

Congress of the United States
Washington, DC 20515

March 18, 2003

Nike v. Kasky: The Whole Story

Dear Colleague:

You or your staff may have seen the Dear Colleagues that have been recently circulated from Representative Kucinich asking you to join him in filing a Supreme Court *amicus brief* in the case of Nike v. Kasky. Unfortunately they fail to tell the whole story.

We thought you might like to learn the facts about this important First Amendment case, scheduled for Supreme Court review on April 23, 2003. In May 2002, the California Supreme Court (in a 4-3) decision, overturned two lower California State Court decisions, and determined that Nike's public statements about its labor practices were commercial speech - and therefore not entitled to the same level of First Amendment protection as non-commercial speech. Specifically, the Court held that any California resident could bring suit to challenge any statement by any entity offering goods or services about its operations even when the statement is not presented through advertising. If that opinion is left to stand, it would have a chilling effect on participation in public debate and would be counterproductive to achieving progress and real reform on these issues because any Californian could sue without a claim of reliance or injury or purposeful wrongdoing by the speaker.

Nike v. Kasky, is NOT about whether corporations can lie, nor is it about Nike's past labor practices. Everyone agrees that a purposeful misstatement that causes any harm can give rise to a suit. **Pure and simply, this case IS about whether corporations, labor unions and other non-governmental organizations have the ability to participate in the public debate on issues as vast as globalization, protection of the environment, diversity and other important issues without the threat of being sued.**

We are writing to point out that a wide array of divergent organizations including major U.S. business groups (including the U.S. Chamber, NAM and BRT), the U.S. Solicitor General, the ACLU, the AFL-CIO, and important media organizations disagree with Rep. Kucinich on this matter. Noted Constitutional scholars and Supreme Court advocates Laurence Tribe and Walter Dellinger are leading Nike's legal team on this matter.

Think about the last time a Supreme Court case aligned such a diverse group of organizations. The following portions of their *amicus briefs* to fully understand the importance of this case, and why the Supreme Court should not view this type of speech as commercial:

The **U.S.-Chamber of Commerce** wrote that "If general discussion about a company's business operations and labor conditions were subjected to the same kind of restrictions that apply to speech proposing a commercial transaction, the predictable result would be to impede and impoverish public debate on important policy issues";

While the **AFL-CIO** filed a brief critical of Nike's past labor practices, they make the strong point that the California Supreme Court's decision must be overturned in order to protect public debate. The AFL-CIO's brief states, "First Amendment principles leave no room for legal regulation that inhibits the freedom of speech of one of the disputants in a public debate. And, that is true whether the disfavored speaker is an individual, a union, or a business corporation."

The **U.S. Solicitor General representing the United States Government** explained that California law is entirely aberrational in the United States and said that the Court "should rule that the First Amendment bars private suits, such as [this one], that challenge the truthfulness of representations that caused the plaintiff himself no harm." It further explained that Nike's legal position does not undermine the government's existing authority to regulate false, deceptive or misleading speech.

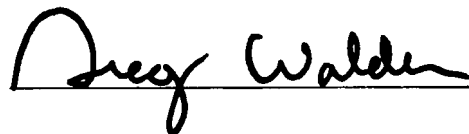
The **ACLU** argued, "[W]e strongly believe that the dispute over Nike's overseas labor practices should be resolved through public debate and not in a courtroom." "Nike's interest in telling its side of the story in a nationwide debate," continued the ACLU, "is no less entitled to full First Amendment protection than statements made by those who have leveled charges critical of Nike's employment practices."

As members of Oregon's Congressional delegation, we have not always agreed with each other on matters dealing with international trade and globalization. But we do agree that we want a full, open, and transparent debate about these issues and we want corporations, labor unions and other non-governmental organizations to be fully engaged on these matters and not hindered by a single state's limitation of the protection given by the First Amendment. It is the prospect of an open debate, with consequences in the marketplace if misstatements are made, that will ensure that consumers receive complete and accurate information.

Sincerely,



Earl Blumenauer



Greg Walden



Peter DeFazio



Darlene Hooley



David Wu