

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (August 29–September 4, 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.

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Decisions of the Supreme Court

The Supreme Court did not issue any opinions or grants of certiorari this week. The Supreme Court’s next term begins October 3, 2022.

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:** A divided Ninth Circuit held that a solvent company that declared bankruptcy to proactively address potential liabilities must pay interest to its unimpaired creditors at the contractual rate rather than a lower rate in the restructuring plan. The bankruptcy court and the district court decided that Ninth Circuit precedent and the

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Bankruptcy Code limited the creditors to recover interest at a lower federal judgment rate, [28 U.S.C. § 1961\(a\)](#), pursuant to the plan. The Ninth Circuit reversed, holding that the Bankruptcy Code did not abrogate the common law solvent debtor exception, and a solvent debtor must honor its contractual obligations to its unimpaired creditors by paying the previously agreed upon interest rates before the debtor's shareholders could reap a surplus from the bankruptcy estate (*In re PG&E Corp.*).

- **Bankruptcy:** The Eleventh Circuit ruled that debt held by a produce buyer acting as a trustee under the [Perishable Agricultural Commodities Act \(PACA\)](#) may be discharged in bankruptcy proceedings. Although [11 U.S.C. § 523\(a\)\(4\)](#) provides that discharge is unavailable for a debtor who engages in "fraud ... while acting in a fiduciary capacity," the circuit court held that a PACA trustee's duties are not sufficiently fiduciary for § 523(a)(4) to apply. The court noted that PACA does not require a trustee to segregate trust assets and refrain from using those assets for a non-trust purpose, which the court recognized as necessary for a trust to operate in a "fiduciary capacity" under § 523(a)(4) (*In re Forrest*).
- ***Commerce:** A divided Fifth Circuit held that a Texas law restricting the building, owning, or operating of electricity transmission lines to owners of existing utility facilities unconstitutionally discriminated against out-of-state businesses in violation of the "dormant" Commerce Clause. An out-of-state company challenged the law, which was enacted after it had been awarded the right to build new transmission lines in an area of Texas that is part of an interstate grid. The court reversed the district court's dismissals of the company's dormant Commerce Clause claims and instructed the lower court on remand to consider whether the state had no other means to advance a legitimate local purpose. In reaching this conclusion, the court added to a circuit split by joining the Eleventh and First Circuits and holding that a law can discriminate against interstate commerce even when most of the incumbent businesses that would benefit from the law are headquartered outside of the state (*NextEra Energy Cap. Holdings, Inc. v. Lake*).
- **Commerce:** The Eight Circuit held that a Minnesota law that regulates bullion transactions violates the dormant Commerce Clause by having the practical effect on commerce take place wholly outside the state. Here, the Minnesota law requires bullion dealers to register with the state in order to engage in covered transactions and maintain a surety bond with respect to those transactions. The court construed covered transactions to cover any bullion transaction that involved a Minnesota resident, regardless of whether those transactions took place entirely out of state. The court decided that the state's interest in requiring dealers to register and provide a surety bond before doing business in Minnesota did not justify the law's application to wholly out-of-state commerce (*Styczinski v. Arnold*).
- **Consumer Protection:** The Seventh Circuit upheld a Food and Drug Administration (FDA) order denying approval to a tobacco company to market an e-cigarette product. The [Family Smoking Prevention and Tobacco Control Act](#) requires manufacturers to receive approval from FDA before marketing new tobacco products by showing that the product would be appropriate for protecting the public health. Pursuant to regulations, FDA determines whether a new product is appropriate for protecting the public health by evaluating the risks and benefits to the population, including the likelihood that existing tobacco users will quit and the likelihood that those who do not currently use tobacco products will start. The Seventh Circuit held that FDA issued a reasoned marketing denial order consistent with the Act. (*Gripum, LLC v. FDA*).

- **Criminal Law & Procedure:** The Second Circuit rejected a constitutional challenge to the inclusion of marijuana in [Schedule I of the Controlled Substances Act \(CSA\)](#). The CSA sets forth statutory criteria for classifying Schedule I substances, including requiring a finding that a substance has no accepted medical use. Congress legislatively placed marijuana in Schedule I when it enacted the CSA, subjecting the substance to the most stringent CSA controls. The defendants in this case were charged under the CSA for distributing marijuana, and they argued that the classification of marijuana under Schedule I violates their Fifth Amendment due process and equal protection rights because there is no rational basis for finding that marijuana has no accepted medical use. The Second Circuit’s rational basis review did not consider whether Congress’s placement of marijuana in Schedule I properly applied the statutory scheduling factors, but instead asked whether there was any conceivable basis for Congress to include marijuana in the schedule. The court rejected defendants’ arguments, holding that, even if marijuana’s Schedule I classification might not survive an administrative petition for rescheduling because it fails to meet the CSA’s enumerated criteria, there were numerous public health and safety grounds that could conceivably support Congress’s decision to place marijuana in the strictest schedule ([United States v. Green](#)).
- ***Criminal Law & Procedure:** The Third Circuit held, when deciding whether a state offense qualifies as a predicate offense under the [Armed Career Criminal Act \(ACCA\)](#), that a court must look at the federal law in effect *at the time of commission* of the defendant’s federal offense to determine whether a state crime qualifies as a “serious drug offense” under [18 U.S.C. § 924\(e\)\(1\)](#). A state crime may not qualify as a “serious drug offense” and thus may not serve as an ACCA predicate if the state law governing a particular offense criminalizes more conduct than its federal counterpart. Adding to a circuit split, the Third Circuit rejected the position that the federal law in effect *when the defendant was sentenced* is the relevant authority in determining whether a crime qualifies as an ACCA predicate offense ([United States v. Brown](#)).
- **Criminal Law & Procedure:** Sitting en banc, a divided Eighth Circuit held that Missouri’s parole process for juvenile offenders sentenced to life imprisonment does not violate the Eighth Amendment’s proscription on cruel and unusual punishment. In response to the Supreme Court’s decision in [Miller v. Alabama](#) that the Constitution forbids states from imposing life sentences without parole for juvenile offenders, the Missouri legislature created a process for individuals who had been sentenced to mandatory life imprisonment as juveniles to petition for parole. Rejecting Eighth and Fourteenth Amendment challenges to Missouri’s parole process, the court held the requirement that the state allow some meaningful opportunity for release for juvenile offenders was satisfied, reversed the judgment of the district court, and invalidated an injunction requiring Missouri to implement a remedial plan ([Brown v. Precythe](#)).
- **Criminal Law & Procedure:** The Eighth Circuit reversed a criminal defendant’s conviction for cyberstalking under [18 U.S.C. § 2261A\(2\)\(B\)](#) for sending a series of emails to a state political candidate. The court concluded that the statute’s mens rea element, requiring that a defendant act with the intent to “harass” or “intimidate,” should be construed narrowly so as not to apply to speech protected by the First Amendment. The court determined that such acts would cover criminal harassment involving a true threat where the speaker intends to place the victim in fear of bodily harm or death; speech integral to proscribable criminal conduct; or other speech unprotected by the First Amendment (e.g., defamatory speech or obscenity). The panel concluded that the evidence did not demonstrate that the defendant’s conduct fell under any of these categories ([United States v. Sryniawski](#)).

- **Election Law:** A divided Eighth Circuit reversed a lower court judgment that granted a preliminary injunction against a provision of the Nebraska constitution setting forth signature requirements for ballot initiatives. The state constitution requires specified percentages of registered voters, distributed among two-fifths of the state's counties, to sign a ballot petition in order for a proposed statute or constitutional amendment to be placed on the ballot. The majority held that the lower court erred in deciding that plaintiffs were likely to succeed in their argument that this distribution requirement violated the Equal Protection Clause by devaluing the signature of voters from more populous counties relative to the signatures of less populous counties. The majority determined that because the state law did not draw a suspect classification or restrict a fundamental right, rational basis review applies. Here, the court concluded that the state government identified a number of legitimate interests served by the signature distribution requirement, including to weed out initiatives with a small but concerted support base. The majority also found the balance of equities favored lifting the injunction while litigation in the case continued (*Eggers v. Evnen*).
- **False Claims Act:** The D.C. Circuit held that a company settling a claim brought by the United States for defrauding the government under the [False Claims Act](#) (FCA) receives a *pro tanto*, or dollar for dollar, credit against its liability equal to previous settlements by joint tortfeasors. When a joint tortfeasor settles, the settlement generally counts as a credit against a non-settling party's potential liability. The FCA, however, does not provide a settlement offset rule for calculating a settlement credit. Establishing a common law rule, the D.C. Circuit rejected a proportionate share approach to calculating settlement credits under the FCA and held that a company should receive a *pro tanto* credit instead (*United States v. Honeywell Int'l Inc.*).
- **Immigration:** The Ninth Circuit joined the Eighth Circuit in holding that a burden-shifting framework used in immigration proceedings to determine an alien's eligibility for withholding of removal conflicted with governing statute. Under [8 U.S.C. § 1231\(b\)\(3\)\(B\)\(iii\)](#), an alien is ineligible for withholding of removal to a country where his or her life or freedom would be threatened if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States." The Ninth Circuit held that to apply this bar, there must be evidence supporting a finding of probable cause that a covered crime was committed. The court further held that the Board of Immigration Appeals violated this standard when it applied the burden-shifting framework of [8 C.F.R. § 1240.8\(d\)](#) to the petitioner's claim for relief, under which the government needed only proffer "some evidence" that an excludable crime was committed, at which point the burden shifts and petitioner bears the burden of proving by a preponderance of evidence that it did not (*Gonzalez-Castillo v. Garland*).
- **Labor & Employment:** A divided Fourth Circuit upheld a district court's ruling that it lacked jurisdiction over a federal employee's "mixed case" against his employer, in which the employee alleged he was involuntarily transferred and wrongfully denied promotion because of his whistleblowing activities and on account of his race and gender. The majority held that because the plaintiff's whistleblower claim was not directly appealable to the Merit Systems Protection Board, and first needed to undergo an agency review process, the plaintiff did not satisfy the statutory criteria set forth in [provisions of the Civil Service Reform Act](#) to bundle his whistleblower and discrimination claims together. Because the plaintiff was not entitled to this streamlined process, the majority held that he would need to pursue his whistleblower and discrimination claims through the separate processes available for each (*Zachariasiewicz v. Dep't of Justice*).

- **Labor & Employment:** The Eighth Circuit, joining other circuits, held that the [Employee Retirement Income Security Act \(ERISA\)](#) does not prevent an estate representative from suing a recipient, who the deceased had intended to remove as a beneficiary, for benefits from a retirement account after the distribution of funds has taken place. The Eighth Circuit agreed with the district court that ERISA does not preempt the post-distribution claims against the recipient, noting that every circuit to address the question reached the same conclusion. The court also ruled in favor of the representative on breach of contract and unjust enrichment claims and reversed the district court's grant of summary judgment on these grounds (*Gelschus v. Hogen*).
- **National Security:** The D.C. Circuit held it lacked jurisdiction to hear a Guantanamo detainee's petition for a writ of mandamus requesting the court bar the use of statements obtained by torture in the detainee's prosecution before a military commission. Here, the government had already withdrawn statements obtained through the use of torture from consideration by the military commission, and had pledged to the D.C. Circuit it would not use such statements in later proceedings. In light of the government's actions, the court dismissed the petition on mootness, ripeness, and standing grounds, and also decided that the detainee failed to allege a claim for which mandamus could be granted (*In re Al-Nashiri*).
- **Religion:** A divided Ninth Circuit held that a school district violated the First Amendment when it selectively enforced its non-discrimination policy by revoking a religious group's status as an official student club. The group required its student leaders to take a pledge stating, among other things, that "marriage is exclusively the union of one man and one woman." The school district decided that the requirement violated its policies that district programs be free from discrimination based on sexual orientation, and stripped the club of its official approval and the accompanying organizational benefits. The court held that the school district violated the Free Exercise Clause when it enforced its anti-discrimination policies against the religious group but not against other student groups with facially discriminatory membership criteria. The court reversed the lower court's denial of a preliminary injunction to reinstate the club's approval status (*Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*).
- **Torts:** The Ninth Circuit held that the district court erred in dismissing a federal employee plaintiff's malicious prosecution claim against the United States and individual officials under the [Federal Tort Claims Act](#). The circuit court held that the plaintiffs' claims did not fall under the umbrella of 28 U.S.C. § 2680(a), which provides that the United States does not waive its sovereign immunity for claims related to discretionary functions performed by federal agencies and employees. Courts have recognized that to fall under this exception, an action must be both discretionary and grounded in social, economic, or political policy. Applying this framework, the Ninth Circuit held that the discretionary function exception does not apply where, as here, the plaintiff alleges that an investigative or law enforcement official fabricated evidence, tampered with witnesses, lied under oath, or offered false testimony (*Myles v. United States*).

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