

Press Release



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WLF Asks 9th Circuit to Apply Heightened Scrutiny to California's Commercial-Speech Restrictions

(*Retail Digital Network, LLC v. Prieto*)

"The Supreme Court's recent case law makes it abundantly clear that content- and speaker-based discrimination like this regulation will almost always fail the stringent scrutiny to which courts must now subject it."

—Richard Samp, WLF Chief Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation yesterday evening filed an *amicus curiae* brief in the US Court of Appeals for the Ninth Circuit in an important commercial speech case, *Retail Digital Network, LLC v. Prieto*. It involves the constitutionality of California's so-called tied-house laws, which prohibit alcoholic-beverage manufacturers from paying retailers to advertise their products. WLF filed in support of Retail Digital Network (RDN), a company that installs advertising displays in retail stores and sells ads on those displays. RDN sought a declaratory judgment that these tied-house laws violate the First Amendment.

The federal district court decided in the State of California's favor back in mid-2013, based on a circuit court of appeals precedent from 30 years ago. Although the district court agreed with RDN that the law in question (Cal. Bus. & Prof. Code § 25503) is a content-and speaker-based restriction, it held that intervening US Supreme Court precedent was not 'clearly irreconcilable' with the circuit precedent. On appeal, a three-judge panel unanimously reversed, agreeing with RDN that Supreme Court precedent has undermined the continuing validity of circuit precedent in this area. The State of California's Department of Alcoholic Beverage Control sought *en banc* review, which the Ninth Circuit has granted (thereby vacating the panel decision in the case).

WLF's brief argues that restrictions on truthful advertising of a legal product must withstand heightened judicial scrutiny if they are content- and/or speaker-based, that the speech restrictions at issue are in fact content- and speaker-based, and that they cannot survive heightened scrutiny. California's tied-house regulations should not even survive intermediate scrutiny, WLF's brief contends, as they do not directly advance the State's substantial interest (e.g., in temperance) in a narrow manner. *Amicus* briefs like WLF's may play a greater supporting role than usual in this case, because *en banc* rules limited RDN to supplying copies of briefs that are more than three years old and thus did not discuss the latest developments in Supreme Court jurisprudence.

Upon filing its brief, WLF issued this statement by Chief Litigation Counsel Richard Samp: "This unconstitutional law should not have survived intermediate scrutiny 30 years ago. The Supreme Court's recent case law makes it abundantly clear that content- and speaker-based discrimination like this regulation will almost always fail the stringent scrutiny to which courts must now subject it. The *en banc* Ninth Circuit should use this second chance to uphold the First Amendment and strike down this meddlesome law."

WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual and business civil liberties, and the rule of law.

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