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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (October 2, 2023–October 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

The Supreme Court's new term began last week. The Court did not issue any opinions or agree to review any new cases. However, Justice Samuel Alito, acting in his Circuit Justice capacity, issued an administrative stay to give the Court time to consider the federal government's emergency application to vacate a district court's injunction blocking enforcement, against two challengers, of a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) rule addressing "ghost guns." As discussed in a prior *Congressional Court Watcher*, the Supreme Court already stayed the same district court's vacatur of the ATF rule, allowing the rule to go into effect while litigation challenging it proceeds (*Garland v. Blackhawk Mfg. Grp., Inc.*).

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.

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- **Consumer Protection:** The Third Circuit held that the Fair Credit Reporting Act (FCRA) does not permit furnishers of consumer credit information to decline to investigate disputes they deem frivolous when they receive notice from a consumer reporting agency that a consumer has disputed the accuracy or completeness of the information. The court explained that while the FCRA permits consumer reporting agencies and furnishers of credit information to decline to investigate such disputes when they receive notice of the dispute directly from the consumer, the statute does not afford such discretion when a furnisher receives notice from a consumer reporting agency (*Ingram v. Experian Info. Sols., Inc.*).
- **Criminal Law & Procedure:** The Tenth Circuit rejected a facial overbreadth challenge to a provision in 18 U.S.C. § 2251(a) that makes it a crime to "persuade" a minor "to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." The panel majority interpreted the provision narrowly to cover the physical or psychological pressuring of minors to overcome their resistance to a requested depiction of sexual conduct, when that depiction constitutes child pornography unprotected by the First Amendment. In light of this construction, the panel was not persuaded by the defendant's argument that the statute criminalized a substantial amount of protected speech (*United States v. Streett*).
- **Election Law:** A divided Sixth Circuit rejected a First Amendment challenge to a Tennessee law that makes it a crime for anyone other than an election official to distribute the state's absentee voter application form. The majority held that the law bars conduct, not speech. The majority further held that, even if the prohibition covered some forms of expressive conduct, strict scrutiny would not apply because the ban (1) applied to all persons neutrally regardless of the message they wished to convey and (2) did not limit the ability to engage in actual speech. The majority held that the state's interest in preventing voter confusion was enough to satisfy the applicable level of constitutional scrutiny. The majority also rejected plaintiffs' freedom of association arguments and found that the *Anderson-Burdick* balancing test—which directs that the burdens on electoral participation imposed by state action be balanced against the asserted benefits of that action—did not apply in this context (*Lichtenstein v. Hargett*).
- ***International Law:** A divided First Circuit, sitting en banc, affirmed two foreign nationals' convictions—obtained through unconditional plea agreements—under the Maritime Drug Law Enforcement Act (MDLEA) for trafficking drugs on the high seas using a stateless vessel. A three-judge panel of the First Circuit had previously held that the MDLEA's application to "vessels without nationality" exceeded Congress's constitutional authority because the provision covered some foreign vessels not considered stateless under international law. The en banc court vacated the panel's decision and affirmed the defendants' convictions on narrower, non-constitutional, record-based grounds. In reaching its holding, the en banc court rejected the defendants' argument that the MDLEA's stated application to vessels "subject to the jurisdiction of the United States" limits the subject-matter jurisdiction of federal courts under Article III of the Constitution. The court held instead that this language limits only the substantive reach of the MDLEA. In so holding, the First Circuit deepened a split among the federal courts of appeals on this interpretive question (*United States v. Dávila-Reyes*).
- **Labor & Employment:** The Seventh Circuit held that an employee's unrecorded overtime work on incidental activities was not compensable under the Fair Labor Standards Act (FLSA) because his employer's custom or practice of counting such work for overtime required that it be properly recorded. While the FLSA provides that activities integral to an employee's job count toward overtime pay, an employer need

only count activities incidental to core job responsibilities if it has a custom or practice of doing so. Because the defendant employer's custom or practice was to remunerate employees only for properly recorded work on incidental activities, the court held the employer was not required to compensate the plaintiff employee for unrecorded work, even if the employer had constructive knowledge of that work (*Meadows v. NCR Corp.*).

- **Public Health:** The Ninth Circuit allowed a civil suit against California prison officials where the death of a prison inmate from COVID-19 in the early days of the pandemic was alleged to have resulted from the transfer of inmates from another facility experiencing a COVID-19 outbreak. Among other things, the panel reversed the lower court's order dismissing the suit pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act). That statute grants covered persons immunity from claims "relating to" the administration or use of covered countermeasures (such as diagnostics) in response to a declared public health emergency. The panel agreed with the lower court that the PREP Act conferred upon prison officials immunity from suit for injuries resulting from the administration of COVID-19 tests, including any transfer decisions informed by test results. Here, however, the court held that the PREP Act did not facially apply because the plaintiff's allegation was that the pre-transfer COVID testing was so outdated as to be unrelated to the transfer decision (*Hampton v. California*).
- **Speech**: On a panel rehearing of a September decision, the Fifth Circuit partially affirmed and modified a district court's preliminary injunction that prohibited several federal agencies and executive branch officials from taking certain actions to influence social media companies' content moderation decisions. The court held that some of the originally enjoined federal defendants, including the Executive Office of the President of the United States, the Surgeon General's office, the Centers for Disease Control and Prevention, the Federal Bureau of Investigation, and the Cybersecurity and Infrastructure Security Agency, likely violated the plaintiffs' First Amendment rights by "coercing" or "significantly encouraging" social media companies to censor certain social media content. Concluding that the district court's preliminary injunction was too broad and vague, however, the court modified the injunction by excluding certain government defendants and narrowing the restrictions imposed on the covered defendants' interactions with social media companies. (*Missouri v. Biden*).
- **Torts:** In a per curiam opinion, the Sixth Circuit held that the United States was entitled to sovereign immunity under the Federal Power Act (FPA) in a tort suit alleging that the government negligently licensed a dam to an operator whose conduct resulted in the dam collapsing and destroying the plaintiffs' home. The plaintiffs had sued the United States under the Federal Tort Claims Act (FTCA), which waives the United States' sovereign immunity from many types of tort suits. The FPA, however, contains a separate immunity provision, 16 U.S.C. § 803(c), which explicitly asserts the government's immunity from damages resulting from the "construction, maintenance, or operation" of certain hydroelectric-power works. The court first determined that the FPA's more specific assertion of immunity prevails over the FTCA's general waiver of immunity. The court then joined the Ninth Circuit in interpreting Section 803(c)'s immunity clause as applying to dams licensed under the FPA, even where the dam was originally constructed without a federal license (as was the collapsed dam at issue) (*Allen v. United States*).

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