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COMMENTS

FROM *NIKE V. KASKY* TO MARTHA STEWART: FIRST AMENDMENT PROTECTION FOR CORPORATE SPEAKERS' DENIALS OF PUBLIC CRIMINAL ALLEGATIONS

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I. INTRODUCTION

Richard Epstein once said that “[i]t is difficult to conceive of . . . a defense of freedom of speech so pure as to countenance securities fraud”¹ The regulation of false or misleading statements of material fact under the securities laws,² like other regulations of false or misleading commercial speech, has been upheld under First Amendment analysis, despite the fact that such regulations necessarily curtail speech.³ This rubric is problematic, however, when applied to certain types of corporate speech that have become prevalent in today’s climate of overlapping legal, political, social, economic, and popular culture.

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¹ Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1, 59 (1988) (describing the state police power as the power “to override explicit constitutional guarantees when necessary to protect other persons from the threat or use of force or fraud”).

² 17 C.F.R. § 240.10b-5 (2004).

³ SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968).

In particular, as highly publicized allegations of corporate criminal wrongdoing are becoming more and more common, a lively public debate, fueled by the news media, has developed regarding the guilt and innocence of "corporate celebrities." Corporate criminal allegations have incited an upsurge in a form of advertising known as the corporate image campaign, which focuses not on the products or services a company offers, but on improving the public image of the corporation itself.⁴ However, public denials of criminal allegations seemingly transcend categorization as mere corporate image campaigning. Where the speech of a commercial entity is a denial of criminal allegations, such speech should be more protected than typical low-value "commercial speech," like product advertising.

Both Martha Stewart and the Nike corporation have become embroiled in legal battles stemming from their potential liability for public statements made to defend against highly publicized allegations of criminal wrongdoing.⁵ Potential liability in each case (securities fraud against Stewart and false advertising against Nike) stems from the fact that the commercial entity's denials may have affected the public's view of the corporation's business such that the speech has been categorized as lesser protected "commercial speech."⁶ These two distinct corporate personalities and the analogous legal difficulties they have encountered suggest that a burgeoning class of corporate defendants may require application of unique judicial rules to avoid liability for statements merely denying public allegations of criminal wrongdoing. So long as the current trend toward highly publicized white collar criminal prosecutions continues, this class of corporate defendants dwelling in the public eye will require some protection. Regulations directed at curbing misleading commercial speech, such as securities fraud regulations and false advertising laws, for example, must be revisited to protect corporations' and corporate personalities' First Amendment speech right, a right that should be at its peak when speech is offered in defense of allegations of criminal wrongdoing.

Policy considerations favor some form of unique treatment for corporate entities facing highly publicized criminal allegations. When corporate entities face civil liability (or even criminal conviction) for their denials of public criminal allegations, speech at the heart of the First Amendment is chilled. In particular, a commercial entity's interest in self-expression is curtailed, and a valuable check on government overreach is

⁴ See generally Laura Lin, Note, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459 (1988).

⁵ Nike, Inc. v. Kasky, 539 U.S. 654 (2003); United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

⁶ See, e.g., Nike, 539 U.S. at 657.

circumvented. Moreover, by not permitting any response, the regulations on corporate speech may be unwittingly expressive on their own; silence in the face of criminal allegations may implicitly signal to the public a corporate entity's guilt or, at least, acceptance of the charges against them. Corporate entities and the investing and consuming public have strong interests in allowing the fullest dialogue possible on issues of corporate criminality. And because the government has available more narrowly tailored means of addressing problematic false statements made during the course of a criminal investigation and trial, such regulations of speech should not be permissible under the First Amendment.

This Comment proposes a narrow exception to the current doctrine regarding the low First Amendment protection for false or misleading commercial speech: commercial speakers whose speech rebuts public claims of criminal wrongdoing should not be held liable for claims stemming from the factual content of their denials, even if false or misleading. The basis for this exception is two-fold: that such speech is not in fact commercial and is thus afforded constitutional protection from rigorous regulation;⁷ and that the right of a criminal defendant or accused to deny the allegations against him or her (and to buttress their denial with "modest factual claims")⁸ outweighs the interest that the state has in regulating this narrow class of speech.

This Comment offers an initial review of the Nike and Martha Stewart cases (Part II) before addressing the current First Amendment jurisprudence (Part III.A), particularly as it pertains to commercial speech (Part III.B) and false and misleading speech (Part III.C). This Comment then argues that a commercial entity's public denial of criminal accusations does not constitute commercial speech (Part IV.A); that commercial entities and society each have strong interests in protecting public denials (Part IV.B); that the government interest in regulating such speech is low (Part IV.C); and, therefore, that regulation of such speech violates the First Amendment right of corporate speakers. Thus, this Comment concludes that a corporate entity should not be subject to liability stemming from the denial of public allegations of criminal wrongdoing, even if the denial is false or misleading.

⁷ The United States Supreme Court has held that the imposition of either criminal sanction or civil liability in a private action based on speech constitutes government regulation of speech for the purpose of First Amendment analysis. See, e.g., *City of Houston v. Hill*, 482 U.S. 451 (1987) (invalidating on First Amendment overbreadth grounds a city ordinance making it illegal to oppose, molest, abuse or interrupt a police officer); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (finding imposition of civil liability to be speech regulation).

⁸ Warren L. Dennis & Bruce Boyden, *Stewart Prosecution Imperils Business Civil Liberties*, 18 LEGAL BACKGROUNDER No. 14, Oct. 3, 2003, at 3.

II. FACTUAL BACKGROUND: *NIKE V. KASKY* AND *UNITED STATES V. STEWART*

The Nike corporation recently challenged its potential liability for statements made to defend against and rebut public allegations of human rights violations in its foreign factories.⁹ Starting in 1996, Nike, a popular sporting goods company, was "besieged with a series of allegations that it was mistreating and underpaying workers at foreign facilities."¹⁰ In response to these public allegations, Nike sent press releases, wrote letters to the media and individuals (such as university officials), and commissioned a report on the conditions of Nike's foreign facilities, denying and discrediting the public allegations.¹¹ Based on these public denials, a California resident sued Nike under California's Unfair Competition Law and False Advertising Law,¹² alleging that Nike made false public statements and omitted facts regarding poor working conditions in order to "maintain and/or increase its sales."¹³ The trial court dismissed the suit on First and Fourteenth Amendment grounds, on motion by Nike.¹⁴ The California Court of Appeals affirmed, but the California Supreme Court reversed and remanded on the ground that Nike's commercial speech is not afforded substantial First Amendment protection.¹⁵ The United States Supreme Court granted certiorari to address two issues: (1) whether corporate speech as part of a public debate can be the basis of liability for factual inaccuracies, because such speech may affect consumer opinions of the business as a "good corporate citizen" and thus may be characterized as commercial speech; and (2) whether, assuming such speech is commercial, the First Amendment permits the regulation of Nike's speech.¹⁶ However,

⁹ *Nike*, 539 U.S. at 654.

¹⁰ *Id.*

¹¹ Nike was responding to allegations that:

workers in Nike's production facilities were forced to work overtime, often without overtime pay, and to work excessive overtime, in violation of local laws; were in some cases paid less than the applicable minimum wage; were subjected to physical punishments and abuse; and were exposed to reproductive toxins and other harmful chemicals in the solvents and glue used in the production of Nike's shoes, as well as excessive heat, dust, and noise, without adequate safety equipment, in violation of local laws.

Brief for Respondent at 3-4, *Nike* (No. 02-575) (internal citations omitted).

¹² CAL. BUS. & PROF. CODE §§ 17200-17210, 17500-17509 (West 1997 & Supp. 2004) (defining "unfair competition" as including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising"). A claim under this act can be brought by any citizen of California, as was done by Kasky, acting as a pseudo-Attorney General.

¹³ *Nike*, 539 U.S. at 656.

¹⁴ *Id.*

¹⁵ *Id.* at 657.

¹⁶ *Id.*

because the Supreme Court dismissed the writ of certiorari as improvidently granted,¹⁷ the issue has not been finally resolved.

Even more troubling is the securities fraud case recently brought against Martha Stewart, home-making maven, chief executive officer,¹⁸ and chairman of the board of directors¹⁹ of Martha Stewart Living Omnimedia (MSLO).²⁰ In June of 2002, Stewart faced an onslaught of public interest and media coverage regarding her potential involvement in an insider trading scandal.²¹ On December 27, 2001, Stewart sold her 3,928 shares of ImClone Systems Incorporated, a medicine developer.²² Stewart was widely and publicly accused of selling her shares based on her alleged receipt of nonpublic information the day before the FDA announced its refusal to license Erbitux, ImClone's lead medicinal development,²³ though no formal charges of insider trading had been brought (and never were brought) against Stewart.²⁴ The story of Stewart's involvement with the ImClone scandal was published in both the Associated Press and the New York Times, relying on statements from "people close to a Congressional investigation."²⁵ Less than a week later, a Congressman professed to a national television audience his belief that Stewart was guilty of insider

¹⁷ *Id.*

¹⁸ Stewart is now the *former* chief executive officer of MSLO, since she resigned from this position during the course of the events described.

¹⁹ Interestingly, another "hat" that Stewart once wore was that of securities broker. She was employed as such from approximately 1968-1975. Indictment at 2, *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003) (No. 03 Crim. 717) [hereinafter *Stewart Indictment*].

²⁰ MSLO is a corporation engaged in the business of television production, magazine and book publication, and merchandising and sale of "Martha Stewart" products. *Id.* at 1.

²¹ David Teather, *Martha Stewart: Goose Still Cooking*, GUARDIAN UNLIMITED, Sept. 13, 2002, at <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,791450,00.html> ("Ambushed by a presenter on [CBS News's *The Early Show*] where she has a regular slot, Ms. Stewart now famously remarked that she would rather 'focus on the salad' she was making [than answer questions about her involvement with the ImClone scandal].").

²² *Stewart*, 287 F. Supp. 2d at 462.

²³ Ironically, the FDA has since approved Erbitux for the treatment of certain types of cancer. *Martha's Defense Rests*, CNN MONEY, Feb. 25, 2004, at <http://money.cnn.com/2004/02/25/news/companies/martha/index.htm>.

²⁴ Stewart's sale of ImClone stock prior to the FDA announcement saved her from a financial loss of between \$45,673 and \$51,222, based on the decreased value of ImClone stock on the day following the FDA announcement. *Stewart Indictment*, *supra* note 19, at 9. While the insider trading charges never materialized, Stewart *was* subsequently charged with obstruction of justice and securities fraud (addressed in detail below).

²⁵ *E.g.*, Andrew Pollack, *Martha Stewart Said to Sell Shares Before F.D.A. Ruling*, N.Y. TIMES LATE EDITION, June 7, 2002, at C4.

trading.²⁶ Stewart's potential involvement made repeated national and international headlines in the weeks and months to follow.²⁷ The public allegations of Stewart's involvement took a toll on the value of MSLO common stock, which fell from \$19.01 per share (at closing on June 6, 2002, immediately prior to the report of Stewart's ImClone connection) to \$11.47 per share on June 28, 2002.²⁸

The media reported that a vacationing Stewart had received a telephone message from her broker at Merrill Lynch that stated, "Peter Bacanovic thinks ImClone is going to start trading downward."²⁹ Stewart returned the call and learned that Sam Waksal, the CEO of ImClone, and his family were selling their very substantial shares of ImClone stock.³⁰ Based on this nonpublic information, Stewart allegedly ordered the sale of her own ImClone stock, saving herself from an 18% loss of value after the FDA's rejection of Erbitux on December 28, 2001.³¹ In several public statements in June 2002, Stewart denied this version of events and claimed instead that she had prearranged with her broker an order to sell when her ImClone stock dropped in value to less than \$60 per share.³² That arrangement, Stewart maintained, was the reason for her sale of ImClone stock on December 27, 2001.³³ Following each of Stewart's public denials, the value of MSLO stock increased.³⁴ Based on the increases, allegedly prompted by Stewart's denials, Martha Stewart was charged with securities fraud under the Securities Exchange Act of 1934, Section 240.10b-5,³⁵ for

²⁶ Motion for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29 at 11, *Stewart* (No. 03 Crim. 717), available at http://www.marthataalks.com/trial_update/022304.html [hereinafter Motion for Judgment of Acquittal] (the individual who made this statement was Congressman Jim Greenwood (R-Pa.)).

²⁷ See, e.g., *Martha Stewart Broker Suspended*, BBC NEWS WORLD EDITION, June 22, 2002, at <http://news.bbc.co.uk/2/hi/business/2059953.stm>; *More Misery for Martha Stewart*, CBS NEWS, June 24, 2002, at <http://www.cbsnews.com/stories/2002/06/25/national/main513291.shtml>; Betsy Stark, *Martha's Mess: ImClone Inquiry Casting Cloud over Martha Stewart's Business*, ABC NEWS, June 17, 2002, available at http://more.abcnews.go.com/sections/business/worldnewstonight/stark_marthastewart.html.

²⁸ Stewart Indictment, *supra* note 19, at 36.

²⁹ *Id.* at 7.

³⁰ *Id.* at 7-8.

³¹ *Id.* at 8.

³² See *More Misery for Martha Stewart*, *supra* note 27 ("Stewart has said that her trade was legal and based on a previously arranged 'stop-loss order' to sell the stock if it dipped below 60.").

³³ Stewart Indictment, *supra* note 19, at 37-40.

³⁴ *Id.*

³⁵ 17 C.F.R. § 240.10b-5 (2004):

Employment of manipulative and deceptive devices. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails

publishing “a series of false and misleading public statements during June 2002 regarding her sale of ImClone stock” in “an effort to stop or at least slow the steady erosion of MSLO’s stock price caused by investor concerns” (hereinafter, Count Nine).³⁶ The criminal case against Stewart went to trial.³⁷

Significantly, prior to trial Stewart moved to dismiss Count Nine based on a First Amendment defense, among others.³⁸ While admitting that Count Nine was a novel approach to the securities laws, the court did not dismiss Count Nine and later held that Stewart could not argue at trial the potential First Amendment problem posed by Count Nine.³⁹ Rather, the court ruled as a matter of law that Count Nine poses no First Amendment

or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) *To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading*, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id. (emphasis added). Volatility in stock price is considered an indicator of the materiality of an alleged misstatement.

³⁶ Stewart Indictment, *supra* note 19, at 36. The indictment against Stewart posits that Stewart’s reputation was so critical to the success or failure of her company that false or misleading statements about her personal sale of ImClone stock would have an impact on the value of MSLO shares. *Id.* at 35. Further, the indictment states that Stewart was very aware of her company’s reliance on the Martha Stewart image. *Id.* (“In MSLO’s 1999 prospectus the company stated, ‘Our continued success and the value of our brand name therefore depends, to a large degree, on the reputation of Martha Stewart.’”).

³⁷ Opening statements were given on January 27, 2004. See *Martha’s Lawyer Blasts ‘Guesswork’*, CNN MONEY, Jan. 27, 2004, at http://money.cnn.com/2004/01/27/news/companies/martha_openings/index.htm; Associated Press, *Prosecutor: Stewart Had Tip No One Else Had*, CNN, Jan. 27, 2004, at <http://www.cnn.com/2004/LAW/01/27/martha.stewart.ap/index.html> [hereinafter *Stewart Had Tip*].

³⁸ Memorandum of Law in Further Support of Martha Stewart’s Omnibus Pre-Trial Motions at 10, *United States v. Stewart*, 287 F. Supp. 2d 461, 462 (S.D.N.Y. 2003) (No. 03 Crim. 717) (Nov. 14, 2003), available at http://www.marthataks.com/trial_update/111403.html:

Yet under the regime urged by the government, it may indict a defendant, then indict her again for publicly challenging the first indictment. That is frightening. Count Nine is so far beyond our constitutional tradition that the government failed to find any case in the history of this country in which a person was prosecuted for asserting, explaining, or expressing her own innocence. We hope this will not be the first.

Id.

³⁹ *United States v. Stewart*, No. 03 Crim. 717, 2004 WL 113506, at *4 (S.D.N.Y. Jan. 26, 2004) (granting government’s motion in limine to preclude Stewart from arguing in opening statement or presenting evidence at trial tending to show that her prosecution stems from a claim of innocence in violation of the First Amendment).

problem because "the First Amendment does not protect false statements of fact that are part of a course of criminal conduct."⁴⁰

Following presentation of evidence, Stewart filed a motion to acquit on Count Nine based on insufficiency of the evidence, under Rule 29 of the Federal Rules of Criminal Procedure.⁴¹ After weeks of trial, the court ultimately determined that the evidence presented was insufficient to support a finding of guilt on Count Nine and granted Stewart's motion for acquittal.⁴² Specifically, the court held that the Government had not proved with sufficient evidence that Stewart had the requisite criminal intent to deceive investors and artificially inflate her stock price by making the statements for which she was charged with securities fraud.⁴³ In other words, to reach a conclusion of criminal guilt on Count Nine, the jury would have to impermissibly speculate about Stewart's intent.⁴⁴

The court's decision, however, turned on the high burden that the Government faces in proving the elements of the criminal offense of securities fraud beyond a reasonable doubt.⁴⁵ The court suggested that the evidence presented would have been sufficient to withstand a motion for judgment as a matter of law (and thus would go to the jury) if the charges were civil rather than criminal. The court stated:

This is one of those rare cases in which the standard of proof makes a difference in the assessment of the sufficiency of the evidence. The Government argues, in effect, that evidentiary sufficiency is the same in civil and criminal securities fraud cases. However, the law is to the contrary. . . . The issue at hand is . . . whether, taking into account the heightened standard of proof in criminal cases, there is sufficient evidence of Stewart's intent to deceive investors to present the matter to the jury.⁴⁶

The court concluded that the evidence against Stewart was insufficient to meet this heightened standard, implicitly leaving open the possibility of civil liability. Thus, while the court found that the evidence against Stewart regarding her statements of innocence was insufficient to support a

⁴⁰ *Id.*; see also *Stewart Had Tip*, *supra* note 37 ("Even before opening statements began, [Judge] Cedarbaum dealt Stewart a setback Monday. Cedarbaum said Stewart's defense could not argue that she is being prosecuted merely for claiming she was innocent."); *Martha's Defense Rests*, *supra* note 23.

⁴¹ Motion for Judgment of Acquittal, *supra* note 26.

⁴² *United States v. Stewart*, 305 F. Supp. 2d 368 (S.D.N.Y. 2004). After a five week trial, a jury subsequently found Stewart guilty of conspiracy, obstruction of justice, and making false statements to authorities. *Martha Stewart Found Guilty on All Counts*, CNN, Mar. 6, 2004, at <http://www.cnn.com/2004/LAW/03/05/stewart.main/index.html>. She is currently serving a five-month sentence at a minimum security facility.

⁴³ *Id.* at 378.

⁴⁴ *Id.* at 370.

⁴⁵ *Id.* at 369-70.

⁴⁶ *Id.* at 369.

conviction for securities fraud, Stewart could, under the court's reasoning, be civilly liable under the securities laws for her false or misleading criminal denials.

III. LEGAL BACKGROUND

A. FIRST AMENDMENT FREEDOM OF SPEECH

Essentially underlying Epstein's comment⁴⁷ is the Supreme Court's historic reluctance to apply the First Amendment as an absolute protection of speech, in spite of the absolute language of the free speech provision.⁴⁸ The Court has allowed regulation of lesser valued types of speech,⁴⁹ while creating the strongest protections for speech the Court has deemed essential for a functioning democratic society.⁵⁰ Highly protected speech includes speech on matters of public importance, such as political,⁵¹ social,⁵² or religious⁵³ speech. Regulations of high-value speech must survive strict constitutional scrutiny, because such speech fosters the main theoretical goals of speech protection; high-value speech aids the democratic process,⁵⁴ contributes to a "marketplace of ideas,"⁵⁵ and furthers individual citizen

⁴⁷ Epstein, *supra* note 1, at 59.

⁴⁸ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."). The First Amendment has been applied to the states via the Fourteenth Amendment. See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931).

⁴⁹ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁵⁰ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵¹ *Id.*

⁵² See, e.g., *Nationalist Socialist Party of Am. v. Skokie*, 434 U.S. 1327 (1977).

⁵³ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁵⁴ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24-27 (1948) (positing that freedom of speech ought to allow for informed decision-making by citizens and that restrictions on information relating to a public decision are "mutilation[s] of the thinking process of the community against which the First Amendment is directed"). Another version of the democracy rationale views public opinion as a check on overreaching official action. See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521, 527-542 (1977) ("Under [this] view of democracy, the role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds.").

⁵⁵ The marketplace of ideas theory was first articulated in JOHN STUART MILL, *ON LIBERTY* (1959); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (relying on the marketplace of ideas rationale for First Amendment protection, stating that "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

autonomy.⁵⁶ Speech on issues of public importance is highly protected.⁵⁷ Such speech may include political speech,⁵⁸ expression of ideas,⁵⁹ or even a broad category of speech on issues "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."⁶⁰ Stated less academically and more realistically, any speech that tends to preoccupy the public, either via the news media or other medium of public opinion, should be considered speech that the public deems important.

On the opposite end of the First Amendment spectrum, types of speech receiving low or no protection include threats,⁶¹ speech that intentionally incites imminent violence,⁶² so called "fighting words,"⁶³ and obscenity.⁶⁴

B. PROTECTION AFFORDED COMMERCIAL SPEECH

Commercial speech, though, falls in the middle of the First Amendment spectrum, such that some form of intermediate scrutiny applies.⁶⁵ A lively case history has evolved regarding the definition of commercial speech and the type of protection afforded to commercial speakers. Historically, commercial speech was viewed as entirely unprotected by the First Amendment.⁶⁶ For example, in *Valentine v. Chrestensen*, the Court held that a handbill containing a commercial advertisement was unprotected speech merely because of the commercial

⁵⁶ T.M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-218 (1972) ("[In order to] regard himself as autonomous [a] person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action. . . . [An] autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."). Scanlon later hedges a bit his initially broad theory, suggesting that "it is hard to see how laws against deceptive advertising [could] be squared with this [sweeping] principle." T.M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532-533 (1979).

⁵⁷ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (distinguishing speech on matters of public importance from commercial advertising).

⁵⁸ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976).

⁵⁹ See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (stating that the "right to receive information and ideas, regardless of their social worth is fundamental to our free society").

⁶⁰ *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 68 (1983) (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

⁶¹ *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

⁶² *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁶⁴ *Miller v. California*, 418 U.S. 915 (1974).

⁶⁵ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

⁶⁶ *Beard v. Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

content.⁶⁷ Then in a series of opinions in the 1960s and 1970s, the Court recognized that speech cannot be entirely denied First Amendment protection because the speech is "on a commercial subject."⁶⁸ However, the First Amendment protection afforded commercial speech continues to be less than the protection of other more valued speech.

1. Policy behind limited protection for commercial speech

Essentially three rationales have been offered for the lowered level of protection for commercial speech: the hardness of commercial speech, the low contribution of commercial speech to the forum of ideas, and a heightened need and capability to ensure accuracy of commercial speech.⁶⁹ First of all, because commercial speech serves an economic interest, such speech is seen as hardy and not likely to be crushed by overbroad regulation.⁷⁰ Because commercial messages are generally calculated, regulations of commercial speech also do not inhibit spontaneous speech, which is viewed as more likely to be chilled.⁷¹

Also, the Court views commercial speech and, in particular, advertising as contributing less to the interchange of ideas and thus less likely to foster intense media scrutiny or discussion. Commercial speech contributes not to the interchange of ideas, but to "private economic decision making and public allocation of resources."⁷² Because of its low value as a contributor to the forum of ideas, commercial speech is more fitting for intense regulation.⁷³ The Court has attempted to draw a bright line between commercial and noncommercial speech out of fear that the low protection of commercial speech would dilute the protection afforded more high-value speech.⁷⁴

⁶⁷ 316 U.S. at 54.

⁶⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976).

⁶⁹ See Thomas W. Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 223 (1976-77) (citing *Va. State Bd.*, 425 U.S. at 1834-34 (Stewart, J., concurring)).

⁷⁰ *Cent. Hudson*, 447 U.S. at 564; Brief for Respondent at 13, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

⁷¹ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

⁷² Merrill, *supra* note 69, at 226.

⁷³ *Id.* at 225 (explaining that the Court has "posited an inverse relationship between the value of speech and the permissible degree of regulation").

⁷⁴ *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.").

The fact that commercial speech is not part of the forum of ideas, or is more economic than philosophical, heightens the government's interest in accuracy because the limited potential for public discussion or scrutiny suggests that false statements will not be weeded out and rejected in the public marketplace.⁷⁵ Because advertisements are viewed as uniquely likely to deceive or confuse, content-based restrictions in the commercial context are more permissible.⁷⁶ Additionally, the topic of commercial speech is generally goods and services, which are tangible and thus more susceptible to empirical analysis.⁷⁷ Commercial speakers also have the opportunity to ensure accuracy because a commercial entity typically engages in advance planning before making commercial speech (*i.e.*, before publishing an advertisement).⁷⁸ Thus, because commercial speakers are in a position to have high knowledge of their products or services and the market, they are in a good position to evaluate and verify the accuracy of their messages and should be held more accountable for any inaccuracies.⁷⁹

2. Defining commercial speech

The Supreme Court has attempted to define less-protected commercial speech on several occasions because the classification of speech as commercial or noncommercial is a threshold issue in determining the standard to be applied to regulations of speech.⁸⁰ While the prototypical commercial speech is product or service advertising,⁸¹ the Court has held that other representations by commercial entities, such as press releases and public letters, also can constitute commercial speech.⁸² The Court has applied several standards for distinguishing commercial speech from noncommercial speech based on content, and the four most prominent standards are discussed here.

⁷⁵ Brief for the Petitioners at 16, *Nike* (No. 02-575).

⁷⁶ *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983) (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)).

⁷⁷ *Merrill*, *supra* note 69, at 223 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 780-81 (1976) (Stewart, J., concurring)).

⁷⁸ *Id.*

⁷⁹ Brief for Respondent at 37, *Nike* (No. 02-575); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

⁸⁰ *Bolger*, 463 U.S. at 65-66.

⁸¹ *Id.* at 66 (advertisements as mere "proposals to engage in commercial transactions").

⁸² *See, e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 227 n.4, 228 (1988); *see also Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) ("[S]peech need not closely resemble a typical advertisement to be commercial.").

- a. Commercial speech does “no more than propose a commercial transaction.”⁸³

Most typically, commercial speech is defined as speech that does no more than propose a commercial transaction and thus falls under a tradition of government regulation.⁸⁴ In fact, in *Board of Trustees of the State University of New York v. Fox*, the Court stated clearly, succinctly, and narrowly that whether speech “propose[s] a commercial transaction” is “*the test* for identifying commercial speech.”⁸⁵ The Court has described this distinction between commercial and noncommercial speech as one of “commonsense,”⁸⁶ where commercial speech, intuitively, is speech “linked inextricably to commercial activity.”⁸⁷ The Court has also stated that “speech that has a purpose above and beyond ‘mere solicitation of patronage’ should be treated differently” than speech merely proposing a commercial transaction.⁸⁸

- b. Speech that furthers the speaker’s economic interests or is promotional in nature is commercial speech.

Similarly, the Court has defined commercial speech based on the speaker’s economic motivation or potential for economic gain. Commercial speech has been defined as “expression related *solely* to the economic interests of the speaker and its audience.”⁸⁹ Similarly, commercial speech has been defined as representations that are promotional—statements that serve to benefit the speaker’s economic interests, by increasing sales, for example.⁹⁰ To emphasize, under this standard the purpose of the speech must be solely economic in order to afford the speech lesser First Amendment protection; speech is not rendered

⁸³ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

⁸⁴ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978); *see also* *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

⁸⁵ 492 U.S. 469, 473-74 (citing *Va. State Bd.*, 425 U.S. at 762) (emphasis added).

⁸⁶ *Ohralik*, 436 U.S. at 455-56.

⁸⁷ *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979) (citing *Ohralik*, 436 U.S. at 456).

⁸⁸ *Id.* at 11 n.10 (emphasis added) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975)).

⁸⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980) (emphasis added).

⁹⁰ *In re Primus*, 436 U.S. 412, 438 n.32 (1978). This broad definition was used by the Respondent in *Nike* to support limited protection for “representations . . . that gave consumers factual information to rely on in their purchasing decisions.” Brief for Respondent at 29, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

commercial by the fact that the speech serves, among other things, an economic interest.⁹¹

c. The *Bolger* test for commercial speech

Application of these "commonsense" and economic impact standards, however, has proven more complicated. In particular, deciding which standard to apply becomes murky where a commercial speaker speaks on an issue of public concern. In that context, the two standards discussed thus far yield contradictory results: statements on an issue of public debate, where the issue is related to the business of a commercial speaker, may be economically beneficial to the speaker despite the fact that the speech does not in any way propose a commercial transaction or solicit patronage.⁹² Perhaps because of the difficulty of categorizing expression of this type, the Court articulated a three-part test for identifying commercial speech in *Bolger v. Youngs Drug Products Corp.*⁹³ There, the Court concluded that informational pamphlets published by the maker of Trojan condoms discussing the benefits of condoms and the dangers of sexually transmitted diseases were commercial speech.⁹⁴ The Court so found based on the presence of three factors "in combination": advertising format, explicit product reference, and economic motivation.⁹⁵ In *Bolger*, the speaker conceded that the pamphlets were advertisements.⁹⁶ Further, the pamphlets contained numerous references to condoms, the speaker's product, and no doubt encouraged the use of such prophylactics, thereby increasing the sales of condoms made by Trojan, the market leader.⁹⁷ While the Court found that neither of these factors was determinative in isolation, the three elements combined to qualify the pamphlets as lesser protected commercial speech.⁹⁸ Having met these three factors, the fact that the pamphlets also

⁹¹ In fact, the Court has stated that "some of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (citing, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), for the proposition that print news serves both an economic and informational purpose).

⁹² See, e.g., *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980).

⁹³ 463 U.S. 60 (1983).

⁹⁴ *Id.* at 66-68.

⁹⁵ *Id.* at 66-67; see also Brief for the Petitioners at 23, *Nike* (No. 02-575).

⁹⁶ *Bolger*, 463 U.S. at 66.

⁹⁷ *Id.* at 66-67, 67 n.13.

⁹⁸ *Id.* at 66-67.

contained speech on an issue of public importance was insufficient to render the pamphlets noncommercial.⁹⁹

d. Speech with mixed commercial and noncommercial elements is noncommercial speech.

Finally, the Court has stated that where commercial speech and “pure speech” are “inextricably intertwined,” the categorization of the speech must turn on “the nature of the speech taken as a whole.”¹⁰⁰ Thus, expression that serves a substantial noncommercial purpose but has an incidental commercial effect may be considered noncommercial for the purpose of analysis.¹⁰¹ This definition indicates that where commercial statements by a commercial speaker also include speech on issues of public importance, other interests may be served, rendering the speech noncommercial. However, this rule, first articulated in *Riley v. National Federation of the Blind of North Carolina, Inc.*,¹⁰² has thus far been applied sparingly. Courts have rejected use of this definition to expand the protection for commercial elements of speech where “[n]o law of man or of nature makes it impossible” to separate the commercial and noncommercial elements of the speech.¹⁰³ Where the commercial aspect of speech can be expressed wholly independent of the noncommercial speech, and vice versa, the *Riley* rule affords no heightened protection.¹⁰⁴

3. *Some speech by a commercial entity is noncommercial.*

A significant and foundational point (that bears repeating) is that the limited protection of commercial speech hinges on an equally applicable protection for noncommercial speech by a commercial entity. The Court has recognized that speech by a commercial entity can be noncommercial speech on an issue of public concern, which is deserving of protection against over-regulation.¹⁰⁵ For example, in *Consolidated Edison Co. of*

⁹⁹ *Id.* at 68 (“We have made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 n.5 (1980)).

¹⁰⁰ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

¹⁰¹ *See Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (finding commercial and noncommercial speech not inextricably intertwined); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108 (6th Cir. 1995) (same).

¹⁰² 487 U.S. 781 (1988).

¹⁰³ *Bd. of Tr. of the State Univ. of N.Y.*, 492 U.S. at 474.

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g., Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980).

New York v. Public Service Commission of New York, the Court held that a utility company's billing inserts advocating the development and use of nuclear power constituted high-value speech on a "controversial [issue] of public policy."¹⁰⁶ The Court struck down on First Amendment grounds a ban on the inclusion of such inserts in utility company mailings.¹⁰⁷ In so doing, the Court reiterated that commercial speakers are afforded First Amendment protection and explicitly rejected the contention that the utility company's speech was less protected based on the speaker's identity.¹⁰⁸ Commercial speech can be permissibly subject to strict regulation only because the Court has recognized that a commercial entity can speak in a non-commercial capacity on an issue of public interest and that such speech is fully protected.¹⁰⁹ Thus, underlying the limited First Amendment protection for commercial speech is the premise that there are other, protected avenues of speech for corporate speakers.

4. *Limited protection afforded commercial speech*

Incidentally, despite the limited protection that commercial speech receives, the Court has maintained that restrictions on commercial speech cannot be applied haphazardly. Even where speech is deemed commercial, the expression is entitled to "qualified but nonetheless substantial protection."¹¹⁰ For example, in *Bolger*, the Court found the pamphlet on the topic of condoms and venereal disease to be protected under the First Amendment, despite its status as commercial speech.¹¹¹ The Court held that the sweeping restriction on the mailing of unsolicited advertisements for

¹⁰⁶ *Id.* at 544.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 533 ("[W]e [reject] the contention that a State may confine corporate speech to specified issues 'The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.'" (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)); see also Oral Argument of Laurence H. Tribe, Esq. on Behalf of the Petitioners at 11, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (referencing *Consol. Edison Co. of N.Y., Inc.*, 447 U.S. at 530, as an example of speech on a matter of public importance upheld despite the speaker's economic interest: "[I]n that case . . . the pamphlet is a detailed set of statements about why nuclear power is safer, better, cheaper, and better for our independence, and you know what, Con Ed had a nuclear power plant, Indian Point, they clearly had an economic interest in promoting that view.")).

¹⁰⁹ *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 68 (1983) ("A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions.") (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 75.

contraceptives was not justified, such that even the limited protection afforded commercial speech was infringed.¹¹² Thus, “[t]he application of . . . [a commercial speech restriction] must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.”¹¹³ For this reason, the party seeking to uphold a restriction on commercial speech must carry the burden of justifying the restriction.¹¹⁴ While the protection afforded commercial speech has been limited to speech that is not false or misleading,¹¹⁵ the fear that over-regulation of commercial speech will chill high-value speech is equally relevant in the context of regulations of false or misleading speech, particularly in the context of corporate criminal denials.

C. FALSE OR MISLEADING SPEECH

The Supreme Court once stated that “there is no constitutional value in false statements of fact.”¹¹⁶ Since then, however, the Court has hedged this initially blanket statement.¹¹⁷ The Court has struck down regulations against false speech on matters of public concern to allow “breathing room” for constitutionally protected speech.¹¹⁸ So as not to curtail high-value speech, “the Court has been willing to insulate even demonstrably false speech from liability.”¹¹⁹

Moreover, the Court has consistently referred back to the idea that false statements should not be regulated by the government, but instead

¹¹² *Id.*; see also *Edenfield v. Fane*, 507 U.S. 761, 767 (1993):

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. . . . [T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Fane, 507 U.S. at 767.

¹¹³ *Bolger*, 463 U.S. at 66.

¹¹⁴ *Id.* at 71 n.20 (citing *Cent. Hudson*, 447 U.S. at 570).

¹¹⁵ *Cent. Hudson*, 447 U.S. at 557.

¹¹⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

¹¹⁷ *Nike, Inc. v. Kasky*, 539 U.S. 654, 664 (2003) (“The regulatory interest in protecting market participants from being misled by [factual 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.’”) (citing *Gertz*, 418 U.S. at 340) (emphasis added).

¹¹⁸ *Id.* at 676 (Breyer, J., dissenting) (stating that the Court’s allowance of “breathing space” potentially incorporates a protection for certain types of false and misleading speech) (citing *Gertz*, 418 U.S. at 340; *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967); *N.Y. Times v. Sullivan*, 376 U.S. 254, 272 (1964)).

¹¹⁹ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

weeded out in the marketplace of ideas.¹²⁰ Justice Holmes once stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹²¹ This has time again been rearticulated in various permutations by the Court, the most significant of which is the oft repeated adage that "the fitting remedy for evil counsels is good ones."¹²² Under this theory, the government should not censor false statements, but instead should allow the fullest protection of uninhibited speech so that false statements can in time be countered and contradicted by other (perhaps true) statements.¹²³ The marketplace of ideas concept relies on an assumption that the general public is sufficiently sophisticated to distinguish falsities from truths, assuming that enough information is available to them.

However, in presuming that Stewart's and Nike's denials were false or misleading, whether the denials are classified as commercial or non-commercial speech becomes particularly significant to the analysis. Despite the concerns occasionally expressed by some commentators, false or misleading commercial speech has undoubtedly been subject to permissible government regulation.¹²⁴ The regular standard applied to commercial speech, articulated by the Court in *Central Hudson Gas & Electric v. Public Service Commission of New York*,¹²⁵ does not even apply where commercial speech is misleading. Harmful commercial activity does not become immunized from regulation merely because speech is involved.¹²⁶ Thus, the regulation of false or misleading commercial speech is generally seen as permissible regulation of commercial harms,¹²⁷ however, false or

¹²⁰ See MILL, *supra* note 55.

¹²¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹²² *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹²³ Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 846 (1985) ("The first amendment contemplates not only that the public will be poorly informed but also that the public may be misinformed and misled.").

¹²⁴ The securities fraud laws are one example of such permissible regulation.

¹²⁵ If commercial speech concerns lawful activity and is not misleading, regulation must directly advance a substantial government interest that could not be achieved through a more limited restriction on speech (later limited by *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 493 U.S. 469 (1989)).

¹²⁶ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

¹²⁷ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) ("[A]n interest in preventing commercial harms . . . is, of course, the typical reason why commercial speech can be subject to greater regulation than noncommercial speech."); see also Respondent's Brief for Respondent at 9, *Nike, Inc. v. Kasky*, 539 U.S. 654, 664 (2003) (No. 02-575) (stating that false and misleading commercial speech creates commercial harms that can be regulated without offending the First Amendment) (citing *Discovery Network*, 507 U.S. at 410).

misleading *noncommercial* speech, like speech on matters of public concern, may be protected just as other high-value speech is protected.¹²⁸

To be clear, the State's interests in the regulation of certain commercial speech is not to be understated, particularly where the commercial speech is false or misleading. Regulation of such speech serves as a protection for listeners, who have "little interest in receiving false, misleading, or deceptive commercial information."¹²⁹ Regulation of commercial speech permits the government to ensure the presentation of accurate product information to consumers and thorough corporate disclosures to investors. Of course, the counter-argument to such government control is, again, that "to the extent that regulation makes government the chief editor of information disseminated to investors . . . the regulatory structure seems more consonant with 'authoritative selection'" than with the core First Amendment value of a thriving marketplace of ideas.¹³⁰

In noncommercial contexts, however, the Court has held that speech on public issues requires "'breathing space'—potentially incorporating certain false or misleading speech—in order to survive."¹³¹ For example, in *New York Times v. Sullivan*,¹³² the Court required a showing of actual malice (a higher standard than the general defamation standard) in order to punish a newspaper for the publication of false statements about public figures.¹³³ Under this standard, certain false factual statements that do not rise to the level of actual malice would be permitted in order to avoid chilling important public speech.¹³⁴ Because the Court viewed speech regarding public figures as particularly in the public interest, the Court was more willing to afford protection to such speech.¹³⁵ Thus, where an important interest is being served and the theoretical underpinnings of speech protection are being advanced, false or misleading noncommercial

¹²⁸ Noncommercial speech is seen as contributing to the marketplace of ideas, despite its false, misleading, offensive, or politically incorrect message. See, e.g., *Nat'l Socialist Party of America v. Skokie*, 434 U.S. 1327 (1977). But see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹²⁹ *Discovery Network*, 507 U.S. at 432 (Blackmun, J., concurring).

¹³⁰ Lively, *supra* note 123, at 846 (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943), for the proposition that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection").

¹³¹ *Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer, J., dissenting from denial of the writ as improvidently granted).

¹³² 376 U.S. 254 (1964).

¹³³ *Id.* at 272.

¹³⁴ *Id.*

¹³⁵ *Id.*

statements may be permissible under the current rubric for First Amendment analysis.

IV. ANALYSIS: CORPORATE STATEMENTS OF DEFENSE, EVEN IF FALSE OR MISLEADING, SHOULD BE PROTECTED FROM REGULATION BY THE FIRST AMENDMENT.

Because a commercial entity's statements of defense cannot be classified as commercial speech, and because the interests infringed by regulations of such speech outweigh the government interests served, corporate denials should be protected from regulation, even if false or misleading.

A. MARTHA STEWART'S AND NIKE'S DENIALS¹³⁶ ARE NOT COMMERCIAL SPEECH.

One major difficulty with the commercial speech doctrine, evidenced by corporate criminal denials, is "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."¹³⁷ Corporate public statements of defense are particularly difficult to categorize, yet classification of such speech as either commercial or non-commercial is required under the current jurisprudence.¹³⁸

1. Identity as a commercial entity is insufficient to qualify speech as commercial.

In classifying statements like those made by Martha Stewart and Nike as either commercial or noncommercial, the fact that the speaker has a corporate identity is not dispositive. The Court has stated that the identity of the speaker is not relevant to determining whether speech is commercial.¹³⁹ Thus, the fact that Nike and Martha Stewart are, or are affiliated with, corporate entities does not make their speech necessarily

¹³⁶ Obviously, while Stewart's and Nike's denials are analyzed similarly here, the situations they faced and the statements they made were not identical. Nike was never formally charged with the working conditions violations of which it was publicly accused in its capacity as a corporation. Conversely, Martha Stewart was formally investigated for insider trading in her capacity as an individual, though her standing as the public figurehead of her corporation makes this distinction less determinative. Given these differences and the liability exception this Comment proposes, Stewart should certainly have a First Amendment defense to liability stemming from her statements of denial. Less obviously, but equally included in the exception proposed here, Nike should also have a First Amendment defense to statements of defense made in its corporate capacity.

¹³⁷ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993).

¹³⁸ See, e.g., *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983).

¹³⁹ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

commercial. Though counter-intuitive, not every statement by a commercial speaker is commercial speech for the purpose of First Amendment analysis.¹⁴⁰ Rather, commercial speech is defined solely by its content.¹⁴¹ In particular, speech on a matter of public interest, even if made by a commercial speaker, is treated as non-commercial.¹⁴²

2. *The content of Stewart's and Nike's public denials of criminal wrongdoing is non-commercial.*

Stewart's and Nike's denials should not be afforded lesser First Amendment protection because their speech does not qualify as commercial speech under any of the Court's four distinct definitions.

- a. Stewart's and Nike's denials did not propose a commercial transaction and were not motivated solely by economic interests.

The statements of defense made by Stewart and Nike cannot be classified as commercial speech under the Court's first two definitions of commercial speech. Neither Stewart's nor Nike's statements proposed a commercial transaction, as required by the Court's test stated in *Board of Trustees of the State University of New York v. Fox* (hereinafter *SUNY*); relatedly, the purpose of the denials cannot realistically be considered *solely* economic. While statements need not resemble typical advertisements to be considered commercial,¹⁴³ the statements at issue here did not even remotely invite commercial dealings. Instead, the statements were merely factually informative regarding the actions of the corporate speakers and were proffered as claims of innocence as part of a public debate on the corporate speakers' criminality.

The Martha Stewart statements at issue consisted of Stewart's denial of insider trading, her explanation of the sell order agreement between herself and her broker, and her reiteration of prior statements.¹⁴⁴ Her

¹⁴⁰ See, e.g., *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 544 (1980).

¹⁴¹ *Id.* at 538 n.5.

¹⁴² E.g., *id.* at 538.

¹⁴³ *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995).

¹⁴⁴ Stewart Indictment, *supra* note 19, at 37-40. The Indictment lists three categories of statements made by Stewart from which the securities fraud charge stems. (1) On June 7, 2002, Stewart issued a statement through her attorney, published in the Wall Street Journal, regarding her sale: "The sale was executed because Ms. Stewart had a predetermined price at which she planned to sell the stock. That determination, made more than a month before that trade, was to sell if the stock ever went less than \$60." (2) On June 12, 2002, following the arrest of Samuel Waksal, Stewart prepared and issued a public statement reiterating her stop-loss agreement, stating that on December 27, 2001, she had returned a phone call from

statements did not in any way invite commercial dealings, as would be the case if she had promoted specific products. Moreover, Stewart's statements leading to Count Nine were not even "the typical stuff of securities fraud actions: false statements about earnings, or revenue, new product lines, or issuance of government licenses or approvals."¹⁴⁵ Stewart merely spoke on her own behalf, rather than on behalf of her corporation, in response to publicly released criminal allegations against her. Stewart's public statements essentially stated, "I am innocent, your charges are false, here is why."¹⁴⁶ Stewart's purpose was merely to deny the public allegations and to give her side of the story; if Stewart had any economic motivation, this was secondary to clearing her own name.¹⁴⁷ Under the Court's jurisprudence, if Stewart's speech had a purpose above and beyond "mere solicitation of patronage"¹⁴⁸ and was not *solely* motivated by the economic interests of herself and the listening public,¹⁴⁹ her speech should not be considered commercial for the purpose of First Amendment analysis merely because she is a figurehead of a corporation.

Nike's statements¹⁵⁰ also did not propose a commercial transaction and were not motivated solely by economic interests. Rather, Nike dedicated the text of its statements and letters to refuting the allegations that Nike's

her broker regarding the fact that the price had fallen below \$60, and assuring that her trade had not been based on nonpublic information. In a statement on June 18, 2002, Stewart referred back to her June 12 statement as her explanation for "what did happen" and further stated that she had cooperated with the government to the best of her ability. (3) On June 19, 2002, Stewart read aloud her June 18 statement at a conference for securities analysts and investors.

¹⁴⁵ Dennis & Boyden, *supra* note 8, at 3.

¹⁴⁶ Pre-trial Brief for Defendant at 10, *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003) (No. 03 Crim. 717).

¹⁴⁷ See Motion for Judgment of Acquittal, *supra* note 26, at 13 ("That statements defending Ms. Stewart's innocence were made throughout that period is perfectly consistent with an intent to protect her personal reputation from false accusations.").

¹⁴⁸ *Friedman v. Rogers*, 440 U.S. 1, 13 n.10 (1979).

¹⁴⁹ *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience").

¹⁵⁰ The Kasky complaint alleges that Nike made six false statements:

(1) that its products are manufactured in compliance with applicable local laws and regulations governing wages and working hours; (2) that the average line-workers in the factories are paid double the applicable local minimum wage; (3) that the workers receive free meals and health care; (4) that Nike 'guarantee[s] a living-wage for all workers'; (5) that the workers are protected from corporal punishment and abuse; (6) that working conditions in the factories are in compliance with applicable local laws and regulations governing occupational health-and-safety and environmental standards.

Brief for Respondent at 4-5, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (citations and commentary omitted).

overseas factories violated local laws and that the Nike corporation engaged in human rights violations.¹⁵¹ Typically, less-protected commercial speech by Nike would be an "Air Jordan" television commercial; the statements made by Nike in its defense are a far cry from mere advertisement, even of its general corporate image. Instead, Nike's statements merely refute public criminal allegations against the corporation. Calling such speech "commercial" would conflict with the Court's narrow definition of commercial speech as speech merely proposing a commercial transaction.¹⁵² Additionally, a conceivable, and in fact likely, motivation for Nike's statements was to refute the charges of illegality at its foreign factories. Nike may have merely wanted to have its voice heard as part of the ongoing public debate regarding its mistreatment of foreign factory workers. As such, the interest served by Nike's statements cannot be considered solely economic. Thus, Nike's statements do not fall under either of the Court's first two definitions of commercial speech.

b. Additionally, under the *Bolger* test, corporate denials are noncommercial speech.

The statements by Stewart and Nike also do not qualify as commercial speech under the three-part test articulated in *Bolger v. Youngs Drug Products*.¹⁵³ In *Bolger*, the Court held that speech constitutes commercial speech, despite the inclusion of speech on matters of public importance, where the speech (1) is an advertisement, (2) explicitly refers to the speaker's product, and (3) is economically motivated.¹⁵⁴ Even presuming some level of economic motivation for their denials, the statements offered by Nike and Stewart were not advertisements and did not refer to their products at all.

The Court has found that speech need not closely resemble a typical advertisement to be commercial, such that press releases or public letters can constitute commercial speech.¹⁵⁵ However, the *Bolger* test does rely on the typical advertising format, in combination with the two other elements, as a yardstick by which to gauge the commercial nature of speech.¹⁵⁶

¹⁵¹ *Id.*

¹⁵² *See, e.g.,* Bd. of Tr. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 469 (1989).

¹⁵³ 463 U.S. 60 (1983).

¹⁵⁴ *Id.* at 66-67, 67 n.13.

¹⁵⁵ *Basic, Inc. v. Levinson*, 485 U.S. 224, 227, 228 n.4 (1988); *see also* *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) ("Speech need not closely resemble a typical advertisement to be commercial.").

¹⁵⁶ Note that this is in direct contradiction to the aforementioned test. The Court has been contradictory on this point.

Stewart's and Nike's denials cannot be classified as typical advertisements. In his dissenting opinion in *Nike v. Kasky*, Justice Breyer found relevant the fact that Nike's statements "appear[ed] outside a traditional advertising format, such as a brief television or newspaper advertisement."¹⁵⁷ Rather, Nike's statements were made in the form of various press releases, letters to newspaper editors and certain individuals (such as university deans and athletic directors).¹⁵⁸ Similarly, Martha Stewart's denials were in the form of press releases, direct comment to the Wall Street Journal, and a press release read aloud by Stewart as a preface to her presentation on MSLO at an investors' meeting.¹⁵⁹ These are not the typical fora of advertisements; if advertisement is defined broadly enough to encompass Nike's and Stewart's statements under the *Bolger* test, commercial speech that wouldn't constitute advertisement is difficult to imagine.

Further, neither Stewart nor Nike made reference to any of their particular products in their statements of denial.¹⁶⁰ Stewart made no reference to any of her company's magazines, household or crafts items, or television programs. Nike's statements included no reference to specific sporting goods, but instead focused on the conditions of its foreign manufacturing facilities. Thus, even if Stewart and Nike had some economic motivation for denying the criminal allegations against them, their denials do not constitute commercial speech under the *Bolger* test.

- c. Finally, even if part of Martha Stewart's and Nike's speech is commercial, the commercial and noncommercial aspects are inextricably intertwined, such that speech must be analyzed as noncommercial.

In *Riley v. National Federation of the Blind of North Carolina*, the Court stated that, where commercial speech and "pure speech" are "inextricably intertwined," such that the two categories of speech cannot be separated, the speech must be analyzed as noncommercial.¹⁶¹ This is a narrow category, and courts have declined to apply this rule of analysis where the commercial and noncommercial elements of the speech are at all separable.¹⁶² However, in the context of corporate denials of criminal

¹⁵⁷ *Nike, Inc. v. Kasky*, 539 U.S. 654, 677 (2003) (Breyer, J., dissenting).

¹⁵⁸ *Id.* (Breyer, J., dissenting).

¹⁵⁹ Stewart Indictment, *supra* note 19, at 37-40; *see also supra* note 144.

¹⁶⁰ *See supra* notes 144 and 150 for the content of Stewart's and Nike's statements, respectively.

¹⁶¹ 487 U.S. 781, 796 (1988).

¹⁶² *See, e.g., Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 108 (6th Cir. 1995).

allegations, the *Riley* rule should apply because the commercial and noncommercial elements of the speech are in fact inextricably intertwined. In *SUNY*, the Court upheld a restriction on the marketing of products in campus dormitories and rejected the contention that the sale of housewares was “inextricably intertwined” with noncommercial lessons in home economics.¹⁶³ The Court stated that “[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”¹⁶⁴ The Court recognized that the expression of noncommercial messages should not be limited, but found that the noncommercial message at issue, a home economics lesson, did not have to be combined with the commercial message, the sale of housewares, in order to be conveyed.¹⁶⁵

In *Semco v. Amcast*, the Sixth Circuit similarly rejected a *Riley* contention, also offered in an attempt to heighten the protection for commercial speech under a different set of facts.¹⁶⁶ In *Semco*, an article published on the manufacturing process for “plunger tips” also contained explicit references to the author company’s products.¹⁶⁷ The Court held that the two categories of speech were not inextricably intertwined, because an article could feasibly discuss the manufacturing process without referring to a particular brand of products; likewise, the particular brand could be advertised independent of the manufacturing process publication.¹⁶⁸

However, the issue of corporate criminal denials is distinguishable from the facts in both *Semco* and *SUNY*, and the *Riley* rule should be applied here. If corporate denials have an element of commercial speech because of their potential economic motivation and impact, this commercial element is “inextricably intertwined” with the noncommercial element of such speech, that of offering a denial to public criminal allegations.¹⁶⁹ Put differently, here a “law of man or nature makes it impossible” to deny allegations of corporate criminal wrongdoing without also making statements potentially beneficial to the corporation’s bottom line. Denial of criminal allegations will most often have an economically beneficial effect

¹⁶³ *Bd. of Tr. of the State Univ. of N.Y.*, 492 U.S. at 474.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 52 F.3d 108 (6th Cir. 1995).

¹⁶⁷ *Id.* at 110-11.

¹⁶⁸ *Id.* at 113 (“[N]o law of man or nature makes it impossible’ to explain the new process for manufacturing plunger tips without describing Amcast’s own products, history, quality standards, safety standards, and commitment to public services.”).

¹⁶⁹ *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796 (1988); see also *Nike, Inc. v. Kasky*, 539 U.S. 654, 677 (2003) (Breyer, J., dissenting) (accepting the “inextricably intertwined” rationale on slightly different grounds).

on the speaker when the speaker is in the business of profit-making. Because of this catch-22, even if Nike's and Martha Stewart's statements were motivated in part by a desire to promote their corporation or their products,¹⁷⁰ the *Riley* exception should apply in the narrow case of the factual claims asserted as a criminal denial.

In his dissenting opinion in *Nike v. Kasky*, Justice Breyer¹⁷¹ found that Nike's statements were not purely commercial.¹⁷² Rather, Breyer stated that Nike's public statements, such as the letters written by Nike, are a "mixture of commercial and noncommercial (public-issue-oriented) elements"; he cited to *Riley* and concluded that the speech should receive more protection than that afforded mere commercial speech.¹⁷³ Justice Breyer cited three factors that were relevant to his determination that the speech contained predominant noncommercial elements: the statements were made outside the traditional advertising format; the statements conveyed information to a diverse audience, including those with a mere curiosity about the public controversy; and the content of the statements clearly concerned a "matter . . . of significant public interest and active controversy."¹⁷⁴ Again, the statements made by Stewart and Nike were not published in the typical advertising format.¹⁷⁵ The statements were made to the general public via the media and to private individuals. Each of the statements concerned a topic of heated debate and public curiosity. That these criteria are met suggests that there is at least a noncommercial element to their denials.

Practicality also supports the view that corporate denials are at least partially noncommercial. If Martha Stewart's personal denial of criminal

¹⁷⁰ While neither Nike nor Martha Stewart made direct reference to their corporations' products in their public statements, "a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 67 (1983); see also Nat'l Comm'n. on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977). This rationale almost certainly applies to Nike, whose presence in the sporting goods market is undeniably significant. This rationale may also extend to Stewart's identity as a spokesperson for her brand, because Stewart arguably sells products by selling her own image. Thus, her own self-defense/self-promotion may be seen as promoting her corporation, Martha Stewart Living Omnimedia.

¹⁷¹ With whom Justice O'Connor joined. Justice Kennedy also dissented from the dismissal of the writ as improvidently granted.

¹⁷² 539 U.S. 654, 676 (2003) (Breyer, J., dissenting).

¹⁷³ *Id.* (Breyer, J., dissenting).

¹⁷⁴ *Id.* at 677 (Breyer, J., dissenting). Justice Breyer also emphasized the difficulty with the regulatory scheme for enforcement of the false advertising law in *Nike v. Kasky* and acknowledged that a different context, like the securities laws, may be analyzed differently. However, in assessing whether corporate criminal denials have a noncommercial element, the factors Breyer outlined seem entirely applicable to the securities fraud context.

¹⁷⁵ See *supra* notes 155-59 and accompanying text.

allegations and Nike's statements denying human rights and local law violations are seen merely as commercial speech (with no noncommercial element), one could hardly imagine a corporate denial of criminal allegations that could avoid potential liability under restrictions on commercial speech.

3. Regulation of corporate denials is inconsistent with the rationales offered for commercial speech regulation.

Because the rationales offered for lesser protection of commercial speech are inapplicable to commercial entities' statements of defense, as a matter of policy such speech should not be afforded the lesser First Amendment protection of typical commercial speech.

- a. The government seeks to ensure the accuracy of statements to consumers.

The government has a diminished interest in ensuring the accuracy of speech like Nike's and Martha Stewart's denials, because the speech is on a topic of contemporary public debate, rather than tangible goods and services.¹⁷⁶ The government regulates the accuracy of commercial speech because the accuracy of such speech is readily ascertainable by the speaker and such speech is unlikely to fuel the sort of debate that could self-monitor, or weed out, false statements.¹⁷⁷

While the statements by Stewart and Nike did not pertain to tangible goods and services, their accuracy was arguably readily ascertainable. Their denials, of course, were not capable of the type of regulatory empirical analysis that could ensure the accuracy of factual statements about Air Jordans or 250-thread count bed sheets, but Stewart and Nike both knew whether their statements of innocence were true or false.

¹⁷⁶ For example, the allegations against Nike have fueled many protests over university contracts with the Nike corporation on college campuses around the country. See, e.g., Craig Anderson, *Students Protest UA-Nike Contract*, ARIZ. DAILY WILDCAT, Nov. 25, 1997, available at http://wildcat.arizona.edu/papers/91/65/01_1_m.html.

Even more so, the debate over Martha Stewart's involvement with the ImClone scandal was widely promulgated by the news media and entertainment industry. Martha Stewart was the butt of many jokes made by late-night television personalities, such as Jay Leno, David Letterman, Jon Stewart, Conan O'Brien, Craig Kilborn, and Dennis Miller. See, e.g., <http://politicalhumor.about.com/library/blmarthastewartjokes.htm> (Incidentally, one of the better jokes, made by Conan O'Brien, was: "When reached for comment on the charges, Martha didn't say much, (only) that a subpoena should be served with a nice appetizer.").

¹⁷⁷ Merrill, *supra* note 69, at 223.

Admittedly, commercial speakers are in the best position to evaluate the accuracy of their statements of innocence.

However, that a public debate regarding their guilt was ongoing suggests that Stewart's and Nike's statements were different than mere commercial advertising in their need to be regulated for accuracy. Whereas typical commercial speech, such as advertising, is seen as less likely to provoke public scrutiny and discussion, Nike and Martha Stewart were responding as part of a public debate that was already ongoing. Their statements were direct contributions to the interchange of ideas that was in progress regarding their allegedly criminal activities. Undoubtedly, the climate of public interest into which corporate criminal denials enter is unique; Stewart's and Nike's statements peaked the public's interest like no statement promoting household or sporting goods could. Such a context of public interest and debate is one where the fitting remedy for "evil counsels" should not be censorship or liability, but additional "good counsels."¹⁷⁸ Essentially, where speech is likely to garner public interest and foster public debate, the truth or falsity of such speech should be addressed through the scrutiny of a functioning marketplace of ideas; in the mere advertising context, such a marketplace doesn't exist, prompting the government to regulate the truth of commercial speech. Thus, the accuracy rationale for regulating commercial speech should not apply to corporate criminal denials.

- b. The hardness of commercial speech negates the danger from over-regulation.

Statements like those made by Nike and Martha Stewart are not the kind of "hardy" commercial speech that can withstand being crushed or chilled by overbroad regulation. Rather, there is a great risk that corporate denials will be completely chilled by the fear of liability under securities or false advertising laws.¹⁷⁹ "Hardy" commercial speech is "the offspring of economic self-interest."¹⁸⁰ The denial of criminal allegations is not a hardy

¹⁷⁸ See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (stating that the adage is ineffective as applied to mere advertisements, communications that are less public debate and more one-way); see also *supra* notes 119-22 and accompanying text.

¹⁷⁹ *Nike*, 539 U.S. at 680 (Breyer, J., dissenting) ("Uncertainty about how a court will view these, or other, statements, can easily chill a speaker's efforts to engage in public debate. . .").

¹⁸⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 n.6 (1980). Yet any corporate act can be said to be in the corporation's economic self-interest. If we are willing to define commercial speech so broadly, no statement by a corporate actor or entity would receive First Amendment protection, a position rejected by prior caselaw. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978)

form of speech in the vein of purely economic interests; rather, such speech is a sensitive response to an attack on one's personal (or corporate) innocence and autonomy. Because corporate denials at least possibly serve non-economic goals, such as the simple desire to defend oneself against criminal accusations, corporate denials are more sensitive to over-regulation and more likely to be chilled than commercial, purely economic speech.

- c. Commercial speech is considered less valuable¹⁸¹ and thus more appropriately subject to regulation.

Where denials by commercial entities address an issue of ongoing public debate, such speech is a valuable contribution to the forum of ideas.¹⁸² The statements made by Stewart and Nike are distinguishable from typical commercial speech, like product advertisements, because they are speech on a matter of public concern. The intense media scrutiny and repeated editorializing suggest that Nike's employment practices and Stewart's involvement in the ImClone scandal were subjects in which the public was interested. Particularly when made by highly public entities, denials of criminal wrongdoing are properly classified as aids in the search for truth and the advancement of self-expression, and should be valued highly.¹⁸³

**B. STRONG INTERESTS ARE PROTECTED BY PERMITTING
UNHAMPERED CORPORATE DENIAL OF PUBLIC CRIMINAL
ALLEGATIONS.**

The type of expression exercised by Martha Stewart and Nike is of high First Amendment value and is inconsistent with the low protection afforded mere commercial speech. Typical commercial speech lacks the communicative value of fully protected speech to both the speaker and society.¹⁸⁴ Here, however, the interests of speaker, listeners, and society in general suggest that such speech should be protected.

(protecting corporate speech in the form of political contributions as speech that "lies at the heart of the First Amendment's protection").

¹⁸¹ The value of corporate criminal denials is analyzed more thoroughly in Part IV.B, *infra*.

¹⁸² *Bates v. State Bar of Ariz.*, 433 U.S. 350, 350 (1977) (Blackmun, J., concurring) ("The commercial speech that this Court has permitted government to regulate or proscribe was commercial speech that did not 'serve individual or societal interests in assuring informed and reliable decision-making.'"); *see also supra* notes 51-60 and accompanying text.

¹⁸³ Merrill, *supra* note 69, at 226.

¹⁸⁴ Brief for the Petitioner at 14, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

The right of a criminal defendant to deny allegations against him is a speech right at the heart of the First Amendment, since it ensures complete citizen autonomy, accords with constitutional protections afforded criminal defendants, and protects against an overreaching government. The First Amendment has been recognized as a crucial means of enforcement for "constitutionally guaranteed and other rights."¹⁸⁵ An individual (or a corporation) has a recognized interest in self-expression¹⁸⁶ that should extend to the right to deny criminal allegations that serve to damage one's public reputation. Self-expression, or contributing one's ideas to the public debate of an issue,¹⁸⁷ seems particularly critical when the source of public debate is the speaker herself. And when the debate concerns the speaker's involvement in criminal activity, the interest in self-expression is even higher, as criminality reflects extremely negatively upon both individual and corporate defendants.

Further, a corporate speaker should have a right to deny the public allegations made against him because silence in the face of public criticism may signal acceptance of the allegations and imply guilt.¹⁸⁸ This runs counter to the spirit of our constitutional protections for criminal defendants, in particular the Fifth Amendment proscription of compelling a witness to testify against himself.¹⁸⁹ In addition, in light of our nation's criminal jurisprudence requiring that defendants are innocent until proven guilty¹⁹⁰ and the requirement of due process of law,¹⁹¹ any statement made by a defendant or accused must be allowed full breathing space so as not to be chilled. Particularly where the allegations are so highly publicized, the

¹⁸⁵ NAACP v. Button, 371 U.S. 415, 428-29 (1963).

¹⁸⁶ Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 534 n.2 (1980) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 765 (1978)).

¹⁸⁷ See *supra* notes 51-60 and accompanying text.

¹⁸⁸ This may be particularly true where the source of public criminal allegations is respected, thus giving the allegations considerable credibility. This was a hazard faced by Stewart, whose reported allegations came from congressional insiders. See *supra* notes 25-26.

¹⁸⁹ U.S. CONST. amend. V ("Nor shall any person . . . be compelled in any criminal case to be a witness against himself . . .").

¹⁹⁰ United States v. Soto-Beniquez, 350 F.3d 131 (1st Cir. 2003) (recently reaffirming this long-axiomatic right by holding that a not guilty plea is essentially a declaration of innocence).

¹⁹¹ U.S. CONST. amend. V ("Nor shall any person . . . be deprived of life, liberty, or property without due process of law . . ."). This provision has been interpreted as giving a criminal defendant a right to present a defense.

nearly reciprocal denial of such allegations,¹⁹² as made by Martha Stewart and Nike, must be protected to preserve the ability to deny criminal allegations and assert, via the First Amendment, one's constitutional and other rights.¹⁹³ Without such protection, "profound reticence to speak on social, political, or moral issues" would be consequentially "instill[ed] in commercial entities" facing criminal allegations.¹⁹⁴

Significantly, protection for criminal denials serves as a check on government overreach, one of the significant interests served by the First Amendment. "The freedom of individuals to verbally oppose or challenge government action without criminal consequence 'is one of the principal characteristics by which we distinguish a free nation from a police state.'"¹⁹⁵ A quintessential check on government overreach is the right of a criminal defendant to rebut the charges of criminality and draw public attention to the government's potentially arbitrary exertion of force over the defendant.¹⁹⁶ In particular, the government's imposition of liability or criminality based on statements of defense seems like a precariously slippery slope¹⁹⁷ that should be avoided altogether.

Listeners also have an interest in a corporate entity's statements of defense, just as they have an interest in hearing any idea in the marketplace. Modern First Amendment jurisprudence reflects the idea of a "free" marketplace of ideas, where citizens benefit from having as much information available to them as possible.¹⁹⁸ Just as a corporate defendant has a particular interest in engaging in the public debate about her own criminality, listeners have a heightened interest in hearing from the defendant herself. Input from persons intimately involved in an issue of public debate should be crucial to that debate.¹⁹⁹ Regulation of speech on matters of public importance is reminiscent of the social paternalism

¹⁹² For example, where public claims of criminal wrongdoing are in the form of "D is guilty of crime X because of actions Y," a reciprocal denial would take the form of "D is not guilty of crime X because of actions Z (not Y)."

¹⁹³ *NAACP v. Button*, 371 U.S. 415, 428-29 (1963).

¹⁹⁴ Brief for the Petitioner at 41, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

¹⁹⁵ Memorandum of Law in Further Support of Martha Stewart's Omnibus Pre-Trial Motions at 83, *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003) (No. 03 Crim. 717) (quoting *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987)).

¹⁹⁶ *Id.*

¹⁹⁷ *Dennis & Boyden*, *supra* note 8, at 5 (pithily noting that "Martha Stewart will have her day in court, but she should not be forced to have another day in court for every previous day").

¹⁹⁸ See *supra* note 55 and accompanying text.

¹⁹⁹ Bob Herbert, Editorial, *Let Nike Stay in the Game*, N.Y. TIMES, May 6, 2002, at A21.

rejected by years of First Amendment interpretation.²⁰⁰ Listeners should receive information from both "sides" in the case of criminal wrongdoing.²⁰¹ Allowing the accuser to speak, but requiring the accused to remain silent or face liability, may be misleading to consumers or investors in and of itself.²⁰²

While society has an interest in both the promulgation of commercial²⁰³ and noncommercial speech, this interest is at its peak when the speech is noncommercial and on a matter of public concern. When criminal allegations against a public figure become a matter of public debate, a thriving marketplace of ideas requires permission to respond without threat of liability, even if the response is false. The type of speech that criminal allegations foster is the type of speech that puts a check on government overreaching by questioning the sufficiency of the government's claims. By limiting the types of speakers who can respond to such allegations and instilling a fear of liability for denials, important speech is chilled²⁰⁴ and critical First Amendment goals go underserved.²⁰⁵

C. THE GOVERNMENT'S INTEREST IN REGULATING COMMERCIAL ENTITIES' PUBLIC DENIALS IS LOW.

Furthermore, the government has a low interest in protecting consumers or investors and has other means of regulating any potentially harmful speech by commercial defendants. Because denials of criminal

²⁰⁰ Reply Brief for Petitioner at 8, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) ("If it were the state's role to assure that listeners reach the decision it regards as best informed, in commerce or elsewhere, lessened First Amendment protection would necessarily apply to [other types of speech as well].").

²⁰¹ Dennis & Boyden, *supra* note 8, at 4.

²⁰² Alan Reynolds, *Martha Stewart: Obstructing Injustice*, at <http://www.cato.org/dailys/06-28-03.html> (June 28, 2003):

[Stewart's] statements about having made a December 20 agreement with her broker to sell at \$60 may or may not have been true. But they were not nearly as misleading to MSLO stockholders as the false accusations of insider trading by "people close to a Congressional investigation." The fact that MSLO fell from \$19.01 on June 6 to \$11.47 on June 28 shows that congressional slander on June 6 really did mislead the markets while Martha Stewart's countervailing efforts did not.

Id.

²⁰³ *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (citing *Va. State Bd. of Pharmacy v. Virginia*, 425 U.S. 748, 748 (1976)) ("[S]ociety also has a strong interest in the free flow of information, both because the efficient allocation of resources depends upon informed consumer choices and because 'even an individual advertisement, though entirely commercial,' may be of general public interest.").

²⁰⁴ Dennis & Boyden, *supra* note 8, at 4.

²⁰⁵ See *supra* notes 54-56 and accompanying text.

wrongdoing are viewed as *de rigueur*, such speech, even if false, should not have much of an impact on the market.²⁰⁶ Such speech may be disregarded by consumers and investors as mere “puffery”; the listener may be better informed of a statement’s possible falsity and may even expect and question the accuracy of a corporate defendants’ denial.²⁰⁷ Thus, the government is overly paternalistic when it “assume[s] that consumers lack the ability or sophistication to decide for themselves whether a company’s image reflects reality, or whether that image should influence their purchasing decisions at all.”²⁰⁸

In addition, the government has other means of dealing with false statements by corporate defendants. An obstruction of justice charge may be brought to curtail or punish false statements made in the course of an investigation.²⁰⁹ In particular, Martha Stewart’s later convictions, after the charge of securities fraud was dismissed, prove that the government has other avenues to successfully pursue that would accomplish its legitimate goals.²¹⁰ Further, false statements made in court can, of course, be punished with a charge of perjury.²¹¹ Lastly, if out-of-court public statements are seen as potentially problematic, the court can issue a gag order preventing all parties from issuing public statements, such that the public discourse will not be unfairly one-sided.²¹²

V. CONCLUSION

Regulations imposed on speech on matters of public importance must serve government interests that outweigh the interests being infringed.²¹³ Because the interests supporting a corporate entity’s right to deny criminal allegations are strong, and the government interest in regulating the content of such statements is low, regulation of speech denying criminal allegations violates the First Amendment. The state should not be able to impose a financial disincentive or, even worse, the possibility of imprisonment, to

²⁰⁶ Dennis & Boyden, *supra* note 8, at 3.

²⁰⁷ *Id.* at 4 (“The securities laws presume that investors are able to dismiss ‘puffery’—vaguely optimistic statements about the future—and to anticipate obvious risks that are part and parcel of the business they are investing in.”). The same could be said of consumers making purchasing decisions in response to defenses like that offered by Nike.

²⁰⁸ Reply Brief for Petitioner at 8, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (citation omitted).

²⁰⁹ Dennis & Boyden, *supra* note 8, at 4.

²¹⁰ See *Martha Stewart Found Guilty on All Counts*, *supra* note 42.

²¹¹ *Id.*

²¹² *Id.*

²¹³ See, e.g., *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980).

corporate actors who wish to respond to criminal allegations.²¹⁴ At the least, criminal denials by commercial entities are comprised of both commercial and noncommercial content, rendering them subject to analysis as noncommercial speech.²¹⁵ If statements made by Nike and Martha Stewart are classified as commercial speech (and thus receive lesser First Amendment protection), commercial speakers will fear liability for making any public statement denying criminal allegations. This type of speech, however, should receive the utmost First Amendment protection given our nation's emphasis on protections for criminal defendants and the high value of speech that ensures against government overreach (here, in the decision to prosecute or grant legislative permission for an individual to act as quasi-prosecutor).²¹⁶ Criminal denials cannot be classified as purely commercial, and the interests of society and of corporate speakers outweigh the government's interest in regulating speech of this kind.

The exception proposed here is narrow, such that the risk of dilution of other speech protections is low. Only where the corporate statement is a public denial and refutation of criminal allegations should false or misleading speech be insulated from regulation.²¹⁷ The exception proposed here does little to change prior decisions and allows for flexibility of speech protection for an emerging class of highly public corporate criminal defendants.

A corporate criminal defendant should not be denied the fundamental protections our nation gives to all criminal defendants. By restricting the speech a corporate actor can express, the state must be cautious not to restrict any protected speech. The denial of criminal allegations is speech at the heart of the First Amendment; such speech fosters citizen autonomy and self-expression, as well as the more overarching marketplace of ideas.²¹⁸ Further, such denials limit the reach of the government by opening up government actions to public debate. Where, as in the context discussed

²¹⁴ Nike, Inc. v. Kasky, 539 U.S. 654, 664 (2003) ("Knowledgeable persons should be free to participate in [a debate about important public issues] 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 also supra* notes 38-44 (regarding Martha Stewart's defense of the criminal securities fraud charge). The fact that this imbalance is felt solely by commercial entities under certain speech regulations makes corporate speakers less likely to make statements on their own behalf than private/individual criminal defendants who fear no such liability.

²¹⁵ Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781 (1988).

²¹⁶ The First Amendment is available to enforce these rights. NAACP v. Button, 371 U.S. 415, 428-29 (1963).

²¹⁷ *See supra* note 192 for an example of the factually reciprocal type of criminal denial that would be afforded protection under the exception proposed here.

²¹⁸ *See supra* notes 54-60 and accompanying text.

here, the matter is already one of public debate because of the prominence of the corporate defendant, restrictions on the defensive statements a corporation can make limit unnecessarily the marketplace of ideas to a one-sided debate.

The caution necessary to avoid suppressing protected speech requires an exception to securities fraud, false advertising, or similar laws imposing liability on corporate speakers in the limited context proposed here. Where a corporate figure denies public allegations of criminal wrongdoing, such speech should be protected under the First Amendment, even if factual statements are false or misleading, to provide “breathing space” for high-value criminal denials. Thus, the interest a criminal defendant has in denying criminal allegations is a unique and narrow defense “so pure as to countenance securities fraud,” false advertising, or similar liability stemming from public factual statements of defense.²¹⁹

²¹⁹ Epstein, *supra* note 1, at 59.

