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## WLF Month in Review

This WLF Litigation Division feature highlights WLF's court filings, as well as decisions issued in response to WLF's filings. In this edition, we list **September 2021** filings and results.

### New Filings

- WLF urges the Supreme Court to apply strict scrutiny to content-based restrictions on digital-advertising signs. (***City of Austin v. Reagan National Advertising of Austin***)
- WLF urges the Supreme Court to decide that the text and history of FAA's transportation-worker exemption confirm that it covers only workers who transport goods across borders. (***Southwest Airlines v. Saxon***)
- WLF asks the Supreme Court to halt Montana's end run around the Federal Employer's Liability Act. (***BNSF Railway Co. v. Dannels***)
- WLF joins a coalition of other civil-justice and public-policy groups in applauding the Florida Supreme Court's recent decision to codify the "apex doctrine." (***In re Amendment to Florida Rule of Civil Procedure 1.280***)
- WLF reminds the California Court of Appeal that the First Amendment fully protects scientific speech. (***Johnson & Johnson v. California***)
- WLF urges the Supreme Court to review outsized civil penalty unmoored from actual harm. (***Stars Interactive v. Kentucky***)
- WLF asks the Supreme Court to confirm that Section 504 of the Rehabilitation Act does not permit disparate-impact claims. (***CVS Pharmacy, Inc. v. Doe***)

### Decisions

- In a victory for WLF, the Ninth Circuit reverses certification of an unwieldy nationwide class action. (***Stromberg v. Qualcomm Inc.***) **\*\*victory\*\***
- The Texas Supreme Court declines to review a decision subjecting a nonresident defendant to suit in Texas even though the plaintiffs' claims lack any connection to Texas. (***Cessna Aircraft Co. v. Garcia***)
- The Massachusetts Supreme Judicial Court holds that a plaintiff's punitive-damages claim was not extinguished by the Massachusetts Attorney General in the 1998 Master Settlement Agreement. (***Laramie v. Philip Morris USA***)

Litigation is the backbone of WLF's public-interest mission. We litigate nationally before state and federal courts and agencies. Our team, at times with the pro-bono assistance of leading private attorneys, litigates original actions, files *amicus* briefs, participates in the regulatory process, and provides constitutional analysis before federal agencies and Congress.

If you become aware of a pending legal or regulatory matter in which WLF's unique public-interest participation would advance economic liberty, please contact WLF General Counsel and Vice President of Litigation, Cory Andrews.

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## **NEW FILINGS**

### **WLF urges the Supreme Court to apply strict scrutiny to content-based restrictions on digital-advertising signs.**

*City of Austin v. Reagan National Advertising of Austin*

On September 29, WLF filed an *amicus* brief urging the Supreme Court to affirm the Fifth Circuit in an important free-speech case. Applying the Supreme Court’s 2015 *Reed* decision, the Fifth Circuit held that Austin’s ordinance allowing digital signs to promote on-premises goods and services but not off-premises goods and services violates the First Amendment. As WLF’s brief explains, this type of content-based speech restriction must survive strict scrutiny. As the ordinance is not narrowly tailored to advance a compelling government interest, WLF urges the Supreme Court to hold the ordinance is unconstitutional. WLF’s brief was prepared with the pro bono assistance of Thomas M. Johnson, Jr. and Krystal B. Swendsboe of Wiley Rein LLP (Washington, DC).

### **WLF urges the Supreme Court to decide that the text and history of FAA’s transportation-worker exemption confirm that it covers only workers who transport goods across borders.**

*Southwest Airlines v. Saxon*

On September 27, WLF asked the Supreme Court to review, and ultimately reverse, a Seventh Circuit decision that refused to read section 1 of the Federal Arbitration Act (known as the “transportation worker exemption”) in line with the statute’s text and context. Although some judge-made tests purport to expand the exemption beyond those actively engaged in the interstate transportation of goods, WLF argues that these contrived standards defy statutory text and context, produce inconsistent results, and serve no end set forth by Congress. Because the plaintiff in this case does not physically transport goods interstate or even supervise others who do, she falls outside the section 1 exemption.

### **WLF asks the Supreme Court to halt Montana’s end run around the Federal Employer’s Liability Act.**

*BNSF Railway Co. v. Dannels*

On September 24, WLF asked the Supreme Court to review, and ultimately to reverse, a decision of the Montana Supreme Court that unfairly hamstringing railway companies in their efforts to defend against personal-injury suits by their employees. The Federal Employers’ Liability Act (FELA) provides the sole remedy by which railway employees may recover from their employer for work-related injuries. Yet the Montana Supreme Court’s decision permits employees to supplement their FELA claims with a second suit alleging bad faith in defending against FELA claims. In its *amicus* brief, WLF argues that when Congress adopted FELA, it intended to preempt the entire field of railway-injury claims, thus barring under the Constitution’s Supremacy Clause the very state-law claims Montana courts routinely recognize. WLF asks the Supreme Court to grant review and clarify that FELA preempts Montana’s bad faith tort regime, which unduly interferes with Congress’s exclusive scheme for compensating railroad workers. WLF’s brief was joined by the Allied Educational Foundation.

## **WLF joins a coalition of other civil-justice and public-policy groups in applauding the Florida Supreme Court’s recent decision to codify the “apex doctrine.”**

*In re Amendment to Florida Rule of Civil Procedure 1.280*

On September 21, WLF joined a coalition of other civil-justice and public-policy groups in supporting the Florida Supreme Court’s recent decision to codify the “apex doctrine,” which protects corporate officers from abusive discovery. While the doctrine was previously limited to high-ranking government officials, Rule 1.280 extends the same protections to corporate officers, including former officers. The new rule prevents unjustified depositions of government and corporate officers for no legitimate reason.

## **WLF reminds the California Court of Appeal that the First Amendment fully protects scientific speech.**

*Johnson & Johnson v. California*

On September 20, WLF urged the California Court of Appeal to reverse a trial-court decision imposing \$344 million in civil penalties on a medical-device manufacturer for disseminating fully protected scientific speech. Imposing a penalty larger than all other reported California awards combined, the trial court found that every communication the defendants made about Ethicon’s pelvic-mesh products—whether to doctors or patients, written or verbal—violated California law. Yet as the State conceded on the first day of trial, the “scientific propositions” about pelvic mesh are “very much in dispute” here. In its *amicus* brief supporting reversal or vacatur, WLF argued that the trial court erred by imposing liability without considering the First Amendment, which shields reasonably debatable scientific claims from liability. WLF’s brief also contends that allowing the trial-court’s judgment to stand would irreparably chill scientific speech on vital matters of public health. [WLF’s brief was filed with the pro bono assistance of Peter Choate and Mollie Benedict of Tucker Ellis LLP in Los Angeles.](#)

## **WLF urges the Supreme Court to review outsized civil penalty unmoored from actual harm.**

*Stars Interactive v. Kentucky*

On September 10, WLF urged the Supreme Court to hear an important case about outsized judgments unmoored from the actual harm. Both the Excessive Fines Clause and Due Process Clause of the Constitution limit the permissible size of civil penalties. The Kentucky Supreme Court, however, held that the Constitution allows any civil penalty so long as it is calculated using a mathematical formula. WLF’s *amicus* brief explains how that holding deepens a split amongst state courts of last resort and federal courts of appeals while ignoring Supreme Court precedent. Warning against allowing the \$870 million judgment to stand, WLF urges the Supreme Court to hear this case and clarify the important constitutional limits on civil penalties.

**WLF asks the Supreme Court to confirm that Section 504 of the Rehabilitation Act does not permit disparate-impact claims.**

*CVS Pharmacy, Inc. v. Doe*

On September 8, WLF and the Cato Institute filed an *amicus* brief urging the Supreme Court to apply Section 504 of the Rehabilitation Act of 1973 as written. The Ninth Circuit, and three other circuits, have held that Section 504 permits disparate-impact claims. WLF argues that the Ninth Circuit's decision makes no sense in light of Supreme Court decisions interpreting other nondiscrimination statutes. The Court should also decline to imply a cause of action; the Constitution gives Congress the power to make laws. Because the Affordable Care Act greatly expanded who may be sued under the Rehabilitation Act, WLF urges the Supreme Court to reverse the Ninth Circuit's decision.

## **DECISIONS**

**In a victory for WLF, the Ninth Circuit reverses certification of an unwieldy nationwide class action.**

*Stromberg v. Qualcomm Inc.*

On September 29, the Ninth Circuit reversed a trial court's nationwide class-certification order in an antitrust suit against Qualcomm, a leading computer-chip manufacturer. The decision was a victory for WLF, which filed an *amicus* brief in the case arguing that the class's massive size rendered it unmanageable. The plaintiffs alleged that Qualcomm behaved anticompetitively by forcing cellphone makers to pay inflated royalties to Qualcomm to license certain patents. As a result, consumers allegedly paid more for their cellphones than they would have had Qualcomm charged reasonable royalties. But as the Ninth Circuit emphasized in its decision reversing class certification, cellphone purchasers have no direct dealings with Qualcomm. And the antitrust laws of 22 States provide that only those who deal directly with Qualcomm have standing to sue. As a result, the California district court improperly certified the class by applying California law to the claims of all cellphone purchasers in all 50 States.

**The Texas Supreme Court declines to review a decision subjecting a nonresident defendant to suit in Texas even though the plaintiffs' claims lack any connection to Texas.**

*Cessna Aircraft Co. v. Garcia*

On September 24, the Texas Supreme Court declined to review a lower court decision that subjected a nonresident defendant, Cessna Aircraft Company, to suit in Texas even though the plaintiffs' claims lack any connection to Texas. Following an airplane crash in Mexico, the plaintiffs allege that Cessna negligently designed, manufactured, and assembled the aircraft and its components—outside of Texas. Because the plaintiffs' claims relate solely to Cessna's out-of-state conduct, WLF filed an *amicus* brief urging review and contending that the plaintiffs' claims failed to satisfy the constitutional requirement that they arise from Cessna's Texas contacts. WLF filed its brief with the pro bono assistance of Allyson Ho and Bradley Hubbard in the Dallas office of Gibson, Dunn & Crutcher LLP.

**The Massachusetts Supreme Judicial Court holds that a plaintiff's punitive-damages claim was not extinguished by the Massachusetts Attorney General in the 1998 Master Settlement Agreement.**

*Laramie v. Philip Morris USA*

On September 15, the Massachusetts Supreme Judicial Court affirmed a trial court's decision to allow a punitive-damages claim to go forward in a wrongful death case against Philip Morris USA. The decision was a setback for WLF, which filed an *amicus* brief in the case. In its brief urging reversal, WLF argued that failing to bar the plaintiff's punitive damages claim under settled *res judicata* principles would not only undermine the Commonwealth's public policy favoring litigation settlement, but would also discourage defendants from settling *parens patriae* suits in the future. That would be a calamity for litigants, the judiciary, and the Commonwealth. The Court disagreed, holding that "the doctrine of claims preclusion does not apply in these circumstances." WLF submitted its *amicus* brief with the pro bono assistance of attorney Douglas S. Brooks of the Boston firm Libby Hoopes Brooks PC.