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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 26–July 2, 2023), Part 1

July 3, 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.

This week's *Congressional Court Watcher* is divided into two parts because of the number of notable decisions issued over the past week. This Legal Sidebar (Part 1) discusses Supreme Court activity from June 26 through July 2, 2023. A forthcoming companion Legal Sidebar (Part 2) addresses decisions of the U.S. courts of appeals from that period.

Decisions of the Supreme Court

Last week, the Supreme Court issued its final opinions of the October 2022 term:

- **Civil Procedure:** In a fractured opinion, the Court rejected a Fourteenth Amendment Due Process Clause challenge to a Pennsylvania law requiring an out-of-state corporation to consent to personal jurisdiction in the state's courts to do business in the state. The controlling opinion recognized the Court's 1917 decision in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.* as determinative, and the Court rejected arguments that this decision had implicitly been overruled by later cases (*Mallory v. Norfolk Southern Railway Co.*).

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- **Civil Rights:** In a unanimous decision, the Court clarified its test from *Trans World Airlines, Inc. v. Hardison* for determining when an employer does not have to accommodate an employee's religious practice under Title VII of the Civil Rights Act of 1964 because of the "undue hardship" it would cause. The Court held that *Hardison*, which appeared to characterize an undue hardship as involving "more than de minimis" costs, should not be read literally or in isolation. Instead, the Court interpreted *Hardison* to direct a reviewing court to engage in a fact-specific inquiry, in which the employer must show that the proposed accommodation imposes a substantial increased cost upon the conduct of its business (*Groff v. DeJoy*).
- **Education:** A six-Justice majority struck down race-conscious admissions policies of the University of North Carolina and Harvard College as violating the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. Applying the strict scrutiny standard used to review race-based classifications under the Equal Protection Clause, the Court held that the policies' diversity-related goals lacked sufficiently focused and measurable objectives to support the consideration of an applicant's race. While the Court's decision upends prior rulings permitting the limited use of race in higher education admissions, the Court stated colleges may consider an applicant's discussion of how race informed his or her life experiences, as might occur in an application essay (*Students for Fair Admissions Inc. v. President & Fellows of Harvard College; Students for Fair Admissions, Inc. v. University of North Carolina*).
- **Education:** The Supreme Court issued rulings in related cases challenging the Biden Administration's student loan cancellation policy. In one case, the Court unanimously held that the borrower plaintiffs—one ineligible for any student loan relief and one eligible for only partial relief—failed to identify an injury fairly traceable to the policy (*Dep't of Education v. Brown*). In the other case, the Court held 6-3 that one of the state plaintiffs, Missouri, had standing to challenge the policy because of its effects on a state instrumentality that services federal student loans. Reaching the merits, the majority held that the Secretary of Education's power under the HEROES Act to "waive or modify" statutory or regulatory provisions applicable to federal student financial assistance programs under Title IV of the Higher Education Act did not authorize the policy (*Biden v. Nebraska*).
- **Elections:** By a 6-3 vote, the Supreme Court held that the U.S. Constitution's Elections Clause does not generally deprive a state court of jurisdiction over whether a state legislature, in exercising its authority to regulate federal elections, has comported with the state constitution. The Court further held, however, that state courts cannot transgress ordinary bounds of judicial review to arrogate to themselves power that the Election Clause vests in the state legislature (*Moore v. Harper*).
- **Intellectual Property:** Resolving a circuit split, the Court held that two provisions of the Lanham Act—15 U. S. C. § 1114(1)(a) and § 1125(a)(1)—that provide civil remedies for U.S. trademark infringements extend only to claims where the infringing use in commerce is domestic (*Abitron Austria GmbH v. Hetronic Int'l, Inc.*).
- **Speech:** In a 7-2 judgment, the Court held that, to establish a statement as a "true threat" unprotected by the First Amendment's Free Speech Clause, the government must show that the speaker has some subjective understanding of the threatening nature of the statement; it is not enough to show that an objectively reasonable person would regard the statement as a threat of violence. The controlling opinion further decided that a mens rea of recklessness is sufficient for true-threat prosecutions (*Counterman v. Colorado*).

- **Speech:** The Court held in a 6-3 decision that Colorado would violate the Free Speech Clause if it sought to compel a website designer to produce websites for same-sex weddings against her religious convictions. The majority held that the First Amendment prevented the state from applying a public accommodations law to force the designer to "celebrate and promote" a marriage she did not agree with, regardless of whether the designer offered her services commercially to the public (*303 Creative v. Elenis*).

The Court also agreed to review nine cases (two of which are consolidated) for the October 2023 Term:

- **Civil Rights:** The Court agreed to hear a case from the Eighth Circuit involving a police officer who argues that her transfer to another department component was unlawful discrimination and retaliation under Title VII of the Civil Rights Act of 1964. The Court granted certiorari only to answer whether Title VII bars discrimination in transfer decisions absent a separate court determination that the decision caused a significant disadvantage (*Muldrow v. St. Louis*).
- **Criminal Law & Procedure:** The Court agreed to consider whether the Fifth Amendment's Double Jeopardy Clause prevents retrial of a criminal defendant in an unusual set of circumstances. Here, a jury acquitted the defendant on one charge and convicted him of another arising from the same facts. The Georgia Supreme Court characterized the verdicts as "repugnant" because of their irreconcilable nature and held that the defendant could be retried on both counts (*McElrath v. Georgia*).
- **Firearms:** The Court granted certiorari in a case from the Fifth Circuit asking whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by someone subject to a domestic violence restraining order, is unconstitutional under the Second Amendment (*United States v. Rahimi*).
- **Immigration:** In consolidated cases from the Fifth and Ninth Circuits, the Court agreed to decide whether an alien placed in removal proceedings must receive a notice to appear in a single document containing the time and place of the proceeding and, if the document is not received, whether a removal order issued in absentia is subject to rescission (*Garland v. Singh*; *Campos-Chaves v. Garland*).
- **Immigration:** The Court granted certiorari in a case from the Third Circuit in which it is asked to consider the reviewability of immigration authorities' determination that a set of circumstances does not constitute "extreme and unusual hardship" potentially leading to relief from removal. The Court is asked whether this determination is a mixed question of law and fact or an unreviewable discretionary judgment under governing statute (*Wilkinson v. Garland*).
- **Securities:** The Court agreed to review a Fifth Circuit decision holding unconstitutional the use of in-house administrative law judges (ALJs) by the Securities and Exchange Commission (SEC) to adjudicate securities fraud cases. The Court is asked (1) whether Congress violated the nondelegation doctrine in giving the SEC discretion to bring enforcement actions either administratively or through a suit in an Article III court; (2) if the SEC's in-house adjudication of cases seeking civil penalties violates the Seventh Amendment right to a jury trial; and (3) whether the statutory removal protections given to SEC ALJs infringe on the President's power to remove executive officers (*SEC v. Jarkesy*).
- **Tax:** The Supreme Court agreed to hear a constitutional challenge to Internal Revenue Code § 965's "Mandatory Repatriation Tax" (MRT), created by P.L. 115-97, commonly referred to as the Tax Cuts and Jobs Act. Where U.S. investors previously were not generally obliged to pay taxes on unrealized foreign earnings, the MRT imposes a one-

time tax on a U.S. shareholder's pro rata share of the post-1986 untaxed and undistributed foreign earnings of a specified foreign corporation. The Court is asked whether this tax on unrealized foreign earnings is an unapportioned direct tax in violation of the Sixteenth Amendment's Apportionment Clause, or instead a tax on income exempted from the Amendment's apportionment requirements (*Moore v. United States*).

- **Veterans:** The Court agreed to consider the interplay between the eligibility requirements for education benefits under the Post-9/11 GI Bill and the earlier Montgomery GI Bill for veterans who served distinct periods of qualifying service. By statute, the total time for receipt of educational assistance under each program is capped. The Court is asked whether a veteran may switch to the more generous Post-9/11 GI Bill program before exhausting their Montgomery GI Bill benefits (*Rudisill v. McDonough*).

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