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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (May 23–May 29, 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.

Some 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 click here to subscribe to the *CRS Legal Update* and receive regular notifications of new products and upcoming seminars by CRS attorneys.

Decisions of the Supreme Court

Last week, the Supreme Court issued decisions in two cases for which it heard oral arguments:

- **Arbitration:** The Supreme Court unanimously held that the Federal Arbitration Act (FAA) does not permit courts to create arbitration-specific procedural rules. The Court held that the standard for determining if a litigating party has waived its arbitration rights is the same as used to assess waivers of other contractual rights (*Morgan v. Sundance*).
- **Criminal Law & Procedure:** In a 6-3 decision, the Court held that a federal court may not hold an evidentiary hearing, or otherwise consider evidence outside the state-court record, in a habeas case brought by a state inmate under 28 U.S.C. § 2254(e) alleging ineffective assistance of state court-appointed, post-conviction counsel (*Shinn v. Martinez Ramirez*).

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Decisions of the U.S. Courts of Appeals

Topic headings marked with an asterisk (*) indicate cases in which the appellate court's controlling opinion recognizes a split among the federal appellate courts on a key legal issue resolved in the opinion, contributing to a non-uniform application of the law among the circuits.

- ***Arbitration:** An Eleventh Circuit panel ruled that circuit precedent compelled affirmance of a district court's decision not to vacate a "non-domestic" arbitral award enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The district court held that an FAA provision allowing courts to vacate awards that exceed an arbitration panel's powers applies only to domestic arbitration cases, but not non-domestic arbitration awards covered by the New York Convention. The panel agreed that this conclusion followed Eleventh Circuit precedent, but argued it conflicted with a preferable interpretation endorsed by other circuits and the Supreme Court in subsequent cases. Under that view, the FAA's provisions authorizing the vacating of domestic arbitration awards may apply to non-domestic arbitration covered by the New York Convention when the United States is either the location of the arbitration or when U.S. law was used to conduct the arbitration. The panel urged the Eleventh Circuit to take up the issue en banc and overrule prior precedent (*Corporacion, AIC, SA v. Hidroelectrica Santa Rita, SA*).
- ***Civil Rights:** Furthering a circuit split, the Third Circuit held that under Title VII of the Civil Rights Act, an employer's "reasonable accommodation" of a worker's sincerely held religious beliefs must eliminate, and not merely mitigate, the conflict between the employee's beliefs and work requirements. The court held that the U.S. Postal Service's offer to allow a postal worker to swap shifts with colleagues so that she would not have to work on Sunday in contravention of her religious beliefs was not a reasonable accommodation. Still, the divided panel held that the Postal Service was not required to grant the employee's request for an exemption from Sunday work altogether. Granting the request would cause an undue hardship to the employer's operations, the majority concluded, and Title VII does not require an accommodation in that event (*Groff v. DeJoy*).
- **Consumer Protection:** A divided Eleventh Circuit held that monthly mortgage statements required under the Truth in Lending Act (TILA) and its implementing regulations may, in some circumstances, constitute communications in connection with the collection of a debt under the Fair Debt Collections Practices Act (FDCPA). The majority held that where, as here, a mortgage statement contains debt-collection language not required by the TILA, and the context suggests that the company is attempting to collect on a debt, the FDCPA potentially applies. The court remanded the case to the lower court for further proceedings (*Daniels v. Select Portfolio Servicing, Inc.*).
- **Election Law:** The Third Circuit directed a federal district court to enter an order requiring mail-in ballots in a local Pennsylvania election to be counted, even though the return envelopes for those ballots had not been hand-dated as required under state law. The panel held that private plaintiffs could bring suit against state authorities for violating the Materiality Provision of the Civil Rights Act, which bars persons acting under the color of law from limiting "the right of any individual to vote in any election because of an error or omission . . . if such error or omission is not material in determining whether such voter is qualified . . . to vote in such election." The panel held that the Materiality Provision applied because the state requirement that prospective voters date the return envelope of mail-in ballots was immaterial to voter qualifications and eligibility (*Migliori v. Lehigh County Bd. of Elections*).

- **Election Law:** The Fourth Circuit reversed and vacated a district court order that enjoined state election officials from considering a re-election disqualification based on a candidate's alleged encouragement of disruption of Congress's counting of electoral votes on January 6, 2021. Section Three of the Fourteenth Amendment disqualifies from future federal or state office certain persons who have "engaged in insurrection or rebellion against" the United States unless Congress by a two-thirds vote in each house removes such disability. The district court held that the constitutional disqualification was lifted by the 1872 Amnesty Act, passed in the post-Civil War period to remove the disqualification "from all persons whomsoever" except for certain high-ranking federal officials who had joined the Confederacy. A majority of the appellate panel disagreed, holding that the Act applied only to conduct that occurred before the statute's enactment. (A concurring panelist would have ruled that the lower court lacked jurisdiction to hear the case because doing so usurped Congress's constitutional authority to determine the qualifications of its Members.) The panel reached no other merits-based issues, including whether the Fourteenth Amendment applied to the Member's alleged conduct (*Cawthorn v. Amalfi*).
- **Environmental Law:** On remand from the Supreme Court, the First Circuit held that a climate-change suit brought by Rhode Island under state law against multinational oil and gas companies should be heard in Rhode Island state court. The appeals court held that there was no basis under applicable statutes for the removal of the suit to federal court. The First Circuit's decision comes shortly after similar decisions were reached by the Ninth and Fourth Circuits in climate-liability suits brought under state law, discussed in prior issues of the *Congressional Court Watcher* (*Rhode Island v. Shell Oil Products Co., LLC*).
- **Environmental Law:** The Fifth Circuit held that the Seventh Amendment guarantees a defendant a right to a jury trial when the federal government seeks reimbursement under the Oil Pollution Act of 1990 for cleanup costs associated with an oil spill (*United States v. ERR, LLC*).
- **Firearms:** The Eleventh Circuit held that the federal prohibition against unlawfully present aliens possessing a firearm does not violate the Second Amendment. The panel assumed without deciding that some unlawfully present aliens may be among "the people" referenced by the Second Amendment. Still, the panel described the Amendment as codifying a preexisting right to keep and bear arms that had been subject to certain well-recognized exceptions. One such exception, the court held, enabled Congress to restrict the privilege to keep and bear arms for unlawfully present aliens and others who do not owe or swear allegiance to the United States (*United States v. Jiminez-Shilon*).
- **Intellectual Property:** The Federal Circuit rejected challenges to the Commissioner of Patents' ability to decide whether to grant rehearing of a patent claim adjudicated by the Patent Trial and Appeal Board (PTAB)—a function of the Patent & Trademark Office's (PTO's) Director that was exercised by the Commissioner during a period when the Director's office was vacant. Last year in *United States v. Arthrex, Inc.*, the Supreme Court held that the PTAB could not make final decisions on patentability because they were "inferior," non-presidentially appointed officers. The Supreme Court remanded the case so that the PTO Director—a presidentially appointed "principal" officer—could determine whether rehearing was appropriate. At the time of remand, however, the office of the Director was vacant, and the power to grant or deny rehearing requests was delegated during the vacancy to the Commissioner for Patents, an inferior officer. The Federal Circuit rejected the petitioner's constitutional arguments against the Commissioner's exercise of the Director's authority, ruling that such arguments were

foreclosed by Supreme Court precedent recognizing that inferior officers may temporarily perform functions of a principal officer on an acting basis. The court also held that the exercise of this authority was not barred by the Federal Vacancies Reform Act (FVRA), because that statute only constrains when an inferior officer may perform *non-delegable duties*, and not to the Director's delegable duty to decide whether to grant a rehearing request. The court also rejected arguments that, because the President cannot remove the Commissioner at-will, it would violate the separation of powers for the Commissioner to perform the Director's functions, finding this argument unpersuasive because under the FVRA, the President could end the Commissioner's exercise of the Director's powers at any time by naming an acting Director (*Arthrex, Inc. v. Smith & Nephew, Inc.*).

- **National Security:** The Ninth Circuit affirmed a district court order directing recipients of three national security letters (NSLs)—administrative subpoenas issued to wire or electronic service providers requiring the production of certain subscriber information relevant to a national security investigation—to comply with statutory nondisclosure requirements until informed otherwise by the government. Emphasizing that a federal statute enables an NSL recipient to request judicial review of a nondisclosure order at any time and however many times it wishes, the panel held that neither the governing statute nor First Amendment considerations compel a district court to schedule periodic judicial review of a nondisclosure order *sua sponte*. The court left open whether there might be a set of circumstances when a court would abuse its discretion by not scheduling periodic review (*In re Three National Security Letters*).
- **Securities:** The D.C. Circuit upheld the Securities and Exchange Commission's (SEC's) revision of a regulation concerning securities market data, concluding that the agency did not act arbitrarily and capriciously in promulgating the new Market Data Infrastructure Rule. The 2021 rule more broadly defines "core data" that investors may obtain from centralized securities-information processors, and adopts a competitive model for data feeds by allowing entities other than securities exchanges to develop and sell data products based on data obtained from the exchanges (*NASDAQ Stock Market LLC v. SEC*).
- **Securities:** The D.C. Circuit upheld the SEC's denial of petitioner's application for a whistleblower award for providing information leading to a successful enforcement action. The panel held that the governing statute plainly and unambiguously requires an applicant to have provided "original information" after July 21, 2010, and that such information resulted in a successful enforcement action. Because the petitioner submitted the relevant information before that date, he was statutorily ineligible (*Ross v. SEC*).

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- **Speech:** The Eleventh Circuit largely upheld a preliminary injunction barring enforcement of a Florida law that prohibits certain social media companies from (1) "deplatforming" political candidates; (2) prioritizing or deprioritizing posts by or about a candidate; (3) removing any post by a "journalistic enterprise" on account of its content; and (4) taking certain moderation actions against users without providing a "thorough rationale" to the affected user. The court viewed the plaintiff social media companies as indisputably private actors protected by the First Amendment. The panel held that the companies were substantially likely to succeed in their claims that their content-moderation decisions were protected exercises of editorial judgment that the aforementioned provisions of state law unconstitutionally burdened. However, the court held that certain other disclosure-related provisions of the challenged law were likely to withstand constitutional scrutiny. Although the Fifth Circuit recently issued a stay pending appeal of a preliminary injunction issued by a district court against a similar social media law enacted by Texas, the Eleventh Circuit did not address this ongoing legal challenge (*NetChoice, LLC v. Attorney Gen. of Florida*).
- **Transportation:** In reversing a district court's dismissal of plaintiff's challenge to his alleged inclusion in the Terrorist Screening Database and placement on the No Fly List, the Ninth Circuit concluded that 49 U.S.C. § 46110 did not divest the district court of jurisdiction over the plaintiff's claims. That statute vests the courts of appeals with exclusive jurisdiction over challenges made to orders by the Transportation Security Administrator, whose powers include the ability to remove or maintain a person on the No Fly List following the completion of an administrative redress process. The panel held that § 46110 did not govern here, where the plaintiff was challenging his initial placement on the No Fly List by the Terrorist Screening Center, rather than any subsequent actions of the Transportation Security Administrator, and remanded for further proceedings (*Fikre v. Fed. Bureau of Investigation*).

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