

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Oct. 11–Oct. 17, 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

On October 12, the Supreme Court issued its second [Orders List](#) of the October 2021 term. The Court granted certiorari in several cases to vacate circuit court decisions and remand them for reconsideration in light of intervening Supreme Court decisions. The Court also granted certiorari and vacated a D.C. Circuit decision that held the House of Representatives had standing to challenge the Trump Administration’s invocation of statutory authorities to transfer or reprioritize appropriated funds for barrier construction along the U.S.-Mexico border, a practice the Biden Administration halted. The Supreme Court remanded the case with instructions for the circuit court to dismiss the case as moot (*Yellen v. House of Representatives*).

Decisions of the U.S. Courts of Appeals

- **Abortion:** A divided Fifth Circuit panel granted emergency motions to stay a district court’s preliminary injunction against the State of Texas in a suit brought by the United States, seeking to bar enforcement of a state law that generally bans physicians from performing an abortion once a fetal heartbeat is detected. (As noted in [last week’s](#)

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Congressional Court Watcher Sidebar, the Fifth Circuit already issued a temporary administrative stay of the injunction while it considered these motions.) The challenged law remains in effect during the appeal. The one-page order explains that the stay was granted “for reasons stated in *Whole Women’s Health v. Jackson*,” a separate pre-enforcement challenge in which the Fifth Circuit held that state officials and judges were not subject to suit in federal court to prevent enforcement of the law, which is enforced exclusively through private civil actions against abortion providers (*United States v. Texas*).

- **Bankruptcy:** Section 523(a)(1)(B) of the Bankruptcy Code provides that a relevant tax debt cannot be discharged from bankruptcy proceedings if the taxpayer failed to file a required “return, or equivalent report or notice.” The Ninth Circuit concluded that, where a state law requires a taxpayer to notify the state tax board when Internal Revenue Service changes the taxpayer’s federal income tax liability, that state notification is an “equivalent report” under Section 523(a)(1)(B) that must be filed for the tax debt to be discharged in bankruptcy proceedings (*In re Berkovich*).
- **Civil Forfeiture:** The Eleventh Circuit recognized that foreign nationals lack a constitutional right to enter the United States for purposes of attending a civil forfeiture trial involving their property. The case involved the forfeiture of funds accrued as part of an immigration visa scam by five Chinese nationals who were unable to enter the United States but had counsel representing them throughout the proceedings (*United States v. Approximately \$299,873.70 Seized from a Bank of America Account*).
- **Civil Rights:** The D.C. Circuit upheld the U.S. Capitol Police’s disciplinary actions against an employee for, among other things, leaking to the press a picture of an unattended Capitol Police firearm in the restroom of a restricted area of the Capitol Visitor Center. In addition to rejecting plaintiff’s sex discrimination and retaliation claims, the circuit court also affirmed the lower court’s judgment against plaintiff’s First Amendment retaliation claim. The panel concluded that plaintiff’s interest as a public employee in commenting on matters of public concern was outweighed by the Capitol Police’s interest in disciplining plaintiff for violating the department’s media policy, interfering with its regular operations, damaging trust among department employees, and impairing plaintiff’s ability to serve effectively as a supervisor (*Breiterman v. U.S. Capitol Police*).
- **Criminal Law & Procedure:** The Seventh Circuit held that the standard used to review a district court’s initial decision on whether to detain or release a pretrial criminal defendant under 18 U.S.C. § 3142 also applies to appellate review of a district court’s decision to revoke a defendant’s pretrial release under 18 U.S.C. § 3148 (*United States v. Wilks*).
- **Housing:** Federal statute and regulation provide the Department of Housing and Urban Development (HUD) with a range of enforcement options if a “Section 8” landlord fails to take remedial action after being notified by the agency of deficiencies in the housing conditions of low-income tenants for whom HUD provides rental assistance. A divided Fifth Circuit panel construed a long-standing agency regulation, 24 C.F.R. § 886.323(e), as providing, in the event these enforcement options are available, HUD is also unconditionally required to provide rehousing assistance to a Section 8 beneficiary who requests such assistance (*Hawkins v. HUD*).
- **Immigration:** An alien convicted of an offense defined as an “aggravated felony” under the Immigration and Nationality Act (INA) is subject to adverse immigration consequences. The INA’s definition lists specific offenses as well as several broad

categories of crimes, and includes some misdemeanors as well as actual felonies (i.e., crimes punishable by at least a year and a day of imprisonment). In an appendix to an opinion in which it concluded that petitioners' criminal offenses fell under the "aggravated felony" definition, a Second Circuit panel expressed concern with the "ambiguity" of the "aggravated felony" definition, which frequently requires courts to closely examine the elements of a federal, state, or foreign offense to determine whether it meets the definition. The panel recommended that Congress consider replacing the current definition with a bright-line definition that includes any offense for which the sentence imposed exceeds a specified length, with the appropriate sentence length to be determined by Congress (*Chery v. Garland*).

- **Intellectual Property:** In a civil action under 35 U.S.C. § 145 seeking a patent award after an adverse determination by the Patent & Trademark Office (PTO), "[a]ll the expenses of the proceeding shall be paid by the applicant." In a modified opinion, the Federal Circuit held that § 145 does not require an applicant to pay the PTO's expert witness fees because the statute lacks the specificity to overcome the judicial presumption against interpreting a statute to allow fee-shifting (*Hyatt v. Hirschfeld*).
- **Labor & Employment:** The Fair Labor Standards Act generally requires that employers pay non-exempt employees for overtime hours at one-and-a-half times the regular rate. However, Department of Labor regulations set forth a "fluctuating workweek method" for calculating overtime pay for an employee who is provided a fixed salary yet works irregular hours, so that the employer needs only to pay the employee's overtime hours at one half of the employee's regular rate of pay. The Eleventh Circuit joined another circuit in concluding that a company's bonus payment to an employee on top of his or her fixed salary does not preclude the employer from using the "fluctuating workweek method" to calculate overtime pay (*Hernandez v. Plastipak Packaging, Inc.*).
- **Religion:** The Freedom of Access to Clinic Entrances Act (FCEA) bars persons from intentionally injuring, intimidating, or interfering with another's religious exercise at a "place of religious worship." The Second Circuit construed "place of religious worship" to cover places that religious adherents collectively recognize, or religious leadership designate as, locations primarily used to gather for or hold religious worship activities—regardless of whether those locations are fixed or movable, enduring or temporary, structured or unenclosed. Because the court concluded that FCEA did not cover a street table used by plaintiffs, as the table was not primarily used for religious worship, a panel majority declined to consider whether FCEA was a constitutional exercise of Congress's Commerce Clause power (a concurring panelist believed the court should have reached the issue and ruled the FCEA unconstitutional) (*Zhang Jingrong v. Chinese Anti-Cult World Alliance, Inc.*).

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