

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Dec. 27, 2022–Jan. 2, 2023)

January 4, 2023

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. It did take 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 Supreme Court’s judgment. The Court indicated that it is not reviewing the merits of the district court’s underlying decision on the Title 42 policy’s lawfulness, but only the states’ ability to intervene.

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The Court scheduled oral arguments for February 2023. The Court has issued no further orders in the case since December 27 (*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.

- **Civil Rights:** The Fourth Circuit reversed a district court's dismissal of an action under [Section 504](#) of the Rehabilitation Act of 1973 alleging that a medical center failed to provide a deaf man with effective interpretive services or auxiliary aids to communicate during his wife's childbirth. The hospital provided two video link devices that each malfunctioned and failed to resolve the problem over the couples' three-day stay. The court joined other circuits to hold that a plaintiff can claim intentional discrimination under the Rehabilitation Act by alleging defendant's deliberate indifference. As to that showing, the court held that a plaintiff need not allege systematic failures to accommodate, but need only claim that a defendant knew of plaintiff's need for communication aids and ultimately failed to provide them (*Basta v. Novant Health Incorporated*).
- **Civil Rights:** Sitting en banc, a divided Eleventh Circuit held that a school district did not violate either the Equal Protection Clause of the Fourteenth Amendment or [Title IX of the Education Amendments Act of 1972](#) by separating school bathrooms by "biological sex" and requiring a transgender boy to use either the communal female restroom or single-stall, sex-neutral bathrooms. On the constitutional claim, the court determined that the school district's bathroom policy advanced the important governmental objective of protecting students' privacy in school bathrooms. The court also held that a policy may lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status. On the Title IX claim, the court held that the school district's policy is permitted by statutory and regulatory exceptions permitting separate housing and bathroom facilities on the basis of sex, which the court read within the meaning of Title IX as biological sex (*Adams v. Sch. Bd. of St. Johns Cnty.*).
- **Communications:** The Ninth Circuit reversed a district court's dismissal of a class action brought on behalf of children alleging that Google tracked online behavior and collected data on YouTube without consent, in violation of several states' laws. The district court concluded that the claims were expressly preempted by [15 U.S.C. § 6502\(d\)](#) of the Children's Online Privacy Protection Act (COPPA), under which [Federal Trade Commission regulations](#) bar the collection of certain personal information of individuals under the age of 13 without parental consent. Section 6502(d) preempts any state and local laws that are "inconsistent with the treatment of those activities or actions under th[e] section." The Ninth Circuit rejected the district court's reading that COPPA creates an exclusive remedial scheme and held that COPPA does not preempt state laws that supplement or prohibit the same conduct as COPPA (*Jones v. Google*).
- **Criminal Law & Procedure:** A divided Eighth Circuit affirmed a criminal defendant's conviction under [18 U.S.C. § 2423\(a\)](#), which criminalizes knowingly transporting a person under the age of 18 in interstate or foreign commerce with the intent that the person engage in prostitution or other unlawful sexual activities. The court joined other appellate courts interpreting the statute in holding it does not require knowledge of the victim's underage status. The court rejected the defendant's reliance on the "all-subsequent-elements presumption" of statutory interpretation as support for the argument

that the term “knowingly” established the requisite mental state for both transporting an individual and the individual’s age because Congress codified Section 2423(a) in the context of a long-standing tradition of strict liability as to a child’s age in sex crimes. Additionally, the court held that ignorance of this statute was not a defense because transportation of an underage person with intent that the victim engage in sexual activity is per-se blameworthy activity (*United States v. Moreira-Bravo*).

- ***Criminal Law & Procedure:** The Tenth Circuit, in reversing a district court’s grant of habeas relief, held that a habeas petitioner seeking to cross-appeal from the portion of a district court’s order partially denying his habeas petition is required to obtain a certificate of appealability (COA) from the district court. The statute establishing the prerequisites for an appeal in a habeas proceeding, 28 U.S.C. § 2253(c), states that “[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals.” Recognizing that all but one circuit court to address this question has applied the COA requirement to claims arising from a prisoner’s cross-appeal, the Tenth Circuit denied the COA and dismissed the cross-appeal for lack of jurisdiction (*Sumpter v. Kansas*).
- ***Environmental Law:** The Ninth Circuit affirmed a district court’s dismissal of an Indian tribe’s lawsuit regarding the City of Seattle’s operation of the Gorge Dam. The tribe brought suit in Washington State court alleging that Seattle’s operation of the dam without fish passage facilities violates certain federal and state laws. Seattle removed the case to federal district court. The Ninth Circuit held that the tribe in effect challenged a Federal Energy Regulatory Commission (FERC) order concerning the dam and that the *Federal Power Act* vests exclusive jurisdiction in the federal courts of appeals over all objections to FERC orders by a party to a FERC proceeding, such as the tribe, even objections based on state law. The Ninth Circuit affirmed the district court’s dismissal for lack of subject matter jurisdiction and held that the district court did not need to remand the state claims to state court, despite language in 28 U.S.C. § 1447(c), because of circuit precedent recognizing a futility exception to that provision. All three members of the Ninth Circuit panel endorsed a separate concurring opinion urging the full Ninth Circuit to reconsider and abandon that futility exception, which other circuits have rejected, in an appropriate case (*Sauk-Suiattle Indian Tribe v. City of Seattle*).
- **Labor:** The Fourth Circuit held that a North Carolina law’s provisions prohibiting entering into certain contractual agreements regarding labor union dues and settlements did not violate the First or Fourteenth Amendments of the U.S. Constitution or 42 U.S.C. § 1981. Rejecting a broader reading by the district court that the settlement provision effectively bars any settlement agreement between an agricultural producer and labor union, the Fourth Circuit concluded that the provision only prohibits the parties from conditioning a settlement agreement on an agricultural producer’s union affiliation. The court reversed the district court’s holding that the settlement provision violated the First and Fourteenth Amendments and vacated the accompanying injunction, affirmed the district court’s holding that the dues provision was constitutional, and determined that neither provision violated Section 1981 (*Farm Labor Organizing Committee v. Stein*).
- **Securities:** Following a vacatur and remand for further consideration by the Supreme Court, the Second Circuit issued a divided opinion that granted the government’s request to dismiss criminal convictions for *conversion of government property*, *wire fraud*, and *securities fraud*, all flowing from misappropriation of information from the Centers for Medicare & Medicaid Services (CMS). Guided by the Supreme Court’s decision in *Kelly v. United States*, the parties and the court agreed that the convictions could not stand because the CMS information did not constitute property or a thing of value. In a

- separate, noncontrolling opinion, the judges in the majority also commented on the discrepancy between the standards for liability for [criminal](#) and [civil](#) insider trading in the Second Circuit. The court observed that, as a result of the Second Circuit’s decision at an earlier stage of the litigation, criminal liability for insider trading does not require proof that a tipper received a “personal benefit.” This created an anomaly, the concurrence suggested, because Supreme Court precedent establishes that civil insider trading liability requires such proof. The judges argued that this asymmetry merited the attention of the courts of appeals, the Supreme Court, and Congress (*United States v. Blaszczak*).
- **Transportation:** The D.C. Circuit reversed a district court’s judgment in favor of Amtrak and held that the Southeastern Pennsylvania Transportation Authority (SEPTA) possesses an easement granting access to certain Philadelphia-area Amtrak rail facilities. SEPTA argued that it exercised an option to acquire the easement from Conrail in 1982, pursuant to federal rail statutes. Amtrak maintained that it had instead exercised a contractual right of first refusal and purchased the easement from Conrail, with the dispute sitting dormant until the recent expiration of a lease agreement between Amtrak and SEPTA. The D.C. Circuit held that Amtrak’s private right of first refusal could not impede SEPTA’s public, statutorily derived right to acquire the easement (*Nat’l R.R. Passenger Corp. v. Se. Pa. Transp. Auth.*).

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