

# MONTH IN REVIEW

September 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](http://www.wlf.org).

## New Filings

*Labcorp v. Davis*

*R.J. Reynolds Tobacco Co.  
v. FDA*

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

*NicQuid LLC v. FDA*

*Dewberry Group v. Dewberry  
Engineers*

## Decisions

*X Corp. v. Bonta*  
*\*victory\**

# NEW FILINGS

## *Labcorp v. Davis*

WLF asks the Supreme Court to clarify Article III's limits on class actions.

On September 23, WLF filed an amicus brief urging the Supreme Court to review a Ninth Circuit decision in an important separation-of-powers case. Despite Supreme Court precedent holding that district courts may not enter judgment for uninjured class members, the Ninth Circuit held that district courts may certify classes with uninjured members. As WLF's brief shows, the Ninth Circuit's ruling contravenes foundational separation-of-powers principles. The Founders gave federal courts constitutional jurisdiction over only cases and controversies. They did so to prevent the judiciary from governing the country through injunction. Similarly, the Take Care Clause gives the President the authority to enforce federal laws. But the Ninth Circuit's decision improperly transfers that authority to the plaintiffs' bar.

On September 20, WLF asked the Supreme Court to review and ultimately reverse, on First Amendment grounds, a decision upholding an FDA requirement that tobacco manufacturers and retailers prominently display a series of misleading, graphic warning labels on cigarette packages and advertisements. In its amicus brief urging review of the Fifth Circuit's ruling, WLF emphasized that the First Amendment fully protects the right both to speak and not to speak. WLF's brief explained why the graphic warnings at issue here do not qualify as ordinary disclosures akin to those that the Supreme Court has upheld. Rather, they are the very sort of controversial, ideological messages that have nothing to do with preventing consumers from being misled.

## *R. J. Reynolds Tobacco Co. v. FDA*

WLF urges the Supreme Court to review FDA's unconstitutional compelled-speech mandate on tobacco products and retailers.

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

WLF asks the Supreme Court to clarify that federal law preempts New York's ratemaking for broadband providers.

On September 13, WLF filed an amicus brief urging the Supreme Court to review and ultimately overturn a Second Circuit decision in an important preemption case affecting the internet. WLF joined TechFreedom in urging the high court to clarify that Congress excluded broadband from rate regulation and other forms of common-carrier regulation by the States. In its brief urging review, WLF contends that Congress, in the Telecommunications Act of 1996, declared that the internet should remain "unfettered" by state regulation. That law provides that a company offering interstate communications services may be regulated as a common carrier only to the extent that it "provides telecommunications services." Yet the FCC has already determined that broadband service is not a telecommunications service, but an "information service." The States, therefore, may not regulate a broadband service as a common carrier. Under the Second Circuit's reasoning, however, States could impose market entry or exit requirements, rate regulations, and many other onerous regulations on email, text messaging, and much more. That would be a disaster for the internet, for technological progress, and for society.

## *NicQuid LLC v. FDA*

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WLF urges the Fifth Circuit to bar federal agencies from regulatory bait-and-switches.

On September 5, WLF urged the Fifth Circuit to vacate the denial of premarket approval for NicQuid's modified-risk tobacco products. The FDA told companies they need not include certain information in applications and then denied those applications for failing to include that very information. WLF's brief argues that this regulatory bait-and-switch violates NicQuid's due-process rights. The brief also details how FDA's denial order is arbitrary and capricious because FDA did not consider NicQuid's evidence.

On September 4, WLF filed a brief in an important trademark case. The Fourth Circuit held that district courts may require infringing defendants to disgorge the profits of non-party corporate affiliates. WLF's brief explains that when Congress invokes equity when drafting statutes, it limits the types of recovery available to plaintiffs. Here, that means courts cannot award disgorgement of profits earned by non-parties. WLF's brief also explains why it is possible to sue all infringers. Finally, affirming the Fourth Circuit's decision will harm America's economy because it will divert capital from its most productive use.

## *Dewberry Group v. Dewberry Engineers*

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WLF asks the Supreme Court to cabin the equitable relief available in trademark-infringement cases.

## *X Corp. v. Bonta*

The Ninth Circuit holds that a California law likely violates social media platforms' free-speech rights.

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On September 4, the Ninth Circuit reversed a trial court's refusal to enjoin California's controversial new social media law, AB 587. The decision was a victory for WLF, which filed an amicus brief in the case. As WLF's brief explained, AB 587 violates the First Amendment because it compels companies to speak against their will, impermissibly interferes with the constitutionally protected editorial judgments of social media platforms and places an unjustified and undue burden on social media companies. The Ninth Circuit agreed, holding that X Corp. was likely to succeed on the merits of its First Amendment challenge because AB 587's provisions are content based and not narrowly tailored to accomplish the State's goals. WLF's amicus brief was prepared with the generous pro bono assistance of Trent Norris, Mark Brennan, Ryan Thompson, Sophie Baum, and Alexander Tablan of Hogan Lovells US LLP.

Celebrating its 47th year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual and business civil liberties, and the rule of law.

To learn more about our new briefs and regulatory filings, visit our website at [wlf.org/litigation](https://wlf.org/litigation).

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.

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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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