

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 27–July 3, 2022), Part 2

July 5, 2022

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 27 to July 3, 2022, while a [companion Sidebar](#) (Part 1) 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.

- **Abortion:** In a per curiam opinion issued days after the Supreme Court’s decision in [Dobbs v. Jackson Women’s Health Organization](#), the Fifth Circuit vacated a lower court injunction that blocked enforcement of a Texas law regulating the disposal of embryonic and fetal tissue at health care facilities. The district court, applying the Supreme Court’s pre-*Dobbs* framework, had held that the Texas law unconstitutionally impaired abortion access. (The lower court also held that the disposal requirement violated equal protection

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principles.) Following *Dobbs*, which overruled earlier cases and held that the Constitution does not confer a right to an abortion, the Fifth Circuit vacated the lower court's injunction and remanded for further proceedings consistent with that decision (*Whole Woman's Health v. Young*).

- **Civil Rights:** The First Circuit affirmed a district court's dismissal of plaintiffs' Title VII claim of racial discrimination by a grocery chain, which enforced a dress code that prevented workers from wearing Black Lives Matter face masks. The court concluded that the policy's enforcement against Black and non-Black employees who wore the masks did not mean that a Title VII claim could not be brought; a Title VII claim could allege that an employer discriminated against Black workers because of their race, and also discriminated against non-Black workers because of their association with Black persons. Here, however, the court held that there was an obvious, non-race-based motivation for the grocery chain's conduct—a desire not to allow employees to express political messages at work (a policy that could have raised free speech concerns if done by a government actor, as highlighted in *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny County*, discussed below). The court ruled that the plaintiffs did not provide sufficient factual allegations in their complaint to support their claim that the chain's intent was racially motivated (*Frith v. Whole Foods Market, Inc.*).
- **Civil Rights:** The Eleventh Circuit held that a plaintiff who alleged retaliation because of her opposition to her employer's discriminatory employment practices was not exempted from Title VII's anti-retaliation provisions on account of her activities arising in the performance of her human resource management duties. The court also held the Title VII's anti-retaliation provisions may apply to a current employer alleged to have taken action in response to employee activities directed at a former employer (*Patterson v. Georgia Pacific, LLC*).
- ***Criminal Law & Procedure:** The Third Circuit furthered a circuit split over the meaning of § 403(b) of the First Step Act. That provision specifies the Act's application to pending cases under 18 U.S.C. § 924(c)(1)(C), which enhances the penalties for the commission of a "crime of violence" while armed with a firearm under certain conditions. Section 403(b) provides that the Act's amendments apply when the covered offense was "committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." The circuit court held that the amendments made by § 403(b) applied in the resentencing of criminal defendants who were convicted and sentenced before the First Step Act's enactment, but whose sentences were vacated after the Act became law (*United States v. Mitchell*).
- **Criminal Law & Procedure:** The Fourth Circuit held that a jury, not the criminal trial court judge, must decide whether an "official act" was present in a case where the defendant allegedly conspired to bribe a public official. The defendant was charged with conspiracy to commit honest services fraud under 18 U.S.C. § 1349, which requires the government to show that a public official committed an "official act," as defined by 18 U.S.C. § 201, in exchange for loans or gifts. The circuit court held that it was the responsibility of the jury, not the presiding judge, to determine whether the conduct at issue was an "official act" because it was an element of the offense for which the defendant was charged. The court vacated the defendant's convictions under § 1349 and a related offense, and remanded for a new trial (*United States v. Lindberg*).
- **Criminal Law & Procedure:** The Fourth Circuit upheld a criminal defendant's conviction under the federal wire fraud statute, 18 U.S.C. § 1343, for her role in a multimillion dollar scheme operated from Israel that targeted victims worldwide,

including in the United States. The court agreed with the defendant that the wire fraud statute did not apply extraterritorially, but understood the statute's focus to be on the use of domestic wires to engage in a fraudulent scheme. Accordingly, the court held that the defendant's conduct was covered by the statute because it involved the transmission of messages received by U.S. persons over domestic wires (*United States v. Elbaz*).

- **Election Law:** The Fifth Circuit stayed pending appeal a district court's permanent injunction, which had directed county officials to halt enforcement of a "wet" signature requirement for voter registration. The Texas statute at issue generally requires that, if a person's registration application is submitted by fax, the applicant must thereafter submit by personal delivery or mail the original application with the applicant's original signature. The circuit court ruled that the plaintiffs were unlikely to succeed in their claims that this requirement unconstitutionally abridged the right to vote or violated the [Civil Rights Act's Materiality Provision](#), which generally bars officials from limiting a person's right to vote due to an error or omission that is immaterial to determining voting qualifications. The court decided, among other things, that the wet signature requirement ensured that the applicant had actually attested to meeting the state's voting qualifications, and also helped to detect and deter voter fraud. The court also concluded that plaintiffs likely lacked standing to bring the case, and that other factors weighed in favor of granting the stay (*Vote.Org v. Callanen*).
- **Employee Benefits:** [Section 1132\(a\)\(3\) of the Employee Retirement Income Security Act](#) permits beneficiaries of covered plans to sue for "appropriate equitable relief" if the plan or governing statute is violated. The Eleventh Circuit held that this provision allows a beneficiary to bring suit to recover benefits lost due to the fiduciary's breach of its duties in the enrollment process. As a result, the panel reversed a district court's dismissal of a suit by a widow who alleged that her spouse's employer did not provide him with the necessary paperwork to complete the plan enrollment process (*Gimeno v. NCHMD, Inc.*).
- **Immigration:** The Second Circuit held that to satisfy the definition of "refugee" found in [8 U.S.C. § 1101\(a\)\(42\)\(A\)](#)—a general requisite for an asylum-seeker to qualify for relief from removal—dual nationals need only show that they would face persecution in a singular country of nationality, not both (*Zepeda-Lopez v. Garland*).
- ***Immigration:** The Third Circuit held it could review an alien's challenge to the legal basis for his removal order, after concluding that the streamlined administrative removal process which he had undergone stopped him from raising his challenge earlier. The petitioner had been ordered removed under an expedited removal process applicable to certain aliens convicted of aggravated felonies. Adding to a circuit split, the Third Circuit held that [regulations implementing this streamlined process](#) did not enable the alien to challenge the legal basis for his removal, but only factual determinations. The court therefore concluded that the petitioner satisfied a statutory requirement that he exhaust all administrative remedies before seeking judicial review of his removal order. Still, the panel upheld the alien's removal order after concluding that he had, in fact, committed a removable offense (*Barradas Jacome v. Attorney Gen.*).
- **Immigration:** The Fifth Circuit held that an immigration regulation, [8 C.F.R. § 1003.2\(c\)\(3\)](#), was invalid to the extent that it carved out an exception to a statutory provision, [8 U.S.C. § 1229a\(c\)\(7\)\(A\)](#), which generally allows aliens to file only one motion to reopen their removal proceedings. The regulation allows additional motions to reopen removal proceedings to apply for asylum or withholding of removal if the alien asserts that changed circumstances in the country where removal has been ordered entitle him or her to relief (*Djie v. Garland*).

- **Immigration:** The Ninth Circuit held that an alien’s receipt of temporary protected status (TPS)—a temporary form of relief available to those who cannot return safely to designated countries because of specified conditions—did not constitute “admission” to the United States for immigration purposes. The panel concluded that the petitioner in the case before it, who unlawfully entered the United States but was later given TPS, was [statutorily ineligible for a form of relief](#) available to those who had resided in the United States for seven years after being “admitted.” The panel recognized that the Supreme Court’s 2021 decision in [Sanchez v. Mayorkas](#) overruled conflicting circuit precedent ([Hernandez v. Garland](#)).
- **Public Benefits:** The Eleventh Circuit recognized that a [Social Security Administration regulation](#) abrogated the treating-physician rule that had been used by the Eleventh Circuit and other circuits. The judicially created rule directed administrative law judges (ALJs) adjudicating disability claims under the Social Security Act to defer to the medical opinion of the treating physicians. The regulation instead directs ALJs to accord the treating physician’s opinion no deference, and instead weigh medical opinions based on their persuasiveness ([Harner v. SSA](#)).
- **Public Health:** The en banc Fifth Circuit agreed to rehear a case originally heard by a three-judge circuit panel on the implementation of an executive order generally requiring federal employees to be vaccinated against Coronavirus Disease 2019 (COVID-19). The earlier panel had allowed the implementation of the executive order after concluding that the Civil Service Reform Act barred the lower court from reviewing it. In deciding to rehear the case, the en banc court vacated the earlier panel opinion ([Feds for Med. Freedom v. Biden](#)).
- **Speech:** The Third Circuit affirmed a district court’s preliminary injunction requiring a port authority to rescind disciplinary measures taken against workers who wore face masks displaying the message “Black Lives Matter.” The port authority required employees to wear face masks to deter the spread of COVID-19, but had in place a policy barring masks and other adornments with political or social messages, which plaintiffs contended had been applied laxly in other cases. The circuit court ruled that the workers had a protected First Amendment interest in expressing social and political views, and that the port authority had not shown that wearing such masks would cause disruption to the port authority’s operations. At this stage in the litigation, the circuit court held that the port authority had not shown it was likely to prevail on the merits, and other factors also favored upholding the injunction while litigation continued ([Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny County](#)).
- ***Tax:** The Sixth Circuit upheld a criminal defendant’s convictions for various tax-related offenses, including under [26 U.S.C. § 7206\(2\)](#), for helping to prepare a false tax return. Adding to a circuit split, the panel held criminal liability under § 7206(2) is not dependent upon the fraudulent return having actually been filed with the Internal Revenue Service ([United States v. VanDemark](#)).

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