

The Brief

WINTER 2023

NFIB Legal Center Challenges EPA Overreach and Electric Vehicle Mandates

During the past few months, the NFIB Small Business Legal Center joined several important energy and climate cases pending at the United States Court of Appeals for the D.C. Circuit. This court is often referred to as the second-highest court in the land, which demonstrates the importance and consequential outcomes of these cases for small businesses.

Thanks to the generous support of our donors like you, we were able to file amicus briefs in three cases that have the potential to dramatically impact energy and transportation costs for small businesses.

Ohio v. Environmental Protection Agency (EPA)

This case involves a waiver EPA gave to the State of California, which allows California to impose highly restrictive greenhouse gas emission standards. The court will decide whether EPA had authority under the Clean Air Act to give California the waiver. The NFIB Legal Center brief argues that EPA failed to consider the nationwide effects of California's proposed emission standards and the impact on energy costs for small businesses.

The rule, if allowed to stand, would mean that by 2035 100% of new cars and light trucks sold in California would need to be zero-emission vehicles, including plug-in hybrid electric vehicles. This would be an outrageously expensive change for small businesses.

Texas v. EPA

In *Texas v. EPA*, multiple states challenged EPA's new greenhouse gas Tailpipe Rule for light-duty vehicles as an invalid and unauthorized exercise of the agency's authority.

The Legal Center partnered with the Pacific Legal Foundation to file a brief arguing that EPA did not have authority to impose the nationwide emissions standard for light-duty vehicles. Imposing such a standard is a major policy question that Congress must answer, or clearly delegate authority to the agency to answer. Our brief also highlights the downstream harm that will come to small businesses and consumers from the agency imposing such strict standards on commercial light-duty vehicles.

Natural Resources Defense Council v. National Highway Transportation Safety Administration (NHTSA)

In this third energy case, the Legal Center filed a brief fighting an unreasonable fuel economy standard that NHTSA issued. We are arguing that NHTSA exceeded its authority under federal law by considering electric vehicle standards when determining new fuel emission standards.

Decisions in all three cases could come at any point in 2023. Depending on the outcome, we would not be surprised to see them appealed to the United States Supreme Court. As always, the NFIB Small Business Legal Center will continue to fight and advocate for small business interests in cases involving the climate, energy costs, and agency overreach.

Keep up with our work at:
NFIB.com/legal

Don't forget to check out
our Facebook page.

facebook.com/NFIB.legal



TAMING THE REGULATORY BEAST

By Elizabeth Milito, Executive Director, NFIB Small Business Legal Center

the typical NFIB member that operates without the benefit of in-house attorneys or compliance officers. As a result, business owners like you are pulled away from productive revenue generating tasks and you end up spending an inordinate amount of time and energy trying to decipher and comply with regulatory requirements. Unfortunately, the regulatory burden on small business has continued to grow for decades.

NFIB's Research Foundation confirms that unreasonable regulation remains a top concern for small business. According to NFIB's monthly Small Business Economic Trends survey, "unreasonable government regulations" ranks as a top problem.

Taming the regulatory beast is one of the NFIB Small Business Legal Center's top priorities. And thanks to your generous support, the Legal Center is up to the challenge. This year we anticipate that our legal work will focus on litigation aimed to stop federal agencies' costly regulations that disproportionately affect small businesses.

Reasonable minds can disagree whether a regulation is unreasonably burdensome or not. But reasonable minds should agree that if regulation is necessary, the government should seek to achieve its ends without burdening small business or stifling innovation and the economy. Our newsletter's cover story features three illustrative examples of burdensome federal climate regulations out of the Environmental Protection Agency (EPA) and the U.S. Department of Transportation.

EPA, in particular, continues to unabashedly produce bad rules. In December, it announced a final rule on Waters of the United States (WOTUS). The WOTUS Rule determines which bodies of water fall under federal jurisdiction. The new rule's radical expansion of federal authority over private property wetlands across the country will require owners to spend more time and money on compliance.

The WOTUS rule comes even though a significant WOTUS case in which the Legal Center participated, *Sackett v. EPA*, is pending at the U.S. Supreme Court. America's small farmers, ranchers, developers, contractors, and other small businesses with water on their property have been affected greatly by the ongoing changes to WOTUS standards. This new EPA rule

Every week we talk to small business owners throughout the country about regulatory problems. Too often the government makes things particularly difficult for businesses, like

further complicates compliance standards and increases uncertainty for small businesses. As with EPA's ill-conceived climate rules, the Legal Center will continue to fight EPA's WOTUS overreach.

The Legal Center is also watching the harmful rules under consideration at the U.S. Department of Labor (DOL). For instance, we anticipate DOL will propose a new overtime rule later this year along with a new independent contractor rule. Both rules would increase labor costs at a time when small businesses are struggling with inflation, supply chain issues, and a nationwide labor shortage.

Regardless of how well-intentioned lawmakers and regulators may be, the reality is that with each new imposition the regulatory beast grows. This makes launching and running a small business more daunting. And while entrepreneurs like you are a unique breed—willing to take risks and to work as hard as is necessary to build and grow your business—you are understandably frustrated with regulatory drag. For this reason, the NFIB Legal Center is committed to taming the regulatory beast.

Please do not hesitate to reach out to us directly if you have ideas or comments about our work. We look forward to a fantastic 2023, bringing the voice of small business to the courts.

Thank you for your support!

Elizabeth Milito

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A Recap of NFIB's 2022 Webinar Series

In 2022, the NFIB Small Business Legal Center hosted 13 webinars on a variety of topics with fabulous guest speakers. Webinars offered tips on taxes, collections, marketing, human resources, and much more. All webinars are recorded and can be found at <https://www.nfib.com/webinars/>.

Below are the top four webinars from 2022 along with the link for viewing.

1. Wage & Hour Guide for Small Businesses

Navigating employment laws can be tricky, and wage and hour compliance can be particularly problematic for small businesses. This webinar offers business owners a better understanding of federal wage and hour law and an overview of NFIB's Wage and Hour Handbook.

<https://www.nfib.com/webinars/wage-hour-guide-for-small-businesses-plus-a-special-update-on-dol-changing-rules-for-independent-contractors/>

2. Every Dollar Counts: Small Business Debt Collection and Credit Management Strategies

Presented by special guest, Cliff Ennico, Esq., this webinar covers debt collection and creditor relations. Collecting money owed to your business can be frustrating and stressful, but Cliff offers valuable insight on how to avoid overdue accounts in the first place and how to navigate collection procedures fast and legally.

<https://www.nfib.com/webinars/every-dollar-counts-small-business-debt-collection-and-credit-management-strategies/>

3. What's Your Digital Marketing Success Plan?

Our digital marketing webinar, presented by special guest Donna Botti, is designed for small business owners committed to growing their business with added digital marketing. Donna offers tips for drafting a successful digital marketing plan and updating websites.

<https://www.nfib.com/webinars/whats-your-digital-marketing-success-plan/>

4. Tax Tips for Small Businesses in 2023 and Retroactive ERC/ERTC Claims

With Special Guest, DJ Antonacio, this webinar offers tactics on creating a successful financial strategy for 2023. The webinar also provides tips for reducing tax liability, updates on federal tax programs, and an overview of how to retroactively claim the Employee Retention Tax Credit.

<https://www.nfib.com/webinars/tax-tips-for-small-business-in-2023-and-retroactive-erc-ertc-claims/>

NFIB Joins Lawsuit Challenging Connecticut Ban on Employer Free Speech

For over 70 years, employers have had the right under federal law to convene meetings with employees about their statutory labor rights, including the right to refrain from forming unions. But a recently enacted "captive audience" law in Connecticut bans this longstanding practice. On November 1, 2022, NFIB joined with eight other national and state business groups in suing Connecticut.

This law amended the Connecticut statutes so that now any employer can be sued if the employer subjects or threatens to subject any employee to discipline or discharge if the employee refuses to attend an employer-sponsored meeting where the employer shares his or her opinion concerning religious or political matters.

Under the law, employers cannot gather employees to discuss the economic or business consequences of a law passing or the effects on the business from unionization. Due to the law's broad wording, an employer making a passing reference to a politically related matter, or a single candidate, could be sued.

Any employer who violates the law will be liable to the employee for the "full amount of gross loss of wages or compensation, with costs and such reasonable attorney's fees."

NFIB's lawsuit makes two claims:

1. First, we allege that the captive audience law violates the First Amendment of the U.S. Constitution by discriminating against employers' viewpoints on political matters because it regulates the content of employers' communications with their employees, and chills and prohibits certain employer speech; and
2. Second, we argue that the captive audience law is preempted by the National Labor Relations Act, which comprehensively regulates labor relations and the right of employers to speak to employees on unionization.

We have asked the court to declare the law unconstitutional and block its enforcement. To keep up with this lawsuit and other legal challenges, visit nfib.com/legal.

SBLC's webinars will continue monthly in 2023. Join us the first Wednesday of each month at 12 PM ET. Visit [nfib.com/webinars](https://www.nfib.com/webinars) for more information.

Legal Center Brief Defends Small Business in ADA Website Accessibility Lawsuit

The NFIB Small Business Legal Center has long sought to protect small businesses from the confusion and lack of clarity surrounding how the Americans with Disabilities Act (ADA) applies to business websites. In 2021, we published the white paper "The ADA and Small Business: Website Compliance Amid a Plethora of Uncertainty," and testified on Capitol Hill to the challenges and compliance costs imposed on small businesses by the ADA's lack of certainty regarding business websites.

This past December, we took another step in our advocacy for small businesses. We filed an amicus brief urging the Supreme Court to hear the case *Acheson Hotels, LLC v. Laufer*.

Laufer is a disabled Florida resident and self-identified ADA "tester." She browses the Internet for hotel websites, usually targeting smaller hotels that provide, in her view, insufficient information on ADA accessibility. After finding such a website, she sues them in court. In recent years, she has filed over 600 lawsuits on this basis.

Coast Village Inn and Cottages is a small resort in Maine. Laufer visited Coast Village Inn's reservation website and thought it failed to provide enough information about ADA accessibility. Because she never intended to visit the Inn, she did not bother to call or email about accessibility. Coast Village argues in its defense that Laufer's only reason for visiting the resort's website was to target the hotel in an ADA lawsuit.

The question before the Supreme Court is whether a "tester" who has no intention of visiting the business has suffered a legally recognizable injury from simply visiting the website. Our amicus brief argues that the Court should hear the case and that this type of injury is not enough.

For more information on ADA website accessibility, please contact the NFIB Small Business Legal Center at info@nfib.org.



Media Mentions

10/12/2022

Fox Business quoted Executive Director Elizabeth Milito in response to President Biden's proposed independent contractor "Gig Rule." Milito warned, "This is a rule that's only going to make it more challenging for small businesses to operate in today's already difficult economy." The proposed rule would re-classify millions of gig workers as employees.

<https://www.foxbusiness.com/politics/bidens-proposed-gig-worker-rule-could-deal-major-blow-small-businesses>

10/14/2022

The Oregon Business Report also quoted Executive Director Elizabeth Milito regarding the Department of Labor's proposed rule on independent contractors. "Small business owners need clarity for determining who is and isn't considered an independent contractor under the Fair Labor Standards Act ... Unfortunately, the Department of Labor's new proposed rule will complicate the current standards and ultimately lead to frivolous litigation and increased costs for small businesses. NFIB opposes the proposed rule and changes to the independent contractor standard."

<https://oregonbusinessreport.com/2022/10/independent-contractor-rule-bad-for-small-business/>

11/01/2022

The Connecticut Business & Industry Association (CBA) referenced NFIB and Executive Director Elizabeth Milito for joining in challenging Connecticut's captive audience law. The law restricts employers from discussing political matters with employees, including legislative and regulatory proposals. Elizabeth Milito stated: "Small business owners expect the freedom to communicate with their employees regarding various business issues. This law is an example of government overreach and threatens to restrict the relationships between employer and employees."

<https://www.cbia.com/news/media-center/cbia-captive-audience-lawsuit>

11/21/22

Bloomberg Law referenced NFIB and the National Association of Home Builders for their amicus brief filed in *Allstates Refractory Contractors, LLC v. Martin Walsh*. The brief argues, "The unbounded and sweeping delegation to OSHA of the powers both to create workplace-safety standards—a legislative function—and then to enforce those rules against countless employers cannot be tolerated under existing precedent."

<https://news.bloomberglaw.com/daily-labor-report/punching-in-unions-gear-up-for-georgia-runoff-canvassing-drive-28>