

MONTH IN REVIEW

December 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

Amazon.com v. NLRB

*Swinomish Indian Tribal
Community v. BNSF
Railway Co.*

Epic Games v. Google

Decisions

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

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

*In re Proposed Changes to
Florida Civil Rule of
Procedure 1.280(c)*
victory

NEW FILINGS

Amazon.com v. NLRB

WLF urges the Fifth Circuit to hold that the NLRB's Administrative Law Judges are unconstitutional.

On December 18, WLF asked the Fifth Circuit to vacate the NLRB's unlawful and unconstitutional enforcement action against Amazon.com. In its amicus brief in support of Amazon, WLF urges the court to hold that NLRB's ALJs enjoy unconstitutional removal protection. As the brief explains, NLRB's ALJs are inferior officers who enjoy multiple levels of for-cause removal protection. The Supreme Court's decisions in *Jarkesy* and *Free Enterprise Fund* make clear that this violates Article II because the President lacks the ability to ensure that the ALJs are fulfilling their duties. WLF's brief was prepared by Alex T. MacDonald at Littler Mendelson PC.

On December 13, WLF urged the Ninth Circuit to bring a district court's runaway disgorgement award back within equitable bounds. In its amicus brief supporting BNSF, WLF argues that, under binding precedent, disgorgement awards cannot exceed the net profits of the wrongdoer. In fact, disgorgement awards must deduct legitimate expenses. And above all, disgorgement awards may not be so excessive that they cross the line from equity into penalty. The decision here jettisons each of those limits. By disregarding BNSF's legitimate contributions in calculating its disgorgement award, the district court crossed the line from equity into penalty.

Swinomish Indian Tribal Community v. BNSF Railway Co.

WLF asks the Ninth Circuit to bring a district court's punitive disgorgement award back within equitable bounds.

Epic Games v. Google

WLF asks the Ninth Circuit to vacate a controversial antitrust injunction that would stifle innovation.

On December 4, WLF asked the Ninth Circuit to reverse a trial court’s controversial verdict and sweeping injunction in a major antitrust case. In its amicus brief supporting Google, WLF argues that under prevailing law, a business—even an alleged monopolist—may choose with whom it transacts. Exceptions are rare. The Supreme Court has never endorsed a remedial duty to deal where there is no prior course of dealing. For without a prior course of dealing, there can be no evidence that a particular course would be profitable, no reason to infer that the monopolist’s otherwise lawful refusal was unjustified, and no prior terms to guide the court in determining what terms to impose on competitors. Not only would courts become “central planners”—something antitrust law seeks to avoid—but worse, they would be centrally planning on a blank slate.

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.

N.Y. State Telecomm. Ass'n v. James

The Supreme Court denies review in a prominent preemption case affecting the internet.

On December 16, the Supreme Court declined to review a Second Circuit decision in a preemption case affecting the internet. The denial was a setback for WLF, which joined TechFreedom on an amicus brief urging the 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 contended that under the Second Circuit's reasoning, 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.

On December 11, dismissed as improvidently granted a petition to review an important Ninth Circuit securities case. The dismissal was a disappointment for WLF, which filed an amicus brief urging the Court to uphold the critical pleading requirements of the Private Securities Litigation Reform Act (PSLRA). WLF was joined on its amicus brief by the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, and the Securities Industry and Financial Markets Association. The brief explained why allowing securities plaintiffs to rely on hired-gun expert reports to establish
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NVIDIA Corp. v. E. Ohman &or Fonder

The Supreme Court dismisses as improvidently granted a petition to review an important Ninth Circuit securities case.

NVIDIA Corp. v. E. Ohman &or Fonder

The Supreme Court dismisses as improvidently granted a petition to review an important Ninth Circuit securities case.

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falsity and scienter would permit securities-fraud plaintiffs to circumvent the PSLRA by substituting *post hoc* expert speculation for particularized factual allegations of falsity and scienter. Affirming the Ninth Circuit’s rule would therefore create an easy roadmap for future plaintiffs to engage in the kind of fishing expeditions the PSLRA was supposed to end. WLF’s brief was drafted with pro bono assistance from James N. Kramer, Daniel A. Rubens, and Jodie C. Liu of Orrick Herrington & Sutcliffe LLP.

On December 5, 2024, the Florida Supreme Court adopted amendments to Rule 1.280(c) of the Florida Rules of Civil Procedure. The decision was a victory for WLF, which had joined a coalition of civil-justice reform groups to urge adoption of the proposed changes. The coalition’s comment asked the Court to amend the rule to explicitly state that discovery must be “proportional to the needs of the case,” consistent with Federal Rule of Civil Procedure 26(b)(1). The new rule does just that.

In re Proposed Changes to Florida Civil Rule of Procedure 1.280(c)

The Florida Supreme Court adopts amendments incorporating the proportionality language of Federal Rule of Civil Procedure 26(b)(1) into the Florida discovery rules.

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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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