

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Sept. 27–Oct. 3, 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 contact the author to subscribe to the *CRS Legal Update* newsletter and receive regular notifications of new products published by CRS attorneys.

Decisions of the Supreme Court

This past week the Supreme Court added five cases to its term’s docket:

- **Criminal Law & Procedure:** Between 2010 and 2018, Congress passed legislation prospectively reducing sentence disparities between certain crack and powder cocaine offenses and giving courts discretion to reduce the sentences of defendants convicted under the prior standards. The Supreme Court granted certiorari in a case to decide whether a court reviewing a sentence under these provisions must or may consider intervening legal and factual developments arising after the defendant’s conviction ([Concepcion v. United States](#)).
- **Election Law/First Amendment:** When a candidate for federal office loans money to his or her campaign, federal law sets a \$250,000 cap on the amount of post-election contributions that a campaign may use to reimburse the candidate. The Supreme Court will exercise its mandatory jurisdiction in a case where it is asked to review whether the appellees have standing to challenge the cap and, if so, whether the cap violates the First Amendment’s Free Speech Clause ([Federal Election Commission v. Ted Cruz for Senate](#)).

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- **First Amendment (Religious Speech):** The Supreme Court granted certiorari in a case involving a challenge to the City of Boston’s denial of a religious organization’s permit to raise temporarily a flag with a Latin Cross on a city flagpole, after the City previously approved hundreds of flag raisings by other private, non-religious entities. The Court is asked to consider whether the flagpole displays constitute government speech or private speech in a public forum, and whether the City’s denial was impermissible religious viewpoint discrimination or content discrimination under the First Amendment (*Shurtleff v. City of Boston*).
- **Foreign Sovereign Immunities Act (FSIA):** The FSIA provides that when a foreign nation is not immune from jurisdiction in the federal or state courts, it may be held liable in the same manner and to the same extent as similarly situated private individuals. The Supreme Court is asked to decide whether a federal court hearing a state law claim under the FSIA must apply the forum state’s choice-of-law rules to determine what substantive law governs the claims, or whether the court instead may apply federal common law (*Cassirer v. Thyssen-Bornemisza Collection Foundation*).
- **Tax:** The Internal Revenue Code (IRC) provides a 30-day time limit to file in the Tax Court a petition for review of a Commissioner of the Internal Revenue Service’s notice of determination. The Supreme Court is asked to consider whether the IRC’s three-day time limit is jurisdictional or instead a claim processing rule subject to equitable tolling (*Boechler, P.C. v. Commissioner of Internal Revenue*).

Decisions of the U.S. Courts of Appeals

- **Banking:** The Fifth Circuit deferred to the Office of the Comptroller General’s interpretation of an ambiguous regulation implementing National Bank Act requirements. The interpretive letter treats overdraft bank fees as charges for non-interest deposit account services, rather than as interest subject to usury limitations under the Act (*Johnson v. BOKF National Association*).
- **Environmental Law:** The Resource Conservation and Recovery Act (RCRA) creates a private right of action against any entity contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste which “may present an imminent and substantial endangerment to health or the environment.” A divided Ninth Circuit panel held that RCRA permitted suit against transporters of solid waste—including a municipal government whose water-distribution system transported groundwater contaminated by such waste—regardless of whether the transporter was involved in the waste’s initial creation or disposal (*California River Watch v. City of Vacaville*).
- **Fair Housing Act (FHA):** Sitting en banc, the Ninth Circuit ruled that FHA allowed those who were directly harmed by the issuance of a discriminatory loan to bring suit against covered lenders, but not third parties who were indirectly affected by the harm caused to the loan recipients, even if their injury may have been foreseeable (*City of Oakland v. Wells Fargo & Co.*).
- **Federal Courts:** The federal *in forma pauperis* statute allows prisoners to bring a civil action or appeal a judgment in federal court without prepaying filing fees, unless three or more prior actions or appeals were dismissed on certain enumerated grounds. The Third Circuit ruled that a “mixed motive dismissal,” where a portion of a prisoner’s action or appeal was dismissed on enumerated grounds and a portion dismissed on other grounds, does not count as a “strike” under the statute (*Talley v. Wetzel*).
- **Federal Courts:** 28 U.S.C. § 1446 sets forth requirements for a defendant in a civil suit seeking removal to federal court, including that a notice of removal is filed within 30 days of the defendant’s receipt of the initial pleading or summons (whichever is shorter),

and any properly served and joined co-defendants also agree to the removal. The Second Circuit held that a defendant cannot cure a failure to obtain unanimous, timely consent to removal by obtaining consent after the 30-day period lapses (*Taylor v. Mediatronic, Inc.*).

- **Federal Courts:** Under 28 U.S.C. § 1446(b), when it is unclear from an initial pleading that a civil suit filed in state court is removable to federal court, the defendant's 30-day clock to file a notice of removal begins upon receiving "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case" is removable. A Ninth Circuit panel diverged from another circuit in holding that oral deposition testimony does not trigger the 30-day timeline until the defendant receives the deposition transcript, and joined two other circuits in ruling that the removal clock does not begin until receiving a "paper" that makes the removal ground "unequivocally clear and certain" (*Dietrich v. The Boeing Company*).
- **Firearms:** Under 18 U.S.C. § 922(g), it is a crime for specified categories of persons to possess a firearm. A Sixth Circuit panel held that the Sixth Amendment's Double Jeopardy Clause bars a defendant from being convicted of two counts under the provision (here, unlawfully possessing a firearm as a convicted felon and as a domestic violence misdemeanor) based on the same incident of firearm possession (*United States v. Grant*).
- **Firearms:** A rule that went into effect in 2019 specified that "bump stock" devices, which enable a shooter of a semiautomatic firearm to start a continuous firing cycle with a single pull of the trigger, fall under a federal statute's prohibition on machineguns, and the rule requires bump stock device owners to divest them. A Federal Circuit panel rejected plaintiffs' claim seeking compensation for divestment of their bump stock devices (plaintiffs did not challenge the validity of the rule itself); a panel majority held that plaintiffs lacked an established property right in the devices given there was a valid agency implementation of a statutory bar that predated their acquisition of the devices (*McCutchen v. United States*).
- **Food & Drug:** The Orphan Drug Act incentivizes the development of drugs to treat rare diseases by providing that, once the drug is approved by the Food and Drug Administration (FDA), the FDA cannot approve another application or issue a license for "the same drug for the same disease or condition" for a seven-year period. The Eleventh Circuit held that the FDA contravened the Act by approving an application to treat pediatric patients with a drug for which another manufacturer received orphan drug exclusivity to treat the same illness in adult patients (*Catalyst Pharmaceuticals, Inc. v. Becerra*).
- **Hawaiian Admission Act:** A Ninth Circuit panel held that the state of Hawaii had concurrent jurisdiction over a military base under the Hawaii Admission Act. While the Act reserved to the United States the power to declare exclusive jurisdiction over areas it designated as critical, it had not done so here (*Lake v. Ohana Military Communities*).
- **Indian Affairs:** The Freedom of Information Act exempts from its disclosure requirements those records specifically exempted from disclosure by another statute, including "medical quality assurance records" of the Indian Health Service (IHS) under the Indian Health Care Improvement Act. A Second Circuit panel held that an IHS report evaluating the agency's management and administration did not fall under this exemption (*New York Times v. Department of Health and Human Services*).
- **Intellectual Property:** The Federal Circuit held that a screenwriter was an independent contractor rather than an employee for Copyright Act purposes, enabling him to reclaim his copyright ownership in the screenplay from a film production company under the terms of the Act. In so doing, the court held that the definition of "employee" in copyright

law is distinct from its usage in labor law, and is grounded in the common law of agency as interpreted in copyright-context case law (*Horror Inc. v. Miller*).

- **Intellectual Property:** The Federal Circuit held that the Patent & Trademark Office cannot institute an ex parte reexamination proceeding when “nearly identical” inter partes review petitions were previously denied for raising repetitious “abusive” arguments. Although the statute permits the denial of a reexamination petition when the question of patentability is “the same or substantially the same” as a prior petition, this provision does not apply when the earlier petition was dismissed without reaching the claim’s merits (*In Re: Vivint, Inc.*).
- **Labor & Employment:** Overruling prior precedent, the Second Circuit held that the United States could not collect back wages owed to an employee under federal laws governing the H1-B visa program through the Federal Debt Collection Procedures Act, because those wages were not an amount “owing to the United States” under the statute (*United States v. Bedi*).
- **Labor & Employment:** In a case applying Fair Labor Standards Act regulations to a dispute over the deduction of meal breaks from an employee’s overtime pay, the Eleventh Circuit held that once an employee shows that logged work hours are generally compensable, the employer bears the burden of showing that a carved-out meal period is bona fide, with the employee completely relieved of duties in that period (*Gelber v. Akal Security, Inc.*).
- **Medicaid:** In reviewing a state agency’s cancellation of plaintiff’s long-term Medicaid benefits because plaintiff’s resources exceeded the program’s eligibility cap, a Tenth Circuit panel concluded that the interpretation of an ambiguous regulation defining “resources” set forth in a Social Security Administration program manual was entitled to judicial deference (*Baker v. Brown*).
- **Medicaid and Medicare:** A 2019 revised rule of the Center of Medicare and Medicaid Services (CMS) regulates the use of arbitration agreements by long-term care facilities that participate in the Medicare and Medicaid programs. An Eighth Circuit panel held that the rule did not contravene Federal Arbitration Act requirements; was premised on a reasonable interpretation of the Medicare and Medicaid statutes; and was not arbitrary and capricious. While the rule’s accompanying certification under the Regulatory Flexibility Act did not comport with that Act’s procedural requirements, the court deemed this to be harmless error (*Northpoint Health Services of Arkansas, LLC v. U.S. Department of Health & Human Services*).
- **Terrorism:** The Eleventh Circuit dismissed a civil suit filed under the Anti-Terrorism Act arising from the 2016 Pulse night club shooting. The court ruled the shooting did not constitute “international terrorism” under the Act, as the domestic shooting was not accomplished by the traversing of national boundaries and, while a designated foreign terrorist organization claimed after-the-fact credit, the plaintiffs did not allege the group actually planned or carried out the attack (*Colon v. Twitter*).

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