



Congressional Court Watcher: Circuit Splits from May 2026

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

This Legal Sidebar discusses circuit splits that emerged or widened following decisions from May 2026 on matters relevant to Congress. The Sidebar does not address every circuit split that developed or widened during this period. Selected cases typically involve judicial disagreement over the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress’s lawmaking and oversight functions. The Sidebar includes only cases where an appellate court’s controlling opinion recognizes a split among the circuits on a key legal issue resolved in the opinion. This Sidebar refers to each U.S. Court of Appeals by its number or descriptor (e.g., “D.C. Circuit” for “U.S. Court of Appeals for the D.C. Circuit”).

Some cases identified in this Sidebar, or the legal questions they address, are examined in other CRS general distribution products. Members of Congress and congressional staff may [click here](#) to subscribe to the *CRS Legal Update* and receive regular notifications of new products and upcoming seminars by CRS attorneys.

- **Civil Procedure:** The Tenth Circuit held that a group of plaintiffs alleging breach of a settlement agreement satisfied the ascertainability requirement for certifying a class action. [Federal Rule of Civil Procedure 23](#), which sets the prerequisites for bringing a class action in federal court, does not expressly refer to ascertainability. Most circuits, however, treat ascertainability as an [implied prerequisite](#) and require the party seeking class certification to establish that the court will be able to ascertain the class members at some stage of the proceeding. Pointing to its decision in an [earlier case](#), the Tenth Circuit held that a moving party meets this ascertainability requirement when a class is defined clearly and objectively and the movant shows that class members can be identified with reasonable accuracy. That rule, the court explained, follows the [Seventh Circuit’s](#) interpretation of the ascertainability requirement but splits with the [Third Circuit](#), which

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has held that ascertainability incorporates an “administrative feasibility” element. In the Third Circuit’s [view](#), to show ascertainability at the class certification stage, a movant must establish that there is an “administratively feasible” way to decide whether putative class members are covered by the class definition ([Rider v. Oxy USA, Inc.](#)).

- **Civil Procedure:** The Eleventh Circuit held that a federal court hearing a case in [diversity jurisdiction](#) must apply state law to determine the applicability of a contract’s forum selection clause. The Supreme Court has observed that federal courts exercising diversity jurisdiction generally “[apply](#) state substantive law and federal procedural law.” The Eleventh Circuit had previously [held](#) that in diversity jurisdiction cases, federal law governs a court’s consideration of whether to enforce a forum selection clause. In this case, the court held that the question of whether a forum selection clause applies to the particular parties in a particular dispute is distinct from the question of whether to enforce the clause. The applicability question, the court decided, turns on interpretation of the relevant language in the contract, and contract interpretation is a substantive issue governed by state law in diversity cases. Accordingly, the court applied Florida choice-of-law rules to identify the law governing the contract at issue, and based on those choice-of-law rules, it interpreted the contract under Slovenian law. The [Second](#), [Third](#), [Fifth](#), [Sixth](#), and [Tenth](#) Circuits have similarly concluded that the applicability and enforceability of forum selection clauses are distinct legal issues governed by different sources of law in diversity actions. The Eleventh Circuit split, however, with the [Fourth](#) and [Ninth](#) Circuits. Those two courts have held that, in diversity cases, federal law governs both the interpretation and enforceability of forum selection clauses ([Declan Flight, Inc. v. Textron eAviation, Inc.](#)).
- **Communications:** The Eleventh Circuit held that [47 U.S.C. § 332\(c\)\(7\)\(B\)\(i\)](#)—which provides that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities” by state and local governments “shall not prohibit or have the effect of prohibiting the provision of personal wireless services”—applies to local or state zoning rules, but not to a decision to deny an individual permit for a wireless service facility. Pointing to the statute’s text, context, and structure, the court interpreted the word “regulation” in Section 332(c)(7)(B)(i) to mean “control by rule.” Accordingly, the court explained, Section 332(c)(7)(B)(i) restricts municipalities’ control of facility siting by rules, but not through individual zoning decisions. In the Eleventh Circuit’s view, this interpretation of Section 332(c)(7)(B)(i) is “irreconcilable with any version of the significant gap test” that has been adopted by the [First](#), [Second](#), [Sixth](#), [Seventh](#), and [Ninth](#) Circuits. Those circuits have held that the denial of a single permit for a wireless service facility can violate Section 332(c)(7)(B)(i) if the proposed facility would be the least intrusive means or only feasible way to close a significant gap in wireless services ([T-Mobile South, LLC v. City of Roswell](#)).
- **Firearms:** In consolidated cases, a divided Second Circuit upheld a lower court decision that rejected a constitutional challenge to some provisions of a New York firearms statute, but held that a provision barring the possession of firearms on private property without express owner’s consent violated the [Second Amendment](#) as applied to property open to the public (e.g., a gas station or a grocery store). The panel observed that its analysis of the law’s compatibility with the Second Amendment was governed by the framework set forth by the Supreme Court in [New York State Rifle & Pistol Association., Inc. v. Bruen](#), which first looks at whether conduct regulated by the challenged law is covered by the plain text of the Second Amendment and, if so, requires the government to prove that the law is consistent with the nation’s historical tradition of firearms regulation. The Second Circuit panel majority held that the New York law’s firearms restrictions, as

applied to private property open to the public, were not consistent with the nation's historical tradition. The majority disagreed with the conflicting analysis of the [Ninth Circuit](#) in its review of a different state's firearm statute, deciding that the historical examples of firearms regulation on private property cited by that court did not constitute sufficiently close analogues that reflected a national tradition of such regulation (*Christian v. James*; *Boron v. James*).

- **Immigration:** Within days of each other, the Sixth, Seventh, and Eleventh Circuits issued decisions involving a widening circuit split over when an alien taken into immigration custody after having unlawfully entered the country years earlier can be detained without bond during the pendency of removal proceedings. Under federal statute, in many cases an alien [may be released](#) from custody on bond or on his or her own recognizance during the pendency of removal proceedings. Except in narrow circumstances, however, [8 U.S.C. § 1225\(b\)\(2\)\(A\)](#) directs that, “in the case of an alien who is an *applicant for admission*, if the examining immigration officer determines that an *alien seeking admission* is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained [during removal proceedings]” (italics added). Federal [statute](#) provides that an alien “present in the United States who has not been admitted” shall be treated as an “applicant for admission,” but does not define an alien “seeking admission.” The [Fifth](#) and [Eighth](#) Circuits have treated “applicant for admission” and “alien seeking admission” as synonymous terms, meaning that aliens present in the United States but not lawfully admitted are subject to mandatory detention under Section 1225(b)(2)(A). In May 2026, divided panels of the Sixth Circuit (in *Lopez-Campos v. Raycraft*) and the Eleventh Circuits (in *Hernandez Alvarez v. Warden, Federal Detention Center Miami*) disagreed with this interpretation. They joined an earlier [Second Circuit](#) panel in holding that an “alien seeking admission” under Section 1225(b)(2)(A) is not synonymous with an “applicant for admission,” and that Section 1225(b)(2)(A) only directs the mandatory detention of those unlawfully present aliens who are actively seeking lawful admission into the country. In the same period as the Sixth and Eleventh Circuit cases were decided, the Seventh Circuit (in *Castañon Nava v. U.S. Department of Homeland Security*) vacated an earlier decision that took a similar position as those courts on Section 1225(b)(2)(A)'s meaning. The Seventh Circuit panel—in the course of reviewing a request for a stay of district court orders enforcing a consent decree—had [initially concluded](#) that the government was unlikely to prevail in its position that Section 1225(b)(2)(A) directed the mandatory detention of all unlawful entrants. After full briefing and oral arguments in the case, a fractured panel affirmed and reversed aspects of the district court's consent decree orders without conclusively deciding the proper interpretation of Section 1225(b)(2)(A).
- **Immigration:** A divided Sixth Circuit panel held that the [Sixth Amendment](#), which guarantees a criminal defendant's right to [effective counsel](#), does not require a defense attorney to inform a [naturalized](#) citizen when a guilty plea for a criminal offense could lead to the citizen's denaturalization. The panel majority reasoned that [Supreme Court precedent](#) recognized that a criminal defense attorney generally was not required to inform the defendant of collateral consequences stemming from a plea agreement—i.e., those beyond the control of the district court in which the conviction was issued. Because denaturalization is [a separate judicial process](#) over which the criminal court exercises no responsibility, the panel majority held that the Sixth Amendment did not require notification by a criminal defense attorney of the risks of denaturalization. Although the Supreme Court in *Padilla v. Kentucky* recognized a limited exception to the collateral rule, requiring that a criminal defendant who is an [alien](#) be informed when a guilty plea

would render him or her deportable, the panel majority believed this exception did not apply beyond the deportation context. The majority split with the [Second Circuit](#), which has applied *Padilla* to require that a criminal defendant be informed of the risk of denaturalization resulting from a guilty plea (*United States v. Singh*).

- **Labor & Employment:** The Second Circuit held that a federal district court lacked personal jurisdiction over out-of-state plaintiffs' claims against an out-of-state defendant in a [collective action](#) brought under the [Fair Labor Standards Act](#) (FLSA). The FLSA allows employees to sue on behalf of themselves and others who are "[similarly situated](#)." [Federal Rule of Civil Procedure 4\(k\)](#) provides that service of process establishes personal jurisdiction over a defendant in three circumstances: (1) when the defendant would be subject to the jurisdiction of the court of general jurisdiction in the state where the district court is located; (2) over certain parties joined to the lawsuit (in circumstances not relevant here); and (3) when authorized by a federal statute. The Second Circuit explained that, because the FLSA does not provide for nationwide service of process or otherwise authorize service on the defendant in this case, the only applicable category from Rule 4(k) was the first one. Accordingly, the federal district court could exercise personal jurisdiction in the FLSA action only over defendants subject to the jurisdiction of the court's [state counterpart](#). That state court's jurisdiction, the Second Circuit said, is limited by the [Due Process Clause](#) of the Fourteenth Amendment. Accordingly, the Second Circuit held that the Fourteenth Amendment's due process limits—including the limits identified by the Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California*—applied to this case. In *Bristol-Myers Squibb*, the Supreme Court held that the Fourteenth Amendment prohibited a California state court from exercising specific personal jurisdiction over claims of nonresident plaintiffs against a nonresident defendant in a mass tort action—even though the mass tort action included [some claims](#) brought by California residents. The Second Circuit applied this reasoning to the various "similarly situated" employees' claims in this FLSA collective action and concluded that the district court lacked specific personal jurisdiction over each FLSA claim brought by an out-of-state plaintiff. The Second Circuit joined the [Third](#), [Sixth](#), [Seventh](#), [Eighth](#), and [Ninth](#) Circuits, which have applied *Bristol-Myers Squibb*'s claim-by-claim specific personal jurisdiction analysis to FLSA collective actions. The Second Circuit split, however, with the [First Circuit](#). In the First Circuit's [view](#), Rule 4(k) governs when service of a summons establishes personal jurisdiction, but does not limit a federal court's jurisdiction after a summons has been properly served. As a result, the First Circuit has [declined](#) to apply *Bristol-Myers Squibb* and dismiss claims asserted by out-of-state plaintiffs in an FLSA collective action where the named (in-state) plaintiff had established personal jurisdiction over the defendant consistent with Rule 4(k) (*Provencher v. Bimbo Foods Bakeries Distrib. LLC*).
- **Labor & Employment:** A divided Sixth Circuit held that when the National Labor Relations Board ("Board") seeks a preliminary injunction under [29 U.S.C. § 160\(j\)](#), courts may not infer, without independent factual support, that an employer's refusal to bargain with a union causes irreparable harm. The Supreme Court recently [confirmed](#) that the "the traditional four-factor test for a preliminary injunction"—which [includes](#) a requirement that the party seeking the injunction show a likelihood of irreparable harm—"governs the Board's requests under" 29 U.S.C. § 160(j). The Sixth Circuit held that the Board, like other litigants, must demonstrate "certain and immediate" harm to satisfy the irreparable harm requirement, and this harm must be shown through factual support, not inferred only from a refusal to bargain. The Sixth Circuit disagreed with a [Ninth Circuit](#) decision holding that an employer's failure to bargain in good faith, coupled with

permissible inferences regarding the likely effects of that failure, may be enough to show the likelihood of irreparable injury (*Kerwin v. Trinity Health Grand Haven Hosp.*).

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