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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (December 4–December 10, 2023)

December 11, 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

Last week, the Supreme Court issued its first opinion of the current term in an argued case:

- **Federal Courts:** Eight Justices agreed to dismiss as moot a case where the Court was asked whether a plaintiff had standing to sue a hotel under the Americans with Disabilities Act (ADA) for omitting accessibility-related information from its website, even though the plaintiff did not intend to visit the hotel. The plaintiff, who had sued hundreds of hotels, filed a suggestion of mootness with the Court after a lower court sanctioned her attorney in some ADA suits for misconduct. In light of the plaintiff's voluntary dismissal of her pending cases, her indication that she did not plan to file any more suits, and the majority's conclusion that she was not trying to manipulate the Court's jurisdiction, the Court decided that it was an appropriate exercise of its discretion to dismiss the case as moot (*Acheson Hotels v. Laufer*).

The Court also granted certiorari in one case:

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- **Labor & Employment:** The Court agreed to hear a case on whether 5 U.S.C. § 7703(b)(1)(A)'s 60-day deadline for a federal employee to seek Federal Circuit review of a final decision of the Merit Systems Protection Board is jurisdictional, meaning that the deadline is not subject to equitable tolling (*Harrow v. Dep't of Defense*).

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.

- ***Arbitration:** The Ninth Circuit held that a party challenging a delegation clause in an arbitration agreement must both specifically mention that it is challenging that clause and make specific arguments in support of that challenge. (A delegation clause is a provision delegating certain issues regarding arbitrability to the arbitrator rather than a court.) The court further held that the party may invoke the same arguments to challenge the delegation provision that it advances in support of its challenge to the arbitration agreement as a whole, but that the party must make clear why the arguments support each challenge. A majority of the panel concluded that there is a circuit split on this delegation issue, with the Ninth Circuit's standard being more lenient than that adopted by the Sixth and Eleventh Circuits (*Bielski v. Coinbase, Inc.*).
- **Criminal Law & Procedure:** The Third Circuit recognized that the Supreme Court's 2023 decision in *Jones v. Hendrix* abrogated conflicting circuit precedent. Applying *Hendrix*, the circuit court held that a federal inmate could not file a federal habeas corpus petition under 28 U.S.C. § 2241 as an end-run around the limits on successive motions challenging a conviction or sentence under 28 U.S.C. § 2255, where the inmate claimed that a Supreme Court decision, issued after he filed unsuccessful § 2255 motions, had rendered his conviction invalid (*Voneida v. Johnson*).
- **Criminal Law & Procedure:** The Fourth Circuit held that when a person held in federal civil commitment for sexual dangerousness under the Adam Walsh Child Protection and Safety Act (18 U.S.C. § 4248) seeks release through a discharge hearing under 18 U.S.C. § 4247(h), the detainee bears the burden of showing by a preponderance of the evidence that he or she is no longer sexually dangerous (*United States v. Vandivere*).
- **Election Law:** A divided Fifth Circuit, sitting en banc, issued a stay of a district court's order pending consideration of the lower court's decision that a Texas redistricting plan for county commission elections diluted the voting power of Black and Hispanic voters in violation of Section 2 of the Voting Rights Act (VRA). While neither the Black nor Hispanic population in the county was large enough to be individually protected under Section 2, both the district court and a three-judge Fifth Circuit panel applied binding circuit precedent recognizing that distinct minority groups should be aggregated for purposes of vote-dilution claims. On November 28, 2023, the Fifth Circuit decided to rehear the case en banc (*Petteway v. Galveston Cnty.*).
- **Environmental Law:** The Ninth Circuit remanded a biological opinion (BiOp) issued by the U.S. Fish and Wildlife Service (FWS) on the U.S. Army's use of water from the San Pedro River Basin. In concluding that the Army's action would not jeopardize listed species, FWS relied on the use of a nearby conservation easement to save water and mitigate the effects of the action on listed species in the basin. The Ninth Circuit held that Section 7 of the Endangered Species Act and the implementing regulations require the federal agencies to demonstrate that the *effect* of a conservation measure intended to

mitigate an action's effects on listed species—and not, as the government argued, merely the measure itself—is "reasonably certain" to occur. The court further held that the regulations require the government to determine that the beneficial effect is reasonably certain to occur based on solid, clear, and substantial information (*Ctr. for Biological Diversity v. Haaland*).

- **Environment:** The Tenth Circuit affirmed a district court order requiring a company to pay the total sum of royalty underpayments assessed in connection with its federal gas leases, rejecting the company's argument that a provision of the Federal Oil and Gas Royalty Simplification and Fairness Act (30 U.S.C. § 1724(h)) shielded it from paying the full amount. Section 1724(h) allows disputed assessments to be administratively appealed to the Secretary of the Department of the Interior, who has 33 months to issue a final decision and, if no decision is issued, "shall be deemed to have issued and granted a decision in favor of the appellant as to any . . . monetary obligation the principal amount of which is less than $10,000." The company argued that, because the Secretary did not issue a ruling on its adjudicatory appeal in 33 months, the company was not required to pay nearly $700,000 that it had been assessed through 432 individual obligations, each of which was for an amount less than $10,000. The Tenth Circuit held otherwise, concluding that while the term "monetary obligation" in Section 1724(h) is ambiguous, the surrounding statutory language and expressed congressional intent make clear the term referred to the aggregate amount the company was assessed, not each individual component (*BP Am. Production Co. v. Haaland*).
- **Firearms:** In a per curium opinion, the Second Circuit affirmed a district court's denial of injunctive relief in a suit brought by firearms dealers challenging certain commercial regulations by the State of New York on the sale of firearms and ammunition. The court held that the plaintiffs had not shown that the regulations—which required the locking up of firearms inventory by stores after hours, the installation of security alarms, monthly inventory checks, employment requirements, periodic onsite inspection by police, and background checks on prospective buyers before the sale of ammunition—were so onerous as to violate the Second Amendment by preventing law-abiding citizens from acquiring firearms. The court also held that the regulations were not preempted by federal laws establishing recordkeeping duties for federally licensed firearms dealers and that governed the use of the federal background check system (*Gazzola v. Hochul*).
- **Firearms:** In a 261-page opinion addressing four consolidated cases, the Second Circuit affirmed or vacated aspects of preliminary injunctions halting enforcement of several provisions of a New York firearms law enacted after the Supreme Court ruled in *New York State Rifle & Pistol Association, Inc. v. Bruen* that some earlier state restrictions violated the Second Amendment. The circuit court reviewed injunctions of state provisions that (1) added new disclosure requirements for applicants for in-home and concealed-carry licenses to show they possessed "good moral character," including character references and social media accounts; (2) made it a criminal offense for a person to carry a firearm in specified "sensitive locations," including places of worship, even if that person had a concealed-carry license; and (3) made it a crime to enter another person's private property, whether generally open to the public (e.g., a gas station or grocery store) or a personal residence, without the owner or lessee's express consent. The plaintiffs argued that these laws violated the Second Amendment and, in some instances, also the First Amendment. The Second Circuit decided that the plaintiffs were likely to succeed only in their facial legal challenges to the social media disclosure requirement and the criminal prohibition on carrying a firearm on private property held open to the general public. The Second Circuit also upheld the injunction blocking the "sensitive

location" provision from being applied against a named plaintiff pastor and his church (*Antonyuk v. Chiumento; Hardaway v. Chiumento; Christian v. Chiumento; Flynn v. Chiumento*).

- ***Immigration:** A three-judge Fifth Circuit panel withdrew an earlier opinion and substituted a new one that, in effect, resulted in the court switching sides in a circuit split over when an alien subject to a reinstated removal order may seek judicial review of a later administrative denial of that alien's applications for withholding of removal and protection under the Convention Against Torture (CAT). (That growing circuit split, not addressed directly by the panel, is discussed in prior editions of the *Congressional Court Watcher*.) Under 8 U.S.C. § 1252(b)(1), a "final order of removal" may be appealed to a U.S. circuit court within 30 days of the date of the order. In its earlier opinion, the panel concluded the 30-day clock is tied to the earlier reinstatement of removal order, not the later relief proceedings, and that intervening Supreme Court decisions abrogated conflicting circuit precedent. The panel changed its position in its new opinion, holding that the Supreme Court had not negated circuit precedent and that the 30-day clock begins once the relief proceedings are completed (*Argueta-Hernandez v. Garland*).
- **Immigration:** The Eighth Circuit joined the Second, Third, Fourth, and Fifth Circuits in holding that the Supreme Court's decision in *Esquivel-Quintana v. Sessions*—which held that, in the context of statutory rape offenses, the term "sexual abuse of a minor," as employed in Section 101(a)(43)(A) of the Immigration and Nationality Act (INA), requires the age of the victim to be less than 16—did not overrule the Board of Immigration Appeals' (BIA's) long-standing interpretation of the meaning of that term. In a 1999 decision, the BIA relied on the definition of "sexual abuse" found in 18 U.S.C. § 3509(a)(8) in concluding that the term "sexual abuse of a minor," for purposes of the INA, encompassed a wide range of sexually explicit conduct. The Eighth Circuit construed *Esquivel-Quintana* as a narrow holding that did not otherwise address the BIA's construction of that term (*Aguilar-Sanchez v. Garland*).
- **Securities:** The First Circuit adopted the two-part rule employed by several circuits to decide if a relief defendant in a securities enforcement action may be subject to equitable disgorgement. This rule requires the agency to show by a preponderance of the evidence that (1) the relief defendant, though not accused of wrongdoing in the action, received ill-gotten funds; and (2) the relief defendant lacks a legitimate claim to the funds (*Sec. & Exch. Comm'n v. Sanchez-Diaz*).
- **Sovereign Immunity:** A divided Ninth Circuit, sitting en banc, affirmed a lower court's dismissal of claims brought against the California State Bar because the Bar is an arm of the State of California and enjoys sovereign immunity from suit in federal court under the Eleventh Amendment. In doing so, the majority abandoned the circuit's prior test for assessing whether an entity is an arm of the state and applied a three-factor test used by the D.C. Circuit, which considers the state's intended status for the entity; the state's control of the entity; and the entity's effects on the state treasury (*Kohn v. State Bar of California*).
- **Speech:** The D.C. Circuit narrowed a district court's gag order prohibiting former President Donald Trump from making public statements "targeting" certain people involved in a criminal case alleging that he conspired to overturn and obstruct the certification of the 2020 election. The circuit court ruled that First Amendment considerations required limiting the injunction to bar parties and their counsel from either making or directing others to make public statements about (1) potential witnesses regarding their possible participation in the proceedings; (2) counsel in the case other

than Special Counsel Jack Smith; and (3) members of the court and their staff, or family members of counsel or staff members, if the statements were made with the intent to materially interfere with the work of counsel or staff in the case, or with knowledge that such interference would likely result (*United States v. Trump*).

- **Torts:** The First Circuit clarified its application of the discretionary function exception to the Federal Tort Claims Act (FTCA) in a suit brought by a federal prisoner against the Federal Bureau of Investigation and named agents. The FTCA acts as a limited waiver of the federal government's sovereign immunity in tort claims, but the discretionary function exception insulates the government from liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." The panel held that unconstitutional conduct does not fall under the discretionary function exception and directed the lower court on remand to consider whether the plaintiff's complaint plausibly alleged such conduct (*Torres-Estrada v. Cases*).

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