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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (December 11–December 17, 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

Last week, the Supreme Court granted certiorari in seven cases, two of which are consolidated:

- **Abortion:** In consolidated cases from the Fifth Circuit, the Court is asked to consider questions related to challenges to actions taken by the Food and Drug Administration (FDA) in 2016 to approve certain modifications to the approved application for marketing mifepristone, a medication abortion drug, and in 2021 to not enforce the requirement that mifepristone be dispensed in person during the COVID-19 pandemic (*Danco Labs., LLC v. All. for Hippocratic Med.*; *FDA v. All. for Hippocratic Med.*).
- **Criminal Law & Procedure:** The Court agreed to review a case from the Seventh Circuit on whether 18 U.S.C. § 666(a)(1)(B)—which generally makes it a crime for a state or local government agent to corruptly solicit, demand, or agree to accept things of value worth at least $5,000 with the intent "to be influenced or rewarded in connection" with government action—applies to gratuities, which are rewards for actions the payee

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has already taken or is already committed to take without any quid pro quo agreement (*Snyder v. United States*).

- **Criminal Law & Procedure:** The Court agreed to hear a case from the Ninth Circuit on the application of the standards for reviewing ineffective assistance of counsel claims under *Strickland v. Washington*. In particular, the Court is asked to determine the appropriate level of deference that a reviewing court should accord to a district court's factual findings concluding that a defense counsel's deficient performance did not prejudice the criminal defendant (*Thornell v. Jones*).
- **Criminal Law & Procedure:** The Court granted certiorari in a case from the D.C. Circuit on whether individuals alleged to have attempted to disrupt congressional certification of the 2020 presidential election results on January 6, 2021, may be charged with corruptly obstructing, influencing, or impeding an official proceeding in violation of 18 U.S.C. § 1512(c)(2). The specific issue presented to the Court is whether a violation of this provision requires some action as to a document, record, or other object with the intent to impair the item's use in an official proceeding (*Fischer v. United States*).
- **Tax:** The Court granted certiorari in a case from the Eighth Circuit to decide whether the Internal Revenue Service's assessment for estate tax purposes of the fair-market value of a closely held corporation properly treated the corporation's life insurance policy on a deceased shareholder as an asset when the policy proceeds were used to redeem the decedent's shares (*Connelly v. United States*).

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 Procedure:** In a matter of first impression, the Second Circuit held that a defense based on a claim of presidential immunity may be considered waived if not timely raised. The plaintiff brought a civil suit alleging that then-President Donald Trump defamed her by publicly stating she had fabricated her claim that he had sexually assaulted her decades earlier. The court held that the former President had failed to timely raise a presidential immunity defense, and the lower court did not err or abuse its discretion when it denied his attempt to raise the defense three years after the plaintiff filed her complaint. The circuit court rejected the former President's argument that presidential immunity is a nonwaivable jurisdictional defense, instead deciding that such claims should be treated similarly to other forms of immunity that the parties agreed were waivable (*Carroll v. Trump*).
- **Communications:** The Eleventh Circuit held that the Federal Communications Commission's (FCC's) authority over the Universal Service Fund (USF) under Section 254 of the Telecommunications Act of 1996 does not violate the nondelegation or private nondelegation doctrines, echoing conclusions reached by other circuit courts in similar cases. The FCC promotes universal access to telecommunications service via the USF, which is funded by required contributions from covered telecommunications carriers. The contributions are calculated in part based on data gathered by a private not-for-profit organization known as the Universal Service Administrative Company (USAC). The circuit panel's controlling opinion held that Section 254 does not violate the nondelegation doctrine because it provides an intelligible principle to the FCC in administering the program. The controlling opinion also decided that there is no private

nondelegation doctrine violation because USAC is subordinate to the FCC and the FCC maintains authority and surveillance over USAC (*Consumers' Research v. FCC*).

- **Education:** A divided Second Circuit, sitting en banc, held that plaintiffs had standing to bring suit against the Connecticut Interscholastic Athletic Conference and its member high schools under Title IX of the Education Amendments of 1972 to challenge its policy allowing transgender students to participate in sports consistent with their gender identity. The majority held that, at this stage in the litigation, the plaintiffs—nontransgender women who competed in high school athletics against transgender student-athletes and alleged that they were denied equal athletic opportunities and benefits as a result—alleged actual injuries that were plausibly redressable by the requested monetary and injunctive relief. The majority directed the lower court to decide the Title IX claims before or in tandem with determining whether monetary damages were available in this specific case. (*Soule v. Conn. Ass'n of Schs*).
- ***Election Law:** A divided Fifth Circuit reversed the lower court and upheld a Texas law requiring an original signature on a voter registration form. Before reaching the merits, the court held that the plaintiffs had standing to bring suit, joining the Third and Eleventh Circuits and splitting with the Sixth Circuit in deciding that private parties could file suit under 42 U.S.C. § 1983 to enforce the "materiality provision" of the Civil Rights Act of 1964. That provision provides that the right to vote shall not be denied because of an immaterial error or omission in a voter registration form or other voting records. On the merits, circuit panel majority held that given the totality of the circumstances, the requirement was a material voting qualification permitted under the Civil Rights Act. The majority also rejected the plaintiffs' First Amendment claim, deciding that the state's interests in ensuring voting integrity outweighed the minimal burden that the signature requirement placed on persons' electoral participation (*Vote.org v. Callanen*).
- **Food & Drug:** The First Circuit upheld two criminal defendants' convictions under the Federal Food, Drug, and Cosmetic Act (FFDCA) and, in doing so, rejected the defendants' constitutional arguments that their prosecutions violated the First Amendment. The FFDCA and its implementing regulations generally outlaw the commercial distribution of "adulterated" or "misbranded" medical devices, including marketing devices with a "major change or modification" in their "intended use" without providing the requisite premarket notification to the FDA. The circuit court held that the First Amendment was not implicated by prosecutors' use of truthful, nonmisleading promotional speech by the defendants to establish that they commercially distributed a medical device with the criminal intent that those devices be used for purposes not permitted by the FFDCA. The court also decided that FDA regulations defining "intended use" permitted consideration of any relevant statements or conduct by the defendants—not just their marketing and promotional statements—in determining whether the defendants marketed a misbranded or adulterated medical device (*United States v. Facteau*).
- ***Immigration:** The Tenth Circuit issued a revised opinion, substantively the same as its earlier ruling in a withdrawn opinion, examining the method for computing the maximum period after an alien is found removable during which the alien may be permitted to voluntarily depart the United States or file an administrative motion to reopen the proceedings. 8 U.S.C. § 1229c(b)(2) provides that an immigration judge may issue an order granting the alien the ability to voluntarily depart the country instead of ordering their removal and that the voluntary departure period may last up to 60 days. The Tenth Circuit held that this period may not exceed 60 calendar days from the date of service of the voluntary departure order. The court noted it disagreed with the Ninth Circuit, which

the Tenth Circuit panel described as having held that a voluntary departure period extended to the next business day when the 60th day falls on a federal holiday or weekend (*Monsalvo Velazquez v. Garland*).

- **Labor and Employment:** The First Circuit held that, under Department of Labor (DOL) regulations, the time that truck drivers spend in the sleeper berths of their trucks above eight hours is compensable time under the Fair Labor Standards Act's overtime requirements. The court adopted "the predominant benefit" test applied by other circuits, under which time is deemed compensable if "spent predominantly for the employer's benefit." The court determined that time spent in sleeper berths satisfies the test, reasoning that employees are significantly limited in their ability to engage in leisure activities while confined in the small sleeper berths of moving trucks and that the employee is still on call while in the sleeper berth if the employee on driving duty needs assistance. Based on this conclusion, the court held that the plaintiff was entitled to compensation for time spent in the sleeper berth beyond the eight hours for sleeping time that the employer is allowed to exclude under DOL regulations, thereby affirming the district court's grant of summary judgment to the plaintiff (*Montoya v. CRST Expedited, Inc.*).
- **Labor and Employment:** In affirming a jury verdict finding the plaintiff's employer terminated her based on race or sex in violation of Title VII of the Civil Rights Act of 1964, the Eleventh Circuit emphasized that the burden-shifting framework the Supreme Court set out in *McDonnell Douglas Corp. v. Green*—which compares a plaintiff's treatment with that of a similarly situated employee—establishes an evidentiary framework and not a standard of liability for a Title VII claim. Because the framework is only one way to show discrimination, the court noted, a plaintiff may prevail on the ultimate question of intentional discrimination with sufficient evidence of a discriminatory motive in an employment action even if they do not identify a similarly situated employee (*Tynes v. Fla. Dep't of Juv. Just.*).
- **Labor and Employment:** A divided Eleventh Circuit affirmed a lower court judgment for an employer on wrongful termination and retaliation claims. In doing so, the majority held that a retaliation claim under the Family and Medical Leave Act (FMLA) requires the plaintiff to show that the employer would not have taken adverse action "but for" FMLA-protected conduct and that, in this case, the plaintiff had not met that burden. In reaching its holding, the majority decided that a DOL regulation endorsing a "negative factor" causation standard—where taking FMLA leave need not be the "but-for" reason for an adverse action but need only be one motivating factor—diverged from the FMLA's text and thus was not entitled to *Chevron* deference (*Lapham v. Walgreen Co.*).

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