

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 5–June 11, 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.

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## Decisions of the Supreme Court

Last week, the Supreme Court issued decisions in five cases (two of which were consolidated) for which it heard oral arguments:

- **Criminal Law & Procedure:** The Court vacated the Fifth Circuit’s affirmance of a criminal defendant’s sentence under the federal aggravated identity theft statute, [18 U.S.C. § 1028A\(a\)\(1\)](#), where the sentence was based on the defendant overbilling Medicaid by falsifying the scope of services provided to a patient. Section 1028A(a)(1) punishes “misuse” of another’s name or identifying information when done “in relation to” a predicate offense. Eight Justices joined an opinion holding that for § 1028A(a)(1) to apply, the misuse must be at the crux of what makes the underlying conduct criminal. Here, the Court believed the defendant’s misuse of another’s name was merely an ancillary feature of his method to overbill Medicaid (*Dubin v. United States*).
- **Elections:** By a 5–4 vote, the Court upheld a three-judge district court panel’s ruling that Alabama’s congressional redistricting plan, creating one majority-Black congressional

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district out of seven districts total, impermissibly diluted the votes of Black Alabamans in violation of the Voting Rights Act (VRA), along with a related ruling by a district court in a separate case. In so doing, the majority declined to revisit the three-pronged test established in *Thornburg v. Gingles* for proving vote dilution under [Section 2 of the VRA](#). It concluded that, based on the evidentiary record, the test was properly applied here (*Allen v. Milligan*; *Allen v. Caster*).

- **Health:** In a 7-2 decision, the Court held that the Federal Nursing Home Reform Act (FNHRA)—which sets minimum standards of care for nursing homes receiving federal funding in the Medicaid program—unambiguously confers federal rights that are actionable under [42 U.S.C. § 1983](#). In so doing, the Court rejected arguments that legislation enacted pursuant to Congress’s Spending Clause power cannot give rise to rights privately enforceable under § 1983 (*Health & Hospital Corp. of Marion County v. Talevski*).
- **Intellectual Property:** A unanimous Court reversed and vacated a lower court ruling that the humorous use of another entity’s trademark, even if used as a source identifier for goods, receives heightened protection in a trademark infringement suit brought under the [Lanham Act](#). The case involves a company that manufactures dog toys labeled “Bad Spaniels” that resemble bottles of Jack Daniel’s whiskey. The Court held that the ordinary standard for trademark infringement, and not a heightened standard for “expressive works,” applied to the case, because the challenged use of Jack Daniel’s trademark was itself a mark (i.e., it was used to identify the source of the dog toys). As to a separate claim for trademark dilution, the Court held that a statutory exclusion for “noncommercial” uses of another’s mark did not provide a blanket shield for all parody or humorous commentary (*Jack Daniel’s Properties, Inc. v. VIP Products, LLC*).

## 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.

- **Bankruptcy:** The Fifth Circuit held in consolidated appeals that a bankruptcy court lacked jurisdiction under the Bankruptcy Code to settle class actions that were not provided for in a confirmed Chapter 11 Plan (the Plan). The court acknowledged that adjudications of pre-bankruptcy petition claims against a debtor’s estate fall within a bankruptcy court’s “[core jurisdiction](#).” The court held that such jurisdiction did not apply here because nearly all of the class members did not file proofs of claim by the court-imposed deadline (the Bar Date), the Plan stated that any proof of claim filed after the Bar Date would be deemed disallowed and expunged (with narrow exceptions that did not apply), and [the Bankruptcy Code](#) itself [requires the filing](#) of a proof of claim to participate in the Plan voting process. (*RDNJ Trowbridge v. Chesapeake Energy Corp.*).
- **\*Civil Procedure:** The Tenth Circuit joined nearly every other circuit court as to the procedural standard for certifying an “issue class”—that is, for treating part of a case as a class action when class certification is not warranted for the case as a whole. The court held that issue certification under Federal Rule of Civil Procedure 23(c)(4) is appropriate if the issue class itself satisfies Rule 23(a), which imposes requirements of numerosity, commonality, typicality, and adequacy, and Rule 23(b)(3), which requires a showing that common issues predominate over individual issues. This standard deviates from the Third Circuit, which takes additional steps to certify an issue class, and the Fifth Circuit, which

in one decision required that the entire cause of action, and not just the contemplated issue class, meet the predominance requirement (*Black v. Occidental Petrol. Corp.*).

- **Criminal Law & Procedure:** The First Circuit, interpreting the “turnover” statute of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3664(n), held that a district court applied the statute lawfully to, among other things, COVID-19 stimulus checks, and that the district court’s decision to require immediate payment toward restitution was reasonable. Section 3664(n) requires prison inmates to put substantial resources, such as an inheritance or settlement, that are acquired while incarcerated toward unpaid restitution obligations (*United States v. Saemisch*).
- **\*Criminal Law & Procedure:** The First Circuit declined to apply the Ninth Circuit’s standard for prosecutorial misconduct based on the denial of use immunity for defense witnesses. Use immunity protects witnesses from having their testimony used as evidence against them in court. The First Circuit held that the “effective defense theory,” under which a strong need for exculpatory testimony can override the government’s objection to use immunity, is not good law in that circuit. Instead, the court applied First Circuit precedent, whereby the government may defeat a challenge to the denial of use immunity by offering a plausible reason for denying such immunity. The court found plausible the government’s position that it wanted to avoid potential obstacles to prosecuting the defense witness in question on pending federal charges (*United States v. Munera-Gomez*).
- **Criminal Law & Procedure:** The Fourth Circuit affirmed the conviction of a defendant charged with producing child pornography in violation of 18 U.S.C. § 2251(a). The defendant contended that his conviction involved an impermissible extraterritorial application of § 2251(a) because he was in New Zealand at the time of recording the unlawful images and videos. The court applied the presumption against extraterritoriality and held that § 2251(a) does not provide a clear indication of an extraterritorial application. The court nonetheless held that the case involved a domestic application of § 2251(a) because the “focus” of the statute is the production of a visual depiction of a minor engaged in sexually explicit conduct or the transmission of a live visual depiction of such conduct, and here, the defendant produced and transmitted such a visual depiction with a minor who lived in Virginia (*United States v. Skinner*).
- **\*Criminal Law & Procedure:** The Sixth Circuit reversed a district court’s order granting compassionate release to a prisoner under the [First Step Act](#). The district court determined that the prisoner’s sentence was unconstitutional under the Supreme Court’s decision in *Apprendi v. New Jersey* and granted the prisoner’s motion for release. The Sixth Circuit held that a sentencing error is not an “extraordinary and compelling” reason for compassionate release under the First Step Act and instead can only be corrected by way of a federal habeas petition. In so holding, the Sixth Circuit joined four other circuits, while the First Circuit has stated that a sentencing error might provide a reason for compassionate release (*United States v. West*).
- **Criminal Law & Procedure:** The Ninth Circuit held that, for a parolee to be detained or searched without a warrant under the [Fourth Amendment](#), a law enforcement officer must have at least probable cause—not absolute certainty—to believe that (1) the individual to be detained or searched is on active parole, and (2) the applicable parole condition authorizes the search or seizure (*United States v. Estrella*).
- **\*Criminal Law & Procedure:** The Ninth Circuit affirmed the dismissal of two habeas corpus petitions challenging the petitioners’ conditions of confinement. The court held that prisoners may not bring such claims under the federal habeas corpus statute, 28 U.S.C. § 2241. The court reasoned that, under [Ninth Circuit precedent](#), challenges to

the conditions of a sentence's execution, but not the conditions of the inmate's confinement, may be brought under § 2241. The court also conducted a review of the history and purpose of habeas corpus and concluded that conditions-of-confinement claims are not at the "core of habeas corpus." The Ninth Circuit disagreed with multiple other circuits that appear to have held that seeking release from confinement is the necessary attribute of a claim's sounding in habeas. Instead, the Ninth Circuit held, the key inquiry is the petitioner's argument *why* release from confinement is legally required to remedy a constitutional violation (*Pinson v. Carvajal*).

- **Fair Credit Reporting Act (FCRA):** The Eleventh Circuit declined to impose a "new-material information" requirement on an FCRA cause of action. Under FCRA, a consumer may dispute the accuracy of their credit reports with their bank, also known as a "furnisher." Upon receiving the dispute, the furnisher must conduct a reasonable investigation into the report's accuracy, and a consumer may sue a furnisher for conducting an unreasonable investigation. Here, the court held that the statute of limitations for such a claim restarts every time a furnisher commences an unreasonable investigation, regardless of whether the dispute causing a later investigation contains new information. The court was not persuaded by the defendant's argument that consumers could abuse the FCRA and restart their limitations clock by resubmitting an old dispute. The court added that, had Congress intended for FCRA to have a new-material information rule, it would have included such a rule in the statute. Although the circuit court agreed that the plaintiff's claim was timely, it affirmed the lower court's holding that the defendant conducted a reasonable investigation (*Milgram v. Chase Bank USA, N.A.*).
- **Firearms:** A divided Third Circuit, sitting en banc, held that the federal felon-in-possession law, 18 U.S.C. § 922(g)(1), as applied to a felon convicted of violating Pennsylvania's law prohibiting false statements to obtain food stamps, violated the [Second Amendment](#). The majority, which described its decision as narrow, reasoned that the Government failed to show that the United States has a long-standing history and tradition of depriving similarly situated people of firearms—the Second Amendment standard articulated by the Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* (*Range v. Att'y Gen.*).
- **Food & Drug:** The First Circuit held that the plaintiffs' state law claims regarding the advertising labels of dietary supplements were preempted by the [Food, Drug, and Cosmetic Act](#) (FD&C Act). The plaintiffs argued that the labels for glutamine supplements made deceptive claims by conflating the benefits of natural and supplemental glutamine. The court determined that the label claims concerned the general effect of glutamine rather than the specific effect of the supplements and met the requirements for such claims under the FD&C Act. As the FD&C Act expressly preempts any state law labeling requirement concerning that type of label claim that is not identical to the FD&C Act's requirements, the court held that the plaintiff's state law claims were preempted. (*Ferrari v. Vitamin Shop Indus.*).
- **Freedom of Information Act (FOIA):** The D.C. Circuit affirmed a district court's order granting summary judgment to several intelligence agencies. The plaintiff filed suit after the agencies rejected his FOIA request seeking records about the alleged "unmasking" of members of former President Trump's Administration and transition team under the [Foreign Intelligence Surveillance Act of 1978](#), referring to a process by which agencies may learn the identity of U.S. persons associated with material incidentally captured in electronic surveillance. The agencies rejected the request with so-called *Glomar* responses, taking the position that divulging even the existence or non-existence of the

records at issue was exempt from FOIA. The D.C. Circuit held that the agencies properly issued such responses under multiple FOIA exemptions and did not need to search first for any potentially responsive records (*Schaerr v. U.S. Dep't of Just.*).

- **Labor & Employment:** The Fifth Circuit held that audiologists are “physicians” under Section 7(b) of the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. § 907(b). Section 907(b) of the LHWCA provides covered employees with the right to choose an attending physician to provide medical care. The Court, reasoning that the plain meaning of “physician” includes audiologists, held that the interpretation of the Director of the Office of Workers’ Compensation Programs including audiologists in the regulatory definition of “physician” was entitled to administrative deference (*Huntington Ingalls, Inc. v. Dir., Off. of Workers’ Comp. Programs.*).
- **Labor & Employment:** The Eighth Circuit held that a provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(d), is not jurisdictional. Section 1132(d), a central enforcement mechanism under ERISA, provides that any money judgment against an employee benefit plan shall be enforceable against the plan only, and not against another person absent a showing of liability of the person in their individual capacity. The court had previously found that the inability to enforce a money judgment under § 1132(d) amounted to a lack of standing to sue. The court reconsidered that position in light of the Supreme Court’s holdings that claims processing rules and elements of a cause of action are distinct from limitations on subject matter jurisdiction. The court held that the text of the statute did not implicate jurisdiction, and accordingly, it did not deprive the plaintiff of standing (*Shafer v. Zimmerman Transfer, Inc.*).
- **Speech or Debate Clause:** A divided Eighth Circuit granted in part a petition for a writ of mandamus to quash an order compelling documents and testimony from several current and former members of the North Dakota Legislative Assembly and a legislative aide. The district court directed the lawmakers to comply with subpoenas for documents or testimony in a civil case brought against the State alleging violations of Section 2 of the VRA. The Eighth Circuit, stating that legislators enjoy a privilege under the federal common law that largely approximates the protections afforded to federal legislators under the Speech or Debate Clause of the U.S. Constitution, rejected the district court’s view that legislative privilege did not apply because the subpoena sought communications between legislators and third parties (*In Re: North Dakota Legis. Assembly*).
- **Territories:** The Ninth Circuit held that Congress intended for a statute that bestows noncitizen national status on those born in American Samoa to apply retroactively. At issue were the 1986 amendments to the Immigration and Nationality Act of 1952, codified at 8 U.S.C. § 1408. The court considered the effect of the amendments on individuals born in American Samoa prior to 1986. The court concluded that the text of § 1408 indicated legislative intent to apply the statute retroactively. The court found particularly relevant an uncodified section of the 1986 amendments providing that § 1408 shall apply to persons born before, on, or after the date of enactment (*Koonwaiyou v. Blinken*).

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