

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (February 5–February 11, 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 issued opinions in two cases last week:

- **Labor & Employment:** The Court unanimously held that whistleblowing protections under the [Sarbanes-Oxley Act](#) for reporting criminal fraud or securities law violations by an employer may be invoked when the whistleblowing activity was a contributing factor in an unfavorable personnel action against the whistleblower. The Court held, however, that the employee need not show that the employer acted with retaliatory intent on account of the whistleblowing (*Murray v. UBS Sec., LLC*).
- **Sovereign Immunity:** The Court unanimously held that the [Fair Credit Reporting Act](#)—which defines a “person” subject to the act’s substantive requirements to include a “government or governmental subdivision or agency”—unambiguously waives the federal government’s sovereign immunity. The United States may therefore be held liable for civil damages under the act (*Dep’t of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*).

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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.

- **Agriculture:** The Eleventh Circuit held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt a plaintiff's Georgia state law failure-to-warn tort claim against the manufacturer of the weedkiller Roundup related to the potentially carcinogenic effects of glyphosate, the product's active ingredient. FIFRA expressly preempts state labeling or packaging requirements for pesticides that are "in addition to or different from" federal requirements ([7 U.S.C. § 136v](#)), but it does not expressly preempt either additional state remedies for violations of federal law or state-law requirements that do not relate to pesticide labeling or packaging. The court reasoned that both FIFRA and Georgia common law require pesticide manufacturers to warn users of potential risks to health and safety. As a result, the court held that the plaintiff's state-law failure-to-warn claim was not preempted because, although the claim related to labeling or packaging, the duties the state law cause of action would impose are fully consistent with FIFRA. The court also held that FIFRA did not impliedly preempt the failure-to-warn claim because Roundup's manufacturer did not establish that it could not have complied with both state and FIFRA requirements (*Carson v. Monsanto Co.*).
- **\*Arbitration:** The Ninth Circuit split with the Second Circuit over the manner of proper service of a motion to confirm an arbitral award on adverse parties who are not available for service in the United States. The Ninth Circuit reasoned that [Section 9 of the Federal Arbitration Act](#) (FAA) did not govern service because the adverse party would not be amenable to service by any of the means listed thereunder. As a result, the Ninth Circuit held that [Section 6 of the Federal Arbitration Act](#) governed instances where Section 9 does apply. Section 6 requires that any application to the district court be made "in the manner provided by law for the making and hearing of motions." The Ninth Circuit concluded that [Federal Rule of Civil Procedure 5](#), which governs the service of motions filed in federal court, applies to service in these cases. The Second Circuit has held that [Federal Rule of Civil Procedure 4](#), which governs the service of a summons and complaint in federal court, applies (*Voltage Pictures, LLC v. Gussi, S.A. de C.V.*).
- **Banking:** Joining other circuits, the Sixth Circuit held that, to establish civil liability for "willfully" violating the Bank Secrecy Act's annual reporting requirements involving foreign bank accounts containing \$10,000 or more, the government must show the violation was committed knowingly or recklessly. The court acknowledged that it had interpreted "willfully" more narrowly in corresponding provisions of the Bank Secrecy Act establishing [criminal liability](#) for violations of reporting requirements, for which the court had required that the defendant acted with "full knowledge that his conduct was unlawful." The court noted that the intent sufficient for an act to be considered willful differs in the civil and criminal contexts. In support of its position, the court observed that the [Supreme Court](#) has interpreted "willfully" differently for civil and criminal provisions of the Fair Credit Reporting Act (*United States v. Kelly*).
- **Civil Rights:** The Eleventh Circuit held that sovereign immunity bars retaliation claims against state governments under Title V of the [Americans with Disabilities Act](#) (ADA) when brought in conjunction with employment discrimination claims under ADA Title I. The Supreme Court previously determined in *Board of Trustees of University of Alabama v. Garrett* that sovereign immunity barred Title I claims against state governments. The

Eleventh Circuit reasoned that a Title V claim based on an underlying Title I claim must also be barred (*Dupree v. Owens*).

- **Criminal Law & Procedure:** The Eighth Circuit held that while 21 U.S.C. § 841(b)(1)(A) requires a federal district court to sentence certain controlled substance offenders to at least five years' supervised release, a court retains discretion under 18 U.S.C. § 3583(e)(1) to end the term of supervised release early if certain conditions are met. The court held that a 2002 amendment to Section 841(b)(1)(A), specifying that a sentencing court must *impose* a five-year term of supervised release "[n]otwithstanding Section 3585 of Title 18," does not prevent the court from deciding to *end* the period of supervised release early (*United States v. Lester*).
- **Labor & Employment:** The Ninth Circuit joined the First, Second, and D.C. Circuits in holding that the whistleblower antiretaliation provisions of the *Sarbanes-Oxley* and *Dodd-Frank* Acts do not apply extraterritorially because Congress did not "affirmatively and unmistakably" instruct that the provisions should apply to foreign conduct. In considering whether this case nevertheless involved a permissible domestic application of the statutes, the court concluded that the relevant conduct occurred outside of the United States. The plaintiff was a Canadian employee, residing in Canada, who alleged that his Canadian employer retaliated against him for engaging in protected conduct. The court rejected the plaintiff's argument that his access of his employer's web servers, which were located in California, amounted to domestic conduct. The court, thus, dismissed both the Sarbanes-Oxley and Dodd-Frank claims (*Daramola v. Oracle Am., Inc.*).
- **Maritime Law:** A divided Ninth Circuit held that 46 U.S.C. § 30527(a), which bars certain liability waivers in regulations or contracts for a "vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country," does not apply when a vessel transports passengers away from and back to a single U.S. port without stopping at any other port (*Ehart v. Lahaina Divers, Inc.*).
- **Separation of Powers:** The D.C. Circuit rejected former President Donald Trump's claim that his prosecution in federal court for various actions he allegedly took while in office to challenge the results of the 2020 presidential election was barred by executive immunity, the *Impeachment Judgments Clause*, and the *Double Jeopardy Clause*. First, the court held that the separation of powers doctrine does not bar federal criminal prosecution of a former President for official acts that violate generally applicable laws. Executive immunity is rooted in the constitutional tradition of the separation of powers and may immunize the President from certain lawsuits challenging lawful acts within his discretion. The court reasoned that the former President lacked lawful discretionary authority to violate federal criminal law, and therefore is subject to prosecution for those actions. Second, the court concluded that functional policy considerations do not immunize the former President. Executive immunity is intended to allow a President to act "fearlessly and impartially" without fear of later prosecution and to prevent meritless and harassing litigation. The court weighed these concerns and ultimately concluded that the interest in criminal accountability, as well as the public's interest in democratically selecting its President, outweigh the potential risks of chilling presidential action and permitting vexatious litigation. Third, the court decided that the Impeachment Judgments Clause does not require that former Presidents be impeached and convicted for conduct before they may be criminally prosecuted for it. Fourth, the court held that the former President's impeachment acquittal does not bar his subsequent prosecution under the Double Jeopardy Clause because impeachment is not a criminal process and cannot result in criminal punishment (*United States v. Trump*).

- **Speech:** In consolidated cases, the Third Circuit considered claims under [42 U.S.C. § 1983](#) and a state law equivalent by two New Jersey parents who were arrested after refusing to wear masks to oppose mask mandates in schools. The parents each had alleged their arrests were retaliation for exercising their First Amendment rights. The Third Circuit affirmed the district court’s dismissal of one parent’s claim for failure to state a claim because the parent failed to allege constitutionally protected conduct, as required for a claim under Section 1983 and the state equivalent. The Third Circuit held that there is no [First Amendment](#) right to refuse to wear a mask as required by valid health and safety orders issued during an official public health emergency. The panel reasoned that the parent’s decision to refuse to wear a mask was not inherently expressive conduct because a reasonable observer would not understand her message simply from seeing her unmasked. The court decided that her action was susceptible to multiple interpretations, and, unlike a burning flag, a mask is not inherently symbolic but rather protective equipment (*Falcone v. Dickstein*).

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