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

November 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 **October 2023** filings and results.

New Filings

- WLF asks the Ohio Supreme Court to adopt a proposed rule change to help ensure that unreliable expert evidence does not reach the jury. (***In re Proposed Amendments to Ohio Rule of Evidence 702***)
- WLF urges the Ninth Circuit to rehear a sharply divided panel opinion in an important securities case. (***E. Ohman J:or Fonder AB v. NVIDIA Corp.***)
- WLF asks the Third Circuit to confirm that federal trial courts lack jurisdiction to enforce OSHA's nonfinal orders. (***Gulden v. ExxonMobil***)
- WLF urges the Supreme Court to end multiple layers of for-cause removal protections for administrative law judges. (***SEC v. Jarkesy***)
- WLF asks the Supreme Court to decide who bears the burden of proving the applicability of an exemption to the Fair Labor Standards Act. (***EMD Sales v. Carerra***)
- WLF urges the Florida Supreme Court to implement vital reforms to the Florida Rules of Civil Procedure. (***In re Proposed Changes to the Florida Rules of Civil Procedure***)

Decisions

- The Supreme Court declines to hear an important case about the regulatory process. (***Avail Vapor v. FDA***)
- The Supreme Court denies one petition (but grants two others) seeking to clarify the First-Amendment limits of government-compelled speech. (***NetChoice, LLC v. Attorney General, State of Florida***)

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

NEW FILINGS

WLF asks the Ohio Supreme Court to adopt a proposed rule change to help ensure that unreliable expert evidence does not reach the jury.
In re Proposed Amendments to Ohio Rule of Evidence 702

On October 26, WLF joined a coalition of civil-justice reform groups in urging the Ohio Supreme Court to adopt proposed changes to Ohio Rule of Evidence 702, which governs the admissibility of expert evidence. Among other things, the proposed changes would align the Ohio rule with its federal analog by requiring the proponent of expert evidence to prove that it is "more likely than not" that the rule's reliability requirements are satisfied.

WLF urges the Ninth Circuit to rehear a sharply divided panel opinion in an important securities case.
E. Ohman J:or Fonder AB v. NVIDIA Corp.

On October 20, WLF urged the Ninth Circuit to rehear a sharply divided panel decision that gutted the critical pleading requirements of the Private Securities Litigation Reform Act (PSLRA). In its amicus brief urging rehearing, WLF 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. If left in place, 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.

WLF asks the Third Circuit to confirm that federal trial courts lack jurisdiction to enforce OSHA's nonfinal orders.
Gulden v. ExxonMobil

On October 18, WLF urged the Third Circuit to affirm the dismissal of a suit by two former Exxon employees to enforce a preliminary order of the Occupational Safety and Health Administration. WLF joined the U.S. Chamber of Commerce, the Association of American Railroads, and the National Manufacturers Association on the amicus brief, which was drafted by David Morrell, Jacqueline Holmes, and Ryan Proctor of Jones Day. In their brief urging affirmance, amici argue that the plain text of Sarbanes-Oxley authorizes judicial enforcement only of final—not preliminary—orders. Statutory context and history reinforce this conclusion. In contrast, plaintiffs' policy arguments for overriding the statute's plain meaning imply a cause of action where Congress did not create one—a practice the Supreme Court rejected long ago.

WLF urges the Supreme Court to end multiple layers of for-cause removal protections for administrative law judges.
SEC v. Jarkesy

On October 17, WLF filed an amicus brief urging the Supreme Court to affirm a Fifth Circuit decision vacating an SEC order. WLF's brief focused on one of the three questions presented—whether the Constitution allows SEC administrative law judges to have multiple levels of for-cause removal protection. As WLF's brief explains, Court precent makes clear that multiple levels of for-cause removal protection unconstitutionally inhibit the President's ability to supervise officers of the United States. WLF's brief also explains why the for-cause removal protections are not severable. The for-cause removal protections are an integral part of the statutory scheme, and there is no evidence that Congress would have passed a statute without those protections.

WLF asks the Supreme Court to decide who bears the burden of proving the applicability of an exemption to the Fair Labor Standards Act.
EMD Sales v. Carerra

On October 6, WLF urged the Supreme Court to hear an important case about the burden of proof in FLSA cases. Splitting from six other courts of appeals, the Fourth Circuit held that employers must prove the applicability of FLSA exemptions by clear and convincing evidence. WLF's brief argues that this holding flouts the Supreme Court's *Encino Motorcars* decision. The Fourth Circuit's rule relied on the principle that FLSA exemptions must be construed narrowly. But *Encino Motorcars* rejected that principle. WLF's brief also explains why this case is important. FLSA exemptions are frequently litigated and the burden of proof is often outcome determinative. A circuit applying the wrong burden of proof in FLSA actions is particularly bad because of the statute's loose venue provision.

WLF urges the Florida Supreme Court to implement vital reforms to the Florida Rules of Civil Procedure.
In re Proposed Changes to the Florida Rules of Civil Procedure

On October 2, WLF joined a coalition of civil-justice reform groups in urging the Florida Supreme Court to consider three additional changes to the Florida Rules of Civil Procedure. The coalition's comment asks the Court to (a) revise Florida Rule of Civil Procedure 1.280 to state that discovery must be "proportional to the needs of the case" like Federal Rule of Civil Procedure 26(b)(1)); (b) require disclosure of all third-party litigation funding agreements; and (c) address the extreme unfairness under new Florida Rule of Civil Procedure 1.460 if failure to continue trial would result in a defendant having to defend multiple trials simultaneously or close together.

DECISIONS

The Supreme Court declines to hear an important case about the regulatory process.
Avail Vapor v. FDA

On October 10, the Supreme Court declined to hear an important case about the regulatory process. This decision was a setback for WLF, which filed an amicus curiae brief urging review of a Fourth Circuit decision holding that the Food and Drug Administration could tell companies they need not include information in applications and then deny those applications for failing to include that very information. WLF's brief argued that this bait-and-switch violated the petitioners' due-process rights. The brief also detailed how FDA's denial orders were arbitrary and capricious because FDA did not consider the petitioners' evidence. Finally, the brief explained why FDA's action could endanger American lives.

The Supreme Court denies one petition (but grants two others) seeking to clarify the First-Amendment limits of government-compelled speech.
NetChoice, LLC v. Attorney General, State of Florida

On October 2, the Supreme Court denied a petition by NetChoice, LLC to review an Eleventh Circuit decision mostly affirming an injunction against Florida's new social media law, SB7072. Although the Court denied NetChoice's petition here, it granted two other petitions—one by Florida in this case and another by NetChoice concerning a similar law in Texas. In doing so, the Court agreed to decide whether Florida's and Texas's compelled-speech requirements violate the First Amendment. As WLF's brief explained, there is no logical limit to government intrusion into how platforms decide what

speech to disseminate if Texas's and Florida's laws are upheld. WLF joined TechFreedom's amicus brief, which was prepared in house by Corbin K. Barthold and Berin Szóka, the Supreme Court invited the Solicitor General of the U.S. to file a brief representing the views of the federal government on NetChoice's petition for certiorari.

