PACIFIC LEGAL FOUNDATION

August 18, 2016

Public Comments Processing
Attn: TTB-2016-0005
Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW
Box 12
Washington, D.C. 20005

Via Federal e-Rulemaking Portal

Re: Docket No. TTB-2016-0005

Dear Director Greenberg:

Pacific Legal Foundation (PLF) appreciates the opportunity to comment on the proposal to impose appellation of origin labeling requirements on wines sold exclusively in intrastate commerce, which are now exempt from such rules.[1]

PLF is a non-profit, public interest foundation with nationwide experience litigating the constitutional rights of entrepreneurs to free speech and their right to earn a living free of unnecessary governmental interference. PLF also frequently participates in the administrative process to comment on the constitutional implications of proposed regulations.

TTB'S PROPOSED RULE FOR USE OF APPELLATIONS OF ORIGIN IN WINE LABELING RAISES SERIOUS FIRST AMENDMENT CONCERNS

Advertising and other "commercial speech"—including wine labeling—is protected by the First Amendment.[2] When the government seeks to regulate commercial speech, at a minimum, the regulations must pass the four-part test established by the United

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[1] Notice No. 160, 81 Fed. Reg. 40,584 (June 22, 2016).

[2] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

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States Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*.[3] Under *Central Hudson*, First Amendment protection applies to speech concerning lawful commercial activity, which is not misleading.[4] Further, the government's asserted interest in regulating the speech must be "substantial," and the regulation must directly advance that interest and be no more extensive than necessary to serve that interest.[5]

TTB's proposed rule goes further in abridging commercial speech than previous similar rules that have passed constitutional muster. Consider the leading case of *Bronco Wine Co. v. Jolly*,[6] in which a California winemaker challenged a California law that prohibits the use of any name of viticultural significance in wine advertising or labeling, unless the wine qualifies for use of the Napa appellation of origin.[7] Under that law, winemakers cannot use the name "Napa" or any federally recognized viticultural region within Napa County, "unless at least 75 percent of the grapes used to make the wine are from Napa County, or 85 percent of the grapes used to make the wine are from a viticultural region within Napa County."[8] Some of Bronco's brands included viticulturally significant names such as "Napa Ridge," "Napa Creek Winery," and "Rutherford Vintners."[9] However, Bronco's wines were not made out of the required amounts of Napa grapes. In fact, Bronco's wines were made entirely from grapes grown outside of Napa County.[10] The court ruled that using "Napa" in a brand name for wine that is not made from grapes grown in Napa County is inherently misleading and not subject to First Amendment protection.[11] According to evidence

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[3] 447 U.S. 557, 566 (1980).

[4] *Id.*

[5] *Id.*

[6] 29 Cal. Rpt. 3d 462, 468-70 (Cal. Ct. App. 2005).

[7] Cal. Bus. & Prof. Code § 25241.

[8] *Id.*

[9] *Bronco Wine*, 29 Cal. Rpt. 3d at 468.

[10] *Id.* at 469.

[11] *Id.* at 481.

produced in the case, where grapes are *grown* is one of two primary factors considered by consumers when purchasing wine.[12] Indeed, the evidence showed that consumers believe wine marketed with the name "Napa Valley" is made from grapes grown in Napa Valley.[13] Furthermore, since Napa wines have a world renowned reputation for quality, advertising a wine with the Napa name implies that the wine is of superior quality.[14] Thus, the court deemed it constitutionally permissible to prohibit inherently misleading wine labels that would allow winemakers to benefit from false claims.

As highlighted by TTB's own hypothetical,[15] however, the proposed rule regulates substantially beyond the concerns of inherently misleading commercial speech addressed by the California law in the *Bronco Wine* case. The proposed rule includes a hypothetical that states that if a wine is labeled with the "Napa Valley" appellation, but includes a disclaimer that the wine was "produced and bottled by ABC Winery, Anytown, Illinois," then the label violates TTB regulations even if the wine is made from grapes grown in Napa.[16]

Under this hypothetical, the proposed rule is subject to the full *Central Hudson* test, because a wine made from grapes grown in Napa, and truthfully labeled as a Napa wine, does not inherently mislead consumers even if the wine is "finished" out-of-state when the label includes a disclaimer that informs consumers of that fact. The court in *Bronco Wine* repeatedly noted that the location where the grapes are grown—not where the wine is finished—is the key factor as to whether consumers would be misled.[17] Others commenting on this proposed rule have made the same point.[18]

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[12] *Bronco Wine*, 29 Cal. Rpt. 3d at 475. The other factor is the type of wine (e.g. Pinot Grigio or Chardonnay). *Id.* n.11.

[13] 29 Cal. Rpt. 3d at 476.

[14] *Id.* at 475-76.

[15] 81 Fed. Reg. 40,584, 40,586.

[16] *See id.*

[17] 29 Cal. Rpt. 3d at 473-76, 480-81.

[18] *See, e.g.*, Comment 13: Maltzman, Jeffrey (Aug. 16, 2016).

Even assuming the federal government has a substantial interest in regulating the use of appellations of origin in wine labeling sold intrastate, the proposed rule will not satisfy the remaining *Central Hudson* elements: the regulation must still directly advance that interest and be no more extensive than necessary to serve that interest.[19] If information can be presented in a manner that is not deceptive, then the government cannot prohibit the disclosure of information.[20]

The above-mentioned hypothetical disclaimer that the wine was produced and bottled in Illinois but made from Napa-grown grapes and labeled "Napa Valley" provides consumers with sufficient information to avoid being misled—and vintners have a First Amendment right to communicate truthful messages about their products. If, however, the hypothetical disclaimer is insufficient, there are other possible disclaimers that provide additional clarity. For example, a label advertising a Napa wine that truthfully states "85 percent of grapes used to make this wine were grown in Napa County, California," and "Finished and bottled in Illinois," allows winemakers to honestly advertise their product and enjoy the benefits associated with Napa wines. The label also provides consumers with enough information to know they are buying a wine made with Napa-grown grapes but finished outside of California.

The proposed rule violates the First Amendment to the extent it prohibits truthful labeling of wines with viticulturally significant names and in a manner that is more extensive than necessary to serve the government's legitimate interest in the matter.

That the proposed rule only seeks to eliminate the exception for winemakers using out of state grapes to market and sell wine intrastate does not change the analysis. While the constitutionality of the existing regulations is not before the TTB in this proceeding, a proposal to extend a rule of dubious constitutionality to new circumstances merits the TTB's consideration of the First Amendment implications.

Sincerely,

CALEB R. TROTTER
Attorney
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[19] *Central Hudson*, 447 U.S. at 566.

[20] *In re R.M.J.*, 455 U.S. 191, 203 (1982).