



Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (October 30, 2023–November 5, 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.

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.

Decisions of the Supreme Court

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

- **Arbitration:** The Court agreed to hear a case from the Ninth Circuit on whether an arbitrator or a court decides if an arbitration agreement’s scope had been narrowed by a later contract, when the earlier agreement had delegated to the arbitrator authority to decide threshold questions of arbitrability (*Coinbase v. Suski*).
- **Firearms:** The Court decided to review a case from the Fifth Circuit that held that a nonmechanical bump stock is not a machine gun under [18 U.S.C. § 921\(a\)\(24\)](#). In a 2018 [final rule](#), the Bureau of Alcohol, Tobacco, Firearms, and Explosives classified bump stocks, an accessory that attaches to a semiautomatic weapon to increase the rate of fire, as machine guns for purposes of the National Firearms Act and the federal statutory ban on the possession or transfer of new machine guns (*Garland v. Cargill*).
- **Speech:** The Court agreed to review a case from the Second Circuit brought by the National Rifle Association (NRA) against a New York state official who issued guidance

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letters urging regulated banks and insurance companies to stop doing business with the NRA in the wake of a school shooting. The Court granted certiorari to consider if such action by a government regulator is permissible under the First Amendment (*NRA v. Vullo*).

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 Eleventh Circuit considered whether a debtor fraudulently “concealed” property from the bankruptcy estate in violation of 11 U.S.C. § 727(a)(2), when he split real property in a way that shielded the valuable portion from the estate. The panel interpreted “concealed” under § 727(a)(2) to involve knowingly withholding information about the property or knowingly preventing the property’s discovery. Here, the panel affirmed the bankruptcy court’s ruling that the creditor had not proven a violation of § 727(a)(2), where the debtor publicly recorded deeds for the split property, paid taxes for the whole property, and listed the property in his bankruptcy schedules (*PRN Real Estate & Investments, Ltd. v. Cole*).
- ***Civil Procedure:** The Ninth Circuit found that obstetricians/gynecologists who regularly performed abortions in cases involving fetuses with genetic abnormalities had standing to seek an injunction to block the enforcement of an Arizona law criminalizing the performance of such abortions. The panel decided that plaintiffs identified actual and imminent injuries based on lost revenues for abortions they could not perform and the imminent threat of criminal prosecution. Disagreeing with the framework employed by the Eleventh Circuit, the panel held that contrary to the lower court’s ruling upon remand, the plaintiffs did not need to tie their economic injury to a constitutional right to establish standing, but only had to show an injury to their business activity fairly traceable to the statute, which they did. The panel reversed the lower court and remanded for it to consider plaintiffs’ motion for a preliminary injunction on the merits (*Isacson v. Mayes*).
- **Civil Procedure:** A divided Eleventh Circuit held that Florida legislators who passed a law prohibiting the teaching of critical race theory in public institutions were shielded by common-law legislative privilege from responding to subpoenas seeking documents to determine if they had a discriminatory intent in passing the law. The majority held the district court erred in splitting the subpoena requests into two categories: (1) documents revealing the legislators’ motivations which it deemed were privileged, and (2) purely factual documents which it deemed were not. The majority found that the privilege covered all documents because the *purpose* of the subpoenas was to determine the legislators’ intent. The majority declined to extend to a civil suit the Supreme Court’s decision in *United States v. Gillock*, which held that the legislative privilege may yield in the enforcement of federal criminal statutes (*Pernell v. Fla. Bd. of Governors of State Univ.*).
- **Environmental Law:** The Eighth Circuit vacated an Environmental Protection Agency (EPA) order that banned the use of chlorpyrifos on food crops, after finding the decision to ban the insecticide was arbitrary and capricious. The EPA’s decision followed a [2021 order by the Ninth Circuit](#) directing the agency act within 60 days to revoke all tolerances of chlorpyrifos residue in or around food, or to modify tolerances in a way the agency determined with reasonable certainty would not result in harm from aggregate exposure. The Eighth Circuit characterized the EPA’s decision to ban chlorpyrifos as arbitrary and

capricious, as it did not consider whether it could safely retain some chlorpyrifos tolerances (*Red River Valley Sugarbeet Growers Ass'n v. Regan*).

- **Firearms:** In consolidated cases, a divided Seventh Circuit declined to block enforcement of legislation enacted by the State of Illinois, along with similar ordinances adopted by several municipalities, that generally ban the possession of certain semiautomatic weapons and large-capacity magazines. Plaintiffs sought to preliminarily enjoin these laws on Second Amendment grounds, but the majority decided that, at this stage, the plaintiffs were unlikely to succeed on the merits of the challenge under the two-step analytical framework announced by the Supreme Court in *New York State Rifle & Pistol Association v. Bruen*. Under *Bruen*'s first-step, the majority understood bearable "Arms" protected by the [Second Amendment](#) to include those in common use for a lawful purpose, not weapons like machine guns that can be reserved for military use. The majority concluded that the firearms and feeding devices identified in the challenged legislation do not enjoy Second Amendment protections, as they are more like military-grade weaponry than the type of weapons commonly used for self-defense. Further, the majority decided that, even if the items had enjoyed some Second Amendment protection that required the court to proceed to *Bruen*'s second-step, the challenged restrictions were still likely consistent with the historical practice of constitutionally permissible firearms regulations (*Bevis v. City of Naperville*; *Herrera v. Raoul*; *Barnett v. Raoul*).
- **Intellectual Property:** Reversing the lower court's grant of a motion to dismiss, the Ninth Circuit allowed a choreographer to go forward with his suit alleging that a video game developer infringed his registered copyright of choreographic work by allegedly copying a combination of movements repeated throughout the choreographed work. In so doing, the court held that while individual choreographic elements, including poses, are unprotected in isolation, the composition and arrangement of such poses and other elements can be copyrightable. Analogizing to music copyright cases, the panel decided that the plaintiff plausibly alleged that animations of the video game developer were substantially similar to the copyright-protected aspects of his choreography, and remanded for further proceedings, including to decide the appropriate level of copyright protection to which the plaintiff's work is entitled (*Hanagami v. Epic Games, Inc.*).
- **Securities:** The Second Circuit held that a district court abused its discretion when it ordered disgorgement from a securities fraud defendant under [15 U.S.C. § 78u\(d\)\(5\)](#) and [§ 78u\(d\)\(7\)](#), which allow for equitable relief, without making a predicate finding that the defrauded investors had suffered a pecuniary harm, as required by traditional equitable limitations. The panel also held the district court erred by failing to credit the value of securities surrendered by the defendant against the total disgorgement award. The court of appeals vacated the lower court's decision and remanded for a finding as to whether the investors suffered a pecuniary loss and, if so, revaluation of the disgorgement award taking into account the surrendered securities (*Sec. Exch. Comm'n v. Govil*).
- **Securities:** The Fifth Circuit held that the Securities and Exchange Commission (SEC) acted arbitrarily and capriciously in adopting a final rule requiring companies to report share repurchase data and disclose the reason why they repurchased shares of their own stock. The SEC justified the final rule as necessary to decrease investor uncertainty about possible improper motivations underlying buybacks, such as increasing executive compensation to the detriment of shareholders. The panel held that the SEC failed to adequately show that opportunistic or improperly motivated buybacks are a genuine problem even under its theory of investor uncertainty, and the agency also failed to adequately respond to comments suggesting means to quantify the rule's costs and benefits or substantiate the rule's benefits. Rather than vacate the rule, the panel

remanded with directions that the SEC correct defects in the rule within 30 days (*Chamber of Com. of U.S. v. SEC*).

- **Speech:** A divided Ninth Circuit held that a state-owned California fairground, whose guidelines limited “free speech activities”—defined as leafletting, picketing, or gathering signatures—to designated “free expression zones,” did not violate the First Amendment rights of a person hoping to distribute religious tokens to festival goers outside the designated areas. The panel held the enclosed area of the fairgrounds was not a public forum during the privately organized, ticketed festival so the state could restrict “free speech activities” within that area. The panel further found that while the exterior area of the fairgrounds, which included the designated “free expression zones” outside the entry gates, was a public forum under the California Constitution, limiting the area where “free speech activities” could take place was a reasonable “time, place, and manner” restriction (*Camenzind v. Cal. Expo. & State Fair*).

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