



Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (July 25–July 31, 2022)

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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

No Supreme Court opinions or grants of certiorari were issued this week. The Supreme Court’s next term is to begin October 3, 2022.

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 Rights:** Joining the only other circuit to examine the matter directly, a divided Sixth Circuit panel held that disability-related employment discrimination claims brought under [§ 501](#) and [§ 504](#) of the Rehabilitation Act require different causation standards. The majority opinion recognized that federal employees, whose claims fall under [§ 501](#), must show the employer would not have taken adverse action without, or “but-for,” disability-

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related discrimination, even though other factors may have played a part. Workers at federally funded employers, covered under § 504, must show that the discrimination alone motivated the adverse action (*Bledsoe v. Tenn. Valley Auth. Bd. of Dirs.*).

- **Criminal Law & Procedure:** A divided Fourth Circuit panel held that a felony conviction under 18 U.S.C. § 1361 for willfully injuring or committing depredation against government property, with damage exceeding \$1,000, does not qualify as a predicate crime of violence under 18 U.S.C. § 924(c), which punishes possession of a firearm in furtherance of such crime. Applying the categorical approach the Supreme Court provided in *United States v. Davis*, the Fourth Circuit rejected the district court's conclusion that the § 1361 offense is divisible into separate offenses of willful injury and depredation. With a unified understanding of the statute, the majority determined that a § 1361 offense was not a "crime of violence" because a defendant need not use, attempt to use, or threaten physical force to be convicted (*United States v. Melaku*).
- **Criminal Law & Procedure:** The D.C. Circuit rejected a defendant's challenges to his convictions for involvement in the 2012 terrorist attack on the United States' diplomatic outpost in Benghazi, Libya. The court agreed with the government that the sentence imposed was unreasonably low and remanded for resentencing. The court held that a felony conviction under 18 U.S.C. § 1363 for destroying or injuring buildings or property within the United States' special maritime and territorial jurisdiction qualified as a predicate crime of violence under 18 U.S.C. § 924(c). Applying the modified categorical approach the Supreme Court explained in *Mathis v. United States*, the court determined that § 1363 is divisible into separate offenses for conspiracy to injure property and directly injuring property, and the latter offense is a "crime of violence" for which the defendant was convicted (*United States v. Abu Khatallah*).
- ***False Claims Act:** In a case involving the interaction of a 2010 amendment to the [False Claims Act](#) and the [Anti-Kickback Statute](#), the Eighth Circuit held that the amendment requires but-for causation between the anti-kickback violation and the allegedly false claim. To establish that the claim "includes items or services resulting from" an anti-kickback violation, the government must prove that defendants would not have included particular items or services in a claim absent illegal kickbacks. Disagreeing with the Third Circuit, the court determined that it was insufficient for the government to show that illegal kickbacks merely tainted the claim (*United States ex rel. Cairns v. D.S. Med. LLC*).
- **Food & Drug:** The D.C. Circuit denied flavored e-cigarette liquid manufacturers' petitions for review of the Food and Drug Administration's (FDA's) marketing denial orders. The court held that 21 U.S.C. § 387j authorizes FDA to compare claimed cessation benefits between flavored and nonflavored tobacco products. The court concluded that FDA did not act arbitrarily and capriciously and rejected the petitioners' arguments that FDA departed from an earlier guidance document (*Prohibition Juice Co. v. FDA*).
- **Health:** The Second Circuit upheld a Department of Health and Human Services Office of Inspector General (HHS OIG) advisory opinion stating that Pfizer would violate the Anti-Kickback Statute if it covered Medicare Part D beneficiaries' copays for an expensive drug. Under Medicare's cost-sharing structure, these beneficiaries are responsible for a \$13,000 co-pay toward the \$225,000 annual cost of the drug. Pfizer sought to cover these copays for eligible beneficiaries directly, but HHS OIG ruled that this would violate the Anti-Kickback Statute's prohibition on offering remuneration to induce an individual to purchase a federally reimbursable health care product (42 U.S.C.

§ 1320a-7b(b)(2)(B)). The Second Circuit agreed and rejected Pfizer’s argument that corrupt intent is required for Anti-Kickback Statute liability (*Pfizer, Inc. v. U.S. Dep’t of Health & Human Servs.*).

- **Immigration:** Joining other circuits, the Third Circuit held that an alien from a country that was not part of the Visa Waiver Program (VWP), but attempted to enter the United States by using the passport of a person from a VWP-participant country, was subject to restrictions found in 8 U.S.C. § 1187 preventing VWP applicants from challenging their removability except through an application for asylum (*Shkempi v. Att’y Gen.*).
- **Immigration:** In consolidated appeals, a divided Ninth Circuit panel largely affirmed lower court decisions holding that the Attorney General lacked statutory authority to condition state or local jurisdictions’ receipt of [Byrne JAG Program](#) funds in fiscal years 2017 and 2018 upon those jurisdictions’ assistance with federal immigration enforcement activities. (The United States did not appeal the lower court rulings enjoining the withholding of these funds to the extent these rulings were based on statutory grounds.) The circuit court also remanded with instructions to dismiss facial Tenth Amendment challenges brought by plaintiffs against 8 U.S.C. §§ 1373 and 1644, which constrain jurisdictions from limiting the sharing of immigration-status information with the federal government. The court held these challenges were not justiciable in their current posture. The federal government had disbursed the grant funds to the plaintiffs and announced it would no longer enforce the challenged grant conditions, and an intervening Ninth Circuit decision made clear that the plaintiff jurisdictions’ policies complied with §§ 1373 and 1644 (*City & Cnty. of San Francisco v. Garland*).
- **Indian Law:** A divided Ninth Circuit held that the [Indian Gaming Regulatory Act \(IGRA\)](#) sets forth an exhaustive list of permissible negotiation topics between states and Indian tribes seeking to conclude a compact allowing those tribes to conduct high-stakes gambling operations. Here, the Ninth Circuit majority decided that California’s insistence that a negotiated compact include provisions addressing matters unrelated to casino gaming operations—including provisions on family law, environmental law, and torts—showed that the state was not negotiating in good faith, enabling the plaintiff tribes to seek judicial remedies to compel the state to return to the bargaining table (*Chicken Ranch Rancheria of Me-Wuk Indians v. California*).
- ***Labor & Employment:** The Third Circuit added to a circuit split over personal jurisdiction and opt-in plaintiffs in [Fair Labor Standards Act \(FLSA\)](#) collective actions. Joining the majority view, the Third Circuit held that where the district court lacks general personal jurisdiction over the defendant, all opt-in plaintiffs must establish specific personal jurisdiction over the defendant with respect to their individual claims. The court rejected the plaintiffs’ efforts to analogize FLSA collective actions to class actions (*Fischer v. Federal Express Corp.*).
- **Labor & Employment:** The Third Circuit reversed a lower court’s interpretation of the [Civil Service Reform Act \(CSRA\)](#). While the lower court held that all of the plaintiff’s statutory claims were precluded under the CSRA because they arose in the context of the plaintiff’s federal employment, the Third Circuit determined that the CSRA barred only claims challenging employment actions within the jurisdiction of the Merit Systems Protection Board. The Third Circuit concluded that some of the plaintiff’s claims were not precluded under this narrower inquiry (*Manivannan v. U.S. Dep’t of Energy*).
- **Securities:** The D.C. Circuit upheld the Securities and Exchange Commission’s (SEC’s) approval of an attempt by a securities exchange to combat latency arbitrage, a trading strategy in which high-frequency traders submit orders taking advantage of split-second

differences in information around a price change. The exchange used a combination of physical infrastructure and an algorithm to attempt to limit such orders. The SEC approved a [rule change](#) permitting expanded use of this system. The court rejected a high-frequency trader's claims that the SEC's actions were discriminatory and procedurally defective, holding that the SEC cited substantial evidence and reasonably explained its conclusion that the rule change would benefit the overall market by combating latency arbitrage (*Citadel Secs. LLC v. SEC*).

- **Speech:** The Ninth Circuit held that defendant school board members, who created publicly accessible social media pages first to promote their campaigns and then, post-election, to communicate with constituents about the carrying out of their duties, violated the First Amendment when they blocked certain critical commenters from these pages. The court held that the board members were acting under color of state law in operating the pages because they were performing official duties. The court also concluded that the interactive portions of those social media pages were designated public fora because they were open for unrestricted public comment. The defendants' decision to block the commenters, the panel concluded, was not sufficiently tailored to a significant governmental interest to withstand constitutional scrutiny (*Garnier v. O'Connor-Ratcliff*).
- **Transportation:** The D.C. Circuit upheld Federal Motor Carrier Safety Administration rule changes that eased certain regulatory requirements for commercial motor vehicle operators. The rule changes expand an exemption to record-keeping requirements for short-haul drivers (49 C.F.R. § 395.1(e)(1)) and modify a break requirement for long-haul drivers (49 C.F.R. § 395.3(a)(3)(ii)). The court ruled that the Administration's actions were not arbitrary and capricious, because the Administration sufficiently explained and justified its conclusions that the changes would not adversely affect safety, driver health, or regulatory compliance (*Advocs. for Highway & Auto Safety v. Federal Motor Carrier Safety Admin.*).
- **Transportation:** The D.C. Circuit rejected Fourth Amendment and procedural challenges to the Federal Aviation Administration's [Remote Identification rule](#) requiring drones to emit identifying information by radio signal. The court determined that drone pilots generally lack any reasonable expectation of privacy in the location of their drones during flight. The court also held that the plaintiff's speculative concerns of continuous data collection and tracking did not support vacating the rule and could be addressed, if realized, in future as-applied challenges (*Brennan v. Dickson*).
- **Transportation:** The Ninth Circuit held that the [Railroad Unemployment Insurance Act \(RUIA\)](#) preempts California's [Healthy Workplaces, Healthy Families Act](#) as applied to railroad employees. RUIA provides unemployment and sickness benefits to railway workers and prohibits them from having any right to "sickness benefits under a sickness law of any State" (45 U.S.C. § 363(b)). The court found that the California statute's provision of paid sick leave fell within RUIA's preemption provision (*Nat'l Ry. Passenger Corp. v. Su*).

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