



Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (October 23, 2023–October 29, 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.

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Decisions of the Supreme Court

The Court took action on an emergency application last week:

- **Indian Law:** The Court denied a request to stay a D.C. Circuit decision that enabled a gaming compact between the Seminole Tribe of Florida and the State of Florida to take effect. The case centered on whether the compact's provision addressing online sports betting violated the [Indian Gaming Regulatory Act](#). Chief Justice John Roberts had earlier issued an administrative stay in the case to give the Court time to consider the application (*W. Flagler Assocs., Ltd. v. Haaland*).

Decisions of the U.S. Courts of Appeals

- **Bankruptcy:** In a per curiam opinion, the Fifth Circuit held that [11 U.S.C. § 365\(f\)](#), which addresses the treatment of executory contracts in bankruptcy proceedings, does not authorize a bankruptcy court to approve a debtor's partial assignment of an executory

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contract. The court concluded that when § 365(f) is invoked, the executory contract must be assigned in whole, not in part (*Matter of Thornhill Bros. Fitness, L.L.C.*).

- **Civil Procedure:** A divided Ninth Circuit reversed a lower court's order remanding a suit to state court. Former employees of private contractors who provided warzone-security services to the Department of Defense (DOD) brought the employment condition and contract-related suit in state court. 28 U.S.C. § 1442(a)(1) allows removal to federal court of civil actions against "any officer (or any person acting under that officer) of the United States or of any agency thereof, . . . for or relating to any act under color of such office." The majority held there was (1) a causal nexus between the employees' work-related claims and the private contractors' actions under DOD direction and (2) a "colorable federal defense." In so doing, the majority agreed with the Fifth Circuit that, in assessing whether a party alleged a colorable federal defense necessary for removal under § 1442(a)(1), the question is not whether the defense is meritorious but whether it is not wholly insubstantial and frivolous (*Defiore v. SOC, LLC*).
- **Civil Rights:** The Seventh Circuit held that a wheelchair user demonstrated she lacked meaningful access to her local post office because it lacked a wheelchair ramp in violation of [Section 504 of the Rehabilitation Act](#), which prevents the United States Postal Service (USPS) from excluding people solely because of their disabilities. The court found that the district court erred when it granted summary judgment for the USPS on the grounds that plaintiff could purchase postal products on its website or visit other wheelchair-accessible post offices within 15 minutes of her home. The circuit court remanded the case so the lower court could determine whether construction of a wheelchair ramp is a reasonable accommodation (*Ellison v. United States Postal Serv.*).
- **Consumer Protection:** The Seventh Circuit joined the Tenth and Eleventh Circuits in holding that an alleged violation of the [Fair Debt Collection Practices Act](#), based on a debt collector sharing a debtor's data with a third-party mail vendor to prepare a collection letter, does not establish a legally cognizable harm sufficient to confer Article III standing. The circuit court applied Supreme Court caselaw holding that, although Congress can create a private cause of action for statutory violations, [Article III](#) requires that a plaintiff, whose claim involves an allegation of intangible harm caused by a statutory violation, must identify a close historical or common-law analogue. Finding no concrete injury from the alleged FDCPA violation, the panel affirmed the dismissal of the proposed class action suit (*Nabozny v. Optio Solutions, LLC*).
- **Election Law:** A divided Fifth Circuit upheld a district court's denial of Louisiana's request to dissolve a 1992 judgment, entered with the consent of the parties, on the method for selecting judges to the state supreme court. The judgment resolved long-running litigation over whether the state's method for selecting state supreme court judges diluted the votes of Black persons in violation of [Section 2 of the Voting Rights Act \(VRA\)](#), and it required the state to establish one supreme court election district with a majority-Black population. The panel majority held that the state's motion to dissolve the judgment did not satisfy [Federal Rule of Civil Procedure 60\(b\)'s evidentiary burden](#). The majority decided that the state did not show that all items in the judgment had been implemented, including institutional reform intended to ensure prospective compliance with VRA Section 2, and the state had not shown that prospective application of the order was no longer equitable (*Chisom v. Louisiana*).
- **Election Law:** The Tenth Circuit held that a Wyoming law prohibiting electioneering within 300 feet of a polling place on election day, and limiting the display of election bumper stickers within that buffer zone, did not violate plaintiff's [First Amendment](#) rights

because the law was narrowly tailored to advance the state’s interest in preventing voter confusion, undue influence, and election fraud, and the restriction did not significantly impinge on constitutionally protected rights. The panel also vacated and remanded the lower court’s ruling upholding Wyoming’s prohibition of electioneering within 100 feet of an absentee polling place during the 45-day period when absentee voting is being conducted because the lower court failed to consider the temporal scope of the ban (*Frank v. Lee*).

- **Environmental Law:** The Fifth Circuit issued a decision rendering mutually exclusive the [Oil Pollution Act \(OPA\)](#) and the [Comprehensive Environmental Response, Compensation, and Liability Act \(CERCLA\)](#), which both establish remedial schemes that apportion liability for the costs of removing covered pollutants. Whereas the OPA specifically addresses oil, CERCLA covers other hazardous substances. Affirming the lower court’s dismissal of plaintiffs’ OPA claims related to the spillage of a mixture of oil and hazardous substances, the Fifth Circuit held that the mixture did not meet the OPA’s definition of “oil” and was instead covered by CERCLA’s regulatory framework (*Munoz v. Intercontinental Terminals Co., L.L.C.*).
- **Speech:** The Fifth Circuit held that a Texas statute regulating the use of drones through a no-fly provision did not, on its face, violate the First Amendment rights of journalists. The court said there was nothing inherently expressive about operating a drone, and the statute restricted flight, rather than speech. Journalists also brought a facial challenge to Texas’s law prohibiting the use of a drone to capture images of private persons or property with the intent to conduct surveillance on the individual or property. The court rejected the challenge, holding that the surveillance provision satisfied intermediate constitutional scrutiny because the statute was narrowly tailored to further Texas’s substantial interest in protecting its citizens’ right to privacy. The panel also affirmed the lower court’s dismissal of plaintiff’s preemption claim because plaintiffs failed to show that Congress or the Federal Aviation Administration intended to occupy the entire field of drone regulation (*Nat’l Press Photographers Ass’n v. McCraw*).
- **Tax:** In a matter of first impression, the Eleventh Circuit held that the bright-line rule established by the Supreme Court in *United States v. Boyle*, under which a taxpayer cannot avoid penalties for failing to file a tax return on time because he relies on a tax return preparer, applies to an e-filed return. [Federal statute](#) penalizes taxpayers for filing late tax returns, unless the delay “is due to reasonable cause and not due to willful neglect.” In *Boyle*, the Supreme Court held that “reliance on an agent” without more does not amount to “reasonable cause” for failure to paper-file a tax return on time. In this case, the court of appeals found no material difference between a paper-filed return and an e-filed return (*Lee v. United States*).

Author Information

Michael John Garcia
Deputy Assistant Director/ALD

Rosemary W. Gardey
Legislative Attorney

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