

Congressional Court Watcher: Circuit Splits from August 2024

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The U.S. Courts of Appeals for the thirteen “circuits” issue thousands of precedential decisions each year. Because relatively few of these decisions are ultimately reviewed by the Supreme Court, the U.S. Courts of Appeals are often the [last word](#) on consequential legal questions. The federal appellate courts sometimes reach different conclusions on the same issue of federal law, causing a “split” among the circuits that leads to the non-uniform application of federal law among similarly situated litigants.

This Legal Sidebar discusses circuit splits that emerged or widened following decisions from last month on matters relevant to Congress. The Sidebar does not address every circuit split that developed or widened during this period. Selected cases typically involve judicial disagreement over the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress’s lawmaking and oversight functions. The Sidebar only includes cases where an appellate court’s controlling opinion recognizes a split among the circuits on a key legal issue resolved in the opinion.

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.

- **Communications:** The Third Circuit ruled that the lower court erred in dismissing a suit brought by a parent against TikTok. The plaintiff alleged that her child died when attempting to emulate activities shown in videos recommended to the child via TikTok’s algorithm. The panel reversed the lower court’s ruling that TikTok was shielded from liability by [Section 230 of the Communications Decency Act](#), which generally immunizes providers and users of interactive computer services from liability for content posted by third parties. The panel’s majority opinion observed that the Supreme Court recently recognized in [Moody v. NetChoice, LLC](#) that a platform’s editorial judgments in compiling third-party content are themselves expressive activity covered by the First Amendment. Applying *NetChoice*, the majority reasoned that TikTok’s algorithmic recommendations were the platform’s own expressive activity, not those of a third party, and therefore TikTok was not shielded by Section 230 from products liability and negligence claims that were based on the algorithm. The majority observed that its ruling

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may depart from pre-*NetChoice* decisions issued by other circuits that had recognized Section 230 immunity as extending to a platform's social media recommendations (*Anderson v. TikTok, Inc.*).

- **Criminal Law & Procedure:** The First Circuit affirmed the sentencing enhancement for a defendant convicted of child pornography offenses under 18 U.S.C. § 2252A, where a 10-year mandatory minimum was imposed under Section 2252A(b)(2) because the defendant previously had been convicted of a state offense “relating to” child pornography. The court rejected the defendant’s argument that his state conviction should not have triggered an enhancement under Section 2252A because the state law defined child pornography more broadly than federal law. Widening a circuit split, the First Circuit joined four other courts (of six to have considered the matter) that have held that the state child pornography offense need only relate to, and not be a perfect match with, the federal definition of child pornography to trigger the sentencing enhancement (*United States v. Trahan*).
- **Criminal Law & Procedure:** The Fifth Circuit held that geofence warrants generally violate the Fourth Amendment. Through these warrants, technology companies may be compelled to conduct searches of their location history databases and share with law enforcement the cell phones and affiliated users whom the databases identify as having been found in a specified area during a certain period. The court observed that geofence warrants have been used increasingly by law enforcement when the location of a crime is known but the individual suspect is not. Parting ways with the *Fourth Circuit*, the Fifth Circuit held that acquiring location history data through a geofence is a search for Fourth Amendment purposes. The Fifth Circuit further determined that geofence warrants are effectively general warrants categorically prohibited by the Fourth Amendment (*United States v. Smith*).
- **Criminal Law & Procedure:** Citing circuit precedent, the Seventh Circuit held that under the Supreme Court’s ruling in *Stinson v. United States*, the Sentencing Commission’s official commentary interpreting the Sentencing Guidelines is binding unless it is based on a plainly erroneous reading, is inconsistent with the relevant Sentencing Guidelines provision, or violates the Constitution. The court acknowledged that, although its view is shared by at least two other circuits, at least four circuits have decided in contrast that, under the Supreme Court’s post-*Stinson* decision in *Kisor v. Wilkie*, deference is owed to the Commission’s commentary only when the Guideline provision corresponding to the commentary is ambiguous (*United States v. Ponle*).
- **Criminal Law & Procedure:** The Seventh Circuit affirmed a defendant’s conviction and sentence for various child pornography offenses under 18 U.S.C. §§ 2251 and 2252A. The panel rejected, among other things, the defendant’s argument that the conduct described in his plea agreement did not involve the “lascivious exhibition” of a child’s intimate areas qualifying as prohibited “sexually explicit conduct” under Sections 2251 and 2252A. In so doing, the panel joined several other circuits in declining to adopt the *D.C. Circuit’s* narrower interpretation of “lascivious exhibition.” (*United States v. Porter*).
- **Criminal Law & Procedure:** The Seventh Circuit held that the procedural default rule—which generally limits the claims that may be brought outside of trial or direct appellate review—bars competency-based due process claims raised by a criminal defendant for the first time in a collateral review challenge to his sentence. The panel further held that the rule applies regardless of whether the claims are substantive (e.g., the defendant was incompetent) or procedural (e.g., the trial court should have held a competency hearing). The panel observed that federal circuits have taken different views of whether the

procedural default rule applies to competency claims and, if it does, whether it matters that the competency claim is substantive or procedural (*Yang v. United States*).

- **Criminal Law & Procedure:** Observing that binding circuit precedent controlled the outcome of its decision, the Eighth Circuit held that the [Mandatory Victims Restitution Act \(MVRA\)](#), which extended the enforcement period for criminal restitution obligations under [18 U.S.C. § 3613\(b\)](#), applies to defendants whose offenses were committed before the MVRA's enactment and for whom the restitution period would have expired if not for the MVRA. Disagreeing with most circuits to have considered the question, the Eighth Circuit held that MVRA restitution is a civil remedy rather than a criminal penalty and thus does not implicate the Constitution's [Ex Post Facto Clause](#) (*United States v. Ellingburg*).
- **Criminal Law & Procedure:** The Eleventh Circuit joined most circuits in recognizing that a motion to amend a federal habeas corpus petition, or to otherwise reopen habeas proceedings, filed after the district court has entered its final judgment and while an appeal on that judgment remains pending should be treated as a "second or successive" habeas application under [28 U.S.C. § 2244\(b\)](#) that may be filed only with the approval of the circuit court. The panel disagreed with the [Second](#) and [Third Circuits](#), which have held that the motion to amend is not a "second or successive" habeas application in these circumstances (*Boyd v. Sec'y, Dep't of Corr.*).
- **Election Law:** A divided Fifth Circuit, sitting en banc, reversed a district court's determination that a Texas redistricting plan for county commission elections diluted the voting power of Black and Hispanic voters in violation of [Section 2 of the Voting Rights Act](#). While neither the Black nor Hispanic population in the county was large enough to be individually protected under Section 2, both the district court and a three-judge Fifth Circuit panel applied binding circuit precedent recognizing that distinct minority groups should be aggregated for purposes of vote-dilution claims. The en banc court joined the [Sixth Circuit](#) in holding that Section 2 does not permit such aggregation, abrogating prior circuit precedent and disagreeing with the contrary conclusion of the [Eleventh Circuit](#) (*Petteway v. Galveston Cnty.*).
- **Employee Benefits:** The Eleventh Circuit affirmed the lower court's dismissal of claims brought by participants in a 401(k) retirement plan against the plan's administrators under the [Employee Retirement Income Security Act of 1974](#) (ERISA). The circuit panel ruled that the participants failed to show the administrator had breached its fiduciary duty by not prudently monitoring their investments. In so doing, the panel held that ERISA does not employ a burden-shifting framework under which ERISA administrators must show that plan losses were caused by something other than a breach of the administrators' fiduciary duty. Widening a circuit split, the panel held that plaintiffs bear the burden of proof on all elements of their claims (*Pizarro v. Home Depot, Inc.*).

- **Firearms:** The Sixth Circuit rejected both facial and as-applied Second Amendment challenges brought by a criminal defendant to 18 U.S.C. § 922(g)(1), which generally prohibits the possession of a firearm by a person previously convicted of an offense subject to imprisonment for more than a year. Agreeing with the [Third Circuit](#), the court held that the framework used by the Supreme Court to determine whether a firearm restriction comports with the Second Amendment, which considers whether that restriction is consistent with the nation’s history and tradition of firearms regulation, permits the disarming of dangerous persons. The majority disagreed, however, with those circuits that have decided the Second Amendment applies only to law-abiding citizens in the first instance. The court rejected the defendant’s facial challenge to Section 922(g)(1) because it concluded the prohibition was constitutional when applied to dangerous persons. The panel also decided the law was constitutional as applied to the defendant on account of his dangerousness, as he had been previously convicted of aggravated robbery, attempted murder, and unlawfully possessing a firearm. The court left the door open to future as-applied challenges to the provision at issue (*United States v. Williams*).
- **Immigration:** In an amended opinion, the Ninth Circuit held that its “on the merits” exception to the jurisdictional bar established in 8 U.S.C. § 1252(a)(2)(C) was abrogated by recent Supreme Court precedent. Section 1252(a)(2)(C) bars judicial review of a final removal order “against an alien who is removable by reason of having committed” covered criminal offenses. The “on the merits” exception allowed judicial review of final removal orders where an alien committed a covered offense but was ordered removed for another reason. The Ninth Circuit held that this rule conflicted with the Supreme Court’s reasoning in *Nasrallah v. Barr*, under which a court may not review factual challenges to a final removal order or any prior orders that merged into it. In this case, the Ninth Circuit held that petitioner’s challenges, which relied on the Ninth Circuit’s “on the merits” exception, merged with her final removal order and were therefore unreviewable. The panel identified a split with the [Fourth Circuit](#), which held that Section 1252(a)(2)(C) does not preclude review of a denial of a motion to open or reconsider a prior removal order based on factual findings that were collateral to those facts that provided the basis for the order (*Coria v. Garland*).
- **Labor & Employment:** The Tenth Circuit affirmed the lower court’s enforcement of an arbitration award on an employer requiring a renewed collective bargaining agreement (CBA) with a labor union. The employer argued, among other things, that the directed CBA contained provisions on permissive subjects that an employer is not statutorily obligated to bargain over, and that the award should be unenforceable on public policy grounds. Joining the majority of circuits that have considered the question but disagreeing with the [Fifth](#) and [Sixth Circuits](#), the Tenth Circuit held that imposing permissive subjects of bargaining in an arbitral award does not violate public policy (*Brent Elec. Co., Inc. v. Int’l Bhd. of Elec. Workers Loc. Union No. 584*).
- **Tax:** The Eleventh Circuit held that fines assessed for failing to properly report foreign bank accounts (known as FBAR penalties) are subject to the Eighth Amendment’s [Excessive Fines Clause](#), as FBAR penalties are largely punitive. The court decided that penalties levied on one of the defendant’s accounts violated the Clause because those penalties were grossly disproportionate to the FBAR offense. The panel remanded with directions for the trial court to enter a judgment in a lower amount. The circuit panel noted its disagreement with the [First Circuit](#), which had concluded that the Excessive Fines Clause does not apply to FBAR penalties (*United States v. Schwarzbaum*).

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