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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (July 3, 2023–July 9, 2023)

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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

No Supreme Court opinions or grants of certiorari were issued last week. The Supreme Court's next term is to begin October 2, 2023.

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.

- ***Civil Rights:** In a case challenging a waterpark's refusal to allow a person with one natural hand to use a water ride, the Eleventh Circuit held that the park had not shown it complied with the Americans with Disabilities Act (ADA). The ADA generally bars a public accommodation from excluding someone with a disability except when "necessary." The water park argued its eligibility requirements were "necessary" because they were compelled by state law. Acknowledging disagreement with the Sixth Circuit,

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the court held that compliance with state law is not "necessary" under the ADA, which preempts conflicting state requirements. The court remanded for further proceedings on whether the refusal was "necessary" because of actual safety concerns (*Campbell v. Universal City Devel. Partners, Ltd.*).

- **Communications:** The D.C. Circuit turned away constitutional challenges to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), which broadens criminal and civil liability for conduct related to online sex trafficking. The plaintiffs argued the new criminal prohibitions created by FOSTA were facially overbroad under the First Amendment and swept in protected speech, like general advocacy of prostitution or giving safety advice to sex workers. The court instead held these provisions are co-extensive with traditional aiding and abetting prohibitions, covering speech integral to criminal conduct unprotected under the First Amendment. The court also rejected arguments that these and other FOSTA provisions were unconstitutionally vague, or that provisions altering online platforms' immunity from liability for user-posted content under the Communications Decency Act violated the Ex Post Facto Clause or the First Amendment (*Woodhull Freedom Found. v. United States*).
- **Criminal Law & Procedure:** The Second Circuit held that the timeliness of a state prisoner's habeas petition under 28 U.S.C. § 2244(d)(1) is assessed on a claim-by-claim basis, joining every other federal circuit court that has considered the question. The Second Circuit rejected the prisoner's argument that, because the statute establishes a time limit for an "application," he could raise otherwise time-barred claims in a petition that also asserted timely claims (*Clemente v. Lee*).
- **Criminal Law & Procedure:** The Seventh Circuit held that a defendant's conviction for attempted murder of a federal officer under 18 U.S.C. § 1114 is a valid predicate crime of violence under the Armed Career Criminal Act (ACCA). Following the Supreme Court's guidance in *United States v. Taylor* on applying the categorical approach to attempt offenses, the Seventh Circuit reasoned that completed murder is a crime of violence because the use of physical force is always an element the government must prove to obtain a conviction for completed murder. The court concluded that, because an attempt is treated as an attempt to carry out each element of the completed offense, attempted murder is also a crime of violence for purposes of the ACCA (*United States v. States*).
- **Criminal Law & Procedure:** The Seventh Circuit joined every other federal circuit court in holding that a sex offender is "indigent" under 18 U.S.C. § 3014, and not liable for a $5,000 special assessment, if he was eligible for appointed counsel at sentencing and he does not have the financial prospects for repaying the special assessment. Although § 3014 does not mention earning capacity, the court held that the ordinary definition of indigency and § 3014's allowance of a twenty-year payment period for the special assessment indicate that courts should consider a defendant's future earning capacity (*United States v. Otradovec*).
- ***Criminal Law & Procedure:** The Eighth Circuit held that arson, 18 U.S.C. § 844(f)(1), is not subject to a sentencing enhancement as a "crime of violence" under 18 U.S.C. § 924(c)(3) because it does not contain, as an element, the use of physical force against the property of another. Section 844(f)(1) defines arson as "maliciously damag[ing] or destroy[ing]" a vehicle owned or possessed by an entity receiving federal funding, and the court interpreted "maliciously" as a willful disregard of the likelihood that property will be damaged or destroyed. The court considered the Supreme Court's holding in *Borden v. United States*, which ruled that any crime that can be committed recklessly does not have, as an element, the use of physical force. The court acknowledged that

circuit courts have disagreed about how to apply *Borden* to criminal statutes that use mental states, like malice, and concluded that *Borden* required a crime of violence to contain an element of "targeting" conduct at someone or something, which the mental state of malice lacks (*United States v. Lung'aho*).

- ***Criminal Law & Procedure:** The Ninth Circuit held that district courts may consider non-retroactive changes in post-sentencing decisional law, or law made by judges, when considering whether a defendant has shown extraordinary and compelling reasons for a sentencing reduction under 18 U.S.C. § 3582. The court found support in its prior decision *United States v. Chen*, where it held that district courts may consider non-retroactive changes made by statutory sentencing law. Here, the court held that the logic underpinning *Chen* also applied to cases where the relevant change in sentencing law is decisional. While some circuits have "kept the door open" to motions for sentence reductions based on decisional law, the Ninth Circuit's affirmative holding is in conflict with several circuits that rejected such motions (*United States v. Roper*).
- **Environmental Law:** The D.C. Circuit vacated a Department of Energy (DOE) final rule setting boiler efficiency standards higher than recognized industry standards. This was the second time the rule was before the court, following remand back to the agency for further deliberations after determining evidentiary requirements for setting the standard were not met. Here, the court held that DOE should have provided an opportunity for notice-and-comment before filing its supplement to the rule because it relied on new literature and evidence to support its reasoning, and DOE again failed to provide a sufficient explanation in response to challenges to key assumptions it made (*Am. Pub. Gas Ass'n v. DOE*).
- **Food & Drug:** Joining other circuits, the Ninth Circuit denied two e-cigarette liquid manufacturers' petitions for review of the Food and Drug Administration's (FDA's) marketing denial orders. The court held that 21 U.S.C. § 387j authorizes FDA to compare claimed cessation benefits between flavored and nonflavored tobacco products. The court concluded that FDA did not act arbitrarily or capriciously in denying petitioners' applications, and that any error made in overlooking petitioners' marketing plans was harmless (*Lotus Vaping Tech., LLL v. U.S. FDA*).
- **Government Processes:** The D.C. Circuit held that the U.S. International Development Finance Corporation (DFC) was not subject to the Sunshine Act, even though the Act had applied to a DFC predecessor, the Overseas Private Investment Corporation (OPIC). The Act requires covered agencies to generally make their meetings open to the public, and it defines a covered "agency" as including one "headed by a collegial body . . . , a majority of whom are appointed to such position by the President with the advice and consent of the Senate." The court observed that unlike OPIC, the majority of the DFC board were not directly appointed as board members by the President, but served ex officio while occupying a separate office (*Ctr. for Biological Diversity v. U.S. DFC*).
- ***Health:** The Sixth Circuit granted an emergency stay of a lower court's preliminary injunction against a Tennessee law restricting gender-affirming surgeries, hormone therapy, and puberty blockers for transgender minors. The circuit panel ruled that Tennessee was likely to prevail in its appeal of the injunction, and the panel expedited review of that appeal. At this stage, the panel held that the state-wide injunction was likely overbroad and unnecessary to remedy the plaintiffs' alleged injuries. On the merits, the panel held that the plaintiffs were unlikely to succeed in their arguments that the law violated parents' constitutional due process right to control their children's medical care. The court also held that plaintiffs were unlikely to show that the law violated

constitutional equal protection principles, and the panel expressed disagreement with other circuits that have applied heightened constitutional scrutiny to transgender-based classifications (*L.W. v. Skrmetti*).

- ***Immigration:** The Third Circuit held that an alien may not be removed in absentia if the original notice to appear (NTA) for removal proceedings lacked the date and time of the proceedings as required under 8 U.S.C. § 1229(a)(1), even if a supplemental notice issued pursuant to §1229(a)(2) later supplied the missing information. The circuit panel cited the Supreme Court's decision in *Pereira v. Sessions*, which held that the issuance of an NTA that lacked the date and time of an alien's removal proceedings was not an NTA under § 1229(a)(1), and therefore did not cut off the required period of continuous presence for cancellation of removal. The Third Circuit determined that, as in *Pereira*, the government's two-step process of supplying only some information in an NTA and providing a supplemental notice with the date and time later did not comport with the requirements of either § 1229(a)(1) or § 1229(a)(2). The decision widens a circuit split on whether § 1229(a)(2) provides a basis for this two-step process, with the Third Circuit joining the First, Fifth, and Ninth Circuits, and disagreeing with the Sixth and Eleventh Circuits (*Madrid-Mancia v. Att'y Gen.*).
- **International Law:** The Third Circuit affirmed a lower court judgment that Venezuela's national oil company operated as the "alter ego" of Venezuela's government, potentially enabling arbitration award creditors of the Venezuelan government to attach property held by the bank (*OI Eur. Grp. B.V. v. Bolivian Repub. Of Venezuela Petrolqs de Venezuela, S.A.*).
- **International Law:** A divided Ninth Circuit held that plaintiffs could proceed with certain claims brought under the *Alien Tort Statute (ATS)* and the *Torture Victim Protection Act of 1991 (TVPA)* against U.S. corporation Cisco and two company executives. The plaintiffs alleged that the defendants aided and abetted or conspired with Chinese authorities to surveil Falun Gong practitioners, resulting in the practitioners' arrest and torture. The majority held that aiding and abetting liability may fall under the ATS if the claim involves assistance to the principal, but such assistance must be knowingly provided. While caselaw recognizes that the ATS does not apply extraterritorially, the majority found it applicable to Cisco (but not the company executives) because much of Cisco's alleged aiding and abetting conduct occurred in the United States. The panel also held that the TVPA encompasses claims against persons who aid and abet torture or extrajudicial killings, even if those persons did not participate in those acts directly, and found that the TVPA claims against the Cisco executives had been adequately pleaded and could proceed (*Doe I v. Cisco Systems, Inc.*).
- **Labor & Employment:** The D.C. Circuit upheld the Secretary of Labor's interpretation of regulations under the Federal Mine Safety and Health Act of 1977 on when an operator's history of safety and health violations is considered in the penalty assessment for a new violation. The Secretary construed the governing regulation, which considers violations in the "preceding 15-month period," to cover all citations or orders that were finalized in that period, even if they were issued earlier. The court ruled that the governing regulation was ambiguous and deferred to the Secretary's reasonable interpretation (*GMS Mine Repair v. Fed. Mine Safety & Health Rev. Comm'n*).

- **Labor & Employment:** The Seventh Circuit held that an injured railroad employee cannot establish negligence *per se* in a Federal Employers' Liability Act (FELA) action based on an alleged violation of Federal Railroad Administration (FRA) Track Safety Standards without showing that the track owner had actual or constructive notice of the alleged violation. The plaintiff conceded that notice is required for the FRA to impose civil penalties for Track Safety Standard violations, but argued that violations resulting in injury are actionable under FELA even without notice. The Seventh Circuit disagreed, but reversed the district court's order granting summary judgment to the defendant after separately concluding that a genuine factual dispute existed as to whether the defendant had notice of the alleged violation (*Jaranowski v. Ind. Harbor Belt R.R. Co.*).

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