

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Oct. 17–Oct. 23, 2022)

October 24, 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 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 did not issue any opinions or agree to hear any new cases. On October 20, 2022, in her capacity as the [Circuit Justice](#) for the Seventh Circuit, Justice Amy Coney Barrett denied an [emergency application](#) to enjoin implementation of the Biden Administration’s student loan cancellation program pending the Seventh Circuit’s ruling on an appeal challenging that program. A district court within the Seventh Circuit had dismissed a plaintiff’s claim challenging the program, finding the plaintiff lacked standing to sue, without ruling on the underlying merits. The plaintiff’s appeal remains before the Seventh Circuit (*Brown Cnty Taxpayers Ass’n v. Biden*). As discussed below, the Eighth Circuit issued an administrative stay in a different case challenging the program.

## 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.

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- **\*Communications:** The Ninth Circuit affirmed a district court’s refusal to decertify a class suit against a company for violating the Telephone Consumer Protection Act (TCPA) through its unsolicited phone calls to plaintiffs, but remanded for consideration of whether the \$925 million jury verdict—a result of applying the TCPA’s \$500 statutory penalty per violation to more than 1.8 million calls—was excessive under the Fifth Amendment’s Due Process Clause. The Ninth Circuit also addressed whether the plaintiffs had constitutional standing to sue, an issue that the defendant had not raised before the district court. Joining most appellate courts to have considered the issue, the Ninth Circuit held that the receipt of unsolicited telephone calls in violation of the TCPA is a concrete injury satisfying constitutional standing requirements. The Ninth Circuit decided, however, that in denying the defendant’s motion to challenging the damage award, the trial court did not properly consider the constitutionality of the statutory damages award in the aggregate, and remanded for further proceedings (*Wakefield v. Visualus, Inc.*).
- **Criminal Law & Procedure:** In an appeal of the denial of a motion for a sentence reduction, the Fourth Circuit affirmed the district court’s holding that 21 U.S.C. § 848(e)(1)(A), which criminalizes drug-related murder, is not a covered offense for purposes of the First Step Act. The First Step Act allows district courts to apply the Fair Sentencing Act, which reduced the statutory penalties for certain crack offenses, retroactively to sentences for certain crimes committed before the Fair Sentencing Act’s enactment. The court ruled that because § 848(e)(1)(A)’s penalties were not modified by the Fair Sentencing Act, the defendants were not entitled to a sentence reduction under the First Step Act (*United States v. Roane*).
- **\*Criminal Law & Procedure:** Affirming a criminal defendant’s conviction under the federal bank fraud statute, the Sixth Circuit clarified its understanding of the mental state required to support a conviction under 18 U.S.C. § 1344(1) for “knowingly” executing or attempting to execute a scheme to defraud a financial institution. The court rejected earlier circuit jurisprudence, along with caselaw from the First Circuit, which interpreted § 1344(1) as requiring an offender to have purposely sought to deprive a bank of funds. Instead, citing *intervening Supreme Court precedent*, the circuit court held that for liability to attach under § 1344(1), a defendant must know that his or her actions are likely to deprive the bank of a property interest, regardless of whether that deprivation is a purpose behind the defendant’s conduct (*United States v. Skouteris*).
- **Education:** The Eighth Circuit issued an administrative stay that temporarily halts the Biden Administration from discharging student loan debt under its student loan cancellation plan while the court considers a request by six states that the plan be enjoined from going into effect pending appeal. A federal district court had held that the states did not satisfy constitutional standing requirements to bring suit, and the court dismissed their case without reaching the merits of their arguments that the statute does not authorize the cancellation plan. The Eighth Circuit’s administrative stay is not a merits ruling. Instead, it serves as a brief stop-gap to ensure the status quo remains in place while the court considers the states’ motion (*Nebraska v. Biden*). (As noted above, on October 20, 2022, Justice Barrett denied an emergency application to stay implementation of the program in a separate challenge pending before the Seventh Circuit.)
- **Energy:** The Fifth Circuit upheld a decision by the Federal Energy Regulatory Commission (FERC) to impose civil penalties against multiple British Petroleum-affiliated entities for manipulating the natural gas market in the wake of a hurricane. Even so, the court directed the agency to reassess the penalties imposed, concluding that

certain challenged transactions were outside FERC's jurisdiction. The court held that the 2005 amendments to the [Natural Gas Act](#), barring manipulation by entities "in connection with" a transaction subject to FERC's jurisdiction, did not alter the NGA's clear delineation between interstate transactions, over which FERC has jurisdiction, and intrastate transactions, over which it does not. The court ruled that the NGA "clearly forbids FERC from exercising jurisdiction" over those challenged transactions that were intrastate in nature, even if they helped manipulate the price of interstate gas governed by the NGA (*BP America, Inc. v. FERC*).

- **Environmental Law:** The Eighth Circuit affirmed a lower court's dismissal of a suit brought by thirteen states over [action taken](#) by the Biden Administration to ensure that agencies use estimates of the social cost of greenhouse gas emissions (SC-GHG) when monetizing the costs and benefits of future agency actions. The panel agreed that the states did not satisfy constitutional standing requirements and the case was not ripe for adjudication where the challenged conduct involved only the publication of interim SC-GHG estimates, but where executive agencies and officials had not yet proposed actions in reliance on those estimates (*Missouri v. Biden*).
- **Separation of Powers:** The Fifth Circuit vacated the Consumer Financial Protection Bureau's 2017 [Payday Lending Rule](#)—intended to regulate payday, vehicle title, and certain high-cost installment loans—holding that Congress unconstitutionally ceded its Appropriations Clause powers to the Bureau in violation of the Constitution's separation of powers. Unlike other executive agencies funded via periodic congressional appropriations, the Bureau's funding comes directly from the Federal Reserve through a mechanism the court termed "anomalous" and "double-insulated" from congressional oversight. Although the Rule was first promulgated by the Bureau's Director, who the Supreme Court held was subject to unconstitutional, statutory removal protections in its 2020 decision in *Seila Law LLC v. CFPB*, the Fifth Circuit declined to vacate the Rule on this ground because the plaintiffs had not shown they were harmed by this constitutional defect (*Cnty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*).
- **Separation of Powers:** In a brief order, the Eleventh Circuit denied a U.S. Senator's request to stay a district court order requiring him to testify on certain matters as part of a Georgia grand jury investigation into activities surrounding the state's certification of the 2020 presidential election. The district court had quashed the subpoena to the extent that it required the Senator to testify regarding phone calls made to Georgia election officials about the certification, after concluding the Senator's communications were part of an informal legislative investigation protected by the Speech or Debate Clause. However, the district court declined to quash the subpoena with regard to three activities it did not deem to be legislative: (1) the Senator's communications and coordination with former President Trump's presidential campaign about its post-election efforts in Georgia; (2) the Senator's public statements about the 2020 election; and (3) the Senator's alleged efforts to exhort Georgia election officials to take certain actions. In declining to stay the district court order, the Eleventh Circuit observed that the Senator could still assert his Speech or Debate Clause privilege in response to specific questions related to these three activities where they implicated his fact-finding investigation into Georgia's election certification (*Fulton Cnty, Special Purpose Grand Jury v. Graham*). (The Senator subsequently sought an emergency stay of the order by the Supreme Court pending appeal, and on October 24, 2022—the day after the week covered by this *Congressional Court Watcher* edition—Justice Clarence Thomas in his capacity as the Circuit Justice for the Eleventh Circuit [issued](#) an administrative stay of the district court's order pending further action by the Supreme Court.)

- **Transportation:** The Sixth Circuit affirmed a district court’s dismissal of an Administrative Procedure Act (APA) challenge to operating procedures governing enforcement proceedings by the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA). Apart from bringing the APA claim in district court, in the Sixth Circuit, the plaintiff separately challenged the civil penalty order entered in the underlying PHMSA enforcement proceedings. The Sixth Circuit expressly has exclusive jurisdiction over such a challenge under a provision of the Hazardous Materials Transportation Act, [49 U.S.C. § 5127\(c\)](#), but it does not expressly have exclusive jurisdiction over the agency’s rulemaking authority generally. The Sixth Circuit majority held that the plaintiff’s APA claim was inescapably intertwined with its challenge to the civil penalty order, and therefore also fell under the scope of § 5127(c). The majority observed that the [Supreme Court recently agreed](#) to resolve a circuit split over a similar exclusive-jurisdiction statute applicable in the securities context, but found challenges like those before the district court (relating to rulemaking) distinguishable from the challenges (relating to the Appointments Clause of the Constitution) underlying the cases that the Supreme Court accepted for review (*Polyweave Packaging, Inc. v. Buttigieg*).
- **Torts:** The Ninth Circuit affirmed in part and reversed in part a trial court’s judgment for Planned Parenthood against defendants who had used fake driver’s licenses and other subterfuge to infiltrate plaintiffs’ facilities and surreptitiously record organization members and activities, which the defendants’ released in edited form over the internet. The circuit court held that the First Amendment did not provide a defense to the awarding of compensatory damages against the defendants (who characterized their activities as journalistic) for violating laws of general applicability. Even so, the circuit court reversed the jury verdict and vacated the related damage award against the defendants for violating a provision of the Federal Wiretap Tap Act, [18 U.S.C. § 2511\(2\)\(d\)](#), applicable to the interception of communications for the purpose of “committing any criminal or tortious act in violation” of federal or state law. The panel held that the “criminal or tortious” purpose necessary for liability to attach under § 2511(2)(d) must be separate and independent from the purpose of the recording itself, and that was not the case here (*Planned Parenthood Fed. of America, Inc. v. Newman*).

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