Press Release

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WLF Urges Supreme Court To Reject Averaging Of Injuries As Basis For Class Certification

(*StarKist Co. v. Olean Wholesale Cooperative*)

> **"A crowd of antitrust plaintiffs clamoring to average their injuries calls to mind the statistician's joke about a man with his head in an oven and his feet in a freezer who insists that, overall, he's quite comfortable."**
> —Cory Andrews, WLF General Counsel & Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today asked the U.S. Supreme Court to review—and ultimately to overturn—an en banc decision by the U.S. Court of Appeals for the Ninth Circuit that stands class certification on an averaging of the alleged harms suffered by the class members.

The plaintiffs sought to press antitrust claims on behalf of three classes of purchasers of packaged tuna. To do so, they had to establish that common issues "predominate" within each class. The plaintiffs convinced the trial court to find such predominance, and grant class certification, based on an averaging of the alleged anticompetitive overcharges suffered within each proposed class. When a Ninth Circuit panel rightly reversed that decision, an en banc panel of the Ninth Circuit vacated the original panel's opinion and affirmed.

WLF's *amicus* brief gives the Supreme Court four reasons why it should intervene and hear the case. First, averaging a class's damages improperly hides the fact that many class members have no injury under Article III of the Constitution. Second, to retreat to an averaging method that obscures individual class members' lack of injury is, in effect, to admit a lack of predominance under Rule 23. Third, averaging injuries violates due process by depriving the defendant of the chance to raise individual defenses against each party the defendant has not harmed. Finally, the Rules Enabling Act prohibits using the class mechanism to relieve class members of the need to show that they each suffered an injury under the antitrust laws.

Celebrating its 45th year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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