

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Sept. 20–26, 2021)

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The federal courts issue hundreds of decisions every week in cases involving diverse legal disputes. This Sidebar series selects decisions from the past week that may be of particular interest to federal lawmakers, focusing on precedential decisions of the [Supreme Court](#) and the courts of appeals for the [thirteen federal circuits](#). Selected cases typically involve the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress’s lawmaking and oversight functions.

Some of the cases identified in this Sidebar, or the legal questions they address, are examined in other CRS general distribution products. Members of Congress and congressional staff may email the author to receive regular notifications of new products published by CRS attorneys.

Decisions of the Supreme Court

No Supreme Court opinions or grants of certiorari were issued this week.

Decisions of the U.S. Courts of Appeals

- **Communications:** Section 230 of the Communications Act generally shields online service providers from civil liability for hosting others’ content, subject to exceptions including suits under intellectual property laws. Splitting with another circuit, a divided Third Circuit panel held that this carve-out applied to both federal and state intellectual property claims, and further ruled that the exception covered plaintiff’s state law claim against a defendant social media company alleging it violated her right of publicity ([Hepp v. Facebook](#)).
- **Criminal Law & Procedure:** A divided Third Circuit panel joined other circuits in recognizing a Hobbs Act robbery conviction does not qualify as a “crime of violence” for purposes of the career offender provision of the U.S. Sentencing Guidelines because that term covers a narrower swathe of conduct than does a Hobbs Act robbery offense ([United States v. Scott](#)).

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- **Environmental Law:** The Ninth Circuit held that a citizen suit under the Clean Water Act may be premised on a defendant's ongoing or reasonably expected violations of monitoring and reporting requirements, even if no proof is offered of an ongoing discharge of pollutants into the waters of the United States (*Inland Empire Waterkeeper v. Corona Clay Co.*).
- **Fair Credit Report Act (FCRA):** FCRA regulates consumer reporting agencies' use of consumer reports. Adding to a circuit split, a divided D.C. Circuit held that FCRA's authorization of damage suits against any "person" waived the federal government's sovereign immunity, because the court read the statute's definition of "person" to cover the federal government. However, the court ruled that defendant Federal Motor Carrier Safety Administration did not act as a "consumer reporting agency" under FCRA when it distributed safety records of commercial truck drivers to prospective employers, and the court therefore dismissed the suit against it (*Mowrer v. Department of Transportation*).
- **Firearms:** Earlier this year, a divided Fourth Circuit panel ruled in favor of plaintiff's Second Amendment challenge to federal laws and regulations that barred her from purchasing a handgun because she was under 21. When plaintiff turned 21 shortly thereafter, the court remanded the case to be dismissed as moot and vacated the earlier opinion, resulting in it losing precedential value under circuit caselaw (*Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*).
- **Freedom of Information Act (FOIA):** The Open FOIA Act of 2009 provides that later laws may only exempt agencies from FOIA disclosure requirements if they "specifically cited" to FOIA. In an amended opinion, a divided Ninth Circuit panel held that post-2009 appropriations riders limiting the covered agency's disclosure of firearms-related information ("Tiahrt Riders") did not relieve that agency of FOIA disclosure requirements because the post-2009 riders did not specifically cite to FOIA. (The majority believed the government waived arguments that the 2009 law impermissibly constrained how a future Congress can create FOIA exemptions.) The post-2009 Tiahrt Riders did, however, repeal by implication earlier riders that were not subject to the Open FOIA Act's citation requirement and may have otherwise barred disclosure (*Center for Investigative Reporting v. Department of Justice*).
- **Immigration:** The Eighth Circuit held that an asylum seeker's claim was properly denied because, among other things, her claim was premised on being part of a family that was unaffiliated with gangs and refused to provide support to gang activity, a class that lacked sufficient particularity and social distinction to be considered a "particular social group" under the asylum statute (*Tino v. Garland*).
- **Labor & Employment:** In a suit for unlawful retaliation under the Federal Railroad Safety Act, the Second Circuit construed the statute's protection of an employee's "reporting, in good faith, a hazardous safety or security condition" to require that an employee *subjectively* believe the reported matter represents a hazardous safety or security condition, and ruled that the reported condition need not be a physical condition (*Ziparo v. CSX Transportation, Inc.*).
- **Labor & Employment:** The Seventh Circuit held that the Labor Management Relations Act preempted a class action suit brought under state law by unionized employees challenging their employer's collection of biometric information from them, because the federal law recognized certified unions as the exclusive representative of employees in collective working condition disputes with management (*Fernandez v. Kerry*).
- **Presidential Pardons:** The Tenth Circuit held that a petitioner's acceptance of a presidential pardon of his military court-martial convictions did not constitute a legal

- confession of guilt or a waiver of his habeas right to challenge the legality of the convictions (*Lorance v. Commandant*).
- **Securities:** Section 11 of the Securities Act imposes civil liability for false or misleading statements in registration documents and provides that persons who acquire “such security” have standing to sue for violations. A divided Ninth Circuit panel held that because the defendant had to file a registration statement to sell shares through a direct listing that made registered and unregistered shares available to the public, the plaintiff had standing to bring suit under Section 11 even though he could not identify whether the shares purchased through the listing were registered (*Pirani v. Slack Technologies, Inc.*).

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