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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Dec. 19-Dec. 27, 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 did not issue any opinions or agree to hear any new cases but took action in a case concerning the executive branch's "Title 42" policy, which allows immigration authorities to summarily expel certain aliens arriving from Canada or Mexico (regardless of their country of origin) to prevent the transmission of the Coronavirus Disease 2019 (COVID-19).

In November 2022, a D.C. federal district court ruled the Title 42 policy was unlawful and directed the Biden Administration to end the policy. When the D.C. Circuit rejected several states' request to intervene in the case to defend the policy's lawfulness, those states asked the Supreme Court to stay the district court order and review the case. On December 19, 2022, Chief Justice Roberts issued an administrative stay to give the Court time to consider the emergency application.

On December 27, 2022, by a 5-4 vote, the Court granted certiorari to consider whether the states may intervene, and the Court stayed implementation of the district court order pending the Court's judgment. The Court indicated that it is not reviewing the merits of the district court's underlying decision on the

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Title 42 policy's lawfulness, but only the states' ability to intervene. The Supreme Court's action will be discussed further in the next edition of the *Congressional Court Watcher* (*Arizona v. Mayorkas*).

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 nonuniform application of the law among the circuits.

- **Arbitration:** The Ninth Circuit joined a number of other federal courts of appeals in concluding that defenses available under the Federal Arbitration Act (FAA) are also available in certain proceedings governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which applies to arbitration awards involving at least one foreign party. The court held that Article V(1)(e) of the Convention, which provides a defense to the confirmation of an arbitral award that "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made," incorporates the defenses of domestic arbitral law. Applying that principle, the court held that it could vacate an award under the relevant provision of the FAA only if the award shows a "manifest disregard of law or is completely irrational." Against that standard, the court upheld the award. Although the court disclaimed the existence of a circuit split, a panel of the Eleventh Circuit reached a different conclusion that is now pending rehearing before the Eleventh Circuit sitting en banc (*Hayday Farms, Inc. v. FeeDx Holdings, Inc.*).
- **Criminal Law & Procedure:** The Fourth Circuit held that, under the Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences, U.S. courts retain jurisdiction to revoke the supervised release of a defendant who was transferred from a U.S. prison to a Mexican prison, released in Mexico, and then reentered the United States. The treaty provides that when a prisoner is transferred between the United States and Mexico, the laws of the receiving state (here, Mexico) govern the completion of the defendant's sentence, including the terms of supervised release. In potential tension with the Department of Justice's interpretation of this provision, the Fourth Circuit held that U.S. courts retain jurisdiction to enforce the sentence they imposed if the defendant returns to the United States and violates the conditions of his U.S. sentence (*United States v. Rios*).
- ***Criminal Law & Procedure:** A divided Sixth Circuit joined a circuit split over the meaning of the "safety valve" provision of the First Step Act, 18 U.S.C. § 3553(f), which allows a court to depart downward from a mandatory minimum sentence if a criminal defendant does not have, among other things, "more than 4 criminal history points ... a prior 3-point offense, ... and a prior 2-point violent offense." The court agreed with the Fifth, Seventh, and Eighth Circuits in holding that a defendant who satisfies any one of the three conditions is disqualified from safety-valve relief. The Ninth and Eleventh Circuits have held, however, that a defendant is only ineligible for safety-valve relief if the defendant satisfies all three conditions (*United States v. Haynes*).
- ***Criminal Law & Procedure:** A divided en banc Sixth Circuit affirmed a district court's denial of compassionate release under 18 U.S.C. § 3582(c)(1)(A), ruling that a nonretroactive change in sentencing law was not an extraordinary and compelling reason for a sentence reduction. The court reasoned that, while the First Step Act altered the process for filing compassionate release motions, it did not change the substantive requirements for obtaining compassionate release. This decision contributes to a circuit

split over the discretion afforded to district courts when ruling on compassionate release motions (*United States v. McCall*).

- ***Criminal Law & Procedure:** The Seventh Circuit maintained its position in a circuit split over the meaning of "controlled substance" in the U.S. Sentencing Guidelines, holding that a controlled substance" in the guidelines is not limited to its definition in the Controlled Substances Act (CSA). The court observed that the U.S. Sentencing Commission had yet to signal whether it intended to incorporate the CSA definition into the guidelines (*United States v. Jones*).
- **Criminal Law & Procedure:** Joining other circuits, the Eighth Circuit held that 18 U.S.C. § 3599, which permits federal courts to authorize funding for legal representation and reasonably necessary services to an indigent defendant facing the death penalty, does not provide federal courts with jurisdiction to oversee funded services. The court vacated a district court's order directing state officials to comply with a defendant's request to facilitate medical testing in support of his clemency petition (*Tisius v. Vangergriff*).
- **Criminal Law and Procedure:** Examining the forced labor statute, which prohibits knowingly providing or obtaining labor through force, threat of force, physical restraint, or abuse of legal process, the Ninth Circuit held that these methods are factual means by which a crime is committed, rather than legal elements of the crime. (Juries must unanimously convict criminal defendants of each element of a crime, but they need not be unanimous on the factual means by which a defendant's conduct satisfies each element.) The court held that a jury therefore need not be unanimous as to which factual means of forced labor the defendant used. The Ninth Circuit relied on the plain language of the forced labor statute and its previous interpretation of the related sex trafficking statute (*United States v. Barai*).
- **Criminal Law & Procedure:** The Ninth Circuit joined multiple federal courts of appeals in recognizing that a conviction under 18 U.S.C. § 1958(a) for soliciting the use of facilities of commerce with the intent to commit murder is categorically not a "crime of violence" punishable under 18 U.S.C. § 373(a), a federal solicitation statute. This is because § 1958(a) does not require that a defendant enter into a murder-for-hire agreement, that the defendant carry out or otherwise attempt to accomplish his or her criminal intent, or that the contemplated murder be attempted or accomplished by another person. The Ninth Circuit did agree with other circuits, however, in holding that 18 U.S.C. § 844(d), which prohibits the transportation of an explosive with knowledge or intent to kill, injure, or intimidate, is a crime of violence under § 373(a) (*United States v. Linehan*).
- **Environmental Law:** The Ninth Circuit granted in part and denied in part petitions for review challenging the Environmental Protection Agency's (EPA's) 2019 decision to amend the registration of the pesticide sulfoxaflor to remove conditions from a 2016 registration that limited its use. The court held that the EPA violated the Endangered Species Act's consultation requirements by failing to determine whether sulfoxaflor may affect endangered or threatened species or their designated critical habitats. The court also held that the EPA had not satisfied the notice-and-comment provisions of the Federal Insecticide, Fungicide, and Rodenticide Act because it failed to seek the public's input on the amended registration. The court remanded the decision to the EPA to address the statutory deficiencies, but the majority declined to vacate the amended registration while EPA reconsiders its decision, citing concerns that vacatur may cause more harm to the environment and disrupt the agricultural industry (*Center for Food Safety v. Regan*).

- **Environmental Law:** The D.C. Circuit vacated a dam license issued by the Federal Energy Regulatory Commission (FERC) after finding that the statutory prerequisites had not been met. Under the Clean Water Act, a dam operator must obtain a state certification for its project before FERC can issue a license. The statute allows a state to either deny certification, grant the request with or without conditions that FERC must incorporate in the license, or waive certification by "fail[ing]" or "refus[ing]" to act on the request. In this case, Maryland originally certified the request at issue with significant environmental protection conditions. Following litigation, Maryland and the operator entered into a settlement in which Maryland agreed to waive certification. The court held that Maryland could only waive certification by failing or refusing to act; it could not affirmatively waive certification after granting it (*Waterkeepers Chesapeake v. FERC*).
- **False Claims Act:** In a qui tam action (i.e., a lawsuit filed by a private individual called a relator on behalf of the government), the First Circuit held that relators may not recover reasonable attorneys' fees under the False Claims Act (FCA) when they privately agree to receive funds from another relator who may recover based on its own claims against the defendant. Additionally, because the provision applies only when the government "proceeds with an action," the court held that a relator may not receive attorneys' fees for a claim in which the government declined to intervene, reading "action" as synonymous with "an individual claim" (*United States ex rel. Lovell v. Athenahealth, Inc.*).
- **Health:** The Second Circuit held that it lacked subject-matter jurisdiction over a hospital's lawsuit disputing its Medicare reimbursement rate for "uncompensated care," that is, healthcare provided to uninsured patients who cannot pay. Under the Medicare Act, the Secretary of Health and Human Services calculates reimbursement rates for such services based on "estimates" of certain factors. The Act also provides that "there shall be no administrative or judicial review ... of . . . any estimate of the Secretary for purposes of determining the factors" used to calculate this reimbursement rate. The Second Circuit held that statutory language precluding judicial review applies to any challenge to the "validity" of agency action, including, as in this case, a purely procedural challenge to the Secretary's decision to adopt a certain methodology without notice-and-comment rulemaking. The court interpreted the canon favoring judicial review of executive action narrowly, as applying only at the end of a court's textual analysis to resolve a "grievous ambiguity or uncertainty in the statute." The court also refused to consider an extra-statutory challenge to the agency's action as *ultra vires*, or beyond the agency's authority, holding that such challenges are available only where the preclusion of judicial review is implied rather than express (*Yale New Haven Hospital v. Becerra*).
- **Immigration:** The Eleventh Circuit denied in part and dismissed in part a petition for review of a Board of Immigration Appeals (BIA) decision that a petitioner was subject to removal for committing an aggravated felony under the Immigration and Nationality Act (INA). The petitioner challenged (1) a decision by the Attorney General, *Matter of Thomas*, that state court orders modifying a criminal sentence do not remove the immigration consequences of a criminal conviction if the modification is based on reasons unrelated to the merits of the underlying case; and (2) the BIA's decision in the petitioner's case applying *Matter of Thomas*. The Eleventh Circuit first held that Congress gave the Attorney General broad authority to decide legal questions arising under the immigration laws. Second, the court held that the Attorney General's interpretation of the INA provision defining a "conviction" was reasonable and entitled to deference under the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. Accordingly, the court held that the petitioner was an aggravated felon

within the meaning of the INA, notwithstanding a state court's modification of his criminal sentence (*Edwards v. U.S. Attorney General*).

- **Labor & Employment:** A divided Fifth Circuit affirmed a preliminary injunction against the Biden Administration's executive order mandating that federal contracts require contractors to ensure that their workforces are vaccinated against COVID-19 (unless a worker is entitled to an exception). The court held that the order ran afoul of the major questions doctrine, which counsels against interpreting general delegations of agency authority as empowering agencies to pursue policies of economic and political significance that are inconsistent with the agencies' historical assertions of authority. Applying the doctrine here to the President, rather than an agency, the Fifth Circuit held that the Procurement Act did not authorize the President to issue the vaccine mandate. The preliminary injunction halts enforcement of the policy against only the plaintiff states: Louisiana, Indiana, and Mississippi (*Louisiana v. Biden*).
- ***Religion:** The D.C. Circuit reversed in part the denial of a preliminary injunction for three members of the Sikh faith after the U.S. Marine Corps refused to accommodate their religious practices during initial training, thus preventing them from enlisting. Disagreeing with several sister circuits, the court declined to apply a heightened standard for preliminary relief where, as here, an injunction—allowing the plaintiffs to complete initial training before the litigation reached the merits—would amount to irreversible relief. The court applied the traditional preliminary injunction standard to two plaintiffs who had expressed a desire to join the Marines immediately. The court ruled that the two had shown (1) a likelihood of success on their claim under the Religious Freedom Restoration Act; (2) that they have suffered and continue to suffer irreparable, grave, immediate, and ongoing injuries as a result of their faith; and (3) that the equities and the public interest weighed heavily in favor of granting an injunction. The court remanded for reconsideration of the request of the third plaintiff, who had deferred his enlistment plans (*Singh v. Berger*).
- **Securities:** The Ninth Circuit reversed in part a dismissal of a lawsuit under § 12(a)(2) of the Securities Act of 1933. Section 12(a)(2) imposes liability on any person who offers or sells a security by means of a prospectus or oral communication where the communication contains an untrue statement of material fact or omits to state a material fact necessary to make a statement not misleading. Here, the defendants posted about securities on a social media account, and the court held that § 12 contained no requirement that a solicitation be directed or targeted to a particular plaintiff. The court reasoned that the Securities Act contains broad language as to whom a security holder may sue for misleading statements or omissions (*Pino v. Cardone Capital, LLC*).
- **Securities:** The D.C. Circuit denied a petition for review from the Department of Labor's Administrative Review Board concerning the extraterritoriality of Section 806 of the Sarbanes-Oxley Act (SOX). Applying the presumption against extraterritoriality, the court held that SOX's text, context, and legislative history do not contain a clear, affirmative indication that the statute applies abroad. Ruling that the statute thus clearly lacked extraterritorial application, the court reasoned it did not need to decide whether the Administrative Review Board was entitled to *Chevron* deference (*Garvey v. Administrative Review Board*).

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