

MONTH IN REVIEW

April 2024

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Washington Legal Foundation

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WLF.org



Washington Legal Foundation's *Month in Review* report is a Litigation Division feature that highlights WLF's court and regulatory filings each month, as well as decisions issued in response to WLF's filings.

To learn more about WLF's litigation work, visit our website at www.wlf.org.

New Filings

Minnesota Telecom Alliance v. FCC

In re In-Use Locomotive Regulation

PhRMA v. McClain

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

*Facebook, Inc. v.
Amalgamated Bank*

*Sunoco LP v. City & County
of Honolulu*

Decisions

In re Non-Compete Rule

*N.Y. State Telecom. Ass'n
v. James*

*Bissonnette v. LePage Bakeries
Park St., LLC*

*Macquerie Infrastructure Corp. v.
Moab Partners, LP ***victory****

Minnesota Telecom Alliance v. FCC

WLF urges the Eighth Circuit to set aside the FCC's unlawful disparate-impact rule.

On April 29, 2024, WLF asked the Eighth Circuit to set aside a new FCC rule that threatens to impose a lawless disparate-impact regulatory regime on the broadband industry. WLF joined Pacific Legal Foundation on the brief, which was drafted by Alison Somin and Erin E. Wilcox. The case arises from the Infrastructure Investment and Jobs Act (IIJA), a \$1.2 trillion omnibus infrastructure bill that authorizes the FCC to “adopt final rules to facilitate equal access to broadband internet access service,” including by “preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.” In the brief, WLF argues that the IIJA supplies no plausible statutory basis for the FCC's unprecedented power grab and violates the Constitution.

On April 19, WLF filed a formal comment asking the EPA to reject California's request for authorization to implement the California Air Resources Board's (CARB's) In-Use Locomotive Regulation. WLF joined Steven G. Bradbury, a Distinguished Fellow at The Heritage Foundation, who authored the comment. The comment explains why EPA must deny California's request. Despite its deceptive title as a regulation of locomotive “use,” CARB's rule would require rail operators in California to buy or lease new locomotives or locomotive engines that meet CARB's emissions limits. Under Supreme Court precedent, that is a regulation relating to emissions controls for new locomotives and engines that is barred under the plain language of section 209 of the Clean Air Act.

In re In-Use Locomotive Regulation

WLF urges EPA to deny California's request for regulatory authorization under the Clean Air Act.

PhRMA v. McClain

WLF asks the Eighth Circuit to prevent States from overhauling federal prescription-drug benefit program.

On April 16, WLF filed an amicus brief in an important case about States' inability to amend federal law. An Eighth Circuit panel held that Arkansas could amend the federal statute regulating the 340B Program. WLF's brief asks the full Eighth Circuit to rehear the case. As the brief explains, the 340B Program is so large that any decision whether to expand the program must be made at the national level by Congress. WLF's brief also explains the consequences of allowing the panel's decision to stand. It will lead to less research and development by pharmaceutical companies, meaning fewer life-saving drugs. It will also increase regulatory costs leading to higher prices for patients.

On April 5, WLF urged the Supreme Court to review, and ultimately reverse, a sharply divided Ninth Circuit decision that gutted the critical pleading requirements of the Private Securities Litigation Reform Act (PSLRA). In its amicus brief urging review, WLF explained why the Ninth Circuit's reliance on plaintiffs' hired-gun expert report to establish falsity and scienter conflicts with decisions from other circuits. If left in place, the decision would create 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.

NVIDIA Corp. v. E. Ohman For Fonder AB

WLF urges Supreme Court to review important securities case out of the Ninth Circuit.

Facebook, Inc. v. Amalgamated Bank

WLF calls on Supreme Court to clarify scope of disclosure obligations under federal securities law.

On April 5, WLF asked the Supreme Court to review, and ultimately reverse, a Ninth Circuit decision that would hold companies liable for failing to include irrelevant and stale information in their forward-looking risk disclosures. WLF's amicus brief was prepared with the pro bono assistance of Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP. As WLF explains in its amicus brief urging review, the Ninth Circuit's ruling will force companies to overdisclose risks about immaterial past incidents, which will confuse investors who must navigate a company's SEC filings to find information relevant to their investment decisions. And under the Ninth Circuit's lax pleading standard, companies will be vulnerable to frivolous securities litigation based on accurate forward-looking statements—an outcome Congress sought to avoid when passing the Private Securities Litigation Reform Act.

On April 1, WLF filed an amicus brief urging the Supreme Court to hear important cases about greenhouse-gas litigation. Splitting from the Second Circuit, the Hawaii Supreme Court held that claims about climate change arising from greenhouse-gas emissions are not exclusively governed by federal common law. WLF's brief explains why, despite passage of the Clean Air Act, federal common law still controls claims about interstate and international greenhouse-gas emissions. The brief also explains the devastating consequences of allowing the Hawaii Supreme Court's decision to stand.

Sunoco LP v. City & County of Honolulu

WLF asks Supreme Court to decide whether state or federal law governs climate-change litigation.

In re *Non-Compete Rule*

The FTC finalizes its controversial rule banning virtually all non-compete agreements nationwide.

On April 23, the Federal Trade Commission banned all non-compete agreements nationwide. This was a setback for WLF, which filed a formal comment urging the FTC to abandon the proposal. WLF's comment detailed how banning non-competes violates the fundamental right to contract. The comment also showed how banning non-competes violates the major-questions doctrine. Congress did not give the FTC power to issue such an important rule affecting 30 million Americans through vague language. Finally, WLF's comment explained that banning non-competes jeopardizes the American dream by preventing low-skill workers from getting on-the-job training.

On April 26, a divided panel of the Second Circuit held that federal law does not preempt New York's ratemaking for broadband providers. The decision was a setback for WLF, which had joined TechFreedom on an amicus brief urging affirmance of the district court's holding that the FCC's 2018 order excludes broadband from rate regulation and other forms of common-carrier regulation.

N.Y. State Telecom. *Ass'n v. James*

A divided Second Circuit panel holds that federal law does not preempt New York's ratemaking for broadband providers.

Bissonnette v. LePage Bakeries Park St., LLC

WLF calls on Supreme Court to clarify scope of disclosure obligations under federal securities law.

On April 12, the Supreme Court vacated a Second Circuit decision that limited the scope of Section 1 of the Federal Arbitration Act, known as the “transportation worker exemption,” to workers in the transportation industry. A unanimous Court held, contrary to the Second Circuit, that a transportation worker need not work in the transportation industry to be exempt from coverage under §1 of the FAA. The decision was a setback for WLF, which filed an amicus brief with the Court arguing that efforts to expand the exemption beyond transportation-industry workers who carry goods or passengers across borders defy statutory text and context, produce inconsistent results, and serve no end set forth by Congress.

On April 12, the Supreme Court rejected the Second Circuit’s novel interpretation of federal securities law that split with every other circuit that had decided the issue. The high court’s decision was a victory for WLF, which filed an amicus brief in the case urging reversal. WLF’s brief was prepared with generous pro bono support from Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP. WLF’s amicus brief detailed how the Second Circuit’s reasoning is at odds with the plain meaning of the SEC rule, the common law of fraud-by-omission, and longstanding Supreme Court precedent. A unanimous Court agreed, explaining that “The failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim only if the omission renders affirmative statements made misleading.”

Macquarie Infrastructure Corp. v. Moab Partners, LP

The Supreme Court rejects the Second Circuit’s flawed reading of SEC Rule 10b-5.

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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 our General Counsel and Vice President of Litigation, Cory Andrews.

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