.

25 QUESTION: General Olson, do you think that

1 Congress would be able to authorize a scheme of Private
2 Attorney General, for instance, to enforce SEC
3 regulations?

4 GENERAL OLSON: Yes, Justice O'Connor, with
5 respect to concrete harm in connection with specific
6 individuals. First place, Article III would require that,
7 that there actually be concrete harm, an individual
8 participating in a transaction. This Court has held with
9 respect to 10(b)(5) -- Rule 10(b)(5), for example, that
10 there must be a buyer or seller of security.

11 QUESTION: What will happen is, they'll find in
12 5 minutes somebody who bought some Nike shoes who feels
13 the same way, you know, so you'll just have this exact
14 suit with a different plaintiff, possibly, or maybe
15 Mr. Kasky once bought some, for all I know, and -- and so
16 that isn't really going to help, is it?

17 GENERAL OLSON: Yes, it is, Justice Breyer. It
18 will limit -- first of all it will limit the regulation of
19 marketplace speech to the traditional patterns and the
20 regimes that have existed --

21 QUESTION: Okay, so in your view, if Mr. Kasky
22 has bought some shoes and is prepared to say, you know, if
23 I hadn't believed their ad and hadn't been deceived, I
24 never would have bought them --

25 GENERAL OLSON: Yes.

1 QUESTION: -- we can go right ahead with this
2 suit?

3 GENERAL OLSON: If -- well, if -- there are
4 other problems with the California statute in terms of its
5 breadth and its vagueness and things of that nature, but
6 the principal problem that we're talking about here, which
7 avoids the problem of saying that everything is either
8 commercial or noncommercial, is that traditionally, for
9 hundreds of years, the -- the private individual who has
10 suffered that injury has been able to bring an action.

11 QUESTION: And I -- I accept that. I'm -- you
12 pointed to evils of both the other positions, but the
13 problem that I'm having with the third set of evils, which
14 I think Justice O'Connor expressed --

15 QUESTION: Yes.

16 QUESTION: -- is, imagine an ad -- it's really
17 an ad, and it says, our refrigerators are ozone-friendly.
18 The penguins love them, all right.

19 (Laughter.)

20 QUESTION: And now it turns out they have the
21 worst chemical in there anybody's ever heard of. It's
22 going to destroy the ozone layer. They're lying through
23 their teeth, all right.

24 Now, that ad, I take it either the FTC or a
25 private person could proceed against. I would think so.

1 GENERAL OLSON: Yes.

2 QUESTION: If the answer's yes, then we have the
3 problem, which I was going to ask Mr. Tribe, and I -- I
4 need thinking on this, how do you draw a line? How do you
5 draw a line between, this commercial is not a commercial,
6 it's a letter sent to the marketing directors -- I think
7 that's their best one -- and my penguin-friendly ozone
8 commercial? How do we draw that line legally, and you're
9 doing it a third way, but how do we stop the private AG,
10 Congress having the right to give the private AG the power
11 to go after my penguins?

12 GENERAL OLSON: Well, in the first place,
13 there -- there is the Article III requirement of actual,
14 concrete harm suffered by an individual. There are
15 hundreds of years of common law tradition with respect to
16 allowing an individual who is the -- who has received in
17 some way a material misrepresentation of fact, which your
18 question presupposes, that -- that causes justifiable
19 reliance in the marketplace and actual harm as a result of
20 that conduct.

21 Now, with respect to whether that individual,
22 who can then recover the damage actually suffered, can go
23 on and then seek some sort of institutional injunctive or
24 equitable relief, the courts over the years, over hundreds
25 of years have developed circumstances under which the

1 remedy in the injunctive suit, or in the equitable action,
2 has to be tailored to the actual harm suffered by the
3 individual.

4 QUESTION: General Olson, you're saying that
5 schemes other than the one California adopted would
6 probably make much more sense and be more valuable for
7 producing speech, but what -- what principle is it that
8 you rely on to say that California's scheme is bad, just
9 because there might be others that would be much more
10 favorable to the market of speech?

11 GENERAL OLSON: Our principle, Chief Justice
12 Rehnquist, is that the governmental power to regulate
13 speech in the marketplace, which is constrained by the
14 First Amendment, has been transferred to private citizens
15 without the normal constraints that -- that --

16 QUESTION: Well, what is your best authority so
17 far as a case from our Court for that proposition?

18 GENERAL OLSON: Well, one of the --

19 QUESTION: Can you answer the question?

20 GENERAL OLSON: The -- well, I think that I have
21 to start with the Gertz case, in which the -- the Supreme
22 Court said in the context of a libel suit there is a
23 governmental interest in protecting individuals from
24 actual injury suffered, but the Court went on in Gertz to
25 say, but that's the limit of the --

1 QUESTION: But when you can pair one share of
2 stock, go into court and say, I -- I want a class action,
3 I'm going to pursue this securities suit, it's -- it's --
4 it goes back to the question Justice Breyer asked. I buy
5 one pair of Nike shoes, I come and say, okay, I'm a
6 customer and I want to sue on behalf of all customers
7 similarly situated. It seems to me that your solution, if
8 it allows room for that, doesn't really get to the
9 problem

10 GENERAL OLSON: Well, we believe it does,
11 Justice Ginsburg. Those kind of suits, persons who bought
12 one share who were misled in the marketplace, or one pair
13 of shoes who had received misleading information, has been
14 actually suffered, eliminates the idea that governmental
15 power is being transferred to people in gross, that the
16 license to be Government, to regulate speech, is just
17 turned loose to everyone. These are traditional notions
18 of who gets into court and under what circumstances.
19 Act --

20 QUESTION: General Olson, let -- let me just ask
21 you the procedural question, because I found that your
22 argument was very well laid out, but I did not see that
23 that position was taken, and my major concern was that the
24 California official who should speak to this question is
25 not before us, wasn't in this case as far as I know, the

1 Attorney General of California.

2 GENERAL OLSON: Let me answer it this way. This
3 Court has said in Yee versus Escondido that if the legal
4 argument is embraced within the question actually properly
5 raised, the litigants can make that argument. It also
6 discussed that same issue in the Lebron case. This --

7 QUESTION: Aren't you notified if there's a --
8 if there's a question of the constitutionality of a
9 statute passed by Congress so that you will have the
10 opportunity to come in and tell the Court what your view
11 is?

12 GENERAL OLSON: That is a requirement, and it's
13 addressed in the appendix in -- in the reply brief and in
14 the appendix to the reply brief filed on behalf of -- of
15 Nike, but it's also important to recognize that this
16 specific point is raised in the -- in the cert petition
17 itself. On pages 27 and 28 Nike said, made the point,
18 other features of the California liability scheme --
19 scheme aggravate the chilling effect, and then goes on to
20 elaborate on that point by saying, it invests every single
21 California resident with the power of a Private Attorney
22 General, so --

23 QUESTION: But that doesn't show that it was
24 raised and decided below.

25 GENERAL OLSON: That's -- that's correct,

1 Justice Ginsburg, but -- and -- and Mr. Tribe says that it
2 was raised to a certain extent below. I can't answer that
3 question. I can say it was embraced within the question
4 presented, it was raised in the cert petition, it is a --
5 it is an antecedent question for deciding the First
6 Amendment issue in this case, and it is -- it is an issue
7 that California courts have been dealing with for many
8 years.

9 For many, many years the California courts have
10 talked about and considered whether this any person
11 provision is proper. Let me -- I -- I've --

12 QUESTION: Thank you, General Olson.

13 GENERAL OLSON: Thank you.

14 QUESTION: Mr. Hoerber, we'll hear from you.

15 ORAL ARGUMENT OF PAUL R. HOEBER

16 ON BEHALF OF THE RESPONDENT

17 MR. HOEBER: Thank you, Mr. Chief Justice, may
18 it please the Court:

19 I'm going to start with the jurisdictional
20 issues, and the first point, and Mr. Kasky never bought
21 any Nikes. He never bought any. I suppose now he never
22 will. He didn't buy any Nikes, he had no standing under
23 Article III. As the plaintiff in this case there was no
24 case or controversy. If it had been brought in Federal
25 court it would have been dismissed.

1 Now, in these circumstances this Court says --
2 it said in ASARCO the court can still take jurisdiction,
3 but in ASARCO, the State court judgment there established
4 liability and left only questions of what the type of
5 remedy might be.

6 Here, the State court decision by the California
7 Supreme Court effectively overruled Nike's demurrer and
8 remanded the case for litigation and trial. That is not
9 close to ASARCO. Nike would have to admit that the
10 statements were false to get anywhere near the judgment in
11 ASARCO, so the first point on ASARCO is, it doesn't even
12 apply.

13 The Court would have to extend ASARCO to even
14 consider the next question, which would be, if the Court
15 did that, whether Nike, which, of course has the burden of
16 proof, has established that because of this decision it
17 will suffer or has suffered an Article III injury.

18 QUESTION: ASARCO, where it's claimed is, it's
19 under the fourth exception listed in ASARCO.

20 MR. HOEBER: No, that's -- excuse me, Justice
21 Breyer. That's -- that's Cox.

22 QUESTION: Oh, Cox. It's under the fourth Cox,
23 I'm sorry.

24 MR. HOEBER: Which I will get to in just --

25 QUESTION: Sorry. Sorry.

1 MR. HOEBER: But Nike has the burden under
2 ASARCO to show that it -- if the Court gets to it, that it
3 has Article III standing, and I'll direct the Court's
4 attention to the reply brief, page 6, and the only -- only
5 factor that Nike points to to show that it has Article III
6 standing is, and I quote, the certain injury Nike
7 confronts from having to defend its speech in this
8 litigation, and I will say that I do not believe that the
9 process of litigation counts, or qualifies, or is
10 sufficient to establish Article III standing. If it
11 were --

12 QUESTION: You can't think of any civil scheme
13 which is, on its face, so burdensome that it chills
14 speech? You can't think of anything?

15 MR. HOEBER: The -- the scheme -- the scheme
16 would be, Your Honor, perhaps -- no doubt, but the process
17 of litigation. What I'm thinking of is in ASARCO, if the
18 process of litigation itself were enough to establish
19 Article III standing, then the lessees would have had
20 standing from the moment they put it in the case --

21 QUESTION: Well, but here the argument is, the
22 process of litigation is what causes the substantive
23 injury --

24 MR. HOEBER: Well, I think that -- that --

25 QUESTION: -- to a First Amendment right, which

1 is clearly something you have Article III standing to
2 assert.

3 MR. HOEBER: The -- but -- but going through the
4 process of litigation, if it were a criminal case, the
5 arrest and the prosecution and the ultimate, possible
6 conviction, but simply going through the litigation does
7 not distinguish --

8 QUESTION: Well, that's the question on the
9 merits. They say it does.

10 MR. HOEBER: The question on the merits being
11 the chilling effect of the California scheme --

12 QUESTION: Imagine it was The New York Times --

13 MR. HOEBER: -- not the -- not the litigation
14 its -- not the process of litigation itself.

15 QUESTION: Well, suppose it was, the defendant
16 was the New York Times. Suppose it was a newspaper, I
17 mean, you know, and somebody's trying to stop them from
18 printing an article, couldn't they get here under --
19 under similar circumstances?

20 MR. HOEBER: Under ASARCO.

21 QUESTION: Yes, I mean --

22 MR. HOEBER: Under --

23 QUESTION: I don't know if literally it's
24 ASARCO, but what we have is a -- is a plausible claim that
25 speech of an important political nature is being stopped.

1 Now, that's their claim. Now, I -- I would have thought
2 there's a way to get the case here, and -- and why -- I
3 mean --

4 MR. HOEBER: Well -- well, what I'm saying is,
5 that may -- that may well be true, and it may well be true
6 that -- that a scheme can -- can stifle speech and
7 establish harm, but the -- the simple process of
8 litigation, responding to discovery and going through the
9 litigation is not what is stifling the speech. It's --

10 QUESTION: Well, that's one of the issues in the
11 case.

12 MR. HOEBER: Well, all right, then I'll move to
13 my second jurisdictional point, because I want to make
14 sure it comes out, and this is under Cox, and that is,
15 there is no final judgment because this is a -- in a
16 traditional sense because this is the overruling of a
17 demurrer, but the fourth exception set forth in Cox
18 provides a way that this Court can hear a case in this
19 circumstance, but one of the conditions, necessary
20 conditions is that were this Court to hear the case and
21 reverse, that would put an end to the -- to the -- to the
22 litigation, at least to the relevant cause of action.

23 Here, because it's a -- it's a demurrer, and the
24 question is the sufficiency of the complaint against the
25 demurrer, Nike has to show that plaintiff could not amend

1 the complaint in response to, or respondent could not
2 amend the complaint in response to the -- whatever defect
3 might be --

4 QUESTION: Well --

5 QUESTION: I don't see that --

6 QUESTION: -- that's what the intermediate court
7 of appeals said in California. I would think that's
8 pretty good authority.

9 MR. HOEBER: What the court of appeals said in
10 California was that we could not amend the complaint, or
11 the facts in the -- in the complaint could not be amended
12 to allege noncommercial speech, noncommercial speech, and
13 that's true.

14 We don't claim that we would allege
15 noncommercial speech. For one thing, the statute only
16 covers commercial speech, and it's a red herring in that
17 sense, where under us -- that we would lose the course of
18 action and we couldn't proceed, so yes, the court of
19 appeal did finish by saying, we don't see any reasonable
20 possibility that the complaint can be amended to allege
21 noncommercial speech, so that --

22 QUESTION: Okay, but let's -- let's assume it
23 could be amended in some way. The demurrer is to the
24 complaint as it is, and if we accept their position, then
25 you cannot go forward with the complaint as it is. You

1 would have to modify your lawsuit by amendment or bring a
2 new one, and why isn't that sufficient for -- for the
3 fourth Cox exception?

4 MR. HOEBER: Well, it would -- the complaint as
5 it is would not be sufficient, but what Cox says is, for
6 the -- for the fourth exception, that the court's ruling
7 of reversal must be preclusive of further litigation on
8 the cause of action, so we gave the example --

9 QUESTION: Well, the cause of action as pleaded.
10 I mean, not a cause of action that you might have pleaded,
11 or a different one that you might bring.

12 MR. HOEBER: Well, it would be the cause -- the
13 cause of action would remain as pleaded. If the court --
14 if the court were to -- to say -- and we gave the example
15 of negligence -- the court were to say strict liability
16 is -- is unconstitutional, you must have a -- something
17 more than strict liability, you must have negligence, the
18 cause of action would remain the same as --

19 QUESTION: Well, I think we're --

20 MR. HOEBER: -- as in libel cases --

21 QUESTION: I think we're playing with words.
22 You simply could not go forward on the cause of action as
23 you stated that cause of action in your pleadings. You
24 would have to come forward with a cause of action which is
25 in some respect different in order --

1 MR. HOEBER: It would be more burdensome.

2 QUESTION: -- in order to meet the
3 constitutional objection, and if that is the case, why
4 isn't it sufficient under Cox IV that you could not
5 proceed in the -- in the suit as you have pleaded it and
6 brought it?

7 MR. HOEBER: Well, we're certainly not going to
8 argue about words, and what -- that is certainly correct,
9 that if -- as pleaded, and -- and we pleaded under the
10 statute it's a -- it's strict liability, and if the Court
11 were to say, you must have negligence, we would amend the
12 complaint to allege negligence, so it is certainly correct
13 that as pleaded we would not be proceeding on an
14 as-pleaded. We would amend the complaint.

15 What I -- what I'm saying is that as I
16 understand the Cox exception, the point of it is that the
17 Court is saying that we will only take a case under
18 Cox IV, when we know that if we reverse, the case is over
19 on that -- on that cause of action, not the technicality
20 of the pleading so much, but the reality of it, and if we
21 can amend the complain to allege the additional element,
22 it's really the same -- it is the same cause of action.
23 It's just more burdensome.

24 QUESTION: What you're saying is, is that Cox
25 category has real teeth in it, and that you just can't --

1 you have to show that it's really going to be over.

2 MR. HOEBER: Yes. My -- yes, I --

3 QUESTION: But one aspect of it is that the
4 demurrer was granted without leave to repeat, as I
5 understand it, was dismissed with prejudice.

6 MR. HOEBER: Yes. In -- in San Francisco
7 Superior Court, the trial court, the judge granted the
8 demurrer without leave to amend. Under California law --
9 and I should say, California law is not the Federal Rules
10 of Civil Procedure.

11 California law is the field code, the updated
12 field code, but it goes back to 1872, in fact to 1850, so
13 under California law, when the -- when the trial judge
14 granted the demurrer without leave to amend, we were
15 entitled to, and we did appeal without seeking leave to
16 amend, and -- and under California law, and I -- I'll say
17 this in response to the statement on page 4 of the reply
18 brief that he makes no -- excuse me, that his abandonment
19 of the claimed right to amend, we did not abandon.
20 Respondent did not abandon any claimed right to amend.

21 Under California law, we are entitled to amend.
22 We didn't abandon it. I'm not sure how -- how we could
23 abandon it. We felt we were right on the law, and we
24 appealed from the -- from the superior court to the court
25 of appeal. The court of appeal ruled against us and said,

1 as I noted earlier, we don't see a possibility of
2 amended -- amending it to noncommercial speech, which we
3 agree with.

4 We appealed to the California Supreme Court
5 because we felt we were right on the law, and the
6 California Supreme Court agreed with us. If -- if the
7 California Supreme Court had said, you're wrong on the
8 law, you've got to prove negligence, maybe the California
9 Supreme Court would have done that. We would have then
10 amended the complaint and proved negligence.

11 QUESTION: You're not going to be able to amend
12 the complaint in respect to at least one argument, which I
13 think is a substantial argument, and that's the argument
14 that this particular statement, whether made to the
15 directors of the marketing, or whoever made it, is a
16 statement that plays a role in a public debate about what
17 kind of society we wish to live in, and it's looking
18 towards action of a legislative sort, an administrative
19 sort, or possibly an interdependent individual sort, like
20 a boycott, and that being a statement that plays that kind
21 of role in a public debate, it is entitled to the highest
22 protection regardless of the forum it appeared in, so
23 California cannot proceed.

24 Now, in respect to that kind of an argument,
25 what's your reply?

1 MR. HOEBER: My -- my reply is, number 1, if --
2 if this Court were to say the case is barred, of course we
3 couldn't amend. We could not amend, but -- so -- I'm
4 not -- I don't mean --

5 QUESTION: I'm really trying to get you to the
6 merits.

7 MR. HOEBER: Yes, I -- I'm going to -- I'm about
8 to move to the merits. I'm -- so yes, there are
9 certain -- certainly circumstances we could not amend.

10 Now, on the merits, and in direct response to --
11 to your question, that's not this complaint. That is not
12 this complaint. Maybe there's a lot of statements in
13 Nike's briefs that suggest that's this case, and that's
14 this complaint, but the record before this Court is in
15 that complaint, and it's nowhere else.

16 QUESTION: No, well, they say -- they're saying
17 don't look at -- look at the statement. It's the
18 statement we're talking about, and look at all their
19 examples, and the statement that Nike gave is
20 characterized, according to them, as I characterized it,
21 so they say, we don't care what it says in the complaint.
22 The complaint apparently would like us, something bad to
23 happen to us as a result of having made this statement.
24 That's enough for us. The First Amendment protects us
25 from that bad thing.

1 MR. HOEBER: Yes, and -- and --

2 QUESTION: And why doesn't it?

3 MR. HOEBER: And it doesn't because the
4 statements alleged in the complaint are specific, factual
5 representations that say, we make our products in
6 compliance with the laws of -- of the country of
7 manufacture with respect to wages and overtime, with
8 respect to health and safety, with respect to
9 environmental standards, we pay our workers twice the
10 minimum wage -- they are specific factual statements of
11 that kind. They are not statements that go beyond that,
12 that talk about globalization --

13 QUESTION: How is your client hurt by that?

14 MR. HOEBER: My client is here as -- as a
15 Private Attorney General under the California provisions
16 authorizing --

17 QUESTION: So he's -- so he's not hurt by it --

18 MR. HOEBER: So he is not hurt by it. He has,
19 as I said, no Article III standing. He -- he is not hurt
20 by it. He is a Private Attorney General, and on the
21 Private Attorney General point, I will -- I will say this,
22 on -- we said in our brief that it was not raised.

23 QUESTION: If he's not hurt by that, how is
24 anybody in California hurt by that?

25 MR. HOEBER: Everybody in California will be

1 hurt by it, or is hurt by it in exactly the same way that,
2 under this complaint as it would be if it had been brought
3 by the California Attorney General or by the Federal Trade
4 Commission.

5 The California statute, apart from the Private
6 Attorney General provision, which is admittedly unusual,
7 maybe unique, but apart from the Private Attorney General
8 provision, the California statute is essentially the same
9 as the Federal Trade Commission Act. Section 5 of the
10 Federal Trade Commission Act and the California statute
11 have the same standard of liability, which is likely to
12 mislead, or likely to deceive.

13 The Solicitor General's brief sets out the --
14 the standards on the Federal section 5. They're
15 essentially the same, a claim that is likely to mislead
16 people, that's material, and so under section 5 under the
17 California statute it is not required that -- that the
18 plaintiff come in and prove actual deception, actual
19 injury, actual harm, so it's -- it's precisely the same
20 under either scheme.

21 QUESTION: May I -- may I interrupt to go back
22 to your article, your final judgment argument for just a
23 moment with respect to this? Supposing that we should
24 hold that in a case like this, where you don't have
25 Article III standing, that the case may not go forward

1 unless the plaintiff can meet the New York Times standard,
2 prove actual malice and gross negligence and all the rest,
3 but it could theoretically go forward if those allegations
4 were made.

5 My question is, is it your understanding, as a
6 matter of California law and as a matter of the history of
7 this case, that you would have the right to -- to file an
8 amendment to your complaint making those allegations?

9 MR. HOEBER: Absolutely. Absolutely.

10 QUESTION: Well, then, if that's true, is it
11 clear the case is not final, the judgment of law is not
12 final?

13 MR. HOEBER: Well, on the -- on the same grounds
14 I said before, we -- if the court were to add an --

15 QUESTION: It would be only if we were to hold
16 that no matter what you allege, New York Times or anything
17 else, these statements are constitutionally immune from
18 criticism in a proceeding of this kind. Only in that case
19 would the case really be final, if we held that.

20 MR. HOEBER: Well, the case would certainly be
21 final if the Court held that.

22 QUESTION: Yes.

23 MR. HOEBER: We would not be able to amend the
24 case.

25 QUESTION: Yes.

1 MR. HOEBER: It would be over.

2 On the Private Attorney General, because it is
3 an unusual provision, I will only say this on -- on the
4 question whether it was raised below. That's an easy --
5 we said in our brief it was not raised below. That is an
6 easy matter to settle. Nike filed the brief. They filed
7 the brief in the California Supreme Court. It's their --

8 QUESTION: Well, what -- what if it weren't
9 raised below. I mean, if a basic First Amendment
10 challenge to the statute is raised below, I mean, if you
11 lose in the Supreme Court of California you're certainly
12 not just going to repeat exactly the same arguments.
13 You're going to think up some new ones.

14 MR. HOEBER: Well --

15 (Laughter.)

16 MR. HOEBER: I will only say as a matter of fact
17 it was not raised below. The California Supreme Court did
18 not address it. It's not even in the cert petition. You
19 can look at pages 8, 9, and 19 to 23, and they've got a
20 different argument. It's not there. That's the fact.

21 The upshot of not raising it below, I'm assuming
22 the Court doesn't address arguments that were not
23 raised below.

24 QUESTION: Well, the Escondido case says there's
25 some latitude there.

1 MR. HOEBER: And I -- and I -- I'm aware there's
2 latitude, and there's -- there's latitude as to what's an
3 argument and what's a claim, but this is a very specific
4 argument that the Private Attorney General provision is
5 unconstitutional.

6 QUESTION: Is it -- is it correct that in the
7 court below they did raise the point that, in fact, there
8 was no harm here, and one of the defects of the procedure
9 was that no one, either suing, or no one of the class on
10 behalf of whom suit was brought had or was alleged to have
11 had suffered any injury? That was in their argument,
12 wasn't it?

13 MR. HOEBER: Not that I recall. I don't recall
14 that argument. The --

15 QUESTION: If it was, would that be enough?

16 MR. HOEBER: Well, it -- it certainly would not
17 raise to my mind an attack on the Private Attorney General
18 provision, but I mean, the Private Attorney General
19 provision is a well-known and well -- and well-understood
20 provision that stands out, and to -- to attack it, I think
21 you have to mention it.

22 QUESTION: Well, I mean, if -- the -- the
23 argument is not merely that there is something magically
24 wrong with a Private Attorney General. The argument is
25 that what's wrong with a Private Attorney General is that

1 without public accountability, the Attorney General can
2 sue without, in effect, showing any harm, so whether you
3 use the term or not, that's the guts of the argument, and
4 if they raise the guts below, isn't that enough to -- to
5 get them into court?

6 MR. HOEBER: If they raised the guts below, it
7 would be enough.

8 QUESTION: Yes.

9 MR. HOEBER: I -- I guess I would say they
10 didn't raise the guts below.

11 QUESTION: Okay.

12 MR. HOEBER: But if they did, yes, I --

13 QUESTION: I would think out in California if a
14 litigant is challenging a statute as unconstitutional in
15 every instance, that you cannot have such an institution
16 of a Private Attorney General, doesn't the Attorney
17 General weigh in on those cases?

18 MR. HOEBER: Yes. The Attorney -- the Attorney
19 General in California under this statute, and it's not
20 just for the Private Attorney General, but under the --
21 the false advertising and -- and unfair competition
22 statute, any time a -- a case gets on appeal the Attorney
23 General gets served with the briefs, so when we appealed
24 in the first instance we served the Attorney General with
25 our briefs, and we -- in the court of appeal and again in

1 the California Supreme Court, and the Attorney General
2 came in and filed an amicus brief in the California
3 Supreme Court on our behalf, which of course only related
4 to the merits, the commercial speech issue, which was the
5 issue we were litigating.

6 QUESTION: Not on the issue of whether you could
7 have --

8 MR. HOEBER: No.

9 QUESTION: -- this kind of animal.

10 MR. HOEBER: No. No. No.

11 I want to draw the Court's attention to -- to
12 footnote 3 in the reply brief. I think this may clarify
13 some matters, and -- and in particular the phrase in -- in
14 footnote 3 that says, public agencies.

15 QUESTION: What page is that on? .

16 MR. HOEBER: I'm sorry, it's page 3, footnote 3,
17 and the reference to public agencies.

18 The argument that -- that the Private Attorney
19 General provision is unconstitutional because we don't
20 have any injury, and allege no injury, and it's -- and
21 it's unconstitutional, the result of that argument is that
22 respondent is an improper plaintiff, is just -- doesn't --
23 doesn't meet constitutional requirements as an improper
24 plaintiff.

25 If the Court were to hold that, then there are

1 no further issues for this Court, and that is why I
2 direct -- I focus on footnote 3, because in footnote 3, as
3 I -- as I read it, Nike is saying that even if the Court
4 holds that the Private Attorney General provision is
5 unconstitutional because the plaintiff has no injury,
6 nevertheless the Court should go on because there will be
7 future lawsuits filed by public agencies, and the Court
8 should go on to impose a scienter requirement deliberate
9 or reckless falsehood.

10 And I want to say that those public agencies,
11 which is another word for law enforcement, which would be
12 California Attorney General, the district attorneys, and
13 not only California, other States and the FTC, they are
14 not before the Court. Those parties are not before the
15 Court. I don't think we can represent those parties.
16 If -- if respondent is an improper plaintiff, there aren't
17 any further issues, and we can't --

18 QUESTION: Can I --

19 QUESTION: Well, you try to have it both ways.
20 You say, well I'm here because I'm a Private Attorney
21 General, but I -- I can't really try this case as well as
22 an Attorney General could.

23 MR. HOEBER: Well, no -- no --

24 QUESTION: That seems to me quite inconsistent.

25 MR. HOEBER: Well, I don't want to say that,

1 Your Honor. I want to say that -- that if we turn to the
2 merits of this case and -- and get away from the Private
3 Attorney General, if the Private Attorney General is
4 constitutional, then respondent is in the same shoes as
5 the Federal Trade Commission or the California Attorney
6 General, and that as far as the merits, go there is no
7 difference.

8 I said earlier that the California statute,
9 statutory scheme is the same as section 5.

10 QUESTION: Well, I accept that. I want to get
11 you just back once more if I can, and you may have nothing
12 to add, but I -- suppose we have to get to what I find in
13 this case personally the hardest question, I think that
14 the Federal Trade Commission certainly has the right to
15 regulate unfair, deceptive advertising, particularly on
16 matters of -- of, that you're trying to sell the product,
17 including those having to do with, say, the environment.

18 I also think that the First Amendment is
19 designed to protect all participants in a public debate,
20 and public debates, contrary, in my mind, to what you said
21 before, are made up of factual statements, primarily, so
22 once you tie a party's hands behind his back in respect to
23 facts, you've silenced him

24 Now, if all parties should participate equally
25 under the First Amendment, and also you should be able to

1 have regulation by the FTC of deceptive advertising, how
2 do I draw that line?

3 MR. HOEBER: Well, in this case, the reason I
4 say -- and I'm not trying to carve out facts as different
5 from, necessarily different from anything else. The facts
6 here were representations about the conditions under which
7 the product was made.

8 QUESTION: I know, and I think --

9 MR. HOEBER: All right. Now, those --

10 QUESTION: Now, but that's not going to help me.

11 MR. HOEBER: I'm sorry.

12 QUESTION: What I'm really looking for is help
13 in writing a hypothetical opinion. I have to write a
14 standard, or a rule, or a statement, and I know that
15 30 briefs here, which are excellent, have tried to get at
16 that, but I'm still in my mind uncertain about, say, your
17 view or the others on what that sentence should say,
18 trying to distinguish the ones from the others.

19 MR. HOEBER: Well, this case, and I -- and I'll
20 start with a focus here, the -- the debate in this case
21 that's in the complaint, and the only debate that's in the
22 complaint, is the debate over what, in fact, was going on
23 in the shoe factories, what in fact, were the conditions.
24 That was the debate.

25 Now, that debate is not the same as a public

1 debate about a larger public issue. It is a debate about
2 this company's actual practices.

3 QUESTION: But is -- is it different for First
4 Amendment purposes?

5 MR. HOEBER: Well, I think -- I think it has to
6 be, Your Honor, because the -- the company is making
7 representations to consumers about its own practices for
8 the purpose of convincing those consumers that they should
9 buy the company's products, so it is commercial speech in
10 that sense.

11 QUESTION: Whereas if it --

12 MR. HOEBER: It is not -- it is not a --

13 QUESTION: Whereas if it were about
14 globalization and what is happening in these countries it
15 would be different for First Amendment purposes?

16 MR. HOEBER: Yes. It would not be about the
17 company's -- this -- these statements are about the
18 company's products, the conditions under which the
19 products are made.

20 QUESTION: What difference would that make?
21 I -- I really haven't been clear on what difference it
22 makes whether it's commercial or noncommercial. So long
23 as it's false, and so long as it misleads somebody --

24 MR. HOEBER: Well, the Court has said that if it
25 is --

1 QUESTION: Yes.

2 MR. HOEBER: -- that if it is commercial speech
3 and it's false or misleading, it's not protected by the
4 First Amendment. I -- I --

5 QUESTION: Yes.

6 MR. HOEBER: It's also true that false factual
7 statements have no constitutional --

8 QUESTION: No, but I mean, even if it's not
9 commercial speech, if somebody misleads me, to my
10 detriment, with a false statement, I wouldn't have a cause
11 of action?

12 MR. HOEBER: Yes, you would have a cause of
13 action. You would certainly have a cause of action,
14 and -- and if I sold you a watch and told you it was made
15 in the United States and you relied on that and bought it
16 from me and I lied, or -- or even if I innocently told you
17 that, you could rescind the transaction.

18 QUESTION: Is -- is the only way I can rely to
19 my detriment is if -- if it is commercial speech? I mean,
20 it seems to me if I rely on a -- on a statement that --
21 that the person expects me to rely on, and I do so, and it
22 harms me, I have a cause of action. I -- does it really
23 matter --

24 MR. HOEBER: I -- I --

25 QUESTION: -- whether it's commercial or

1 noncommercial speech?

2 MR. HOEBER: I suspect it does not, for a -- for
3 a cause of action alleging reliance to my detriment and --

4 QUESTION: Can you think of any case that this
5 Court has decided in which the outcome has depended on
6 whether or not the speech was commercial, other than the
7 case the California Supreme Court decided?

8 MR. HOEBER: There -- there is a paucity of
9 authority from this Court that was --

10 QUESTION: I wonder if there's any at all.

11 (Laughter.)

12 MR. HOEBER: -- directly on point.

13 QUESTION: Yes.

14 MR. HOEBER: No.

15 The case that -- that was most important, and
16 this maybe gets back to Justice Breyer's point, for our
17 purposes would be the Egg Commission case -- the Egg
18 Commission case, the National Commission on Egg Nutrition,
19 because there was a product and there were attacks on the
20 product saying it caused -- that the cholesterol was bad,
21 and this is 25 years ago, and it was new, and -- and the
22 Federal Trade -- and the egg industry fought back and said
23 no, eggs -- eggs are helpful in nutrition, and -- and they
24 don't harm, so that was a case where you had a dispute, or
25 a debate about the product.

1 QUESTION: Yes, but where I am really is, I -- I
2 think it's possible to look at the commercial speech cases
3 as creating a doctrine with an exception, and it's the
4 unfair advertising that falls outside the doctrine, so all
5 we know is, we're back to square 1 as far as the
6 commercial speech doctrine is concerned, so let's face it
7 as if there were no such doctrine and try to figure out
8 how under the First Amendment we get proper standards.

9 MR. HOEBER: Well --

10 QUESTION: And that -- and that's what I'm
11 trying to figure out.

12 MR. HOEBER: Well, I -- yes. If -- if the Court
13 wants to do that in this case, on this record --

14 QUESTION: I mean, I don't know if we want to do
15 it or not do it. I'm trying to figure out what -- how to
16 go about it if I ended up thinking we should go about it.

17 (Laughter.)

18 MR. HOEBER: Then -- then my suggestion is that
19 this case alleges specific representations about a -- a
20 company's products, namely the conditions under which they
21 were made. Consumers rely on those representations. The
22 Solicitor General agrees with that. They rely on those
23 representations, and they rely on them in making decisions
24 as to whether or not to buy the company's products.

25 When companies make representations about their

1 products with the purpose of consumers relying on those
2 representations, and consumers do rely on those
3 representations, it violates section 5 of the Federal
4 Trade Commission Act, it violates the California statute,
5 and it ought to be subject to regulation.

6 QUESTION: Well, just becomes something
7 violates -- you're suggesting that if it -- if it's
8 contrary to section 5 of the Federal Trade Commission Act,
9 surely it must be constitutional, but I'm not sure -- I
10 don't know that we've ever said that everything in the
11 Federal Trade Commission Act is constitutional.

12 MR. HOEBER: No, I'm sure the Court has not said
13 that, and I -- and I'm -- and I --

14 QUESTION: Let's --

15 QUESTION: Go on.

16 QUESTION: Let's assume a -- a law that --
17 that -- I -- I guess that -- that there were, that -- that
18 requires advertising on radio or television to be
19 supported, that you -- you cannot make the claim unless
20 the claim is supported, all right, and the burden is on
21 you to have the support before you can even make it, and
22 it's a violation, even -- even if it happens to be true,
23 if -- if you have not done the studies that show that this
24 little pill does this thing or -- or another, you cannot
25 make the statement.

1 Now, I suppose we would allow that in -- in
2 advertising, wouldn't we? But would we allow such a --
3 such a precondition to -- to speech in -- in a
4 noncommercial area?

5 MR. HOEBER: I'm sure -- I suspect not.

6 QUESTION: So there is a difference between what
7 we're willing to do with commercial speech and
8 noncommercial speech, but why -- why wouldn't we limit it,
9 limit the term commercial speech in that context to
10 advertising, to really -- and -- and some of our cases
11 speak that way. It has to be the context of the offering
12 of a -- of a transaction, the offering of a deal.

13 So that if you have some general, you know,
14 advertising on television, we're a -- we're a -- an
15 environmentally concerned company, it doesn't fall within
16 commercial speech. It's only if in connection -- you
17 know, on the -- on the label it says, buy this because, or
18 you know, it's a pitch to sell the product.

19 Isn't that a line that it's feasible to draw,
20 and why isn't that a sensible line?

21 MR. HOEBER: Well, it may be feasible to draw.
22 I -- I imagine it would be difficult to draw, and I think
23 that's why the Federal Trade Commission says advertising,
24 product labels, other promotions and marketing material,
25 because it in many instances is not easy to draw --

1 QUESTION: Well, the California Supreme Court
2 defined commercial speech as speech when a person is
3 engaged in commerce. Just generally, is that their basis?

4 MR. HOEBER: Oh, I think the California Supreme
5 Court was trying to spell out what it -- what it --

6 QUESTION: Do you defend the California Supreme
7 Court's --

8 MR. HOEBER: Well --

9 QUESTION: -- definition?

10 MR. HOEBER: We don't need to go as far as the
11 California Supreme Court may have gone, in particular with
12 its definition of product references, because I think the
13 California Supreme Court was concerned about so-called
14 image advertising and the possible ways companies promote
15 themselves apart from this particular product.

16 QUESTION: Well, if it -- if this case -- if we
17 reach the merits, and if we have to address it, we're
18 going to have to know what commercial speech is, I
19 suppose.

20 MR. HOEBER: Yes.

21 QUESTION: And we're going to have to look at
22 California's definition.

23 MR. HOEBER: Yes.

24 QUESTION: And I just wondered if you supported
25 that.

1 MR. HOEBER: Well, we support it, but we don't
2 have to go as far, because in this -- because we have
3 representations about the product, the -- the
4 circumstances under which the product was made.

5 We certainly agree that --

6 QUESTION: None of this speech was advertising
7 in the true sense of that term, was it?

8 MR. HOEBER: Well, if the true sense means
9 advertising format, no, these were not in advertising
10 format, but for example, the -- the -- one of the exhibits
11 is the -- is a primer, a 30-page primer, which looks for
12 all the world like the kind of promotional brochures and
13 marketing material that's handed out by lots of companies.

14 Now, it's not an advertisement on television,
15 and -- and that line may be feasible to draw, or it may --
16 may have fuzzy edges, but it's going to leave out a lot of
17 promotions and a lot of communications that consumers rely
18 on.

19 QUESTION: Yes. It's not a perfect world.

20 MR. HOEBER: No. No.

21 (Laughter.)

22 QUESTION: But it's worse -- it's worse,
23 actually, because I think your case, the truth of the
24 matter is, I think it's both. You know, it's both.
25 They're both trying to sell their product and they're

1 trying to make a statement that's relevant to a public
2 debate.

3 MR. HOEBER: Maybe the --

4 QUESTION: And so what do we do if we're drawing
5 this standard, and there's a wide range of things that
6 quite honestly fall into both?

7 MR. HOEBER: Well, my -- my position is that
8 it's -- consumer protection is --

9 QUESTION: Trumps the First Amendment?

10 MR. HOEBER: Not that it trumps the First
11 Amendment --

12 QUESTION: Yes.

13 MR. HOEBER: -- but -- but the hypothetical is,
14 it's both.

15 QUESTION: Yes, that's right.

16 MR. HOEBER: And -- and if it were just the --
17 if it was -- if it was -- companies -- the Court has said
18 that companies have the right, or speakers have the right
19 to comment directly on public issues, and -- and if you
20 comment directly on a public issue and discuss the public
21 issue, you are certainly protected.

22 QUESTION: If it's very difficult to define
23 commercial speech, then isn't it true that under this
24 scheme companies are chilled in speaking?

25 MR. HOEBER: Well, they -- they may be chilled

1 in speaking if -- because of the difficulty in defining
2 commercial speech, and that presumably will chill false
3 statements as well, since the -- the statute and the
4 regulation only applies to false or misleading speech,
5 and -- and I think that to the extent the -- the
6 definition is -- is unclear, it may -- I don't know that
7 for a fact, but it's -- it's plausible.

8 QUESTION: Are -- are there cases where we've
9 upheld statutes that are chilling of speech?

10 MR. HOEBER: Oh yes. Yes, there are.

11 QUESTION: What are they?

12 (Laughter.)

13 MR. HOEBER: Well --

14 QUESTION: We haven't said that they're chilling
15 of speech.

16 (Laughter.)

17 MR. HOEBER: I think you caught me there, Your
18 Honor.

19 On -- back to -- to Justice Breyer's question.
20 I don't think anybody would say defining commercial speech
21 is easy, but in this case, where we allege that -- where
22 the complaint alleges that the company made factual
23 representations about its -- the circumstances under which
24 its products are made, with the purpose of persuading
25 consumers to buy the product, and we know that consumers

1 want that information and rely on that information, that
2 should fit within any reasonable definition of commercial
3 speech. If --

4 QUESTION: Are you saying that you can't
5 distinguish what you are targeting from, say, a label that
6 says, made by disabled veterans, when it wasn't? You --
7 you put them in the same category?

8 MR. HOEBER: I put that in the commercial speech
9 category.

10 QUESTION: Thank you, Mr. Hoeber.

11 MR. HOEBER: Thank you, Your Honor.

12 QUESTION: Mr. Tribe, you have 3 minutes
13 remaining.

14 REBUTTAL ARGUMENT OF LAURENCE H. TRIBE

15 ON BEHALF OF THE PETITIONERS .

16 MR. TRIBE: Thank you, Mr. Chief Justice.

17 Let me just deal with a couple of technical
18 things first. The Attorney General of California was
19 notified below. He filed a brief. It's not required in
20 California that all of the arguments be rehearsed before
21 him, and most importantly the California Supreme Court
22 passed on the fundamental claim that this scheme, applied
23 to public debate, violates the First Amendment, and under
24 *Yee v. Escondido* in any event we can make a different
25 argument.

1 But if you look at the brief below, the most
2 telling part of it, I think -- and it gets to the pivot of
3 this case -- this is at pages 30 to 31 of the California
4 Supreme Court brief. It there recites that if the shoe,
5 as it were, were on the other foot, under California law
6 this case would go away in an instant.

7 The case decided unanimously by the Supreme
8 Court of California in 1984 is Epic v. Superior Court. In
9 that case there was an ideological boycott of companies
10 that were doing business with the plaintiff. The
11 plaintiff was not thought to be environmentally friendly
12 enough. The plaintiff sued for trade libel, they wanted
13 damages, they wanted an injunction, they said it was
14 interference with contract. The trial court was about to
15 hold the trial and the Supreme Court of California, citing
16 Article 1, section 2 of its constitution, said, hey,
17 public debate, there are interests on both sides, but the
18 courts of California can't resolve it.

19 It seems to me that what we have here, and this
20 goes to the question of the Private Attorney General
21 action, is that if there is a debate between interests of
22 labor and interests of management, the California Supreme
23 Court has transmogrified this old statute, which was
24 pretty strange to begin with but had never been used to
25 stifle and silence the public debate, it's transformed it

1 into a conversation-stopper, and the power to do that is,
2 I think, extraordinary.

3 They say, maybe there will be a chill. If you
4 look at the media brief, the media are now saying that
5 businesses around the world are already afraid to
6 communicate with us because California may get them, and
7 the European brief, filed by a consortium that controls
8 about \$2 trillion of investment, says that the efforts of
9 the European Union to encourage transparency are being
10 frustrated by California saying that if you come out and
11 answer these charges, as they did in the letter to the
12 athletic directors, you can be trapped, because you're a
13 business, so you're trying to make money, so it's
14 commercial speech.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe.
16 The case is submitted.

17 MR. TRIBE: Thank you, Mr. Chief Justice.

18 (Whereupon, at 12:21 p.m., the case in the
19 above-entitled matter was submitted.)

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