

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 3–Jan. 8, 2023)

January 9, 2023

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 [13 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

The Supreme Court did not issue any opinions or grants of certiorari this week.

Decisions of the U.S. Courts of Appeal

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 nonuniform application of the law among the circuits.

- **Civil Rights:** The Ninth Circuit ruled in favor of operators of two sober living homes—housing for residents recovering from drug or alcohol addiction and who are individuals with a disability under state or federal law—challenging city ordinances requiring them to acquire a permit and to avoid being near other sober homes or addiction treatment facilities. The plaintiff sober homes sued the city under, among other things, the [Fair Housing Act](#) (FHA) and the [Americans with Disabilities Act](#) (ADA). The lower court granted summary judgment for the city, finding that the operators did not establish that their residents either had a disability or were regarded by the city

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as having a disability. The Ninth Circuit reversed, holding that an actual disability under the FHA and the ADA need not be shown individually and can be demonstrated collectively, such as by evidence that the homes serve or intended to serve individuals with actual disabilities. The court further held that the sober homes could satisfy the “regarded as” requirement under the FHA and the ADA if they showed that the city perceived their residents as having disabilities; they need not show that the city subjectively believed that any resident or potential resident met legal standards for disability (*SoCal Recovery, LLC v. City of Costa Mesa*).

- **Criminal Law & Procedure:** The Fourth Circuit held that, even if an incarcerated individual has presented an “extraordinary and compelling” reason for a sentencing reduction under the First Step Act, a district court may deny the reduction to preserve an original sentence that was reached by plea agreement. The district court acknowledged that the individual had an “extraordinary and compelling” reason for a sentencing reduction under 18 U.S.C. § 3582: his sentence was excessive, as he received a sentence of 384 months pursuant to a plea agreement, but if he were sentenced under current law, the minimum sentence would be 168 months. The district court nonetheless denied compassionate release (which would result in a sentence reduction) so as not to disturb the plea agreement. The Fourth Circuit affirmed the district court decision, holding that a district court retains discretion to grant a sentencing reduction and that the consideration of the plea agreement was an appropriate exercise of this discretion (*United States v. Bond*).
- **Criminal Law & Procedure:** The Eighth Circuit held that to initiate a warrantless search of a residence not known to be the home of a parolee, an officer must have probable cause, rather than reasonable suspicion, to believe the dwelling is the residence of a parolee. Affirming the district court in granting the defendant’s motion to suppress evidence obtained during a search, the Eighth Circuit joined the Ninth Circuit in reasoning that the potential to violate the [Fourth Amendment](#) constitutional rights of third parties in such searches necessitates a more rigorous standard than reasonable suspicion. The court also emphasized that the higher bar was not burdensome, as law enforcement should already possess substantial information needed to locate parolees, and that the waiver signed by parolees allowing for searches of their own residences nullifies any need for law enforcement to develop a reason to search (*United States v. Thabit*).
- **Criminal Law & Procedure:** The Eleventh Circuit, on [remand](#) from the Supreme Court, held that the jury instruction used to convict individuals of violating 21 U.S.C. § 841(a) inadequately conveyed the mens rea requirement of the statute. Under 21 U.S.C. § 841, it is a crime to “knowingly or intentionally . . . manufacture, distribute, or dispense” controlled substances, “[e]xcept as authorized.” The Supreme Court vacated the convictions under § 841 of two doctors who prescribed controlled substances, and who asserted they had acted in the good faith belief that their conduct was permissible. The Court held that to obtain a conviction under this section, the government must prove beyond a reasonable doubt that a defendant knowingly or intentionally dispensed a controlled substance, and knowingly or intentionally did so in an unauthorized manner. The Court remanded the cases so the lower courts could discern whether the jury instructions in the two cases reflected an appropriate understanding of § 841’s scienter requirement. On remand, the Eleventh Circuit concluded that the jury instruction had not properly described this burden of proof and thus vacated the convictions affected by those flawed instructions. Other convictions not affected by the flawed jury instructions were affirmed (*United States v. Ruan*).
- **Environment:** The Fifth Circuit upheld the Army Corps of Engineers’ issuance of a Clean Water Act permit authorizing the development of a natural gas pipeline and export facility in Texas. Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), a court must set aside a Corps permit if its issuance was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Denying a petition for review, the Fifth Circuit rejected the petitioners’

arguments that the permit issuance failed to show that the approved project was the least environmentally damaging practicable alternative and that the potential environmental effect on the wetlands caused by pipeline construction necessitated compensatory mitigation. The court held that the Corps satisfactorily explained its reasons for rejecting alternative plans and did not act arbitrarily in its determination that the potential impacts to wetlands were temporary (*Shrimpers and Fishermen of the RGV v. U.S. Army Corps of Engineers*).

- **Fair Credit Reporting Act (FCRA):** The Second Circuit held that a credit reporting agency's decision to report the plaintiff's private student loan debt after the plaintiff went through Chapter 7 bankruptcy did not violate the FCRA's requirement in [15 U.S.C. § 1681e\(b\)](#) that agencies take reasonable steps to ensure the accuracy of information in consumer credit reports. The court noted that reporting the student loan would only be inaccurate if it was dischargeable in bankruptcy, which is a question of law that the bankruptcy court left unresolved. The Second Circuit concluded, in agreement with all other circuit courts that have addressed the issue, that inaccuracies that turn on legal disputes are not cognizable under the act's accuracy requirement (*Mader v. Experian*).
- ***Financial Regulation:** The Third Circuit held that two provisions of the [Sarbanes-Oxley Act](#)—statute of limitations (which requires an individual complaining of retaliation for whistleblowing to file an administrative complaint within 180 days of the alleged retaliation) and exhaustion requirement (which requires the individual to seek administrative relief prior to proceeding to federal court)—are procedural and not jurisdictional. The Third Circuit explained that courts have discretion to excuse violations of procedural provisions and that such violations will not automatically result in dismissal. The court acknowledged that its holding rejected the Second Circuit's 2019 contrary interpretation of the exhaustion requirement but stated that the Second Circuit's approach is outdated in light of subsequent Supreme Court caselaw. The Third Circuit concluded that dismissal here was nonetheless appropriate because the administrative complaint was filed years after the 180-day deadline and amending the complaint would have been futile (*Jaludi v. Citigroup*).
- ***Firearms:** Sitting en banc, a divided Fifth Circuit held that a nonmechanical bump stock is not a machinegun within the meaning of [18 U.S.C. § 921\(a\)\(24\)](#). In a 2018 [final rule](#), the Bureau of Alcohol, Tobacco, Firearms, and Explosives classified bump stocks, an accessory that attaches to a semiautomatic weapon to increase the rate of fire, as machineguns for purposes of the National Firearms Act and the federal statutory ban on the possession or transfer of new machineguns. Of the 16 members of the court, 13 agreed that an act of Congress is required to prohibit bump stocks. A 12-member majority of the court agreed that even if the current statutory language were ambiguous, the rule of lenity would require the court to interpret the law against imposing criminal liability. Eight members of the court viewed the regulation as contrary to the plain meaning of the statutory definition of machinegun because a bump stock does not fire a weapon automatically and by a single function of the trigger, meaning the final rule violated the Administrative Procedure Act. Three members of the court wrote in dissent that a bump stock met the statutory definition of machinegun and that the majority improperly applied the rule of lenity. The court reversed the judgment of the district court and remanded with instructions to enter judgment against the government and determine the appropriate remedy (*Cargill v. Garland*).
- **First Amendment (Speech):** The Ninth Circuit held that the [First Amendment](#) did not protect a volunteer member of a municipal advisory board from dismissal for her political affiliations. The court affirmed the district court's dismissal of the volunteer's complaint in which she alleged that she was fired by the city councilmember who appointed her in retaliation for exercising her First Amendment rights to free speech, association, and assembly by attending a political rally. Concluding that the volunteer was acting as a political extension and public face of her appointer

to the board, the Court held that political compatibility was an appropriate requirement for the position and she could be fired for incompatible political activity (*Lathus v. City of Huntington Beach*).

- **Immigration:** The Fourth Circuit held that an alien's prior conviction under a Virginia identity-theft statute is categorically a crime of moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(ii), rendering him ineligible for cancellation of removal under 8 U.S.C. § 1229b. The individual obtained a loan using a Social Security number that belonged to a Virginia resident. The Fourth Circuit concluded the Board of Immigration Appeals did not err in finding the identity-theft offense constituted a crime of moral turpitude because the state statute requires an intent to defraud, and fraud is inherently a crime involving moral turpitude. The court noted that the individual intended to defraud the bank, even if he did not intend to defraud the Virginia resident (*Salazar v. Garland*).
- **Procurement:** The Federal Circuit held that certain lobbying and strategic costs that Raytheon charged the government were unallowable under the [Federal Acquisition Regulation](#) (FAR). In its incurred-cost submissions to the government, Raytheon did not account for lobbying activities that occurred outside of normal business hours. The court concluded that, because after-hours lobbying activities were considered part of their employees' regular duties and factored in these employees' salaries, the company charged the government for unallowable lobbying costs. The court also concluded that the strategic costs involving Raytheon's decisions about whether to submit an offer or whether to go to market were associated with planning mergers and acquisitions that are expressly unallowable under the FAR and therefore should not have been charged to the government. The court remanded the case to the Armed Services Board of Contract Appeals for an assessment of how much Raytheon should repay the government (*Secretary of Defense v. Raytheon Company*).
- **Terrorism:** The Second Circuit held that a direct connection to terrorist groups is not necessary to prove a conspiracy violation under the Antiterrorism Act (ATA), as amended by the Justice Against Sponsors of Terrorism Act (JASTA). 18 U.S.C. § 2333(a) of the ATA states that any U.S. national injured by an act of international terrorism may sue in federal court to recover civil damages, and JASTA's amendments established secondary liability for aiding and abetting or conspiracy in 18 U.S.C. § 2333(d)(2). The Second Circuit held that the district court erred in concluding that § 2333(d)(2) required plaintiffs to allege that several banks conspired directly with terrorist organizations, highlighting Congress's purpose to provide civil litigants with the broadest possible basis to seek relief. However, the court ultimately affirmed the district court's judgment to dismiss the JASTA conspiracy claims since the plaintiffs did not sufficiently allege a direct or indirect conspiracy between the banks and terrorist groups (*Freeman v. HSBC Holdings PLC*).

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