

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 19–June 25, 2023), Part 2

June 26, 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.

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.

This week’s *Congressional Court Watcher* is divided into two parts because of the number of notable decisions issued over the past week. This Legal Sidebar (Part 2) discusses activity by the U.S. courts of appeals from June 19 through June 25, 2023, while a [companion Legal Sidebar](#) (Part 1) addresses Supreme Court decisions from that period.

## 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 Seventh Circuit held that fraud is not a standalone basis for avoiding a pre-bankruptcy transfer of funds under the Bankruptcy Code’s fraudulent transfer statute, [11 U.S.C. § 548](#). The court joined other circuits to address the issue in holding that, per § 548’s plain language, there must be both fraud and an underlying “interest of the debtor in property” to void a transfer. The court reasoned that the interest-in-property

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requirement should apply in the same way it does elsewhere in the Code, such as in 11 U.S.C. § 547 (*Mann v. LSQ Funding Grp., L.C.*).

- **Civil Rights:** The Fifth Circuit held that under the [Religious Freedom Restoration Act](#) (RFRA), at least some employers with sincerely held religious beliefs were entitled to an exemption from Equal Employment Opportunity Commission (EEOC) guidance interpreting Title VII's prohibition on sex discrimination to include sexual orientation and gender identity discrimination. The court noted that the Supreme Court decision in *Bostock v. Clayton County* left open the question of how religious exemptions might apply to Title VII. The court affirmed the trial court's finding that a plaintiff religious employer was entitled to an exemption under RFRA, and held the EEOC had not demonstrated a compelling interest in denying an exemption (*Braidwood Mgmt., Inc. v. EEOC*).
- **Civil Rights:** The D.C. Circuit held that protestors could not seek damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* for alleged violations of their constitutional rights by federal law enforcement officers during the clearing of protestors from Lafayette Park, adjacent to the White House, in June 2020. 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. The D.C. Circuit held that the protestors' claims represented a new context compared to recognized *Bivens* claims and that national security was a special factor counseling hesitation against extending *Bivens* to that context (*Buchanan v. Barr*).
- **Criminal Law & Procedure:** The Fifth Circuit held that a mandatory sentencing enhancement in 18 U.S.C. § 2251(e) is triggered by prior convictions involving any criminal sexual conduct involving children, not only by convictions involving child pornography. The enhancement, part of a provision criminalizing offenses related to child pornography, applies to those with two or more prior state convictions "relating to the sexual exploitation of children." Relying on statutory context and history, the court adopted a broad reading of that language and held that the defendant's two prior state convictions for indecent exposure to a child triggered the enhancement (*United States v. Moore*).
- **Criminal Law & Procedure:** A divided Sixth Circuit held that Michigan's lifetime sex-offender registration and electronic monitoring requirements do not render those offenders "in custody" under 28 U.S.C. § 2254(a), a prerequisite for seeking post-conviction relief under that federal habeas corpus statute. The majority acknowledged Supreme Court and circuit precedent providing that a § 2254 petitioner may still be "in custody" following incarceration if there are severe restrictions on their liberty. Here, the majority held, the offender's registration and monitoring requirements were collateral consequences of conviction rather than the severe restraints on liberty necessary for an offender to be "in custody" (*Corridore v. Washington*).
- **\*Criminal Law & Procedure:** The Tenth Circuit widened a circuit split by holding that commentary from the U.S. Sentencing Commission is generally entitled to deference even after the Supreme Court's decision in *Kisor v. Wilkie*. In *Kisor*, the Supreme Court held that courts may not defer to agency interpretations of their own regulation if the court determines the regulation is not ambiguous. The circuit courts have split on whether *Kisor* abrogated an [earlier Supreme Court decision](#) providing for broad deference to the Sentencing Commission's commentary. The Tenth Circuit declined to extend *Kisor* and reduce deference to the Sentencing Commission absent clear direction from the Supreme

Court. The Tenth Circuit thus affirmed the defendant's sentence based in part on Sentencing Commission [commentary](#) providing that conspiracies to commit crimes of violence count as crimes of violence for sentencing purposes (*United States v. Maloid*).

- **\*Criminal Law and Procedure:** The Eleventh Circuit held that a defendant imprisoned for violating conditions of supervised release is eligible for a sentence reduction under the [First Step Act of 2018](#) when the underlying crime for which supervised release was imposed qualifies for a reduction under the Act. The court further held that the district court did not abuse its discretion in denying a sentence reduction without first calculating the new sentencing guidelines range. The Eleventh Circuit added that, in some instances, determining the new guidelines range may be the “better practice,” but the court declined to adopt the [Seventh Circuit](#)’s categorical approach that a district court must always first recalculate the guidelines range before considering whether a sentence reduction is appropriate under the First Step Act (*United States v. Gonzalez*).
- **Environmental Law:** The Sixth Circuit held that the federal government’s management of the American oil industry during World War II did not make the United States an “operator” of certain refineries under the [Comprehensive Environmental Response, Compensation, and Liability Act of 1980](#) (CERCLA). The current owners of the refineries sought contribution from the United States for the cost of their remediation efforts under CERCLA. The district court granted partial summary judgment to the owners on the issue of whether the government “operated” the facilities during the war, but the Sixth Circuit reversed, explaining that the federal government’s wartime oversight did not extend to waste disposal issues (*MRP Props. Co. v. United States*).
- **Environmental Law:** The D.C. Circuit issued a mixed ruling on the authority of the Environmental Protection Agency (EPA) to regulate hydrofluorocarbons (HFCs), potent ozone-depleting greenhouse gases. The panel unanimously held that the EPA had authority under the American Innovation and Manufacturing Act of 2020, [42 U.S.C. § 7675](#), to regulate HFCs in blended substances because those HFCs are molecularly identical to “pure” HFCs and thus meet the definition of a regulated substance under § 7675(b)(11). The panel further held that petitioners’ nondelegation challenge failed because they did not first raise the argument with the agency. The panel divided on EPA’s authority to issue rules requiring (1) using only reusable cylinders in the transport of HFCs and (2) affixing QR codes to HFC containers that link to a valid certification, with the majority finding that EPA’s interpretation of its authority was contrary to the plain meaning of statutory text (*Heating, Air Conditioning & Refrigeration Distributors Int’l v. EPA*).
- **Immigration:** The Fifth Circuit joined several other circuits in holding that the Immigration and Nationality Act bars courts from reviewing immigration authorities’ denial of a national-interest waiver. Under [8 U.S.C. § 1153\(b\)\(2\)](#), petitioners who have advanced degrees or exceptional abilities receive priority. Petitioners must typically have a job offer from a U.S. employer to qualify. Under the national-interest waiver provision, this requirement may be waived if immigration authorities deem it to be in the national interest. The Fifth Circuit held that the denial of such a waiver is a discretionary decision for which [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(ii\)](#) bars jurisdiction (*Flores v. Garland*).
- **Immigration:** The D.C. Circuit held that the alleged burden of a visa denial on the constitutional right to marriage of the applicant’s spouse does not justify an exception to the usual rule prohibiting judicial review of visa decisions. The consular-non-reviewability doctrine precludes judicial review of government decisions to issue or withhold a visa, subject to limited exceptions. One such exception permits a U.S. citizen

to challenge the exclusion of an alien if the denial burdens the citizen's constitutional rights. The D.C. Circuit held this exception did not apply where a visa applicant's wife sought judicial review based on the denial of her right to marriage, as the constitutional right to marriage does not include a right to reside in the United States with one's spouse. The court also held that, even if the exception applied, the challenge would fail because the government had provided a facially legitimate and bona fide reason for the denial (*Colindres v. U.S. Dep't of State*).

- **Indian Law:** The Tenth Circuit, citing [long-standing Supreme Court precedent](#), reaffirmed that the [Major Crimes Act](#) was a constitutional exercise of Congress's plenary authority over Indian affairs. Following the Supreme Court's decision in *McGirt v. Oklahoma*, which held that portions of eastern Oklahoma are tribal lands where the state lacks jurisdiction to prosecute certain crimes committed by tribal members, McGirt was indicted, retried, and convicted by a federal jury under the Major Crimes Act. On appeal, the court rejected McGirt's arguments that the Major Crimes Act exceeded Congress's authority to regulate Indian tribes and further held that the Act remained valid even if there was a conflict between the Act and treaties between the federal government and Muskogee Creek Nation (*United States v. McGirt*).

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