SUPREME COURT OF THE UNITED STATES

No. 02–575

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[June 26, 2003]

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 disassociated 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 fi-

nally 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," 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

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[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.

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 overcome 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 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

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[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.

[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).

> 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 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

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[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 defendant's motion to dismiss a state-court complaint alleging that semicommercial speech was false and misleading. See *post*, at 6 (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.

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 12–13. On the one hand, 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.

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[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 public or a private enforcement action, see *post*, at 14–15, is a difficult and important question that I believe would benefit from further development below.

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 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.