

2022 ANNUAL REPORT

WLF

Washington Legal Foundation

Defending Economic Liberties Since 1977



“A headquarters befitting an established institution.”

In 1993, Washington Legal Foundation purchased the Alice Roosevelt Longworth House, a Beaux-Arts style townhouse built in 1881, to serve as its national headquarters. The unconventional daughter of President Theodore Roosevelt moved into the house in 1925 with her husband, Speaker of the House of Representatives Nicholas Longworth. For the next 60 years, Mrs. Longworth’s home was a salon from which she wielded influence over national politics, hosting presidents, cabinet secretaries, members of Congress, scientists, authors, captains of industry, and diplomats. As WLF’s founder, Daniel J. Popeo, routinely quipped to visitors, “If only these walls could talk.”

“The other Washington monument,” as some called Mrs. Longworth, lived at 2009 Massachusetts Avenue until her death in 1980 at age 96. The charm and intricate detail of her home remain alive at WLF’s headquarters, and the organization embodies the well-informed skepticism and strong-willed advocacy of the building’s seven-decade owner.



Washington Legal Foundation is the nation’s premier public-interest law firm and policy center. Our mission is to preserve and defend America’s free-enterprise system by litigating, educating, and advocating for free-market principles, a limited and accountable government, individual and business civil liberties, and the rule of law.

We **LITIGATE** precedent-setting issues before courts and regulatory agencies; **PUBLISH** and distribute timely and influential legal studies; and **COMMUNICATE** our message through webcast programs, blog commentary, op-eds, and public-education campaigns.

Table of Contents

Friends and Supporters Letter.....3
Legal Policy Advisory Board.....4
Litigating.....6
Litigation Briefs and Regulatory Comments.....10
Impact Focus: False Claims Act.....15
Pro Bono Law Firms.....16
Publishing.....18
Legal Studies Publications.....20
Communicating.....24
Resources and Support.....29

WLF Leadership

- Constance Larcher**, Chief Executive Officer
- Glenn G. Lammi**, Executive Director and Vice President of Legal Studies
- Cory L. Andrews**, General Counsel and Vice President of Litigation
- John M. Masslon II**, Senior Litigation Counsel
- Jennifer Shafer**, Development Specialist
- Harrison Stewart**, Director of Operations

“At a minimum, the rule of law demands fair notice of the law and equality in its application. The government must be bound by fixed rules announced in advance, people must be able to conform their conduct to these rules, and the government must be prevented from using retroactive or malleable rules to single out unpopular groups for disfavored treatment.”

Neil M. Gorsuch

Associate Justice of the U.S. Supreme Court
A Republic, If You Can Keep It



To Our Friends and Supporters

For Americans to “secure the Blessings of Liberty” noted in our Constitution’s preamble, a robust free-enterprise system is absolutely essential. And to flourish, free enterprise requires a static Rule of Law as described by Justice Gorsuch on the previous page. Sadly, in 2022, antipathy toward business and support for debilitating regulation and litigation became increasingly in vogue. Even some individuals and organizations that tout themselves as free-market adherents have joined the anti-business chorus.

Not Washington Legal Foundation. Since 1977, WLF has never wavered from its mission to preserve and defend America’s free-enterprise system in the courts, the administrative state, and the court of public opinion. With those policy-making arenas taking center stage while legislatures remain in gridlock, WLF is ideally positioned to advance the public interest. WLF fights to keep free enterprise free—free to create wealth for shareholders and employees, and free to develop innovative, high-quality goods and services for consumers.

In this Annual Report, we are proud to detail our 2022 litigation, advocacy, and education to spotlight successes in WLF’s pursuit of a favorable legal and regulatory environment for commerce.

WLF’s Litigation Division filed 66 amicus briefs and regulatory comments: that’s nearly six filings a month. Our highly regarded briefs supported positive outcomes in 18 cases in 2022, including eight U.S. Supreme Court victories and seven instances where appellate courts agreed to review lower court decisions

adverse to free enterprise. Our filings demanded that federal agencies provide basic due process and act in a manner consistent with statutes and the Constitution. They urged judges to actively referee civil litigation and bring meritless lawsuits to an end. And they insisted that each branch of government stay in its constitutionally prescribed lane.

Our uncommon think tank, the Legal Studies Division, released 42 original papers and posted 72 insightful commentaries to our blog, the *WLF Legal Pulse*. We also produced and livestreamed 13 Media Briefing and Webinar programs. We appreciate the attorneys and other legal experts, listed in the pages to follow, whose pro bono contributions as writers and panelists enabled such productivity.

We are grateful for those allies whose support and friendship make WLF’s unique work possible. We especially appreciate the counsel and encouragement of our volunteer Legal Policy Advisory Board. And, of course, we never forget those individuals and organizations whose generous philanthropy sustains WLF and propel our shared mission forward.

Although WLF achieved much in 2022, threats to economic freedom will endure, if not expand, this year. As we’ve learned from 45 years of public-interest litigation and legal-policy advocacy, progress requires perseverance. This report demonstrates that WLF possesses the tools and the determination to press on. With your help we will build on this year’s accomplishments and secure more liberty for all Americans.



A handwritten signature in black ink that reads "Glenn G. Lammi".

Glenn G. Lammi
Executive Director & Vice President of Legal Studies



A handwritten signature in black ink that reads "Cory L. Andrews".

Cory L. Andrews
General Counsel & Vice President of Litigation

Legal Policy Advisory Board

Chairman of the Board

Jay B. Stephens
Kirkland & Ellis LLP

Former Chairmen

Frank J. Fahrenkopf, Jr.
The Honorable Dick Thornburgh
Richard K. Willard

Prof. Stephen M. Bainbridge
William D. Warren
Distinguished Professor of Law
UCLA School of Law

Mark A. Behrens
Shook, Hardy & Bacon LLP

Lisa S. Blatt
Williams & Connolly LLP

The Hon. Susan G. Braden
Chief Judge (Ret.)
U.S. Court of Federal Claims

Gregory A. Brower
Chief Global Compliance Officer
Wynn Resorts

Carol Elder Bruce
Law Office of Carol
Elder Bruce, PLLC

James H. Burnley, IV
Venable LLP

Ralph J. Caccia
Wiley

Michael A. Carvin
Jones Day (Ret.)

Drew Clark
Vice President and General Counsel
McKee Foods Corporation

Charles Cooper
Cooper & Kirk PLLC

Viet D. Dinh
Chief Legal and Policy Officer
Fox

Richard L. Frank
Olsson Frank Weeda Terman Matz PC

Harold Furchtgott-Roth
President
Furchtgott-Roth Economic Enterprises

Stuart M. Gerson
Epstein Becker & Green PC

Thomas C. Goldstein
Goldstein & Russell PC

Eric Grannon
White & Case LLP

Sarah M. Harris
Williams & Connolly LLP

Allyson N. Ho
Gibson, Dunn & Crutcher LLP

Coleen Klasmeier
Sidley Austin LLP

Katharine R. Latimer
Hollingsworth LLP (Ret.)

Jay P. Lefkowitz
Kirkland & Ellis LLP

Susan W. Liebeler
President
Lexpert Research Services

Leah L. Lorber
Assistant General Counsel
GlaxoSmithKline

Michael J. Lotito
Littler Mendelson PC

Arvin Maskin
Mayer Brown LLP

Stephen McManus
Senior Vice President and General Counsel
State Farm Mutual Automobile Insurance Co.

Rob McKenna
Orrick, Herrington & Sutcliffe LLP

Maureen K. Ohlhausen
Baker Botts LLP

Theodore B. Olson
Gibson, Dunn & Crutcher LLP

R. Hewitt Pate
Vice President and General Counsel
Chevron Corporation

Carter G. Phillips
Sidley Austin LLP

Prof. Stephen B. Presser
Raoul Berger Professor of Law Emeritus
Northwestern Pritzker School of Law

Prof. George L. Priest
Edward J. Phelps Professor of Law and Economics
Yale Law School

Charles F. (Rick) Rule
Rule Garza Howley LLP

Evan M. Tager
Mayer Brown LLP

George J. Terwilliger
McGuire Woods LLP

Prof. Larry D. Thompson
John A. Sibley Professor in Corporate and Business Law,
University of Georgia School of Law

Daniel E. Troy
Executive Vice President, Chief Legal Officer, and
General Counsel
Valo Health

Drew Tulumello
Weil, Gotshal & Manges LLP

Thomas N. Vanderford, Jr.
Associate General Counsel and
Executive Director of Litigation
Hyundai Motor America

Joe D. Whitley
Womble Bond Dickinson (US) LLP

Prof. Joshua D. Wright
University Professor of Law
George Mason University, Antonin Scalia Law School

Advisory Board Member Spotlight

Gregory A. Brower, Wynn Resorts



Greg's connection to WLF began in 1990 when he served as a litigation clerk during law school. He joined WLF's advisory board in 2010, took leave in 2016 for a senior position at the FBI, and then rejoined in 2018. During his time on the board, Greg has authored numerous WLF publications, participated in programs, and since 2018 has served as the *WLF Legal Pulse* blog's Featured Expert Contributor on White Collar Crime & Corporate Compliance. In 2022, Greg authored a Legal Studies publication and 11 posts for the blog. Drawing on his service in the Nevada legislature, the U.S. Justice Department, private practice, and now at Wynn Resorts, Greg provides invaluable strategic guidance and has helped WLF to expand its network of allies and volunteers.

Litigating

Washington Legal Foundation litigates at every level of the judiciary, from federal and state trial courts to the U.S. Supreme Court. WLF also regularly participates in administrative proceedings to promote regulatory reform.

During 2022, the legal or constitutional principle WLF advanced in its amicus briefs prevailed in 18 cases.

Seven of those briefs supported a party's request that a court grant discretionary review of a lower-court decision—a crucial point in the litigation process where amicus briefs can have the most impact. Four of those briefs successfully supported certiorari petitions to the U.S. Supreme Court.

Eleven briefs led to victory on the merits, 4 in the Supreme Court and 7 in federal appellate courts.

WLF participated in or obtained outcomes in 84 court cases and administrative-agency proceedings in 2022. A complete list of those cases and regulatory proceedings can be found on pages 10-14.

WLF amicus briefs and regulatory comments are available at WLF.org.

No. 21-40720

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

DAMONIE EARL, individually and on behalf of all others similarly situated; LINDA RUGG, individually and on behalf of all others similarly situated; TIMOTHY BLAKELY, JR.; STEPHANIE BLAKELY; MARISA THOMPSON, individually and on behalf of all others similarly situated; MUHAMMAD MUDDASIR KHAN; JOHN ROGERS, individually and on behalf of all others similarly situated; VALERIE MORTZ-ROGERS, individually and on behalf of all others similarly situated; JAMES LA MORTE; BRETT NOBLE, individually and on behalf of all others similarly situated; RUBEN CASTRO, individually and on behalf of all others similarly situated; FRITZ RINGLING, individually and on behalf of all others similarly situated; LITAUN LEWIS, individually and on behalf of all others similarly situated; LANCE HOGUE, JR., individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE BOEING COMPANY; SOUTHWEST AIRLINES CO.,
Defendants-Appellants.

On Rule 23(f) Appeal from the
United States District Court for the
Eastern District of Texas, No. 4:19-cv-507

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS**

(Counsel listed on following page)

No. 21-86

In The
Supreme Court of the United States

AXON ENTERPRISE, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION
AS AMICI CURIAE SUPPORTING PETITIONER**

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Counsel of Record
Cory L. Andrews
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May 10, 2022

Axon v. Federal Trade Commission
U.S. Supreme Court

WLF argues the Supreme Court should allow parties to challenge agencies' structure in federal court.



Dr. Adam Feldman
@AdamSFeldman

The most amicus briefs filed by a group in granted cases this term is 3 (the most of any group this term). 3 groups filed this many in granted cases: [@WLF](#), Intl Municipal Lawyers Assn., and Immigration Law Institute. /3

1:37 PM · Apr 8, 2022 · Twitter Web App

No. 21-15430

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

ACA CONNECTS – AMERICA’S COMMUNICATIONS
ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION,
NCTA – THE INTERNET & TELEVISION ASSOCIATION, and
USTELECOM – THE BROADBAND ASSOCIATION,

Plaintiffs-Appellants,

v.

ROB BONTA, in his official capacity as Attorney General of California,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:18-cv-2684 (District Judge John A. Mendez)

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL
FOUNDATION AND TECHFREEDOM
SUPPORTING REHEARING *EN BANC*

Corbin K. Barthold
Berin Szóka
James Dunstan
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John M. Masslon II
Cory L. Andrews
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February 22, 2022

In re Grand Jury
U.S. Supreme Court

WLF successfully supported a certiorari petition
asking the Court to clarify the scope of the
attorney-client privilege for communications
containing both legal and non-legal advice.

ACA Connects v. Bonta

U.S. Court of Appeals for the Ninth Circuit

Joined by TechFreedom, WLF asked the court
to rehear en banc an important preemption case
affecting broadband regulation.

22-146

IN THE United States Court of Appeals
for the Second Circuit

NICHOLE DANIELS-FEASEL, individually and as parent and natural guardian
of C.F., JESSICA ANGLIN, individually and as parent and natural guardian of
J.A., GINGER EUGLEY, individually and as parent and natural guardian of
D.F., CHRIS HAYNER, individually and as parent and natural guardian of T.P.,
DEBORAH DiMEGLIO, individually and as parent and natural guardian of
L.D., REBECCA WARBERG, as parent and natural guardian of B.W.,

Plaintiffs-Appellants,

LANA RUTHART, individually and as parent and natural guardian of L.M.,

Plaintiff,

v.

FOREST PHARMACEUTICALS, INC., FOREST LABORATORIES, LLC,
FOREST LABORATORIES INC., ALLERGAN PLC,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Southern District of New York
No. 17-cv-4188-LTS-JLC, Hon. Laura Taylor Swain

BRIEF OF WASHINGTON LEGAL FOUNDATION AS
AMICUS CURIAE SUPPORTING APPELLEES AND AFFIRMANCE

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Counsel for Amicus Curiae

September 14, 2022

Daniels-Feasel v. Forest Pharmaceuticals, Inc.
U.S. Court of Appeals for the Second Circuit

WLF urges the court to affirm the exclusion of
scientifically unreliable evidence in an important
pharmaceutical case.

No. 21-1397
In The
Supreme Court of the United States

IN RE GRAND JURY

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL
FOUNDATION AS *AMICUS CURIAE*
SUPPORTING PETITIONER

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June 1, 2022

Collaboration in 2022

*In Forces for Good:
The Six Practices of
High-Impact Nonprofits,*
the authors counsel,
“Great nonprofits
collaborate rather than
compete with their
social sector peers.”
WLF recognizes and
thanks the like-minded
organizations with which
we partnered on an
amicus brief this year.

Alliance for Automotive Innovation
Allied Educational Foundation
Associated General Contractors of America
Atlantic Legal Foundation
California Chamber of Commerce
Cato Institute
DRI-The Voice of the Defense Bar
Information Technology and Innovation Foundation
Mountain States Legal Foundation
National Retail Federation
NFIB Small Business Legal Center
Online Lenders Alliance
Pharmaceutical Research and Manufacturers of America
TechFreedom
U.S. Chamber of Commerce

Litigation Briefs and Regulatory Comments

WLF participated in or obtained outcomes in 84 court cases and regulatory proceedings. Briefs and regulatory comments filed by WLF are available at WLF.org.

Washington Legal Foundation litigates at every level of the judicial system, from local courts to the U.S. Supreme Court. WLF also regularly initiates, or intervenes in, administrative proceedings to promote regulatory reform.

U.S. Supreme Court

3M Co. v. Amador

Opposing unreliable expert evidence in federal court

Alphabet Inc. v. Rhode Island

Opposing spurious securities class actions

Axon v. FTC

Securing a regulated party's right to challenge an agency's structure

Bank of America v. Fund Liquidation Holdings LLC

Supporting Article III standing requirements

BNSF Railway Co. v. Dannels

Supporting federal preemption of state-law railroad-injury claims

BP plc v. Mayor & City Council of Baltimore

Supporting federal jurisdiction for greenhouse-gas litigation

California Trucking Association v. Bonta

Challenging state laws that conflict with the FAAAA

City of Austin v. Reagan National Advertising of Austin

Challenging content-based restrictions on advertising

Cooper Tire v. McCall

Opposing personal jurisdiction based on business registration

Coverall v. Rivas

Enforcing arbitration agreements under the FAA

Cummings v. Premier Rehab Keller

Cabining emotional-distress damages under the Rehabilitation Act

In re Grand Jury

Safeguarding the attorney-client privilege

Johnson & Johnson v. California

Protecting defendants' constitutional rights

Mallory v. Norfolk So. Railway

Opposing personal jurisdiction based on business registration

Molina Healthcare v. Prose

Urging Rule 9(b)'s heightened pleading standard for False Claims Act claims

Monsanto Co. v. Hardeman

Opposing unreliable expert evidence in federal court

Monsanto Co. v. Pilliod

Supporting federal preemption for federally registered pesticides

Morgan v. Sundance

Enforcing arbitration agreements under the FAA

National Federation of Independent Businesses v. OSHA

Opposing federal agency overreach

National Pork Producers Council v. Ross

Opposing state violations of the dormant Commerce Clause

Net Choice, LLC v. Attorney General of Florida

Opposing government compelled speech

Pivotal Software, Inc. v. Superior Court of California

Applying the PSLRA discovery stay in both state and federal court

Rocket Mortgage v. Alig

Opposing certification of a class with many uninjured members

RJR Tobacco Co. v. Los Angeles

Ensuring uniform product standards through federal preemption

Sackett v. EPA

Opposing agency deference on the jurisdictional scope of the Clean Water Act

SEC v. Cochran

Securing a regulated party's right to challenge an agency's structure

Slack Technologies, LLC v. Pirani

Opposing novel liability theories under federal securities law

Southwest Airlines v. Saxon

Clarifying the Federal Arbitration Act's "transportation exception"

Starkist Co. v. Olean Wholesale Cooperative

Opposing certification of an unwieldy nationwide class

Suncor v. County of Boulder

Supporting federal jurisdiction for greenhouse-gas litigation

Swisher v. Trendsettah

Opposing "manufactured finality" for appellate jurisdiction

TitleMax v. Weissmann

Opposing state violations of the dormant Commerce Clause

United States ex rel. Polansky v. Executive Health Resources

Ensuring the government's right to dismiss False Claims Act suits

Viking River Cruises v. Moriana

Enforcing arbitration agreements under the FAA

Federal Appellate and District Courts

Abbo-Bradley v. City of Niagra Falls

U.S. Court of Appeals for the Second Circuit
Supporting the “revival doctrine” for federal removal

ACA Connects v. Bonta

U.S. Court of Appeals for the Ninth Circuit
Supporting federal preemption over broadband regulation

Adams v. Merck Sharp & Dohme

U.S. Court of Appeals for the Ninth Circuit
Supporting federal preemption under the Food Drug and Cosmetic Act

Alig v. Quicken Loans

U.S. Court of Appeals for the Fourth Circuit
Opposing certification of a class with many uninjured members

Arkansas Teacher Retirement System v. Goldman Sachs Group

U.S. Court of Appeals for the Second Circuit
Opposing certification of an unwieldy securities class

AstraZeneca Pharmaceuticals v. HHS

U.S. Court of Appeals for the Third Circuit
Opposing agency claims of broad extra-statutory authority

Bader Farms, Inc. v. BASF Corp.

U.S. Court of Appeals for the Eighth Circuit
Insisting on causation as a crucial element of tort liability

Boley v. Universal Health Services

U.S. Court of Appeals for the Third Circuit
Insisting on Article III standing in ERISA class actions

Calcutt v. FDIC

U.S. Court of Appeals for the Sixth Circuit
Combatting unconstitutional agency structures

Caremark v. Chickasaw Nation

U.S. Court of Appeals for the Ninth Circuit
Enforcing arbitration agreements under the FAA

Consumers’ Research v. CPSC

U.S. Court of Appeals for the Fifth Circuit
Challenging an agency’s unconstitutional structure

Daniels-Feasel v. Forest Pharmaceuticals

U.S. Court of Appeals for the Second Circuit
Opposing unreliable expert evidence in federal court

Earl v. The Boeing Co.

U.S. Court of Appeals for the Fifth Circuit
Opposing unreliable expert evidence in class actions

Eli Lilly Co. v. Becerra

U.S. Court of Appeals for the Seventh Circuit
Opposing agency claims of broad extra-statutory authority

Epic Games v. Apple Inc.

U.S. Court of Appeals for the Ninth Circuit
Opposing antitrust liability for innovator non-monopolists

Health Freedom Defense Fund v. Biden

U.S. Court of Appeals for the Eleventh Circuit
Opposing federal agency overreach

In re Goldman Sachs Group, Inc. Securities Litigation

U.S. Court of Appeals for the Second Circuit
Opposing spurious securities class actions

In re HIV Antitrust Litigation

U.S. Court of Appeals for the Ninth Circuit
Opposing unwieldy and improper class actions

In re JUUL Marketing Sales Practices

U.S. Court of Appeals for the Ninth Circuit
Opposing unwieldy and improper class actions

In re LTL Management

U.S. Court of Appeals for the Third Circuit
Favoring the efficiencies of bankruptcy over the mass tort system

In re Niaspan Antitrust Litigation

U.S. Court of Appeals for the Third Circuit
Supporting a robust ascertainability standard for class actions

Mamani v. Berzain

U.S. Court of Appeals for the Eleventh Circuit
Cabining liability under the Torture Victim Protection Act

National Association of Wheat Growers v. Bonta

U.S. Court of Appeals for the Ninth Circuit
Combatting compelled speech under the First Amendment

N.Y. State Telecomm. Ass’n v. James

U.S. Court of Appeals for the Second Circuit
Supporting federal preemption over broadband regulation

Pulse Network v. Visa

U.S. Court of Appeals for the Fifth Circuit
Enforcing antitrust standing requirements

RJR Tobacco Co. v. Los Angeles

U.S. Court of Appeals for the Ninth Circuit
Ensuring uniform product standards through federal preemption

Starkist Co. v. Olean Wholesale Cooperative

U.S. Court of Appeals for the Ninth Circuit
Opposing certification of an unwieldy nationwide class

State of New York v. Facebook, Inc.

U.S. Court of Appeals for the D.C. Circuit
Opposing a broad antitrust duty to deal for market competitors

Trendsettah v. Swisher

U.S. Court of Appeals for the Ninth Circuit
Opposing “manufactured finality” for appellate jurisdiction

United States ex rel. Proctor v. Safeway

U.S. Court of Appeals for the Seventh Circuit
Bolstering the False Claims Act’s scienter requirement

United States ex rel. Sheldon v. Allergan

U.S. Court of Appeals for the Fourth Circuit
Bolstering the False Claims Act’s scienter requirement

United States ex rel. Yarberry v. Supervalu

U.S. Court of Appeals for the Seventh Circuit
Bolstering the False Claims Act’s scienter requirement

United States v. Facticeau

U.S. Court of Appeals for the First Circuit
Protecting truthful off-label speech under the First Amendment

United States v. Walmart Inc.

U.S. District Court for the District of Delaware
Opposing the government’s “collective knowledge” theory of scienter

Vanda Pharmaceuticals v. FDA

U.S. District Court for the District of Columbia
Ensuring agency transparency under FOIA

State Supreme and Appellate Courts

Bert Co. v. Turk

Supreme Court of Pennsylvania
Supporting due-process limits on punitive damages awards

Coates v. RJR Tobacco Co.

Florida Supreme Court
Opposing unconstitutionally excessive punitive damages

“WLF’s amicus brief supporting review of *Vanderventer v. Hyundai* provided the critical broader context within which the Wisconsin Supreme Court must evaluate certiorari in this test of expert evidence gatekeeping in the State.”

Thomas N. Vanderford, Jr.
Associate General Counsel
Executive Director, Litigation
Hyundai Motor America

Gilead Sciences v. Superior Court

California Court of Appeal
Opposing novel product-liability theories for prescription medicines

In re Walmart, Inc.

Texas Supreme Court
Limiting the scope of discovery in premises liability cases

Johnson & Johnson v. California

California Court of Appeal
Protecting defendants' constitutional rights

Vanderventer v. Hyundai Motors

Supreme Court of Wisconsin
Opposing unreliable expert evidence in state court

Administrative Comments

In re Amendments to West Virginia Rules of Civil Procedure

Supreme Court of Appeals of West Virginia
Supporting commonsense civil-discovery reforms

In re Climate-Related Disclosure Rule

U.S. Securities and Exchange Commission
Opposing mission creep in federal regulatory agencies

In re Merger Enforcement

U.S. Department of Justice & Federal Trade Commission
Urging sensible regulatory guidelines for mergers

In re Proposed California Privacy Rights Act Regulations

California Privacy Protection Agency
Opposing burdensome state privacy regulations

In re Proposed Rules Banning Flavored Cigars and Menthol Cigarettes

U.S. Food and Drug Administration
Opposing proposed ban on flavored cigars and menthol cigarettes

In re Operational Evaluation of FDA's Tobacco Program

Reagan-Udall Foundation
Offering suggestions for improving FDA regulation of tobacco and vaping

In re Standard for Determining Joint-Employer Status

U.S. National Labor Relations Board
Preserving traditional common-law rules for determining employment status

In re Supreme Court of Florida's Workgroup on Improved Resolution of Civil Cases

Supreme Court of Florida
Supporting commonsense civil-discovery reforms

In re The Atlanta Opera, Inc.

U.S. National Labor Relations Board
Protecting traditional independent contractor rules

In re Trade Regulation Rule

U.S. Federal Trade Commission
Urging close adherence to federal law in privacy regulation

Impact Focus:

Federal False Claims Act

Of the thousands of federal laws and regulations on the books, few have as sweeping an impact on free enterprise as the False Claims Act (FCA). Enacted during the Civil War to deter and punish contractors who billed the Union army for worthless goods, the anti-fraud law applies to any party contracting with the U.S. government. The FCA features a unique enforcement provision that deputizes private parties to sue contractors and share in any recovery.

Over the past four decades, WLF has dedicated considerable litigation and legal-studies resources to shaping how the government enforces the FCA and how the courts interpret it.

In 2022, WLF made measurable gains on the FCA front. Two federal circuit courts agreed with WLF that mere negligence does not establish an FCA violation. In January 2023, the Supreme Court agreed to review the cases and WLF plans to file an amicus brief.

In December, the justices heard arguments in *U.S. ex rel. Polansky* on the federal government's authority to dismiss a private party's FCA lawsuit after federal prosecutors decline to intervene in the case. Several past *WLF Legal Pulse* blog commentaries educated the public on the issue in *Polansky*, and a WLF virtual briefing previewed the oral arguments.

WASHINGTON LEGAL FOUNDATION
U.S. ex rel. Polansky v. Ex. A U.S. Supreme Court Oral Argument
Featuring
Jay B. Stephens
Kirkland & Ellis LLP
Former General Counsel
Raytheon Companies
Joshua J. Fougere
Sidley Austin LLP
Stephen A. Wood
Chuhak & Teeson, P.C.
All WLF programs archived at www.wlf.org
WLF is a public-interest law firm and policy center dedicated to the public good.

WLF's amicus brief in *Polansky* spotlighted why limits on the government's dismissal power would entangle the FCA in separation-of-powers problems. Justice Thomas led off oral arguments asking about those very constitutional concerns. Chief Justice Roberts posed a similar query to the government's counsel, noting his surprise that the Solicitor General's brief mentioned Article II only once, in a footnote.

On the WLF Legal Pulse
Timely commentary from WLF's blog
Washington Legal Foundation
Advocate for Freedom and Justice®
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THE FIFTH CIRCUIT WEIGHS IN ON GOVERNMENT DISMISSAL OF QUI TAM ACTIONS—IS CONGRESS NEXT?

by Steven A. Wood

The United States Court of Appeals for the Fifth Circuit has recently become the latest appellate court to confront the question of what standard should govern the United States Government's motion to dismiss a *qui tam* action under 31 U.S.C. § 3730 (c)(2)(A). In *United States ex rel. Health Choice Alliance LLC v. Eli Lilly & Co.*, No. 19-40906, 2021 WL 2821116 (5th Cir. July 7, 2021), the court affirmed dismissal of the relator's action in a case factually similar to *United States v. UCB, Inc.*, 970 F.3d 875 (7th Cir. 2020). In *Health Choice*, as in *UCB*, investors created an LLC for the sole purpose of bringing a *qui tam* action against pharmaceutical industry defendants alleging fraud in connection with the provision of certain drug and insurance education services.

In *Health Choice*, the Fifth Circuit held that the Government's motion to dismiss the relator's action was rightly granted over the relator's strenuous objection. In coming to this result, the court did not expressly embrace either of the (c)(2)(A) standards crafted by other courts of appeals. In fact, all three members of the panel agreed only on the result, not necessarily on the reasoning, indicating that jurisprudential divergence on this issue continues. As the law on this issue continues to develop, a recent announcement from key senators indicates that Congress may intercede in an effort to settle disagreements over the appropriate standard, although it remains to be seen whether the proposed legislation provides a useful solution. Finally, *Health Choice* suggests an alternative that would relieve the Government of the burden of contested (c)(2)(A) motion practice where the *qui tam* cases lack merit.

United States ex rel. Health Choice Alliance LLC v. Eli Lilly & Co.—The Facts

The relators in this case, Health Choice Alliance and Health Choice Group, were limited liability companies created by the National Health Care Analysis Group for the sole purpose of filing *qui tam* actions against pharmaceutical companies alleging fraud and violations of various federal statutes including the False Claims Act. The two cases at issue in this appeal, one brought against Eli Lilly, the other against Bayer Corporation, were among eleven similar cases filed in various district courts by related entities against pharmaceutical manufacturers and distributors alleging violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). In each of these cases, the relators alleged that the defendants provided free product education services (nurse educator and insurance reimbursement assistance) in

No. 21-1052
IN THE
Supreme Court of the United States
UNITED STATES OF AMERICA, EX REL.
JESSE POLANSKY M.D., MPH.,
Petitioner,
v.
EXECUTIVE HEALTH RESOURCES, INC., ET AL.,
Respondents.
On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit
BRIEF OF WASHINGTON LEGAL
FOUNDATION AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS
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October 24, 2022 * Counsel of Record

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Pro Bono Spotlight



David A. Zetony, Greenberg Traurig LLP

WLF recognizes David for his pro bono contributions in 2022. Our publication library includes six papers David has written on online data privacy and security regulation. He also authored a year-long series of *WLF Legal Pulse* blog posts on California data-privacy directives. In August, David volunteered to represent WLF before the California Privacy Protection Agency. He and several Greenberg Traurig colleagues drafted a meticulously researched and reasoned comment on a proposed data-privacy rule. When the agency revised the rule based in part on WLF's comment, David and his team authored and filed a supplemental comment.

Publishing

WLF established its Legal Studies Division 35 years ago to develop and disseminate persuasive, highly relevant, and timely publications. Our papers shape legal-policy debates where a free-enterprise perspective may not otherwise be considered.

We deliver free-market advocacy to judges and other government officials before they make decisions affecting individual and economic liberties.

Enterprising Legal Advocacy

WLF's Legal Studies Division isn't a traditional think tank. We don't maintain an in-house lineup of scholars who research and write. Instead, we recruit private practitioners, corporate counsel, academics, and other legal professionals to author our publications on a pro bono basis. That innovative approach allows us to focus WLF's charitable resources on putting these intellectual tools into the hands of legal decision makers and influence leaders.

This year, WLF released 42 original publications authored by 61 different writers, 40 of whom were first-time contributors.

Those new authors join the nearly 2,500 volunteers that have helped build WLF's collection of over 3,000 legal studies—a resource bank that former U.S. Claims Court Chief Judge Loren Smith called “a true library for the defense of our free-enterprise system.”

A complete list of 2022 WLF publications is available on pages 20-22. Visit [WLF.org](https://www.wlf.org) for WLF's full library of publications.

WLF's publications cover an expanse of legal-policy issues, including:

Administrative Law and Procedure

Antitrust and Consumer Protection

Arbitration

Asbestos and Toxic Torts

Business Civil Liberties and Criminal Liability

Capital Markets, Securities, and Corporate Governance

Civil-Justice Reform

Class-Action Litigation

Commercial Speech

Data Privacy and Security

Employment Law

Environmental Regulation and Enforcement

Expert Evidence

Federal Preemption

False Claims Act

Food, Drug, and Medical-Device Law

General Jurisdiction and Standing to Sue

Healthcare

Insurance Law and Regulation

Intellectual and Private Property Rights

Product Liability and Safety

“The efforts Washington Legal Foundation so diligently and effectively undertakes help our Nation's lawyers and most importantly, judges in preserving what is set forth on the front of the U.S. Supreme Court: “Equal Justice Under Law.”

*Victor E. Schwartz
Public Policy Practice Group Co-Chair
Shook, Hardy & Bacon LLP*

Administrative Law and Procedure

WLF's Circulating Opinion: *Wages and White Lion Investments, L.L.C. v. FDA*

Digesting a dissenting opinion by U.S. Court of Appeals for the Fifth Circuit Judge Edith H. Jones.

WLF's Circulating Opinion: *State of Arizona, et al. v. Joseph R. Biden, et al.*

Digesting a concurring opinion by U.S. Court of Appeals for the Sixth Circuit Chief Judge Jeffrey S. Sutton.

Antitrust and Consumer Protection

FTC's Challenge to Altria-JUUL Transaction: Antitrust and Constitutional Issues Hiding in Plain Sight

Steven Cernak | Bona Law PC

Allbirds' Defeat of Consumer Class Action Offers Valuable Greenwashing-Avoidance Guideposts

William J. Hubbard |Thompson Hine LLP

Class Actions Aimed at "Recyclable" Claims: So Far, Courts Resist Demands to Reinterpret Existing Law

Katie Bond and Samuel A. Butler | Lathrop GPM

A Post-AMG Capital Update: Equitable Solutions for Litigating Parties That Have Passed the Point of No Return

Bernie Nash, Milton Marquis, and Mira Baylson | Cozen O'Connor

The FTC's Prior Approval Policy Likely Will Eliminate Incentives to Cooperate with Antitrust Investigations

Gerald A. Stein | Norton Rose Fulbright US LLP and Michael A. Primrose | Benesch Friedlander Coplan & Aronoff LLP

Arbitration

Massachusetts High Court Limits Scope of Transportation Worker Exception to Statutory Arbitration Requirements

Patrick J. Bannon and Barry J. Miller | Seyfarth Shaw LLP

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Three Key Takeaways from Second Circuit's Latest Section 10(b) Securities Class-Action Decision

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Pirani v. Slack Technologies, Inc., et al.: Ninth Circuit Cuts Securities Plaintiffs Slack on Standing

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Civil-Justice Reform

Proposals to Allow Nonlawyer Ownership of Law Firms, Fee Splitting Experience Rejection

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Georgia Supreme Court's Doubts on Seat Belt Gag Rule's Constitutionality Puts Legislature on Notice

Lee Mickus | Evans Fears & Schutttert LLP

Fourth Circuit Upholds West Virginia Law Regulating Misleading Drug and Device Lawsuit Ads

Mark A. Behrens and Kateland R. Jackson | Shook, Hardy & Bacon LLP

Class-Action Litigation

Not Worried About PFAS Liability? You Should Be.

J. Barton Seitz, Joshua Frank, and Samantha Olson | Baker Botts LLP

11th Circuit Sharpens Circuit Split on Ascertainability as Prerequisite to Rule 23 Class Certification

Joshua L. Becker and Caroline M. Gieser | Shook, Hardy & Bacon LLP

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Alaap Shah and Stuart M. Gerson | Epstein Becker & Green, PC

Discovery Process

Georgia Supreme Court Declines to Adopt Apex Doctrine But Offers Some Protection to High-Ranking Executives

Paul Alessio Mezzina and Billie Pritchard | King & Spalding LLP

Employment Law

WLF's Circulating Opinion: *FEDRLST Media, LLC v. National Labor Relations Board*

Digesting a concurring opinion by Judge Paul B. Matey, U.S. Court of Appeals for the Third Circuit.

Massachusetts High Court Chooses FLSA's Joint Employment Standard, Dealing Plaintiffs a Double Blow

Barry J. Miller | Seyfarth Shaw LLP

Environmental Regulation and Enforcement

Supplement or Supplant? Recent Judicial Decisions Seemingly Endorse Citizen-Suit Role Beyond Clean Water Act's Intent.

Brent Rosser and Kate Perkins | Hunton Andrews Kurth

Greenhouse Gasses, Natural Gas, and the D.C. Circuit: One Agency's Struggle to Balance the Three

Kasdin Mitchell and Rex Manning | Kirkland & Ellis LLP

New Jersey DEP Accepting Comments on NJ Environmental Justice Law Implementation

Carlos M. Bollar and William Puleo | Archer & Greiner, PC

Regulation of GHGs as Toxic Substances? That's Not How TSCA Works.

Michael Boucher, Peter Gray, and Amy Symonds | Crowell & Moring LLP

Flawed Federal Jurisdiction Ruling Grants State Court National Climate-Change Policymaking Power

Lincoln Davis Wilson | Dechert LLP

10th Circuit Sustains CAA Citizen Suit for Minute Mobile-Source Emissions But Cabins with Geographic Nexus Test

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New York's Environmental Rights Constitutional Amendment Will Require Sound Judicial Interpretation

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WLF's Circulating Opinion: *Allen v. Ollie's Bargain Outlet, Inc.*

Digesting a concurring opinion by U.S. Court of Appeals for the Third Circuit Judge David J. Porter.

Federal Preemption

State Prescription Drug Legislation and ERISA Preemption: An Evolving Landscape

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FDA Seeks Targeted Congressional Reversal of Judicial Checks on Agency Abuses of Discretion

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The FDA's "Intended Use" Regulations Should Not Restrict Actions to Meet Market Demand for Off-Label Use

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Healthcare

Mandated Rebates and "Negotiation": The IRA Paves a Rocky Road for Pharma and Biotech Innovation

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State Insurance Commission's Assault on Risk-Based Auto Rates Both Unlawful and Ill-Advised

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Section 1498(a) Is No Rx for Lowering Drug Prices

U.S. Court of Federal Claims Judge Susan G. Braden (ret.) and Joshua A. Kresh | Center for Intellectual Property X Innovation Policy

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Communicating

WLF's communications activities ensure that champions of free enterprise are equipped with the pertinent scholarship they need to become effective advocates. We believe that knowledge empowers citizens nationwide to recognize threats to their individual liberties.

Programming

WLF Briefings and Webinars are one-hour live broadcasts that address complex court decisions, legal-policy developments, and regulatory and judicial trends. Our panelists—law firm leaders, appellate specialists, in-house counsel, and legal scholars—participate virtually. We post the recordings of past Briefings and Webinars on our website and add them to our YouTube library.

In addition to the three Briefings WLF presents each year on the U.S. Supreme Court—at mid-Term, at the end of a Term, and to preview an upcoming Term—we hosted programs on such provocative and timely topics as mass arbitration, environmental justice, and shareholder meetings.

We also initiated a new Webinar series, “Taking the Initiative on IP Protection.” The series features discussions with industry leaders and their counsel on the use of strategic litigation, voluntary agreements, and other proactive measures to safeguard businesses’ intellectual property. The three webinars held in 2022 focused on counterfeiting and fraudulent sales of N95 masks during the pandemic; online entertainment content piracy; and rogue THC-containing edible manufacturers’ use of packaging that resembles well-known candy and other food brands.

A full list of participants in this year’s programs is available on page 28.

Blogging

In its eleventh year, our blog, the *WLF Legal Pulse*, remains a valuable complement to WLF’s more traditional publishing efforts. The blog features regular contributions from WLF attorneys and includes posts from leading private practitioners, academics, law students, and others as guest contributors.

We published 72 substantive blog commentaries by WLF attorneys and guest contributors in 2022.

We are honored to have, among our guest contributors, ten attorneys from major law firms, one in-house corporate counsel, and one contributor from a leading academic institution, all who volunteer to cover specific topic areas as “Featured Expert Contributors.”

WLF also maintained its long-running blog-publishing relationship with Forbes.com. The company maintains a contributor site within its network of blogs for WLF attorneys’ commentaries. One post, which criticized the US. Solicitor General’s reversal of its position on federal-law supremacy over state regulation of air travel, attracted over 26,000 readers.

Pro Bono Spotlight

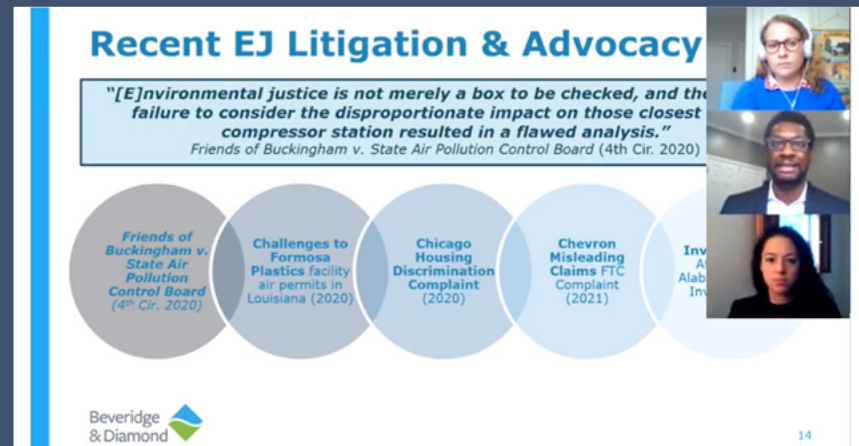


Matthew Wetzel, Goodwin Procter LLP

Matt has served as the *WLF Legal Pulse* Featured Expert Contributor on Life Sciences and Medtech Regulation since August 2021. This year, Matt authored five blog posts, each of which he drafted at his own initiative, on some of the most important topics facing medical-product makers and patients, including funding of continuing medical education, physician-owned device distributors, and drug makers’ copay assistance programs. He also wrote a WLF LEGAL BACKGROUNDER on the Inflation Reduction Act and the profound challenges the law poses for pharmaceutical and biotech innovation.

Informing the Media

Targeted and broad-based, WLF hosts Media Briefings on current legal issues to educate key decision makers and opinion leaders. As an essential element of our outreach strategy, these briefings feature leading legal authorities addressing a wide variety of timely topics.



Three Beveridge & Diamond LLP attorneys looked back at environmental-justice developments in 2021 and offered their strategic thoughts on the existing legal and policy landscape and what's around the corner. From the top: Hilary T. Jacobs, Julius M. Redd, and Stacey Sublett Halliday.



Three well-regarded appellate practitioners addressed questions in early July on the just-completed Supreme Court term with a focus on decisions impacting free enterprise and broader economic liberties. Clockwise: Shay Dvoretzky, Skadden Arps; WLF's Glenn Lammi; Amy Saharia, Williams & Connolly LLP; and Morgan Ratner, Sullivan & Cromwell.

Framing the Issues

WLF's educational message reaches far beyond Washington, thanks to our webcasting capabilities. Decisionmakers and thought leaders around America and the world can tune in to our live briefings and seminars or visit WLF's [website](#), where each program is conveniently archived.



This installment of a new Webinar series examined movie studios' international fight against unlawful distribution of copyrighted entertainment content and the impact of such piracy on studios, their employees, and consumers. From the top: WLF's Glenn Lammi; Motion Picture Association (MPA) General Counsel Karyn A. Temple; MPA Chief of Global Content Protection Jan van Voorn.



Our panelists assessed the trends in 2022's environmental and social proxy proposals, discussed SEC activity and necessary responses, and offered their experienced take on how those developments can drive private securities and consumer-fraud litigation. Clockwise: Jurgita Ashley, Thompson Hine LLP; WLF's Glenn Lammi; Brian Valerio, Alliance Advisors; and David A. Wilson, Thompson Hine LLP.

Speakers

WLF is grateful for the pro bono participation of the following attorneys, academics, and other legal professionals in our Media Briefing and Webinar programs in 2022.

- Jurgita Ashley**, Thompson Hine LLP
- Michael Buschbacher**, Boyden Gray & Associates
- William Childs**, 3M
- Paul D. Clement**, Clement & Murphy PLLC
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- Joshua J. Fougere**, Sidley Austin LLP
- Stacey Sublett Halliday**, Beveridge & Diamond PC
- Kenneth Heyer**, Former Deputy Director, FTC Bureau of Competition
- Hilary T. Jacobs**, Beveridge & Diamond PC
- Sherman (“Tiger”) Joyce**, American Tort Reform Association
- Michael E. Kenneally**, Morgan, Lewis & Bockius LLP
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- Stacy Papadopoulos**, Consumer Brands Association
- Archis Parasharami**, Mayer Brown LLP
- Professor Samir Parikh**, Lewis and Clark Law School
- Morgan L. Ratner**, Sullivan & Cromwell LLP
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- Jay B. Stephens**, Kirkland & Ellis LLP
- Karyn A. Temple**, Motion Picture Association
- John W. Ursu**, Faegre Drinker Biddle & Reath LLP
- Brian Valerio**, Alliance Advisors
- Jan van Voorn**, Motion Picture Association and the Alliance for Creativity and Entertainment
- David A. Wilson**, Thompson Hine LLP
- Stephen A. Wood**, Chuhak & Tecson, PC

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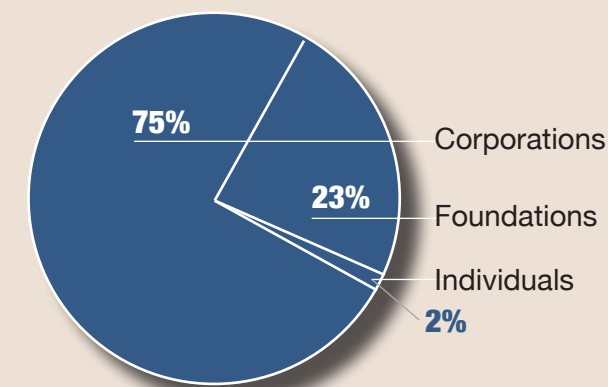
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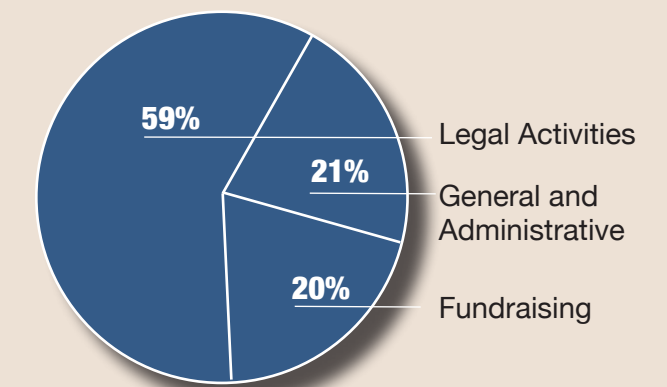
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*“The execution of the laws is more
important than the making of them.”*

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