

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (May 1, 2023–May 7, 2023)

May 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 [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.

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## Decisions of the Supreme Court

Last week, the Supreme Court granted certiorari in two cases:

- **Administrative Law:** The Court agreed to review a decision of the D.C. Circuit to consider whether to overrule the administrative law doctrine known as [Chevron deference](#), established by the Court in [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.](#), or clarify whether a statute’s silence regarding an agency’s authority to take a particular action constitutes an ambiguity requiring deference to the agency under [Chevron](#) ([Loper Bright Enter. v. Raimondo](#)).
- **Financial Regulation:** The Court will review a decision of the Second Circuit regarding whistleblowers who report financial wrongdoing and their protections under the [Sarbanes-Oxley Act](#). The Court will consider whether, under the burden-shifting framework for cases brought under the statute, a whistleblower must prove his employer acted with a “retaliatory intent,” or whether the lack of retaliatory intent is part of the

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affirmative defense on which the employer bears the burden of proof (*Murray v. UBS Sec., LLC*).

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 to replace it with one devised by the state court. The North Carolina Supreme Court originally 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 of the decision in June 2022 and heard oral argument in December 2022. The composition of the North Carolina Supreme Court changed following the November 2022 elections. The newly configured state supreme court reheard the underlying case, rejected its earlier rulings, and in [an April 28, 2023, opinion](#) held that North Carolina courts may not nullify a redistricting map on the basis of partisan gerrymandering. The U.S. Supreme Court [invited the parties and the Solicitor General](#) to file supplemental briefs on how the April 28 order affects the Supreme Court's jurisdiction. Briefs are due May 11 (*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.

- **\*Arbitration:** The First Circuit affirmed a district court's denial of defendants' motion to dismiss or compel arbitration in a lawsuit brought by distributors of baked goods against the companies who bake the goods. The court held that the distributors fell within the Section 1 exemption to the [Federal Arbitration Act](#) (FAA) as transportation workers engaged in interstate commerce. In accordance with its March 2023 decision in *Fraga v. Premium Retail Services* and the Supreme Court's decision in *Southwest Airlines Company v. Saxon*, the court held that the distributors' work constituted "transportation" even if their employer was not engaged in the transportation industry. This interpretation of both *Saxon* and the FAA conflicts with the [Second Circuit](#), which held in a case involving the same defendants that working in the transportation industry is a necessary condition to qualify for the Section 1 exemption. The court also held that Section 1 applies to workers who perform transportation work "frequently," regardless of their other responsibilities or formal job descriptions (*Canales v. CK Sales Co., LLC*).
- **Communications:** The Sixth Circuit held that the Federal Communication Commission's (FCC's) authority over the Universal Service Fund pursuant to [Section 254 of the Communications Act](#) does not violate the nondelegation or private nondelegation doctrines, echoing the conclusions reached by other circuit courts in similar cases. The FCC promotes universal access to telecommunications service via the Fund, which is funded by required contributions from covered telecommunications carriers calculated in part based on data gathered by a private not-for-profit organization, the Universal Service Administrative Company (USAC). Like the Fifth and D.C. Circuits, the Sixth Circuit held that Section 254 provides an intelligible principle and so does not violate the nondelegation doctrine. The Sixth Circuit also held, in agreement with the Fifth Circuit, that there is no private nondelegation doctrine violation because USAC is subordinate to the FCC and does not exercise decisionmaking power (*Consumers' Research v. FCC*).

- **Criminal Law & Procedure:** The Second Circuit joined several other circuits in holding that the mandatory 35-year minimum sentence in [18 U.S.C. § 2251\(e\)](#) for recidivists with two or more federal or state predicate convictions “relating to the sexual exploitation of children” is not limited to offenses involving the production of child pornography. An individual who was convicted of violating [18 U.S.C. § 2251\(a\)](#) for prior state convictions for sexual assault of a minor and file sharing child pornography argued that “relating to the sexual exploitation of children” covers only production offenses. The Second Circuit joined the Third, Fourth, Sixth, and Eighth Circuits in rejecting this interpretation based on the text and context of the statute ([United States v. Winczuk](#)).
  - **Criminal Law & Procedure:** The Fourth Circuit held that a preponderance-of-the-evidence standard applies when a district court considers whether to revoke a conditional discharge in a federal civil commitment proceeding under [18 U.S.C. § 4246\(f\)](#). Section 4246 sets forth the process for civilly committing inmates due to be released from federal custody or incapable of standing trial. While § 4246(d) expressly requires clear-and-convincing evidence of dangerousness for an initial commitment, the court held that the less demanding preponderance-of-the-evidence standard applies when a defendant previously committed and conditionally discharged faces recommitment under § 4246(f) ([United States v. Perkins](#)).
  - **Speech:** The Ninth Circuit held that a Member of Congress did not violate the First Amendment by urging a bookseller to stop promoting the plaintiffs’ book. In a letter to Amazon’s chief executive, the Member raised concerns about the company’s potential promotion of certain books about COVID-19, including one authored and published by the plaintiffs, through its search function and “Best Seller” lists. The Member asked Amazon to review and publicly disclose the extent to which its algorithms direct consumers to “COVID-19 misinformation” and develop a plan to modify its algorithms to stop any such practice. The Ninth Circuit determined that the letter contained permissible persuasion rather than unlawful coercion because, among other reasons, it was framed as a request and not a demand and did not threaten specific enforcement action. The court affirmed the district court’s denial of a preliminary injunction that would have required the Member to retract the letter and refrain from sending similar communications in the future ([Kennedy, Jr. v. Warren](#)).
  - **Torts:** The Fourth Circuit joined several other circuits in holding that a provision of the [Federal Tort Claims Act](#) waiving sovereign immunity in detention-of-goods cases applies only when the property at issue is seized solely for the purpose of forfeiture. Under [28 U.S.C. § 2680\(c\)](#), the United States does not waive sovereign immunity for claims concerning the detention of goods by law enforcement officers, but an exception applies, and immunity is waived, if “the property was seized for the purpose of forfeiture” and other conditions are met. The court held that when property is seized pursuant to both a criminal warrant and a civil forfeiture warrant, the exception does not apply, and the United States is immune ([Myers v. Mayorkas](#)).
  - **Veterans:** The Federal Circuit held that the Secretary of Veterans Affairs may assign veterans disability ratings of zero percent in response to claims for benefits. The plaintiff relied on statutes setting forth 10 grades of disability, between 10 percent and 100 percent ([38 U.S.C. §§ 1155 and 1114](#)), for the premise that the Secretary must issue a disability rating of at least ten percent. The court rejected this premise, citing Congress’s “long-standing practice” of recognizing certain injuries as noncompensable and reasoning that Congress evinced no intent to limit the Secretary’s authority to issue zero-percent ratings in §§ 1155 and 1114 ([Frazier v. McDonough](#)).
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