

Lisa Danetz & Thomas Alan Linzey
on The Supremes' June 2003 Kasky Dismissal

26 June 2003

natural_persons list

Lisa Danetz is a staff attorney at the National Voting Rights Institute in Boston. NVRI does both litigation and public education related to campaign finance reform, trying to redefine campaign finance reform as a civil rights issue. Lisa first became aware of the corporate personhood issue through the recent Supreme Court case, *Nike v. Kasky*, and authored the amicus brief filed in that case on behalf of ReclaimDemocracy.org. NVRI became involved in the *Nike v. Kasky* case because the issues involved in the Nike case are the same as those at the heart of corporate participation in the political process: namely, to what degree may the government regulate corporate "speech" that does not fit the Supreme Court's definition of "commercial speech"?

From: Lisa Danetz
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Date: Thu, 26 Jun 2003 16:58:39 -0400
Subject: RE: [natural_persons] Nike case

I thought the list would be interested in knowing that the Supreme Court dismissed the appeal with one sentence in the Nike v. Kasky case. This means that they did not rule on the First Amendment issue and, at least for the time being, there is no Supreme Court law explicitly according the same level of First Amendment protection to corporations and to individuals. . . .

Now that I have read the opinions, Adam [Sacks -- list moderator] asked me to share a few more thoughts about the Nike case. As I mentioned earlier, the Court dismissed the appeal in a one-sentence order. As you may or may not be aware, the Supreme Court only accepts a small number of appeals for review each term. Essentially, the Court's one-sentence order indicated it decided it should not have heard the appeal in the first place. Thus, the California Supreme Court opinion -- which decided that Kasky could proceed with the lawsuit -- was reinstated as controlling the outcome of the case.

Six Justices agreed with this outcome (C.J. Rehnquist and JJ. Stevens, Scalia, Thomas, Souter, and Ginsburg). Three dissented (JJ. Kennedy, Breyer and O'Connor).

There is no way to know the exact reason why the six justices decided that the Court should not have heard the appeal. Justice Stevens, joined by Justice Ginsburg and joined in part by Justice Souter, wrote a concurring opinion outlining the three reasons why he agreed that the appeal should be dismissed. (Justice Souter only agreed with one of the three.) The opinion did not reach corporate personhood issues at all. The remaining three justices who voted to dismiss the appeal remained silent as to their reasons.

It is not surprising that the Court (in the order, concurrence, or dissent) did not discuss corporate personhood issues. Corporate personhood was something of a hidden evil in this

case. The parties themselves viewed this case as a clash between two well-settled First Amendment doctrines: commercial speech (Kasky's view) and political speech (Nike's view). If the Court had ruled in Nike's favor on the First Amendment issue, the logic would have meant that corporations enjoy the same exact First Amendment protections as individual citizens. In other words, the Court would have decided the corporate personhood issue by assumption and without any discussion.

Although many would argue that the case law currently implies that corporations enjoy the same First Amendment protections as individual citizens anyway, the Court has never explicitly decided that people and corporations get the same level of protection. In fact, in a footnote in another case this past term, *Federal Election Commission v. Beaumont*, the Supreme Court appeared to recognize that individual citizens enjoy greater First Amendment protection than do corporations.

We argued this point -- basically, that corporations don't get the same level of protection for political speech -- in our amicus brief but we knew it would be unlikely the Court would address the issue. Even though our brief was submitted on behalf of Kasky, Kasky's lawyer *CONCEDED* that Kasky would lose if the Court determined that the speech was not commercial speech. Therefore, even if the Court examined the merits of the case, it is unlikely it would have reached the issue we raised.

The gist: This dismissal is great news for our side.

Attorney Thomas Alan Linzey works with the Community Environmental Legal Defense Fund, Inc. (CELDF) in Chambersburg, Pennsylvania. CELDF was launched in 1995 to provide free and affordable legal services to grassroots, community-based environmental groups, and rural municipal governments. The Legal Defense Fund currently hosts four Program Areas:

- **The Grassroots Litigation Support Program**
Through this Program, the Legal Defense Fund assists groups and individuals to litigate without a lawyer in County, State, and Federal Courts on selected issues. In addition, the Legal Defense Fund agrees to represent groups and individuals directly on issues of public importance, and maintains a legal referral directory of low cost legal assistance.
- **The Grassroots Administrative and Technical Support Program**
Through this Program, the Legal Defense Fund provides incorporation and IRS 501(c)(3) processing services for groups, provides general legal research, responds to general legal inquiries, and assists organizations with fundraising.
- **The Corporations and Democracy Program**
Through this Program, the Legal Defense Fund drafts Ordinances for local governments and assists organizations to assert direct, local, and democratic control over corporations.
- **The Sustainable Communities Program**
Through this Program, the Legal Defense Fund has created the Franklin County Coalition -- an association of diverse community-based organizations in Franklin County, Pennsylvania seeking to build a sustainable County in South-Central Pennsylvania. The Legal Defense Fund is working to replicate that County-based model in other areas of Pennsylvania.

Since 1995, the Community Environmental Legal Defense Fund (CELDF) has provided legal assistance to over three hundred organizations in seventeen states, and has assisted over seventy rural, local governments in four states.

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Subject: Re: [natural_persons] Nike case

Friends,

I agree with what Lisa has written here -- I read the concurrence and dissent this afternoon.

It is great news only because it delays the inevitable appeal from Nike if a favorable ruling is received by Kasky in the trial court. *AND ONLY* if we take the time to reframe the appeals in our language -- that is, that the Nike Corporation lacks standing to bring an appeal in the first place because it does not possess First Amendment rights. That work has to begin now. Otherwise, the decision today simply delays the inevitable -- and was delivered in the words of the two dissenters -- that the Nike Corporation would be afforded First Amendment protections if their communications are a mix of "political" and "commercial" speech.

Thus, it is our work and our job to reframe the debate -- away from a discussion about political/commercial speech and towards a fundamental rallying cry that corporations do not possess First Amendment rights at all.

That organizing challenge must build upon the framework of local governments adopting Ordinances, and statewide ballot initiatives, that frame this discussion in our language.

If we do our job correctly, the legal brief should write itself. And instead of coming in through the portal of an amicus Brief (of which there were 31 filed), it must become the main focus of Kasky.

Thomas Linzey
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