Press Release

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WLF Asks Supreme Court to Finally Overrule Harmful Antitrust Precedent

(*SAP v. Teradata*)

> ***"Nobody believes that tying is so anticompetitive it must be illegal—yet badly wounded Supreme Court precedent holds otherwise. It's time to bayonet that caselaw."***
> —Zac Morgan, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to grant certiorari and reverse a decision of the U.S. Court of Appeals for the Ninth Circuit holding that "tying arrangements" can be presumptively illegal under federal antitrust law.

Tying occurs when a producer offers two items in a single sale. Technically speaking, the selling of a pair of shoes along with the shoelaces (an item that can be, and is, sold separately) could be considered a tie. In this case, a software company (SAP) offered two software products for sale in a single bundle. Teradata sued SAP, contending that this bundle constituted a per se illegal "tie" under the Sherman Act.

The Ninth Circuit agreed that Teradata credibly stated a case for SAP's per se liability. The court could only reach this conclusion because in 1947, in *International Salt v. United States*, the Supreme Court held that the mere existence of a tying arrangement was sufficient to show that the Sherman Act had been violated. While the Supreme Court has spent the last eighty years slowly backing away from that holding—now only *some* ties are per se illegal—it has never officially overruled it.

WLF's brief explains why the Court should grant review and overrule *International Salt*. It has been undercut by later caselaw and no serious economist truly believes that tying arrangements are inherently anticompetitive. If anything, most ties are likely beneficial to consumers and efficiency-enhancing. The Court's dysfunctional and badly reasoned tying precedent to the contrary should be overturned so it can no longer confuse courts and chill pro-competitive economic behavior.

The brief also urges the Court to replace *International Salt* with a straightforward and judicially policeable line. Rather than presumptively illegal, tying should be presumptively *legal*—unless the tie causes actual output restrictions. As the brief says, "[u]sing output as the sole measure of wrongdoing will give courts a tangible metric, one less likely to cause lengthy battle-of-the-experts trials that eat up time and money that both courts and market competitors could be (efficiently) applying elsewhere."

Celebrating its 48th year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and