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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 13–June 19, 2022), Part 2

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

This week's *Congressional Court Watcher* is divided into two parts because of the number of notable decisions issued over the past week. This Sidebar (Part 2) discusses activity by the U.S. courts of appeals during the week of June 13 to June 19, 2022, while a companion Sidebar addresses Supreme Court decisions from that period.

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, contributing to a non-uniform application of the law among the circuits.

- **Civil Rights:** Sitting en banc, a divided Fourth Circuit held that a charter school dress code requiring girls to wear skirts constituted a sex-based classification that violated the Equal Protection Clause. The majority held that the charter school was a state actor subject to the Clause because it exercised the state's delegated authority to provide public schooling. The charter school sought to justify the skirts requirement as a measure to maintain order and promote "traditional values," but the court held that the requirement

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was a sex-based classification that was not supported by any important government objective. The court also reversed a grant of summary judgment in favor of the school on related claims under Title IX of the Education Amendments of 1972. The majority held that the statute unambiguously applies to sex-based dress codes and that there was no need to consider the views of the federal Department of Education regarding that question. The court remanded the Title IX claims for consideration of whether the skirts requirement discriminates against the plaintiffs because of their sex (*Peltier v. Charter Day School, Inc.*).

- ***Civil Rights:** The Fourth Circuit rejected defendants' claim of qualified immunity in a case brought by inmates at Virginia "supermax" prisons alleging that those facilities' isolation practices violate the Eighth Amendment's prohibition on cruel and unusual punishment. Recognizing differences between its approach and that of the Ninth Circuit, the court held that the defendants would not be immune if they knew that the isolation practices created a substantial risk of serious harm and disregarded that risk (*Thorpe v. Clarke*).
- **Consumer Protection:** The Third Circuit affirmed a grant of summary judgment for a student loan servicer in a suit brought under the Telephone Consumer Protection Act of 1991 (TCPA), which generally prohibits using automated telephone dial-in systems to call cell phone users without their express consent. Plaintiffs alleged that the loan servicer violated the TCPA by using a system that could dial numbers drawn from an account database. The Third Circuit held that, although such a system could qualify as an "automatic telephone dialing system" based on its *ability* to generate random numbers, a defendant is only liable under the TCPA if it made calls *using* that particular ability to produce or store telephone numbers. Here, the court held that plaintiffs presented no evidence that the defendant loan servicer used a dialing system to randomly or sequentially produce or store the plaintiffs' cell phone numbers. It therefore affirmed the judgment for the servicer on plaintiffs' TCPA claim (*Panzarella v. Navient Solutions, Inc.*).
- **Criminal Law & Procedure:** The First Circuit upheld a criminal defendant's conviction for an interstate violation of a protection order under 18 U.S.C. § 2262(a), a provision added by the Violence Against Women Act (VAWA). The court ruled that a "protection order" under VAWA includes provisions in a conditional release order requiring a defendant to refrain from contacting the victim of the defendant's alleged crime or instructing the defendant to avoid locations frequented by the alleged victim (*United States v. Dion*).
- **Criminal Law & Procedure:** The Second Circuit held that when a district court considers a prisoner's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), it is not appropriate to review new evidence proffered by the inmate to challenge the validity of his or her underlying conviction. Such challenges, the court held, should instead be brought by the inmate during direct appeal of his or her conviction or in habeas corpus proceedings (*United States v. Orena*).
- **Criminal Law & Procedure:** The Third Circuit rejected a criminal defendant's First Amendment challenge to the federal cyberstalking statute under which he was convicted, 18 U.S.C. § 2261A. The court held that the law was not facially overbroad, concluding that a narrow interpretation of the statute's intent element prevented the statute's proscription of threatening conduct from reaching a substantial amount of protected speech (*United States v. Yung*).

- **Criminal Law & Procedure:** The Fourth Circuit vacated a criminal defendant's sentence after deciding that the district court erred in concluding that the defendant, whose term of supervised release had been revoked, was subject to a mandatory minimum term of five additional years of supervised release. The Fourth Circuit held that the statute governing the revocation of the defendant's supervised release, 18 U.S.C. § 3583(h), did not authorize the setting of a minimum term of supervised release but instead authorized only a maximum term (*United States v. Nelson*).
- **Criminal Law & Procedure:** Considering whether various federal crimes are "crimes of violence" under the categorical approach provided by the Supreme Court in *United States v. Davis*, the Ninth Circuit joined other circuits in holding that malicious damage or destruction to property by fire or explosive under 18 U.S.C. § 844(i) is not a "crime of violence" under 18 U.S.C. § 924(c)(3). The crime of violence definition requires a covered offense to involve the commission of an act against the person or property of another. Persons convicted of a covered offense could be subject to a mandatory minimum sentence or face other legal consequences. The Ninth Circuit held (and the government conceded) that because a defendant potentially could be convicted under § 844(i) for using an explosive device to destroy his or her *own* property, the offense did not meet the definition of crime of violence (*United States v. Mathews*).
- **Employee Benefits:** The Third Circuit rejected a class action suit by Federal Bureau of Investigation employees under the Federal Employees' Retirement System Act, holding that sovereign immunity barred their claim. The employees alleged that the government's contributions to their Thrift Savings Plan accounts were late as a result of the 2018 federal government shutdown, and they sought compensation for the market gains they missed as a result. The court held that market gains are not "benefits" under 5 U.S.C. § 8477, and that Congress had therefore not allowed suits to recover such gains (*Doe v. United States*).
- **Environmental Law:** The Sixth Circuit held that a defendant was not entitled to immunity from state-law tort suits based on its status as an environmental remediation contractor for the Tennessee Valley Authority (TVA). The court held that TVA itself would not have been immune from suit because the suits were not inconsistent with certain federal statutes and would not interfere with TVA's operations. Because TVA could be sued, the contractor had no derivative immunity (*Adkisson v. Jacobs Engineering Group*).
- **Environmental Law:** The Ninth Circuit ruled that substantial evidence did not support the Environmental Protection Agency's (EPA's) conclusion that glyphosate—the active ingredient in the Roundup weed killer—is likely not carcinogenic to humans. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides that the EPA may not register a pesticide for sale or use if it poses "any unreasonable risk to man or the environment," and requires EPA to review existing registrations periodically. As part of this periodic review process, the EPA issued an Interim Decision concluding that glyphosate was likely not carcinogenic to humans and establishing mitigation measures to reduce the ecological risks arising from glyphosate products. The Ninth Circuit held that EPA's characterization of the risk that glyphosate poses to humans was inconsistent with EPA's own analysis of the evidence before it. On that basis, the court remanded part of the Interim Decision to EPA for further consideration, but it declined to vacate the Interim Decision based on those grounds or because of EPA's failure to comply with consultation requirements set forth in the Endangered Species Act before issuing the Interim Decision (*National Resources Defense Council v. EPA*).

- **Immigration:** The Ninth Circuit rejected First Amendment and equal protection challenges to a ground for immigration inadmissibility, 8 U.S.C. § 1182(a)(6)(E)(i), applicable to aliens who "encourage" others to unlawfully enter the United States. In so doing, the court ruled that the term "encourage" was used in the sense of soliciting or aiding and abetting the crime of unlawful entry, and was not substantially overbroad relative to its legitimate sweep (*Marquez-Reyes v. Garland*).
- **Immigration:** The Ninth Circuit held that 8 U.S.C. § 1226(e), which bars federal courts from reviewing discretionary judgments related to the detention of aliens under that provision, precluded review of the Board of Immigration Appeals' determination of the danger petitioner posed to the community, which the Board concluded warranted his continued detention (*Martinez v. Clark*).
- **Labor & Employment:** The Fifth Circuit upheld the district court's dismissal of the petitioner's constitutional challenge to the personnel action taken against him by his government employer, because the petitioner's claim was not reviewable under the Civil Service Reform Act (CSRA). The panel observed that the Supreme Court had recognized that the CSRA provides a comprehensive and exclusive system for reviewing personnel actions against federal employees. Citing the Supreme Court's recognition of the CSRA's exclusive framework for the review of personnel actions against federal employees, the circuit court held that any gaps that Congress left in the CSRA's coverage were intentional and not for the courts to fill. The court concluded that where, as here, the CSRA does not provide for review of a worker's constitutional challenge to a personnel action, the statute also precludes extra-statutory review by the courts of that constitutional claim (*Zummer v. Sallet*).
- **Labor & Employment:** The Fifth Circuit held that the Coronavirus Disease 2019 pandemic does not constitute a "natural disaster" under the Worker Adjustment and Retraining Notification Act (WARN Act). The statute requires covered employers to provide 60 days' notice before a plant closing or mass layoff, subject to limited exception, including when the closure or layoff is "due to" a "natural disaster." The court held the Department of Labor's regulations implementing this exception to the 60-day notice requirement, which require the plant closure or layoffs to be a direct result of the natural disaster, is a reasonable interpretation of the governing statute and incorporates a proximate-cause standard of causation (*Easom v. US Wells Services, Inc.*).

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