

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Feb. 7–Feb. 13, 2022)

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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 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.

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## Decisions of the Supreme Court

Last week, the Supreme Court took action on an application for emergency action in related cases, while also agreeing to review the lower court’s decisions at a later date:

- **Election Law:** By a 5-4 vote, the Supreme Court permitted Alabama to go forward with its congressional redistricting plan pending the Court’s consideration of a legal challenge to it. In January 2022, a three-judge district court panel issued a preliminary injunction in related cases to prevent Alabama from conducting congressional elections according to the plan. The court concluded that plaintiffs were likely to prevail on their argument that the plan, creating one majority-Black congressional district out of seven districts total, impermissibly diluted the votes of Black Alabamans in violation of the Voting Rights Act. The court indicated that the violation could be remedied by a new redistricting plan that included an additional majority-Black congressional district. In staying the lower court’s preliminary injunction and agreeing to review the case, the Supreme Court did not address the merits of plaintiffs’ arguments that the plan violated the Voting Rights Act

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and that the proposed districts were racially gerrymandered in violation of the Fourteenth Amendment; nor did it address Alabama's claim that the districts were drawn in a race-neutral way and that a more race-conscious approach would violate the Fourteenth Amendment. Because the Supreme Court will not hear arguments in the cases until the October 2022 Term, it seems likely that the legal dispute over Alabama's congressional redistricting plan will not be resolved until after the November 2022 congressional election (*Merrill v. Milligan*; *Merrill v. Caster*).

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

- **Bankruptcy:** Agreeing with other circuits that have considered the issue, the Seventh Circuit held that the costs associated with an attorney's disciplinary proceedings cannot be discharged through Chapter 7 bankruptcy proceedings because, under the governing statute, those costs are considered a "penalty" owed to the government and are "not compensation for actual pecuniary loss" (*Osicka v. Office of Lawyer Regulation*).
- **Consumer Protection:** The First Circuit held that the Fair Credit Reporting Act (FCRA) did not preempt all state laws relating to information contained in consumer reports. Instead, the court decided that the FCRA more narrowly preempts only those state laws that address information covered by 15 U.S.C. § 1681, which concerns specific types of adverse information related to consumers, along with other adverse information that is more than seven years old (*Consumer Data Industry Ass'n. v. Frey*).
- **Criminal Law & Procedure:** Joining several other circuits, the Seventh Circuit held that a criminal defendant convicted of a multidrug conspiracy was potentially eligible for a discretionary sentence reduction under the First Step Act so long as the conspiracy included a cocaine base, even if the conspiracy also involved other illicit substances (*United States v. McSwain*).
- **Environmental:** The Oil Pollution Act of 1990 (OPA), which Congress passed in the wake of the Exxon Valdez oil spill, creates a comprehensive remedial scheme apportioning liability for oil-removal costs. Ruling on an issue of first impression, the Eleventh Circuit held that OPA did not authorize a claim against the government for oil-removal damages related to an accident at a boat lift operated by the U.S. Army Corps of Engineers, which ruptured the hull of a vessel transporting oil through a Mississippi waterway pouring thousands of gallons of oil into the river. The court also concluded that OPA's remedial scheme displaces the more general sovereign-immunity waiver of the Suits in Admiralty Act, a 1920 law that generally waives sovereign immunity in most admiralty claims (*Savage Services Corp. v. United States*).
- **Immigration:** The Third Circuit held that an alien allowed to return to the United States through immigration parole was subject to the grounds of removal applicable to aliens who have not been lawfully admitted into the United States. Under immigration law, aliens issued parole may physically enter the United States, but continue to be treated as "arriving aliens" for immigration removal purposes. In the case before it, the court found that the alien, whom the government sought to remove after he overstayed his parole, had once been admitted into the United States under a tourist visa, because his return to the country was not pursuant to that since-expired visa (*Iredia v. Attorney General*).
- **Immigration:** The Ninth Circuit struck down 8 U.S.C. § 1324(a)(1)(A)(iv), which makes it a criminal offense to "encourage or induce" an alien to enter or remain in the United States unlawfully, as overbroad under the First Amendment. The court agreed with the government that certain conduct falling under the provision is not protected speech under the First Amendment, including smuggling activities, procuring and providing fraudulent

- documents to present aliens unlawfully, assisting aliens' unlawful entry, and misleadingly luring aliens into the country for unlawful work. However, the panel concluded that the provision also swept in a substantial amount of protected speech, such as expressing a desire for an unlawfully present alien to remain in the country. The court therefore struck the provision down as overbroad, reasoning that the statute's potential reach had a substantial chilling effect on protected speech (*United States v. Hansen*).
- **Public Health:** By declining to resolve the government's request for a stay pending appeal, a divided Fifth Circuit panel kept in place a district court's nationwide preliminary injunction suspending enforcement of the Biden Administration's mandate requiring federal executive branch employees to be vaccinated, subject to limited exemptions. The lower court concluded the President lacked statutory or independent constitutional authority to issue the mandate. While the *per curiam* order was issued without an opinion, the dissenting judge contended the government was likely to prevail on appeal because, among other things, the mandate was a lawful exercise of the President's authority over the federal executive branch workforce (*Feds for Medical Freedom v. Biden*).

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