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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 **January 2022** filings and results.

### New Filings

- WLF urges the Supreme Court to construe the FAA's transportation-worker exemption in line with its statutory text and context. (***Southwest Airlines v. Saxon***)
- WLF asks the Supreme Court to review the Georgia Supreme Court's holding that state courts may exercise general jurisdiction over any foreign company registering to do business in the State. (***Cooper Tire v. McCall***)
- WLF urges the Fifth Circuit to reject class certification built on junk science. (***Earl v. The Boeing Co.***)
- WLF asks the Second Circuit to grant immediate appellate review of the district court's certification order in a prominent securities class action. (***In re Goldman Sachs Group, Inc. Securities Litigation***)

### Decisions

- The Fourth Circuit joins other circuits in applying the *Safeco* test for willfulness in False Claims Act cases. (***U.S. ex rel. Sheldon v. Allergan***) **\*\*victory\*\***
- The Supreme Court grants review in an important separation-of-powers case. (***Axon v. FTC***) **\*\*victory\*\***
- The Supreme Court stays OSHA's attempt to mandate vaccines for much of the nation's workforce. (***National Federation of Independent Businesses v. OSHA***) **\*\*victory\*\***
- The Supreme Court vacates a Fourth Circuit opinion and remands for reconsideration in light of intervening Supreme Court precedent on Article III standing. (***Rocket Mortgage v. Alig***) **\*\*victory\*\***
- The Supreme Court declines to review a decision of the Montana Supreme Court that unfairly hamstringing railway companies in their efforts to defend, under federal law, personal-injury suits. (***BNSF Railway Co. v. Dannels***)
- The Supreme Court declines to review a Second Circuit decision requiring federal trial courts to exercise Article III jurisdiction in cases brought by non-existent plaintiffs who have no stake in the outcome of the litigation. (***Bank of America v. Fund Liquidation Holdings LLC***)
- The Texas Supreme Court declines to grant mandamus relief limiting the scope of discovery in a major premises-liability case. (***In re Walmart, Inc.***)

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 construe the FAA’s transportation-worker exemption in line with its statutory text and context.**

*Southwest Airlines v. Saxon*

On January 28, WLF asked the Supreme Court to 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 in its *amicus* brief 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 review the Georgia Supreme Court’s holding that state courts may exercise general jurisdiction over any foreign company registering to do business in the State.**

*Cooper Tire v. McCall*

On January 18, WLF filed an *amicus* brief urging the U.S. Supreme Court to review a Georgia Supreme Court decision, which held that state courts may exercise general jurisdiction over any foreign company that registers to do business in the State. WLF’s brief explains that the decision causes uncertainty for businesses nationwide—uncertainty that will harm our economy. WLF’s brief also explains why *stare decisis* factors do not counsel against overturning a 1917 decision that the Georgia Supreme Court relied on here.

### **WLF urges the Fifth Circuit to reject class certification built on junk science.**

*Earl v. The Boeing Co.*

On January 14, WLF urged the Fifth Circuit not to permit plaintiffs to obtain class certification on the basis of unreliable expert evidence. The case arises from a putative class action against The Boeing Company and Southwest Airlines following two tragic overseas accidents involving Boeing’s 737 MAX 8 airplane. In a case unrelated to those tragedies, the district court certified four classes comprising 200,000,000 claims after determining that the plaintiffs’ lone damages expert could ultimately “fix” demonstrable flaws in his conjoint survey as evidence of classwide damages. But, as WLF’s *amicus* brief argues, a district court may not certify any class without first resolving whether the plaintiffs have introduced reliable evidence, including expert testimony, of classwide injury and damages. The district court violated that rule here by allowing the plaintiffs’ deeply flawed damages model to serve as the basis for class certification.

### **WLF asks the Second Circuit to grant immediate appellate review of the district court’s certification order in a prominent securities class action.**

*In re Goldman Sachs Group, Inc. Securities Litigation*

On January 5, WLF asked the Second Circuit to clarify the meaning of a recent U.S. Supreme Court precedent for securities class actions. The appeal arises on remand from the Supreme Court’s 2021 decision in *Goldman Sachs Group v. Arkansas Teacher Retirement System*. There, the Supreme Court established a “mismatch” test to exclude from liability generic corporate statements made by virtually every public company. On remand,

the district court misconstrued the “mismatch” test to require only a finding that the supposedly corrective disclosures generally “implicate” the same subject matter as the purported misrepresentations. And the district court expanded the inflation-maintenance theory by premising price impact on the effect of a disclosure differing in kind from the alleged misstatement itself. Urging interlocutory review, WLF’s brief contends that the district court’s application of *Goldman* would leave defendants without the meaningful ability to defeat class certification for failure to prove price impact, thus undermining Supreme Court precedent and congressional policy aimed at limiting meritless securities class actions and coercive settlements. WLF’s amicus brief was prepared with the pro bono assistance of Lyle Roberts, Mark D. Lanpher, George Anhang, and William Marsh of Shearman & Sterling LLP.

## **DECISIONS**

### **The Fourth Circuit joins other circuits in applying the *Safeco* test for willfulness in False Claims Act cases.**

[\*U.S. ex rel. Sheldon v. Allergan\*](#)

On January 25, the Fourth Circuit in a False Claims Act case adopted the test for willfulness announced by the Supreme Court in *Safeco*. As WLF’s *amicus* brief showed, the *Safeco* test applies in FCA cases when deciding if a defendant acted with reckless disregard for the truth or falsity of submitted claims. Violations of the FCA carry both punitive civil penalties and criminal liability. This means that even civil defendants are entitled to heightened due-process protections. WLF explained that applying *Safeco* in FCA cases provides the necessary due-process protections while advancing Congress’s goal of ensuring companies do not bury their heads in the sand.

### **The Supreme Court grants review in an important separation-of-powers case.**

[\*Axon v. FTC\*](#)

On January 24, the Supreme Court agreed to hear an important separation-of-powers case. WLF filed an *amicus* brief urging review and explaining how the Ninth Circuit misapplied the Supreme Court’s *Thunder Basin* decision. The Ninth Circuit focused almost exclusively on one factor—whether Axon can receive meaningful judicial review of its challenge to the FTC’s structure. It held that once-per-decade review suffices for “meaningful” judicial review. As WLF’s brief showed, this decision follows a pattern among lower courts of applying *Thunder Basin* in a manner that violates defendants’ due-process rights. WLF looks forward to the merits-stage briefing where it will urge the Court to reverse the Ninth Circuit’s decision.

### **The Supreme Court stays OSHA’s attempt to mandate vaccines for much of the nation’s workforce.**

[\*National Federation of Independent Businesses v. OSHA\*](#)

On January 13, the U.S. Supreme Court stayed the Occupational Safety and Health Administration’s vaccine mandate. This was a victory for WLF, which filed an *amicus* brief in the case. As WLF’s brief showed, the emergency temporary standard would have harmed our nation’s economy. Therefore, a stay of the mandate is in the public interest. WLF’s brief also explained why OSHA acted without statutory authorization. So the Applicants are likely to succeed on their challenge. Now the Sixth Circuit

must act quickly and vacate the emergency temporary standard to give certainty to businesses nationwide.

**The Supreme Court vacates a Fourth Circuit opinion and remands for reconsideration in light of intervening Supreme Court precedent on Article III standing.**

[\*Rocket Mortgage v. Alig\*](#)

On January 10, the U.S. Supreme Court vacated a Fourth Circuit opinion and remanded for reconsideration in light of intervening Supreme Court precedent. This outcome was a victory for WLF, which filed the only *amicus* brief in the case. As WLF's brief showed, the Fourth Circuit's decision was inconsistent with the Supreme Court's recent *TransUnion* decision. There, the Court said that allowing uninjured class members to maintain suit in federal court violates core separation-of-powers principles. WLF hopes that the Fourth Circuit will properly apply the precedent on remand.

**The Supreme Court declines to review a decision of the Montana Supreme Court that unfairly hamstringing railway companies in their efforts to defend, under federal law, personal-injury suits.**

[\*BNSF Railway Co. v. Dannels\*](#)

On January 10, the Supreme Court declined to review 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 decision was a setback for WLF, which had filed an *amicus* brief with the Court urging review. 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's brief was joined by the Allied Educational Foundation.

**The Supreme Court declines to review a Second Circuit decision requiring federal trial courts to exercise Article III jurisdiction in cases brought by non-existent plaintiffs who have no stake in the outcome of the litigation.**

[\*Bank of America v. Fund Liquidation Holdings LLC\*](#)

On January 10, the Supreme Court declined to review a Second Circuit decision requiring federal trial courts to exercise jurisdiction in cases brought by non-existent plaintiffs who have no stake in the outcome of the litigation. The decision was a disappointment for WLF, which filed an *amicus* brief urging the Court's review. That brief advanced three arguments. First, the Second Circuit's decision contravenes the Supreme Court's standing jurisprudence by virtually eliminating the case-or-controversy requirement as a meaningful check on federal-court jurisdiction. Second, if left to stand, the Second Circuit's holding will severely erode the Constitution's careful separation of powers. And third, the Second Circuit's decision elevates a procedural rule above a bedrock constitutional duty, in violation of the Rules Enabling Act and Federal Rule of Civil Procedure 82.

**The Texas Supreme Court declines to grant mandamus relief limiting the scope of discovery in a major premises-liability case.**

*In re Walmart, Inc.*

On January 28, the Texas Supreme Court declined to grant mandamus relief to limit discovery in a major premises-liability case. The decision was a setback for WLF, which filed a brief with the court urging mandamus. Under Texas law, a premises-liability plaintiff can subject a defendant to free-ranging and burdensome discovery only after showing that the defendant could have reasonably foreseen her injury. The trial court here refused to apply that principle. It derided the rule as “too restrictive” and faulted the Texas Supreme Court for what it viewed as inadequate guidance. In short, it refused to apply the law. In its *amicus* brief, WLF urged the Texas Supreme Court to intervene and relieve Walmart of the need to produce massive amounts of burdensome discovery unrelated to the threshold issue of foreseeability. WLF’s brief was prepared with the generous pro bono assistance of Allyson N. Ho and Elizabeth Kiernan of Gibson, Dunn & Crutcher LLP in Dallas.