

Congressional Court Watcher: Circuit Splits from September 2024

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The U.S. Courts of Appeals for the 13 “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 nonuniform application of federal law among similarly situated litigants.

This Legal Sidebar discusses circuit splits that emerged or widened following decisions from the 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 in which 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.

- **Civil Procedure:** Sitting en banc, the Ninth Circuit overruled prior circuit precedent and held that the False Claims Act’s (FCA’s) [first-to-file rule](#), which bars a private entity from either intervening in or bringing a related action based on the facts of a pending FCA case, is not jurisdictional in nature. This means, among other things, that a litigant who did not timely invoke the first-to-file rule would likely forfeit the ability to raise it on appeal. The Ninth Circuit’s decision is consistent with the position taken by four other circuits, but splits with the [Fourth](#), [Fifth](#), and [Tenth Circuits](#), which held the rule is jurisdictional (*Stein v. Kaiser Found. Health Plan, Inc.*).
- **Civil Rights:** A Ninth Circuit panel upheld a lower court’s ruling granting a preliminary injunction blocking Arizona from enforcing against the plaintiffs an Arizona law barring transgender girls from playing on girls’ interscholastic or intramural sports teams. The

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panel observed that a prior Ninth Circuit ruling recognized that heightened constitutional scrutiny applies to laws that discriminate based on transgender status. The court concluded that the district court did not err in finding that Arizona failed to provide an adequate justification for the restrictions to withstand such scrutiny. In so doing, the circuit court recognized that the standard of scrutiny it applied differed from the approach taken by the [Sixth Circuit](#), which applied the more deferential rational-basis review standard to a law prohibiting certain medical treatments for transgender minors (*Doe v. Horne*).

- **Criminal Law & Procedure:** The Fourth Circuit widened a circuit split over whether a *Heck* dismissal constitutes a “strike” under the federal *in forma pauperis* statute, [28 U.S.C. § 1915](#). Section 1915 of the Prison Litigation Reform Act allows prisoners to bring a civil action or appeal a judgment in federal court without prepaying filing fees, unless three or more prior actions or appeals were dismissed on certain enumerated grounds (*strikes*), including failure to state a claim. In *Heck v. Humphrey*, the Supreme Court held that to recover damages for an allegedly unconstitutional conviction or imprisonment under [42 U.S.C. § 1983](#), the plaintiff’s conviction or sentence must have been reversed on appeal, expunged by executive action, declared invalid by a state court, or called into question by a federal court’s issuance of habeas relief. The Fourth Circuit joined several circuits in holding that a prisoner’s prior suit barred on *Heck* grounds constituted a dismissal for failure to state a claim and is therefore a strike under Section 1915. The court split with the [Second](#) and [Ninth Circuits](#), which have recognized that *Heck* dismissals do not always constitute strikes under Section 1915 (*Brunson v. Stein*).
- **Criminal Law & Procedure:** The Ninth Circuit upheld a criminal defendant’s convictions for activities arising out of a workers’ compensation fraud scheme in which patients were routed to health care professionals who were complicit in the scheme for unnecessary medical services. In so doing, the panel decided that prosecution for honest-services mail fraud under [18 U.S.C. §§ 1341](#) and [1346](#), which courts have interpreted to include as an element of these offenses a breach of a fiduciary duty, may be based on a breach of a physician’s duty to his or her patient. Disagreeing with the [Eighth Circuit](#), the panel joined the [Seventh Circuit](#) in holding that the same element is required to prove honest-services fraud in public- and private-sector cases. In both types of cases, the government must show a deprivation of the intangible right to honest services; prosecutions in private-sector cases do not require an actual or intended tangible harm to the victim (*United States v. Solakyan*).
- **Environmental Law:** A divided Ninth Circuit directed the lower court to dismiss as moot a citizen suit brought under the [Clean Water Act](#) (CWA) against a defendant alleged to have violated the CWA by discharging pollutants without a permit. The majority held that the case was rendered constitutionally moot when, following the lower court’s verdict, the defendant obtained a permit authorizing the discharge. The court’s mootness determination applied not only to the plaintiff’s claims for injunctive and declaratory relief, but also to its claim for civil penalties under the CWA. Agreeing with the [Eighth Circuit](#), the panel majority reasoned that after the Supreme Court decided *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, citizen suit claims for civil penalties are subject to the same mootness standards as claims for injunctive relief. The court observed that [several other circuits concluded otherwise](#) before *Laidlaw*, but found these cases unpersuasive in light of the Supreme Court’s decision (*Coastal Env’t Rts. Found. v. Naples Rest. Grp., LLC*).
- **Freedom of Information Act (FOIA):** The Ninth Circuit held that when a federal agency misses its statutory deadline to respond to a [FOIA request](#), and the federal agency

responds to a FOIA request after the requester files suit to compel production, a district court need not dismiss the case on account of the requester failing to exhaust the agency's administrative appeals process. The Ninth Circuit joined the [Fourth Circuit](#) in this holding, but split with the [Fifth Circuit](#), which has held that an agency's post-lawsuit FOIA response compels the lower court to dismiss the case in order for the requester to first seek administrative review (*Corbett v. Transp. Sec. Admin.*).

- **Health:** A divided Tenth Circuit affirmed a lower court's decision to not preliminarily enjoin a Colorado statute that bars mental health professionals from attempting to change minors' sexual orientation or gender identify through "conversion therapy." The majority decided that the plaintiff's challenge was unlikely to succeed, including her claim that the law violated her First Amendment free speech rights. Joining the [Ninth Circuit](#) and splitting with the [Eleventh Circuit](#), the panel majority held that the prohibition is a regulation of professional conduct that only incidentally involves speech, and therefore does not need to survive strict constitutional scrutiny to satisfy First Amendment requirements. The court held that the Colorado law withstood rational basis standard of review because it was rationally related to Colorado's legitimate interest in protecting minors from harmful therapeutic treatments and ensuring the integrity of the mental health profession (*Chiles v. Salazar*).
- **Indian Law:** A divided en banc Ninth Circuit declined to rehear a three-judge circuit panel decision affirming a district court's determination that a tribal court had subject-matter jurisdiction over the tribe's breach-of-contract lawsuit for insurance claims related to COVID-19 pandemic business closures. Although the tribe and its businesses brought the insurance claims in connection with tribal properties on tribal land, the insurance companies were neither part of the tribe nor physically present on the tribe's reservation. A majority of the en banc judges recognized that neither Supreme Court nor circuit precedent required the nonmember to be physically present on tribal land for a tribal court to assert jurisdiction over consensual relationships between nonmembers and tribal members on tribal land. The majority also stated that Supreme Court caselaw did not require a federal court to make an independent inquiry into whether the tribal court properly exercised jurisdiction over the nonmember, splitting with the [Seventh Circuit](#) and agreeing with the [Fifth Circuit](#) (*Lexington Ins. Co. v. Smith*).
- **Labor & Employment:** Reversing the lower court, the Ninth Circuit reinstated the plaintiff's suit against his former employer under the False Claims Act, in which he alleged he was fired in retaliation for raising concerns about improper billing practices. In so doing, the panel widened circuit splits on two different matters. The panel joined circuits that have used the *McDonnell Douglas* burden-shifting framework to analyze FCA retaliation claims. Under this framework, if an employee establishes a prima facie claim of retaliation, the employer bears the burden of showing a legitimate, nonretaliatory reason for its adverse action. Next, the employee bears the burden of showing the stated reason was pretextual. The court disagreed with the [Third Circuit](#), which used a different framework drawn from First Amendment retaliation cases. The court also addressed the notice element of an FCA retaliation claim, requiring that the employer know of the employee's protected conduct, deciding that the plaintiff's reporting of billing irregularities to his employer met the notice requirement. The panel disagreed with the [Tenth](#) and [Fifth Circuits](#), which have required an employee (such as the plaintiff) whose duties include ensuring regulatory compliance and reporting irregularities to satisfy a higher notice standard. So long as the employer is aware of the employee's efforts to stop an FCA violation, the panel reasoned, the notice element of an FCA retaliation claim is satisfied (*Mooney v. Fife*).

- **Maritime Law:** The Ninth Circuit widened a circuit split over the [Limitation of Liability Act](#), which generally permits a shipowner to cap its total liability for losses or injury resulting from a maritime accident that occurs “without the privity or knowledge of the owner.” The law establishes a procedure for when multiple claimants seek money damages from the same accident, under which a federal district court may apportion compensation among those claimants and enjoin other courts from adjudicating related claims. Courts have recognized an exception when there is a single claimant, making the procedure unnecessary. In this case, the victim of a maritime accident brought claims against a shipowner and third-party defendants, while the vessel owner sought indemnification and contribution from those third-party defendants. The shipowner argued that the law’s multi-claimant procedures applied and required all the claims to be resolved by the same federal district court. Disagreeing with the [Eighth](#) and [Sixth](#) Circuits, which held that indemnity and contribution claims do not create multiple claimants because those claims are considered to be derivative of the underlying tort claim, the Ninth Circuit held that third-party indemnity and contribution claims do give rise to a multiple claimant situation subject to the Limitation of Liability Act’s special procedures (*In re Live Life Bella Vita LLC*).
- **Securities:** The Fourth Circuit affirmed a lower court’s dismissal of a class action lawsuit brought by stockholders against a corporation and its directors alleging a breach of fiduciary duties. Except when all the plaintiffs and defendants are from different states, class action lawsuits alleging violations of state law generally must be brought in state court, but may be removable to federal court if certain criteria set forth in the Class Action Fairness Act (CAFA) are met. CAFA [does not](#) extend federal subject-matter jurisdiction to class actions that “solely” involve claims relating to the “the internal affairs or governance of a corporation” or the “rights, duties (including fiduciary duties), and obligations relating to . . . any security” under state law. The Fourth Circuit held that this carveout did not apply to the class action before it because one of the claims involved aiding and abetting a breach of a fiduciary duty against a corporate outsider, which the court reasoned did not relate to the “internal affairs” of the corporation or the rights and duties created by a security. The panel acknowledged disagreement with the [Second Circuit](#), which had held that an almost identical action fell under the CAFA carveout. While the Fourth Circuit found that federal subject-matter jurisdiction existed over the suit, it still concluded that the plaintiffs had not adequately alleged a duty was breached (*Kim v. Cedar Realty Tr., Inc.*).
- **Separation of Powers:** A divided Eighth Circuit affirmed a lower court’s denial of a preliminary injunction in a case challenging the constitutionality of the [Horseracing Integrity and Safety Act](#) (HISA) and enforcement actions taken under HISA by the Horseracing Integrity and Safety Authority (Authority), a private, nongovernmental entity. Under HISA, the Authority proposes and enforces rules about horseracing, subject to the oversight of the Federal Trade Commission (FTC). In deciding that the plaintiffs’ constitutional challenge was unlikely to succeed, the Eighth Circuit concluded that the power wielded by the Authority did not violate the [private nondelegation doctrine](#) because it operates under the oversight and control of the FTC. The circuit panel split with a [Fifth Circuit decision](#) that held that HISA’s enforcement provisions are facially unconstitutional because Congress impermissibly delegated government power to a private entity not accountable to the people. In September, Justice Samuel Alito, acting in his Circuit Justice capacity, issued [an administrative stay](#) of the Fifth Circuit ruling to give the Supreme Court time to consider an emergency application filed by the federal government (*Walmsley v. FTC*).

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