



Washington Legal Foundation
Advocate for Freedom and Justice[®]
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

July 3, 2023

WLF Month in Review

This WLF Litigation Division feature highlights WLF's court and regulatory filings, as well as decisions issued in response to WLF's filings. In this edition, we list **June 2023** filings and results.

New Filings

- WLF joins a coalition on a comment cautioning the FTC that its proposed Negative Option Rule exceeds the agency's lawful authority. ([In re Negative Option Rule](#))
- WLF asks the Ninth Circuit to rehear en banc an antitrust case imposing a nationwide injunction that offends core federalism tenets. ([Epic Games v. Apple](#))
- WLF urges the Ninth Circuit to bar uninjured plaintiffs from pursuing money damages. ([In re Google Play Store Antitrust Litigation](#))
- WLF asks the Ninth Circuit to review a class-certification order in unwieldy civil-RICO case. ([Painters Fund v. Takeda Pharmaceutical Co.](#))
- WLF urges the D.C. Circuit to reinstate a suit challenging a final rule issued by the Library of Congress. ([MITA v. Library of Congress](#))
- WLF asks the Fifth Circuit to reverse an FTC order and declare the agency's structure unconstitutional. ([Illumina v. FTC](#))

Decisions

- The Ninth Circuit declines to rehear en banc an important antitrust case. ([Epic Games v. Apple Inc.](#))
- The Supreme Court declines to review a Georgia Supreme Court decision holding that state courts may exercise general jurisdiction over any foreign company that registers to do business in the State. ([Cooper Tire v. McCall](#))
- The Supreme Court holds that state courts' exercising general jurisdiction over any company registered to do business in a State does not violate the Fourteenth Amendment's Due Process Clause. ([Mallory v. Norfolk Southern Railway Co.](#))
- The Supreme Court clarifies that an immediate appeal as of right from a district court's refusal to compel arbitration automatically stays litigation pending the appeal. ([Coinbase v. Bielski](#)) ***victory***
- The Eleventh Circuit vacates as moot an order setting aside the CDC's illicit mask mandate for public transportation. ([Health Freedom Defense Fund v. Biden](#))
- The Supreme Court rejects a bright-line rule and holds that a foreign-domiciled plaintiff alleges a domestic injury under RICO when the "circumstances surrounding the injury indicate it arose in the United States." ([Yegiazaryan v. Smagin](#))

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.

WLF Legal Staff Contacts

Cory Andrews
General Counsel | Vice President of Litigation
candrews@wlf.org

John Masslon II
Senior Litigation Counsel
jmasslon@wlf.org

Glenn Lammi
Executive Director | Vice President of Legal Studies
glammi@wlf.org

WLF Month in Review June 2023

- The Supreme Court confirms that the United States may, at any time, intervene in and dismiss a qui tam suit under the False Claims Act. (*U.S. ex rel. Polansky v. Executive Health Resources*) ***victory***
- The NLRB abandons the common-law test for whether an independent contractor qualifies as an employee. (*The Atlanta Opera, Inc.*)
- The Supreme Court clarifies the scope of liability under section 11 of the Securities Act. (*Slack Technologies, LLC v. Pirani*) ***victory***
- The Supreme Court declines to adopt the Safeco test for willfulness in False Claims Act cases. (*United States ex rel. Schutte v. SuperValu; United States ex rel. Proctor v. Safeway*)

NEW FILINGS

WLF joins a coalition on a comment cautioning the FTC that its proposed Negative Option Rule exceeds the agency's lawful authority.

In re Negative Option Rule

On June 23, WLF joined a coalition of legal-policy groups in a formal comment on proposed amendments to the FTC's Negative Option Rule. The proposed rule is aimed at combatting unfair or deceptive practices arising from recurring charges for products or services consumers do not want and cannot cancel without undue difficulty. As the comment explains, if the FTC is to have the authority it claims in the rule to impose civil penalties for ordinary misrepresentations, even for certain classes of transactions, only Congress can confer that power—and only by amending the Act. The comment was prepared by Tech Freedom's Berin Szóka.

WLF asks the Ninth Circuit to rehear en banc an antitrust case imposing a nationwide injunction that offends core federalism tenets.

Epic Games v. Apple Inc.

On June 16, WLF filed an amicus brief urging the Ninth Circuit to rehear en banc an important federalism case. The panel rejected Epic's argument that Apple's policies requiring developers to sell apps only on the App Store and not to steer customers to outside payment processors violated the Sherman Act. But the panel affirmed a nationwide injunction for Apple's allegedly violating California's unfair competition law. As WLF's brief shows, the panel opinion ignores federalism principles that are key to the continued viability of the American experiment. The decision also ignores binding Ninth Circuit precedent limiting the reach of California law outside the State's borders.

WLF urges the Ninth Circuit to bar uninjured plaintiffs from pursuing money damages.

In re Google Play Store Antitrust Litigation

On June 15, WLF urged the Ninth Circuit to reverse a class-certification order in a prominent antitrust case. Consumers argue that Google's policies pushing them to use Google Play violated the Sherman Act. As WLF's amicus brief explains, a natural experiment and marketing theory show that many of the purported class members suffered no injury. They thus lack standing to pursue their claims under the Supreme Court's *TransUnion* decision. WLF's brief also explains the pro-competitive effects of Google's policies.

WLF asks the Ninth Circuit to review a class-certification order in unwieldy civil-RICO case.

Painters Fund v. Takeda Pharmaceutical Co.

On June 14, WLF asked the Ninth Circuit to review, and ultimately to reverse, a federal trial-court's certification order in an unwieldy class action. The case arises from a civil-RICO suit by a third-party payer and others to recover treble their prescription costs for Actos, an FDA-approved diabetes drug. As WLF's amicus

brief makes clear, the plaintiffs' key evidentiary problem is how to distinguish those Actos prescriptions that would have been written despite an increased-risk disclosure from those that would not have been written because of that disclosure. But making that distinction requires an individualized inquiry into the medical factors relevant to each patient's prescription. Class certification is never appropriate where, as here, individualized questions will predominate over common ones. WLF's amicus brief was prepared with generous pro bono assistance from Charles S. Dameron and Joseph E. Begun of Latham & Watkins LLP.

WLF urges the D.C. Circuit to reinstate a suit challenging a final rule issued by the Library of Congress.
Medical Imaging and Technology Alliance v. Library of Congress

On June 9, WLF urged the D.C. Circuit to reverse a federal trial-court's dismissal of an important challenge to a final rule issued by the Library of Congress. WLF joined the National Association of Manufacturers on the amicus brief, which was drafted by David Chung and Elizabeth Dawson of Crowell & Moring LLP. The brief argues that judicial review of federal action is essential to maintain the separation of powers. Only a clear statement from Congress can overcome the strong presumption of judicial review of administrative actions. Here there is no clear statement precluding review of the Library's DMCA rulemaking. Moreover, withholding judicial review of the Library's rule will have unintended consequences. The rule threatens to erode copyright protections, stifle innovation, and harm consumers.

WLF asks the Fifth Circuit to reverse an FTC order and declare the agency's structure unconstitutional.
Illumina v. FTC

On June 8, WLF filed an amicus brief urging the Fifth Circuit to reverse a Federal Trade Commission order and declare the FTC's structure unconstitutional. WLF's brief explains that FTC commissioners cannot enjoy for-cause removal protection because the FTC (1) is comprised of three members, all Democrats; (2) has at least one non-expert commissioner; and (3) exercises executive power. The brief also argues that the FTC's procedures violate due process in two respects. First, administrative agencies cannot adjudicate private rights. Second, the FTC cannot serve as both the prosecutor and the judge in a case, which it did here. All these constitutional defects require reversing the FTC's order.

DECISIONS

The Ninth Circuit declines to rehear en banc an important antitrust case.
Epic Games v. Apple Inc.

On June 30, the Ninth Circuit declined to rehear en banc a high-profile antitrust case. This was a mixed result for WLF, which filed amicus briefs at the panel and rehearing stages. The panel correctly rejected Epic's argument that Apple's policies requiring developers to sell apps only on the App Store and not to steer customers to outside payment processors violated the Sherman Act. As WLF's panel-stage brief showed, Apple's policies have many procompetitive effects that outweigh any anticompetitive effects. But the panel erred by affirming a nationwide injunction for Apple's allegedly violating California's unfair competition law. As WLF's rehearing-stage brief showed, the panel opinion ignored federalism principles that are key to the continued viability of the American experiment. The decision also ignored binding Ninth Circuit precedent limiting the reach of California law outside the State's borders.

The Supreme Court declines to review a Georgia Supreme Court decision holding that state courts may exercise general jurisdiction over any foreign company that registers to do business in the State.

Cooper Tire v. McCall

On June 30, the Supreme Court declined to review a Georgia Supreme Court decision holding that state courts may exercise general jurisdiction over any foreign company that registers to do business in the State. This was a setback for WLF, which filed an amicus brief supporting the petitioner. WLF's brief explained that the decision causes uncertainty for businesses nationwide—uncertainty that will harm our economy. WLF's brief also explained why stare decisis factors do not counsel against overturning a 1917 decision that the Georgia Supreme Court relied on here. Unfortunately, the Supreme Court rejected that argument in *Mallory v. Norfolk Southern*.

The Supreme Court holds that state courts' exercising general jurisdiction over any company registered to do business in a State does not violate the Fourteenth Amendment's Due Process Clause.

Mallory v. Norfolk Southern Railway Co.

On June 27, the U.S. Supreme Court vacated a Pennsylvania Supreme Court decision. The Court held that state courts' exercising general jurisdiction over every company that registers to do business in a State does not violate the Fourteenth Amendment's Due Process Clause. This was a setback for WLF, which filed an amicus brief supporting the defendant. The brief explained how the stare decisis factors supported overruling the Court's 1917 *Pennsylvania Fire* decision.

The Supreme Court clarifies that an immediate appeal as of right from a district court's refusal to compel arbitration automatically stays litigation pending the appeal.

Coinbase v. Bielski

On June 23, the Supreme Court reversed a Ninth Circuit decision that would have forced a company to proceed with costly and burdensome litigation while its arbitrability appeal was pending. The decision was a victory for WLF, which filed an amicus brief in the case. As WLF explained in its brief, the intolerable risk of bearing that burden would upend the core policies animating the FAA. The majority's reasoning largely tracks policy arguments WLF advanced in its brief. Namely, that Section 16 of the FAA makes sense only if an interlocutory appeal from the trial court's refusal to compel arbitration automatically stays litigation in the district court. Congress never would have granted defendants the right to an immediate appeal if it had contemplated that litigation would continue apace while the appeal was pending. On the contrary, Congress crafted Section 16 against the background principle that an appeal divests a district court of jurisdiction over the case being appealed. And Congress recognized that the main virtues of arbitration—avoiding the cost and burden of litigation—would be lost if the case proceeds simultaneously in litigation and appeal only to be ultimately decided in arbitration.

The Eleventh Circuit vacates as moot an order setting aside the CDC's illicit mask mandate for public transportation.

Health Freedom Defense Fund v. Biden

On June 22, the Eleventh Circuit vacated a decision setting aside an order from the Centers for Disease Control and Prevention requiring masks on public transportation. The court held that the case was moot because the order expired during pendency of the appeal. WLF's brief argued that the Constitution's structural protections do not disappear during emergencies. Because Congress never gave CDC the power to issue a mask mandate, the order violated separation-of-powers principles. The brief also explained why the order was arbitrary and and capricious.

The Supreme Court rejects a bright-line rule and holds that a foreign-domiciled plaintiff alleges a domestic injury under RICO when the “circumstances surrounding the injury indicate it arose in the United States.”
Yegiazaryan v. Smagin

On June 22, the Supreme Court affirmed a Ninth Circuit ruling about what constitutes a “domestic injury” under the Racketeer Influenced and Corrupt Organizations Act (RICO). The decision was a setback for WLF, which filed an amicus brief urging reversal in the case. WLF argued that allowing foreign plaintiffs to “domesticate” foreign injuries by simply confirming foreign awards in the United States as the basis for civil RICO claims would amplify the burden on the federal courts, impose higher litigation costs on multi-national businesses, and force defendants into coercive settlements. Six members of the Court disagreed, holding that a plaintiff alleges a domestic injury under civil RICO when the “circumstances surrounding the injury indicate it arose in the United States.” Applying this case-by-case inquiry here, the Court held that RICO’s domestic-injury requirement had been satisfied.

The Supreme Court confirms that the United States may, at any time, intervene in and dismiss a qui tam suit under the False Claims Act.
U.S. ex rel. Polansky v. Executive Health Resources

On June 16, the Supreme Court affirmed a Third Circuit decision that confirms the government’s right to dismiss a qui tam suit under the False Claims Act (FCA). The case asked the Court to interpret the FCA to mean that the Executive Branch has no authority to dismiss an FCA action after declining to intervene. In its amicus brief, WLF explained why adopting that interpretation would undermine the Constitution’s separation of powers. Although the Court’s majority did not take up that constitutional question, it held that the text of the FCA makes clear that the United States may intervene and voluntarily dismiss the suit at any time—even if it initially declined to intervene. And the Government’s motion to dismiss will satisfy Federal Rule of Civil Procedure 41 in all but the most exceptional cases. WLF’s amicus brief was drafted with the pro bono assistance of Kristin Graham Koehler, Joshua J. Fougere, Christopher S. Ross, and Alexandria T. Mushka of Sidley Austin LLP.

The NLRB abandons the common-law test for whether an independent contractor qualifies as an employee.
The Atlanta Opera, Inc.

On June 13, the NLRB abandoned the common-law test for whether a worker qualifies as an independent contractor or an employee. The decision was a setback for WLF, which filed an amicus brief in the administrative action. For more than 50 years, the Supreme Court has held that the “obvious purpose” of the NLRA “was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.” Congress enshrined that common-law test in the 1947 Taft-Hartley amendments. The NLRB’s decision effectively nullifies those amendments and the Supreme Court’s precedent by replacing the common-law test with a new, more expansive test.

The Supreme Court clarifies the scope of liability under section 11 of the Securities Act.
Slack Technologies, LLC v. Pirani

On June 1, the Supreme Court unanimously vacated a Ninth Circuit decision that drastically expanded the liability scope of federal securities law. The decision was welcome news for WLF, which filed an

amicus brief in the case. In its amicus brief urging reversal, WLF asked the Court to ensure that the tasks of crafting public policy and amending federal law are performed by Congress, not the courts. The Supreme Court agreed, explaining in its opinion that “the Court’s function is to discern and apply existing law.” Doing just that, the Court held that the text and context of Section 11 confirm that liability “extends only to shares that are traceable to an allegedly defective registration.” WLF’s brief was drafted with pro bono assistance from James N. Kramer of Orrick Herrington & Sutcliffe LLP.

The Supreme Court declines to adopt the Safeco test for willfulness in False Claims Act cases.

United States ex rel. Schutte v. SuperValu; United States ex rel. Proctor v. Safeway

On June 1, the Supreme Court held that the test for willfulness announced by the Supreme Court in *Safeco* does not apply in FCA actions. This decision was a setback for WLF, which filed an amicus brief supporting the respondents. WLF’s brief explained that violations of the FCA carry both punitive civil penalties and criminal liability. This means that defendants are entitled to heightened due-process protections. WLF contended that applying *Safeco* in FCA cases would provide the necessary due-process protections while advancing Congress’s goal of ensuring companies do not bury their heads in the sand.