

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Dec. 6–Dec. 12, 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

Last week, the Supreme Court issued rulings in two consolidated cases where it heard oral arguments:

- **Abortion:** The Court issued decisions barring certain federal court challenges to the Texas Heartbeat Act (also known as S.B. 8) and allowing others to proceed while the statute remains in effect. The Texas law generally bans abortion once a fetal heartbeat is detected, and is enforced exclusively through private civil actions against those who perform or aid or abet prohibited abortions. The United States and a group of abortion providers and advocates brought challenges to the constitutionality of S.B. 8. After the Fifth Circuit allowed the law to take effect, the plaintiffs sought review by the Supreme Court. The Court granted certiorari to address only the procedural question of whether the plaintiffs could challenge S.B. 8 in federal court before it is enforced, rather than the merits of the plaintiffs’ constitutional claims. In the case brought by the private plaintiffs, the Court ruled 8-1 that the suit could proceed against state medical board officials who

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had the power to rescind abortion providers' medical licenses. A majority of the Court concluded that the plaintiffs could not sue the Texas attorney general, who lacked authority to enforce S.B. 8; state court judges and clerks, who enjoyed sovereign immunity; or a private individual who disclaimed any intention of suing under the statute. Still, the Court observed that its ruling did not preclude plaintiffs from challenging S.B. 8 in state court or raising constitutional defenses if sued under the law (*Whole Women's Health v. Jackson*). Over a lone dissent, the Court dismissed the writ of certiorari in the case brought by the federal government as improvidently granted, without ruling on whether the United States could bring suit (*United States v. Texas*).

The Court also added four cases (two that are consolidated) to the term's docket:

- **Arbitration:** The Federal Arbitration Act (FAA) permits parties to contract for arbitration of disputes and, in so doing, forfeit their rights to bring suit over matters covered by the arbitration agreement. The FAA does not apply to contracts of seamen, railroad employees, and transportation workers “engaged in foreign or interstate commerce.” Granting certiorari in a case from the Seventh Circuit, the Supreme Court is asked to consider whether exempted transportation workers include airline employees who load and unload cargo from vehicles that travel in foreign or interstate commerce, but who do not travel in interstate or foreign commerce themselves (*Southwest Airlines Co. v. Saxon*).
- **Arbitration:** Under 28 U.S.C. § 1782(a), a federal district court may compel a person within the district to give testimony or other evidence “for use in a proceeding in a foreign or international tribunal.” The Supreme Court granted certiorari in two cases to consider whether § 1782(a) proceedings before a “foreign or international tribunal” may include private commercial arbitration, a question on which lower courts have split (*AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States*; *ZF Automotive US, Inc. v. Luxshare, Ltd.*).
- **International Law:** The Hague Convention on the Civil Aspects of International Child Abduction, as implemented by 22 U.S.C. § 9001, requires U.S. courts to provide for the prompt return of a child wrongfully removed from his or her home country unless an exception applies, including when there is “grave risk” that repatriation “would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” The Supreme Court granted certiorari in a case from the Second Circuit, where it may consider whether a court’s finding a grave risk exists requires the court to then consider whether ameliorative measures would still enable the children’s return (*Golan v. Saada*).

## Decisions of the U.S. Courts of Appeals

- **Civil Service:** The Tucker Act waives the United States’ sovereign immunity against certain claims, including those based on money-mandating statutes or regulations. The Federal Circuit affirmed the dismissal of plaintiffs’ Tucker Act claim, where plaintiffs sought a yearly relocation incentive bonus from their government employer in addition to the one-time relocation bonus already received. The court held that the statute under which the relocation bonus was issued, 5 U.S.C. § 5753(b), along with implementing agency regulations, employed discretionary language that made clear they were not money-mandating (*Bell v. United States*).
- **Election Law:** A divided Ninth Circuit panel upheld an Arizona law that requires mail-in voters to sign an affidavit printed on the return envelope or to submit a corrected mail-in ballot by election day. Reversing the district court, the Ninth Circuit held that this

requirement did not violate the First and Fourteenth Amendments or deny voters' procedural due process (*Arizona Democratic Party v. Hobbs*).

- **Environmental Law:** The Third Circuit affirmed a criminal defendant's convictions for falsifying a ship's log to conceal the release of pollutants by defendant's vessel. Among other things, the court joined two other circuits in concluding that a regulation requiring tank vessels to "maintain an Oil Record book" not only contemplated the physical possession of a record book, but also an obligation to keep it substantively accurate. The panel also vacated the portion of the district court's sentence barring the defendant, a foreign national, from entering the United States for a period, holding the sentence was not authorized by the Immigration and Nationality Act, which sets forth the exclusive procedures for alien admission and removal (*United States v. Vastardis*).
- **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. The D.C. Circuit held that this exception did not apply categorically to attachments to emails sent by then-acting Attorney General Sally Yates on the day she declined to defend an order by President Trump suspending entry of foreign nationals from certain Muslim-majority countries. Instead, the panel remanded the case to the district court for in camera review of the attachments to determine whether they were in fact deliberative (*Judicial Watch, Inc. v. Dep't of Justice*).
- **Insurance:** In the wake of the Coronavirus Disease 2019 (COVID-19) pandemic, several courts have considered challenges to insurance claim denials brought by businesses whose properties were closed because of government shutdown orders and other measures to deter the spread of the disease. The Seventh Circuit joined four other circuits in concluding that under relevant state laws governing insurance claims for "direct physical loss of property," a suspension of operations due to COVID-19-related measures would not give rise to a claim, because the suspension was not due to a physical alteration to the covered property (*Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*; *Crescent Plaza Hotel Owner, L.P. v. Zurich American Ins. Co.*; *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*; *Mashallah, Inc. v. West Bend Mutual Ins. Co.*).
- **National Security:** In related criminal cases involving evidence obtained under the Foreign Intelligence Surveillance Act (FISA) program, divided Tenth Circuit panels upheld the criminal defendants' convictions for providing or conspiring to provide material support to terrorist groups. Among other things, panel majorities rejected defendants' constitutional challenges to Section 702 of the Foreign Intelligence Surveillance Amendments Act of 2008, through which the government surveilled defendants' international phone calls and emails without a judicial warrant (*United States v. Muhtorov*; *United States v. Jumaev*).
- **Public Health:** A Centers for Medicare & Medicaid Services (CMS) interim final rule issued in November 2021 generally requires certain types of health care entities participating in the Medicare and Medicaid programs to ensure staff are vaccinated against COVID-19 unless exempted for religious, medical, or other prescribed reasons. A divided Eleventh Circuit panel denied Florida's request to enjoin that vaccine mandate pending the state's appeal of a lower court's denial of its preliminary injunction request. The court held that Florida's challenge was not mooted by an out-of-circuit district court's injunction that covered health care entities in Florida because that injunction could be narrowed on appeal to the Fifth Circuit. The Eleventh Circuit panel majority also held that Florida was unlikely to succeed in its argument that CMS lacked statutory authority to issue the interim rule; the state failed to carry its burden of showing

irreparable harm if an injunction was not issued; and failed to demonstrate the public interest weighed in favor of enjoining the CMS mandate (*Florida v. Dep't of Health & Human Services*).

- **Separation of Powers:** The Select Committee to Investigate the January 6th Attack on the U.S. Capitol sent a request to the Archivist of the United States under the Presidential Records Act, seeking disclosure of certain Trump Administration records the Committee believes are relevant to its investigation. For some of those documents, former President Trump claimed executive privilege, but President Biden determined an invocation of executive privilege is unwarranted. The D.C. Circuit did not resolve the general question of whether a former President's invocation of executive privilege overrides the current President's decision not to invoke privilege. Instead, the court decided the case on narrower grounds, finding that the former President provided no basis to override the current President's judgment and the accommodations worked out between the congressional committee and the executive branch over the requested documents (*Trump v. Thompson*).
- **Tax:** Subpart F of the Internal Revenue Code addresses the taxation of American corporations for certain income held by their foreign subsidiaries, referred to as *controlled foreign corporations* (CFCs). Taxed income includes the CFC's foreign base company sales income (FBCSI). A divided Sixth Circuit panel affirmed the Tax Court's ruling that income from a U.S. corporation's Luxembourg affiliate, derived from selling appliances to the U.S. corporation and a Mexican branch, constituted FBCSI earned by a CFC. The majority held that two Code provisions setting forth what constitutes FBCSI, 26 U.S.C. § 954(d)(1) and (d)(2), should be read independently with their meaning informed by the historical context in which they were enacted (i.e., to prevent U.S. corporations from using CFCs for the sole purpose of tax avoidance). As a result, the majority concluded, a CFC's use of a foreign branch to achieve "substantially the same" tax-deferral effect as an American corporation could have achieved by shifting income to a foreign subsidiary prior to enactment of Subpart F is treated as taxable FBCSI under § 954(d)(2) (*Whirlpool Financial Corp. v. Commissioner of Internal Revenue*).
- **Transportation:** The Seventh Circuit vacated a Surface Transportation Board decision as to the use of the Belt Railway of Chicago, the largest switching and terminal railroad in the United States, by its six railroad-owners. The Board determined that, under the governing statute, 49 U.S.C. § 10742, a rail carrier's power to designate a place where it will receive traffic from other carriers is limited to portions of the rail line that the designating carrier owns. The court rejected the Board's interpretation, premised on common-law traditions, after concluding it conflicted with statute's text and was not entitled to judicial deference under the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (*Wisconsin Central Ltd. v. Surface Transportation Board*).
- **Transportation:** The D.C. Circuit upheld a number of directives and an emergency amendment by the Transportation Security Administration (TSA) generally requiring masks be worn in airports, commercial aircrafts, buses, and trains to deter the spread of COVID-19. The panel concluded that these measures were a reasonable exercise of TSA's authority under the Aviation and Transportation Security Act. The panel divided on whether the plaintiff had standing, but not on lawfulness of the mask mandate (*Corbett v. TSA*).

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