Press Release

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COURT URGED TO OVERTURN CALIFORNIA LIMITATIONS ON CORPORATE SPEECH

***(Nike, Inc. v. Kasky,* No. 02-575)**

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to overturn a California court decision that threatens to impose severe restrictions on the right of corporations to speak freely on issues of public importance.

In a brief filed in *Nike, Inc. v. Kasky,* WLF argued that the California court effectively held that *all* corporate speech -- even speech on matters of great public importance -- is entitled to reduced levels of First Amendment protection. WLF argued that that decision is contrary to a long line of Supreme Court decisions and threatens to chill significant amounts of speech by corporations. In November, WLF filed a brief urging the Supreme Court to grant review in the case; the Court agreed to do so in January.

"It cannot be in the public interest to silence corporations on issues that are of importance to the general public," said WLF Chief Counsel Richard Samp after filing WLF's brief. "But if the California decision is allowed to stand, corporations will shy away from saying anything on substantive issues and instead will direct their resources toward feel-good advertising that contributes little to public debate," Samp said.

The case arises in connection with the on-going public debate over the overseas labor practices of Nike, a leading athletic apparel and equipment manufacturer. During the past decade, numerous critics of Nike have alleged that workers at many of its overseas manufacturing facilities have been subject to substandard working conditions. These allegations have been widely reported in newspapers and on television programs and have become an issue of significant public interest. Nike has responded by denying the charges -- through press releases, letters to newspapers, letters to university presidents and athletic directors, etc.

The plaintiff, Marc Kasky, is a California resident who heard some of the denials and believes they are false (although he has no first-hand knowledge of working conditions at Nike facilities). He sued Nike as a "private attorney general" under California's unfair competition law

(§ 17200) and its false advertising law (§ 17500). Although he does not claim to have been injured by Nike's denials, he claims that some consumers might be induced by Nike's denials to purchase the company's products and therefore seeks an injunction against the company -- as well as an award of attorney fees.

The lower courts threw out the complaint on First Amendment grounds. Applying standard First Amendment principles applicable in libel cases, the courts held that Nike's statements were not actionable even if false, in the absence of evidence that Nike actually knew that its statements were false. (Nike alleges that its statements are true, and Kasky alleges that Nike officials acted negligently, not that it knowingly issued false statements.) But the California Supreme Court, by a 4-3 vote, reversed and reinstated the case. It held that the Nike statements constituted "commercial speech," a category of speech that is entitled to a reduced level of First Amendment protection. The court held that because a State is entitled to impose an absolute ban on false commercial speech, the suit should be permitted to go forward.

In its brief, WLF argued that the California Supreme Court erred in classifying Nike's denials as "commercial speech." WLF argued that that speech category is limited to speech, such as advertising, that does no more than propose a commercial transaction. WLF argued that Nike issued its denial not for the express purpose of selling its products, but for the purpose of responding to charges leveled against the company's labor practices -- charges that have become matters of significant public interest.

WLF further argued that even if Nike's denials could be classified as commercial speech, they are still entitled to full First Amendment protection because sound public policy requires that companies be encouraged to speak out on issues of public interest. WLF argued that any speech (regardless whether classified as commercial or noncommercial) is entitled to full First Amendment protection if it concerns a matter of public interest and does not directly relate to the characteristics of a product or service offered for sale. WLF argued that if the decision below is allowed to stand, companies will confine their speech to "feel good" advertising -- such as advertising depicting a famous athlete training while wearing Nike gear. WLF that argued such advertising has great appeal to companies because it contains no statements of fact and thus almost surely will not become a target of litigation.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States, including many in California. It devotes a significant portion of its resources to protecting the speech rights of the business community. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.