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WLF Urges Supreme Court to Halt Dangerous “Constructive Tying” Antitrust Theory (*Nielsen v. Cumulus*)

“Constructive tying is just a fancy way of conceding there’s no anti-competitive tie-in.”

— Zac Morgan, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to grant review of a Second Circuit decision that dramatically expanded Sherman Act liability for businesses engaged in beneficial, consumer welfare-maximizing sales.

The case arises from a federal antitrust suit by Cumulus Media against The Nielsen Company (the radio-and-TV ratings firm). Cumulus wanted to buy only national radio-broadcast data from Nielsen, while procuring local reports from one of Nielsen’s competitors. In contract negotiations, Nielsen offered both national-and-local reports at a steep discount relative to the nationwide report, which could be had at a premium. The Second Circuit deemed this an anti-competitive “constructive tie,” likely triggering Sherman Act liability.

WLF’s brief explains why that holding is wrong. Ties are a specific antitrust term of art for when two products are offered in a single sale, with no option to buy the items separately. But Nielsen did not do that here; it offered a bundled discount to make buying two things more attractive. As WLF contends in urging review, that is garden-variety business conduct, as anyone who has ever seen an ad for two medium pizzas and a soft drink offered for less than a large cheese pizza well knows. Those kind of offers benefit consumers and recognize customer agency to choose. They should not be vulnerable to antitrust liability under federal law.

Celebrating its 49th 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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