

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Sept. 5–Sept. 11, 2022)

September 12, 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.

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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 is set to begin on 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:** The Fifth Circuit held that a bankruptcy court exceeded its authority in approving a bankruptcy plan that exculpated certain non-debtor third parties from post-petition lawsuits not arising from gross negligence, bad faith, or willful or criminal misconduct. Third-party releases are limited by [11 U.S.C. § 524](#), which states that the “discharge of a debt of the debtor does not affect the liability of any other entity on, or the

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property of any other entity for, such debt.” Acknowledging a circuit split over § 524’s effect and reach, the court reaffirmed its prior holding that the statute categorically bars third-party exculpations absent express authority in another Bankruptcy Code provision. The court vacated the exculpatory order as to the non-debtors who had no such express authority for exculpation (*NexPoint v. Highland Capital Mgmt.*).

- **Civil Rights:** The Ninth Circuit held that a school’s nonrenewal of an employment contract may constitute an adverse action in a [Title IX](#) retaliation claim. Here, the plaintiff alleged that the college where he coached failed to renew his contract because of complaints he made about gender equity issues in the athletic department. The district court had held that the nonrenewal was not an adverse action on the rationale that an employee is not legally entitled to a contract renewal. Reversing, the Ninth Circuit held that nonrenewal may be an adverse action when done for retaliatory reasons. Because contract nonrenewal could deter a reasonable employee from reporting sex discrimination, the court held that the plaintiff established a prima facie case that he suffered an adverse action. The circuit court remanded the case to the lower court to consider the school’s alternative arguments as to why judgment should be granted in its favor (*MacIntyre v. Carroll Coll.*).
- **Consumer Protection:** The Eighth Circuit held that a non-consumer lacks standing under the third-party communications provision of the Fair Debt Collection Practices Act (FDCPA), [15 U.S.C. § 1692c\(b\)](#), to bring a cause of action against a debt collector. The FDCPA prohibits a debt collector from contacting a third party about the collection of a debt without the consumer’s prior consent. Joining other circuits, the court affirmed the district court’s holding that, unlike other FDCPA provisions that protect third parties, § 1692c(b)’s consumer consent requirement limits its protection to a consumer-debtor (*Magdy v. I.C. System, Inc.*).
- **\*Criminal Law & Procedure:** The D.C. Circuit held that a sentencing court must orally pronounce the discretionary conditions of a defendant’s supervised release. The district court sentenced a defendant without pronouncing most of these conditions, including 16 conditions that [18 U.S.C. § 3583](#) leaves to the court’s discretion. A district court need not orally pronounce mandatory sentencing conditions, which follow from the imposition of supervised release. Adding to a circuit split, the D.C. Circuit held that discretionary conditions recommended by the Sentencing Guidelines are not compelled by law so the district court erred by not pronouncing them at sentencing. The court remanded for the district court to conform the later written judgment, which contained the discretionary release conditions, to the orally pronounced judgment (*United States v. Matthews*).
- **Criminal Law & Procedure:** A divided Third Circuit held that the [Mandatory Victims Restitution Act \(MVRA\)](#), which amended prior law to extend the time that a criminal defendant may be made to pay restitution to his or her victims, did not apply to defendants whose offenses were committed before the MVRA’s enactment. The majority held that the retroactive application of the MVRA to such persons would violate the Constitution’s Ex Post Facto Clause (*United States v. Norwood*).
- **\*Criminal Law & Procedure:** A divided Seventh Circuit widened a circuit split over the meaning of [18 U.S.C. § 3553\(f\)](#), the “safety valve” exception for mandatory minimum sentences available for certain drug trafficking and unlawful possession offenses. Section 3553(f), as amended by the First Step Act, provides that the exception may apply to a person convicted of covered offenses who “does not have—(A) more than 4 criminal history points . . . ; (B) a prior 3-point offense . . . ; and (C) a prior 2-point offense.” The Seventh Circuit held that the phrase “does not have—,” which serves to modify each

listed requirement, and the word “and” between subsections (B) and (C), signify that the conditions should be read distributively, so that defendants are ineligible if they fail *any* of the three conditions. (The Eighth Circuit recently reached a similar conclusion.) The court rejected the Ninth Circuit’s interpretation under which defendants are eligible so long as they do not meet *all* three conditions (*United States v. Pace*).

- **\*Criminal Law & Procedure:** Joining five of the six other circuits to consider the issue, the Tenth Circuit held that a federal criminal defendant’s prior state conviction is not categorically a “serious drug offense” under the [Armed Career Criminal Act \(ACCA\)](#), which would give rise to a sentence enhancement if the state offense included substances that were not federally controlled at the time of the federal offense. Here, the federal criminal defendant had been convicted under an Oklahoma drug law that covered hemp. While hemp was a controlled substance under federal law at the time of the state law conviction, it was not a controlled substance at the time of the federal offense. (There is a circuit split as to whether the appropriate comparison is to the federal schedule at the time of the commission of the federal offense or at the time of sentencing for the offense. The Tenth Circuit decided it need not address this issue because the federal schedule excluded hemp at both times.) The court remanded the case to the trial court for resentencing without the ACCA enhancement (*United States v. Williams*).
- **Energy:** The Fourth Circuit affirmed the dismissal of an [Administrative Procedure Act \(APA\)](#) challenge to the Tennessee Valley Authority’s (TVA’s) change in electricity rates, holding that TVA’s ratemaking authority is committed to agency discretion and therefore not subject to judicial review. [5 U.S.C. § 701\(a\)\(2\)](#) precludes judicial review of agency action committed to agency discretion by law, which the Fourth Circuit interprets as a two-part inquiry: whether courts have traditionally treated the agency action as committed to agency discretion and, if so, whether Congress limited that discretion by setting guidelines or otherwise providing a limit in the relevant statute. Holding that ratemaking has traditionally been committed to TVA’s discretion and that Congress did not set guidelines or limits in TVA’s statute, the court dismissed the APA challenge and all other claims on other grounds (*Holbrook v. TVA*).
- **Immigration:** The Ninth Circuit held that an alien subject to mandatory detention under [8 U.S.C. § 1226\(c\)](#) is not entitled to a bond hearing upon appealing an administrative removal decision to federal court. Earlier Ninth Circuit decisions recognized that if the immigration case of an alien subject to mandatory detention reaches federal court, and that court issues a stay of removal pending its review, the government’s authority to hold the alien shifts to the discretionary detention framework of [8 U.S.C. § 1226\(a\)](#), which affords the alien the right to a bond hearing that could lead to his or her release from custody. Here, the Ninth Circuit concluded that aspects of these earlier decisions were irreconcilable with the Supreme Court’s 2018 decision in *Jennings v. Rodriguez*, which held that aliens subject to mandatory detention under § 1226(c) remain subject to that framework throughout the pendency of removal proceedings. The panel did not reach the petitioner’s constitutional argument that she was entitled to habeas corpus relief from her prolonged detention and remanded to the district court to consider this claim in the first instance (*Hernandez Avilez v. Garland*).
- **Indian Law:** A Ninth Circuit panel held that an [1891 law](#) establishing the Metlakatla Indian Community’s reservation preserved a non-exclusive right of Community members to fish in off-reservation waters where they had traditionally fished, including for commercial purposes, notwithstanding an Alaska statute that limited commercial fishing in some of these waters. The court found support for this conclusion from (1) a 1918 [Supreme Court decision](#) interpreting the 1891 law’s application to off-reservation fishing;

(2) the circumstances surrounding the statute's enactment, which sought to preserve the Community's way of life, including its use of fishing for economic support; and  
(3) application of a Federal Indian Law canon of construction under which federal statutes and treaties concerning the rights of federally recognized tribes are construed liberally in their favor (*Metlakatla Indian Community v. Dunleavy*).

- **Separation of Powers:** The Ninth Circuit held that a claimant for Social Security disability benefits was entitled to a new hearing before a different administrative law judge (ALJ) because the challenged decision was tainted by an Appointments Clause violation. Here, a petitioner argued that it was improper for the same Social Security Administration ALJ who denied petitioner's original benefits claim, and whose appointment violated the Appointments Clause, to rehear the claim following subsequent ratification of the ALJ's appointment by the Social Security Commissioner. Because the same ALJ issued both decisions, the petitioner did not receive an adjudication untainted by an Appointments Clause violation (*Cody v. Kijakazi*).
- **Speech:** The Ninth Circuit held that Washington's licensing scheme, which punishes health care providers for practicing conversion therapy on minors, does not violate the First Amendment. The requirement was challenged by a therapist claiming that the licensing requirement violated the free speech rights of health care providers, among other things. Relying on a case upholding a similar law in California, the court rejected the argument that the Supreme Court's decision in *NIFLA v. Becerra* abrogated prior circuit precedent, holding that Washington's law satisfied rational basis review and affirming the district court's dismissal of the free speech challenge and all other challenges (*Tingley v. Ferguson*).
- **Trade:** The Federal Circuit held that importers seeking refunds for duties deposited with U.S. Customs and Border Protection (Customs) cannot invoke the U.S. Court of International Trade's (Trade Court's) residual jurisdiction under 28 U.S.C. § 1581(i) when they failed to file a timely complaint under § 1581(a), under which an adequate remedy would have been available. Section 1581(a) grants the Trade Court exclusive jurisdiction over any civil action commenced to contest a Customs classification decision. Having failed to file a timely complaint under subsection (a) of § 1581, the importers seeking the refund sought jurisdiction under subsection (i). Section 1581(i), a catchall provision, grants the Trade Court jurisdiction over civil actions against U.S. agencies over tariffs, duties, and fees. The Federal Circuit held that because a remedy would have been available under § 1581(a) had the importers timely protested Customs' classification decisions, the Trade Court's residual jurisdiction under § 1581(i) cannot be invoked unless § 1581(a) would have been manifestly inadequate. Deciding that the importers' failure to invoke an available remedy within the time frame prescribed did not render the remedy manifestly inadequate, the court affirmed the Trade Court's dismissals (*ARP Materials, Inc. v. United States*).

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