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The United States Courts of Appeals: Background and Circuit Splits from 2024

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The United States Courts of Appeals: Background and Circuit Splits from 2024

SUMMARY

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The U.S. Courts of Appeals frequently act as the final arbiters of questions of law within their respective jurisdictions. Although the Supreme Court of the United States sits at the pinnacle of the American judicial system and acts as the final arbiter on questions of federal law, the number of precedential decisions issued each year by the Court is quite small. For example, the Court issued final decisions in 69 argued cases in its 2023 Term (64 disposed of through signed opinions and the remaining through per curiam opinions) and in 68 argued cases in its 2022 Term (66 through signed opinions and 2 through per curiam opinions). By contrast, the courts that sit just below the Supreme Court in the federal judicial hierarchy—the U.S. Courts of Appeals for 13 "circuits"—issue thousands of precedential decisions every year. The most current data available from the U.S. Courts reveal that in FY2023 and FY2022, the appellate courts for the 12 "regional" circuits (i.e., all of the federal courts of appeals other than the U.S. Court of Appeals for the Federal Circuit) published, respectively, 3,165 and 3,424 signed precedential opinions disposing of appeals to those courts.

This state of affairs is a product of both the design and the historical evolution of the federal judiciary. With limited exceptions, the Supreme Court exercises wholly discretionary appellate jurisdiction, deciding for itself which appeals it will accept out of the thousands that are submitted for its consideration each year. The federal courts of appeals, by contrast, are statutorily obligated to accept and decide all appeals challenging a final decision of a federal trial court, as well as certain appeals challenging non-final orders. What is more, in the absence of a binding Supreme Court decision on an issue, each federal court of appeals is free to decide that issue independently, and its decision will then be binding on all federal trial courts within the jurisdiction of that circuit. As a result, the federal appellate courts can, and often do, 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. These conflicts may then be locked into place due to the judge-made "law of the circuit doctrine," which all of the federal courts of appeals have adopted. Under this doctrine, the first published decision on a question of federal law by a three-judge panel within a circuit—including one diverging from a decision in another federal court of appeals—is generally binding on all later panels within that same circuit unless the decision is reviewed and overruled by the Supreme Court or a later (usually en banc) appellate panel within that circuit, or is superseded by a legislative change in the governing law.

This report provides insight into the substantial, and often decisive, role played by the U.S. Courts of Appeals in applying and developing federal law. The report offers a brief description of the historical development and current organization of the federal judiciary as a whole. It then provides information regarding the structure and role of the U.S. Courts of Appeals within the federal judicial system. The report next discusses the impact of "circuit splits" on the application and evolution of federal law. After offering some considerations for Congress, it concludes by cataloguing 88 circuit splits that arose or widened within the federal courts of appeals in 2024 that were identified by the *Congressional Court Watcher*, a CRS Legal Sidebar series tracking notable federal appellate court decisions of potential interest to Congress.

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The Supreme Court of the United States sits at the pinnacle of the American judicial system, and its decisions are the final word on questions of federal law, having nationwide effect. It is thus unsurprising that the Supreme Court's decisions regularly garner widespread attention from the general public, the media, and the other branches of federal government, including Congress. The Supreme Court, however, decides fewer than 100 argued cases annually, compared to the thousands of precedential decisions issued every year by the courts that sit just below the Supreme Court in the federal judicial hierarchy—the U.S. Courts of Appeals for the 13 judicial circuits, commonly referred to as "circuit courts." This disparity ensures that the U.S. Courts of Appeals frequently act as the final arbiters of questions of federal law within their respective jurisdictions.

This report provides insight into the substantial, and often decisive, role played by the federal courts of appeals in applying and developing federal law. The report begins with a brief description of the historical development and current organization of the federal judiciary as a whole. The report then provides information regarding the structure and role of the U.S. Courts of Appeals within the federal judicial system. The report next discusses the impact of "circuit splits"—that is, divergent decisions among the federal courts of appeals on the same federal legal issue—on the application and evolution of federal law. The report then offers some considerations for Congress before concluding with a catalogue of 88 circuit splits that arose or deepened within the federal courts of appeals in 2024, and which were identified by the *Congressional Court Watcher*, a CRS Legal Sidebar series that tracks notable federal appellate court decisions of interest to Congress.

The Structure of the Federal Court System

Article III, Section 1 of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[1] Pursuant to this directive, Congress created the Supreme Court of the United States and two tiers of "inferior" Article III federal courts, the U.S. Courts of Appeals and the U.S. District Courts.[2] The term "inferior" as used in Article III connotes a court's placement below the Supreme Court in the organizational hierarchy of the federal judiciary.[3]

[1] U.S. CONST. art. III, § 1. *See also id.* art. I, § 8, cl. 9 ("The Congress shall have Power ... To constitute Tribunals inferior to the supreme Court.").

[2] Congress established the Supreme Court, 3 circuit courts, and 13 district courts in the First Judiciary Act of 1789. *See* Judiciary Act of 1789, 1 Stat. 73. The current structure of the Article III judiciary is set forth in 28 U.S.C. §§ 1, 41, 81–131, 251.

[3] Article III courts are vested with the full judicial power conferred by the Constitution, and thus are sometimes called "constitutional" courts. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). Congress has exercised other of its constitutional powers to create a number of non-Article III, or "legislative," courts to undertake specialized functions or fill unique needs, such as the U.S. Court of Federal Claims, the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, and the territorial district courts. *See* 26 U.S.C. § 7441 ("There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court."); 28 U.S.C. § 171 (stating that the U.S. Court of Federal Claims "is declared to be a court established under article I of the Constitution of the United States"); 38 U.S.C. § 7251 ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims."); CRS Report R47641, *Federal and State Courts: Structure and Interaction*, by Joanna R. Lampe and Laura Deal (2023); Cong. Rsch Serv., *Congressional Power to Establish Non-Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-9-1/ALDE_00013604/ (last visited Jan. 26, 2025); Cong. Rsch Serv., *Power of Congress over Territories*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C2-3/ALDE_00013511/ (last visited Jan. 26, 2025). A full discussion of the legal bases for, functions of, and constitutional limitations applicable to non-Article III courts is beyond the scope of this report.

The U.S. District Courts occupy the lowest tier of the federal judicial hierarchy.[4] They are the federal trial courts, empowered to try both civil and criminal cases that meet the criteria for the exercise of federal subject-matter jurisdiction.[5] There is at least one district court in each state along with one in the District of Columbia and one in Puerto Rico.[6] The U.S. Court of International Trade is a specialized Article III trial court that has nationwide jurisdiction over claims involving international trade and U.S. customs laws.[7]

The 13 U.S. Courts of Appeals occupy the middle tier of the federal judiciary's hierarchy.[8] They decide appeals by parties challenging a final decision of a federal district court or one of the specialized courts, as well as appeals challenging certain interlocutory, or non-final, orders.[9] In addition, some federal statutes provide that particular agency actions are directly reviewed by the U.S. Courts of Appeals.[10] Direct review of agency decisions makes up a sizable portion of the federal appellate docket.[11]

The U.S. Supreme Court is the highest court in both the federal judicial system and, on questions of federal law, the entire American judiciary. While the Court has original jurisdiction over

[4] *See* 28 U.S.C. §§ 81–131; *About Federal Courts: Court Role and Structure*, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Jan. 26, 2025) [hereinafter *Court Role and Structure*].

[5] Congress has granted federal courts two categories of subject-matter jurisdiction. "Federal-question jurisdiction" encompasses "all civil actions" that "aris[e] under" federal law. 28 U.S.C. § 1331. "Diversity jurisdiction" encompasses civil cases in which the monetary amount in controversy exceeds $75,000 and there is diversity of citizenship among the parties, for example, the parties are citizens of different states. *Id.* § 1332(a). The Supreme Court has explained that "[e]ach serves a distinct purpose: Federal-question jurisdiction affords parties a federal forum in which 'to vindicate federal rights,' whereas diversity jurisdiction provides 'a neutral forum' for parties from different States." Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1746 (2019).

[6] *See* 28 U.S.C. §§ 81–131; *Court Role and Structure*, *supra* note 4; *About Federal Courts*: *Federal Courts & the Public*, *Court Website Links*, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links (last visited Jan. 26, 2025) [hereinafter *Federal Court Website Links*]. Each federal district court includes an Article I bankruptcy court dedicated to resolving bankruptcy cases. *See id.*; 28 U.S.C. § 151; *Court Role and Structure*, *supra* note 4. Each of the territories of Guam, the Northern Mariana Islands, and the Virgin Islands has a non-Article III trial court that handles all federal cases, including bankruptcy cases. *See* 48 U.S.C. § 1424 (Guam); *id.* §§ 1611, 1612(a) (Virgin Islands); *id.* §§ 1821–1822 (Northern Mariana Islands); *Court Role and Structure*, *supra* note 4; *Federal Court Website Links*, *supra*.

[7] *See* 28 U.S.C. § 251; *About the Court*, U.S. COURT OF INTERNATIONAL TRADE, https://www.cit.uscourts.gov/about-court (last visited Jan. 26, 2025).

[8] *See* 28 U.S.C. § 41.

[9] *See* "Structure and Role of the U.S. Courts of Appeals," *infra*.

[10] *See, e.g.*, 8 U.S.C. § 1252(a) (authorizing direct appellate review of most final immigration removal orders issued in administrative proceedings); 28 U.S.C. § 2342 (giving federal appeals courts exclusive jurisdiction to review various agency actions); 29 U.S.C. § 655(f) (providing that a pre-enforcement challenge to an emergency temporary standard issued by the Occupational Safety and Health Administration may be filed with the U.S. Court of Appeals in the jurisdiction where the petitioner resides or has a principal place of business). Some statutes may specify that review takes place in a particular appellate court. *See, e.g.*, 42 U.S.C. § 7607(b) (granting the U.S. Court of Appeals for the D.C. Circuit exclusive jurisdiction for review of Clean Air Act regulations promulgated by the Environmental Protection Agency).

[11] In the 12-month period ending March 31, 2024, for example, roughly 12.5% of all filings in the 12 regional U.S. Courts of Appeals involved appeals of agency administrative decisions, 80% of which were appeals of immigration decisions by the Board of Immigration Appeals. U.S. Courts, *Federal Judicial Caseload Statistics 2024*, https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 (last visited Jan. 26, 2025).

certain legal disputes,[12] most cases come to the Court through appeals from decisions of the U.S. Courts of Appeals and state supreme courts, when the state case raises issues of federal law.[13]

The Structure and Role of the U.S. Courts of Appeals

Twelve of the 13 U.S. Courts of Appeals are organized into regional "circuits," meaning that each court exercises jurisdiction over appeals from the district courts within a specific set of states and, sometimes, U.S. territories.[14] For example, the U.S. Court of Appeals for the First Circuit (First Circuit) exercises jurisdiction over appeals from the district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.[15] The Ninth Circuit encompasses the most states and territories, adjudicating appeals from the district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington.[16] **Figure 1** below depicts the geographic jurisdiction of each of the 12 regional U.S. Courts of Appeals.

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) exercises geographic jurisdiction only over appeals from the U.S. District Court for the District of Columbia.[17] However, that limited geographic reach belies the wide scope of cases handled by the D.C. Circuit, which has been called the second-most-important court in the country after the Supreme Court.[18] Due to a combination of geographic and statutory factors, the D.C. Circuit handles a uniquely large number of administrative law cases, national security cases, and other cases concerning the federal government as compared to the other circuits.[19] The D.C. Circuit also exercises exclusive appellate jurisdiction over a variety of specialized subject matter, including decisions of copyright royalty judges[20] and certain military commissions.[21]

The jurisdiction of the 13th federal court of appeals—the U.S. Court of Appeals for the Federal Circuit (Federal Circuit)—is defined by subject matter rather than geography.[22] The Federal

[12] U.S. CONST., art. III, § 2, cl. 2 (giving the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"); 28 U.S.C. § 1251 (setting forth matters over which the Court has original and exclusive jurisdiction—i.e., controversies with two or more states—and cases where it has both original and appellate jurisdiction).

[13] *See* 28 U.S.C. § 1254 (providing that "[c]ases in the courts of appeals may be reviewed by the Supreme Court"); *id.* § 1257 (providing that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court" when the state case involves an issue of federal law).

[14] *See* 28 U.S.C. § 41.

[15] *See id.*

[16] *See id.*; 48 U.S.C. § 1821(a) ("The Northern Mariana Islands shall constitute a part of the same judicial circuit of the United States as Guam."); **Figure 1**, *infra*.

[17] *See* 28 U.S.C. § 41.

[18] *See* Jake Kobrick, *The Role of the U.S. Courts of Appeals in the Federal Judiciary, Differences Between Circuits*, https://www.fjc.gov/history/courts/Role-of-the-Courts-of-Appeals (last visited Jan. 26, 2025) [hereinafter *Differences Between Circuits*]; Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L. J. 779, 779 (2002).

[19] *See Differences Between Circuits*, *supra* note 18; Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. OF L. & PUB. POL. 131, 140–48, 152 (2013); Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 715, 719–26 (2014); Pierce, *supra* note 18.

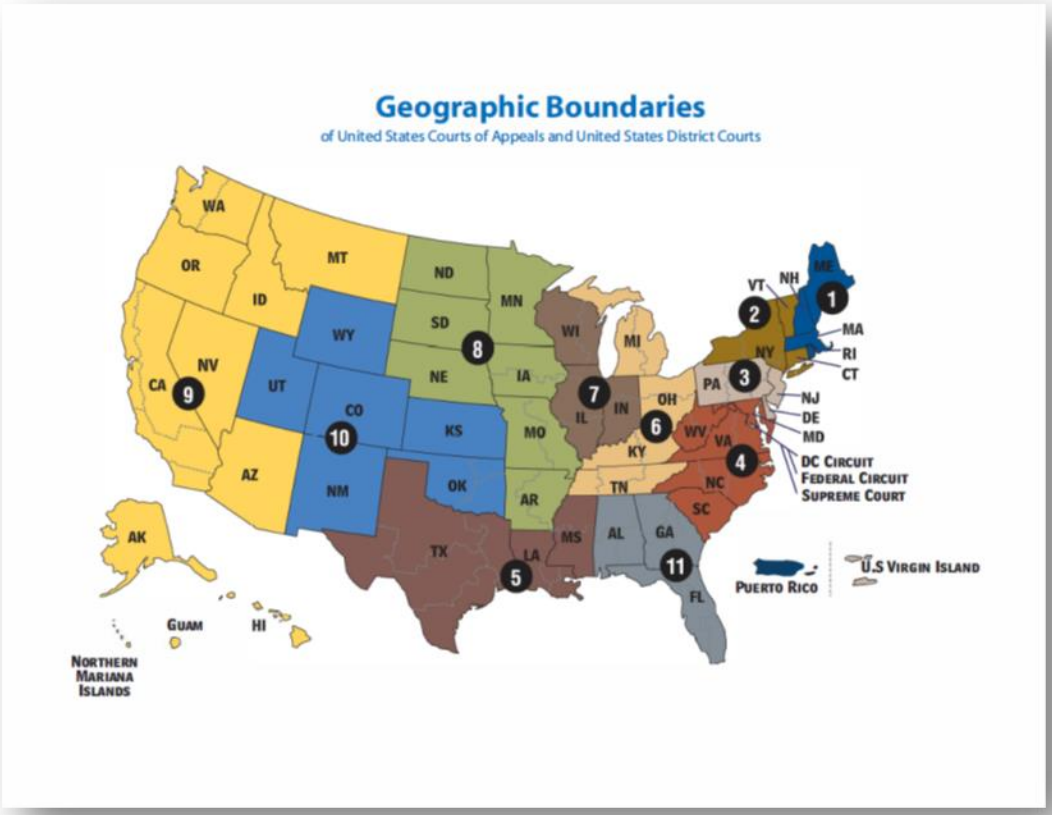
[20] 17 U.S.C. § 803(d)(1).

[21] 10 U.S.C. § 950g(a).

[22] Statistics & Reports: Judicial Business, U.S. Courts of Appeals—Judicial Business 2023, U.S. Court of Appeals for the Federal Circuit, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2023 (last visited Jan. 26, 2025) [hereinafter Judicial Business 2023—Federal Circuit]; *Differences Between Circuits*, *supra* note 18.

Circuit exercises exclusive nationwide jurisdiction over appeals involving customs and patent claims, as well as appeals from the U.S. Court of Federal Claims, which adjudicates claims for money damages brought against the United States, and the U.S. Court of International Trade.[23] The Federal Circuit also exercises exclusive jurisdiction over specified appeals from the Merit Systems Protection Board, the U.S. Court of Appeals for Veterans Claims, and agency boards of contract appeals.[24]

Figure 1. Geographic Boundaries of the U.S. Courts of Appeals and District Courts



Source: Admin. Office of the U.S. Courts, https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links (last visited January 26, 2025).

The U.S. Courts of Appeals are "intermediate" courts of appeals.[25] This is because they occupy the middle tier of the federal court system between the federal district courts and the Supreme

[23] 28 U.S.C. § 1295(a)(1)–(5); *Judicial Business 2023—Federal Circuit*, *supra* note 22; *Court Role and Structure*, *supra* note 4; *Differences Between Circuits*, *supra* note 18.

[24] *See* 28 U.S.C. § 1295(a)(9)–(10) (appeals from the Merit Systems Protection Board and agency boards of contract appeals); 38 U.S.C. § 7292 (establishing the Federal Circuit's jurisdiction over appeals from the U.S. Court of Appeals for Veterans Claims). The U.S. Court of Appeals for Veterans Claims is a specialized Article I court with exclusive jurisdiction to review administrative decisions of the Board of Veterans' Appeals within the Department of Veterans Affairs. *See About the Court*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, https://www.uscourts.cavc.gov/about.php (last visited Jan. 26, 2025).

[25] *See* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 112 (1959) (Frankfurter, J., dissenting) (noting that (continued...)

Court, and because their decisions are subject to review by the Supreme Court.[26] As a practical matter, however, the Supreme Court exercises its review authority in only a limited number of cases each year. For example, the Court issued final decisions in 69 cases argued in its 2023 Term (64 through signed opinions and the remaining through per curiam opinions) and in 68 cases argued in its 2022 Term (66 through signed opinions and 2 through per curiam opinions).[27] (The total number of cases filed in the Supreme Court was 4,223 in the 2023 Term and 4,159 in the 2022 Term.[28])

By contrast, the most recent data available from the Administrative Office of the U.S. Courts indicate that in FY2023 and FY2022 the 12 regional federal circuits (i.e., all of the federal courts of appeals other than the Federal Circuit) published, respectively, 3,165 and 3,424 precedential written, signed opinions.[29] Overall, the 12 regional U.S. Courts of Appeals collectively issued 26,391 appellate opinions or orders in cases terminated on the merits after oral hearing or submission on briefs in FY2023, and 28,504 such opinions or orders in FY2022.[30]

The vast difference in the number of cases decided by the Supreme Court and the U.S. Courts of Appeals stems from the different scope of their respective appellate jurisdictions. With very limited exceptions, the Supreme Court exercises wholly discretionary appellate jurisdiction,[31] deciding for itself which appeals it will hear out of the thousands that are submitted for its consideration. The Court's rules indicate that the Court grants discretionary review, or a writ of certiorari, "only for compelling reasons," which may include

- a "conflict" among two or more U.S. Courts of Appeals "on the same important matter";[32]
- a "conflict" between a U.S. Court of Appeals and a state court of last resort on "an important federal question";[33]

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the Evarts Act of 1891 "established intermediate courts of appeals to free th[e Supreme] Court from reviewing the great mass of federal litigation").

[26] *See* 28 U.S.C. § 1254.

[27] Hon. John G. Roberts, Jr., *2024 Year-End Report on the Federal Judiciary* 10 (Dec. 31, 2024), https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf (last visited Jan. 24, 2025) [hereinafter *Federal Judiciary 2024 Year-End Report*]; Hon. John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* 8 (Dec. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf (last visited Jan. 25, 2025) The Supreme Court's annual term begins "on the first Monday in October and end[s] on the day before the first Monday in October of the following year." S. Ct. R. 3.

[28] *2024 Year-End Report on the Federal Judiciary*, *supra* note 27, at 10. Besides several dozen "merits" decisions issued by the Court each year after full briefing and oral argument, the Court also issues orders granting or denying petitions for a writ of certiorari; rulings in emergency matters, such as requests to stay lower court decisions pending appeal; and orders setting deadlines and other procedures for litigation before the Court. While most of these orders involve either granting or denying certiorari in a case or routine procedural questions, some orders may have a major impact on high-profile litigation. For further discussion, see CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe (2023), at 27-32.

[29] *Judicial Facts and Figures 2023* Table 2.5—Type of Opinion or Order Filed in Cases Terminated on the Merits, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2023 (last visited Jan. 8, 2025). This table shows similar numbers for cases terminated on the merits by the U.S. Courts of Appeals in other years.

[30] *Id.*

[31] Congress removed the last vestiges of the Supreme Court's mandatory appellate jurisdiction over judgments of the U.S. Courts of Appeals and state supreme courts in 1988. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988). The current statutes that confer and control the Supreme Court's jurisdiction are codified at 28 U.S.C. §§ 1251, 1253–1254, 1257–1260.

[32] S. Ct. R. 10(a).

[33] S. Ct. R. 10(a), (b).

- a "conflict" among two or more state courts of last resort on "an important federal question";[34]
- a decision of a state court or U.S. Court of Appeals on "an important federal question" that "conflicts with relevant decisions of" the U.S. Supreme Court;[35]
- a decision of a state court or U.S. Court of Appeals on "an important question of federal law" that "has not been, but should be, settled by" the U.S. Supreme Court;[36] and
- a decision of a U.S. Court of Appeals that "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of" the Supreme Court's "supervisory power."[37]

The scope of the U.S. Courts of Appeals' mandatory appellate jurisdiction is much broader. Under 28 U.S.C. § 1291, the 12 regional courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States."[38] This jurisdiction is mandatory because, under Section 1291, "a party may appeal to a court of appeals *as of right* from 'final decisions of the district courts.'"[39] A final decision for these purposes "is normally limited to an order that resolves the entire case."[40]

The 12 regional U.S. Courts of Appeals also exercise appellate jurisdiction over certain interlocutory, or non-final, decisions of district courts under 28 U.S.C. § 1292. Section 1292(a) assigns these courts mandatory jurisdiction over appeals from "interlocutory orders of the district courts … granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," "appointing receivers, or refusing orders to wind up receiverships," and "determining the rights and liabilities of the parties to admiralty cases."[41] Section 1292(b) grants the U.S. Courts of Appeals discretion to review other non-final orders if the district court first certifies that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[42]

The Federal Circuit has similar mandatory and discretionary appellate authority over final decisions and non-final orders issued in the limited set of specialized cases over which Congress granted it exclusive jurisdiction.[43]

Each final published decision of a U.S. Court of Appeals establishes binding law, or precedent, that applies throughout that circuit, unless the decision is reviewed and overruled by the Supreme Court or a subsequent (most likely en banc) appellate panel within that circuit, or is superseded by a legislative change in the governing law.[44] As discussed earlier, only a fraction of final

[34] S. Ct. R. 10(b).

[35] S. Ct. R. 10(c).

[36] *Id.*

[37] S. Ct. R. 10(a).

[38] 28 U.S.C. § 1291.

[39] Ritzen Group, Inc. v. Jackson Masonry, LLC, 589 U.S. 35, 38 (2020) (emphasis added).

[40] *Id.*

[41] 28 U.S.C. § 1292(a).

[42] *Id.* § 1292(b).

[43] *See id.* §§ 1292(c)–(d), 1295.

[44] BRYAN GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 492–94 (2016) (discussing traditional rules for overruling (continued...)

decisions by the circuit courts are reviewed by the Supreme Court. In this way, the federal courts of appeals are at the forefront of the application and interpretation of every aspect of federal law. As one analysis observed, "Ultimately, the appellate courts bear the chief responsibility for lawmaking in the federal system because the Supreme Court chooses to review an extremely narrow band of cases."[45]

The Importance of Circuit Splits in the Evolution and Application of Federal Law

In exercising their broad mandatory and discretionary appellate jurisdiction, the U.S. Courts of Appeals decide constitutional questions and interpret the meaning of federal statutes and their interplay with other federal and state laws, international treaties, and the U.S. Constitution. They also frequently interpret federal agency rules to assess whether they adhere to Congress's statutory directives.

One of the clearest indicators that the federal courts of appeals are grappling with an unsettled issue of federal law is the existence of a conflict, or "split," among the circuits. A "circuit split" occurs when 2 or more of the 13 federal courts of appeals reach different conclusions on the same question of federal law, for example, by applying different interpretations of the same statutory term.[46] This difference results in the non-uniform treatment of similarly situated litigants, depending on the circuit that hears their case, and also may lead to greater uncertainty for litigants in the circuits that have not yet addressed the issue.[47]

Circuit splits can arise only when the Supreme Court has not resolved the question, leaving the federal courts of appeals without mandatory precedent to follow.[48] In the absence of a binding Supreme Court decision on an issue, each federal court of appeals is free to decide that issue independently, and that decision will then be binding on all federal trial courts within the jurisdiction of that circuit.[49] What is more, all federal courts of appeals follow the "law of the

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circuit decisions, but noting that some judicial circuits' procedural rules allow a three-judge circuit panel to overturn an earlier decision). Historically, en banc review referred to a procedure by which all of the judges of a court of appeals who were in regular active service would review the decision of the three-judge panel that originally decided the matter. Due to the differing numbers of active judges that now comprise each of the 13 U.S. Courts of Appeals, the circuits may have different rules establishing what constitutes en banc review for that court. *Compare, e.g.*, 1st Cir. R. 35 (providing that "a court en banc consists solely of the circuit judges of this circuit in regular active service," with limited exceptions allowing participation by a senior judge), *with* 9th Cir. R. 35-3 ("The en banc court . . . shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.").

[45] Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 997 (2020) (internal quotation marks omitted).

[46] Circuit Split, LEGAL INFO. INST., https://www.law.cornell.edu/wex/circuit_split (last visited Jan. 26, 2025) [hereinafter *Legal Info. Inst.*]; Cohen & Cohen, *supra* note 45, at 990; Christina M. Manfredi, *Waiving Goodbye to Personal Jurisdiction Defenses: Why United States Courts Should Maintain a Rebuttable Presumption of Preclusion and Waiver Within the Context of International Litigation*, 58 CATH. UNIV. L. REV. 233, 256 n.156 (2008).

[47] *Legal Info. Inst.*, *supra* note 46; Cohen & Cohen, *supra* note 45, at 990, 996. The non-uniform interpretation of the law may also affect federal agencies responsible for implementing statutes and regulations subject to conflicting judicial rulings. For further discussion, see CRS Report R47882, *Agency Nonacquiescence: An Overview of Constitutional and Practical Considerations*, by Benjamin M. Barczewski (2023).

[48] Manfredi, *supra* note 46, at 256 n.156.

[49] Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1430–31 (2020) (noting that the Supreme Court's decision in Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900), "paired with (continued...)

circuit doctrine."[50] Under that doctrine, the first published decision on a question of federal law by a three-judge appellate panel within a circuit is generally binding on all later panels within that same circuit unless the decision is overruled by the Supreme Court or a later (typically en banc) appellate panel of that circuit, or is superseded by legislation.[51] If the Supreme Court decides a legal question that was the subject of a circuit split or Congress resolves the question through legislation, all 13 federal courts of appeals are bound to apply those directives, ensuring nationwide uniformity on the issue.[52]

As noted earlier, a split among the circuits on a question of federal law is one of the main factors that prompts the Supreme Court to agree to accept an appeal.[53] Commenters have observed that the Supreme Court appears to fill the majority of its docket—often around 70%—with cases involving apparent conflicts.[54] A court of appeals will often expressly indicate in its opinion that its decision differs from that of another court or "deepens" a preexisting split among the circuits by joining one side in that conflicting interpretation of a point of law.[55] The Supreme Court's rules make it clear, however, that the existence of a circuit split is not on its own sufficient to warrant Supreme Court review; the split must concern an "important matter."[56]

Thus, by both design and the historical evolution of the federal judiciary, the federal courts of appeals serve as incubators for legal issues of national importance and novel questions of federal law as those issues move toward possible resolution by the U.S. Supreme Court.[57] That process, however, ensures that a conflict among the federal courts of appeals may persist and deepen for years, unless and until the Supreme Court grants certiorari to resolve it.[58] In the absence of a Supreme Court decision, the federal courts of appeals will remain the final decisionmakers on many of those questions.[59]

Considerations for Congress

Congress is constitutionally empowered to respond legislatively to many federal judicial decisions. The volume and diffuse nature of appellate court decisions may, however, make it more

congressional maintenance of the regional circuits over time, can reasonably be read as support for a longstanding practice of treating decisions from other circuits as persuasive and not binding authority").

[50] Sassman, *supra* note 49, at 1406.

[51] *See Id.* at 1401, 1405, 1406–07, 1426–27; Cohen & Cohen, *supra* note 45, at 1006. *See also* BRYAN GARNER ET AL., *supra* note 44, at 492–94. *See also* Hon. Michael S. Kanne, *The "Non-Banc En Banc": Seventh Circuit Rule 40(e) and the Law of the Circuit"*, 32 S. Ill. U. L.J. 611 (2007-2008) (discussing Seventh Circuit rule requiring the circulation of any proposed panel opinion that would overrule a prior circuit decision to all active members of the court, and providing that the opinion not be published unless a majority of the members do not vote to rehear the issue en banc).

[52] *See* Manfredi, *supra* note 46, at 256 n.156.

[53] S. Ct. R. 10(a).

[54] Sassman, *supra* note 49, at 1421. *See also* Stephen M. Shapiro, et al., SUPREME COURT PRACTICE §§ 4.3, 4.4 (11th ed. 2013).

[55] *See, e.g.*, United States v. Chavez, 29 F.4th 1223 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 485 (2022).

[56] S. Ct. R. 10(a).

[57] *See* Cohen & Cohen, *supra* note 45, at 998 (noting that some commenters "argue that the current system allows the circuits to act as laboratories for the development of federal law"); Sassman, *supra* note 49, at 1447–50.

[58] *See* Sassman, *supra* note 49, at 1403, 1405, 1419–21.

[59] *See* Cohen & Cohen, *supra* note 45, at 994–95 (noting that "the Court has left unresolved circuit splits in important and numerous areas of federal law," and that, "[e]ven if the Court changed course and shifted most of its focus to cases that present circuit splits, it might be unwilling or unable to hear enough cases to meaningfully reduce the number of circuit splits"); Sassman, *supra* note 49, at 1405 ("[T]he open secret is that the Supreme Court cannot possibly resolve all of the conflicts generated by the courts of appeals.").

challenging for an individual Member or their staff to monitor judicial developments at the appellate level than at the Supreme Court.[60] This characteristic may, in turn, make it much less likely that Congress will respond through legislation to issues raised by appellate court decisions. For instance, one study of congressional responses to appellate rulings concluded that, between 1990 and 1998, Congress responded "to only a minute percentage of cases decided by the courts of appeals, even though the majority of appeals court decisions involve the application of federal statutes."[61] The study identified 65 instances where Congress enacted a law to overrule or codify an appellate court decision during that period.[62] In contrast, a different study, focusing on congressional overrides of Supreme Court decisions interpreting statutes, identified 104 legislative overrides of such decisions over roughly the same period.[63]

There are several ways for lawmakers to discern when a judicial opinion indicates an issue that may benefit from legislative attention. In addition to pointing out circuit splits, federal courts of appeals may use other means to "set the table" for consideration of the question by the Supreme Court or by Congress.[64] As the First Circuit has explained, "it is not uncommon in this and other circuits to include language in opinions that flags potential issues for Congress to consider, should it choose to do so."[65] To this end, courts of appeals have stated in their opinions that Congress may wish to "revisit," "examine," "reexamine," "clarify," or "give further direction" on some aspect of federal statutory or regulatory law.[66] A vigorous dissent from a majority opinion by a judge, or a number of judges, of a court of appeals might also signal that a case raises an important federal-law issue on which the judges of the court strongly disagree.[67]

One tool available to help Congress identify federal appellate court decisions that may be of legislative interest is the Congressional Research Service's (CRS's) *Congressional Court Watcher* series, published as part of the CRS Legal Sidebar product line. The *Congressional Court Watcher* briefly recaps decisions of the Supreme Court (including grants of petitions for a writ of certiorari) and precedential decisions of the courts of appeals for the 13 federal circuits. Selected cases typically involve the interpretation or validity of federal statutes, the validity of agency

[60] *See* Stefanie A. Lindquist & David A. Yalof, Cong*ressional Responses to Federal Circuit Court Decisions, 85* JUDICATURE 61, 67 (2001) ("Indeed, in the case of appellate court decisions interpreting federal statutes, Congress is faced with thousands of decisions each year of potential relevance, in contrast to yearly consideration of less than 100 Supreme Court decisions in recent terms."); Marin K. Levy & Tejas N. Narechania, *Interbranch Information Sharing: Examining the Statutory Opinion Transmission Project*, 108 CAL. L. REV. 917, 918–19 (2020) (observing that "the vast and largely undifferentiated nature of the modern Judiciary's body of decisions creates a problem of attention for Congress: Which statutory interpretations merit a second look?"); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653, 662 (1992).

[61] Lindquist & Yalof, *supra* note 60, at 68.

[62] *Id.*

[63] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1356 (2014) (identifying 104 legislative overrides of Supreme Court decisions in the 1990s).

[64] *See* Pierce, *supra* note 18, at 779–81.

[65] Goethel v. U.S. Dep't of Commerce, 854 F.3d 106, 117 (1st Cir. 2017).

[66] *See id.* (quoting cases).

[67] *See, e.g.*, William J. Brennan, Jr., *In Defense of Dissents*, 50 HASTINGS L.J. 671, 674 (1999) ("In its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority's legal analysis."); Daryl Lim, *I Dissent: The Federal Circuit's "Great Dissenter," Her Influence on the Patent Dialogue, and Why It Matters*, 19 VAND. J. OF ENT. & TECH L. 873, 887 (2017) ("Some judges see dissenting as an obligation because Congress makes the laws and judges interpret them. Since majority opinions may be wrong, dissents inject accountability and thus integrity into the judicial process."); *id.* at 890 ("In an appellate court like the Federal Circuit, the dissent can tell the Supreme Court or future panels that the majority's rule needs to be examined carefully and should be revised or overturned.").

action taken pursuant to statutory delegations of authority, and constitutional issues relevant to Congress's lawmaking and oversight functions. **Table 1** below recaps the circuit splits identified in the *Congressional Court Watcher* series in 2024, illustrating the array of federal legal issues of potential congressional interest decided by the federal courts of appeals throughout the past year.

Circuit Splits That Emerged or Widened in 2024 on Topics of Congressional Interest

Table 1 below identifies 88 appellate court decisions from 2024 where the controlling opinion of a circuit panel or en banc circuit court recognized 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. **Table 1** does not include court decisions that were abrogated by the circuit court or the Supreme Court as of the date of this report.[68]

Identified cases are organized into 24 topics:

- Arbitration (2 cases)
- Bankruptcy (1 case)
- Civil Procedure (6 cases)
- Civil Rights (4 cases)
- Class Actions (2 cases)
- Communications (2 cases)
- Criminal Law & Procedure (26 cases)
- Education (1 case)
- Election Law (1 case)
- Employee Benefits (1 case)
- Environmental Law (6 cases)
- Firearms (2 cases)
- Freedom of Information Act (FOIA) (2 cases)
- Food & Drug (2 cases)
- Health (2 cases)
- Immigration (10 cases)
- Indian Law (1 case)
- Labor & Employment (5 cases)
- Maritime Law (1 case)
- Securities (1 case)

[68] For example, in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), the Eleventh Circuit adopting the majority position on two issues that have divided the federal appellate courts concerning when a state conviction constitutes a "controlled substance offense" under the Sentencing Guidelines. The Supreme Court subsequently vacated the Eleventh Circuit's decision and remanded for further consideration in light of an intervening Supreme Court decision relevant to the defendant's underlying challenge to his criminal conviction. Dubois v. United States, No. 24-5744 (U.S. Jan. 13, 2025).

- Separation of Powers (3 cases)
- Tax (2 cases)
- Torts (3 cases)
- Transportation (1 case)

These categories do not necessarily capture the full range of legal issues the listed cases address.

Cases under each topic are arranged by federal judicial circuit (with cases from the D.C. Circuit and the Federal Circuit preceding numbered circuits, which are organized numerically) and in order of publication in the *Federal Reporter*. Each case is accompanied by a brief summary of the key holding or holdings of the controlling opinion, along with citations to decisions from other circuits identified by the controlling opinion as taking a conflicting view on a legal question resolved in the case.

Methodology

Cases listed in **Table 1** were originally identified and summarized in the *Congressional Court Watcher*. *Congressional Court Watcher* authors reviewed all reported federal appellate decisions between January 1 and December 31, 2024, and summarized those circuit splits likely to be of particular interest to lawmakers. **Table 1** below includes appellate decisions identified in the *Congressional Court Watcher* in which the controlling opinion acknowledged a circuit split on a legal issue resolved in the opinion. All cases referenced in **Table 1** (including decisions cited in a referenced case as reflecting a circuit split) were reviewed before publication of this CRS report to ensure that they had not been abrogated or superseded by a later decision. This report omits from **Table 1** decisions originally included in the *Congressional Court Watcher* that announced a circuit split but were later vacated or overruled.

The last column of **Table 1** identifies decisions from other circuits that are referenced in a listed case as evidence of a circuit split. **Table 1** only identifies reported (i.e., precedential) decisions from other federal courts of appeals that the controlling opinion identifies as conflicting. (If an opinion cites multiple conflicting decisions from a particular circuit, only the most recent is listed.) **Table 1** does not identify conflicting decisions by other circuits in non-precedential cases or decisions by state courts or federal district courts. **Table 1** omits conflicting decisions from other circuits if those decisions were subsequently abrogated. **Table 1** does not include citations to circuit court rulings that are mentioned in a controlling opinion as *agreeing* with its position in a circuit split. **Table 1** also omits cases where a controlling opinion recognizes the existence of a circuit split on a particular issue but does not take a position on that issue in deciding the case.

Table 1 does not attempt to present an exhaustive list of all circuit splits that emerged or widened in 2024. Different approaches might have yielded different results. **Table 1** is based on the CRS *Congressional Court Watcher* series, which selects court decisions on the topics most relevant to Congress's legislative and oversight functions. The collected cases in **Table 1** typically involve (1) the interpretation or validity of a federal statute; (2) the validity or interpretation of a rule or regulation implementing a federal statute; or (3) a constitutional issue of relevance to Congress's lawmaking and oversight functions. **Table 1** does not attempt to identify circuit splits involving matters that generally fall outside of Congress's legislative purview, such as judicial doctrines not tied to a particular federal law or program.[69]

[69] *See, e.g.*, United States v. Neely, No. 23-3166, 2024 WL 5229878, at *6–7 (D.C. Cir. Dec. 27, 2024) (widening a circuit split over the framework used to assess whether the withholding of *Miranda* warnings during the first stage of a (continued...)

Because the methodology used to identify circuit splits turns on whether a controlling circuit court opinion recognizes disagreement with one or more circuits on a key legal question, **Table 1** could be underinclusive or overinclusive as compared to other approaches for counting circuit splits.

For example, **Table 1** only includes cases where the controlling opinion specifically acknowledges a divergent approach by one or more other circuits. This detail means that **Table 1** does not include cases where the controlling opinion does not specifically acknowledge this difference in approach. **Table 1** also does not include cases where, for example, a dissenting opinion characterizes the controlling opinion as causing a circuit split but the controlling opinion—which serves as binding precedent for future courts in the circuit—either does not acknowledge or disputes the dissent's characterization.[70]

Still, it may not always be clear whether a controlling opinion, when announcing its disagreement with another circuit, is creating or widening a circuit split. While each case discussed in **Table 1** identifies a decision from one or more other circuits that take a diverging view on a legal issue, observers may disagree as to whether some of these divergences are so significant as to result in the non-uniform application of the law among the circuits. There may also, occasionally, be uncertainty as to whether the disagreement involves a matter critical to the identifying court's decision, or instead involves a non-critical matter that might be treated as non-binding dictum by future jurists.[71] **Table 1**'s inclusion of citations to referenced cases allows readers to review the cases themselves and make an independent assessment.

multistep interrogation process renders inadmissible any incriminating statements made after *Miranda* warnings are given).

[70] *See, e.g.*, Jama v. State Farm Mut. Auto. Ins. Co., 113 F.4th 924, 933 (9th Cir. 2024) (reversing, in part, a district court's class decertification, and describing the dissent as "incorrectly claim[ing] our decision today creates a circuit split").

[71] For example, in *Jacks v. DirectSat USA, LLC*, 118 F.4th 888 (7th Cir. 2024), 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. The court adopted the approach taken by the Second, Third, Fourth, Sixth, and Ninth Circuits, but criticized the approach taken by the Fifth Circuit. *Id.* at 897-98. While acknowledging that the D.C. Circuit had taken a "middle ground" between these divergent approaches, the Seventh Circuit did not opine whether the D.C. Circuit's approach meaningfully conflicted with its own. *See id.*

Table 1. Circuit Splits Recognized in 2024

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Arbitration	Ninth Circuit	Voltage Pictures, LLC v. Gussi, S.A. de C.V., 92 F.4th 815 (9th Cir. 2024), *cert. denied*, No. 23-1261(U.S. Oct. 7, 2024)	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 FAA 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.	Second Circuit Commodities & Mins Enter. Ltd. v. CVG Ferrominera Orinoco, C.A., 49 F.4th 802 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 786 (2023)
Arbitration	Tenth Circuit	Brock v. Flowers Foods, Inc., 121 F.4th 753 (10th Cir. 2024)	The Tenth Circuit affirmed the lower court's decision that a Colorado distributor of baked goods produced by an out-of-state retailer fell under the exemption from the FAA for transportation workers engaged in foreign or interstate commerce, meaning that the arbitration clause in the agreement between the distributor and retailer was not enforceable under the FAA. Examining both federal caselaw and the particular business relationship between the defendant and plaintiff, the panel concluded that the distributor fell under the exemption because it was involved in the final, intrastate leg of an interstate delivery route on behalf of the retailer. The panel noted its disagreement with the approach taken by the Fifth Circuit, which has held that "last-mile" delivery drivers whose routes are entirely in-state do not fall under the FAA exemption.	Fifth Circuit Lopez v. Cintas Corp., 47 F.4th 428 (5th Cir. 2022)
Bankruptcy	Eleventh Circuit	Al Zawawi v. Diss (*In re* Al Zawawi), 97 F.4th 1244 (11th Cir. 2024)	The Eleventh Circuit held that 11 U.S.C. § 109(a), which specifies that "only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor under this title," does not apply to cases brought under Chapter 15 of the Bankruptcy Code, which addresses cases of cross-border insolvency. The panel described this ruling as controlled by binding circuit precedent, while noting that its interpretation was in tension with the plain language of the Bankruptcy Code. The court also observed that its position conflicted with that of the Second Circuit, which held that the entirety of Chapter 1 of the Bankruptcy Code, including Section 109(a), applies to Chapter 15 proceedings.	Second Circuit Drawbridge Special Opportunities Fund LP v. Barnet (*In re* Barnet), 737 F.3d 238 (2d Cir. 2013)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Civil Procedure	Third Circuit	Knowles v. Temple Univ., 109 F.4th 141 (3d Cir. 2024)	The Third Circuit decided a case about the interplay between Sections 1920 and 1921 of Title 28 of the *U.S. Code*, which address the reimbursement of a prevailing party in litigation for service of process costs. Section 1920(1) authorizes reimbursement of fees related to the "clerk and marshal," while Section 1921 addresses which fees U.S. "marshals and deputy marshals shall routinely collect, and a court may tax as costs," including serving subpoenas and summonses. The Third Circuit held that "marshal" refers to a public actor under the statutes. Disagreeing with other courts, including the Seventh and Eleventh Circuits, the Third Circuit panel held that Section 1920 does not permit awarding fees for service by private process servers.	Seventh Circuit Collins v. Gorman, 96 F.3d 1057 (7th Cir. 1996) Eleventh Circuit U.S. EEOC v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000)
Civil Procedure	Third Circuit	Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136 (3d Cir. 2024), *cert. denied*, No. 23-1327 (U.S. Oct. 7, 2024)	A divided Third Circuit held that a plaintiff did not satisfy constitutional standing requirements to bring claims against a debt-collection company under the Fair Debt Collection Practices Act for unauthorized third-party communications. The decision involved application of *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), where the Supreme Court held that when a federal statute provides a plaintiff with a cause of action based on a violation of federal law, a plaintiff establishes standing by identifying a "concrete harm" that has a close relationship to a traditionally recognized basis for a tort brought in American courts. Here, the panel majority observed that the circuits disagree on this standard's application. Some favor an element-based approach, in which a plaintiff's alleged harm must not lack any element essential for liability under the comparator tort, while other circuits consider whether the harm alleged by the plaintiff is the same kind of harm caused by the comparator tort. The panel majority endorsed the latter approach and found that the plaintiff failed to show that the harm caused by the defendant sharing her personal information with a mailing vendor had a close relationship to a traditionally recognized harm.	Eleventh Circuit Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir. 2022)
Civil Procedure	Sixth Circuit	Burton v. Coney Island Auto Parts Unlimited, Inc. (*In re* Vista-Pro Automotive, LLC), 109 F.4th 438 (6th Cir. 2024), *reh'g en banc denied*, No. 23-5881 (6th Cir. Aug. 29, 2024)	A divided Sixth Circuit panel upheld the denial of a company's motion to vacate a default judgment issued years earlier; the lower court had decided the motion to vacate was untimely. Federal Rule of Civil Procedure 60(b)(4) permits a federal court to "relieve a party . . . from a final judgment, order, or proceeding" for enumerated reasons or "any other reason that justifies relief." Applying circuit precedent, the panel majority held that courts retain discretion to deny Rule 60(b)(4) motions—even for judgments that would otherwise be void due to a fundamental jurisdictional error or violation of a party's due process rights—if those motions are not made within a reasonable time after the final decision. While acknowledging that other circuits have held that there is no time	First Circuit Sea-Land Serv., Inc. v. Ceramica Europa II, Inc., 160 F.3d 849 (1st Cir. 1998) Second Circuit Crosby v. Bradstreet Co., 312 F.2d 483 (2d Cir. 1963), *cert. denied*, 373 U.S. 911 (1963)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			limit for Rule 60(b)(4) motions to vacate void judgments, the panel majority described its interpretation as consistent with the text of the rule and principles of equity. The panel suggested that the reasonable-time clock might not begin to run until enforcement of the judgment is attempted, but found it unnecessary to resolve that issue.	Third Circuit United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000) (en banc) Fifth Circuit Norris v. Causey, 869 F.3d 360 (5th Cir. 2017) Seventh Circuit Philos Techs., Inc. v. Philos & D, Inc., 645 F.3d 851 (7th Cir. 2011) Eighth Circuit Woods Bros. Constr. Co. v. Yankton Cnty., 54 F.2d 304 (8th Cir. 1931) Ninth Circuit Meadows v. Dominican Republic, 817 F.2d 517 (9th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987) Tenth Circuit Misco Leasing, Inc. v. Vaughn, 450 F.2d 257 (10th Cir. 1971) D.C. Circuit Austin v. Smith, 312 F.2d 337 (D.C. Cir. 1962)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Civil Procedure	Seventh Circuit	United States v. Onamuti, 103 F.4th 1298 (7th Cir. 2024) (per curiam)	In a per curiam decision, the Seventh Circuit sided with the majority view of a circuit split regarding the time limit for appealing a district court's order under a statutory provision colloquially known as the Hyde Amendment, Pub. L. No. 105-119, Title VI, § 617, which permits criminal defendants to recoup fees incurred in the course of defending against a federal prosecution that was "vexatious, frivolous, or in bad faith." Before considering the merits of the petitioner's challenge to the district court's denial of his motion for fees, the panel first considered the government's argument that the petitioner had not timely appealed the lower court's decision. The panel rejected the government's position, and that of at least one other circuit, that defendants have only 14 days to appeal a Hyde Amendment order. The panel joined the majority of circuit courts that have considered the matter and held that such appeals are subject to the more generous 60-day civil time limit from a final judgment, rather than the 14-day deadline for criminal appeals, because Hyde Amendment motions are civil in nature. Finding the petitioner's appeal was timely, the panel nonetheless affirmed the district court's denial of fees, though on different grounds than the lower court.	Tenth Circuit United States v. Robbins, 179 F.3d 1268 (10th Cir. 1999)
Civil Procedure	Seventh Circuit	Jacks v. DirectSat USA, LLC, 118 F.4th 888 (7th Cir. 2024)	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 in resolving 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 common questions that predominate as to the resolution of the entire claim, not just the individual issues for which certification is sought. (The Seventh Circuit also noted a less significant difference in approach with the D.C. Circuit.) 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.	D.C. Circuit Harris v. Med. Transp. Mgmt., Inc., 77 F.4th 746 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 818 (2024) Fifth Circuit Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Civil Procedure	Ninth Circuit	Stein v. Kaiser Found. Health Plan, Inc., 115 F.4th 1244 (9th Cir. 2024) (en banc)	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.	Fourth Circuit United States *ex rel.* Carter v. Halliburton Co., 866 F.3d 199 (4th Cir. 2017), *cert. denied*, 585 U.S. 1016 (2018) Fifth Circuit United States *ex rel.* Branch Consultants v. Allstate Ins. Co., 560 F.3d 371 (5th Cir. 2009) Tenth Circuit Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276 (10th Cir. 2004)
Civil Rights	Sixth Circuit	Ogbonna-McGruder v. Austin Peay State Univ., 91 F.4th 833 (6th Cir. 2024), *cert. denied*, No. 23-1238 (U.S. June 24, 2024)	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.	Eleventh Circuit Tonkyro v. Sec'y, Dep't of Veterans Aff., 995 F.3d 828 (11th Cir. 2021)
Civil Rights	Sixth Circuit	Gore v. Lee, 107 F.4th 548 (6th Cir. 2024)	A divided Sixth Circuit rejected equal protection and due process challenges to a Tennessee statute barring persons from changing the sex identified on their birth certificate to one consistent with their gender identity. The majority held that the law did not discriminate based on sex because the restriction applies equally to males and females who want to change identification records to match their gender identity. The panel cited circuit precedent in holding that laws that discriminate based on transgender status are not subject to heightened scrutiny because transgender status is not a suspect class for constitutional purposes. Applying the more forgiving rational basis standard of review, the majority upheld the law because it was rationally related to the state's interest in preparing and publishing reports on vital statistics and maintaining a consistent, biologically based definition of sex in government records. The panel majority acknowledged a split with the Tenth Circuit, which had	Tenth Circuit Fowler v. Stitt, 104 F.4th 770 (10th Cir. 2024)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			recently ruled that a similar Oklahoma law was unconstitutional even under rational basis review.	
Civil Rights	Ninth Circuit	Rajaram v. Meta Platforms, Inc., 105 F.4th 1179 (9th Cir. 2024)	A divided Ninth Circuit panel held that 42 U.S.C. § 1981 prohibits discrimination in hiring against U.S. citizens on the basis of their citizenship. The majority therefore reversed a district court's dismissal of an employment discrimination action alleging that an employer discriminated against a naturalized citizen by preferring to hire noncitizen H-1B visa holders. The majority reasoned that the text of the statute requires that all persons within the jurisdiction of the United States "have the same right" to make contracts as "white citizens," and, reading "the same" literally, an employer preferring some subset of noncitizens would impermissibly give those noncitizens a greater right to make contracts than citizens. The majority acknowledged that in so holding it disagreed with the Fifth Circuit.	Fifth Circuit Chaiffetz v. Robertson Rsch. Holding, Ltd., 798 F.2d 731 (5th Cir. 1986)
Civil Rights	Ninth Circuit	Doe v. Horne, 115 F.4th 1083 (9th Cir. 2024), *petition for cert. filed*, No. 24-449 (U.S. Oct. 29, 2024)	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 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.	Sixth Circuit L. W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir.), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024)
Class Actions	Second Circuit	Bacher *ex rel.* Bacher v. Boehringer Ingelheim Pharms., Inc., 110 F.4th 95 (2d Cir. 2024), *petition for cert. filed*, No. 24-456 (U.S. Oct. 23, 2024)	A divided Second Circuit rejected the defendant drug makers' attempt to remove plaintiffs' personal injury suits from state court to federal court under the Class Action Fairness Act (CAFA). CAFA generally confers federal subject-matter jurisdiction over a civil "mass action," which occurs when "monetary relief claims of 100 or more persons are proposed to be tried jointly." CAFA provides that actions consolidated or coordinated solely for pretrial purposes are not "mass actions." Joining three other circuits and splitting with the Sixth Circuit, the Second Circuit panel majority interpreted CAFA to require a reviewing court to determine whether the plaintiffs had intended to have a joint trial. The majority held that the context of the plaintiffs' request that a state court consolidate their cases only showed that they intended pretrial consolidation, and that	Sixth Circuit Adams v. 3M Co., 65 F.4th 802 (6th Cir. 2023)

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			the action therefore did not qualify as a "mass action" removable to federal court.	
Class Actions	Eleventh Circuit	Drazen v. Pinto, 106 F.4th 1302 (11th Cir. 2024)	In a per curiam, reissued decision, the Eleventh Circuit decided what constitutes a "coupon" for purposes of the CAFA attorney fee provisions that apply when a class action settlement awards class members coupons in lieu of monetary relief. The panel held that a coupon can be a voucher, certificate, or form that may be exchanged either for a good or service or for a discount on a good or service. The panel described its position as aligning with the approach of the Second and Fourth Circuits, but observed that other circuit courts had taken different views on when or whether a voucher may constitute a coupon. Splitting with the Ninth Circuit but joining most other reviewing courts, the Eleventh Circuit panel also held that CAFA does not require that attorney fees for coupon settlements be based solely on the value of redeemed coupons. Instead, the circuit court concluded that a court may also employ the lodestar method, calculating the time the attorney could reasonably have been expected to work and multiplying that amount by a reasonable hourly rate.	Ninth Circuit Feder v. Frank (*In re* HP Inkjet Printer Litig.), 716 F.3d 1173 (9th Cir. 2013)
Communications	Third Circuit	Anderson v. TikTok, Inc., 116 F.4th 180 (3d Cir. 2024)	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*, 603 U.S. 707 (2024), 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 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.	First Circuit Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 580 U.S. 1083 (2017) Second Circuit Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 276 (2020) Third Circuit Green v. Am. Online, 318 F.3d 465 (3d Cir. 2003), *cert. denied*, 540 U.S. 877 (2003) Fifth Circuit Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008), *cert. denied*, 555 U.S. 1031 (2008)

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				Sixth Circuit Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398 (6th Cir. 2014) Eighth Circuit Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010) Ninth Circuit Dyroff v. Ultimate Software Grp., 934 F.3d 1093 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020) D.C. Circuit Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 680 (2014)
Communications	Fifth Circuit	Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024), *cert. granted*, No. 24-422 (U.S. Nov. 22, 2024)	A divided en banc panel of the Fifth Circuit held that the Federal Communications Commission's (FCC's) funding mechanism for the Universal Service Fund (USF) under Section 254 of the Telecommunications Act of 1996 violates constitutional nondelegation principles. The FCC promotes universal access to telecommunications service via the USF, which is funded by required contributions from covered telecommunications carriers. A private entity, the Universal Service Administrative Company, is charged by the FCC with tasks that include calculating the USF contribution factor. The en banc majority held that the power to levy USF contributions is quintessentially the legislative power to tax. The majority declined to squarely decide whether Congress improperly delegated its taxing power to the FCC without providing the agency with an intelligible principle to guide its discretion, or whether the FCC impermissibly delegated this taxing power to a private entity. Instead, the majority concluded that the combination of Congress's broad delegation to the FCC and the agency's subdelegation to a private entity amounted to a constitutional violation. The majority's decision breaks from rulings of the Sixth and Eleventh Circuits rejecting similar nondelegation challenges. The Supreme Court has agreed to consider the	Sixth Circuit Consumers' Rsch. v. FCC, 67 F.4th 773 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2628 (2024) Eleventh Circuit Consumers' Rsch., Cause Based Com., Inc. v. FCC, 88 F.4th 917 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 2629 (2024)

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			issue in the October 2024 term in *SHLB Coalition. v. Consumers' Research*, No. 24-422.	
Criminal Law & Procedure	D.C. Circuit	United States v. Burwell, 122 F.4th 984 (D.C. Cir. 2024)	The D.C. Circuit held that an offense under the federal bank robbery statute, 18 U.S.C. § 2113(a) does not constitute a "crime of violence" under 18 U.S.C. § 924(c). Section 924(c) establishes heightened penalties for an offender who carries a firearm when committing a "crime of violence," which is defined to include those offenses that necessarily involve "the use, attempted use, or threatened use of physical force." The D.C. Circuit held that Section 2113(a) defines a single crime that can be committed either "by force or violence, or by intimidation . . . [or] extortion." Because extortion need not involve the threat or use of physical force, the court held that Section 2113(a) did not constitute a crime of violence. The court acknowledged disagreement with the First, Second, and Ninth Circuits, which have read Section 2113(a) to set forth multiple criminal offenses, including the crime of bank robbery (which those courts recognized as a crime of violence) and the crime of extortion (which those courts did not recognize as a crime of violence).	First Circuit King v. United States, 965 F.3d 60 (1st Cir. 2020) Second Circuit United States v. Evans, 924 F.3d 21 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 505 (2019) Ninth Circuit United States v. Watson, 881 F.3d 782 (9th Cir. 2018) (per curiam), *cert. denied*, 586 U.S. 878 (2018)
Criminal Law & Procedure	First Circuit	United States v. Trahan, 111 F.4th 185 (1st Cir. 2024), *cert. petition filed*, No. 24-6287 (U.S. Jan. 13, 2025)	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.	Sixth Circuit United States v. Davis, 751 F.3d 769 (6th Cir. 2014) Ninth Circuit United States v. Reinhart, 893 F.3d 606 (9th Cir. 2018)
Criminal Law & Procedure	Second Circuit	United States v. Fernandez, 104 F.4th 420 (2d Cir. 2024), *petition for cert. filed*, No. 24-556 (U.S. Nov. 18, 2024)	The Second Circuit reversed a district court's decision to grant the appellee's motion for compassionate release from custody. Section 3582(c)(1)(A)(i) of Title 18 of the *U.S. Code* authorizes the court to reduce a federal prisoner's term of imprisonment for "extraordinary and compelling reasons." The circuit panel concluded that the lower court abused its discretion in considering the appellee's "potential innocence" claim because potential-innocence claims must be brought under 28 U.S.C. § 2255. The panel further concluded that the disparity between his sentence and his codefendants was not an extraordinary or compelling reason for a sentence reduction, because there were valid justifications for	First Circuit United States v. Trenkler, 47 F.4th 42 (1st Cir. 2022)

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			the disparity in this case. With its decision, the Second Circuit joins the majority of a lopsided circuit split, where only the First Circuit has concluded that a trial court may consider nearly any claim as a possible extraordinary and compelling reason.	
Criminal Law & Procedure	Second Circuit	United States v. Weinlein, 109 F.4th 91 (2d Cir. 2024), *petition for cert. filed*, No. 24-458 (U.S. Oct. 23, 2024)	The Second 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 the Third Circuit, the panel held that retroactive application of the MVRA would not violate the Constitution's Ex Post Facto Clause.	Third Circuit United States v. Norwood, 49 F.4th 189 (3d Cir. 2022)
Criminal Law & Procedure	Third Circuit	United States v. D'Ambrosio, 105 F.4th 533 (3d Cir. 2024)	The Third Circuit held that, where a person properly exhausts all challenges to the legality of a condition of supervised release, a district court may consider legality as grounds for modification in a motion pursuant to 18 U.S.C. § 3583(e)(2). The court acknowledged that the Second, Fifth, Sixth, and Ninth Circuits have found that illegality does not provide a proper ground for such a motion, while the Fourth and Seventh Circuits have permitted challenges based on legality under certain circumstances. The court concluded that sentencing judges who impose conditions of supervised release must be permitted to amend those conditions, balancing needs for finality and flexibility.	Second Circuit United States v. Lussier, 104 F.3d 32 (2d Cir. 1997) Fifth Circuit United States v. Hatten, 167 F.3d 884 (5th Cir. 1999) Sixth Circuit United States v. Faber, 950 F.3d 356 (6th Cir. 2020); Ninth Circuit United States v. Gross, 307 F.3d 1043 (9th Cir. 2002)
Criminal Law & Procedure	Third Circuit	United States v. Rutherford, 120 F.4th 360 (3d Cir. 2024)	The Third Circuit affirmed a lower court's decision that a prisoner had not shown "extraordinary and compelling reasons" to warrant a sentencing reduction under the federal compassionate release statute. The court acknowledged circuit splits on two legal questions relevant to its ruling. Joining the Sixth, Seventh, Eighth, and D.C. Circuits while disagreeing with the First, Fourth, Ninth, and Tenth Circuits, the court held that the First Step Act's change to the mandatory minimum applicable to the statute that the defendant violated could not be considered as an "extraordinary and compelling" reason supporting a sentence reduction, because Congress expressly made the change non-retroactive. Splitting with the Eleventh	First Circuit United States v. Ruvalcaba, 26 F.4th 14 (1st Cir. 2022) Fourth Circuit United States v. McCoy, 981 F.3d 271 (4th Cir. 2020)

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			Circuit, the Third Circuit also held that an appeals court could give retroactive effect to the U.S. Sentencing Commission's 2023 Amended Policy Statement, which provides that non-retroactive changes in law can be considered an extraordinary and compelling reason to grant compassionate release if certain conditions are met. The court nonetheless ruled that the Amended Policy Statement did not support the prisoner's sentencing reduction motion because the Amended Policy Statement was inconsistent with congressional intent expressed in the First Step Act and did not supersede conflicting circuit caselaw.	Ninth Circuit United States v. Chen, 48 F.4th 1092 (9th Cir. 2022) Tenth Circuit United States v. McGee, 992 F.3d 1035 (10th Cir. 2021)
Criminal Law & Procedure	Fourth Circuit	United States v. Richardson, 96 F.4th 659 (4th Cir. 2024)	The Fourth Circuit held that a federal district court has discretion to reduce sentences for both covered and noncovered offenses under Section 404 of the First Step Act if it concludes the sentences function as a package. The court held that the sentencing package doctrine—which authorizes a district court to reconsider any rulings from the initial sentencing following a circuit court order vacating part of a sentence and remanding the case for resentencing—applies to resentencing determinations under the First Step Act. In so doing, the Fourth Circuit joined the Seventh and Eighth Circuits and split with the Second, Tenth, and Eleventh Circuits. Concluding that the district court was in the best position to determine whether the defendant's sentences function as a package, the Fourth Circuit vacated and remanded the case with instruction that the district court could apply the sentencing package doctrine when considering whether to reduce the defendant's sentence.	Third Circuit United States v. Junius, 86 F.4th 1027 (3d Cir. 2023)
Criminal Law & Procedure	Fourth Circuit	United States v. Sanders, 107 F.4th 234 (4th Cir. 2024)	The Fourth Circuit affirmed a defendant's convictions and sentences for various child pornography offenses under 18 U.S.C. §§ 2251 and 2252. The panel rejected, among other things, the defendant's challenge to jury instructions on when the "lascivious exhibition" of a child's intimate areas qualifies as "sexually explicit conduct" for purposes of Sections 2251 and 2552. In so doing, the panel joined nine other circuits that have adopted or endorsed the *Dost* factors—a multifactor test set forth by a federal district court in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986)—to determine what constitutes a "lascivious exhibition," disagreeing with the Seventh Circuit and D.C. Circuit, which have either discouraged the use of, or declined to adopt, the *Dost* factors.	Seventh Circuit United States v. Price, 775 F.3d 828 (7th Cir. 2014)

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Criminal Law & Procedure	Fourth Circuit	Brunson v. Stein, 116 F.4th 301 (4th Cir. 2024), *petition for cert. filed*, No. 24-597 (U.S. Dec. 3, 2024)	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*, 512 U.S. 477 (1994), 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.	Second Circuit Cotton v. Noeth, 96 F.4th 249 (2d Cir. 2024) Ninth Circuit Washington v. L.A. Cnty. Sheriff's Dep't, 833 F.3d 1048 (9th Cir. 2016)
Criminal Law & Procedure	Fourth Circuit	United States v. Mitchell, 120 F.4th 1233 (4th Cir. 2024)	A Fourth Circuit panel issued a ruling on when courts may defer to the U.S. Sentencing Commission's official commentary interpreting the U.S. Sentencing Guidelines—a question that has not only split the federal circuits, but also has sparked disagreement among different appellate panels within the Fourth Circuit itself. In this case, the panel agreed with the Third, Sixth, Ninth, and Eleventh Circuits that, following the Supreme Court's ruling in *Kisor v. Wilkie*, 588 U.S. 558 (2019), courts may defer to the U.S. Sentencing Commission's official commentary interpreting the U.S. Sentencing Guidelines only after the court determines that the relevant Guideline is genuinely ambiguous and the court has exhausted all traditional tools of construction. The panel acknowledged a split with the Second, Fifth, Seventh, Eighth, and Tenth Circuits, which have all held that the Supreme Court's pre-*Kisor* ruling in *Stinson v. United States*, 508 U.S. 36 (1993), remains controlling, under which the Commission's official commentary is binding unless it is plainly erroneous, inconsistent with the Guideline provision itself, or violates the Constitution. The panel also acknowledged an apparent conflict between prior Fourth Circuit panels, with one panel deciding that *Kisor* was controlling and another panel ruling shortly thereafter that *Stinson* remained dispositive. The panel here held that, to the extent that the prior two panels were in conflict, the first-decided case was controlling on future circuit panels.	Second Circuit United States v. Rainford, 110 F.4th 455 (2d Cir. 2024) Fifth Circuit United States v. Vargas, 74 F.4th 673 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 828 (2024) Seventh Circuit United States v. White, 97 F.4th 532 (7th Cir. 2024), *cert. denied sub nom.* Keith v. United States, No. 24-5031 (U.S. Oct. 7, 2024) Eighth Circuit United States v. Donath, 107 F.4th 830 (8th Cir. 2024), *petition for cert. filed*, No. 24-6202 (U.S. Dec 26, 2024)

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				Tenth Circuit United States v. Maloid, 71 F.4th 795 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1035 (2024)
Criminal Law & Procedure	Fifth Circuit	United States v. Duffey, 92 F.4th 304 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2713 (2024)	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 published opinions from the Third 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.	Third Circuit United States v. Mitchell, 38 F.4th 382 (3d Cir. 2022) Ninth Circuit United States v. Merrell, 37 F.4th 571 (9th Cir. 2022)
Criminal Law & Procedure	Fifth Circuit	United States v. Smith, 110 F.4th 817 (5th Cir. 2024)	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.	Fourth Circuit United States v. Chatrie, 107 F.4th 319 (4th Cir. 2024), *reh'g en banc granted*, No. 22-4489 (4th Cir. Nov. 1, 2024)
Criminal Law & Procedure	Fifth Circuit	United States v. Minor, 121 F.4th 1085 (5th Cir. 2024)	A divided Fifth Circuit held that the lower court inappropriately applied the U.S. Sentencing Guidelines' career-offender sentencing enhancement to a criminal defendant. A defendant qualifies for a sentencing enhancement under the Guidelines if the defendant "has at least two prior felony convictions of ... a controlled substance offense," and courts in the Fifth Circuit look to the definition of "controlled substance" in the Controlled Substances Act (CSA) to determine the offenses covered by the enhancement. The lower court had determined the defendant was	Third Circuit United States v. Lewis, 58 F.4th 764 (3d Cir.), *cert. denied*, 144 S. Ct. 489 (2023) Sixth Circuit United States v. Clark, 46

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			subject to the enhancement based on three prior federal marijuana-related offenses more than a decade earlier. In its sentencing of the defendant, the lower court had reasoned that even if the defendant's prior marijuana offenses would not be considered "controlled substance" offenses after changes made by a 2018 amendment to the CSA, those offenses would have satisfied the CSA definition at the time of the convictions and therefore qualified as controlled substances offenses. A majority of the Fifth Circuit panel disagreed, holding that the sentencing court needed to determine whether those earlier convictions would qualify as controlled substance offenses under the CSA at the time of the defendant's sentencing for his most recent offense. The majority observed that its approach was consistent with the views of several circuits, while acknowledging that the Third, Sixth, and Eighth Circuits do not follow the time-of-current sentencing approach.	F.4th 404 (6th Cir. 2022), *cert. denied*, 144 S. Ct. 107 (2023) Eighth Circuit United States v. Henderson, 11 F.4th 713 (8th Cir. 2021), *cert. denied*,142 S. Ct. 1696 (2022)
Criminal Law & Procedure	Fifth Circuit	United States v. Wilkerson, 124 F.4th 361 (5th Cir. 2024)	The Fifth 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 his conduct did not involve the "lascivious exhibition" of a child's intimate areas necessary to qualify as prohibited "sexually explicit conduct" under Sections 2251 and 2552A. In so doing, the panel joined several other circuits in declining to adopt the D.C. Circuit's narrower interpretation of "lascivious exhibition," and further held that intervening Supreme Court caselaw had not abrogated controlling Fifth Circuit precedent.	D.C. Circuit United States v. Hillie, 39 F.4th 674 (D.C. Cir. 2022)
Criminal Law & Procedure	Seventh Circuit	United States v. Thompson, 89 F.4th 1010 (7th Cir. 2024), *cert. granted*, No. 23-1095, (U.S. Oct. 4, 2024)	The Seventh Circuit upheld a defendant's conviction under 18 U.S.C. § 1014, which prohibits individuals from making "false statements" to influence a financial institution with respect to a loan, when the defendant's statements were true but misleading. When the Federal Deposit Insurance Corporation (FDIC) sought to collect the debt owed by the defendant to a defunct lending institution, the defendant contested the total amount the FDIC stated that he owed and repeatedly declared that he had "borrowed $110,000." Although it was technically true that the defendant borrowed $110,000 from the lender on one occasion, he failed to mention that he owed the lending institution over twice that amount because of additional loans he had taken. Applying circuit precedent, the circuit panel held, in upholding the conviction, that Section 1014's prohibition on false statements includes misleading representations. The panel acknowledged a split with the Sixth Circuit, which has held that Section 1014 does not criminalize misleading statements. The Supreme Court has agreed to review the Seventh Circuit's decision in its October 2024 term.	Sixth Circuit United States v. Kurlemann, 736 F.3d 439 (6th Cir. 2013)

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Criminal Law & Procedure	Seventh Circuit	United States v. White, 97 F.4th 532 (7th Cir. 2024), *cert. denied*, No. 24-5031 (U.S. Oct. 7, 2024)	Citing circuit precedent, the Seventh Circuit held that under the Supreme Court's ruling in *Stinson v. United States*, the U.S. Sentencing Commission's official commentary interpreting the Sentencing Guidelines is binding, unless it is based on a plainly erroneous reading or is inconsistent with the relevant Sentencing Guidelines provision, or violates the Constitution. Five other circuits have joined the Seventh Circuit in this view. An equal number of circuits have disagreed, deciding that the Supreme Court's post-*Stinson* decision in *Kisor v. Wilkie* means that deference is owed to the Commission's commentary only when the Guideline provision the commentary interprets is ambiguous.	Third Circuit United States v. Nasir, 982 F.3d 144 (3d Cir. 2020) (en banc), *vacated on other grounds*, 142 S. Ct. 56 (2021) Fourth Circuit United States v. Campbell, 22 F.4th 438 (4th Cir. 2022) Sixth Circuit United States v. Havis, 927 F.3d 382 (6th Cir. 2019) (en banc) (per ctm) Ninth Circuit United States v. Castillo, 69 F.4th 648 (9th Cir. 2023) Eleventh Circuit United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc) D.C. Circuit United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018)
Criminal Law & Procedure	Seventh Circuit	United States v. Johnson, 104 F.4th 662 (7th Cir. 2024) (per curiam)	The Seventh Circuit, in a per curiam decision, concluded that it remains appropriate to defer to the commentary of the U.S. Sentencing Guidelines in determining a sentence for a criminal defendant, confirming a prior ruling that such commentary can be relied upon. The defendant argued that the Supreme Court's decision in *Kisor v. Wilkie* holding that commentary cannot be relied upon where it is inconsistent with the provisions of law it purports to interpret upended an earlier, general principle that such commentary may be entitled to deference. Reaffirming prior circuit precedent while acknowledging a growing circuit split on the matter, the panel interpreted *Kisor* as merely prohibiting deference to	Third Circuit United States v. Nasir, 17 F.4th 459 (3d Cir. 2021) (en banc) Sixth Circuit United States v. Riccardi, 989 F.3d 476 (6th Cir. 2021).

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			commentary where it violates the Constitution or federal law or is inconsistent with, or a plainly erroneous reading of, the guideline. The circuit panel affirmed the district court's sentence and, in particular, its reliance on commentary in calculating the total amount of loss attributable to the defendant's fraud.	Ninth Circuit United States v. Castillo, 69 F.4th 648 (9th Cir. 2023) Eleventh Circuit United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc)
Criminal Law & Procedure	Seventh Circuit	United States v. Ponle, 110 F.4th 958 (7th Cir. 2024)	Citing circuit precedent, the Seventh Circuit held that under the Supreme Court's ruling in *Stinson v. United States*, the U.S. 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.	Third Circuit United States v. Nasir, 982 F.3d 144 (3d Cir. 2020), *vacated on other grounds*, 142 S. Ct. 56 (2021) Sixth Circuit United States v. Riccardi, 989 F.3d 476 (6th Cir. 2021) Ninth Circuit United States v. Castillo, 69 F.4th 648 (9th Cir. 2023) Eleventh Circuit United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc)
Criminal Law & Procedure	Seventh Circuit	Yang v. United States, 114 F.4th 899 (7th Cir. 2024), *petition for cert. filed*, No. 24-704 (U.S. Jan 02, 2025)	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.	Fourth Circuit United States v. Basham, 789 F.3d 358 (4th Cir. 2015), *cert. denied*, 577 U.S. 1230 (2016) Sixth Circuit Hodges v. Colson, 727 F.3d 517 (6th Cir. 2013), *cert. denied*, 575 U.S. 915 (2015)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
				Eighth Circuit Lyons v. Luebbers, 403 F.3d 585 (8th Cir. 2005) Ninth Circuit Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996) Tenth Circuit Lay v. Royal, 860 F.3d 1307 (10th Cir. 2017), *cert. denied*, 584 U.S. 936 (2018) Eleventh Circuit Raheem v. GDCP Warden, 995 F.3d 895 (11th Cir. 2021), *cert. denied*, 142 S.Ct. 1234 (2022)
Criminal Law & Procedure	Seventh Circuit	United States v. Porter, 114 F.4th 931 (7th Cir. 2024)	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 2552A. In so doing, the panel joined several other circuits in declining to adopt the D.C. Circuit's narrower interpretation of "lascivious exhibition."	D.C. Circuit United States v. Hillie, 14 F.4th 677 (D.C. Cir. 2021), *on reh'g*, 39 F.4th 674 (D.C. Cir. 2022)
Criminal Law & Procedure	Eighth Circuit	United States v. Ellingburg, 113 F.4th 839 (8th Cir. 2024) (per curiam), *petition for cert. filed*, No. 24-482 (U.S. Oct. 30, 2024)	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.	First Circuit United States v. Tull-Abreu, 921 F.3d 294 (1st Cir. 2019), *cert. denied*, 140 S.Ct. 424 (2019) Second Circuit Gonzalez v. United States, 792 F.3d 232 (2d Cir. 2015)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
				Third Circuit United States v. Leahy, 438 F.3d 328 (3d Cir. 2006), *cert. denied*, 549 U.S. 1071 (2006) Fourth Circuit United States v. Grant, 715 F.3d 552 (4th Cir. 2013) Fifth Circuit United States v. Adams, 363 F.3d 363 (5th Cir. 2004) Sixth Circuit United States v. Sosebee, 419 F.3d 451 (6th Cir. 2005) Ninth Circuit United States v. Lillard, 935 F.3d 827 (9th Cir. 2019)
Criminal Law & Procedure	Ninth Circuit	Hebrard v. Nofziger, 90 F.4th 1000 (9th Cir. 2024)	A divided Ninth Circuit affirmed a district court's sua sponte dismissal, pursuant to the Supreme Court's decision in *Heck v. Humphrey*, of a state prisoner's suit under 42 U.S.C. § 1983 against prison officials for alleged due process violations arising in a disciplinary hearing. Under *Heck*, a district court must dismiss a state prisoner's suit seeking damages under Section 1983 if a judgment in the prisoner's favor would necessarily imply the invalidity of the prisoner's conviction or sentence, unless the prisoner had successfully challenged the sentence already in habeas proceedings. Here, the prisoner sought expungement of his disciplinary convictions as well as damages for the sanctions imposed by the prison official other than the revocation of earned-time credit; he sought no relief for this last sanction. Disagreeing with the Second Circuit's decision in a similar case, the Ninth Circuit majority held that the prisoner's claim was barred by *Heck* despite his decision not to directly challenge the imposition of one of the disciplinary sanctions. The majority reasoned that the prisoner's request for expungement of his disciplinary convictions would necessarily invalidate all the underlying sanctions, including the earned-time credit	Second Circuit Peralta v. Vasquez, 467 F.3d 98 (2d Cir. 2006), *cert. denied*, 551 U.S. 1145 (2007)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			sanction that lengthened his sentence, and therefore the case fell under *Heck*'s scope. Because the prisoner had not brought a successful habeas challenge first, the court held that it must dismiss the suit on its own.	
Criminal Law & Procedure	Ninth Circuit	United States v. Solakyan, 119 F.4th 575 (9th Cir. 2024)	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.	Eighth Circuit Miss. River Revival, Inc. v. City of Minneapolis, 319 F.3d 1013 (8th Cir. 2003)
Criminal Law & Procedure	Eleventh Circuit	United States v. Hernandez, 107 F.4th 965 (11th Cir. 2024)	A divided Eleventh Circuit deepened a circuit split as to when Section 403 of the First Step Act—which generally provides for reduced sentencing for multiple "crime of violence" violations under 18 U.S.C. § 924(c)—applies to "pending" cases—that is, cases in which the offense occurred pre-enactment but the sentence had not been "imposed" by the date of enactment. The Eleventh Circuit joined the Fifth and Sixth Circuits in holding that post-enactment vacatur of a pre-enactment sentence counts as an "imposed" sentence, disqualifying a defendant from Section 403(b) resentencing. The panel split with the Third and Ninth Circuits, which have held that a defendant is eligible for Section 403(b) resentencing in those situations. The Supreme Court agreed to review this issue in its October 2024 term in the consolidated cases of *Hewitt v. United States*, No. 23-1002, and *Duffey v. United States*, No. 23-1150.	Third Circuit United States v. Mitchell, 38 F.4th 382 (3d Cir. 2022) Seventh Circuit United States v. Uriarte, 975 F.3d 596 (7th Cir. 2020) Ninth Circuit United States v. Merrell, 37 F.4th 571 (9th Cir. 2022)
Criminal Law & Procedure	Eleventh Circuit	Boyd v. Sec'y, Dep't of Corrs., 114 F.4th 1232 (11th Cir. 2024)	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.	Second Circuit Whab v. United States, 408 F.3d 116 (2d Cir. 2005) Third Circuit United States v. Santarelli, 929 F.3d 95 (3d Cir. 2019)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Criminal Law & Procedure	Eleventh Circuit	United States v. Armstrong, 122 F.4th 1278 (11th Cir. 2024)	Days after the D.C. Circuit decision in *United States v. Burwell*, the Eleventh Circuit issued an opinion involving the meaning of the federal bank robbery statute. A divided Eleventh Circuit panel joined those courts that have treated 18 U.S.C. § 2113(a) as divisible into separate offenses relating to bank robbery and bank extortion. (The panel did not reference the contrary position taken by the D.C. Circuit in *Burwell*.) The panel majority upheld the defendant's sentencing enhancement under 18 U.S.C. § 924(c) for brandishing a firearm in the commission of a crime of violence after concluding that the defendant's multiple convictions under Section 2113(a) met the crime-of-violence definition. The majority ruled that the defendant's conviction for attempted bank robbery was a crime of violence, joining those circuits that have read the offense to involve the actual or threatened use of force and violence or intimidation while attempting to take money from a bank. The majority disagreed with the Second, Fourth, Sixth, and Ninth Circuits, which have not read Section 2113(c) to require the actual or threatened use of force to sustain a conviction for attempted bank robbery.	Second Circuit United States v. Stallworth, 543 F.2d 1038 (2d Cir. 1976) Fourth Circuit United States v. McFadden, 739 F.2d 149 (4th Cir. 1984), *cert. denied*, 469 U.S. 920 (1984) Sixth Circuit United States v. Wesley, 417 F.3d 612 (6th Cir. 2005) Ninth Circuit United States v. Moore, 921 F.2d 207 (9th Cir. 1990)
Education	Eleventh Circuit	Joseph v. Bd. of Regents, 121 F.4th 855 (11th Cir. 2024)	In consolidated cases, the Eleventh Circuit held that Title IX of the Education Amendments of 1972, which generally bars sex discrimination at educational institutions receiving federal funding, does not confer on employees an implied right to bring suit against those institutions for sex discrimination in the workplace. The panel described its determination as consistent with the Supreme Court's 2001 decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), which the panel characterized as recognizing that, where Congress has not expressly created a private right of action to enforce a federal statute, courts may only find an implied right when congressional intent is clear. The panel found no indication that Congress intended to create such a right. The panel noted that Title IX's antidiscrimination protections were focused on students, not employees, and concluded that the statute was not intended to supplant Title VII of the Civil Rights Act of 1964, which specifically addresses sex discrimination in the workplace and expressly provides a private right of action to employees. The court also reasoned that the Supreme Court's 2005 ruling in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), which held that Title IX gives rise to an implied private right of action for retaliation when an individual complains of sex discrimination, does not extend to nonretaliatory employment discrimination claims. The Eleventh Circuit's decision is generally consistent with rulings by the Fifth and Seventh Circuits limiting the availability of employment lawsuits under Title IX, but	First Circuit Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) Second Circuit Vengalattore v. Cornell Univ., 36 F.4th 87 (2d Cir. 2022) Third Circuit Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545 (3d Cir. 2017) Fourth Circuit Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203 (4th Cir. 1994)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			diverges from decisions by the First, Second, Third, Fourth, Eighth, and Tenth Circuits that have recognized nonretaliatory employment discrimination claims under Title IX.	Eighth Circuit O'Connor v. Peru State Coll., 781 F.2d 632 (8th Cir. 1986) Tenth Circuit Mabry v. State Bd. of Cmty. Colls. & Occupational Educ., 813 F.2d 311 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987)
Election Law	Fifth Circuit	Petteway v. Galveston Cnty., 111 F.4th 596 (5th Cir. 2024)	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.	Eleventh Circuit Concerned Citizens v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524 (11th Cir. 1990)
Employee Benefits	Eleventh Circuit	Pizarro v. Home Depot, Inc., 111 F.4th 1165 (11th Cir. 2024), *petition for cert. filed*, No. 24-620 (U.S. Dec. 6, 2024)	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.	First Circuit Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018), *cert. denied*, 140 S.Ct. 911 (2020) Fourth Circuit Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014), *cert. denied*, 576 U.S. 1054 (2015)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Environmental Law	D.C. Circuit	Env't Comm. v. EPA, 94 F.4th 77 (D.C. Cir. 2024)	A divided D.C. Circuit panel partially vacated a 2015 Environmental Protection Agency (EPA) rule directing most states to revise their state implementation plans (SIPs) under the Clean Air Act (CAA) so that pollutants emitted during periods when a facility starts up, shuts down, or malfunctions (SSM periods) would not be exempted from state emission requirements. To begin, the circuit court held that the EPA could call for SIP revisions if it concluded that the SIPs were substantially inadequate under the CAA without having to first determine whether the SIPs had adverse effects. The panel majority ruled, however, that the EPA did not show that the CAA required states to apply uniform standards for SSM and non-SSM emissions. The majority vacated portions of the EPA rule directing revision of SIPs containing either automatic or discretionary exemptions for SSM emissions or that provided an affirmative defense under state law to a facility that failed to adhere to state emission standards because of SSM emissions. The court upheld the rule's direction that states not limit state courts' discretion to impose civil monetary penalties on entities found to violate SIP requirements. Splitting with the Fifth Circuit, the court held that this liability limitation conflicted with the CAA.	Fifth Circuit Luminant Generation Co. v. EPA, 714 F.3d 841 (5th Cir. 2013), 571 U.S. 828 (2013)
Environmental Law	Fifth Circuit	Sierra Club v. La. Dep't of Env't Quality, 100 F.4th 555 (5th Cir. 2024)	The Fifth Circuit upheld Louisiana's decision to issue a pre-construction permit for a liquid natural gas export facility, rejecting the petitioner's arguments that the decision was arbitrary and capricious because the facility's emissions would exceed national ambient air quality standards and the permit did not require the facility to use best available control technologies to limit emissions. In so doing, the panel widened a circuit split on the appropriate standard of review that federal courts should employ when reviewing state agency action. The panel joined the Third Circuit in holding that the state agency should be afforded the same deference they would receive under state law, expressing disagreement with the Fourth Circuit's application of the Administrative Procedure Act's arbitrary and capricious standard to state agency action.	Fourth Circuit Appalachian Voices v. State Water Control Bd., 912 F.3d 746 (4th Cir. 2019)
Environmental Law	Sixth Circuit	Kentucky v. EPA, 123 F.4th 447 (6th Cir. 2024)	The Sixth Circuit vacated the EPA's disapproval of Kentucky's State Implementation Plan (SIP) for meeting EPA's air quality standards for emissions of ozone-forming gases under the CAA. The EPA's disapproval of Kentucky's SIP was part of a final rule disapproving the SIPs of 21 states. The Sixth Circuit first considered whether it was the appropriate court to review the challenge under the CAA's judicial review provision. That provision provides that a challenge to a "locally or regionally applicable" final action by the EPA should be filed in the appropriate regional circuit, while a challenge to a "nationally applicable" final action that may only be	Tenth Circuit Oklahoma v. EPA, 93 F.4th 1262 (10th Cir. 2024), *cert. granted*, No. 23-1067 (U.S. Oct. 21, 2024)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			reviewed in the D.C. Circuit. Joining several other courts but splitting with the Tenth Circuit, the Sixth Circuit panel held that a challenge to the denial of an individual SIP, even if included in a rule denying multiple SIPs, involves a "locally or regionally applicable" final action reviewable in the state's regional circuit. (The Supreme Court may resolve the circuit split over this issue later this term when it reviews the Tenth Circuit's ruling.) On the merits, the circuit panel concluded that the EPA acted arbitrarily and capriciously when it denied Kentucky's SIP using different emissions modeling and ozone thresholds than had been used in earlier agency guidance documents that Kentucky relied on when developing its SIP.	
Environmental Law	Ninth Circuit	Puget Soundkeeper All. v. Port of Tacoma, 104 F.4th 95 (9th Cir. 2024), *petition for cert. filed*, No. 24-350 (U.S. Sept. 27, 2024)	The Ninth Circuit reversed a district court holding regarding the scope of Industrial Stormwater General Permits (ISGP) issued by Washington State pursuant to its delegated authority under the Clean Water Act (CWA). An environmental organization alleged that a port failed to abide by the state permitting requirements related to a cargo terminal area. Under the federal regulations governing the National Pollutant Discharge Elimination System (NPDES) program, a permit would not have been required for stormwater discharges at the terminal, because that section of the port was not involved in specific categories of operations. The state's permitting regulations, however, imposed more stringent requirements. The court held that the state's general stormwater discharge permit for industrial facilities applies across the entirety of each covered facility, including those portions that would not be required by the NPDES program. Acknowledging a circuit split, the court also rejected arguments that a citizen suit could not proceed under the CWA where the state regulation exceeded the requirements of the federal regulations.	Second Circuit Atl. States Legal Found. v. Eastman Kodak, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 513 U.S. 811 (1994)
Environmental Law	Tenth Circuit	Oklahoma v. EPA, 93 F.4th 1262 (10th Cir. 2024), *cert. granted*, No. 23-1068 (U.S. Oct. 21, 2024)	The Tenth Circuit granted a motion to transfer to the D.C. Circuit petitions challenging an EPA rule disapproving 21 SIPs under the CAA. Acknowledging disagreement with rulings by other courts, including published decisions by the Fourth and Sixth Circuits, the Tenth Circuit held that EPA's rule is a "nationally applicable" final action, rather than a "locally or regionally applicable" final action, and therefore the CAA's judicial review provision permits review of the rule only in the D.C. Circuit. Although the petitions sought review only of EPA's disapproval of two states' plans, the court ruled that the nature of the agency's action, rather than the scope of the petitioners' challenges, was the appropriate basis for determining the appropriate venue. The Supreme Court has agreed to review the case in the October 2024 term.	Fourth Circuit West Virginia v. EPA, 90 F.4th 323 (4th Cir. 2024) Sixth Circuit Kentucky v. EPA, 123 F.4th 447 (6th Cir. 2024)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Environmental Law	Eleventh Circuit	Hunt Refin. Co. v. EPA, 90 F.4th 1107 (11th Cir. 2024)	The Eleventh Circuit held that the D.C. Circuit was the appropriate venue for a small refinery's challenge to the EPA's denial of its requested exemption from the Renewable Fuel Standard (RFS) requirements of the CAA. The CAA's judicial review provision, 42 U.S.C. § 7607(b)(1), makes the D.C. Circuit the appropriate venue for challenges to (1) "nationally applicable" final actions by the EPA under the CAA and (2) "locally or regionally applicable" final actions "based on a determination of nationwide scope or effect" when the EPA publishes notice of that determination. The Eleventh Circuit held that the denial of the refinery's requested exemption was part of a nationally applicable final action by the EPA, resulting from the EPA's reinterpretation of the governing statute and new analytical approach to assessing eligibility for exemption based on disproportionate economic hardship from compliance with the RFS. Even if the denial of the exemption request was a "locally or regionally applicable" final action, the court held that the D.C. Circuit was the appropriate venue because the EPA published its findings that the exemption denial was based on a determination of nationwide effect. The panel observed that four other circuits agreed that the D.C. Circuit was the appropriate venue in similar cases, with only the Fifth Circuit deciding otherwise.	Fifth Circuit Calumet Shreveport Refin., LLC v. EPA, 86 F.4th 1121 (5th Cir. 2023), cert. granted, No. 23-1229 (Oct. 21, 2024)
Firearms	Third Circuit	Fed. Law Enf't Officers Ass'n v. Att'y Gen., 93 F.4th 122 (3d Cir. 2024)	Joining the D.C. Circuit and splitting with the Fourth Circuit, the Third Circuit concluded that the Law Enforcement Officers Safety Act of 2004 (LEOSA) provides certain retired federal and state law enforcement officers with an enforceable right to carry a concealed firearm that preempts conflicting state restrictions. Disagreeing with the Fourth Circuit, the court reasoned that LEOSA reflects Congress's clear and unambiguous intent to confer this right upon retired officers because the statute focused on the individual right-holder. The court also determined that LEOSA expressly preempts a New Jersey law to the extent that it imposes additional conditions or restrictions upon a qualified retired law enforcement officer's ability to carry a concealed firearm.	Fourth Circuit Carey v. Throwe, 957 F.3d 468 (4th Cir. 2020), *cert. denied*, 141 S.Ct. 1054
Firearms	Sixth Circuit	United States v. Williams, 113 F.4th 637 (6th Cir. 2024)	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	Seventh Circuit United States v. Gay, 98 F.4th 843 (7th Cir. 2024) Tenth Circuit Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023), *cert. granted*, 144 S. Ct. 2708 (2024)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			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.	
FOIA	D.C. Circuit	Am. Oversight v. U.S. Dep't of Health and Human Servs., 101 F.4th 909 (D.C. Cir. 2024)	A divided D.C. Circuit panel held that 2017 communications between executive branch agencies and Members of Congress and their staff regarding possible legislation to repeal the Affordable Care Act were not "intra-agency memorandums or letters" exempted from FOIA's disclosure requirements. The D.C. Circuit and some other circuits have endorsed the "consultant corollary" doctrine, under which FOIA's exemption of certain "intra-agency" communications also protects certain materials that have been supplied to an agency by external consultants and used by the agency in its deliberative processes. The circuit panel decided that the Supreme Court had narrowed the application of the doctrine so that it extends at most to documents shared with an agency by outside persons who have no independent stake in the matter being considered. (The panel majority observed that the Sixth Circuit had concluded that the Supreme Court had foreclosed application of any form of the consultant corollary doctrine.) The D.C. Circuit panel held that Members and their staff represented their own interests when communicating with the agencies on the potential health care legislation, so the FOIA exemption did not apply. The court explicitly declined to decide whether Members and their staff could ever satisfy the consultant corollary doctrine.	Sixth Circuit Lucaj v. FBI, 852 F.3d 541 (6th Cir. 2017)
FOIA	Ninth Circuit	Corbett v. TSA, 116 F.4th 1024 (9th Cir. 2024)	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.	Fifth Circuit Voinche v. FBI, 999 F.2d 962 (5th Cir. 1993)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Food & Drug	Fifth Circuit	Wages & White Lion Invs., LLC v. FDA, 90 F.4th 357 (5th Cir. 2024) (en banc), *cert. granted*, 144 S. Ct. 2714 (2024)	Recognizing a split from other circuits, a divided en banc Fifth Circuit held that the Food and Drug Administration (FDA) acted arbitrarily and capriciously when it denied electronic cigarette manufacturers' premarket tobacco applications (PMTAs) to sell flavored tobacco products. The Fifth Circuit held that (1) FDA did not provide adequate notice of how the PMTAs would be evaluated; (2) FDA failed to acknowledge and explain its change in position from earlier agency guidance when it denied the PMTAs; (3) FDA failed to consider the applicants' good-faith reliance on the agency's prior guidance; and (4) FDA relied on post hoc rationalizations in defending its denial of the PMTAs. The Fifth Circuit joins the Eleventh Circuit, which reviewed similar PMTA denials, in holding FDA's actions to be arbitrary and capricious and splits with the Second, Third, Fourth, Seventh, and Ninth Circuits, which previously upheld FDA's actions in denying other similar electronic cigarette PMTAs. The Supreme Court subsequently agreed to review the case in its October 2024 term.	Second Circuit Magellan Techns., Inc. v. FDA, 70 F.4th 622 (2d Cir. 2023), *petition for cert. filed*, No. 23-799 (U.S. Jan 24, 2024) Third Circuit Liquid Labs LLC v. FDA, 52 F.4th 533 (3d Cir. 2022)) Fourth Circuit Avail Vapor, LLC v. FDA, 55 F.4th 409 (4th Cir. 2022), *cert. denied*, 144 S. Ct. 277 (2023) Seventh Circuit Gripum, LLC v. FDA, 47 F.4th 553 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 2458 (2023) Ninth Circuit Lotus Vaping Techs., LLC v. FDA, 73 F.4th 657 (9th Cir. 2023), *petition for cert. filed*, No. 23-871 (U.S. Feb 13, 2024) D.C. Circuit Prohibition Juice Co. v. FDA, 45 F.4th 8 (D.C. Cir. 2022).
Food & Drug	Tenth Circuit	Electric Clouds, Inc. v. FDA, 94 F.4th 950 (10th Cir. 2024)	The Tenth Circuit denied two e-cigarette liquid manufacturers' petitions for review of the FDA's rejection of their applications to market flavored e-cigarette liquids. Joining several other circuits but breaking with the Fifth Circuit, the court rejected arguments that various statements by FDA about the application process were misleading and held that FDA did not act arbitrarily and capriciously in rejecting the e-cigarette liquid	Fifth Circuit Wages & White Lion Invs., LLC v. FDA, 90 F.4th 357 (5th Cir. 2024) (en banc), *cert.*

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			applications. Again joining with several other circuits but breaking with the Fifth and Eleventh Circuits, the court further held that any error made in overlooking the manufacturers' marketing plans was harmless. The Supreme Court may resolve the circuit split this term in *FDA v. Wages & White Lion Investments., LLC*, No. 23-1038.	*granted*, 144 S. Ct. 2714 (2024) Eleventh Circuit Bidi Vapor v. FDA, 47 F.4th 1191 (11th Cir. 2022)
Health	Seventh Circuit	K.C. v. Individual Members of Med. Licensing Bd., 121 F.4th 604 (7th Cir. 2024)	A divided Seventh Circuit panel vacated a preliminary injunction that blocked enforcement of an Indiana law barring physicians from treating gender dysphoria in minors by altering a child's sex characteristics through medication or surgery or aiding and abetting such treatment. On the merits, the majority held that the plaintiffs were unlikely to succeed in their arguments that the law violated parents' constitutional due process rights to control their children's medical care, or that the law violated physicians' First Amendment rights by limiting their ability to provide minor patients with advice on gender transition procedures. The panel majority also held that the plaintiffs were unlikely to show that the law violated constitutional equal protection principles. Joining the Sixth and Eleventh Circuits, but splitting with the Eighth Circuit, which all reviewed similar state laws, the majority held that the ban on certain medical treatments for minors did not merit heightened constitutional scrutiny. This term the Supreme Court is considering *United States v. Skrmetti*, No. 23-477, which asks whether state restrictions on certain medical treatments for gender dysphoria in minors are constitutional.	Eighth Circuit Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022)
Health	Tenth Circuit	Chiles v. Salazar, 116 F.4th 1178 (10th Cir. 2024), *petition for cert. filed*, No. 24-539 (U.S. Nov. 13, 2024)	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.	Eleventh Circuit Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Immigration	Second Circuit	KC v. Garland, 108 F.4th 130 (2d Cir. 2024)	The Second Circuit upheld immigration adjudicatory authorities' determination that an alien petitioner was ineligible for asylum and related forms of relief from removal. The court held that the petitioner had not shown that immigration authorities erred in deciding that he had not established past persecution or a well-founded fear of persecution if returned to his home country. In so doing, the circuit panel joined most reviewing courts, but split with the Fourth Circuit, in holding that the receipt of death threats is not a form of persecution per se.	Fourth Circuit Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015)
Immigration	Third Circuit	Carlos Alberto Inestroza-Tosta v. Att'y Gen., 105 F.4th 499 (3d Cir. 2024)	The Third Circuit ruled on the meaning and effect of the 30-day deadline for seeking judicial review of a final order of removal under 8 U.S.C. § 1252(b)(1) and, in so doing, contributed to circuit splits on two different issues. The panel held that Section 1252(b)(1)'s 30-day deadline is a claims-processing rule subject to equitable tolling. While circuit precedent previously recognized this deadline to be an absolute, jurisdictional rule, the panel decided that the Supreme Court's decision in *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), which interpreted a separate but similar provision as a nonjurisdictional claims-processing rule, abrogated this precedent. The Third Circuit's holding that Section 1252(b)(1) is a claims-processing rule is consistent with the views of the Fifth and Ninth Circuits but contrary to decisions by the Fourth and Seventh Circuits. The Third Circuit also widened a circuit split over when an order of removal is "final" under Section 1252(b), joining the majority of reviewing circuits in holding that an order is not final until a decision is made on the alien's request for withholding of removal. The panel acknowledged a split with some circuits that have held that, where an alien is subject to a reinstated order of removal after unlawfully returning to the United States, the 30-day clock begins on the date of reinstatement regardless of whether withholding of removal is requested.	Fourth Circuit Salgado v. Garland, 69 F.4th 179 (4th Cir. 2023). Seventh Circuit F.J.A.P. v. Garland, 94 F.4th 620 (7th Cir. 2024)
Immigration	Third Circuit	Castillo v. Att'y Gen. of United States, 109 F.4th 127 (3d Cir. 2024)	A divided Third Circuit panel ordered the transfer to the Sixth Circuit of an alien petitioner's challenge to decisions made in his immigration removal proceeding, which had been held remotely. The petitioner's notice to appear at the proceeding was filed and docketed in an immigration court located within the Sixth Circuit, and the subsequent remote proceeding was conducted by an immigration judge physically present in a location within the Fourth Circuit, while the petitioner attended the proceeding remotely from a location in the Third Circuit. The Third Circuit joined those circuits that have held that immigration "proceedings" take place where they initially began unless there is a formal change in venue. Because that formal change had not occurred here, the circuit panel reasoned that the petitioner's challenge should properly have	Fourth Circuit Herrera-Alcala v. Garland, 39 F.4th 233 (4th Cir. 2022) Tenth Circuit Yang You Lee v. Lynch, 791 F.3d 1261 (10th Cir. 2015)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			been brought in the Sixth Circuit. The panel acknowledged a split with the Fourth and Tenth Circuits, which have held that venue is proper in the location where the immigration judge is located.	
Immigration	Fourth Circuit	Diaz-Hernandez v. Garland, 104 F.4th 465 (4th Cir. 2024), *cert denied*, No. 24-5462 (U.S. Jan. 13, 2025)	The Fourth Circuit affirmed a Board of Immigration Appeals (BIA) decision upholding the denial of applications for asylum and withholding of removal. The court agreed with the BIA that the petitioners, a brother and sister, failed to show persecution on account of a protected ground, including their membership in a particular social group, in this case defined as "the children of their mother." The court held that the petitioners could not establish the required nexus to a protected ground because they failed to show that their family relationship was "one *central* reason" for their feared persecution. In reaching this conclusion, the court rejected the petitioners' contention that the "one central reason" standard for proving a nexus does not apply to withholding of removal actions, thereby adding to a circuit split on whether the nexus standard in the withholding statute is materially different (and, in the petitioners' view, less onerous) than that found in the asylum statute.	Sixth Circuit Guzman-Vazquez v. Barr, 959 F.3d 253 (6th Cir. 2020) Ninth Circuit Barajas-Romero v. Lynch, 846 F.3d 351 (9th Cir. 2017)
Immigration	Fourth Circuit	Lovo v. Miller, 107 F.4th 199 (4th Cir. 2024)	A divided Fourth Circuit panel upheld the dismissal of a suit brought by a U.S. citizen and her alien spouse alleging that U.S. Citizenship and Immigration Services (USCIS) unreasonably delayed adjudicating the spouse's application to waive his period of unlawful presence in the United States. Disagreeing with USCIS and at least one other circuit, the majority held that 8 U.S.C. § 1182(a)(9)(B)(v), which bars judicial review of "a decision or action" regarding unlawful presence, does not bar review of claims based on agency inaction or delay. Still, the majority held that neither governing statutes nor agency regulations required USCIS to adjudicate a waiver application and, thus, that the court lacked jurisdiction over the plaintiffs' claims.	Seventh Circuit Soni v. Jaddou, 103 F.4th 1271 (7th Cir. 2024)
Immigration	Fifth Circuit	United States v. Hernandez Velasquez, 120 F.4th 1294 (5th Cir. 2024)	The Fifth Circuit affirmed an alien's conviction for unlawfully reentering the United States following his removal from the country and, in so doing, decided that the lower court appropriately rejected the alien's collateral attack on his underlying removal order. The defendant claimed that his stipulation to removal and waiver of his rights to challenge his deportation were invalid because they were not done knowingly. The Fifth Circuit joined several circuits in holding that the defendant bears the burden of proving the invalidity of a signed written waiver of rights in the underlying removal proceeding, and the court split with the Ninth Circuit, which holds that the government carries the burden of proving the waiver was valid. The Fifth Circuit held that the alien in this case did not meet	Ninth Circuit United States v. Gomez, 757 F.3d 885 (9th Cir. 2014)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			that burden by demonstrating through a preponderance of evidence that the waiver was invalid.	
Immigration	Seventh Circuit	F.J.A.P. v. Garland, 94 F.4th 620 (7th Cir. 2024)	A divided Seventh Circuit issued the latest ruling in a growing circuit split over when an alien subject to a reinstated removal order may seek judicial review of a later administrative denial of that alien's eligibility to pursue withholding of removal. Under 8 U.S.C. § 1252(b)(1), a "final" order of removal may be appealed to a U.S. circuit court within 30 days of the date of the order. Joining the Fifth, Sixth, Ninth, and Tenth Circuits, but disagreeing with the Second and Fourth Circuits, a majority of the Seventh Circuit panel held that the 30-day clock is tied to the later relief proceedings, not the earlier reinstatement of removal order.	Second Circuit Bhaktibhai-Patel v. Garland, 32 F.4th 180 (2d Cir. 2022) Fourth Circuit Martinez v. Garland, 86 F.4th 561 (4th Cir. 2023), *petition for cert. filed*, No. 23-7678 (U.S. Jun 10, 2024)
Immigration	Ninth Circuit	Coria v. Garland, 114 F.4th 994 (9th Cir. 2024), *petition for cert. filed*, No. 24-753 (U.S. Jan 15, 2025)	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*, 590 U.S. 573 (2020), 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.	Fourth Circuit Williams v. Garland, 59 F.4th 620 (4th Cir. 2023), *as amended* (Feb. 10, 2023)
Immigration	Ninth Circuit	Al Otro Lado v. Exec. Office for Immigr. Rev., 120 F.4th 606 (9th Cir. 2024)	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	Tenth Circuit Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			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.	
Immigration	Ninth Circuit	Magana-Magana v. Garland, 124 F.4th 757 (9th Cir. 2024)	The Ninth Circuit held that it had jurisdiction to review the BIA's denial of the petitioner's motion to reopen her immigration removal proceedings pursuant to the Violence Against Women Act (VAWA). VAWA allows qualifying victims of domestic violence to have their cases reopened upon filing a motion within one year of the removal order's issuance. The circuit court held that neither VAWA nor the Immigration and Nationality Act's jurisdiction-stripping provisions prevented the court from deciding whether the petitioner had shown the extraordinary circumstances necessary to overlook the untimeliness of her motion to reopen proceedings. The panel joined the Fifth Circuit but split with the Third and Seventh Circuits in deciding that the BIA's determination that an alien failed to show extraordinary circumstances is reviewable.	Third Circuit Yasin v. Att'y Gen. of United States, 20 F.4th 818 (3d Cir. 2021) Seventh Circuit Joseph v. Lynch, 793 F.3d 739 (7th Cir. 2015)
Indian Law	Ninth Circuit	Lexington Ins. Co. v. Smith, 117 F.4th 1106 (9th Cir. 2024) (per curiam)	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	Seventh Circuit Jackson v. Payday Fin., LLC, 764 F.3d 765 (7th Cir. 2014), *cert. denied*, 575 U.S. 983 (2015)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			the tribal court properly exercised jurisdiction over the nonmember, splitting with the Seventh Circuit and agreeing with the Fifth Circuit.	
Labor & Employment	Federal Circuit	*Boyer v. United States*, 97 F.4th 834 (Fed. Cir.), *reh'g* en banc *denied*, 98 F.4th 1073 (Fed. Cir. 2024)	The Federal Circuit held that the Equal Pay Act (EPA) applies to the federal government as it does to other employers, and it widened a circuit split over when prior pay may justify salary differentials among male and female employees. The EPA generally bars discrimination in compensation between similarly situated employees of the opposite sex, subject to exceptions that include when the difference is because of a "factor other than sex." The Fourth and Seventh Circuits have held that prior pay is a "factor other than sex" that, standing alone, can justify differential treatment, while the Ninth Circuit has decided that prior pay can never justify differential pay. The Sixth, Tenth, and Eleventh Circuits have taken a middle approach, under which an employer may consider prior pay only if a pay disparity is based on at least one other permissible factor. The Federal Circuit largely endorsed the middle approach, although it would also allow employers to use prior pay alone if they can show that employee's prior pay level was not based on sex discrimination.	Ninth Circuit Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 189 (2020)
Labor & Employment	Sixth Circuit	Hamilton v. Comm'r of Soc. Sec., 98 F.4th 800 (6th Cir. 2024) (per curiam)	In a per curiam opinion, a Sixth Circuit panel upheld the Social Security Administration's denial of disability insurance benefits and supplemental security income where the petitioner was found to have transferrable skills that would enable her to find work in two other occupational fields despite her physical impairments. Governing regulations provide that a person of "advanced age" at the alleged onset of a disability are to be treated as disabled unless an administrative law judge finds that her skills are "readily transferable to a significant range of semi-skilled or skilled work that is within [her] functional capacity." The circuit panel disagreed with the Ninth Circuit's interpretation of a "significant range of . . . work" as requiring a finding that the applicant could find employment in at least three different occupational fields. Instead, the panel understood this phrase to mean that the applicant could undertake a substantial number of other jobs, even if those jobs were in two or fewer occupational fields.	Ninth Circuit Maxwell v. Saul, 971 F.3d 1128 (9th Cir. 2020) Lounsburry v. Barnhart, 468 F.3d 1111 (9th Cir. 2006)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Labor & Employment	Ninth Circuit	Mooney v. Fife, 118 F.4th 108 (9th Cir. 2024)	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.	Third Circuit Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176 (3d Cir. 2001), *cert. denied*, 536 U.S. 906 (2002) Fifth Circuit Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994), *cert. denied*, 513 U.S. 1154 (1995) Tenth Circuit United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Labor & Employment	Ninth Circuit	Nebraska v. Su, 121 F.4th 1 (9th Cir. 2024)	A divided Ninth Circuit panel held that Executive Order 14026 and an implementing Department of Labor (DOL) rule imposing a $15 minimum hourly wage requirement on most federal contractors were legally invalid. The panel majority held that the executive action exceeded the President and DOL's authority under the Federal Property and Administrative Services Act (FPASA). While the executive branch argued that the minimum wage mandate aligned with FPASA's stated purpose of providing the government "with an economical and efficient system for ... [p]rocuring and supplying property and nonpersonal services," the panel majority concluded that this purpose statement was not operative language, and that nothing in FPASA authorized a $15 minimum wage mandate. The panel majority observed that its reading tracked with decisions from other circuits recognizing FPASA's purpose statement as non-operative, but diverged from decisions by the Fourth, Tenth, and D.C. Circuits holding that executive action under FPASA is permissible when it has a nexus with economy and efficiency. The panel also concluded that the DOL's implementing rule was arbitrary and capricious because the agency did not consider alternatives to the minimum wage mandate. As a result, the Ninth Circuit panel reversed the lower court's dismissal of the plaintiffs' challenge and remanded for further consideration of the plaintiffs' request for injunctive relief.	Fourth Circuit Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164 (4th Cir. 1981) Tenth Circuit Bradford v. Dep't of Lab., 101 F.4th 707 (10th Cir. 2024), *cert. denied*, No. 24-232 (U.S. Jan. 13, 2025) D.C. Circuit UAW-Labor Emp. & Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 987 (2004)
Labor & Employment	Tenth Circuit	Brent Elec. Co., Inc. v. Int'l Bhd. of Elec. Workers Loc. Union No. 584, 110 F.4th 1196 (10th Cir. 2024), *petition for cert. filed*, No. 24-511 (U.S. Nov. 5, 2024)	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.	Fifth Circuit Sheet Metal Workers Local 54 v. E.F. Etie Sheet Metal Co., 1 F.3d 1464 (5th Cir. 1993) Sixth Circuit Sheet Metal Workers, Int'l Loc. No. 24 v. Architectural Metal Works, Inc., 259 F.3d 418 (6th Cir. 2001)
Maritime Law	Ninth Circuit	*In re* Live Life Bella Vita LLC v. Cruising Yachts, Inc., 115 F.4th 1188 (9th Cir. 2024)	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,	Sixth Circuit S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co., 678 F.2d 636 (6th Cir. 1982) Eighth Circuit Universal Towing Co. v.

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			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 multiclaimant 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.	Barrale, 595 F.2d 414 (8th Cir. 1979)
Securities	Third Circuit	SEC v. Chappell, 107 F.4th 114 (3d Cir. 2024)	The Third Circuit affirmed a preliminary injunction issued by a lower court to freeze the assets of a defendant in a civil enforcement action brought by the Securities and Exchange Commission (SEC), but the circuit panel held that the lower court did not apply the proper test when issuing the injunction. The appeals court held that the lower court should not have employed a test used by the Second Circuit in cases involving injunctions sought by the SEC. The Second Circuit's test considers only whether the SEC makes a substantial showing of likelihood to succeed in proving a securities law violation and a risk of repetition. For injunctions involving asset freezes, the Second Circuit also reduces the level of proof needed to satisfy the likelihood-of-success prong, allowing the SEC to satisfy its burden by showing only that an inference can be drawn that a defendant violated the securities laws. Instead of adopting the Second Circuit's test, the Third Circuit held that the lower court should have employed the traditional four-factor test for deciding whether a preliminary injunction should be issued. Because the defendant sought an immediate answer on whether a preliminary injunction would be proper, the Third Circuit applied the traditional four-factor test and upheld the injunction using that approach.	Second Circuit Smith v. SEC, 653 F.3d 121 (2d Cir. 2011)
Securities	Fourth Circuit	Kim v. Cedar Realty Trust, Inc., 116 F.4th 252 (4th Cir. 2024)	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	Second Circuit Krasner v. Cedar Realty Trust, Inc., 86 F.4th 522 (2d Cir. 2023)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			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.	
Separation of Powers	Fifth Circuit	Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415 (5th Cir. 2024)	Splitting with the Sixth Circuit, the Fifth Circuit held that the enforcement provisions of the 2020 Horseracing Integrity and Safety Act (HISA) are facially unconstitutional because Congress impermissibly delegated government power to a private entity not accountable to the people. HISA established a private Horseracing Integrity and Safety Authority with the power to issue regulatory rules, subject to oversight by the Federal Trade Commission (FTC). In 2022, the Fifth Circuit held that the HISA violated the private nondelegation doctrine because HISA gave the FTC only limited review powers over the Authority's proposed rules. Congress responded by amending the law to provide the FTC greater oversight authority. The Fifth Circuit here held that, although the HISA amendments cured some constitutional defects, the statute still impermissibly permitted the Authority to engage in enforcement actions—including conducting searches, issuing subpoenas, levying fines, and seeking injunctions—without FTC supervision.	Sixth Circuit Oklahoma v. United States, 62 F.4th 221 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024)
Separation of Powers	Eighth Circuit	Walmsley v. FTC, 117 F.4th 1032 (8th Cir. 2024), *petition for cert. filed*, No. 24-420 (U.S. Oct. 15, 2024)	A divided Eighth Circuit affirmed a lower court's denial of a preliminary injunction in a case challenging the constitutionality of the 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 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 Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415 (5th Cir. 2024), *petition for cert. filed*, No. 24-472 (U.S. Oct. 29, 2024)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
			Fifth Circuit ruling to give the Supreme Court time to consider an emergency application filed by the federal government.	
Separation of Powers	Eleventh Circuit	Raper v. Comm'r of Soc. Sec., 89 F.4th 1261 (11th Cir. 2024), *cert. denied*, No. 24-206 (U.S. Dec. 16, 2024)	The Eleventh Circuit held, in reviewing a denial of Social Security disability insurance benefits, that there is no Appointments Clause violation when a decision made by an unconstitutionally appointed administrative law judge (ALJ) is vacated on the merits and remanded to the same adjudicator, who has since been properly appointed. Although the Eleventh Circuit acknowledged that a different ALJ would have to hear the claim on remand if the matter were vacated and remanded due to an Appointments Clause violation, the court held that the same ALJ is permitted to re-adjudicate the claim if the ALJ's initial decision had been vacated and remanded on the merits of the claim. The Eleventh Circuit acknowledged a split with the Fourth and Ninth Circuits, which had previously held that a different ALJ must review the claim on remand to avoid an Appointments Clause violation.	Fourth Circuit Brooks v. Kijakazi, 60 F.4th 735 (4th Cir. 2023) Ninth Circuit Cody v. Kijakazi, 48 F.4th 956 (9th Cir. 2022)
Tax	Third Circuit	Zuch v. Comm'r, 97 F.4th 81 (3d Cir. 2024), *cert. granted*, No. 22-2244 (U.S. Jan. 10, 2025)	The Third Circuit held that a collection due process proceeding, in which a taxpayer challenged the Internal Revenue Service's (IRS's) levy of her property to pay a disputed 2010 tax liability, was not moot. The Tax Court had dismissed the taxpayer's challenge as moot after the IRS withheld the taxpayer's 2013, 2014, 2015, 2016, and 2019 tax refunds, which the IRS claimed set off the 2010 tax liability. The Third Circuit agreed with the taxpayer that this offset did not eliminate the underlying case or controversy over whether the 2010 tax liability existed. Although 26 U.S.C. § 6402 permits the IRS to use a tax refund to set off a taxpayer's unpaid tax debt, the Third Circuit held that neither that statute nor common law permitted the agency to employ setoffs where the underlying debt was disputed. Parting ways from the Fourth Circuit and D.C. Circuit, the circuit panel also held that there may sometimes be a live case or controversy even if the IRS withdraws the proposed levy based on its withholding of refunds, and that the Tax Court has jurisdiction to declare the existence or amount of a taxpayer's underlying liability. The Supreme Court agreed to review the Third Circuit's decision in its October 2024 term.	Fourth Circuit McLane v. Comm'r, 24 F.4th 316 (4th Cir. 2022), *cert. denied*, 143 S.Ct. 408 (2022) D.C. Circuit Willson v. Comm'r, 805 F.3d 316 (D.C. Cir. 2015)
Tax	Eleventh Circuit	United States v. Schwarzbaum, 114 F.4th 1319 (11th Cir. 2024), *opinion vacated and superseded on reconsideration*, No. 22-	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	First Circuit United States v. Toth, 33 F.4th 1 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 552, *reh'g denied*, 143 S. Ct. 2604 (2023) (mem.)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
		14058 (11th Cir. Jan. 23, 2025)	circuit panel noted its disagreement with the First Circuit, which had concluded that the Excessive Fines Clause does not apply to FBAR penalties.	Note: The Eleventh Circuit issued a superseding opinion that differed from its initial ruling in several ways, but the panel reaffirmed its split with the First Circuit over the Excessive Fines Clause's application to FBAR penalties. United States v. Schwarzbaum, No. 22-14058 (11th Cir. Jan. 23, 2025)
Torts	Fourth Circuit	Estate of Van Emburgh *ex rel.* Van Emburgh v. United States, 95 F.4th 795 (4th Cir. 2024)	A divided Fourth Circuit, joining eight other circuits but splitting with the Eighth Circuit, held that regulations implementing the provision of the Federal Tort Claims Act authorizing agencies to settle certain claims against the United States, 28 U.S.C. § 2672, do not enlarge or modify the jurisdictional requirement of administrative exhaustion for claims under the act. Rather, the court held that 28 U.S.C. § 2675 establishes the three exclusive jurisdictional requirements for administrative exhaustion for claims under the act: that a plaintiff present their claim to a federal agency, state the sum sought for the claim, and wait until the agency denies the claim or does not dispose of the claim within six months.	Eighth Circuit Mader v. United States, 654 F.3d 794 (8th Cir. 2011)
Torts	Fifth Circuit	Konan v. U.S. Postal Serv., 96 F.4th 799 (5th Cir. 2024), *petition for cert. filed*, No. 24-351 (U.S. Sept. 27), *and petition for cert. filed*, No. 24-495 (U.S. Oct. 31, 2024)	The Fifth Circuit held that the postal-matter exception to the Federal Tort Claims Act's (FTCA's) waiver of U.S. sovereign immunity does not apply to intentional acts by employees of the U.S. Postal Service (USPS). The FTCA generally waives sovereign immunity to allow claims against the United States for alleged torts, with certain exceptions. The postal-matter exception (28 U.S.C. § 2680(b)) applies to claims "arising out of the loss, miscarriage, or negligent transmission of letters of postal matter." The Plaintiff brought a claim under the FTCA alleging that USPS employees intentionally withheld her mail for two years because of her race. The lower court dismissed this claim on the ground that the postal-matter exception applied and that the court therefore lacked jurisdiction. The Fifth Circuit held that an intentional failure to deliver mail does not qualify as a "loss, miscarriage, or negligent transmission" of mail and therefore the claims were not barred. The court noted that this decision is at odds with published decisions by the First and Eighth Circuits, which have held that the postal-matter exception bars suits for intentional conduct. The court reversed the district court's dismissal of the FTCA claim and remanded the case for further proceedings.	First Circuit Levasseur v. U.S. Postal Serv., 543 F.3d 23 (1st Cir. 2008) Eighth Circuit Benigni v. United States, 141 F.3d 1167 (8th Cir. 1998), *cert. denied*, 525 U.S. 897 (1998)

Subject	Circuit	Citation	Ruling	Acknowledged Circuit Split on a Controlling Issue
Torts	Tenth Circuit	Mengert v. United States, 120 F.4th 696 (10th Cir. 2024)	A divided Tenth Circuit panel issued a decision on the law enforcement proviso of the FTCA, 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.	Ninth Circuit Foster v. United States, 522 F.3d 1071 (9th Cir. 2008)
Transportation	Fifth Circuit	Airlines for Am. v. Dep't of Transp., 110 F.4th 672 (5th Cir. 2024)	A divided Fifth Circuit panel agreed to stay a Department of Transportation (DOT) rule on when and how airlines must disclose certain fees to consumers, including baggage and change fees, during the booking process. The panel held that the plaintiffs made a strong showing that the rule exceeds the agency's authority under 49 U.S.C. § 41712(a), which authorizes the DOT Secretary to "investigate and decide whether an air carrier ... has been or is engaged in an unfair or deceptive practice or an unfair method of competition in ... the sale of air transportation." The panel decided Section 4712(a) does not provide the DOT with the power to prescribe regulations governing the airline industry, but instead authorizes the DOT to adjudicate on a case-by-case basis whether a particular airline's practices are "unfair or deceptive" and, if so, direct the carrier to end those practices. The panel held that the DOT Secretary's general authority under 49 U.S.C. § 40113(a) to take action that the Secretary considers necessary to carry out his or her duties, including through the prescribing of regulations, cannot overcome the plain language of Section 41712(a). The panel disagreed with the Seventh Circuit, which had held that Sections 40113(a) and 41712(a)'s precursors authorized the DOT to engage in legislative rulemaking to address unfair or deceptive practices.	Seventh Circuit United Air Lines, Inc. v. Civ. Aeronautics Bd., 766 F.2d 1107 (7th Cir. 1985)

Source: Cases identified by CRS using the Westlaw legal database and searching for federal appeals court decisions identified for publication in the *Federal Reporter*.

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