

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (March 27-March 31, 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 issued one decision:

- **Civil Procedure:** In a 6-3 decision, the Supreme Court held that statute of limitations under the [Quiet Title Act](#) is a nonjurisdictional claims-processing rule, meaning that the time limit may be waived or extended in some circumstances. The Court specified that it will not interpret a procedural requirement to be jurisdictional unless Congress clearly states that to be its intent (*Wilkins v. United States*).

The Supreme Court also granted certiorari in one case:

- **Civil Rights:** The Supreme Court granted certiorari to review the First Circuit's holding that a plaintiff has standing to sue a hotel under the Americans with Disabilities Act for omitting accessibility-related information from its website, even when the plaintiff does not intend to visit the hotel. The First Circuit joined a circuit split: in similar cases, the Eleventh Circuit concluded that constitutional standing requirements were satisfied, while

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the Second, Fifth, and Tenth Circuits held that they were not (*Acheson Hotels, LLC v. Laufer*).

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 nonuniform application of the law among the circuits.

- ***Criminal Law & Procedure:** Adding to a [circuit split](#), the Tenth Circuit held that, under [18 U.S.C. § 3583\(e\)](#), a sentencing court may not modify or revoke a term of supervised release for retributive purposes. The Fourth, Fifth, and Ninth Circuits reached the same conclusion, while the First, Second, Third, Sixth, and Seventh Circuits permit a sentencing court to consider retribution in these revocation determinations (*United States v. Booker*).
- **Criminal Law & Procedure:** The Eighth Circuit upheld a conviction for distribution of child pornography, concluding that posting child pornography on a private Pinterest board constituted distribution within the meaning of [18 U.S.C. § 2252A\(a\)\(2\)](#). The court reasoned that the private Pinterest board was equivalent to a shared folder because the defendant knew that at least one other person had access to that board (*United States v. Caruso*).
- **Criminal Law and Procedure:** The Sixth Circuit vacated district court orders that denied motions for sentencing reductions under the First Step Act. In the 2022 case, *Concepcion v. United States*, the Supreme Court held that a district court resolving a First Step Act motion for a sentencing reduction must consider legal and factual developments that occurred after the initial sentencing. The Sixth Circuit subsequently clarified that such changes include a nonretroactive change that would provide a lower Guidelines range if a defendant was sentenced under current law (*United States v. Domenech*).
- **Criminal Law & Procedure:** The Fourth Circuit held that the rule set forth by the Supreme Court in *Rehaif v. United States*—that to be convicted of a federal firearms-possession offense, the defendant must know that he belonged to a category of persons barred from possessing a firearm—applies retroactively to convictions that occurred prior to the Supreme Court's ruling (*United States v. Waters*).
- **Environmental Law:** The Fifth Circuit upheld the dismissal of a claim that the U.S. Army Corps of Engineers (USACE) violated the [National Environmental Policy Act](#) (NEPA). The NEPA requires an agency to produce a supplemental environmental impact statement (EIS) for environmental harms caused by "[major federal action](#)." The claim alleged that a spillway diverted floodwaters away from the Mississippi River with significantly increased frequency, and USACE was required to produce a new EIS. The court determined that the NEPA did not require a new EIS, holding that continuous maintenance of the spillway by USACE did not constitute an ongoing major federal action under [40 C.F.R. § 1502.9\(d\)\(1\)](#), even if environmental circumstances had changed (*Harrison County, Mississippi v. United States Army Corps of Engineers*).
- **Environmental Law:** The Fourth Circuit denied review of a decision by the Virginia Department of Environmental Quality (DEQ) to grant a water quality certification under the [Clean Water Act](#) (CWA) and issue a permit for [Mountain Valley Pipeline](#) project. The court determined that DEQ's quality certification decision was not arbitrary or capricious, reasoning that the relevant agencies considered the proposal, asked clarifying questions,

and satisfied itself that the proposed actions were the least environmentally damaging practicable alternative (*Sierra Club v. State Water Control Board*).

- ***False Claims Act:** The Sixth Circuit upheld the dismissal of a case brought under the [False Claims Act](#) and the [Anti-Kickback Statute](#) by interpreting “remuneration” in the latter statute to include only payments or other transfers of value, rather than including any act that may benefit the recipient. The court also held that a plaintiff must show but-for causation between a kickback scheme and the false claim presented—that is, that the service for which the defendant sought government reimbursement would not have occurred *but for* the kickback scheme. The court joined a circuit split on the causation issue, with the Eighth Circuit requiring but-for causation and the Third Circuit requiring only that the claim at issue covered items or services that involved illegal kickbacks (*United States ex rel. Martin v. Hathaway*).
- **First Amendment (Speech):** The Fifth Circuit upheld a district court’s ruling that the defendants—a public school district and associated school officials—did not violate the First Amendment speech rights of a student-athlete who was disciplined for posting on social media, while off-campus, a video that allegedly taunted a student-athlete from another school using a racial slur. The court held, among other things, that the school’s policy justifying the discipline was not unconstitutionally overbroad or vague (*McClelland v. Katy Independent School District*).
- ***Immigration:** Contributing to a circuit split, the Second Circuit joined the Sixth Circuit in holding, among other things, that the Department of Justice’s (DOJ’s) regulations regarding whether an immigration judge may “administratively close” a case are ambiguous. The court observed that the Third, Fourth, and Seventh Circuits have concluded that DOJ’s regulations unambiguously authorize such administrative closure decisions. The Second Circuit disagreed, finding that the regulations did not provide general authority for administrative closure. The court held that the former Attorney General’s then-controlling interpretation of the regulations—that they do not authorize administrative closure except in limited circumstances—was reasonable and therefore entitled to judicial deference (*Garcia v. Garland*).
- **Immigration:** The Fifth Circuit affirmed a district court sentence for illegal reentry under [8 U.S.C. § 1326\(b\)\(2\)](#), which provides a maximum sentence of 20 years for unlawful reentry of someone who was previously deported from the United States after being convicted of an “aggravated felony.” The appellant, who had previously been convicted twice for illegal reentry under § 1326(b) and once for burglary, argued that an intervening Supreme Court case reclassified his burglary conviction as non-aggravated and that his sentence should be lowered. The court rejected this argument, reasoning that an illegal reentry offense committed by a person previously removed on the basis of an aggravated felony conviction *is itself* an aggravated felony, even though the appellant’s burglary conviction was not (*United States v. Huerta-Rodriguez*).
- **Labor & Employment:** The Fifth Circuit upheld a National Labor Relations Board (NLRB) ruling brought by the United Auto Workers (UAW) against Tesla that Tesla CEO Elon Musk posted an unlawful threat on Twitter. The UAW filed an unfair-labor-practice charge based on a tweet from Musk, alleging that the tweet was a threat—in violation of [Section 8\(a\)\(1\)](#) of the National Labor Relations Act—to rescind stock options if employees unionized. In relevant part, the court upheld the NLRB’s finding that employees would understand Musk’s tweet as a threat to rescind stock options as retaliation for unionizing (*Tesla v. NLRB*).

- **Torts:** The Ninth Circuit ruled that the [Federal Tort Claims Act's](#) (FTCA's) discretionary function exception, [28 U.S.C. § 2680\(a\)](#), applied to the U.S. Forest Service when the agency was given an instruction on consulting private landowners about fire-suppression activities but was not told specifically how to follow that instruction. Under the FTCA, the United States waives its sovereign immunity for certain tort claims where harm is caused by a government employee acting within the scope of their position. The panel held that the Forest Service's decisions regarding consultation with landowners during a wildfire fell within this exception because the lack of a specific mandate gave the Forest Service a discretionary choice as to how to proceed (*Schurg v. United States*).

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