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Free Speech for Companies on Justices' Agenda

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WASHINGTON, April 19 — A Supreme Court case on Nike's potential liability for any misstatements in defense of its overseas business practices has become the focus of a passionate debate over the free speech rights of corporations.

The case, to be argued Wednesday, could produce the most important ruling in years on the constitutional contours of commercial speech. It is an appeal by Nike of a California Supreme Court decision last year subjecting the company to a trial on a San Francisco man's complaint that its benign descriptions of working conditions in its Asian factories were misleading enough to violate California's law against false advertising and unfair trade practices.

The trial has not yet taken place, meaning that neither the accusations against Nike nor the merits of the company's self-defense have been tested in court. That has not dimmed the intensity of interest from the business and publishing worlds, which support Nike, and antiglobalization groups, which support Marc Kasky, a 58-year-old runner and former Nike customer who brought the lawsuit five years ago. He invoked an unusual provision of California law that permits individuals to file unfair trade cases as "private attorneys general." Among other remedies, the suit seeks restitution of Nike's California profits attributable to any violations.

As the three dozen briefs submitted to the Supreme Court demonstrate, the case has become a kind of First Amendment mirror not only for the globalization debate but also for a debate of the role of corporations in society.

"California has caused the entire business community to stand up and take notice," the Washington Legal Foundation, a pro-business group here, says in its brief for Nike.

On the other side is Reclaim Democracy.org, a group based in Boulder, Colo., that organized some of the anti-Nike briefs and has the motto "Restoring citizen authority over corporations." In its newsletter, the group declares, "We have worked diligently on this case because it offers a superb opportunity to provoke public scrutiny of the judicial creation of constitutional rights for corporations and to raise awareness of the far-reaching effects such protections have upon our lives."

One such judicial creation is commercial speech, a concept that has flowered only recently as a result of a series of Supreme Court cases beginning in the 1970's. As constitutional doctrine, it remains much in flux. The definition of commercial speech in the court's recent cases is speech that "does no more than propose a commercial transaction." As long as it is not false or misleading, such speech is deserving of constitutional protection, though not at the level of "pure" or political speech.

This case, Nike v. Kasky, No. 02-575, presents the court with two questions, one of definition and one of application.

First, did the California Supreme Court properly characterize Nike's challenged statements as commercial speech, for which liability could attach without the need to show deliberate or reckless falsehood?

Second, even if the speech was properly labeled commercial — a characterization that Nike disputes — does the First Amendment permit California to impose liability at the behest of a "private attorney general" without evidence that he or any other California consumer relied on the statements or was harmed by them?

Mr. Kasky contends that in 1996 and 1997, at the height of public criticism over its employment practices in the third world, Nike made six misrepresentations about its employees' pay and working conditions in nine separate

communications, all directed toward reassuring customers that it was an ethical company that deserved their continued loyalty.

None of these were conventional product advertisements. They included, for example, a letter to the editor published in The New York Times and signed by Nike's chairman; a posting on Nike's Web site; a letter to the chief executive of the Y.W.C.A. of America; a press release; and a letter from Nike's director of sports marketing to university presidents and athletic directors.

Nike's purpose was simply "to induce consumers to buy its products" and the communications were no more than commercial speech, Mr. Kasky's brief asserts.

Before the California Supreme Court, he conceded that if Nike's statements were deemed not to be commercial speech, the First Amendment would require dismissal of his lawsuit.

Among those supporting Mr. Kasky in the current case are California and 17 other states, including New York and Connecticut; Global Exchange, a human rights organization active in the international labor movement; the Sierra Club; Domini Social Investments, which advises funds and individuals on "socially responsible investing"; and Public Citizen, a group affiliated with Ralph Nader. Nike's speech was properly deemed commercial, Public Citizen's brief says, because the company was "speaking to promote and protect its corporate image, an image that has long been at the crux of its marketing campaign and its sales success."

The California court's 4-to-3 decision against Nike adopted a broad definition of commercial speech to include speech by a person or organization "engaged in commerce" that conveys factual information "likely to influence consumers in their commercial decisions." This definition is so broad as "to include virtually every corporate utterance," the three leading advertising industry trade associations tell the justices in a brief for Nike.

Nike's basic argument in its brief is that in its challenged statements, not only was it not directly proposing a commercial transaction, but it was engaging in a topical discussion of broad public interest for which its "status as a corporate speaker is immaterial." Its defense of its labor practices in the context of the globalization debate "belongs at the very core of the First Amendment protections," the brief says, while the California court's theory "cuts the heart out of the First Amendment's protections for statements by commercial entities on nearly every public issue."

Nike's "friends of the court" also include an unusual range, from the American Civil Liberties Union to the Bush administration to the Business Roundtable (150 chief executives of major corporations) to organized labor. The A.F.L.-C.I.O. says in its brief that while it considers Nike an exploitative employer, the discussion should be "an open free speech debate under the First Amendment and not one subject to legal regulation under the commercial speech doctrine." The New York Times Company signed a brief for Nike filed by 40 media organizations.

Beyond the question of the boundary between commercial and noncommercial speech, various groups are pressing a dizzying range of options on the court, from giving commercial speech full protection (a position advocated by Justice Clarence Thomas) to stripping corporations of constitutional rights entirely.

"This is one of the great First Amendment cases," Prof. Robert C. Post of the University of California at Berkeley said in an interview. "State control of corporate speech is fully at the heart of it." Professor Post, a First Amendment scholar who is not involved in the case, added, "The structure of public discourse is at stake."