



Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Dec. 5–Dec. 11, 2022)

December 12, 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 law makers, 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 four cases:

- **Arbitration:** The Supreme Court agreed to hear a case from the Ninth Circuit between the cryptocurrency exchange platform Coinbase and one of its users. The parties ask the Court whether an interlocutory appeal from an order denying a motion to compel arbitration under the Federal Arbitration Act divests a district court of jurisdiction to proceed with the litigation pending appeal (*Coinbase v. Bielski*).
- **Criminal Law & Procedure:** The Supreme Court agreed to review a case from the Second Circuit to decide whether drug traffickers or those who commit violent crimes and cause death by using or carrying a firearm must serve a prison term for such conduct that is consecutive to other offenses under the same statute. The Court is asked to determine whether two different subsections of [18 U.S.C. § 924](#) carry the same prohibition on imposing concurrent, as opposed to consecutive, sentences (*Lora v. United States*).

Congressional Research Service

<https://crsreports.congress.gov>

LSB10875

- **Immigration:** The Supreme Court granted certiorari in a case from the Ninth Circuit regarding a federal law that makes it a crime to encourage illegal immigration. In 2020, the Court vacated and remanded [on procedural grounds](#) a Ninth Circuit decision regarding another challenge to this statute. The Court is asked whether the law is unconstitutionally overbroad under the First Amendment (*United States v. Hansen*).
- **Tax:** The Supreme Court agreed to review a case from the Sixth Circuit to decide whether third parties associated with a delinquent taxpayer are entitled to notice and an opportunity to bring an action to quash when the Internal Revenue Service summons their bank account records. The parties disagree whether those summonses fall within an exception to the tax code's notification requirements (*Polselli v. IRS*).

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.

- **Business:** The Federal Circuit upheld the Small Business Administration's decision not to immediately apply the [Small Business Runway Extension Act](#) (REA) amendment to the [Small Business Act](#) (SBA) when determining whether a company is a small business. The REA amended one subsection of the SBA to change from three years to five years the period of annual average receipts that agencies use to determine whether a business qualifies as a small business. The Small Business Administration claimed that a separate, less stringent part of the SBA governed its own business-size criteria. The court ruled that the REA did not apply to the Small Business Administration because, in drafting the SBA, Congress created two subsections on business-size factors, making the broader one applicable to the Small Business Administration and the narrower one applicable to all other agencies. The REA, the court reasoned, did not limit the Small Business Administration's authority because it amended only the narrower SBA provision (*Obsidian Solutions Group, LLC v. United States*).
- **Civil Rights:** The Eighth Circuit affirmed a grant of declaratory and injunctive relief to a coalition of Catholic Church entities contesting regulations implementing [Section 1557](#) of the Patient Protection and Affordable Care Act. The plaintiffs challenged multiple Health and Human Services Department rules interpreting Section 1557 as requiring that covered entities provide gender-affirming care, with no religious exemption. They also challenged the Equal Employment Opportunity Commission's (EEOC's) interpretation of [Title VII](#) of the Civil Rights Act of 1964 as prohibiting employers from discriminating on the basis of gender identity. The district court held that the plaintiffs had Article III standing to challenge the interpretation of those laws. On appeal, the Eighth Circuit affirmed that the plaintiffs had suffered an injury in fact, the only standing factor at issue. The court reasoned that Section 1557 arguably proscribed the plaintiffs from refusing to perform or cover gender-transition procedures. The court reasoned that HHS had not disavowed enforcement action against the plaintiffs, had declined to implement a religious exemption, and could not identify a history of non-enforcement against the plaintiffs. The court also held that the plaintiffs had shown a credible threat of enforcement with the EEOC, which had engaged in a coordinated effort with HHS to enforce the statutes (*The Religious Sisters of Mercy v. Becerra*).
- **Commerce:** The Second Circuit held that a private party cannot state a claim under [Section 22](#) of the [Commodity Exchange Act](#) (CEA) where the alleged conduct occurred predominantly outside the United States. The court applied the presumption against

extraterritoriality, a canon of statutory interpretation, to Section 22, which affords a private right of action for violations of the CEA. The court ruled that Section 22 lacked any affirmative congressional intention to have extraterritorial effect. Thus, claims that rely on Section 22 must involve a domestic application of the CEA. Accordingly, the court held, a private Section 22 plaintiff must plead both a domestic transaction and sufficiently domestic conduct by a defendant (*Laydon v. Coöperative Rabobank U.A.*)

- **Criminal Law & Procedure:** The Second Circuit interpreted a provision of the [Victims of Trafficking and Violence Protection Act of 2000](#) (TVPA) in affirming the conviction of the leader of the NXIVM organization and the secret society called DOS. The court focused on the meaning of “commercial sex act,” defined as “any sex act, on account of which anything of value is given to or received by any person.” Parsing the TVPA, the court disagreed with the convicted appellant that a commercial sex act contains a monetary or financial component and that the sexual exploitation must be for profit. The court reasoned that: Congress’s repeated use of the prefix “any” reflected an expansive understanding of the phrase “anything of value”; circuit precedent dictated that the phrase applied to both tangibles and intangibles; and under an expansive definition, “value” need not have a monetary or financial component (*United States v. Ranieri*).
- ***Criminal Law & Procedure:** The Second Circuit upheld a district court’s decision not to re-open the pre-trial detention of a criminal defendant charged with murder-for-hire. Disagreeing with the approach of the Ninth Circuit, the court held that the weight assigned to each factor considered under the Bail Reform Act, [18 U.S.C. § 3142\(g\)](#), when determining whether a defendant should be detained before trial will vary depending on the facts of the case. The court added that one factor—evidence of a defendant’s guilt—may be a “key consideration” in pre-trial determinations. By contrast, the Ninth Circuit has stated that the weight of the evidence is the “least important” factor under § 3142(g) and that courts should be wary of predetermining guilt. The Second Circuit rejected the argument that giving strong consideration to evidence of guilt at the pre-trial phase undermines the presumption of innocence, which it held applies only at trial (*United States v. Zhang*).
- ***Criminal Law & Procedure:** A divided Eleventh Circuit, sitting en banc, deepened a circuit split over the meaning of the “safety valve” provision of the First Step Act, [18 U.S.C. § 3553\(f\)](#), which allows a court to depart downwards from a mandatory minimum sentence if a criminal defendant has, among other things, “more than 4 criminal history points ... a prior 3-point offense, ... and a prior 2-point violent offense.” Looking to the plain text of the statute, the majority agreed with the Ninth Circuit that a defendant must meet all three of these conditions to be ineligible for safety-valve relief. The court departed from the holdings of the Fifth, Seventh, and Eighth Circuits, which had held that a defendant who satisfies any one of the three conditions is disqualified from safety-valve relief. The Eleventh Circuit disagreed that its interpretation of the statute rendered conditions superfluous, produced absurd results, or that, in light of what it viewed as the statute’s clear language, it could consult the legislative history for further evidence of Congress’s intent (*United States v. Garcon*).
- ***Education:** Recognizing a circuit split, the Fourth Circuit held that the exhaustion requirement of the Individuals with Disabilities Education Act (IDEA), [20 U.S.C. § 1415\(l\)](#), is not jurisdictional. The court departed from its own precedent in light of more recent [Supreme Court jurisprudence](#) holding that exhaustion and other procedural requirements are not jurisdictional absent a clear statement from Congress. The circuit court explained that the IDEA’s exhaustion requirement is a claims-processing rule and is thus subject to exceptions, including waiver, forfeiture, and equity. The court declined to

find that any exceptions applied in this case, holding that it was bound by the state's application of its own procedural rules (*K.I. v. Durham Public Schools Board of Education*).

- **Intellectual Property:** Considering a motion for a preliminary injunction, the D.C. Circuit held that the [Digital Millennium Copyright Act \(DMCA\)](#) likely did not violate the First Amendment as applied to an inventor who wanted to distribute a device containing computer code that would allow users to circumvent technological controls preventing the recording and distribution of copyrighted digital material. The court held that the DMCA did not target any expressive content within computer code but only the code's function. As the law is content-neutral, the court thought it would likely survive intermediate scrutiny due to the government's substantial interest in combating digital piracy (*Green v. U.S. Department of Justice*).
 - **Immigration:** A divided panel of the Sixth Circuit held that [8 U.S.C. § 1252\(g\)](#), which strips courts of jurisdiction over claims brought by "any alien arising from the decision or action by the Attorney General to ... execute removal orders," did not bar lawsuits arising from the execution of removal orders against participants in the Deferred Action for Childhood Arrivals (DACA) program. Considering the text of the statute, evidence of congressional intent, and the presumption in favor of judicial review of administrative action, the panel held that the term "removal orders" in § 1252(g) refers only to "executable removal orders," and that removal orders for DACA recipients are not executable because those individuals have been granted temporary relief from removal. The panel recognized that its decision is in tension with decisions from the Fifth and Eighth Circuits, which have held that courts have no jurisdiction to consider claims arising from the execution of removal orders subject to a stay (*Enriquez-Perdomo v. Newman*).
 - ***Immigration:** Sitting en banc, a divided Ninth Circuit affirmed a Board of Immigration Appeals (BIA) ruling that an alien who had immigrated to the United States was removable under [8 U.S.C. § 1227\(a\)\(2\)\(E\)\(i\)](#) because of a conviction for a "crime of child abuse, child neglect, or child abandonment." The decision added to a circuit split over the BIA's interpretation of the statute. A plurality of the en banc court ruled that the BIA was entitled to deference in its interpretation of Section 1227(a)(2)(E)(i) as encompassing any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation (*Diaz-Rodriguez v. Garland*).
 - **Procurement:** The Federal Circuit held that the Defense Logistics Agency did not owe a contractor interest under the Contract Disputes Act (CDA), [41 U.S.C. § 7109\(a\)\(1\)](#), on payments it over-withheld while evaluating fraud claims against the contractor. The Federal Circuit held that the CDA allows contractors to recover interest only when the contractor prevails on its *own* claim. The contractor's claim failed due to its fraud. The court held the contractor could not recover any interest on payments it received following a determination of the *government's* claim (*Supreme Foodservice GmbH v. Director of the Defense Logistics Agency*).
-

Author Information

Michael D. Contino
Legislative Attorney

Abigail A. Graber
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.