

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Oct. 24–Oct. 30, 2022)

October 31, 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

Last week, the Supreme Court did not issue any opinions or agree to hear any new cases, but individual Justices in their capacity as [Circuit Justices](#) issued administrative stays pending further Court action in two cases involving congressional authority:

- On October 24, 2022, Justice Clarence Thomas granted an administrative stay in a case challenging a subpoena directing a U.S. Senator to testify as part of a Georgia grand jury investigation into activities surrounding the state’s certification of the 2020 presidential election. As discussed in last week’s [Congressional Court Watcher](#), the Eleventh Circuit affirmed a federal district court order that had upheld the subpoena for the Senator’s testimony on certain matters, while quashing the subpoena to the extent that it covered topics the court deemed privileged under the Speech or Debate Clause, such as a Senator’s investigative fact finding ([Graham v. Fulton Cnty, Special Purpose Grand Jury](#)).

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- On October 26, 2022, Justice Elena Kagan temporarily stayed enforcement of a subpoena issued by the House Select Committee to Investigate the January 6th Attack on the United States Capitol. The subpoena was issued to T-Mobile seeking call records from the phone of the Arizona Republican Party Chair from November 2020 through January 2021. Last week, a divided Ninth Circuit panel, in a non-precedential opinion, had [declined to enjoin](#) enforcement of the subpoena pending the party chair’s First Amendment challenge to the subpoena, with the majority holding that the compelled disclosure would not deter protected associational activity and was narrowly tailored to obtain information relevant to the Committee’s investigation into the events of January 6, 2021 (*Ward v. Thompson*).

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.

- **Communications:** The Ninth Circuit dismissed a civil suit brought under the [Trafficking Victims Protection Reauthorization Act \(TVPRA\)](#) against the social media platform Reddit for allegedly benefiting from sex trafficking conducted on the site. The court held the platform was shielded from liability for user-generated content by [Section 230 of the Communications Act of 1934](#). Although the [Allow States and Victims to Fight Online Sex Trafficking Act](#) amended Section 230 to provide that immunity does not apply when “the conduct underlying the claim” violates the TVPRA, the panel’s majority held that this exception applies only when the defendant website itself engaged in prohibited conduct under the TVPRA’s criminal provision, a finding absent in this case. This ruling highlights an open question related to the scope of the TVPRA exception: whether a plaintiff must prove a violation of the TVPRA’s *criminal* provisions, which entail a heightened mental state requirement as compared to the correlative civil suit provision (*Does v. Reddit, Inc.*).
- **Criminal Law & Procedure:** The Fourth Circuit held that certain “violent crimes in aid of racketeering activity” (VICAR) offenses under [18 U.S.C. § 1959](#)—specifically VICAR assault and murder—require a mens rea culpable enough to constitute a “crime of violence,” as necessary for conviction under [18 U.S.C. § 924\(c\)](#). While noting that the Supreme Court [recently held](#) that a crime with a mens rea of “recklessness” *cannot* qualify as a “violent felony” under § 924(c), the Fourth Circuit held that the elements of both VICAR assault and VICAR murder in this case satisfied the mens rea element of a “crime of violence” for purposes of § 924(c) (*United States v. Manley*).
- **Criminal Law & Procedure:** The Eighth Circuit affirmed a district court’s civil commitment of a criminal defendant found to be mentally incompetent to stand trial, and concluded that the defendant had waived his ability to challenge the lawfulness of his pre-commitment custody by the Attorney General. [18 U.S.C. § 4246](#) sets forth the process for civilly committing a defendant who, after being transferred to the custody of the Attorney General under [18 U.S.C. § 4241\(d\)](#) for further medical evaluation, is found unlikely to attain the mental capacity to stand trial in the foreseeable future. The defendant’s pre-commitment custody exceeded four months—the duration generally allowed by § 4241(d). However, after examining the text and relationship of the two statutes, the Eighth Circuit held that § 4241(d)’s time restriction is not a jurisdictional element of § 4246. Thus, because the defendant had not brought a timely challenge under § 4241(d) in the district court that ordered his pre-commitment custody he could not challenge its lawfulness in the later § 4246 proceedings (*United States v. Ryan*).

- **Food & Drug:** The Third Circuit denied a flavored e-cigarette liquid manufacturer's petition for review of a marketing denial order issued by the Food and Drug Administration (FDA). The panel held that the petitioner failed to show that FDA acted arbitrarily and capriciously in considering submitted evidence. Joining other circuits that heard similar claims, the panel also ruled that when assessing whether the manufacturer's product posed less risk than other tobacco products, FDA could consider comparative cessation evidence between the manufacturer's flavored e-cigarettes and non-flavored e-cigarettes, as outlined in the agency's 2019 guidance (*Liquid Labs LLC v. FDA*).
- **Health:** Joining the Third and Eleventh Circuits, the Second Circuit held that the *Medicare Secondary Payer Act*, which establishes a private cause of action for monetary damages against responsible "primary payers" who fail to cover medical expenses, grants a private cause of action to Medicare Advantage Organizations (MAOs). Under Medicare Part C, Medicare-eligible persons can opt to receive their medical benefits from MAOs, which contract with the Department of Health and Human Services to provide Medicare benefits. After an MAO beneficiary was injured at a supermarket, her MAO sought reimbursement from the store for certain medical expenses the MAO had covered. After the store refused to pay, the district court allowed the MAO to sue for recovery under the Medicare Secondary Payer Act. The Second Circuit affirmed based on the Act's text, which the court found contained no limitation as to which private entities may sue a primary payer that fails to reimburse the secondary payer (*Aetna Life Ins. Co. v. Big Y Foods, Inc.*).
- **Immigration:** A divided Ninth Circuit held that it lacked jurisdiction to consider a petitioner's challenge to his expedited removal order where immigration authorities had determined that he was ineligible for asylum, a determination based on an interim regulation that the Ninth Circuit later ruled invalid. The petitioner had been ordered removed under a streamlined expedited removal process and was determined by immigration authorities to be ineligible for asylum under the "Transit Bar," which rendered certain aliens ineligible for asylum relief if they failed to seek relief from another country through which they traveled en route to the United States. Although the Ninth Circuit in a later case held this regulation contravened governing statute, the majority of the panel here concluded that it could not review the petitioner's removal order because Congress unambiguously barred courts from reviewing the merits of individual expedited removal orders under 8 U.S.C. § 1252(a)(2)(A), (D) (*Mendoza-Linares v. Garland*).
- **Immigration:** The Tenth Circuit concluded that, once a removed alien illegally reenters the United States, 8 U.S.C. § 1231(a)(5) eliminates the Board of Immigration Appeals' (BIA's) authority to review a prior order of removal or to grant relief under federal immigration laws. Looking to the statute's plain language, the court held that § 1231(a)(5) prohibits three things upon an alien's illegal reentry: (1) the reopening of a prior order of removal, (2) the review of a prior order of removal, and (3) an alien's eligibility to apply for any relief. In this case, because the last two prohibitions applied, the court denied an alien's petition for review challenging the BIA's denial of his motion to reconsider a reinstated 1999 removal order (*Zapata-Chacon v. Garland*).
- **Labor & Employment:** The Ninth Circuit held that call center representatives' pre-shift activities of booting up their computers and launching software were potentially compensable under the *Fair Labor Standards Act (FLSA)*, because those tasks were integral and indispensable to the workers' principal duties of answering customer phone calls. The circuit court remanded to the district court to consider, in the first instance, whether the time spent performing these tasks made them noncompensable under the de

- minimis doctrine, and whether the defendant employer knew of the alleged overtime such that it could be liable under the FLSA (*Cadena v. Customer Connexx LLC*).
- **Speech:** The First Circuit affirmed the dismissal of a defamation suit challenging an online newspaper's coverage of a media personality who was present during the events of January 6, 2021. The court relied on two First Amendment principles. First, when reporting that involves matters of public concern is challenged, there is no liability unless the reporting contains false statements. Second, individual statements of opinion related to issues of public concern receive full constitutional protection unless they contain a provably false connotation. Because the plaintiffs failed to allege defamation under either principle, the district court dismissed the suit, and the First Circuit affirmed. (*Cheng v. Neumann*).

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