

Congressional Court Watcher: Circuit Splits from October 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 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 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.

- **Civil Procedure:** The Seventh Circuit widened a circuit split over the standard employed for certifying a class with respect to a particular issue raised in litigation involving damages. [Federal Rule of Civil Procedure 23\(b\)\(3\)](#) provides a general rule for class action certification in cases seeking damages, in which a court may certify the class if certain criteria are met including that “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.” [Rule 23\(c\)\(4\)](#) generally permits district court certification of a class “with respect to particular issues” in a case. The Seventh Circuit joined the majority of reviewing circuit courts in holding that under Rule 23(c)(4), issue class certification in a case involving damages may occur when common questions would predominate the resolution of each of the individual issues to be certified. The panel disagreed with the [Fifth Circuit](#)’s reading of Rules 23(b)(3) and 23(c)(4) as together limiting issue class certification in cases involving damages to situations when the issue class involves

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common questions that predominate as to the resolution of the entire claim, not just the individual issues for which certification is sought. While the Seventh Circuit’s interpretation of Rules 23(b)(3) and 23(c)(4) might allow for issue class certification more often than the minority view, the panel ultimately affirmed the lower court’s decertification of the class in this instance (*Jacks v. DirectSat USA, LLC*).

- **Immigration:** A divided Ninth Circuit panel largely affirmed a district court’s ruling blocking the Department of Homeland Security (DHS) from enforcing the [Asylum Transit Rule](#)—which generally required aliens traveling to the United States through a third country to seek asylum there before applying for such relief in the United States—against certain aliens who were subject to a now-rescinded metering policy. The metering policy required some asylum seekers who sought to enter the United States at the southwest border to remain in Mexico until DHS decided it could process them. The lower court had decided that this policy violated federal immigration laws and the Administrative Procedure Act (APA), and the court ordered that DHS not apply the Asylum Transit Rule to those against whom the metering policy was enforced before the rule went into effect. The Ninth Circuit panel majority agreed with the lower court that DHS was statutorily required to inspect asylum seekers who were subject to metering and that failure to inspect those persons meant that the agency had “[unlawfully withheld](#)” required agency action under the APA. The majority rejected the government’s argument that the metering policy had only “[delayed](#)” the inspection of metered persons, which would have constituted an APA violation only if the delay was determined to be unreasonable. The panel held that agency action is unlawfully withheld when, as it found had occurred here, an agency categorically refuses to act on requests to take required action. In reaching this conclusion, the majority disagreed with the approach of the [Tenth Circuit](#), which holds that a legal duty is only unlawfully “withheld” under the APA when an agency fails to meet a legally imposed deadline for a required action (*Al Otro Lado v. Executive Office of Immigration Review*).
- **Torts:** A divided Tenth Circuit panel issued a decision on the law enforcement proviso of the Federal Torts Claims Act, codified at [28 U.S.C. § 2680\(h\)](#), which waives the United States’ sovereign immunity for enumerated torts including false arrest and imprisonment committed by U.S. “law enforcement or investigative officer[s].” The case involved false arrest claims related to Transportation Security Officers (TSOs) conducting a strip search of the defendant as part of an airport security screening. The panel majority joined several other circuits in holding that TSOs were covered by the law enforcement proviso because of their authority to execute searches, even though TSOs lacked other authorities typically held by federal law enforcement officers, including the power to make arrests, carry weapons, and seize evidence. Joining two other circuits but disagreeing with the [Ninth Circuit](#), the Tenth Circuit panel majority held that the general rule requiring strict construction of sovereign immunity waivers does not apply to Section 2680(h) on account of that proviso being structured differently than a standard waiver. While the majority decided that the United States had waived sovereign immunity in this circumstance, the panel nonetheless affirmed the lower court’s dismissal of the case on the merits (*Mengert v. United States*).

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