



Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Oct. 3–Oct. 9, 2022)

October 11, 2022

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

On October 3, 2022, the first day of its new term, the Supreme Court granted certiorari to review nine cases:

- **Communications:** The Court granted certiorari in two cases from the Ninth Circuit involving social media companies’ possible civil liability under the [Anti-Terrorism Act](#) for conduct that allegedly aided terrorist groups. One of these suits concerns the immunities conferred by [Section 230 of the Communications Act of 1934](#), as amended, to providers and users of interactive computer services. The case concerns a civil suit brought against Google, alleging that the company’s YouTube platform assisted the Islamic State by promoting the organization’s recruitment videos. The plaintiffs contend that Google made targeted recommendations to certain users to watch the videos through computer algorithms, and that these activities are not covered by Section 230’s liability shield against claims arising from third-party content (*Gonzalez v. Google LLC*). A related case before the Court does not address Section 230 immunities, but centers on

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whether social media companies can be found liable for aiding and abetting terrorist groups under the Anti-Terrorism Act by “knowingly” providing “substantial assistance” to those groups through their use of the companies’ generally available services (*Twitter, Inc. v. Taamneh*).

- **Criminal Law & Procedure:** The Court agreed to review a Second Circuit case addressing whether a U.S. district court may exercise criminal jurisdiction under 18 U.S.C. § 3231 over an instrumentality of a foreign sovereign (here, a bank owned by the Turkish government) given the immunities provided by the [Foreign Sovereign Immunities Act](#) (*Turkiye Halk Bankasi A.S. v. United States*).
- **Education:** The Court agreed to review a case from the Sixth Circuit involving the interplay between the [Individuals with Disabilities in Education Act \(IDEA\)](#) and the [Americans with Disabilities Act \(ADA\)](#). An IDEA provision, 20 U.S.C. § 1415(l), states that nothing in the Act restricts the availability of civil procedures and remedies under the ADA and other federal laws protecting children with disabilities. It provides, however, that before filing a civil action under such laws seeking relief available under IDEA, a plaintiff must exhaust the administrative processes for resolving IDEA claims. The Court is asked whether IDEA requires exhaustion of the administrative processes before filing related ADA claims in federal court when doing so would be futile. (Here, the plaintiff had resolved an IDEA claim through settlement.) The Court is also asked whether the exhaustion requirement applies to ADA claims for money damages unavailable under IDEA, a question the Court had once granted certiorari to address but **ultimately declined** to resolve (*Perez v. Sturgis Pub. Schools*).
- **Federal Courts:** In a case from the Ninth Circuit, the Court is asked to consider a contempt order issued against a law firm that did not fully comply with a grand jury subpoena for documents related to the firm’s preparation of a client’s tax return. The firm contends that the documents are shielded from disclosure by attorney-client privilege, as they allegedly had the dual purpose of communicating information related to preparation of the clients’ tax returns and providing legal advice to the client (*In re Grand Jury*).
- **Immigration:** The Court agreed to hear a Fifth Circuit case on whether a provision in a federal immigration statute, 8 U.S.C. § 1252(d)(1), barred review of petitioner’s claim that the Board of Immigration Appeals engaged in impermissible fact-finding. The circuit court held that it lacked jurisdiction to consider the petitioner’s claim because § 1252(d)(1) allows appellate court review of a final order of removal when the petitioner has exhausted all administrative remedies. Here, the petitioner had not raised the fact-finding claim in a motion to reconsider with the BIA (*Santos-Zacaria v. Garland*).
- **Labor & Employment:** The Court agreed to review a decision from the Sixth Circuit holding that a state’s National Guard, in its capacity as an employer and supervisor of dual-status technicians, is an executive agency under the [Federal Service Labor-Management Relations Statute](#) subject to the Federal Labor Relations Authority’s (FLRA’s) jurisdiction. The Supreme Court is asked whether the FLRA may regulate the labor practices of state militias (*Ohio Adjutant General’s Dep’t v. FLRA*).
- **Labor & Employment:** The Court agreed to review a decision by the Washington Supreme Court, which concluded that the [National Labor Relations Act](#) preempted an employer’s state law tort claims against a union for property damage allegedly caused by striking workers (*Glacier Northwest, Inc. v. Int’l Brotherhood of Teamsters*).
- **Territories:** In an appeal from the First Circuit, the Court agreed to consider whether sovereign immunity shields the Financial Oversight and Management Board of Puerto Rico (Board) from suit. The circuit court had held that the Board, which Congress

established through the [Puerto Rico Oversight, Management, and Economic Stability Act \(PROMESA\)](#) to oversee the restructuring of the Commonwealth's debt, was not immune from all claims brought against it in federal court. Assuming without deciding that the Board was an arm of Puerto Rico, and that Puerto Rico was otherwise shielded under the Eleventh Amendment from suit in federal court, the court determined that Congress, acting under its plenary power to legislate on behalf of U.S. territories, had abrogated any immunity the Board might have (*Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*).

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 Second Circuit held that a party seeking to confirm a foreign arbitral award under the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards \(New York Convention\)](#) is not required to serve a summons on the adverse party. The court observed that although the New York Convention and [Chapter 2 of the Federal Arbitration Act](#), which codifies domestic enforcement of foreign arbitral awards under the New York Convention, require notice of an application to confirm the arbitral award be served on the adverse party, neither requires that this notice be accompanied by a summons (*Commodities & Mins. Enter. Ltd v. CVG Ferrominera Orinoco, C.A.*).
- ***Civil Rights:** Adding to a circuit split, the First Circuit held that a plaintiff satisfied constitutional standing requirements to bring suit against a hotel for omitting accessibility-related information from its website as required by ADA regulations. Although the plaintiff said she had no intention to visit the hotel, the court concluded that she alleged a sufficiently concrete and particularized injury because she was denied information to which she was legally entitled. At least five circuit courts have issued precedential decisions in similar cases over the last two years, with the First Circuit and Eleventh Circuit concluding that constitutional standing requirements were satisfied and the Second, Fifth, and Tenth Circuits holding that they were not (*Laufer v. Acheson Hotels, LLC*).
- **Election Law:** The Eleventh Circuit vacated a district court's preliminary injunction that would have required Georgia to delay, until after early voting, distribution of hard-copies of voter registration lists to local election officials for checking in voters. The circuit court concluded that the existing practice was reasonable and nondiscriminatory, and that the plaintiffs failed to show it burdened the right to vote. The court found it unnecessary to consider a preliminary injunction that the district court discussed but failed to issue regarding the recalibration of ballot scanner settings to detect lighter markings (*Curling v. Raffensperger*).
- **Health:** The Eight Circuit affirmed the dismissal of a plaintiff's claim that she was inappropriately transferred to a hospital that could not adequately treat her emergency medical condition in violation of the [Emergency Medical Treatment and Active Labor Act \(EMTALA\)](#). EMTALA provides that a hospital may transfer a person with an emergency medical condition to another hospital only when the receiving hospital agrees to the transfer and has the capacity to treat the individual adequately. The Eight Circuit decided that holding transferring hospitals strictly liable for transferring a patient to an inadequate facility would not be consistent with the aim of EMTALA to deter bad-faith actions by hospitals. The court held that liability did not attach where, as here, the

transferring hospital acted under the reasonable belief that the transfer was appropriate, based on information that had been conveyed to it by the recipient hospital before the patient's transfer (*Ruloph v. LAMMICO*).

- **Immigration:** The Fifth Circuit affirmed a federal district court's ruling that the Department of Homeland Security's (DHS) 2012 memorandum establishing the [Deferred Action for Childhood Arrivals \(DACA\)](#) program is unlawful. Under DACA, aliens without legal status who came to the United States as children and meet other requirements may remain and work in the United States for renewable two-year periods. The Fifth Circuit ruled that DACA conflicts with the Immigration and Nationality Act's regulatory scheme specifying classes of aliens who may obtain lawful presence and associated benefits. The court also held that DHS violated procedural requirements under the Administrative Procedure Act when implementing that policy. The court temporarily stayed its decision for current DACA recipients, and remanded the case to the district court to review a [final rule](#) DHS issued during the pendency of the litigation that codifies the DACA policy in federal regulations (*Texas v. United States*).
 - **Immigration:** A divided D.C. Circuit rejected a legal challenge to a DHS [rule](#) that permits foreign visitors with nonimmigrant student (F-1) visas to remain and work in the United States for a period (up to three years in some cases) of Optional Practical Training after completion of their formal course of study. The court held that the rule was a valid exercise of DHS's statutory authority to set the duration and conditions of a nonimmigrant visitor's presence in the United States and that the rule reasonably related to the legislative purpose for which student visas were authorized. The court also recognized that DHS's authority to set the conditions of nonimmigrant admission includes the power to authorize employment in the United States, including for nonimmigrant students (*Washington All. of Tech. Workers v. DHS*).
 - **Indian Law:** A divided Eighth Circuit held that neither the [Indian Gaming Regulatory Act](#) nor the [Indian Trader Statutes](#) preempted state taxation of nonmember contractors for renovation of the Tribe's casino on its reservation, whether expressly or under the balancing-of-interests test suggested by the Supreme Court in *White Mountain Apache Tribe v. Bracker* (*Flandreau Santee Sioux Tribe v. Houdyshell*).
 - **Intellectual Property:** The Second Circuit reviewed a district court judgment in a lawsuit brought by music publishers against a company that acquired a large private collection of concert recordings by numerous famous musicians, and made audio and audiovisual recordings of those concerts available through streaming services and digital download for a fee. While much of the appeal focused on evidentiary matters and the appropriateness of the remedies and awards issued by the trial court, the circuit court also considered how [Section 115 of the Copyright Act](#) applied to the audiovisual recordings of live concerts made available by the defendant. The circuit court agreed with the lower court that Section 115 of the Copyright Act, which permits [compulsory licensing](#) for the making and distribution of "phonorecords" of a published musical work, excludes from its scope all audiovisual recordings, including of live concerts such as those the defendant had distributed (*ABKCO Music, Inc. v. Sagan*).
 - **Public Health:** A divided Eleventh Circuit lifted a preliminary injunction that limited Florida's enforcement of a state law barring businesses in the state from requiring customers to show proof of vaccination against COVID-19. A district court had halted Florida from applying the law to the plaintiff cruise line company after concluding the company was likely to succeed in its claims that the law impermissibly violated its First Amendment rights and unduly burdened interstate commerce. The circuit court majority
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concluded otherwise on both counts. First, it held that the law regulated non-expressive economic conduct and only incidentally burdened speech, like other statutes barring businesses from discriminating against certain groups, and that it bore a rational relationship to Florida’s legitimate interest in protecting its citizens from discrimination and privacy intrusions. Second, the majority ruled that the plaintiff was unlikely to succeed in its claim that the state law infringed on congressional authority over interstate and foreign commerce. The majority held that Florida had a substantial interest in preventing discrimination against its residents or intrusions on their privacy, and these interests outweighed any burdens imposed on interstate commerce and met constitutional requirements (*Norwegian Cruise Line Holdings Ltd. v. Florida Surgeon Gen.*).

- **Securities:** The Ninth Circuit upheld the Securities and Exchange Commission’s (SEC’s) enforcement action against appellants, who had engaged in a long-running scheme in which they posed as retail investors, rather than registering as brokers, to obtain high-priority municipal bond allocations. The panel rejected the appellants’ arguments that they were not brokers because their client exerted control over their transactions, and concluded that they fell under the Security and Exchange Act’s statutory definition of a “broker” because they traded securities “for the account of others.” In looking to the Act’s plain text to determine whether the appellants acted as brokers, the court declined to employ the widely used *Hansen test* that looks at the totality of the circumstances to assess whether a brokerage relationship exists (*SEC v. Murphy*).
- **Separation of Powers:** In a case following the Supreme Court’s decision in *Collins v. Yellen*, which held that the Federal Housing Finance Agency’s (FHFA’s) enabling statute contained an unconstitutional removal restriction on the FHFA Director, a divided Sixth Circuit partially rejected Freddie Mac and Fannie Mae shareholders’ challenge to a financing arrangement reached by the agency. The court held that (1) the political question doctrine did not preclude resolution of the case; (2) the Deputy Director, who signed the agreement as acting Director, was not serving in violation of the Constitution’s Appointments Clause when he did so; and (3) on remand, the lower court should consider whether, by virtue of the taint associated the unconstitutional removal restrictions on a permanent Director identified in *Collins*, the shareholders had suffered compensable harm and were entitled to retrospective relief (*Rop v. FHFA*).

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