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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Nov. 29–Dec. 5, 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

No Supreme Court opinions were issued last week, and no new cases were added to the Court's docket.

Decisions of the U.S. Courts of Appeals

Topic headings marked with an asterisk (*) indicate cases where the appellate court's controlling opinion recognizes a split among the federal appellate courts on a key legal issue resolved in the opinion.

- **Arbitration:** Section 3 of the Federal Arbitration Act (FAA) provides that a federal court "shall" stay a legal action upon request when the court determines the claims at issue may be arbitrated. The Sixth Circuit reversed a district court's dismissal of plaintiff's claims, instead granting a stay where the record indicated that Section 3 applied. Observing divergent views by appellate courts on whether district courts retain discretion to dismiss a case covered by Section 3, the Sixth Circuit held the Section's use of "shall" generally

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conveyed a mandatory obligation to issue a stay upon request. Still, the court declined to announce an absolute rule, leaving it to a future case to decide whether a court retains discretion to dismiss a case covered by Section 3 (*Arabian Motors Group W.L.L. v. Ford Motor Co.*).

- ***Civil Rights:** Title VII of the Civil Rights Act of 1964 protects from retaliation employees who oppose the discriminatory employment practices it outlaws. Caselaw recognizes that an employee must base a retaliation claim on an objectively reasonable belief that the worker is opposing unlawful conduct. However, the circuits differ in how they assess whether a belief is objectively reasonable. The Tenth Circuit held that this inquiry must consider what a reasonable employee would believe, and not what a reasonable expert in employment law would believe (*Reznik v. inContact, Inc.*).
- **Communications:** The Hobbs Act (also called the Administrative Orders Review Act) channels certain legal actions, including pre-enforcement facial challenges to certain Federal Communications Commission (FCC) orders, to a single circuit court. In a Hobbs Act proceeding in 2017, the D.C. Circuit invalidated an FCC rule on solicited fax advertisements, and the FCC thereafter repealed the rule on the belief that the D.C. Circuit's ruling had binding, nationwide effect. A divided Second Circuit panel dismissed a suit urging the court to direct the FCC to reinstate the rule, holding that under the Hobbs Act's channeling mechanism, the D.C. Circuit's ruling had binding effect on any circuit where the FCC rule's validity was challenged (*Gorss Motels, Inc. v. FCC*).
- ***Financial Regulation:** A decision by the Fifth Circuit identified a circuit split in the interpretation of the Bank Secrecy Act (BSA), which requires reporting of certain financial interests in foreign bank accounts and establishes penalties for each violation. The Ninth Circuit previously held that the failure to file the requisite form was a single violation, regardless of how many accounts might have been reported on that form. The Fifth Circuit disagreed, holding that the defendant committed a separate violation of the BSA for each undisclosed account (*United States v. Bittner*).
- **Firearms:** In 2018, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) published a rule providing that bump-stock type devices—which enable a shooter of a semiautomatic firearm to start a continuous firing cycle with a single pull of the trigger—fall under the federal statutory prohibition on machineguns. In 2019, a district court in the Sixth Circuit declined to issue a preliminary injunction halting implementation of the bump-stock ban while it considered a legal challenge to the rule, concluding the rule was based on a reasonable interpretation of the governing statute. A three-judge Sixth Circuit panel disagreed, but the panel's decision was vacated when the circuit decided to rehear the case en banc earlier this year. The en banc court evenly divided on whether to affirm or reverse the lower court, with the tie resulting in the district court's judgment being affirmed (*Gun Owners of America, Inc. v. Garland*).
- **Firearms:** A divided Ninth Circuit, sitting en banc, rejected a Second Amendment challenge to California's criminal prohibition on the possession of large-capacity magazines. Applying a two-step framework that has been widely adopted by the courts of appeals in Second Amendment cases, the majority held that the statute was a reasonable fit for the important government interest of reducing gun violence, as it targets large-capacity magazines that are used in mass shootings, while interfering only minimally with the core right of self-defense (*Duncan v. Bonta*).
- **Freedom of Information Act (FOIA):** Documents related to the formulation of government policy are exempt from FOIA's general disclosure requirements under the "deliberative process privilege." A divided Second Circuit panel held that the deliberative

process privilege extends to internal "messaging records" created by the Environmental Protection Agency when deciding how to communicate a final agency policy to outside entities, to the extent those records involved the exercise of a policy-oriented judgment. The panel also ruled that an agency may invoke the privilege by connecting a record either to a discrete agency decision or, more broadly, to a specific decisionmaking process (*Natural Resources Defense Council v. EPA*).

- **FOIA:** The D.C. Circuit ordered the Department of Justice (DOJ) to disclose certain passages of the report prepared by Special Counsel Robert S. Mueller III on Russian interference in the 2016 presidential election, partially reversing a district court's decision protecting those passages. DOJ released a redacted version of the report, claiming some information in the report was exempt from disclosure under FOIA because it implicated "personal privacy." The D.C. Circuit agreed with some of those redactions but ordered DOJ to disclose certain passages that showed how the Special Counsel interpreted relevant law and applied it to facts that were already public (*Electronic Privacy Information Center v. U.S. Department of Justice*).
- **Immigration:** An alien convicted of an offense defined as an "aggravated felony" under the Immigration and Nationality Act (INA), including an offense "relating to the obstruction of justice" for which the term of imprisonment is at least one year, is subject to adverse immigration consequences. A divided Fourth Circuit affirmed the Board of Immigration Appeals' finding that the petitioner's accessory-after-the-fact conviction under Virginia law was an obstruction of justice offense that rendered him removable. The majority based this decision, in part, upon its conclusion that the phrase "relating to obstruction of justice" was ambiguous, and that the Board's interpretation of the phrase was entitled to deference under the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* (*Pugin v. Garland*).
- **Immigration:** The en banc Fifth Circuit vacated an earlier three-judge panel decision that largely allowed Department of Homeland Security (DHS) January 2021 interim immigration enforcement guidance to go into effect. Texas and Louisiana claimed the interim policy impermissibly exempts a vast portion of the removable population from immigration enforcement efforts. The district court preliminarily enjoined the enforcement guidance, but a three-judge Fifth Circuit panel issued a partial stay of that injunction. The full court, however, vacated that opinion, allowing the district court's injunction to remain in place while the court of appeals considers the case. The injunction does not address the superseding enforcement guidance issued by DHS that went into effect in November 2021, but Texas and Louisiana recently amended their complaint to challenge the lawfulness of the superseding guidance as well (*Texas v. United States*).
- **Immigration:** In limited cases, an alien charged under 8 U.S.C. § 1326 with illegally reentering the United States after having been removed from the country may challenge the underlying removal order. The Ninth Circuit held that a criminal defendant charged with illegal reentry could not raise such a challenge, premised on the denial of his asylum claim during expedited removal proceedings, when he failed to appeal the denial of his asylum claim administratively (*United States v. De La Mora-Cobian*).
- ***Immigration:** Under 8 U.S.C. § 1231(a)(5), if an alien is ordered removed from the United States and subsequently reenters the country unlawfully, the removal order is reinstated and "is not subject to being reopened or reviewed." The Tenth Circuit held that the Board of Immigration Appeals properly relied on § 1231(a)(5) to dismiss an alien's challenge to his reinstated removal order. Adding to a circuit split, the court held that there is no implicit exception to § 1231(a)(5) that allows for collateral attacks to the

removal order when it is alleged to have resulted from a gross miscarriage of justice (*Tarango-Delgado v. Garland*).

- **Labor & Employment:** In a Fourth Circuit case, employees of a construction subcontractor alleged that both the subcontractor and contractor failed to give notice of a plant closure under the Worker Readjustment and Retraining Notification Act (WARN) before laying them off. Applying the framework used by the Department of Labor to determine when an independent contractor should be considered part of the contracting company for WARN Act purposes, the Fourth Circuit affirmed a judgment in favor of the defendants, holding that the contractor was not the relevant "employer" under the Act, and that the subcontractor could not reasonably have known about the closure (*Pennington v. Fluor Corp.*).
- **Maritime Law:** The Limitation of Liability Act of 1851 provides certain vessel owners with a means of limiting their vessel's tort liability if they bring a civil action for liability limitation within six months of receiving notice of the tort claim. The Fifth Circuit overruled prior circuit precedent in light of intervening Supreme Court decisions, and held that the six-month window for seeking a limitation on liability under the Act was nonjurisdictional in nature, meaning it is subject to equitable tolling (*Bonvillian Marine Service, Inc. v. Pellegrin*).
- **Public Health:** The Fifth Circuit allowed a Texas ban on mask mandates to go back into effect. The governor of Texas prohibited any state or local agency in Texas, including school districts, from requiring any person to wear a mask or face covering. A district court enjoined that ban in a suit brought by parents of disabled children in Texas public schools. The Fifth Circuit stayed the injunction on several grounds, holding that the plaintiffs may not have standing to sue in federal court; that the Americans with Disabilities Act and other federal statutes would likely not provide a remedy or preempt Texas's prohibition on local mask mandates; and that Texas would be irreparably harmed if it could not enforce its general ban on mask mandates. A full appeal of the district court's injunction will proceed, but as a result of this ruling, the ban will remain in place while the Fifth Circuit considers that appeal (*E.T. v. Paxton*).
- **Public Health:** A divided Ninth Circuit panel declined to enjoin a school's Coronavirus Disease 2019 (COVID-19) vaccine mandate while the panel considers a constitutional challenge to it. The mandate requires COVID-19 vaccination as a condition for in-person attendance and participation in extracurricular activities. It includes a medical exemption and a 30-day exemption for certain new enrollees to the school, but does not contain a religious exemption. (The mandate also initially included a "per se" exemption for pregnant students, but after the Ninth Circuit issued an injunction pending appeal on the basis of that exemption, the exemption was removed and the injunction terminated.) A panel majority held that plaintiffs (a student and her parents opposed to the vaccine on religious grounds) were unlikely to succeed in their claim that the vaccine mandate violates the First Amendment's Free Exercise Clause, both facially and as applied to the student, because the requirement is facially neutral, generally applicable, and necessary to advance a compelling state interest. The majority also ruled that the plaintiffs failed to carry their burden of showing irreparable harm if an injunction was not issued, or that the public interest weighed in favor of enjoining the mandate (*Doe v. San Diego Unified School District*).

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