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## Nike Free Speech Case Is Unexpectedly Returned to California

By LINDA GREENHOUSE

**W**ASHINGTON, June 26 — A Supreme Court case that was widely expected to produce a landmark ruling on the free speech rights of corporations ended today with an unexpected "never mind."

The justices dismissed in a one-sentence unsigned order, as "improvidently granted," Nike's appeal of a California Supreme Court decision requiring the company to stand trial on a citizen's complaint of consumer fraud and unfair trade practices for statements it had made in defense of its overseas labor policies. The term means the court changed its mind about taking the case.

As a result, Nike may now have to defend itself in the California courts under a state court ruling that stripped its statements of full First Amendment protection by deeming them only commercial speech, for which there can be liability for statements demonstrated to be false or misleading. For political speech, by contrast, there can be no liability without proof of deliberate or reckless falsehood.

It is also possible that the case will eventually be back before the Supreme Court. The court produced no majority opinion and gave no reason for its action today, which apparently came on a 6-to-3 vote. But a concurring opinion by three justices identified several reasons for the dismissal, including the fact that Nike's case arrived as a pretrial appeal, with many relevant facts, as well as the ultimate liability still to be determined.

The entire exercise was an odd one, because the case, Nike v. Kasky, No. 02-575, was in exactly the same procedural posture in January, when the court accepted the company's appeal. But several justices appeared intensely interested in the procedural issues when the case was argued in April.

Whatever happens next, the passions that the case stirred are not likely to dissipate. The case attracted some three dozen briefs and became the focus of an intense debate, on the Internet, at the court and elsewhere, over the role of multinational corporations, the effects of globalization and the constitutional contours of commercial speech.

Nike lawyers said the concurring opinion, signed by Justices Ruth Bader Ginsburg, David H. Souter and John Paul Stevens, and a dissenting opinion by Justices Stephen G. Breyer and Sandra Day O'Connor, provided fresh ammunition for trying to have the case dismissed before a trial in California. Justice Anthony M. Kennedy also dissented from the dismissal.

The concurring and dissenting opinions said that however Nike's statements in op-ed articles, press releases and letters should be characterized, they were at least a blend of commercial and noncommercial speech. Laurence H. Tribe, a Harvard law professor who argued Nike's appeal, said the opinions refuted the premise of the California Supreme Court that the statements were simply "garden-variety commercial speech."

In addition, Professor Tribe said, the opinions provided ammunition for attacking the unusual California law

under which any resident can sue a company for unfair trade practices as a self-designated "private attorney general."

Justice Breyer's opinion said, "The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums."

Responding on behalf of Marc Kasky, the San Franciscan who sued Nike and sought recovery of its California profits, an antiglobalization group, ReclaimDemocracy.org, called the dismissal "a victory for democracy and the truth." The director of the organization, Jeff Milchen, said it was "a relief to hear that the court was not prepared to consider even more extreme judicial activism on behalf of corporate America and against U.S. citizens by creating a corporate right to lie."

Representative Dennis J. Kucinich, the Ohio Democrat who is seeking the presidential nomination, also signed a brief for Mr. Kasky. Mr. Kucinich called the decision "a victory for consumer protection and corporate accountability."

Because there has not been a trial, the truth or falsity of Nike's characterizations of its business practices has not been established. Nike has maintained that it was engaged in fully protected political speech by offering its side of a debate over the effects of globalization.

In his opinion, Justice Breyer said he agreed with Nike that it was suffering the chilling effect of the California ruling and should not have to wait to have the merits of its case addressed. On the merits, Nike would probably win at the Supreme Court, Justice Breyer said.

"As things stand, the whole business community has a cloud over its speech," Dan Jaffe, executive vice president of the Association of National Advertisers, said in an interview today. The advertising, public relations and publishing industries entered the case on Nike's behalf, as did the A.F.L.-C.I.O., the American Civil Liberties Union and the Bush administration. Seventeen states, including New York and Connecticut, filed briefs on Mr. Kasky's behalf, as did Ralph Nader's Public Citizen and environmental and antiglobalization groups.