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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Oct. 18–Oct. 24, 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 the orders and decisions of the Supreme Court and precedential decisions of 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 authors 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 22, 2021, the Supreme Court granted certiorari in two cases from the Fifth Circuit involving a challenge to a Texas law that generally bans physicians from performing an abortion once a fetal heartbeat is detected. The challenged statute, known as the Texas Heartbeat Act or S.B. 8, is enforced exclusively through private civil actions against those who perform or aid or abet abortions in violation of the statute, or who intend to engage in such activity. The Supreme Court took the unusual step of granting certiorari in both cases *before* the circuit court rendered judgment in them. One challenge is brought by private plaintiffs in a case where the Supreme Court had earlier denied an application to enjoin S.B. 8 from going into effect (*Whole Women's Health v. Jackson*). The other challenge is brought by the United States, which effectively asked the Court to prohibit Texas from enforcing S.B. 8, while federal courts consider challenges to the law, by vacating a Fifth Circuit stay on a distinct court's preliminary injunction. The United States also asked the Supreme Court to treat its application to vacate the circuit court's stay as a petition for certiorari, and the Supreme Court did so (*United States v. Texas*). Key issues in the litigation include whether S.B. 8 deprives persons of their constitutional right to an abortion, whether S.B. 8 is

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preempted by federal law and violates the intergovernmental immunity doctrine, and whether the federal courts can grant the plaintiffs' requested relief. The Court's grants of certiorari are focused only on the procedural questions raised by the two cases—i.e., who has the legal ability to challenge the Texas law. The Court set both cases for oral argument on November 1, 2021, meanwhile leaving the Texas law in effect.

On October 18, the Supreme Court granted certiorari and decided two cases in *per curiam* opinions without briefing or argument on the merits. Both involved excessive force claims against police officers under 42 U.S.C. § 1983. In one, the officer allegedly placed his knee on the plaintiff's back while the plaintiff was lying face-down on the ground (*Rivas-Villegas v. Cortesluna*). In the other, officers were alleged to have recklessly created a situation that required the use of deadly force by cornering a suspect in a garage (*City of Tahlequah v. Bond*). The Court held in both cases that the officers were entitled to qualified immunity because no controlling precedent had clearly established their specific alleged conduct as a violation of the Constitution.

The Court also granted certiorari in two cases related to Indian tribes. In one case, the Court is asked to consider whether a tribe barred by federal law from conducting gaming activities "prohibited by" Texas law is thereby subject to the entire body of Texas gaming regulations, or is only barred from engaging in gaming activities prohibited, rather than regulated, by Texas (*Ysleta del Sur Pueblo v. Texas*). Another case presents the issue of whether the Fifth Amendment's Double Jeopardy Clause prohibits a defendant who was convicted in a Court of Indian Offenses from being prosecuted in federal district court for conduct arising from the same incident (*Denezpi v. United States*).

Decisions of the U.S. Courts of Appeals

- **Bankruptcy:** Under 11 U.S.C. § 554(c), property that has not otherwise been administered by a bankruptcy trustee generally is "abandoned" and returned to the debtor only if it has been "scheduled." In the first published court of appeals decision to consider the question, the Ninth Circuit held that property must be disclosed on a literal bankruptcy "schedule" (and not some other document included in a bankruptcy filing) for this provision to apply (*In re Stevens*).
- **Civil Rights:** A Ninth Circuit panel withdrew an earlier opinion suggesting that evidence of "unconscious bias" against a protected class might be probative of whether an entity engaged in intentional discrimination giving rise to a claim under Title VI of the Civil Rights Act of 1964. The superseding opinion likewise affirmed the district court's judgment for the defendant, but expressly declined to address whether evidence of implicit bias may be probative in a Title VI case. A concurring opinion argued that evidence of implicit bias would rarely, if ever, be admissible (*Yu v. Idaho State University*).
- **Civil Rights:** The Tenth Circuit affirmed a district court's dismissal of various claims related to the death of a prisoner with disabilities, including claims under the Americans with Disabilities Act (ADA). The Tenth Circuit joined other circuits in recognizing that a viable ADA claim requires that a plaintiff's disability be a "but-for" cause of the alleged discriminatory action, but that disability need not be the "sole cause" of the discrimination—a more stringent standard employed by the Rehabilitation Act for disability claims against federal entities and contractors (*Crane v Utah Department of Corrections*).
- **Criminal Law & Procedure:** The Ninth Circuit overturned a defendant's conviction for making a false entry in bank records under 18 U.S.C. § 1005 that was premised on the defendant's purchase and return of cashier's checks in furtherance of a money laundering

scheme. Joining other circuits, the court held that an accurately entered bank transaction is not rendered a false entry under § 1005 solely because of its nexus to unlawful activity (*United States v. Tat*).

- **Election Law:** The Eleventh Circuit rejected the plaintiffs' constitutional challenges to a Florida law that restored felons' voting rights only if they satisfied all "legal financial obligations." The court held that the plaintiffs failed to show a discriminatory intent necessary to bring their constitutional challenge under the Fourteenth Amendment's Equal Protection Clause or the Nineteenth Amendment, regardless of any disparate impact the law had upon minority women such as plaintiffs (*Jones v. Latimer*).
- **Immigration:** The Fourth Circuit held that immigration judges and the Board of Immigration Appeals (BIA) have inherent authority to terminate removal proceedings, abrogating a 2018 Attorney General opinion binding upon those judges that held otherwise. The court remanded the petitioner's case for the BIA to consider whether restoration of the petitioner's status under the Deferred Action for Childhood Arrivals program warranted termination of removal proceedings against him and to reconsider other procedural matters (*Gonzalez v. Garland*).
- **Immigration:** In April 2020, a federal district court provisionally certified two nationwide classes of detainees in Immigration and Customs Enforcement (ICE) custody at heightened risk of severe illness or death from Coronavirus Disease 2019 (COVID-19). The court issued a preliminary injunction, applicable to all U.S. immigration detention facilities, requiring various monitoring and safety protocols and effectively compelling the release of many ICE detainees falling within the provisionally certified classes. A divided Ninth Circuit panel set aside the preliminary injunction, concluding that the plaintiffs had not made a sufficiently clear showing of entitlement to relief to support the injunction's substantial and far-reaching intrusion into detention matters. The majority concluded that the plaintiffs were unlikely to succeed in their claims that ICE showed deliberate indifference to class members' medical needs; that ICE's treatment of class members was unconstitutional "punishment"; or that ICE's treatment violated the Rehabilitation Act. Because the lower court's class certification order depended on and was in service of the preliminary injunction, the panel majority held that the certification also fell (*Fraihat v. ICE)*.
- **Procurement:** The Washington Metropolitan Area Transit Authority (WMATA) was formed by way of a congressionally approved interstate compact between Maryland, Virginia, and the District of Columbia. In affirming the lower court's dismissal of a plaintiff's contract protest against WMATA, the D.C. Circuit held that by way of WMATA's creation under the Constitution's Interstate Compact Clause, WMATA is vested with the sovereign immunities of the compact signatories, including the state sovereign immunities of Maryland and Virginia. The court held that the compact waived immunity in limited, expressly delineated situations that did not cover the plaintiff's procurement-related challenge. The court also held the Administrative Procedure Act did not waive WMATA's sovereign immunity because interstate compact entities are not federal agencies under the Act (*Schindler Elevator Corp. v. WMATA*).
- **Public Health:** The First Circuit upheld the lower court's denial of a motion to preliminarily enjoin implementation of Maine's emergency rule that health care workers be vaccinated against COVID-19, a requirement subject to limited exemptions for medical but not religious reasons. The circuit court held that plaintiffs were unlikely to succeed in their claim that the vaccination requirement violates the First Amendment's Free Exercise Clause because the requirement is facially neutral, generally applicable,

- and necessary to advance a compelling state interest. The court also held that plaintiffs were unlikely to succeed in their challenges under the Fourteenth Amendment's Equal Protection Clause or federal statutes, or in their argument that the rule was preempted by federal law (*Does v. Mills*). (The same day the circuit court ruling was issued, Justice Stephen Breyer, on behalf of the Supreme Court, denied petitioners' application for injunctive relief.)
- **Public Health:** Earlier in 2021, a Texas district court held that the Centers for Disease Control and Prevention (CDC) lacked the constitutional authority to impose an eviction moratorium. The Fifth Circuit held that the Texas case had become moot with the expiration of the CDC's order, but it expressly declined to vacate the district court's opinion deciding the constitutional issue (*Terkel v. CDC*).
- **Public Health:** In February 2020, the Secretary of Health and Human Services declared COVID-19 to be a public health emergency warranting liability protections under the Public Readiness and Emergency Preparedness Act (PREP Act) for covered medical countermeasures. The Third Circuit held that neither the PREP Act's complete preemption of state liability claims based on death or serious physical injury caused by "willful misconduct" of a covered person, nor the Act's establishment of a compensation fund for those who died or were seriously injured by covered medical countermeasures, created federal subject-matter jurisdiction over state law negligence claims against defendant nursing homes for their handling of the COVID-19 pandemic (*Estate of Joseph Maglioli v. Alliance HC Holdings, LLC*).

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