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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Nov. 1–Nov. 7, 2021)

November 8, 2021

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 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 four cases (two that are consolidated) to the term's docket:

- **Criminal Law & Procedure:** Federal drug laws make it a crime to distribute controlled substances, but regulations exempt prescriptions for controlled substances when done "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." The Supreme Court granted certiorari in two cases from the Tenth and Eleventh Circuits involving physicians convicted for issuing prescriptions for opioids. A key issue is whether a defense exists for a physician who honestly, but mistakenly, believed the issued prescriptions were done in the usual course of professional medical practice and, if so, whether the defendants' belief must be objectively reasonable (*Kahn v. United States*; *Ruan v. United States*).
- **Health:** The Supreme Court agreed to review a case from the Sixth Circuit on whether a health plan unlawfully discriminates against persons with end-stage renal disease, in

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violation of assorted provisions of the Medicare Secondary Payer Act and the Employee Retirement Income Security Act, by uniformly reimbursing kidney dialysis for plan participants (a service used disproportionately, but not exclusively, by persons with end-stage renal disease) at notably lower rates than many other medical treatments (*Marietta Memorial Hospital Employee Health Benefit Plan v. Davita Inc.*).

- **Torts:** The Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* recognized an implied cause of action for persons seeking money damages against a federal agent for a constitutional violation, even in the absence of an authorizing statute. In the years following, courts have recognized viable *Bivens* claims in a very narrow set of circumstances. Granting certiorari in a case from the Ninth Circuit, the Court has been asked whether a *Bivens* claim may be raised for Fourth Amendment violations by agents engaged in immigration enforcement functions, and whether *Bivens* allows for First Amendment retaliation claims. The Court declined petitioner's invitation to reconsider *Bivens* itself (*Egbert v. Boule*).

Decisions of the U.S. Courts of Appeals

- **Arbitration:** The Federal Arbitration Act (FAA) permits parties to contractually agree to submit future disputes to arbitration and, in so doing, forfeit their rights to bring suit over matters covered by the arbitration agreement. Section 1 of the FAA, 9 U.S.C. § 1, provides that the Act does not apply to contracts of seamen, railroad employees, and transportation workers who are "engaged in foreign or interstate commerce." The First Circuit concluded that Massachusetts-based Lyft drivers did not fall under FAA § 1's exception, and were therefore subject to arbitration with the rideshare company on account of an agreement signed with Lyft. The court reasoned that the exception for transportation workers in § 1 should be construed to cover persons whose work is of a similar nature as other enumerated categories (i.e., railroad workers and seamen); that is, those whose work is primarily devoted to movement across state boundaries. The plaintiffs' occasional transport of passengers across state lines, or to or from an international airport, was therefore insufficient to fall under § 1 (*Cunningham v. Lyft, Inc.*).
- **Bankruptcy:** Under 11 U.S.C. § 363(m), a reviewing court may not undo a completed sale of a bankruptcy estate's property to a good-faith purchaser when that sale was authorized by a bankruptcy court, unless the sale and authorization "were stayed pending appeal." In concluding that the debtors' claims were rendered statutorily moot, an Eleventh Circuit panel majority held that § 363(m) precluded appeals of any sales authorized by the bankruptcy court, regardless of whether those sales were properly authorized under the Bankruptcy Code. The full panel did, however, conclude that it retained jurisdiction to assess whether a purchase was made in good faith. While the Code does not define a "good faith" purchase under § 363(m), the panel described it as a purchase free from fraud and misconduct, for value, and without knowledge of any adverse claim (*Reynolds v. ServisFirst Bank*).
- **Business:** Section 13(b) of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 53(b), authorizes the Federal Trade Commission (FTC) to seek a temporary restraining order or preliminary injunction (as well as a permanent injunction in some circumstances) against those who the agency believes are violating or about to violate any provision of law that the FTC enforces. Earlier this year, the Supreme Court ruled in *AMG Capital Management, LLC v. FTC* that § 53(b) does not permit the FTC to seek equitable monetary relief. The Eleventh Circuit recognized that this decision overruled prior circuit

precedent, and vacated portions of a district court preliminary injunction inconsistent with that decision. Separately, the circuit court concluded that the appellants could be found responsible under the FTCA for each other's actions under the common enterprise doctrine, and identified several factors for use in determining whether a common enterprise exists, such as whether the entities operated under common control, shared office space and personnel, commingled funds, and coordinated advertising (*FTC v. On Point Capital Partners LLC*).

- **Criminal Law & Procedure:** A "federal crime of terrorism" is defined by 18 U.S.C. § 2332b(g)(5) to include several enumerated offenses, when "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." A conviction that meets this definition is subject to enhanced penalties. In reviewing a defendant's sentencing enhancement, the Eleventh Circuit, among other things, joined other circuits in construing the term "calculated" in the "federal crime of terrorism" definition to impose an intent requirement on the commission of offenses listed in the definition. The court distinguished this requirement from a showing of motive, holding that the government was required to show the defendant's offense was planned to influence, affect, or retaliate against government conduct, regardless of what the personal motives behind the defendant's plans might have been (*United States v. Arcila Ramirez*).
- **Government Processes:** U.S. Customs and Border Protection may issue an administrative summons in investigations under 19 U.S.C. § 1509 for the production of records or the giving of testimony related to those records. The Ninth Circuit held that § 1509's command that the government give "reasonable notice" when issuing a summons for testimony means that the summoned person be given adequate time to arrange to attend the interview. It does not require that the recipient be given reasonable particularity about the questions the agency intends to ask (*United States v. Tan*).
- **Immigration:** Aliens convicted of crimes involving moral turpitude (CIMT) may face various immigration consequences, including removal from the United States. There is no statutory definition of CIMT. CIMT has been interpreted in administrative and judicial caselaw to cover crimes that involve reprehensible conduct and a culpable mental state. Denying a petition from an alien found removable on account of CIMT convictions, the Fourth Circuit held that the CIMT definition was not unconstitutionally vague. The court cited binding Supreme Court precedent that recognized that the ordinary understanding of CIMT provided persons with sufficient notice of covered conduct, and the circuit court rejected petitioner's argument that intervening Supreme Court decisions cast doubt on that decision. The circuit court also concluded that provisions of immigration law addressing CIMT did not run afoul of the nondelegation doctrine, as the meaning of "moral turpitude" was at least as clear as other delegations of authority permissibly made by Congress to the Executive and provided a sufficiently clear intelligible principle to circumscribe executive discretion (*Granados v. Garland*).
- **Immigration:** A person sponsored by U.S. family members to immigrate to the United States is treated as presumptively likely to become a "public charge." Sponsors can overcome this ground of inadmissibility by executing an affidavit of support, pledging to support the immigrant at an annual income of not less than 125% of the federal poverty line. The Eleventh Circuit joined at least two other circuits in recognizing that the governing statute, regulations, and affidavit set forth the exclusive grounds for which a sponsor may terminate support. Here, the court held that the sponsors could not rely on equitable defenses to excuse their obligation to support a family member criminally

charged with domestic abuse and other crimes; such support was required until the alien was convicted and thereafter removed from the United States (*Belevich v. Thomas*).

- **Immigration:** Nonpermanent resident aliens subject to removal from the United States may be eligible for cancellation of removal if they have been continuously present in the country for at least 10 years. In 2018, the Supreme Court held in *Pereira v. Sessions* that a defective notice to appear at removal proceedings does not trigger the "stop-time" rule of 8 U.S.C. § 1229b(b)(1)(A), which provides that the accrual of a period of continuous presence ends once an alien is served a notice to appear or commits specified crimes. The Ninth Circuit held that although petitioner received a final order of removal, the stop-time rule was not triggered because his notice to appear was defective, meaning that he remained eligible for cancellation of removal (*Cantor v. Garland*).
- **Immigration:** The Immigration and Nationality Act (INA) authorizes the issuance of "L-1 visas" that enable multinational companies to transfer noncitizens employed abroad in a "managerial capacity" or "executive capacity" to the company's U.S. office. Implementing regulations establish requirements for L-1 visa petitions for new U.S. offices. The Eleventh Circuit upheld the denial of a new-office L-1 visa petition by U.S. Citizen and Immigration Services (USCIS). The court held that USCIS correctly interpreted the INA to require that an employee working in an "executive capacity" exercise control over a subordinate level of managerial staff, and the agency did not act arbitrarily and capriciously when it determined that the employee's duties did not satisfy this criterion (*VHV Jewelers, LLC v. Wolf*).
- **Indian Law:** A divided Ninth Circuit panel held that tribal sovereign immunity did not apply in a federal lawsuit brought by a company against tribal officials (including a tribal judge who initially presided over a tribal court case between the company and a tribe), because the company sought money damages from the defendants in their personal, rather than official, capacities on account of their allegedly tortious conduct. Because the defendants were being sued in their personal capacities, the panel majority concluded it made no difference for tribal sovereign immunity purposes that some of the alleged tortious conduct occurred in a tribal court proceeding. Still, the court observed that the defendants might avail themselves of personal immunity defenses, and the tribal judge enjoyed absolute judicial immunity (*Acres Bonusing, Inc. v. Martson*).
- **Labor & Employment:** A Federal Railroad Safety Act provision, 49 U.S.C. § 20109(b)(1)(A), bars railroads from taking retaliatory action against employees for "reporting, in good faith, a hazardous safety or security condition." The Third Circuit held that a report covered by this provision need not be objectively reasonable, but only be made honestly without an intent to defraud (*Monohon v. BNSF Railway Co.*).
- **Labor & Employment:** On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published an emergency temporary standard (ETS) that directs employers with 100 or more workers to adopt a Coronavirus Disease 2019 (COVID-19) vaccination policy. The policy generally requires employees to either be vaccinated or, in the alternative, undergo regular weekly COVID-19 testing and wear masks at work. Immediately following the rule's publication, suits were filed in multiple circuit courts of appeals by several states, covered employers, and other entities challenging the ETS. (Under 29 U.S.C. § 655, pre-enforcement challenges to an ETS are filed with the circuit's court of appeals, rather than in district court.) A Fifth Circuit panel granted petitioners' emergency motion to stay enforcement of the ETS pending consideration of petitioners' motion for a permanent injunction. The United States is instructed to respond to the permanent injunction motion by 5:00 p.m. on Monday, November 8 (*BST Holdings, LLC*

v. OSHA). Under 28 U.S.C. § 2112, the challenges brought in the Fifth Circuit and other circuit courts will be consolidated before a single court of appeals, chosen through a random selection process by the U.S. Judicial Panel on Multidistrict Litigation among those circuits from which a petition for review has been filed. The selected court would, in turn, have the power to modify, revoke, or extend any stay issued by the Fifth Circuit or other circuit court that had considered a challenge to the ETS.

- **Privacy:** Federal law, 42 U.S.C. § 290dd-2, provides for the confidentiality of records of persons receiving substance abuse treatment, subject to limited exceptions, and those records may not be used to investigate or prosecute a patient except as authorized by court order. Joining at least two other circuits, the Second Circuit held that § 290dd-2 does not confer patients with a personal right to confidentiality that is enforceable under 42 U.S.C. § 1983, which generally allows suits against state officials for deprivations of rights secured by the Constitution or federal statute (*Schlosser v. Kwak*).
- **Public Benefits:** Social Security Administration (SSA) regulations set forth a multifaceted process for considering a claim for Social Security benefits on the basis of disability. To determine a claimant's eligibility, SSA regulations provide for the use of grids to help assess a claimant's ability to find work, comparing the claimant to persons who share similar characteristics relevant to employability. The regulations instruct that the age-based grid not be applied mechanically in a "borderline" situation where a claimant is a few weeks or months away from the older-age tier. The Eleventh Circuit recognized that the regulation bars SSA from relying solely on the age-based grids in making a disability determination in a borderline situation *(Pupo v. Commissioner, SSA*).
- **Public Health:** The First Circuit considered two challenges to New York's emergency rule that certain health care workers be vaccinated against Coronavirus Disease 2019 (COVID-19), a requirement subject to limited exemptions for medical but not religious reasons. The circuit panel issued a per curiam opinion holding that, based on the present record, plaintiffs were unlikely to succeed on 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 claim that the emergency rule was preempted by Title VII of the Civil Rights Act, or in their arguments that the rule infringed on privacy, medical freedom, and bodily autonomy rights under the Fourteenth Amendment. The circuit court affirmed one district court's denial of a preliminary injunction to the rule and vacated another lower court's preliminary injunction in the related challenge (*We The Patriots USA, Inc. v. Hochul; Dr. A v. Hochul*).

- **Religion:** The Religious Land Use and Institutionalized Persons Act (RLUIPA), among other things, bars state and local governments from imposing or implementing a land use regulation (defined as a "zoning or landmarking law" or application of such law that limits the use or development of land) in a way that substantially burdens religious exercise, unless the government can demonstrate that the regulation furthers a compelling government interest and is the least restrictive means of furthering that interest. The Fourth Circuit upheld a district court's judgment in favor of a religious congregation's RLUIPA claim against a Maryland county that denied the congregation's application for a legislative amendment to the county's water and sewer plan. The denial prevented the congregation from building a church at a desired location. The court concluded that federal, not state law controlled the assessment of whether the application denial was a land use regulation under RLUIPA. Considering various factors, including RLUIPA's direction that its provisions be construed in broad favor of religious exercise, the court held that the application denial was covered by RLUIPA. The court further held that based on the evidentiary record, the lower court did not abuse its discretion in concluding that the county's application denial violated RLUIPA (*Redeemed Christian Church v. Prince George's County, Maryland*).

Author Information

Michael John Garcia
Section Research Manager

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