

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (January 29–February 4, 2024)

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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

The Supreme Court did not issue any opinions or agree to hear any new cases last week.

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 Fifth Circuit joined eight other circuits in holding that a court assessing personal jurisdiction to [confirm](#) a foreign arbitral award under [the New York Convention on the Recognition and Enforcement of Arbitral Awards](#) should consider the defendant’s contacts with the forum state that relate to the underlying dispute, rather than only considering contacts related to the arbitration itself. The court distinguished the case from

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the Supreme Court's recent decision in *Badgerow v. Walters* on two grounds. First, the court observed that *Badgerow* addressed when courts have subject-matter rather than personal jurisdiction over arbitral awards. Second, the court noted that the Supreme Court's decision involved domestic arbitral awards governed by different provisions of the Federal Arbitration Act than those concerning New York Convention-related awards (*Conti II. Container Schiffarts-GMBH & Co. v. MSC Mediterranean Shipping Co. S.A.*).

- **Civil Rights:** The Fifth Circuit affirmed in part and reversed in part a district court judgment for an employee alleging race discrimination and retaliation by her employer. In doing so, the court upheld a provision in the plaintiff's employment contract that shortened the time in which the employee could bring a lawsuit against the employer, resulting in the claims she brought under 42 U.S.C. § 1981 being time-barred. Joining several other circuits and approvingly citing a district court decision by future Justice Ketanji Brown Jackson, the Fifth Circuit held that a six-month contractual limitation on bringing suit is reasonable as applied to Section 1981 claims (*Harris v. FedEx Corp. Servs., Inc.*).
- ***Civil Rights:** The Sixth Circuit held that employees asserting a violation of Title VII of the Civil Rights Act of 1964 based on claims that they were subjected to a hostile work environment in retaliation for filing a discrimination complaint must show "severe or pervasive" harassment. Noting that the Sixth Circuit has repeatedly applied this standard, the panel disagreed with the approach taken by the Eleventh Circuit, which requires a worker to allege only conduct that would lead a reasonable employee to be dissuaded from filing a discrimination complaint (*Ogbonna-McGruder v. Austin Peay State Univ.*).
- ***Criminal Law & Procedure:** The Fifth Circuit widened a circuit split over the meaning of Section 403(b) of the First Step Act. Section 403(b) specifies how an amendment made to 18 U.S.C. § 924(c) by Section 403(a) of the act applies to pending cases for violations of 18 U.S.C. § 924(c), which in some cases enhances the penalties for the commission of a "crime of violence" or drug trafficking crime committed with a firearm. Section 403(b) provides that the act's amendments apply to a covered offense committed before the act was enacted if the sentence for that covered offense had not been imposed as of the date of the act's enactment. Disagreeing with the Third, Fourth, and Ninth Circuits and joining the Sixth Circuit, the Fifth Circuit held that Section 403(b) does not apply to the post-enactment resentencing of a defendant whose pre-enactment sentence was vacated after the First Step Act became law (*United States v. Duffey*).
- **Election Law:** The First Circuit held that Section 8(i) of the National Voter Registration Act (NVRA) preempts certain restrictions imposed by Maine on the use and dissemination of state-generated reports that include identification information and voter participation histories of registered voters. Section 8(i) provides for the public disclosure of covered records in order to ensure the accuracy of each state's lists of eligible voters. The court held that Section 8(i) applies to Maine's state-generated reports because they contain information that could be used to evaluate whether the state was properly reviewing and processing voter applications and registration information. The court held that Maine's dissemination restrictions were preempted to the extent they allowed the reports to be used only to evaluate Maine's compliance with the NVRA and not to evaluate other states' compliance with the NVRA. The court also held that Maine could not prohibit the public release of the state-generated reports by requesters, but that, consistent with federal law, Maine could redact unique or highly sensitive personal information implicated by the public release (*Pub. Interest Legal Found., Inc. v. Bellows*).

- **Immigration:** In denying a removable alien’s petition to review a Board of Immigration Appeals (BIA) order declaring her ineligible to adjust her immigration status, the Fourth Circuit deferred to the BIA’s long-standing interpretation of the governing statute. Under [8 U.S.C. § 1255\(a\)\(2\)](#), an alien admitted or paroled into the United States may, at the discretion of immigration authorities, have their immigration status adjusted to lawful permanent resident if certain criteria are met, including that the applicant is “admissible to the United States for permanent residence.” The Fourth Circuit affirmed the BIA’s long-standing construction of this provision as requiring an applicant for adjustment to be evaluated based on the same standard as an applicant for admission to the United States, even when, as here, the alien was already present in the country. Under this standard, an applicant must prove “[clearly and beyond doubt](#)” that he or she is admissible to the United States to have their status adjusted, which the BIA concluded that the applicant failed to do here (*Nivar Santana v. Garland*).
- **Immigration:** The Seventh Circuit held that the doctrine of consular nonreviewability barred its review of federal officials’ decision to reject four Iranian nationals’ visa applications on terrorism-related grounds. The [doctrine](#) generally precludes judicial review of government decisions to issue or withhold a visa. Courts recognize a narrow exception permitting a U.S. citizen to challenge a visa denial that burdens the citizen’s constitutional rights. The Iranian applicants’ U.S. citizen family members invoked this exception by alleging that the visa denials deprived them of a constitutional right to live with their families. The Seventh Circuit held that the exception did not allow review in this case. The court declined to reach the question of whether U.S. citizens have a cognizable interest in living with their spouse. Even if such a right exists, the court concluded that the challenge still failed because Supreme Court jurisprudence recognized that the presumption against reviewability is not overcome when there are facially legitimate and bona fide reasons for the visa denials, and, in this case, the court concluded the government had provided such reasons for the visa denials (*Pak v. Biden*).
- **Public Health:** The Ninth Circuit held that the [Public Readiness and Emergency Preparedness Act \(PREP Act\)](#) foreclosed a suit brought by Oregon state inmates against the governor and the lead state health official on account of receiving lower prioritization than state correctional officers during the state’s COVID-19 vaccination rollout. The PREP Act grants covered persons immunity from claims relating to the administration or use of covered countermeasures in response to a declared public health emergency. The Ninth Circuit held that the PREP Act applied to the state officials’ vaccination prioritization decisions because the “administration” of a covered countermeasure includes the prioritization of that countermeasure when supply is limited. The court also held that PREP Act immunity extends to suits brought under [42 U.S.C. § 1983](#) asserting constitutional claims against state officials (*Maney v. Brown*).

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