IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARC KASKY, on Behalf of the General Public of the State of California

Plaintiff and Respondent

v.

NIKE INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER and DAVID TAYLOR,

Defendants and Appellants

No. S087859

REQUEST OF CALIFORNIA LABOR FEDERATION, AFL-CIO FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT MARC KASKY

and

BRIEF OF CALIFORNIA LABOR FEDERATION, AFL-CIO, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT MARC KASKY

Court of Appeal, First Appellate District, Division One, Case No. A086142
San Francisco Superior Court, Case No. 994446

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REQUEST OF THE CALIFORNIA LABOR FEDERATION, AFL-CIO FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF AND APPELLANT MARC KASKY

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

The undersigned respectfully requests leave to file a brief as amicus curiae in support of appellant Marc Kasky in this matter in the undersigned's capacity as general counsel to the California Labor Federation, AFL-CIO (hereinafter "Federation"). Federation is composed of affiliated labor organizations representing in excess of two and one-quarter million workers in the State of California.

The gravaman of this case is whether certain statements by Respondent Nike reflect commercial speech, subject to state regulation if untrue, or noncommercial speech, the truth of which may only be judged by the court of public opinion free from state interference.

In 1985 this Court issued an opinion in which it held that an ordinance barring fortune telling for consideration violated free speech rights. In the decision the Court stated that an advertisement that certain cherries were picked by union labor reflected noncommercial speech. Respondent Nike and the Court of Appeal believe this cherry statement reflects a legal standard

insulating from state regulation all advertisement of the nature of labor used to produce a product. Union workers are vitally interested in and directly affected by this issue.

The Federation's brief submitted herewith argues that: first, the cherry metaphor is pure dicta; second, the state has and may continue to regulate false ads of the type of labor employed; third, an advertisement of the type of labor employed is commercial speech and; fourth, the instant case does not involve constitutionally protected "labor dispute" speech. The brief concludes that a corrected "cherry metaphor" should result in a decision in favor of Plaintiff and Appellant Kasky.

The undersigned has read Appellant's Brief on the Merits, Respondents' Brief on the Merits and Appellant's Reply Brief. The undersigned believes there is need for argument on the items specified and that the argument will not be cumulative.

The proposed amicus brief is lodged at this time with this application.

Executed at San Francisco, California this 3 day of November, 2000.

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1. INTRODUCTION AND OVERVIEW OF ARGUMENT

Pursuant to Rule 14(b) of the California Rules of Court the undersigned are submitting herewith this brief amicus curiae on behalf of the California Labor Federation, AFL-CIO, and its affiliates and members who number in excess of two and one-quarter million workers in the State of California. This brief is limited to the points raised in the application for permission to file this brief amicus curiae. This brief is in support of Plaintiff and Appellant Marc Kasky.

> "The principle emerging from these cases is that commercial speech is that which has but one purpose-to advance an economic transaction. By contrast, non-commercial speech encompasses activities extending beyond that purpose. For example, an advertisement that cherries can be purchased for a dollar a box at store X may be commercial speech, but an advertisement informing the public that the cherries for sale at store X were picked by union workers is more: it communicates a message beyond that related to the bare economic interests of the parties." *Spiritual Psychic Science Church v. City of Azusa*

(1985) 39 Cal. 3d. 501, 511 (emphasis added).

The California Labor Federation, AFL-CIO (hereinafter "Federation") believes that the underscored second branch of the Court's cherry metaphor has misled the court below and resulted in the parties espousing arguments which are equally erroneous.

The court below would rely upon the second branch to hold that the "truthfulness" of Nike's advertisements as to the labor practices of its manufacturers must be resolved by the public and not a judge. *Kasky v. Nike (2000)* 79 Cal. App. 4th 165, 176-177.

Nike claims that under the second branch it may make statements as to these labor practices with impunity even if they are designed to increase sales. (Respondents' Brief on the Merits pages 21 thru 25). Alternatively Nike argues that under the "test" established by this Court under the second branch, Nike's speech to the public on "labor dispute" issues must always be viewed as non-commercial and sacrosanct. (Respondents' Brief on the Merits, pages 31 thru 33).

Kasky argues that if the language of the second branch included some explicit sales promotion, the "test" for non-commercial speech would not be met. (Appellant's Brief on the Merits, pages 34-5)

Federation believes all of these arguments on the cherry metaphor miss the mark. First, the metaphor is pure dicta and not the ratio decidendi of this Court's prior decision. Second, an advertisement claiming use of union labor

is commercial speech properly subject to regulation under Labor Code Section 1012 and by extension Business and Professions Code Sections 17200 et seq. Third, claims as to specific identifiable conditions of labor employed in production of merchandise is commercial speech. Fourth, the instant case does not involve a "labor dispute". Under these points Plaintiff and Appellant is entitled to a favorable decision in a demurrer setting.

2. THE CHERRY METAPHOR IS PURE DICTA

> "The ratio decidendi is the principle or rule that constitutes the ground of the decision and it is this principle or rule that has the effect of precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised to determine (a) which statements of law were necessary to the decision, and therefor binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e. dicta, with no force as precedents." (Witkin, 9 California Procedure, 4th Edition, Appeal, Section 945, pages 986-987, citations omitted.)

In *Spiritual Psychic Science Church*, supra, the Court held that a local ordinance barring fortune telling for consideration violated the free speech protections afforded by Article I, Section 2 of the California Constitution.

The ratio decidendi upon which the decision was based were the alternative grounds that fortune telling for consideration could either contain

a spark of political flame as to the form of society in the future or stimulate discussion of the future thus adding to the imagination and intellectual life of Californians. "Under either rationale, fortune telling deserves protection." (*Spiritual Psychic Science Church*, supra at pg. 512)

The case included no issue implicating the question of whether an advertisement as to cherries being picked by union workers should be viewed as commercial or noncommercial speech. "A decision is not even authority except upon the point actually passed upon by the court and directly involved in the case." *Hart v. Burnett* (1860) 15 Cal. 530, 598. The passage of a mere 140 years has not changed this rule of judicial construction. (See for example *Dyer v. Superior Court* (1997) 56 Cal. App. 4th 61, 66.)

The "test" upon which the litigants expound and the lower court relies is thus not a precedent of this Court. Rejection of the dicta in no fashion compels a rejection of the decision of this Court in *Spiritual Psychic Science Church* supra.

3. THE STATE HAS AND MAY CONTINUE TO REGULATE FALSE SPEECH AS TO THE USE OF UNION LABOR

Since 1937 Labor Code Section 1012 has made a misdemeanor a willfully made misrepresentation or false statement by a seller or manufacturer regarding the use of union labor.

In *United Farm Workers v. Superior Court* (1975) 47 Cal. App. 3d 344, the civil remedies available for violation of Section 1012 were considered. In this case real party defendants were alleged to have used without permission the union's name and trademark on defendants' goods. The complaint sought civil damages and injunctive relief for violation of the Labor Code provision and false advertising under the Business and Professions Code.

The superior court had sustained without leave to amend defendants' demurrers to the various causes of action including alleged violations of Business and Professions Code Section 17500. *United Farmworkers of America*, supra, pages 336-337.

The Court of Appeal noted:

> "It is arguable also that a wrongful appropriator of a union label may profit by such wrongful use in that such use may increase the sale of a product bearing such a union label, which label may have an appeal and induce the purchase of goods so labeled." *United Farmworkers of America*, supra, at page 342.

The Court of Appeal reversed the trial court as to all the causes of action including that under Business and Professions Code Section 17500. *United Farmworkers of America*, supra, at pages 343 thru 345. On June 19, 1975 this Court denied defendants' petition for hearing.

The decision in the *Farmworkers* case is silent as to the type of produce involved. Federation cannot believe that "cherry" dicta in *Spiritual Psychic Science Church* was intended by this Court to overturn the *Farmworkers* decision. In this case the Court should resolve the ambiguity by reaffirming *Farmworkers* and abandoning its faulty dicta in *Spiritual Psychic Science Church.*

4. AN ADVERTISEMENT CONCERNING THE TYPE OF LABOR EMPLOYED IS COMMERCIAL SPEECH

> "For most of this Nation's history, purely commercial advertising was not considered to implicate the constitutional protection of the First Amendment. In 1976, the Court extended First Amendment protection to speech that does no more than propose a commercial transaction. Our decisions, however, have recognized the 'common sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. The Constitution therefore affords lesser

protection to commercial speech than to other constitutionally guaranteed expression." U.S. v. Edge Broadcasting Co. (1993) 509 U.S. 418, 426, 113 S. Ct. 2696, 2703 (emphasis added; citations omitted)

Consider the following examples of potential speech. An advertisement claims union labor is used to produce a product. An advertisement claims the workers who produce the product received an hourly wage of X. An advertisement claims the workers who produced the product received health insurance. An advertisement claims workers who produce the product were over a stated minimum age. An advertisement claims workers who produced the product were not beaten or sexually abused. An advertisement claims a product is organic. Consider that none of the aforesaid advertisements specifically urged consumers to buy the product at a stated price.

Federation believes that it would defy "common sense" to believe the advertisements were placed with any intent other than encouraging purchase of the product. Since the advertisements would thus be "commercial speech" the speech could be regulated to the extent it was false or misleading.

The foregoing is entirely in keeping with the first part of the four part test set forth in Central Hudson Gas and Electric Corp. v. Public Services Commission of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351. In reviewing commercial speech the first test is that the speech concern a lawful

activity and not be misleading in order to receive First Amendment protection.

The "common sense" distinction must require the courts to look at factual assertions related to specific work conditions outside of a labor dispute as commercial speech. Any other approach merely grants to all sellers of goods the ability to conduct false advertising campaigns. The Court need look no further than the six allegations of the complaint set forth on page 6 of Appellant's Brief on the Merits for an example of such a practice (compliance with laws and regulations governing wages and hours; payment of a living wage; payment of double the minimum wage; providing free meals and health care to workers; compliance with occupational safety laws; protecting workers from corporal punishment and abuse). This case is not one involving an intellectual dialogue on the purported "benefits" of a global economy. This case is about claims of specific labor conditions in order to induce the purchase of Nike products.

5. RESPONDENT NIKE HAS MISREPRESENTED THE VIRGINIA STATE BOARD OF PHARMACY DECISION

"As the United States Supreme Court noted in *Virginia State Board of Pharmacy*, 'The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both

the employee and employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome.'" (Respondents' Brief on the Merits at page 25)

The Brief fails to note the Court's footnote to this discussion which states in part:

> "The speech of labor disputants, of course, is subject to a number of restrictions ... The constitutionality of restrictions upon speech in the special context of labor disputes is not before us here. We express no views on this complex subject, and advert to cases in the labor field only to note that in some circumstances speech of an entirely private and economic character enjoys the protection of the First Amendment." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 763 footnote 17, 96 S.Ct. 1817, 1826 footnote 17

This Court should also take note that the instant case does not involve a "labor dispute". Nike has taken care to assure that the workers employed by its manufacturers enjoy none of the protections of United States' labor

laws. This case involves allegations that the workers were underage, beaten and sexually abused. The complaint alleges that Nike untruthfully denied these conditions existed in order to induce California consumers to purchase Nike products. Such facts do not involve a "labor dispute".

6. CONCLUSION: A CORRECT "CHERRY" METAPHOR WOULD RESULT IN A DECISION IN FAVOR OF PLAINTIFF

Federation believes a correction to the faulty cherry metaphor dicta would resolve this case.

First, a claim that union labor has been used is commercial speech designed to induce purchases. *United Farmworkers of America*, supra.

Second, the state may not suppress dissemination of truthful information to consumers concerning the use of union labor. *Virginia State Board of Pharmacy*, supra; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 363, 97 S. Ct. 2691

Third, the state may regulate false claims that union labor has been used. In Re R.M.J. (1982) 455 U.S. 191, 203, 102 S. Ct. 929; *United Farmworkers of America*, supra.

Against the "test" of such a corrected metaphor Plaintiff in the instant case must prevail at this time before this Court. FEDERATION BELIEVES THIS IS ESPECIALLY CLEAR IN REGARD TO CLAIMS INVOLVING UNDERAGE WORKERS, PHYSICAL AND SEXUAL ABUSE. IF SUCH EVENTS

TOOK PLACE AND NIKE HAS UNTRUTHFULLY DENIED THEM TO MAINTAIN OR INCREASE ITS MARKET SHARE THE RIGHTS OF CALIFORNIA CONSUMERS TO NOT BE LIED TO MUST BE PROTECTED.

For the reasons set forth in this Brief and those set forth in the Briefs of Appellant the Federation urges reversal of the decision of the Court of Appeal.

Respectfully submitted November 3, 2000.

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DECLARATION OF SERVICE

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Law Offices of Carroll & Scully, Inc., 300 Montgomery Street, Suite #735, San Francisco, California 94104. On the date stated below I served a true copy of:

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and

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on November 3, 2006.

Ellen E. Boring