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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (August 15–August 21, 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:

- **Election Law:** The Court reinstituted a district court's preliminary injunction barring the Georgia Secretary of State from qualifying candidates for the 2022 election for the state's public service commission while a legal challenge to the at-large method of selecting commissioners is under adjudication. The district court preliminarily enjoined use of this method after concluding the plaintiffs were likely to succeed in their claim that it unlawfully dilutes the votes of Black citizens in violation of Section 2 of the Voting Rights Act of 1965. The Eleventh Circuit stayed the district court injunction pending appeal after applying a modified version of the framework the Supreme Court set forth in *Purcell v. Gonzalez*, which cautions against issuing orders that change the rules governing an election that is drawing near. In vacating the stay, the Supreme Court stated that the court of appeals erred by not applying the traditional framework used for analyzing a motion for an emergency stay pending appeal, as the Georgia Secretary of State had not

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advanced a *Purcell*-based argument and, in fact, had earlier stated that the timetable set by the district court for adjudicating the case would give the state enough time to respond to an unfavorable ruling and make necessary changes to the election process. The Supreme Court did not reach the case's underlying merits and stated that the Eleventh Circuit could reconsider whether a stay was appropriate applying the traditional factors instead of the *Purcell* framework (*Rose v. Raffensperger*).

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.

- **Bankruptcy:** The Sixth Circuit held that 11 U.S.C. § 330(a)(3), which covers professionals whose fees are paid by the bankruptcy estate, authorizes bankruptcy courts to consider the monetary results obtained by a professional in determining a fee award. The court reasoned that, although § 330 does not expressly include a "results obtained" factor, the statute instructs courts to consider "all relevant factors" when determining fee awards. Thus, the court concluded, the factors in § 330(a)(3) are not exhaustive (*In re Vill. Apothecary, Inc.*).
- **Civil Procedure:** The Eleventh Circuit declined to hear an interlocutory appeal of an order expanding the scope of a pre-existing receivership estate, an entity created in certain Securities and Exchange Commission enforcement actions. The court ruled that the order did not fall under the interlocutory appeals statute, 28 U.S.C. § 1292, because it neither appointed a receiver nor granted, denied, or modified an injunction. Had Congress wished to provide courts with appellate jurisdiction over orders expanding receiverships, the court reasoned, it would have done so in § 1292. (*SEC v. L.M.E. 2017 Family Trust*).
- **Consumer Protection:** The Fifth Circuit addressed the nexus between the Fair Debt Collection Practices Act (FDCPA) and a plaintiff's standing to sue in federal court. In accordance with the Supreme Court's decision in *TransUnion LLC v. Ramirez*, the court ruled that a plaintiff bringing a statutory claim for damages to redress a prior harm must allege a concrete injury in fact. The court rejected its prior pre-*TransUnion* holding that a plaintiff's exposure to a real risk of financial harm caused by an FDCPA violation satisfies the injury-in-fact requirement (*Perez v. McCreary, Veselka, Bragg & Allen, P.C.*).
- **Environmental Law:** The Third Circuit affirmed two district court orders that remanded to state court climate liability suits brought by Delaware and the City of Hoboken, NJ, against multinational oil companies. The complaints only alleged violations under state tort law, specifically, that the defendant companies' extraction of fossil fuels had worsened climate change. The panel agreed with the district courts that the federal statutes cited by the defendants did not provide federal courts with subject-matter jurisdiction over the complaints. The Third Circuit joins four other circuits to have reached similar decisions in state tort suits involving climate liability claims (*City of Hoboken v. Chevron, Corp.; Delaware v. BP America Inc.*).
- **Environmental Law:** Without reaching the merits, the Fifth Circuit vacated a district court's nationwide preliminary injunction that sought to lift the Biden Administration's "pause" on new oil and gas leases on public lands or in offshore waters. Soon after President Biden issued an executive order instructing the Department of the Interior (DOI) to pause new leases, several states brought suit challenging the order's lawfulness. The district court issued an injunction after concluding that the plaintiffs were likely to

succeed in their challenges under the Administrative Procedure Act (APA). The Fifth Circuit held it could not reach the merits of the government's appeal because the district court did not adequately define the nature of the final agency action it was enjoining—the executive order, a written policy outside the executive order, or an unwritten DOI policy. The court of appeals therefore remanded the case for further proceedings (*Louisiana v. Biden*).

- **Firearms:** The Fifth Circuit held that evidence the government proffered could not sustain a criminal defendant's conviction under the National Firearms Act (NFA) for illegally possessing an unregistered "destructive device." The defendant was found in possession of a bamboo device that the government alleged was similar to a pipe bomb, but the defendant claimed he intended to use the device lawfully to remove beaver dams. The NFA defines a destructive device to include "any explosive, incendiary, or poison gas . . . bomb," but excludes from coverage "any device which is neither designed nor redesigned for use as a weapon." The Fifth Circuit held that when it is unclear whether a device that has some social value or legal use falls under the NFA's definition of "destructive device," the government must present evidence of the defendant's criminal intent, or evidence the device could be used solely for illegal purposes, to sustain a conviction. The court found the government had not done so here and vacated the defendant's conviction (*United States v. Harbarger*).
- **Food & Drug:** A divided First Circuit held that a Maine law regulating medical marijuana dispensaries violated the "dormant" Commerce Clause by requiring officers and directors of those dispensaries to be Maine residents. The majority concluded that the residency requirement was impermissible because it regulated an interstate market in a facially protectionist manner favoring Maine residents, and was not narrowly tailored to advance a legitimate local purpose. The court rejected the defendants' claim that the dormant Commerce Clause did not apply because Congress eradicated the interstate market for marijuana in the Controlled Substances Act (CSA). The court concluded that an interstate market continued to exist after the CSA's enactment, and that subsequent legislation, including regular appropriations restrictions preventing the Department of Justice from interfering with state medical marijuana laws, reflected congressional recognition of an interstate market for medical marijuana that the Maine law impeded (*Northeast Patients Group v. United Cannabis Patients and Caregivers of Maine*).
- **Freedom of Information Act (FOIA):** The Second Circuit ruled that the Department of Justice (DOJ) and the Federal Bureau of Investigation properly withheld notes and memoranda from an investigation into persons associated with the Donald J. Trump 2016 presidential campaign under FOIA Exemption 5, which shields attorney work product. The court also rejected the appellant's narrowed request for documents detailing interviews with targets and subjects of the investigation under the same exemption. The court held that the possibility of materials being produced in criminal discovery has no bearing on whether those materials constitute work product under FOIA Exemption 5, which is coextensive with discovery rules in civil litigation (*Am. Oversight v. DOJ*).
- **FOIA:** The Sixth Circuit held in a divided opinion that the Drug Enforcement Administration and the DOJ properly withheld certain documents from a newspaper concerning a decision to investigate, but ultimately not charge, a state prosecutor with obstruction of justice. The court ruled that FOIA Exemption 7(c), which limits disclosure of records compiled for law enforcement purposes when their release could reasonably be expected to constitute an unwarranted invasion of privacy, covered the information sought. The court reasoned that release of the records would constitute such an invasion of privacy, as the newspaper did not establish an adequate public interest in revealing

government impropriety to outweigh the privacy interests of individuals mentioned in the documents (*Cincinnati Enquirer v. DOJ*).

- **FOIA:** The D.C. Circuit upheld a district court judgment that the DOJ improperly denied plaintiff group's FOIA request for the release of an agency memorandum prepared in response to a report issued by Special Counsel Robert S. Mueller III on Russian interference in the 2016 presidential election. The memo concluded that then-President Trump could not be indicted for obstruction of justice in connection with the Mueller investigation. The agency asserted the deliberative process privilege, which may exempt from FOIA's disclosure requirements records documenting an agency's internal deliberations in the course of formulating a government decision or policy. The D.C. Circuit upheld the district court's finding that the DOJ failed to adequately identify the relevant decisional process to which the memo was connected. The circuit court stated that the memo could not be characterized as informing the DOJ's decision not to indict President Trump, because the agency acknowledged in the litigation that it had never considered the possibility given the DOJ's long-standing position that a sitting President cannot be criminally prosecuted. The circuit court observed that while the agency asserted on appeal that the memo fell within the privilege because it advised the Attorney General in public messaging about the Mueller report, the agency had not properly made this claim to the district court. While acknowledging that the outcome of the case may have been different if the DOJ raised this argument earlier, the circuit court concluded that the case did not involve extraordinary circumstances that might warrant giving the agency another opportunity to justify withholding the records (*Citizens for Responsibility and Ethics in Washington v. DOJ*).
- **Immigration:** The Sixth Circuit held that the Board of Immigration Appeals did not err in concluding that an alien petitioner's conviction for exporting stolen vehicles constituted an "aggravated felony" under the Immigration and Nationality Act (INA), rendering the petitioner removable and subject to other adverse immigration consequences (*Tantchev v. Garland*).
- ***Immigration:** In a divided opinion, the Ninth Circuit reversed a Board of Immigration Appeals decision that the petitioner's state conviction for dissuading a witness from reporting a crime was "an offense relating to obstruction of justice" and thus qualified as an "aggravated felony" under the INA, rendering the alien removable and ineligible for many forms of relief from removal. The court adhered to its 2020 decision holding that "obstruction of justice" under the INA unambiguously requires a nexus to ongoing or pending proceedings. Several other circuit courts, however, have ruled that "obstruction of justice" is ambiguous (*Cordero-Garcia v. Garland*).
- **Immigration:** The Tenth Circuit held that a final order of removal does not trigger the "stop-time" rule under 8 U.S.C. § 1229b(d)(1), which renders certain aliens ineligible for cancellation of removal. Nonpermanent resident aliens may be eligible to have their removal cancelled and adjusted to lawful permanent resident status if, among other things, they have been continuously present in the United States for at least 10 years. The stop-time rule in § 1229b(d) provides that this period ends once an alien is served with a notice to appear (NTA) commencing removal proceedings or commits specified crimes. The Tenth Circuit held that § 1229b(d)(1) sets forth the exclusive means by which the stop-time rule is triggered, and that a final order of removal does not provide an extra-textual trigger. Although the petitioner was issued an NTA before receiving a final order, the Tenth Circuit held that it was defective and therefore did not trigger the stop-time rule. The court remanded the case for further proceedings on whether the petitioner could pursue relief (*Estrada-Cardona v. Garland*).

- **Indian Law:** The Seventh Circuit held that Wisconsin could not assess property taxes on lands within four Ojibwe Indian reservations based on tax immunity granted by an 1854 Treaty. Supreme Court precedent holds that states may not tax reservation lands absent congressional approval. The Seventh Circuit held that this preemption is restored when a tribal member reacquires land that had previously been transferred to non-Indians (*Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers*).
- **Intellectual Property:** The Federal Circuit rejected an argument that the categorical refusal of the Director of the U.S. Patent and Trademark Office (PTO) to revisit requests for its director to review Patent Trial and Appeal Board (PTAB) decisions not to initiate certain administrative patent challenges violates the Constitution's Appointments Clause. The court distinguished the case from the Supreme Court's 2021 decision in *United States v. Arthrex, Inc.*, which held that the Director must review the PTAB's final patentability decisions. Here, the court reasoned, Congress delegated to the Director authority to set policy on institution decisions, which are not final decisions. The court held that, in delegating authority over institution decisions to the PTAB, the Director acted within the bounds of the Appointments Clause (*In re Palo Alto Networks, Inc.*).
- **Labor & Employment:** The Fifth Circuit upheld a district court's vacatur of a Department of Labor (DOL) opinion advising the plaintiff company that a proposed health insurance plan for its limited partnerships would not qualify as a covered plan under the Employee Retirement Income Security Act (ERISA). The DOL issued the opinion under a regulation authorizing the agency to issue self-described "advisory opinions" that interpret and apply ERISA to specific factual situations, and that may be relied on by the requestor in some cases. The Fifth Circuit held that such advisory opinions are final agency action reviewable under the APA, because they represent a consummation of the agency's decisionmaking process and may affect the recipient's rights and obligations. Concluding that the opinion was reviewable, the court of appeals agreed with the lower court that the decision was arbitrary and capricious and affirmed the vacatur of the advisory opinion, but vacated the lower court's related injunction and remanded for further proceedings (*Data Mktg. Partnership, LP v. DOL*).
- **Labor & Employment:** In consolidated appeals, the Seventh Circuit upheld two decisions issuing declaratory relief and attorney's fees to a teacher under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2617. Addressing the scope of available relief, the court ruled that FMLA's text providing for "such equitable relief as may be appropriate" constituted an illustrative list of remedies that encompassed declaratory judgments, thus allowing for attorney's fees under the statute. The court analogized this FMLA text to the "other appropriate equitable relief" language in ERISA, which the court had interpreted before to allow declaratory relief. The court also reasoned that Congress referred to declaratory judgments as equitable in other statutes, and there is an "ordinary presumption that Congress uses similar terms consistently across statutes" (*Simon v. Coop. Educ. Serv. Agency #5*).
- **Speech:** The D.C. Circuit issued a divided opinion holding that a provision in the Administrative Office of the United States Courts (AO) code of conduct restricting employees' off-duty political speech violated the First Amendment's Free Speech Clause. The court acknowledged that the AO, as a government employer, had "unique interests" in regulating employee speech; however, it could not condition government employment on a "complete surrender" of First Amendment rights. The court provided three reasons for rejecting the AO's justifications of its ban. First, the AO had no evidence of employee political activity undermining the public's perception of judicial impartiality. Second, the staff members of the AO did not wield the same power as judges, so their political

activity would likely not result in accusations of judicial bias. Third, it was not "reasonably necessary" to impose the same limits on AO employees as judges (*Guffey v. Mauskopf*).

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