

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Oct. 25–Oct. 31, 2021)

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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 the 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

This past week, the Supreme Court added the following cases to its docket:

- **Environmental Law:** Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), directs the Environmental Protection Agency (EPA) to set emission standards for certain pollutants produced by existing stationary sources. In 2015, the EPA under the Obama Administration relied on § 7411(d) to issue the Clean Power Plan rule to regulate carbon dioxide emissions from existing fossil fuel-fired power plants. The EPA repealed the rule under the Trump Administration and replaced it with the Affordable Clean Energy (ACE) rule. The D.C. Circuit, however, vacated the ACE rule and EPA’s repeal of the Clean Power Plan. The Supreme Court granted certiorari in and consolidated four cases from the D.C. Circuit arising from the Clean Power Plan litigation to consider the breadth of regulatory authority delegated by Congress to the EPA through § 7411(d) (*West Virginia*

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v. EPA; North American Coal Corp. v. EPA; Westmoreland Mining Holdings v. EPA; North Dakota v. EPA).

- **Immigration:** The Supreme Court granted certiorari in a case from the Ninth Circuit involving several states' attempt to intervene to defend a Trump-era immigration rule that the Biden Administration no longer seeks to defend. The Court granted review only of the question as to whether the states may intervene to defend a federal rule that the United States ceases to defend, and did not grant review to consider the validity of the underlying immigration rule (*Arizona v. City and County of San Francisco*).

The Supreme Court also declined, by a 6-3 vote, an application for injunctive relief in a case involving a constitutional challenge to Maine's emergency rule that health care workers be vaccinated against Coronavirus Disease 2019 (COVID-19), a requirement subject to limited exemptions for medical but not religious reasons. (The First Circuit's consideration of the case is discussed in an [earlier Congressional Court Watcher Sidebar](#).) (*Does v. Mills*).

Decisions of the U.S. Courts of Appeals

- **Civil Procedure:** The False Claims Act (FCA) empowers the federal government to bring claims against those who defraud the United States. The FCA also allows private parties (relators) to bring such claims on the government's behalf and recover a share of the proceeds of the action (*qui tam* actions). The relationship between the government and relators, including the procedures the government may use to dismiss an FCA action in which the government had initially decided not to participate, are governed by 33 U.S.C. § 3730(c). Adding to a circuit split over the process for government dismissal of FCA *qui tam* actions, the Third Circuit held that the government must first intervene and become a party to the case before seeking dismissal. The Third Circuit also contributed to a circuit split on a related issue, in concluding that the government is not automatically entitled to dismissal in such circumstances, but instead its motion to dismiss will be considered under the framework of Federal Rule of Civil Procedure 41. Under that framework, the government is generally entitled to dismissal if it asks to end the lawsuit before the defendant has responded to the complaint, but a court has more discretion over dismissal if the defendant has already responded (*Polansky v. Executive Health Resources, Ltd.*).
- **Civil Procedure:** Earlier this year in *TransUnion LLC v. Ramirez*, the Supreme Court observed that when a federal statute provides a plaintiff with a cause of action based on a defendant's violation of federal law, the plaintiff must still satisfy all constitutional requisites for standing, including identifying a "concrete harm" suffered as a result of the violation. *TransUnion* held that courts must consider whether the alleged harm has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. In vacating an earlier, pre-*TransUnion* opinion and issuing a new decision, a divided Eleventh Circuit panel held that the plaintiff satisfied constitutional standing requirements to bring suit under the Fair Debt Collection Practices Act (FDCPA), which limits debt collectors' ability to communicate consumers' personal information to third parties "in connection with the collection of any debt." The court concluded that plaintiff's alleged injury—the sending of sensitive medical information by a debt collector to employees of an unauthorized third-party vendor—constituted a concrete harm because it was sufficiently analogous to the common-law tort of public disclosure of private facts. It also concluded that congressional findings included in the FDCPA indicated that the plaintiff's alleged harm fit within the category of privacy harms that Congress intended to address. Separately, the court decided that the defendant debt

collector's transmittal of the plaintiff's personal information to the vendor constituted communication "in connection with the collection of any debt" under the FDCPA (*Hunstein v. Preferred Collection and Management Services, Inc.*).

- **Communications:** The New & Emerging Technologies 911 Improvement Act required development of a plan for migrating to a national Voice over Internet Protocol (VoIP)-enabled emergency network, and legislated "parity" between VoIP-based and non-VoIP-based providers and subscribers. The Fourth Circuit agreed with a Federal Communications Commission (FCC) ruling that the Act prohibits state and local governments from charging higher 911 fees to VoIP providers than non-VoIP providers. Examining the Act's text, structure, and purpose, the Court found Congress's intent in the parity provision to be unambiguous (*Autauga County Emergency Management Communication District v. FCC*).
- **Criminal Law & Procedure:** The First Step Act altered procedures for judicial consideration of motions for compassionate release, allowing defendants to file a motion when extraordinary and compelling reasons support their release. The Third Circuit held that a defendant's motion for compassionate release under the Act could not be premised solely on substantial assistance provided in a prosecution or criminal investigation, because the Act did not displace existing procedural requirements for motions for sentence reductions based on such assistance. Still, the court observed that assistance could be a relevant, though not exclusive, factor in a court's analysis of whether compassionate release was warranted under the First Step Act (*United States v. Claude*).
- **Criminal Law & Procedure:** The federal *in forma pauperis* statute, 28 U.S.C. § 1915, allows prisoners to bring a civil action or appeal a judgment in federal court without prepaying filing fees, unless three or more prior actions or appeals were dismissed on certain enumerated grounds, including failure to state a claim. In *Heck v. Humphreys*, the Supreme Court held that to recover damages for allegedly unconstitutional conviction or imprisonment under 42 U.S.C. § 1983, the plaintiff's conviction or sentence must have been reversed on appeal, expunged by executive action, declared invalid by a state court, or called into question by a federal court's issuance of habeas relief. Adding to a circuit split, the Third Circuit held that a prisoner's prior suits barred on *Heck* grounds were properly dismissed for failure to state a claim and therefore constituted "strikes" under the *in forma pauperis* statute (*Garrett v. Murphy*).
- **Criminal Law & Procedure:** The federal money laundering statute, 18 U.S.C. § 1956, provides courts with extraterritorial jurisdiction over covered conduct in some circumstances, including when, in the case of a noncitizen, the conduct "occurs in part" in the United States. In upholding a noncitizen's conviction under § 1956, the Fourth Circuit held, among other things, that conspiracy charges under § 1956 may reach extraterritorial conduct, and that the noncitizen defendant's conspiratorial conduct with persons located in the United States to further his money laundering activities in Nigeria fell under the statute (*United States v. Ojedokun*).
- **Election Law:** Affirming the denial of injunctive relief, a divided Fifth Circuit panel concluded that plaintiffs' request to enjoin a county's administration of drive-thru voting in the November 2020 election was moot, and the panel declined plaintiffs' request that drive-thru voting be enjoined in future elections. The majority observed that there was no evidence the county would offer drive-thru voting in the future or do so in a way that would evade future review, and ruled that the plaintiffs' (a voter and candidates in the 2020 election) claim for prospective relief to preserve election integrity was too generalized to satisfy standing requirements (*Hotze v. Hudspeth*).

- **Election Law:** Federal courts have discretion to award attorneys' fees to a "prevailing party" (other than the United States) in civil rights suits under 42 U.S.C. § 1988. The Eleventh Circuit held that a nongovernmental organization that obtained a temporary restraining order against a secretary of state regarding certain election matters was a "prevailing party" under § 1988. While the defendant characterized the order as affording only modest relief compared to what the organization requested, the court concluded it was enough that the secretary altered his conduct to the benefit of the organization as a result of the order (*Common Cause Georgia v. Secretary, State of Georgia*).
- **Immigration:** Federal law provides that aliens may be detained during the pendency of removal proceedings against them, and 8 U.S.C. § 1226(c) requires detention of those who engaged in specified criminal activity. In reviewing a class action brought by persons held under § 1226(c), a divided First Circuit panel ruled aliens subject to § 1226(c) do not have a per se constitutional right to a hearing concerning the reasonableness of their continued detention if held beyond six months. Instead, whether a right attaches depends on whether the alien's individualized circumstances make prolonged detention unreasonable. Because resolution of this issue resolved the common question central to the class's claims, the majority vacated as advisory the district court's declaratory and injunctive relief for individual class members for whom a constitutional right might exist (*Reid v. Donelan*).
- **Immigration:** Aliens may qualify for asylum if they face persecution in their home countries on account of a statutorily protected ground, including membership in a "particular social group." The United States' policy on whether aliens fleeing domestic violence may constitute a "particular social group" has changed several times; in 2021, the Attorney General rescinded earlier agency rulings that held that domestic violence generally cannot form an asylum claim. The Fifth Circuit held that an asylum-seeker's alleged social group—Honduran women unable to leave their relationships due to domestic violence fears—did not constitute a "particular social group." The court held that the Attorney General's interpretation of the asylum statute was not entitled to deference, because even assuming the statute was ambiguous, it would be unreasonable to interpret a "particular social group" to be defined only by reference to the persecution faced by the members of that group (*Jaco v. Garland*).
- **Immigration:** Under 8 U.S.C. § 1325(a)(1), it is a criminal offense for an alien "to enter the United States at any time or place other than as designated by immigration officers." The Ninth Circuit held that § 1325(a)(1), enacted to control unauthorized immigration, is a regulatory offense for which no presumption of scienter (i.e., knowledge of wrongdoing) applies. The court ruled that the government did not need to show that the defendant had knowledge of his alienage to convict (*United States v. Rizo-Rizo*).

- **Immigration:** The doctrine of consular non-reviewability shields consular decisions regarding visa applications from judicial review. In its first published decision on consular non-reviewability, the Eleventh Circuit held that the doctrine does not divest courts of subject-matter jurisdiction over visa claims. Instead, the doctrine reflects judicial reluctance to review the Executive's exercise of power delegated by Congress, which has plenary authority to make rules for the exclusion of aliens, so long as the exercise is based on a facially legitimate and bona fide reason. Observing possible tension with the more deferential views of two other circuits, the Eleventh Circuit described a decision as "facially legitimate" if a valid statutory basis is cited for the exclusion, and "bona fide" when the Executive identifies a factual predicate for the visa denial (*Del Valle v. Secretary of State*).
- **Public Health:** The Food and Drug Administration (FDA) denied an application to market flavored e-cigarettes under the Family Smoking Prevention and Tobacco Control Act. The Fifth Circuit granted a stay of the FDA's ruling, thereby allowing the applicant to continue marketing and selling its products. The court found, among other things, that the applicant was likely to succeed on the merits based on its Administrative Procedure Act challenge because the FDA did not act reasonably in denying the application. The court also found the applicant demonstrated a likelihood of irreparable harm (*Wages & White Lion Investments, L.L.C. v. FDA*).
- **Tax:** The Eleventh Circuit affirmed summary judgment for the government in a case deciding whether a partner in a limited liability company or partnership must raise a "supervisory approval issue" under 26 U.S.C. § 6751(b)(1) before or after he files a refund lawsuit. The Internal Revenue Service (IRS) is prohibited under § 6751(b)(1) from assessing a tax penalty "unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." The Eleventh Circuit held that in partnership tax cases controlled by the Tax Equity and Fiscal Responsibility Act of 1982, the supervisory approval issue must be exhausted with the IRS *before* the partner files his individual refund lawsuit and must be raised *during* the earlier partnership-level proceedings (*Ginsburg v. United States*).
- **Veterans:** The Veterans' Benefits Act (VBA) sets out a comprehensive scheme governing the appointment, employment, and discipline of Department of Veterans Affairs physicians. Joining every other circuit, the Tenth Circuit held that the process set forth in the VBA is the exclusive remedy for review of an employee's termination, foreclosing judicial review. The court also held that the Administrative Procedure Act could not be used to obtain the judicial review the plaintiff was denied under the VBA's comprehensive scheme (*Tompkins v. Dep't of Veterans Affairs*).

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