Press Release

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WLF Seeks to Reverse Antitrust Ruling Against Apple for Bringing Competition to E-Book Market

(Apple Inc. v. United States)

"The appeals court's legally and economically flawed decision, if allowed to stand, would create new challenges for would-be market entrants and chill procompetitive conduct by established firms."—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation today asked the U.S. Supreme Court to review (and overturn) a Second Circuit U.S. Court of Appeals decision that incorrectly applied antitrust principles to condemn as *per se* unlawful market behavior that ultimately benefitted consumers. The Second Circuit's high-profile ruling in favor of the U.S. and some 30 states, WLF argues in its *amicus* brief, contradicts the entire purpose of antitrust law.

Anticipating the iPad tablet computer's launch in January 2010, Apple eyed entering an e-book market dominated by one retailer with a 90% market share. Publishers eager to promote e-book competition signed agreements whereby Apple permitted them to sell e-books on Apple's iBookstore at whatever price they chose (subject to certain limitations), with Apple retaining 30% of the proceeds in return for having provided the sales platform. E-book sales subsequently exploded, overall prices decreased, and retail competition increased.

The Second Circuit nonetheless held Apple *per se* liable under the antitrust laws for facilitating a price-fixing scheme among publishers—because several publishers used their new arrangement with Apple to raise prices on some e-books. WLF argues the Second Circuit erred when it judged Apple's conduct under the *per se* rule—a rule that imposes antitrust liability without permitting defendants to demonstrate that their activity actually promotes competition. WLF argues the Supreme Court's 2007 *Leegin* decision requires all "vertical price restraints" (of the sort Apple's contracts with the publishers allegedly imposed) to be judged under "the rule of reason"—which requires detailed economic analysis before a court may find that an antitrust defendant unreasonably restrained trade. WLF's brief also criticizes the appeals court for faulting Apple's use of "most favored nation" clauses, a commonly used contract provision that allows retailers to ensure they are offered terms no less favorable than the terms offered to their competitors.

Upon filing its brief, WLF issued the following statement by Chief Counsel Richard Samp: "It is ironic that the federal courts would read antitrust law to condemn as *per se* unlawful business conduct that broke a monopolist's grip on sales. The appeals court's legally and economically flawed decision, if allowed to stand, would create new challenges for would-be market entrants and chill procompetitive conduct by established firms."

WLF is a free-market, public-interest law firm and policy center that participates in litigation where courts and antitrust authorities have misapplied antitrust law to consumers' detriment.

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