

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Apr. 17–Apr. 23, 2023)

April 25, 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.

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## Decisions of the Supreme Court

Last week, the Supreme Court issued decisions on the merits in four cases for which it heard oral arguments:

- **Bankruptcy:** The Supreme Court unanimously ruled that [Bankruptcy Code § 363\(m\)](#), which limits the ability of appellate courts to review sales of bankruptcy-estate property, is not jurisdictional, meaning that the provisions of the statute are subject to waiver, forfeiture, and estoppel. This decision resolves a circuit split over this question. It also marks the [second time](#) this term that the Court has held that a statute lacks the “clear statement” from Congress necessary to treat the law as jurisdictional (*MOAC Mall Holdings LLC v. Transform Holdco LLC*).
- **Criminal Law & Procedure:** In a 6-3 vote, the Supreme Court revived a [civil rights](#) lawsuit by a death-row inmate raising a procedural due process challenge to Texas’s postconviction DNA testing law. The inmate had initially sought postconviction DNA testing in state trial court, but waited to bring the civil rights lawsuit until after the

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conclusion of the state appeals process. The Supreme Court held the period for seeking civil rights relief did not start until after the conclusion of all state appeals, not when the trial court first denied the inmate's request for DNA testing. The decision resolves a circuit split over the starting point for the "statute of limitations clock" (*Reed v. Goertz*).

- **Criminal Law & Procedure:** A divided Supreme Court held that a Turkish bank may face criminal prosecution for allegedly conspiring to evade U.S. economic sanctions against Iran. The Court held that 18 U.S.C. § 3231, which gives federal district courts the power to hear all criminal cases involving offenses against the United States, does not exclude from coverage foreign states or instrumentalities like the bank. The Court rejected the bank's argument that the [Foreign Sovereign Immunities Act of 1976](#) shielded foreign instrumentalities from criminal prosecutions. The Court left open the possibility that the bank may have immunity under common law, and remanded the case for further consideration (*Türkiye Halk Bankası A.S. v. United States*).
- **Interstate Compacts:** The Court held that New Jersey may unilaterally withdraw from an interstate compact with New York. In 1953, Congress approved the Waterfront Commission Compact, an agreement that created a bistate agency to perform certain regulatory and law-enforcement functions at the Port of New York and New Jersey, a port that spans the border of both states. The Court, citing principles of contract law and state sovereignty, as well as the fact that the states did not intend for the Compact to operate forever, unanimously granted New Jersey's motion for judgment on the pleadings and denied New York's cross-motion (*New York v. New Jersey*).

The Supreme Court also granted certiorari in one case:

- **Criminal Law & Procedure:** The Supreme Court agreed to review a case from the Eleventh Circuit to resolve a circuit split over whether federal courts should apply a speedy-trial test or a three-part due process analysis in determining when the Due Process Clause requires a state or local government to conduct a postseizure probable cause hearing prior to a judicial forfeiture (*Culley v. Marshall*).

The Supreme Court also issued an order on applications for stays:

- **Abortion:** The Supreme Court stayed a district court order concerning the Food and Drug Administration's (FDA's) approval of mifepristone pending the Fifth Circuit's disposition of the appeal from that order and any subsequent review of that decision by the Supreme Court, with two Justices dissenting from the stay. The district court's order [stayed](#) FDA's approval of mifepristone, suspending the legal basis for the drug's sale and distribution nationwide. The Supreme Court's action, leaves the current federal regulatory framework in place while litigation continues (*Danco Lab's, LLC v. All. for Hippocratic Med.; FDA v. All. for Hippocratic Med.*).

## 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 Procedure:** The Eleventh Circuit joined several other circuits in holding that 28 U.S.C. § 1654, which allows individuals to represent themselves (i.e., proceed *pro se*) in federal court, does not allow an executor to proceed *pro se* on behalf of an estate where there are additional beneficiaries. The Eleventh Circuit held that the plaintiff was not legally authorized to represent the estate but that the district court erred by not providing

an opportunity for the plaintiff to obtain counsel. The panel noted a disagreement with the Eighth Circuit over whether to adopt a “nullity rule,” which would have prohibited the plaintiff from amending the initial *pro se* complaint (*Iriele v. Griffin*).

- **Criminal Law & Procedure:** The Third Circuit affirmed defendants’ wire-fraud convictions under [18 U.S.C. § 1343](#) for a scheme to falsely certify compliance with disadvantaged business enterprise (DBE) contracting requirements in federally financed infrastructure projects. Relying in part on the Supreme Court’s decision in *Kelly v. United States*, defendants argued that the government failed to prove that they defrauded the Pennsylvania Department of Transportation of property, as required by the wire-fraud statute, because they completed the painting and repair work required by the contracts at issue. The Third Circuit disagreed and held that the defendants’ failure to abide by the DBE terms of the contracts meant that they were not legally entitled to payment, even if they performed the underlying infrastructure work. Consequently, the funds paid by Pennsylvania in accordance with the contracts were, under *Kelly*, the “object of the fraud.” The court remanded the case on separate issues (*United States v. Kousisis*).
- **\*Criminal Law & Procedure:** The Fifth Circuit added to a circuit split in holding that habeas corpus petitioners may not recover attorneys’ fees against the United States under the [Equal Access to Justice Act](#) (EAJA). The court reasoned that the EAJA is a limited waiver of sovereign immunity against the United States in specific civil actions. Habeas corpus actions, the court ruled, are not purely civil actions, but are a hybrid, with characteristics indicative of both civil and criminal actions (*Gomez Barco v. Witte*).
- **Energy:** The Ninth Circuit held that a municipal building ordinance that prohibited natural gas piping into new buildings—thus rendering gas appliances unusable—was preempted by the Energy Policy and Conservation Act (EPCA). The EPCA, [42 U.S.C. § 6297\(c\)](#), states that “no State regulation concerning the energy efficiency, energy use, or water use of [certain covered consumer products] shall be effective with respect to such product,” unless the regulation meets one of certain listed exceptions. The Ninth Circuit panel rejected the city’s arguments that the EPCA’s preemption clause only covers regulations that impose standards directly on gas appliances themselves. The court held that by effectively preventing appliances from using natural gas, the building code’s prohibition against installing gas piping in newly constructed buildings did precisely what the EPCA’s preemption provision prohibits, namely, regulate natural gas use by covered products (*California Restaurant Ass’n v. City of Berkeley*).
- **Environmental Law:** A divided Fourth Circuit vacated a district court judgment that the U.S. Army Corps of Engineers (USACE) violated [§ 1319](#) of the Water Infrastructure Improvements for the Nation Act of 2016 (WIIN Act) in designing a fish-passage structure that would lower by three feet the “pool” around the dam the new structure would replace. Section 1319 directs the Corps to design on the Savannah River “a structure that is able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment.” The court applied principles and canons of statutory construction to determine that “in existence” refers to the purposes served by the pool (i.e., water supply and recreational activities) and not the water elevation levels on the date of the WIIN Act’s enactment (*South Carolina v. U.S. Army Corps of Eng’rs*).
- **Environmental Law:** The Sixth Circuit affirmed a district court’s order dismissing consumers’ claims against Ford Motor Company for allegedly submitting false fuel economy testing results to the Environmental Protection Agency (EPA), on the ground that the [EPCA](#) preempted the plaintiffs’ state-law claims. The Sixth Circuit explained that, under the EPCA, the EPA regulates fuel economy testing and estimates and that

permitting juries to interfere in that process would disrupt the regulatory scheme established by Congress, at least where, as here, the EPA closed its own investigation without further action. The Sixth Circuit thus held that the plaintiffs' state-law claims inevitably conflicted with federal law and so were impliedly preempted (*In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*).

- **First Amendment:** The Ninth Circuit reversed a district court's ruling that the First Amendment immunized a defendant from civil liability under the Federal Wiretap Act, 18 U.S.C. § 2511(1)(c)–(d), for disclosing illegally obtained communications in public, state court filings. The Ninth Circuit disagreed with the district court's application of the *Noerr-Pennington* doctrine, which guides courts to construe statutes in line with the First Amendment right to petition the government for a redress of grievances. The Ninth Circuit held that the Federal Wiretap Act did not burden the defendant's right to petition through court pleadings and that the First Amendment did not preclude statutory liability because the case involved a private custody dispute rather than a matter of public concern. The panel remanded the case to the district court to consider other defenses and to correct errors in calculating damages (*Pyankovska v. Abid*).
- **Food & Drug:** A divided Ninth Circuit held that the Food Drug and Cosmetic (FD&C) Act preempted state law claims that the maker of I Can't Believe It's Not Butter! misrepresented its spray product with a "0 calories and 0 grams of fat per serving" label. Plaintiffs alleged that the serving size on the product's label was an artificially small amount of butter that did not reflect the customary usage. The FD&C Act, 21 U.S.C. § 343-1(a)(4), prohibits states from establishing any requirement for the nutrition labeling of food that is not identical to federal requirements. The Ninth Circuit held that as a matter of Food and Drug Administration (FDA) legal classification, "Butter! Spray" was a "spray" rather than a "butter," and therefore FDA regulations of spray fats and oils allowed the caloric and fat content to be expressed as zero. Since the state claims would establish a requirement for food labeling that contradicts these federal standards, the court affirmed the district court's dismissal (*Pardini v. Unilever United States, Inc.*).
- **\*Health:** The Second Circuit held that a Medicare Advantage (MA) plan's report under Section 111 of the Medicare Secondary Payer Act (the Act) did not amount to an admission of liability by the plan. Section 111 requires that MA plans report to the Centers for Medicare and Medicaid Services (CMS) certain claims they receive so that CMS may make an appropriate determination concerning the coordination of benefits. The court relied on the "not ambiguous" text of Section 111 to hold that a report signifies only a plan's determination that a claimant is entitled to benefits under the Act, not a determination as to which entity must pay those benefits. The court disagreed with an Eleventh Circuit opinion that interpreted a Section 111 report as demonstrating a plan's knowledge that it owed payments under the Act (*MSP v. Hereford*).
- **\*Labor & Employment:** The Ninth Circuit reversed and dissolved a preliminary injunction, effective in Arizona, that barred enforcement of an executive order mandating that federal contractors ensure their workforces are vaccinated against COVID-19. President Biden issued the order under the Federal Property and Administrative Services Act of 1949 (the Procurement Act), which gives the President general authority to prescribe contracting policies. The court ruled that the major questions doctrine, which requires Congress to speak clearly if it wants an agency to have authority on an issue of major political or economic significance, did not apply to presidential action. The court acknowledged that three other circuits had concluded that the doctrine applied to presidential action, but disagreed. The court also ruled that the doctrine would be

- unavailing because the order was not a transformative expansion of the President’s authority under the Procurement Act (*Mayes v. Biden*).
- **Tax:** The Third Circuit held that the Delaware Department of Insurance must comply with an Internal Revenue Service (IRS) summons. The Department argued that Delaware law prohibited it from disclosing the subject information unless the IRS agreed to a confidentiality agreement and that, under the *McCarran-Ferguson Act*, this Delaware law overrode the IRS’s statutory authority. The Third Circuit reasoned that, although the *McCarran-Ferguson Act* protects state insurance laws from intrusive federal action, the Department’s refusal to produce summoned documents did not constitute the “business of insurance” and so did not meet the Act’s threshold requirement (*United States v. Delaware Dep’t of Ins.*).
- **Veterans:** The Federal Circuit affirmed a decision of the U.S. Court of Appeals for Veterans Claims that the Department of Veterans Affairs (VA) may review a fee agreement between an attorney and his client to determine the availability of attorney fees. The court held that under the *Veterans’ Judicial Review Act*, the VA can only pay attorney fees under agreements that draw on past-due benefits awarded on the basis of a claim described in a fee agreement. Accordingly, the court ruled, the VA should not authorize payments on claims excluded from such agreements. The court also held that the VA Secretary must determine whether a fee is payable under a qualifying attorney-fee agreement. The court declined to rule on whether the VA has the authority under this statute to reform a contract between an attorney and client (*Viterna v. McDonough*).

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