

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (December 18–December 25, 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 agreed to hear arguments on four emergency applications to stay the implementation of the [Environmental Protection Agency’s \(EPA’s\) “Good Neighbor” Plan](#), which is intended to limit ozone-forming emissions from power plants and industrial facilities. Under the Clean Air Act (CAA), a state must submit a State Implementation Plan (SIP) for EPA’s approval detailing how it will meet national ambient air quality standards (NAAQS) set by the agency. If EPA concludes that the SIP is inadequate, the agency will issue a federal plan in its place. The CAA imposes “good neighbor” requirements on upwind states’ SIPs to ensure that emission activities within their jurisdictions do not impede downwind states from meeting NAAQS. In 2023, after EPA denied several upwind states’ SIPs, the agency issued the “Good Neighbor” Plan to establish an emission-control program in place of those SIPs. In considering whether to stay the plan while the parties litigate the challenge in the lower courts, the Court has asked the parties to address the basis for the SIP disapprovals and whether the EPA plan is reasonable given that only some upwind states are subject to it (*Ohio v. EPA*; *Kinder Morgan, Inc. v. EPA*; *Am. Forest & Paper Ass’n v. EPA*; *U.S. Steel Corp. v. EPA*).

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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.

- **Civil Liability:** Without reaching the merits, the Ninth Circuit held that a district court improperly dismissed as time-barred a civil suit brought under [18 U.S.C. § 2255](#) by a plaintiff who alleged he was a victim of child pornography when, as an infant, he was photographed nude for the cover of the music group Nirvana's 1991 record *Nevermind*. When the plaintiff filed suit in 2021, [there was a 10-year statute of limitations](#) for suits by victims of child pornography brought under § 2255. (Congress later eliminated this statute of limitations.) The Ninth Circuit held that the plaintiff's case was not time-barred, however, because he alleged injuries suffered on account of the 2021 reissue of the album, which occurred within 10 years of the date he filed his complaint. In so doing, the court held that each republication of child pornography may constitute a new injury for the victim that constitutes a basis for a § 2255 claim (*Elden v. Nirvana L.L.C.*).
- **Civil Procedure:** The Eleventh Circuit held that former White House chief of staff Mark Meadows was not entitled to remove Georgia's prosecution of him to federal court based on federal officer removal under [28 U.S.C. § 1442\(a\)\(1\)](#), where the state charged him with two state law crimes: conspiracy in violation of the Georgia Racketeer Influenced and Corrupt Organizations Act and soliciting the violation of oath by a public officer in connection with the 2020 presidential election. Reasoning that federal officer removal under § 1442(a)(1) does not apply to former federal officers and that, even assuming it did, removal would still be improper because the charged conduct was not related to Meadows's official duties as then-President Trump's chief of staff, the circuit panel affirmed the district court's remand order (*Georgia v. Meadows*).
- **Criminal Law & Procedure:** The Sixth Circuit held that a sentencing court permissibly considered additional factors together with those it was statutorily required to consider when it revoked the supervised release of a criminal offender found in possession of a firearm. [18 U.S.C. § 3583\(g\)](#) directs a sentencing court to revoke an individual's supervised release if found in possession of a firearm and to require the individual to serve a term of imprisonment authorized under [subclause \(e\)](#) of the statute. That provision, in turn, instructs the court to consider a subset of factors listed in [18 U.S.C. § 3553\(a\)](#) when deciding the appropriate sentence. The Sixth Circuit held that the lower court was not limited to consider *only* the listed subset of factors but could also permissibly consider related factors listed in § 3553(a) (*United States v. Esteras*).
- **Energy:** The Sixth Circuit held that the Chair of the Federal Energy Regulatory Commission (FERC) exceeded his authority when he moved to remand a ratemaking challenge so that FERC could reconsider the underlying ratemaking decision. Following the reviewing court's grant of the motion to remand, FERC reversed course on its earlier ratemaking decision. Examining the text and structure of the governing statutes, the circuit panel held that the Chair exceeded his administrative authority by moving to remand the challenge without acquiring the approval of a quorum majority of the Commission. In terms of remedy, the circuit court majority opted not to vacate changes made by FERC to the challenged ratemaking decision upon remand and instead directed FERC to consider whether it would have done anything differently given the Chair's legal mistake (*Elec. Power Supply Ass'n v. FERC*).

- **Transportation:** The Tenth Circuit held that [49 U.S.C. § 1153\(b\)\(1\)](#), which requires a person challenging a final order of the National Transportation Safety Board (NTSB) to file an appeal within 60 days of the order’s issuance absent a “reasonable ground” for the delay, is a claim-processing rule rather than jurisdictional. As a result, the court decided that a petitioner’s failure to comply with the 60-day deadline did not prevent the court from entertaining his appeal of an NTSB decision, but gave the Federal Aviation Administration (FAA) a basis to argue that the court should deny the petition. On the merits, the court held that the petitioner had failed to provide a reasonable ground for not filing his appeal within the 60-day period, and denied it as untimely ([McWhorter v. FAA](#)).

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