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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (July 18–July 24, 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 took action in response to an emergency application, denying a request for a stay of a district court vacatur, but agreeing to review the case in its October 2022 term:

- **Immigration:** In a 5-4 decision, the Court denied an application by the United States to stay a district court order that vacated a 2021 Department of Homeland Security (DHS) memorandum setting forth immigration enforcement priorities and guidance for immigration officers. The United States also asked the Supreme Court to treat its application as a petition for certiorari, and the Court did so and agreed to full review of the case next term. The Court directed the parties to brief and argue three issues: (1) whether the state plaintiffs have standing to challenge the 2021 DHS memo; (2) whether the guidelines set forth in the memo contravene two statutes addressing immigration detention and removal; and (3) whether the district order setting aside the guidelines is barred by 8 U.S.C. § 1252(f)(1), which limits the scope of injunctive relief that lower courts may provide in immigration detention and removal cases (*United States v. Texas*).

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(The Fifth Circuit decision denying the government's motion to stay the district court's vacatur is discussed in a prior edition of the *Congressional Court Watcher.*)

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.

- **Abortion:** The Eleventh Circuit allowed a Georgia abortion law to go into effect, vacating a lower court injunction issued prior to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* that held that the Constitution does not confer a right to an abortion. The circuit court held that a provision of the state law prohibiting abortions in most cases after a fetal heartbeat is detected served the state's legitimate interest, recognized in *Dobbs*, in protecting prenatal life at all stages of development. The court also ruled that an amendment made to Georgia's state code, defining "natural person" to include unborn children, was not unconstitutionally vague on its face, and that any potential applications of the definition to constitutionally protected conduct were properly brought in as-applied challenges (*SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*).
- **Administrative Law:** In a decision that may have implications for the practice of "midnight rulemaking," in which agencies issue rules days before a change in presidential administrations, a divided D.C. Circuit held that the Department of Agriculture (USDA) improperly withdrew a rule submitted for publication in the *Federal Register* days before President Donald Trump was inaugurated. On President Trump's first day in office, his administration sought to withdraw all pending rules by the Obama Administration, including a USDA rule addressing the practice of "horse soring" which had been submitted to (but not yet published by) the Office of the Federal Register. Recent administrations have contended that, at any point before a rule's actual publication in the *Federal Register*, an agency may withdraw the rule without triggering the Administrative Procedure Act's (APA's) requirements relating to the issuance, modification, or rescission of a rule. The majority of the D.C. Circuit panel concluded otherwise, holding that the plain text of the Federal Register Act rendered a rule valid once it had been submitted for "public inspection" to the Office of the Federal Register, triggering APA provisions that typically require notice-and-comment procedures before the rule can be rescinded. The circuit court remanded the case to the district court for further proceedings (*Humane Society of the United States v. Dep't of Agriculture*).
- ***Bankruptcy:** The First Circuit reaffirmed that the bankruptcy laws are subordinate to the Takings Clause in holding that the Fifth Amendment precludes the impairment or discharge of pre-petition takings claims for just compensation in proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act. The court rejected the Financial Oversight and Management Board for Puerto Rico's argument that takings claims can be adjusted in bankruptcy. The court also split with the Ninth Circuit by rejecting the Board's contention that the protections of the Takings Clause only extend to those claimants who still possess rights to specific property at the time of bankruptcy (*In re Financial Oversight & Mgmt. Bd. for Puerto Rico*).
- **Bankruptcy:** The Fifth Circuit vacated orders by the Federal Energy Regulatory Commission (FERC) purporting to require a natural gas producer to continue performing under filed-rate gas transit contracts even if the producer rejected those contracts in bankruptcy. The court held that FERC's powers under the Natural Gas Act do not

override a debtor's ability under a provision of the Bankruptcy Code, 11 U.S.C. § 365(a), to reject and breach any executory contract, nor do they override the authority of a bankruptcy court to decide rejection motions (*Gulfport Energy Corp. v. FERC*).

- **Bankruptcy:** The Eleventh Circuit held that a creditor may file a post-petition claim for the unpaid value of goods delivered to the debtor immediately before bankruptcy without impairing the creditor's defense against disgorgement of pre-petition payments. Specifically, the court determined that a creditor's "new value" defense (a creditor receiving a preferential payment from a debtor gave "new value" in the form of goods or services to the debtor after receiving the payment) against avoidance of pre-petition transfers under 11 U.S.C. § 547(c)(4) is not offset by the debtor's post-petition transfer made in response to the same creditor's claim under 11 U.S.C. § 503(b)(9). The court concluded that the context of § 547(c)(4) provides that the statute's reference to "otherwise unavoidable transfers" is limited to pre-petition transfers (*Auriga Polymers Inc. v. PMCM2, LLC*).
- **Civil Rights:** The Ninth Circuit affirmed a lower court and deferred to the Department of Justice's (DOJ's) interpretation of agency regulations implementing the Americans with Disabilities Act (ADA), contained in a guidance document specifying measures hotels could take to ensure compliance. The lower court dismissed a plaintiff's claim that the defendant hotel's website did not comply with the regulations. The Ninth Circuit held that the DOJ interpretation of the regulations contained in the guidance document was reasonable and entitled to judicial deference. Because the defendant hotel complied with the DOJ guidance document, the court held it also did not violate the associated ADA regulations (*Love v. Marriott Hotel Services, Inc.*).
- **Criminal Law & Procedure:** Joining other circuits that have considered the issue, a divided Seventh Circuit held that reviewing courts should examine the underlying facts of a defendant's criminal offense to determine whether it is a "sex offense" under § 20911(5)(A)(ii) of the Sex Offender Registration and Notification Act (SORNA), as applied through SORNA § 20911(7)(I), concerning sex offenses against minors. The panel majority rejected the defendant's argument that courts should employ a categorical approach, which would have required that every application of the criminal statute under which the defendant was convicted satisfy SORNA's "sex offense" definition, or else the defendant's conviction would not be deemed covered (*United States v. Thayer*).
- **Criminal Law & Procedure:** The Seventh Circuit affirmed a district court's decision denying an inmate's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The panel held that evidence of an inmate's rehabilitation could not be a standalone basis for granting compassionate release. The panel also held that the First Step Act's prospective amendment to one of the statutes under which the defendant was convicted, 18 U.S.C. § 924(c), which reduced the mandatory minimum sentence available for convictions under that provision, was not an extraordinary and compelling reason for compassionate release. The court concluded that a recent Supreme Court decision addressing the First Step Act did not undercut circuit precedent upon which the panel relied (*United States v. Peoples*).
- **Criminal Law & Procedure:** The Ninth Circuit upheld a lower court's revocation of a defendant's supervised release for violating 18 U.S.C. § 1001(a), which generally outlaws materially false statements in matters within the jurisdiction of any branch of the federal government. The defendant had submitted a monthly supervision report to his probation officer that contained false statements, but claimed that because these statements were later forwarded to a judge, his conduct was exempted by § 1001(b),

which provides that the false statement bar does not apply to statements "submitted to a judge or magistrate" in a judicial proceeding. The Ninth Circuit held that this exemption did not apply, holding that the carve-out only exempted statements that the party directly submitted to the judge or magistrate, and not to statements made to third parties in the judicial branch that were later forwarded to specified judicial officers (*United States v. Oliver*).

- **Criminal Law & Procedure:** In a per curiam opinion, the Ninth Circuit held that the United States violated the Insanity Defense Reform Act (IDRA) when it failed to hospitalize a mentally incompetent criminal defendant committed to its custody after more than eight months. A provision of the IDRA, 18 U.S.C. § 4241, provides that a defendant found incompetent by a court shall be transferred to the custody of the Attorney General to "hospitalize . . . for treatment in a suitable facility . . . for such a reasonable period of time, not to exceed four months" as is necessary to determine whether the defendant may attain competency to stand trial. A majority of the panel further held that the four-month period specified in the IDRA only addressed the length of the defendant's hospitalization, not his pre-hospitalization commitment. Still, while acknowledging the statute's silence on the potential duration of the pre-hospitalization period, the majority held that, at the very least, the government's pre-hospitalization delay could not exceed the four-month period permitted for hospitalization. The panel held that the appropriate remedy was to order the defendant's immediate hospitalization, rather than to quash the indictment against him as the defendant had argued (*United States v. Donnelly*).
- **Environmental Law:** A divided Fourth Circuit held that a provision of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(6)(A), which limits citizen enforcement suits for civil penalties under the CWA if a state "has commenced and is diligently prosecuting an action under a State law comparable to" the act's civil penalty scheme, was not triggered by a state's notice that an entity failed to obtain a necessary permit. Examining the features of a CWA civil penalty action, the majority held that two environmental groups' citizen suit could proceed because the bar on citizen enforcement suits related to a state's diligent prosecution of a comparable action would not be triggered until the state agency gave public notice of the action, which had not happened here (*Naturaland Trust v. Dakota Finance LLC*).
- **Environmental Law:** In three separate opinions, the Ninth Circuit upheld the U.S. Fish and Wildlife Service's (FWS's) Comprehensive Conservation Plan for National Wildlife Refuges in the Klamath Basin against challenges by environmental groups and commercial farming lessees. In one case, the court held that the Kuchel Act of 1964 and the National Wildlife Refuge System Administration Act (NWRSAA) require the FWS to ensure that agricultural use of leased land in the refuges is "consistent" with and "compatible" with "proper wildlife management," rejecting the lessees' argument that the statutes elevate agricultural interests to a coequal purpose of the refuges. In the other cases, brought by environmental groups, the court determined that FWS did not act arbitrarily, capriciously, or contrary to law under the Kuchel Act, NWRSAA, or the National Environmental Policy Act (NEPA) in adopting policies regarding continued agricultural leasing, pesticide use, livestock grazing, and water allocations (*Audubon Soc'y of Portland v. Haaland*; *Ctr. for Biological Diversity v. Haaland*; *Tulelake Irrigation Dist. v. U.S. Fish & Wildlife Serv.*).
- **Environmental Law:** The Tenth Circuit upheld FWS's modification of certain trail paths in the Rocky Flats National Wildlife Refuge against challenges under NEPA and the Endangered Species Act (ESA). The court determined that the plaintiffs lacked standing

to pursue their ESA claim and affirmed the district court's dismissal of their NEPA claims. The court decided that controversy surrounding the original opening of the refuge, which was the former site of a nuclear manufacturing facility, did not render the later actions at issue in this case "highly controversial" under 43 C.F.R. § 46.215(c) such that FWS should have prepared a new environmental assessment under NEPA (*Rocky Mountain Peace & Justice Ctr. v. U.S. Fish & Wildlife Serv.*).

- **Food & Drug:** A divided Fifth Circuit denied flavored e-cigarette product manufacturers' petitions for review of marketing denial orders issued by the Food and Drug Administration (FDA). While a Fifth Circuit motions panel previously granted a stay of the denial order after determining that the petitioners were likely to succeed on the merits, the court here disagreed and concluded that petitioners failed to show FDA acted arbitrarily and capriciously in considering submitted evidence. The court also held, contrary to the petitioners' argument, that 21 U.S.C. § 387j authorizes FDA to consider comparative cessation evidence between different tobacco products (*Wages and White Lion Invs. L.L.C. v. FDA*).
- **Firearms:** The Third Circuit rejected a challenge to a 2018 DOJ firearms rule issued under the authority of then-Acting Attorney General Matthew Whitaker, where plaintiff contended that Whitaker's service violated the Federal Vacancies Reform Act and the Constitution's Appointments Clause, rendering the rule invalid. The court concluded that it did not need to reach the question of whether Whitaker's service was lawful in order to decide the case because the 2018 rule was later ratified by duly appointed Attorney General William Barr, and the Vacancies Act did not prohibit the ratification (*Kajmowicz v. Whitaker*).
- ***Immigration:** The Eleventh Circuit held that the notice required to make an in abstentia removal order lawful under 8 U.S.C. § 1229a(b)(5) is notice of the particular hearing missed by the alien. The court disagreed with a Ninth Circuit decision and determined that the statute's requirement of "notice under paragraph (1) or (2) of section 1229(a)" does not mean that both types of notice must be adequate, but only the type relevant to the missed hearing. Because the petitioner relied on defects in earlier notice rather than notice for the hearing he missed, the court denied his petition for review (*Dacostagomez-Aguilar v. U.S. Attorney General*).
- **Securities:** The Second Circuit upheld a Securities and Exchange Commission (SEC) determination that an individual who submitted information to the agency regarding potentially unlawful conduct by a financial institution was ineligible for a whistleblower award where the SEC did not itself bring an enforcement action against the institution, but where other agencies obtained financial settlements in partial reliance on the information shared by the whistleblower. The SEC's whistleblower award program is authorized by 15 U.S.C. § 78u-6, which permits awards for "covered judicial or administrative action" and "related actions" resulting in sanctions over a specified amount. The court held that the SEC's determination that the whistleblower was ineligible for an award was based on a reasonable interpretation of § 78u-6 as authorizing awards only when the covered action was brought by the SEC itself, not another agency (*Hong v. SEC*).
- **Securities:** A divided Fifth Circuit held that amendments made in 2021 to 15 U.S.C. § 78u ratified the disgorgement-of-profits framework used by every circuit court of appeals prior to the Supreme Court's 2020 decision in *Liu v. SEC*. In the pre-*Liu* burden-shifting framework, the government had to demonstrate that the amount to be disgorged for a securities law violation reasonably approximated a defendant's unlawful gain, but

did not need to satisfy the more onerous requirement, adopted in *Liu*, of showing that a disgorgement award would meet the elements of an equitable restitutionary remedy. Because the Fifth Circuit interpreted the 2021 amendments as ratifying the pre-*Liu* framework and the amendment applied retroactively, the court affirmed the district court's judgment against the defendant, including disgorgement assessed according to that framework, without resolving how *Liu* might apply in other cases (*SEC v. Hallam*).

- **Trade:** In a matter involving the Export Control Reform Act of 2018 (ECRA), the D.C. Circuit affirmed a district court's denial of a preliminary injunction to plaintiffs restricted from receiving U.S. exports because of human-rights abuses. The Department of Commerce placed the plaintiffs on its so-called Entity List under ECRA because of their operations in China's Xinjiang Uyghur Autonomous Region. The plaintiffs challenged this action as *ultra vires*, arguing in part that the Secretary of Commerce lacked authority under 50 U.S.C. § 4813 to list entities for human rights reasons, and that the amendment of § 4813 in the proposed United States Innovation and Competition Act of 2021 supported their interpretation of the statute. The court disagreed and held that the plaintiffs were unlikely to succeed on the merits because § 4813(a)(16) authorizes the Secretary to rely on purposes beyond those specifically identified in § 4813(a)(2) (*Changji Esquel Textile Co. v. Raimondo*).

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