

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Nov. 7– Nov. 13, 2022)

November 14, 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 granted certiorari in one case:

- **Criminal Law & Procedure:** The Supreme Court agreed to hear a case where a divided Fifth Circuit, sitting en banc, affirmed a criminal defendant’s sentence under the federal aggravated identity theft statute, [18 U.S.C. § 1028A\(a\)\(1\)](#), based on the defendant overbilling Medicaid by falsifying the scope of services provided to a patient. The Court is asked to resolve a circuit split over whether § 1028A(a)(1) applies to the misuse of another’s identity even if it does not involve an attempt to impersonate the person whose means of identification was misused or an attempt to act on that person’s behalf (*Dubin v. United States*).

Congressional Research Service

<https://crsreports.congress.gov>

LSB10858

## 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:** Joining several circuits, the Tenth Circuit held that an entity bears the burden to prove it is an arm of the state and thus entitled to immunity from suit under the [Eleventh Amendment](#). While the Eleventh Amendment extends sovereign immunity to instrumentalities of the state, it does not do so for political subdivisions like counties, municipalities, or other local government entities. In determining whether the University of Kansas Hospital Authority (UKHA) is an instrumentality of the state entitled to sovereign immunity, the Tenth Circuit held that UKHA had not met its burden of proof, but remanded the case to the district court to in order to reevaluate UKHA's status as an instrumentality of the state (*Hennessey v. University of Kansas Hospital Authority*).
- **Civil Rights:** The Eleventh Circuit held that to succeed on a failure-to-accommodate claim under the [Rehabilitation Act](#), an employee must notify an employer of a disability and demonstrate that the requested accommodation is reasonable. The employee sued under [29 U.S.C. § 794\(a\)](#), which bars disability discrimination, including refusing a requested accommodation. The district court dismissed the employee's claim, finding her generalized request inadequate to trigger a duty to accommodate. Joining other circuits, the Eleventh Circuit agreed with the lower court that in order to trigger a duty under the Act, the employee must show the request is reasonable by providing an employer enough information to assess how the proposed accommodation would address a specific disability (*Owens v. Georgia Governor's Off. of Student Achievement*).
- **Criminal Law & Procedure:** The Fourth Circuit held that a conviction for arson under a prior version of [18 U.S.C. § 844\(f\)](#) does not qualify as a predicate crime of violence under [18 U.S.C. § 924\(c\)](#). The defendant was convicted under a version of § 844(f) that included arson of property "used by" federal entities. Applying the categorical approach the Supreme Court provided in *United States v. Davis*, the Fourth Circuit explained that a crime of violence under § 924(c) means an offense that has as an element "physical force against the property or person of another," but the prior version of § 844(f) could encompass force against a defendant's own property (*United States v. Davis*).
- **Immigration:** In a case centered on the immigration consequences of being convicted of a "crime of moral turpitude," the Seventh Circuit granted a lawful permanent resident's petition for review and remanded to the Board of Immigration Appeals (BIA). The petitioner pleaded guilty to criminal neglect of a dependent in state court and was sentenced to a year in jail suspended to time served plus 30 days. After she was placed in removal proceedings, she successfully petitioned the state court to modify her sentence to less than six months to qualify for the so-called "petty offense" exception to the crime of moral turpitude ground of inadmissibility, [8 U.S.C. § 1182\(a\)\(2\)\(A\)\(ii\)\(II\)](#). The BIA did not apply that exception, relying on an intervening [decision of the Attorney General](#) declaring that state-court sentence modification orders are effective for immigration purposes only if based on a procedural or substantive defect in the underlying criminal proceeding. The Seventh Circuit held that the state criminal neglect offense is categorically a crime of moral turpitude and that the Attorney General's decision was entitled to [Chevron deference](#), but that applying that decision to the petitioner was an impermissibly retroactive application of a new rule (*Zaragoza v. Garland*).

- **Religion:** In a case involving a religious group's opposition to the construction and operation of a gas pipeline on its property, the Third Circuit affirmed a district court's dismissal of the group's claim for money damages under the [Religious Freedom Restoration Act](#) (RFRA) (42 U.S.C. § 2000bb-1(c)). The Third Circuit had previously rejected the religious group's petition for an injunction blocking construction. Echoing that ruling, the circuit court held that the group's damages claim was also barred as an impermissible collateral attack on the Federal Energy Regulatory Commission's (FERC's) authorization of the pipeline under the exclusive-review framework of the [Natural Gas Act](#) (15 U.S.C. §§ 717r(a), 717r(b)). The Third Circuit held that the religious group could and should have raised any RFRA objection before FERC during its administrative review of the pipeline, particularly given that the group had direct notice and opportunity to be heard (*Adorers of the Blood of Christ v. Transcontinental Gas Pipe Line Co.*).
- **Separation of Powers:** The Federal Circuit held that the Merit Systems Protection Board's (MSPB's) administrative judges are not principal officers requiring appointment by the President and confirmation by the Senate under the [Appointments Clause](#). After a Department of Defense employee unsuccessfully challenged her removal before an MSPB administrative judge, she claimed on appeal to the Federal Circuit that MSPB administrative judges are improperly appointed principal officers. The court held that, given MSPB's structure and its authority to review administrative judges' decisions under 5 U.S.C. § 7701(e)(1)(B) on its own motion, administrative judges qualify as inferior officers subject to the direction and supervision of the Board, despite their protections from removal under 5 U.S.C. § 7513(a) (*McIntosh v. Department of Defense*).
- **Speech:** The Sixth Circuit held that the First and Fourteenth Amendments do not give police officers accused of police misconduct and their union representatives the right to record or videotape interviews conducted in the course of a city's investigation of a complaint. The court concluded that the First Amendment's text, history, tradition, and precedent do not support any right to record internal government proceedings during an ongoing investigation (*Hils v. Davis*).
- **Transportation:** The Tenth Circuit affirmed a district court's judgment for the plaintiff on retaliation claims under the [employee protection provisions](#) of the Federal Railroad Safety Act. Among other issues, the circuit court held that a plaintiff may bring a claim under 42 U.S.C. § 20109(a)(2) (protecting employees who refuse to assist in the violation of federal railroad law), even if their conduct might also fall within 42 U.S.C. § 20109(b)(1)(C) (protecting employees who refuse to authorize use of equipment because of an objectively reasonable, good-faith belief in a hazardous safety or security condition). The Third Circuit rejected the defendant's argument that § 20109(b)(1)(C) placed more stringent requirements on a plaintiff and overrode the application of § 20109(a)(2) (*Fresquez v. BNSF Railway Co.*).

## Author Information

Jimmy Balser  
Legislative Attorney

Michael D. Contino  
Legislative Attorney

Alexander H. Pepper  
Legislative Attorney

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.