

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Feb. 27, 2023–Mar. 5, 2023)

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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 two cases:

- **Consumer Protection:** The Supreme Court agreed to review the judgment of the Fifth Circuit vacating a regulation of the [Consumer Financial Protection Bureau](#) (CFPB) on the ground that the primary funding authority for the CFPB, [12 U.S.C. § 5497](#), violates the [Appropriations Clause](#) of the Constitution. Under the current scheme, the CFPB receives its funding from the [Federal Reserve](#). The CFPB communicates its funding needs to the Federal Reserve, and the Federal Reserve must transfer the requested funding to the CFPB so long as the amount does not exceed twelve percent of the Federal Reserve’s operating expenses. The [Fifth Circuit held](#), in relevant part, that this arrangement violates the Constitution’s requirement that “no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” that is, by Congress. (*Consumer Financial Protection Bureau, et al. v. Community Financial Services Association of America, Limited, et al.*).

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- **Criminal Law & Procedure:** The Supreme Court granted certiorari to resolve a circuit split concerning when, under the [First Step Act](#)’s “safety valve” provision, [18 U.S.C. § 3553\(f\)\(1\)](#), a defendant is ineligible to receive a sentence below a mandatory minimum for certain drug offenses. The Act provides that a defendant may be ineligible for such relief based on three criteria: (1) having more than four criminal history points under the Sentencing Guidelines; (2) having a three-point offense; and (3) having a two-point offense. The federal appellate courts are divided as to whether defendants are ineligible if they meet all three criteria or, alternatively, if they satisfy only one criterion. The [Eighth Circuit](#) adopted the latter interpretation in the case the Supreme Court will review (*Pulsifer v. United States*).

The Supreme Court also issued decisions on the merits in two cases for which it heard oral arguments:

- **Property:** In a unanimous decision, the Supreme Court held that “escheatment” (i.e., the government taking ownership of unclaimed property) of the abandoned proceeds of two financial products (Agent Checks and Teller’s Checks) is governed by the [Federal Disposition Act](#) (FDA), not the common law. The Court determined that the proceeds in question qualify as written instruments sufficiently similar to money orders under [12 U.S.C. § 2503](#) and therefore escheat to the State where they were purchased, not to the State of the creditor’s last known address or in which the company holding the funds is incorporated, as is the case under the common law. The Court also held that, under the common law, the abandoned funds would inequitably escheat entirely to the State of incorporation, a result that Congress designed the FDA to prevent (*Delaware v. Pennsylvania et al.*).
- **Tax:** In a 5-4 decision, the Supreme Court held that the maximum penalty under the [Bank Secrecy Act](#) for nonwillful violations of the Act’s foreign account reporting requirements applies per deficient report, not per deficiently reported account. The [regulations](#) implementing the Act require U.S. persons to file an accurate and timely annual Report of Foreign Bank and Financial Accounts (FBAR). The petitioner filed five late FBARs covering ~50–60 accounts per report. The government assessed the statutory maximum \$10,000 penalty for each of the 272 times it deemed an account untimely or inaccurately reported, totaling \$2.72 million. The petitioner argued that the maximum penalty applied only per deficient FBAR, limiting the total to \$50,000. The Supreme Court held that [31 U.S.C. § 5314](#) requires individuals to submit timely, accurate reports and that a violation occurs when individuals fail to do so. In turn, it determined that the maximum penalty under [31 U.S.C. § 5321](#) of \$10,000 per nonwillful violation applies on a per-report basis, not a per-account basis (*Bittner v. United States*).

The Supreme Court also ordered additional briefing in an argued case:

- **Election Law:** In *Moore v. Harper*, the Supreme Court is considering whether a state court is constitutionally permitted to nullify a map created by a state legislature evidencing redrawn congressional districts and replace it with one devised by the state court. The North Carolina Supreme Court struck down a redistricting plan adopted by the state legislature and ordered a lower court to approve a new map. The trial court ultimately approved a map drawn by three court-appointed experts. The U.S. Supreme Court granted review in the case in June 2022 and heard oral argument in December 2022. The composition of the North Carolina Supreme Court changed following the November 2022 elections. On February 3, 2023, the newly configured state supreme court announced it would rehear the underlying case. The U.S. Supreme Court ordered the parties and the Solicitor General to file supplemental briefs on how the February 3

order affects the Supreme Court's jurisdiction under [28 U.S.C. § 1257\(a\)](#) and *Cox Broadcasting Corporation v. Cohn*. Briefs are due Monday, March 20 (*Moore v. Harper*).

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.

- **Administrative Law:** On petition of a labor union, the D.C. Circuit vacated an order of the National Labor Relations Board (NLRB) holding that a shipping company could decline to negotiate with licensed deck officers (LDOs) on container ships based on the company's subjective belief that the LDOs were not covered by the [National Labor Relations Act](#) (NLRA). This conclusion stripped the NLRB of its authority to rule on the merits of a complaint alleging unfair labor practices. The D.C. Circuit held that the NLRB's decision had no support in established law and further held that such an interpretation of the NLRA would enable an employer or union to challenge the jurisdiction of the NLRB and look to deny employees the protections of the NLRA by asserting they did not believe that all of their workers met the statutory definition of an employee (*Int'l Org. of Masters, Mates & Pilots, ILA, AFL-CIO v. NLRB*).
- **Antitrust:** The Second Circuit reversed in part, vacated in part, and affirmed in part a district court order in a suit filed under [federal antitrust law](#) and the [Commodities Exchange Act](#) (CEA) alleging a conspiracy to manipulate platinum and palladium market and benchmark prices. The Second Circuit, reversing the district court, held that two of the plaintiffs have antitrust standing to sue because they were traders in the relevant futures markets and "are the most efficient enforcers of the antitrust laws" for the asserted injury. The Second Circuit affirmed the district court's conclusion that a third plaintiff did not have antitrust standing because it traded in the physical platinum and palladium markets but not the associated futures markets. The Second Circuit also vacated the district court's dismissal of the plaintiffs' CEA claims for being impermissibly extraterritorial, holding that the plaintiffs alleged sufficient domestic activity by the foreign defendants. Finally, the Second Circuit affirmed the district court's holdings as to personal jurisdiction over the foreign defendants because they had the requisite minimal domestic contacts (*In re Platinum and Palladium Antitrust Litigation*).
- ***Arbitration:** The First Circuit declined to adopt the Second Circuit's position on the scope of the [exemption](#) from the [Federal Arbitration Act](#) (FAA) for transportation workers engaged in foreign or interstate commerce. In 2022, the Supreme Court held in *Southwest Airlines Co. v. Saxon* that the exception is based on a worker's actual duties, and that merely working in a transportation industry is not sufficient to qualify. Applying *Saxon* in *Bissonnette v. LePage Bakeries*, the Second Circuit held that, while employment in a transportation industry is not sufficient to qualify for the exception, it is a necessary condition. The First Circuit rejected this approach because, under circuit precedent, people who do not work for the transportation business, such as "last-mile drivers" employed by online retailer Amazon.com, may still qualify for the exemption (*Fraga v. Premium Retail Services, Inc.*).
- ***Civil Rights:** The Fourth Circuit disagreed with another federal appeals court as to whether prison officials may be liable for monetary damages for failing to protect prisoners from attack by fellow inmates. The plaintiff, representing the estate of former inmate James "Whitey" Bulger, sued for violations of the Eighth Amendment in a claim brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of*

Narcotics. In *Bivens*, the Supreme Court recognized an implied cause of action for persons seeking monetary damages for constitutional violations committed by certain federal officials. A *Bivens* remedy, however, is available only in a narrow set of circumstances. In disagreeing with the [Third Circuit's decision](#) to allow a similar lawsuit to go forward, the Fourth Circuit ruled that Eighth Amendment failure-to-protect claims are not a recognized *Bivens* context (*Bulger v. Hurwitz*).

- ***Civil Rights:** In a parent's civil rights action against the City of Seattle following the 2020 death of her son in the Capitol Hill Occupied Protest zone, the Ninth Circuit added to a circuit split by recognizing a Fourteenth Amendment substantive due process right to companionship with one's adult children. The court joined the Tenth Circuit in recognizing a constitutional right to companionship; however, the Tenth Circuit grounded that right in the First Amendment's freedom of association. Despite recognizing this substantive due process right, the Court affirmed the district court's dismissal of the parent's civil rights case because the city's actions were not directed at the deceased (*Sinclair v. City of Seattle*).
- **Consumer Protection:** The Sixth Circuit reversed a district court's order dismissing a claim as time-barred under the [Fair Debt Collection Practices Act](#) (FDCPA). The court joined several other circuits in ruling that the FDCPA's one-year [statute of limitations](#) starts on the date an alleged violation occurs, not when the violation is discovered; in other words, every claimed FDCPA violation has its own one-year statute of limitations. The court cited the FDCPA's text as requiring such a reading of the statute of limitations (*Bouye v. Bruce*).
- **Criminal Law & Procedure:** The Sixth Circuit affirmed the sentences of two brothers convicted on drug charges who asked for sentence reductions under [the First Step Act of 2018](#). The First Step Act gives retroactive effect to the Fair Sentencing Act (FSA), which adjusted the sentencing ratios of powder versus crack cocaine, by permitting defendants to move for a sentence reduction. The court held that while the First Step Act does make the FSA retroactive, it does not allow courts to consider other changes to sentencing law, such as a decision cited by the brothers narrowing the definition of "career offender." The court found support in the Supreme Court's opinion in *Concepcion v. United States*, which held that district courts may reduce a sentence under the First Step Act but are not compelled to do so. It reasoned that requiring courts to apply additional changes in sentencing law under the First Step Act would defy the text of the statute (*United States v. Woods*).
- **Criminal Law & Procedure:** The Seventh Circuit held that aiding and abetting [Hobbs Act robbery](#) is a crime of violence for purposes of a sentencing enhancement under [18 U.S.C. § 924](#). The court, joining every other circuit to rule on this question, reasoned that the federal [aiding-and-abetting statute](#) provides that someone who aides and abets a federal crime has committed the federal crime itself. The court rejected the defendant's argument that the Supreme Court's 2022 decision in *United States v. Taylor*, which held that attempted Hobbs Act robbery was not a crime of violence, altered the outcome. The court explained that *Taylor* did not opine on the culpability of aiders and abettors (*United States v. Worthen*).
- **Environmental Law:** The Fifth Circuit held unlawful a [regulation](#) promulgated by the Department of Commerce (DOC) mandating the installation and use of GPS monitoring technology on certain charter fishing boats in the Gulf of Mexico and Atlantic Ocean under the [Magnuson-Stevens Fishery Conservation and Management Act](#) (Magnuson-Stevens Act). The court ruled that the Magnuson-Stevens Act did not authorize the GPS-

tracking requirement because the requirement did not further enforcement of the statute and was neither necessary nor appropriate for the conservation and management of the fishery in question. The court also concluded that the regulation violated the [Administrative Procedure Act](#) because the DOC failed to address privacy concerns expressed in public comments on the proposed regulation or adequately justify the GPS-monitoring requirement's costs and benefits, and because the agency did not provide fair notice regarding a requirement to provide business information (*Mexican Gulf v. U.S. Department of Commerce*).

- **Firearms:** A divided panel of the Fifth Circuit issued a revised opinion in which it once again held that 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by someone subject to a domestic violence restraining order, is unconstitutional under the Second Amendment. The court expanded on its earlier rejection of the argument that the Second Amendment applies only to ordinary, responsible, and law-abiding citizens, clarifying that, under *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* and *District of Columbia v. Heller*, this class is meant to exclude felons and the mentally ill, for example. The defendant, by contrast, was subject to a civil proceeding and was not a convicted felon. The court also reiterated its holding that the government did not identify a relevantly similar historical analog for the § 922 prohibition (*United States v. Rahimi*).
- **Food & Drug:** The Eighth Circuit held that the [Family Smoking Prevention and Tobacco Control Act](#) (TCA) does not expressly or impliedly preempt a city ordinance banning the sale of flavored tobacco products. The court found that even if the ordinance came within the scope of the Act's preemption provision, it would survive under a Savings Clause that creates an exception for state laws regulating the sale of tobacco products. The court interpreted the Savings Clause to allow state prohibitions, even blanket prohibitions, on the sale of flavored tobacco products. The court reasoned that because the TCA implicates state police powers, courts must accept an interpretation that disfavors preemption. It further stated that if Congress wishes to preempt state bans on tobacco products, it must do so clearly (*R.J. Reynolds Tobacco Company v. City of Edina*).
- **Labor & Employment:** The Ninth Circuit joined other federal appellate courts in holding that the [Aviation and Transportation Security Act](#) (ATSA) preempts [Rehabilitation Act](#) claims by airport security screeners against the Transportation Security Administration (TSA). The plaintiff claimed TSA violated the Rehabilitation Act—which prohibits federal agencies from discriminating against employees with disabilities—when she was fired after becoming unable to fulfill all of the duties of a security screener due to her disability. The court determined that the ATSA's requirement that screeners meet certain qualification standards “[n]otwithstanding any other provision of law” conflicts with and overrides the Rehabilitation Act (*Galaza v. Mayorkas*).
- **Separation of Powers:** The Sixth Circuit upheld as constitutional the amended [Horseracing Integrity and Safety Act](#) (HISA) and rejected a challenge to the law on non-delegation grounds. The constitutional private non-delegation doctrine restricts the government's ability to delegate government power to private entities. HISA established a private Horseracing Integrity and Safety Authority with the power to issue regulatory rules, subject to oversight by the Federal Trade Commission (FTC). In 2022, the [Fifth Circuit](#) held that HISA violated the non-delegation doctrine because it gave the FTC only limited review powers over Authority rules, thus prompting the Act's amendment. Here, the Sixth Circuit held that the amended HISA resolved the non-delegation issue by giving the FTC greater authority to write rules, abrogate or modify Authority Rules, and review Authority enforcement actions (*State of Oklahoma v. United States of America*).

- **Torts:** The Eighth Circuit joined other courts in holding that [the presentment](#) and [sum-certain](#) provisions of the Federal Tort Claims Act (FTCA) do not require a claimant to specify a dollar amount as damages. Prior to filing suit, an FTCA claimant must present a claim to the appropriate federal agency and specify the claim's value so that the agency can determine how to process it. The claimant may later seek a greater amount in court based on newly discovered evidence not reasonably discoverable at the time of presentment. Here, the court held that presenting a range of damages to an agency, as opposed to an exact figure, complies with the FTCA because the range presents the maximum value of a claim. The court also held that a claimant will be confined to that range absent newly discovered evidence (*A.M.L. v. United States*).

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