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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (August 14, 2023–August 20, 2023)

August 21, 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

No Supreme Court opinions or grants of certiorari were issued last week. The Supreme Court's next term is scheduled 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.

- **Abortion:** A divided Fifth Circuit affirmed in part and vacated in part a district court's order relating to the regulation of mifepristone, a prescription drug approved by the Food and Drug Administration (FDA) for termination of a pregnancy. Plaintiffs challenged a series of regulatory actions by the FDA relating to mifepristone's approval and conditions for the drug's prescription and distribution. The Supreme Court had granted an emergency stay of the district court's order pending appeal. The Fifth Circuit panel

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vacated the district court's order staying the FDA's approval of the medication in 2000 and a generic version of the drug in 2019, after concluding that the challenge to the approval of mifepristone in 2000 was likely time-barred and that plaintiffs had not satisfied standing requirements to challenge the 2019 generic drug approval. The panel affirmed the portions of the stay order regarding the FDA's 2016 Amendments and 2021 Non-Enforcement Decision, which had generally eased access to mifepristone, after concluding that the agency likely violated the Administrative Procedure Act. However, even those portions of the district court's order remain stayed under the Supreme Court's emergency order pending disposition of any subsequent petition for certiorari. If these rulings go into effect, it would mean that mifepristone would be available under the restrictions in effect before 2016 (*All. for Hippocratic Medicine v. FDA*).

- **Civil Procedure:** The Fifth Circuit considered a federal district court's duty when, after receiving a case through removal from state court, the federal court determines that it lacks subject-matter jurisdiction to decide it. In that situation, the Fifth Circuit held, 28 U.S.C. § 1447(c) requires the district court to remand to state court even if it concludes that the remand would be futile because the state court also cannot adjudicate the suit. The Fifth Circuit, while recognizing that at least one other circuit has applied a futility exception (albeit inconsistently), joined several sister circuits in holding that the statute does not include an exception (*Spivey v. Chitimacha Tribe of Louisiana*).
- **Civil Rights:** A divided, en banc Fifth Circuit overruled its own precedent to hold that Title VII of the Civil Rights Act permits an employee to challenge discrimination in the terms and conditions of employment, including shift assignments, even if the discrimination does not entail an "ultimate employment decision"—defined by circuit caselaw to be hiring, granting leave, discharging, promoting, and compensating a worker (*Hamilton v. Dallas Cnty.*).
- **Civil Rights:** A divided Ninth Circuit upheld a district court's preliminary injunction blocking enforcement of an Idaho law related to transgender athletes. The Idaho law categorically bans transgender women and girls from participating in female sports and provides that when there is a dispute over the sex of an athlete on a female sports team, that athlete may be made to undergo medical procedures, including gynecological exams, to verify their sex. The majority agreed that the plaintiffs were likely to succeed in their claim that the law violates the Equal Protection Clause as to transgender athletes (by categorically excluding them from female sports) and as to all female athletes (by making them subject to a sex verification process that the majority understood to not apply to male athletes). The majority determined that under circuit precedent, sex-based classifications, including transgender status, are subject to heightened scrutiny under the Equal Protection Clause. The majority held that the lower court did not abuse its discretion in concluding that, based on the record before it, the methods used by the Idaho law were not substantially related to, and in fact undermined, Idaho's asserted goal of providing opportunities to female athletes (*Hecox v. Little*).
- **Consumer Protection:** The Seventh Circuit reversed the dismissal of a borrower's complaint against a credit reporting agency (CRA) under the Fair Credit Reporting Act (FCRA). The court held that a credit report violates the FCRA's requirement of "maximum possible accuracy" when the report has a material omission that could reasonably be expected to adversely affect a consumer's creditworthiness. The court further held that a CRA's failure to include a borrower's undisputed entry into a Trial Period Plan, a kind of mortgage modification, in a credit report renders that report incomplete, and therefore inaccurate, under the FCRA (*Chaitoff v. Experian Information Solutions, Inc.*).

- **Criminal Law & Procedure:** A divided D.C. Circuit remanded a case so a criminal defendant could be resentenced for his role in the unrest at the U.S. Capitol on January 6, 2021. The defendant had pleaded guilty to the petty offense of Parading, Demonstrating, or Picketing in a Capitol Building under 40 U.S.C. § 5104. The district court sentenced the defendant to imprisonment under 40 U.S.C. § 5109(b), and then to a term of probation as provided in Title 18 of the U.S. Code. The D.C. Circuit majority held that the sentencing court erred in mixing and matching these options. The majority engaged in a close textual analysis of 18 U.S.C. § 1561(a)(3), which authorizes a sentence of probation for certain crimes unless the defendant is "sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense." The majority read this to mean that a court could not impose both imprisonment and probation for a single offense, as had occurred here (*United States v. Little*).
- **Criminal Law and Procedure:** The Ninth Circuit affirmed a mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(A). The court held that aiding and abetting robbery in violation of the Hobbs Act is a "crime of violence" for purposes of that statute (*United States v. Eckford*).
- **Education:** The D.C. Circuit affirmed a lower court's denial of a temporary restraining order and an injunction under Section 1415(j) of the Individuals with Disabilities Education Act (IDEA). Section 1415(j), known as the "stay-put" provision, provides that a student "shall remain" in his or her "then-current placement" while an IDEA hearing is pending unless the parent and the state or local education agency agree otherwise. Joining at least four other circuit courts, the court held that the "stay-put" provision does not apply when a fundamental change to an eligible student's individualized education program (in this case, discharge from a private residential treatment center) occurs for reasons outside the control of the educational agency (*Davis v. District of Columbia*).
- **Education:** The Second Circuit held that Vermont Law School's establishment of a barrier to permanently conceal from public view two murals that some found racially offensive did not violate the artist's rights under the Visual Artists Rights Act of 1990. While that law prohibits the "modification" or "destruction" of qualifying artwork, the court held that neither of those terms encompassed an artwork's concealment in a manner that does not otherwise alter the work (*Kerson v. Vermont Law School, Inc.*).
- **Election Law:** A divided Seventh Circuit held that an Indiana law allowing voters over 65 to vote by mail does not violate the Twenty-Sixth Amendment. Analogizing to the Fifteenth and Twenty-Fourth Amendments, the court rejected an argument that the Twenty-Sixth Amendment prohibits any law distinguishing among voters on the basis of age. The court instead held that Indiana's accommodation of the elderly does not impose a material burden on other citizens' exercise of the right to vote, and therefore does not violate the Twenty-Sixth Amendment (*Tully v. Okeson*).
- **Energy:** The Ninth Circuit held that the five-year statute of limitations for the Federal Energy Regulation Commission (FERC) to bring a federal suit to enforce a civil penalty assessment against an entity found to have violated the Federal Power Act runs from the date when FERC assessed the penalty, not from when the alleged wrongdoing occurred (*FERC v. Vitol Inc.*).
- **Food & Drug:** The Ninth Circuit affirmed a district court's dismissal of claims under state consumer protection laws and the federal Food, Drug, and Cosmetic Act (FDCA). Plaintiffs alleged that certain statements of total protein quantity on a food item's front label, as determined by a food's nitrogen content rather than amino acid content, were false and misleading under the FDCA and state law. The court held that the FDCA's

implementing regulations explicitly authorize manufacturers to measure protein quantity using the nitrogen method and further authorize manufacturers to use that measurement to make certain front label protein content claims, as long as the product's Nutrient Facts Panel includes an adjusted protein percent daily value figure. The court further held that, because FDCA implementing regulations explicitly authorize these statements, plaintiffs' state law claims effectively sought to impose labeling requirements different from federal requirements and were therefore expressly preempted (*Nacarino v. Kashi Co.*).

- **Health:** The Tenth Circuit reversed a grant of summary judgment in a dispute over whether federal law preempts four provisions of an Oklahoma law regulating pharmacy benefit managers (PBMs). The provisions at issue regulate PBMs' retail pharmacy access standards and prohibit PBMs from offering certain discounts, excluding certain providers from preferred participation status, and denying, limiting, or terminating a provider's contract based on the employment status of certain employees. Distinguishing these provisions from the Arkansas law at issue in the Supreme Court's decision in *Rutledge v. Pharm. Care Mgmt. Ass'n*, the court held that the Employee Retirement Income Security Act of 1974 (ERISA) preempts each of the challenged provisions as applied to ERISA plans. The court further held that Medicare Part D preempts the provision prohibiting excluding certain providers from preferred participation status as applied to Medicare Part D plans (*Pharm. Care Mgmt. Ass'n v. Mulready*).
- ***Immigration:** In rejecting an alien's challenge to a Board of Immigration Appeals (BIA) decision, the Sixth Circuit acknowledged a growing circuit split over when an alien subject to a reinstated removal order may seek judicial review of the BIA's subsequent denial of the alien's petition for withholding of removal. The Immigration and Nationality Act permits an alien to appeal to a U.S. circuit court for review of a "final" order of removal within 30 days of the order. The question before the court was whether the 30-day clock for the petitioner, who sought to challenge the BIA's denial of his claim for withholding of removal, was linked to the completion of those proceedings or to the earlier reinstatement of the alien's removal order. Relying on circuit precedent, the Sixth Circuit held that the 30-day clock was tied to the completion of the withholding-of-removal proceedings, and therefore found it had jurisdiction to review the petitioner's claim. Still, the court upheld the BIA's determination that the petitioner did not present a credible claim for relief (*Kolov v. Garland*).
- **Indian Law:** The Eight Circuit held that the Parental Kidnapping Prevention Act (PKPA) does not require Indian tribes to give full faith and credit to certain child custody determinations of states. The court relied on the text of the PKPA, which does not include tribes in the definition of "state." The court further held that abrogation or limitation of a tribe's specific sovereign authority through federal statute requires clear congressional intent. The court also observed that when Congress extends full-faith-and-credit requirements to tribes by statute, it does so expressly (*Nygaard v. Taylor*).
- **Tax:** The Ninth Circuit affirmed a multimillion-dollar penalty against a defendant who promoted tax-avoidance claims involving the charitable donations of timeshares, where false statements were made in the timeshares' appraisal. In so doing, the court considered the scope of 26 U.S.C. § 6700, which proscribes the promotion of abusive tax shelters. That statute uses a penalty computation method for violations involving false statements based on "the gross income derived (or to be derived) from such activity by the person on which the penalty is imposed." The panel held that this provision looks to gross income derived from the organization and sale of the tax scheme at large, not just gross income derived from the false statements specifically (*Tarpey v. United States*).

- **Transportation**: 49 U.S.C. § 44902(b) provides immunity to airlines in their decision to refuse to transport passengers they feel are "inimical to safety." The Fifth Circuit held, among other things, that if a passenger's protected status is the but-for cause of the airline's refusal of service, then the statute does not grant immunity to the airline from a suit alleging discrimination under 42 U.S.C. § 1981. The circuit court reasoned that when the passenger's protected status is the but-for cause of the airline's decision to remove them from a plane, the decision is not based on a fear that the passenger is inimical to safety (*Abdallah v. Mesa Air Group, Inc.*).

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