

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (September 5, 2023–September 10, 2023)

September 11, 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

The Supreme Court did not issue any opinions or grant certiorari in any cases last week. The Supreme Court’s next term is scheduled to begin October 2, 2023.

## 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.

- **Consumer Protection:** The Fourth Circuit held that the [Telephone Consumer Protection Act](#)’s prohibition against faxing an “unsolicited advertisement” is limited to faxes that are commercial in nature. The court further held that one set of allegations in the complaint—allegations that a business sent faxes to promote a free product because it earned commissions when fax recipients accepted the product—met this commercial-in-nature standard. Another set of allegations—allegations that faxes were sent as a pretext for or

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prelude to future commercial advertising—fell short of the standard because the plaintiff did not allege that receipt of future advertisements depended on acceptance of the free product (*Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*).

- **\*Criminal Law & Procedure:** The Eleventh Circuit joined a circuit split as to whether a federal criminal defendant sentenced under 18 U.S.C. § 3853 to a period of supervised release following imprisonment may have the supervised release period tolled if he absconds. The court decided that neither the text of § 3853 nor circuit caselaw supported applying the judicially crafted “fugitive tolling doctrine” to those who violate the conditions of their supervision and abscond. The Eleventh Circuit joins the First Circuit in this view, while the Second, Third, Fourth, and Ninth Circuits apply the fugitive tolling doctrine to terms of supervised release (*United States v. Talley*).
- **Employee Benefits:** Joining the Third, Sixth, Seventh, and Eighth Circuits, the Tenth Circuit held that a claim for breach of the [Employee Retirement Income Security Act’s](#) fiduciary duty of prudence may be based on allegations that investment management fees associated with a defined contribution plan are too high when compared to other available options. The court held that, to state such a claim, the plaintiff must allege a “meaningful benchmark” from which a price disparity can be evaluated. Applying that principle, the court affirmed dismissal of the plaintiffs’ complaint (*Matney v. Barrick Gold of North America*).
- **Energy:** The Ninth Circuit held that four revisions to the Federal Energy Regulatory Commission’s (FERC’s) rules implementing the [Public Utility Regulatory Policies Act of 1978](#) (PURPA) were consistent with PURPA and the [Administrative Procedure Act](#). The court, however, went on to hold over a dissent that FERC violated the [National Environmental Policy Act of 1969](#) (NEPA) by failing to prepare an environmental assessment before making the changes. The four revised rules, which FERC adopted in 2020, affect which facilities qualify for certain benefits under PURPA and how those facilities are compensated. The court reasoned that PURPA gives FERC broad discretion to evaluate and revise such rules and that the challenged revisions are reasonable. The court then explained that the revisions would foreseeably shift energy production away from renewable production and toward fossil-fuel production, and FERC was therefore required to prepare an environmental assessment under NEPA. Because vacating the rules would have significant disruptive effects, the court concluded that remand without vacatur was the appropriate remedy for the NEPA violation (*Solar Energy Industries Ass’n v. FERC*).
- **Firearms:** In a case challenging the constitutionality of California’s restrictions on openly carrying handguns in public, the Ninth Circuit ruled that the district court applied the wrong legal standard when it denied plaintiffs’ motion to block criminal enforcement of the restrictions during the pendency of the case. On remand, the circuit court instructed the district court to consider plaintiffs’ likelihood of success on the merits, which the lower court had not done when denying the injunction request. Citing the framework set forth by the Supreme Court in *New York State Rifle & Pistol Association v. Bruen* to determine whether a gun restriction comports with the Second Amendment, the Ninth Circuit directed the lower court to consider (1) whether California’s open-carry restrictions regulate conduct covered by the text of the Second Amendment and (2) if so, whether the restrictions closely resemble a well-established historical analogue in effect when the Second or Fourteenth Amendment were ratified (*Baird v. Bonta*).
- **\*Immigration:** The Ninth Circuit considered when an alien subject to a [reinstated removal order](#) may seek judicial review of a later administrative denial of that alien’s

eligibility to pursue withholding of removal. Under [8 U.S.C. § 1252\(b\)\(1\)](#), a “final” order of removal may be appealed to a U.S. circuit court not later than 30 days of the date of the order. Acknowledging a circuit split on this question, the Ninth Circuit held that the 30-day clock was triggered by the completion of the later relief proceedings and not the earlier reinstatement of the removal order (*Alonso-Juarez v. Garland*).

- **\*Immigration:** The Tenth Circuit examined the method for computing the maximum period during which an alien may be permitted to voluntarily depart the United States or file an administrative motion reopening proceedings after the alien is found removable. [8 U.S.C. § 1229c\(b\)\(2\)](#) provides that an immigration judge may issue an order granting the alien the ability to voluntarily depart the country in lieu of being ordered removed and that the voluntary departure period may last up to 60 days. The Tenth Circuit held that this period may not exceed 60 calendar days from the date of service of the voluntary departure order. The court noted it disagreed with the Ninth Circuit, which held that a voluntary departure period extended to the next business day when the 60th day falls on a federal holiday or weekend (*Monsalvo Velazquez v. Garland*).
- **Insurance:** The Second Circuit considered the meaning of [§ 215\(b\) of the Investment Advisers Act of 1940](#) (IAA), which provides a basis for suit to void a contract when either (1) the contract was made in violation of the IAA or (2) the contract’s performance involves a violation of the statute. With regard to the second ground, the court ruled that a suit cannot be brought under § 215(b) solely because a party engaged in illegal conduct under the IAA; the performance of that conduct must have also been necessary for the party to fulfill its contractual obligations (*NexPoint Diversified Real Estate Trust v. ACIS Capital Management, L.P.*).
- **Public Health:** The Ninth Circuit decided that [§ 3202 of the Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\)](#), which generally requires health insurance companies that cover COVID-19 testing to reimburse providers at specified rates, did not create a private right of action allowing providers to sue insurers. Provisions in the CARES Act and related laws made evident that Congress intended § 3202 to be enforced by federal regulators, and the court held that the language used by these laws did not also authorize enforcement through private suit (*Saloojas, Inc. v. Aetna Health of California, Inc.*).
- **Tax:** The First Circuit ruled that a U.S. company was required to make a lump-sum tax payment for its transfer of more than a billion dollars of intangible property to a foreign affiliate, when that transfer was done in exchange for stock as part of a corporate reorganization and the stock in the foreign affiliate is subsequently distributed to the U.S. company’s shareholders. Agreeing with the Tax Court below, the First Circuit concluded that the stock distribution to the shareholders constituted a “disposition following such transfer” subject to a lump-sum tax payment under [§ 367 of the Internal Revenue Code](#). If the court found that the stock distribution was not a “disposition following such transfer,” the tax attributable would ordinarily have been paid over time on an annual basis. Since the transferor ceased to exist after the reorganization, it could not receive such payments and another of the company’s U.S. subsidiaries instead reported the payment under a related code section. Had there been no U.S. subsidiary, the company’s interpretation would have meant that the income from its appreciated assets would have escaped U.S. tax completely (*TBL Licensing LLC v. Commissioner of Internal Revenue*).
- **Terrorism:** In cases decided the same day, a panel for the Second Circuit struck down as unconstitutional a provision of the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), found in [18 U.S.C. § 2334](#), under which the Palestinian

Liberation Organization and Palestinian Authority are deemed to have consented to U.S. courts' exercise of personal jurisdiction over them in civil suits brought under the [Anti-Terrorism Act \(ATA\)](#) if certain criteria are met. The provision states that those entities "shall be deemed to have consented to personal jurisdiction" to civil suit under the ATA, regardless of the date of occurrence of the underlying act of terrorism, if following enactment of the PSJVT, they either (1) make payments to the designees or family of persons who were incarcerated following acts of terrorism that injured or killed U.S. nationals, or who died while committing those acts; or (2) subject to limited exceptions, engage in any activities within the United States. The court held that the PSJVT did not establish the defendants' valid consent to be sued in a court that lacks personal jurisdiction over them, and therefore violated the defendants' rights under the Fifth Amendment's Due Process Clause (*Fuld v. Palestinian Liberation Org.*; *Waldman v. Palestine Liberation Org.*).

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