

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 26, 2023–July 2, 2023), Part 2

July 3, 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 26 through July 2, 2023, while a [companion Legal Sidebar](#) (Part 1) addresses Supreme Court decisions from this 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.

- **Arbitration:** The Third Circuit affirmed the denial of a motion to dismiss a lawsuit by an employee for breach of fiduciary duties against his employer and the trustee of an employee stock ownership plan (ESOP) under the [Employment Retirement Income Security Act \(ERISA\)](#). The defendants argued that the ESOP’s plan documents contained an arbitration provision with a class action waiver. The court held that the class action waiver bars plaintiffs from seeking remedies [guaranteed by ERISA](#), and, accordingly, the

Congressional Research Service

<https://crsreports.congress.gov>

LSB10996

waiver is unenforceable. Considering the defendants' concession that the class action waiver was nonseverable from the rest of the arbitration provision, the court also ruled the arbitration provision is void in its entirety (*Henry v. Wilmington Tr., NA*).

- **\*Bankruptcy:** The Tenth Circuit held that the government's waiver of sovereign immunity in § 106(a) of the Bankruptcy Code extends to claims by a trustee proceeding under § 544(b)(1) to void a transfer of property—here tax payments to the Internal Revenue Service—under state law. The court found the plain language of the waiver broadly extended to state law claims that formed the “applicable law” under § 544. The decision widens a circuit split, with the Tenth Circuit agreeing with the Fourth and Ninth Circuits' reasoning and departing from the analysis of the Seventh Circuit (*Miller v. United States*).
- **Civil Rights:** The Sixth Circuit held that the Michigan Department of Corrections' denial of recognition to an “explicitly racist” religion violated the Religious Land Use and Institutionalized Person Act of 2000, 42 U.S.C. § 2000cc-1. The court held that the Department had not shown that nonrecognition was the least restrictive means to support the Department's interest in security, particularly when the Department had not considered other alternatives. The court declined to reach the question of whether a broad concern about prison violence was sufficiently specific to show that the Department had a compelling governmental interest (*Fox v. Washington*).
- **Communications:** The Ninth Circuit reversed the dismissal, for lack of Article III standing, of an action brought under the Telephone Consumer Protection Act of 1991 (TCPA) by a mother after receiving unsolicited telemarketing calls and texts on a phone used primarily by her child. The court held that the owner of a phone with a number listed on the National Do-Not-Call Registry suffers an injury in fact sufficient for standing even when she is not the phone's primary or customary user (*Hall v. Smosh Dot Com, Inc.*).
- **Criminal Law & Procedure:** The Second Circuit held that dismissals of lawsuits as barred by res judicata and dismissals on alternative grounds can count against prisoners when applying the Prison Litigation Reform Act's (PLRA's) three-strikes rule. The three-strikes rule largely bars prisoners from proceeding *in forma pauperis* if courts have dismissed three of their prior legal actions or appeals as frivolous, malicious, or failing to state a claim. Here, the court held that a prisoner accrues a strike when, on the face of his complaint, the action is plainly barred by res judicata. A prisoner also accrues a strike, the court held, when a court dismisses a case citing multiple alternative grounds, so long as one of the grounds would independently justify a strike and sufficed for dismissal of all claims (*Griffin v. Carnes*).
- **Criminal Law and Procedure:** The Eighth Circuit affirmed a defendant's convictions and mandatory life sentence for distributing a controlled substance resulting in death. The defendant argued that the mandatory life sentence unconstitutionally violated equal protection principles because, after the First Step Act, drug traffickers convicted under 21 U.S.C. § 841(b)(1)(A) and (B) are subject to a mandatory life sentence only if they have prior “serious drug felony” or “serious violent felony” convictions, while those, like the defendant, convicted under lower quantity thresholds in § 841(b)(1)(C) are subject to a mandatory life sentence if they have any prior convictions for “felony drug offenses.” The Eighth Circuit held that a rational basis exists for this distinction based on Congress's conceivable intent to provide harsher punishments for street-level traffickers who directly sell smaller quantities to individuals and the drug use results in death (*United States v. Cardwell*).

- **Election Law:** The Fifth Circuit held that three Texas electioneering laws do not violate the [First Amendment](#). The Texas Election Code bars loitering or electioneering within 100 feet of a polling place during general and primary elections, and also prohibits wearing certain insignia relating to a candidate, measure, or political party that appears on the ballot within 100 feet of a polling place. The district court upheld the prohibition on the wearing of certain insignia as constitutional, but concluded that the Election Code's challenged restrictions on loitering or electioneering chilled the plaintiff's right to free speech by criminalizing political expression at polling places without limiting language. The Fifth Circuit reversed, first holding that the plaintiff lacked standing with regard to state election officials. With respect to local officials, the court held that the First Amendment claims failed because the challenged laws contain sufficient limiting language to provide an "objective, workable standard" (*Ostrewich v. Nelson*).
- **Environmental Law:** The D.C. Circuit denied petitions for review raising a challenge to the Environmental Protection Agency's (EPA's) [Aircraft Rule](#), which aligns domestic aircraft emission standards with those promulgated by the International Civil Aviation Organization (ICAO). The court held that the Aircraft Rule was within the EPA's Authority [under § 231](#) of the Clean Air Act, and that the EPA reasonably explained its decision to comport its regulation with the ICAO standards (*California v. EPA*).
- **Congress:** The D.C. Circuit affirmed the dismissal of a lawsuit by multiple Members of the U.S. House of Representatives against the former Speaker of the House and other congressional defendants [challenging the requirement](#) that people in the House chamber wear masks or be fined. The court held that the adoption and execution of that requirement were legislative acts that fell under the House's authority to determine the rules of its proceedings and punish its Members for disorderly behavior. As a result, the court reasoned, the Constitution's Speech or Debate Clause conferred immunity on the defendants (*Massie v. Pelosi*).
- **\*Immigration:** The Second Circuit added to a circuit split as to whether an immigration judge may deny adjustment of status to an applicant who had filed a frivolous, but untimely, asylum application. Generally, a person who knowingly files an asylum application containing false, material statements is considered to have filed a [frivolous application](#) and is permanently barred from immigration benefits. The court disagreed with [the Third Circuit](#) and held that an asylum application can be found frivolous even if it was untimely filed. The court explained that the federal statute on [frivolous asylum applications](#) contains no clear statement that the asylum application filing deadline is jurisdictional, thus requiring immigration judges to consider an application's timeliness before analyzing for frivolousness. The court determined that the filing of an asylum application, timely or otherwise, is the only precondition to triggering a frivolousness inquiry (*Ud Din v. Garland*).
- **Indian Law:** The Seventh Circuit held that the [antiretaliation provision](#) of the False Claims Act does not abrogate tribal sovereign immunity. In a suit brought by a former employee against a tribal health center and related defendants, the Seventh Circuit rejected the abrogation argument and affirmed a district court's order dismissing the claims, concluding that the health center acted as an arm of the tribe and was therefore entitled to avail itself of tribal sovereign immunity (*Mestek v. Lac Courte Oreilles Cmty. Health Ctr.*).
- **Indian Law:** The Tenth Circuit held that the city of Tulsa did not have jurisdiction over municipal violations committed by its Indian inhabitants in Indian Country. The plaintiff, a resident of Tulsa and a member of the Choctaw Nation, challenged a citation for

speeding issued by Tulsa within the Muscogee Indian Reservation. A lower court found that Tulsa properly exercised jurisdiction stemming from [Section 14 of the Curtis Act](#), an 1898 federal statute granting lawmaking authority and jurisdiction to municipalities organized under Arkansas law within what was then known as “Indian Territory.” The Tenth Circuit reversed, holding that even if the Curtis Act was never repealed, it no longer applied to Tulsa after the city reorganized under Oklahoma law (*Hooper v. The City of Tulsa*).

- **Indian Law:** The D.C. Circuit held that the Secretary of the Interior did not violate the [Indian Gaming Regulatory Act \(IGRA\)](#), a law that regulates gaming on Indian lands, in allowing a compact between the Seminole Tribe of Florida and the State of Florida to become effective by operation of law. At issue was the compact’s providing for online sports betting, meaning that people could gamble outside of Indian lands. The court held that while IGRA regulates gaming solely on Indian lands, nothing in the statute prohibits tribes and states from entering into a compact that discusses gaming outside of Indian lands. Additionally, the court held that the Secretary did not violate [the Wire Act](#), the [Unlawful Internet Gambling Enforcement Act](#), or the equal protection guarantee of the [Fifth Amendment](#) in allowing the compact to go into effect (*W. Flagler Assocs., Ltd. v. Haaland*).
- **Property:** The Federal Circuit held that the federal government may be liable under the Fifth Amendment’s Takings Clause if it fails to return property seized during a criminal investigation and does not validly assume ownership of the property via forfeiture. The court explained that while the government’s police power may insulate it from liability for an initial seizure, there is no police power exception that insulates law enforcement from takings liability for the period after seized property is no longer needed for criminal proceedings. The court agreed with the Third Circuit that the government needs some justification to retain seized property without compensation once criminal proceedings have concluded (*Jenkins v. United States*).
- **Tax:** The D.C. Circuit reversed a grant of summary judgment for a company in an action brought by one of the company’s employees for willfully filing fraudulent information returns (W-2s) on his behalf, under [26 U.S.C. § 7434](#). The parties disagreed about the requisite scienter, or mental state, required under the statute. Observing that Congress defined neither “willfully” nor “fraudulent” in § 7434, the court applied the statutory interpretation principle that, absent other indication, Congress intends to incorporate the well-settled meaning of common law terms. The court then applied the common law usages of “willfully” and “fraudulent” and held that under § 7434, a plaintiff must show that a defendant acted knowingly or recklessly in filing a false return on someone’s behalf (*Doherty v. Turner Broad. Sys., Inc.*).
- **Torts:** The Ninth Circuit joined a growing circuit consensus in holding that Transportation Security Officers (TSOs) are “law enforcement officers” under the Federal Tort Claims Act (FTCA), [28 U.S.C. § 2680\(h\)](#), which waives sovereign immunity for torts like assault and battery committed by such officers. The court found that under the plain language of the FTCA, TSOs conduct searches and make arrests for violations of federal law, meeting the definition of “law enforcement officers.” The court thus allowed to proceed the plaintiff’s claim against the United States that she was sexually assaulted by a TSO at an airport screening (*Leuthauser v. United States*).
- **\*Transportation:** The D.C. Circuit maintained its position in a circuit split concerning the scope of appellate jurisdiction over decisions of the Surface Transportation Board (STB) under the Hobbs Act, [28 U.S.C. §§ 2341-51](#). The Hobbs Act, along with [28 U.S.C.](#)

§ 2321, confers appellate courts with jurisdiction to review all final STB orders; however, 28 U.S.C. § 1336 vests a district court with exclusive jurisdiction to review questions it certifies to the STB. Here, the D.C. Circuit held that where a district court certifies a question to the STB, an appellate court has jurisdiction to review any additional issues decided by the STB (*Norfolk S. Ry. Co. v. Surface Transp. Bd.*).

## Author Information

Jimmy Balser  
Legislative Attorney

Alexander H. Pepper  
Legislative Attorney

Michael D. Contino  
Legislative Attorney

Matthew D. Trout  
Legislative Attorney

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.