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## 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 **November 2023** filings and results.

### New Filings

- WLF asks the Supreme Court to overturn the Second Circuit's novel interpretation of federal securities law. (***Macquarie Infrastructure Corp. v. Moab Partners***)
- WLF asks the Supreme Court to hear an important federalism case. (***Apple Inc. v. Epic Games***)

### Decisions

- The Ninth Circuit rejects California's attempt to compel misleading and highly controversial speech. (***Nat'l Ass'n of Wheat Growers v. Bonta***)  
**\*victory\***
- The Supreme Court declines to review a deeply flawed Sixth Circuit holding in an MDL proceeding. (***E.I. du Pont de Nemours & Co.***)
- The Ninth Circuit declines to rehear en banc an important case about pleading standards under the federal securities laws. (***E. Ohman J:or Fonder AB v. NVIDIA Corp.***)

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 asks the Supreme Court to overturn the Second Circuit’s novel interpretation of federal securities law.** *Macquarie Infrastructure Corp. v. Moab Partners*

On November 20, WLF asked the Supreme Court to overturn the Second Circuit’s novel interpretation of federal securities law that splits with every other circuit that has decided the issue. Concluding that Item 303 of Regulation S-K creates a privately enforceable duty to disclose, the Second Circuit allowed a shareholder to sue a company for omitting 303 information from its financial statement—even though that omission did not render any portion of the filing misleading. WLF’s brief details how the Second Circuit’s reasoning is at odds with the plain meaning of SEC Rule 10b-5, the common law of fraud-by-omission, and longstanding Supreme Court precedent. WLF’s brief emphasizes that expanding the court-created private right of action under Rule 10b-5 to cover omitted Item 303 information would expand liability far beyond anything contemplated by Congress. WLF’s brief was prepared with generous pro bono support from Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP.

### **WLF asks the Supreme Court to hear an important federalism case.** *Apple Inc. v. Epic Games*

On November 1, WLF filed an amicus brief urging the Supreme Court to hear an important federalism case. The Ninth Circuit 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 it affirmed a nationwide injunction for Apple’s alleged violation of California’s unfair competition law. As WLF’s brief shows, the Ninth Circuit opinion ignores federalism principles because it allows California laws to apply outside the State’s borders. The decision also violates separation-of-powers and vertical federalism principles because it permits one federal judge to make laws for almost two dozen States. TechFreedom joined WLF’s brief.

## DECISIONS

### **The Ninth Circuit rejects California’s attempt to compel misleading and highly controversial speech.** *Nat’l Ass’n of Wheat Growers v. Bonta*

On November 11, the Ninth Circuit affirmed a trial court decision permanently enjoining the State of California from requiring a safety warning under the State’s controversial Proposition 65 regime. The decision was a victory for WLF, which filed an amicus brief in the case. As WLF’s amicus brief explained, California has no valid interest under the First Amendment in compelling false, misleading, and highly controversial speech. The Ninth Circuit agreed. California’s proposed warning, the court held, “requires plaintiffs to convey a controversial, fiercely contested message that the fundamentally disagree with.” And because California “had less burdensome ways to convey its message than to compel plaintiffs to convey it,” any Prop 65 warning for glyphosate would be unconstitutional.

**The Supreme Court declines to review a deeply flawed Sixth Circuit holding in an MDL proceeding.**

*E.I. du Pont de Nemours & Co.*

On November 20, the Supreme Court declined to review a deeply flawed Sixth Circuit decision in a multi-district litigation (MDL) proceeding. Justice Kavanaugh would have granted the petition, and Justice Thomas dissented from the denial. The denial was a disappointment for WLF, which filed an amicus brief urging review. WLF's brief had argued that due process prevents a district court overseeing an MDL from applying nonmutual offensive collateral estoppel to make the results of a handful of bellwether trials binding on every other pending or future case in the MDL. WLF's brief was prepared with generous pro bono support from Jonathan Tam, Matthew Steinberg, and Allison Ozurovich of Dechert LLP.

**The Ninth Circuit declines to rehear en banc an important case about pleading standards under the federal securities laws.**

*E. Ohman J:or Fonder AB v. NVIDIA Corp.*

On November 15, the Ninth Circuit declined to rehear en banc a divided panel opinion about the pleading requirements of the Private Securities Litigation Reform Act (PSLRA). The rehearing denial was a disappointment for WLF, which filed an amicus brief supporting rehearing. WLF's brief explained why the panel majority's reliance on plaintiffs' hired-gun expert report to establish falsity and scienter runs afoul of existing Ninth Circuit case law and decisions from other circuits. The panel majority's ruling creates an easy roadmap for future plaintiffs to engage in the kind of fishing expeditions the PSLRA was supposed to end. WLF's amicus brief was drafted with pro bono assistance from James N. Kramer, Daniel A. Rubens, and Jodie C. Liu of Orrick Herrington & Sutcliffe LLP. The National Association of Manufacturers joined WLF on the brief.