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Legal Sidebar

Congressional Court Watcher: Circuit Splits from July 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 July 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.

- **Administrative Law:** A divided Ninth Circuit panel held that the lower court erred in dismissing a challenge to the Forest Service's decision that the Healthy Forest Restoration Act (HFRA) exempted a restoration project from full National Environmental Policy Act (NEPA) review, even though the plaintiffs did not challenge the agency's reliance on HFRA when the Service solicited public feedback on the scope of the planned project. The majority held that it was presumptively improper for the lower court to impose an issue-exhaustion requirement where—as here—the prior administrative process was non-adversarial, and the claim at issue differed from NEPA claims that the Supreme Court has held are subject to issue-exhaustion requirements (i.e., claims that an agency failed to consider project alternatives or relevant factors). The majority disagreed with the Federal Circuit, which has not limited judicially imposed issue-exhaustion

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requirements to arguments made in adversarial administrative proceedings (*All. for the Wild Rockies v. Higgins*).

- **Criminal Law & Procedure:** The First Circuit affirmed a criminal defendant's convictions and sentences for firearms-related offenses, rejecting legal challenges to the proceedings below and concluding that any error by the lower court was harmless. In doing so, the court considered the application of the U.S. Sentencing Guidelines' career-offender sentencing enhancement. A defendant qualifies for the enhancement under the Guidelines if the defendant "has at least two prior felony convictions of ... a controlled substance offense," but the Guidelines do not define "controlled substance." The court disagreed with the majority of circuits—the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh—which it described as holding that, when the predicate offense arises under state law, either state or federal law may define what constitutes a "controlled substance." Instead, the court adopted the view of the Second, Fifth, and Ninth Circuits, which have interpreted "controlled substance" in the Guidelines to require the "controlled substance" to meet the federal definition, even for predicate state offenses (*United States v. Fulcar*).
- **Criminal Law & Procedure:** The Eighth Circuit upheld a defendant's sentence for a criminal conspiracy offense under the Racketeer Influenced and Corrupt Organizations Act (RICO) based on various gang-related criminal activities, some of which occurred when the defendant was a juvenile, including his killing of a rival gang member. The Eighth Circuit joined the majority of reviewing circuit courts—the First, Second, Fifth, Sixth, Ninth, Tenth, and Eleventh—in holding that acts taken in furtherance of a criminal conspiracy while a juvenile may serve as predicate offenses for RICO purposes if the defendant's participation in the conspiracy continues into adulthood. The panel acknowledged a split with the D.C. Circuit, which has held that an adult cannot be criminally liable under RICO for acts taken as a juvenile, and possibly with the Fourth Circuit, which interprets the Juvenile Delinquency Act as barring prosecution of adults for crimes committed as juveniles except in narrow circumstances (*United States v. Bogan*).
- **Criminal Law & Procedure:** The Ninth Circuit held that a murder-for-hire offense under 18 U.S.C. § 1958(a) is not categorically a "crime of violence" punishable under 18 U.S.C. § 373(a), "Solicitation to commit a crime of violence." Section 373 states that a person can be punished for soliciting another person to commit a felony involving "use, attempted use, or threatened use of physical force" against property or another person. In a 2022 case, the Ninth Circuit held that Section 373(a) requires that the solicited crime involve "purposeful or knowing" conduct or conduct that "evinc[es] extreme recklessness." The panel held that Section 1958(a) did not meet this requirement. Here, the defendant was convicted of murder-for-hire under Section 1958(a) for hiring a hitman who murdered two business associates. In 2022, the Ninth Circuit held that a base offense under Section 1958(a) without personal injury or death is not a crime of violence under Section 373(a); the question in this case was whether the same conclusion applied to an aggravated offense that resulted in death. Splitting with the Fourth Circuit, the Ninth Circuit held that the "death-results" element of Section 1958(a) had no attendant *mens rea* requirement—meaning a person could be convicted of the aggravated offense even if the death or personal injury was unintended—and that Section 1958(a) murder-for-hire was not categorically a crime of violence for purposes of Section 373(a) (*United States v. Henrikson*).
- **Criminal Law & Procedure:** The Tenth Circuit vacated a criminal defendant's sentence and remanded for resentencing because of a potential violation of Federal Rule of Criminal Procedure 32(i)(1)(A), which requires the sentencing court to verify that the

defendant and counsel read and discussed the presentence investigation report (PSR) before sentencing. Here, defense counsel said he had reviewed the PSR with the defendant, but the defendant stated otherwise at the sentencing hearing. The sentencing court did not address the discrepancy. A threshold question was whether the defendant had preserved his argument for appeal, which would determine the applicable standard of review. When a defendant has adequately raised an issue at the trial court level, the appellate court applies "harmless error" review, under which the government bears the burden of proving that any error was harmless. The court noted that if the defendant does not adequately preserve his argument for appeal, appellate courts apply "plain-error" review, under which the defendant bears the burden of showing a reasonable probability that, but for the error, the outcome would have been different. The panel found the defendant had adequately raised his argument by stating at sentencing that his attorney did not review the PSR with him; applying the harmless-error standard, the panel concluded that the government had failed to demonstrate that the error was harmless, and that the defendant was prejudiced by the district court's failure to address the issue because he was unable to contest material facts in the PSR. The panel noted a split with the Sixth Circuit, which had applied plain-error review where a defendant similarly stated at a sentencing hearing that he had not discussed the PSR with his attorney but did not formally object to the sentence at the conclusion of the hearing, which the Sixth Circuit found was needed to preserve the argument for appeal (*United States v. Threatt*).

- **Criminal Law & Procedure:** In denying a prisoner's motion to proceed *in forma pauperis*, the Tenth Circuit considered the scope of the exception to 28 U.S.C. § 1915. The statute generally bars a prisoner from bringing a civil action or appealing a judgment in federal court without prepaying filing fees after three or more prior actions have been dismissed on enumerated grounds, "unless the prisoner is under imminent danger of serious physical injury." Like other reviewing courts, the Tenth Circuit held that a nexus must exist between the "imminent danger of ... injury" and the prisoner's suit. In determining whether such a nexus exists, the Tenth Circuit adopted the approach used by the Second, Ninth, and Federal Circuits, which asks whether the imminent danger is fairly traceable to the unlawful conduct alleged in the prisoner's complaint and whether a favorable judicial outcome would provide redress. The Tenth Circuit observed that its approach differs from that of the Fourth Circuit, which does not require redressability (*Barnett v. Bridges*).
- **Firearms:** In consolidated cases, a divided *en banc* Third Circuit ruled that New Jersey's general ban on semi-automatic rifles violated the Second Amendment, as did the state's prohibition on "large capacity ammunition magazines" (LCMs), defined as magazines capable of holding more than 10 rounds of ammunition. In doing so, the court widened several circuit splits concerning both the interpretation of the governing legal framework and its application to semi-automatic weapons and LCMs. The *en banc* majority observed that its analysis of the state 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 asks whether the 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 *en banc* majority concluded that both semi-automatic rifles and LCMs were covered by the Second Amendment's plain text under step one. As part of the second part of the *Bruen* test, the Third Circuit considered whether the covered weapons were "in common use for lawful purposes" at the time of the restriction, disagreeing with other circuits—including the Tenth and Fourth Circuits—that place the common-use

inquiry at the first step of the *Bruen* framework. The majority held that semi-automatic rifles and LCMs were in common use for lawful purposes when New Jersey enacted the ban. The *en banc* majority added that the nation's historical tradition of firearms regulation did not support the ban. In ruling the New Jersey law violated the Second Amendment, the Third Circuit parted ways with the First, Second, Fourth, and Seventh Circuits on the compatibility of both semi-automatic rifle and LCM bans with the Second Amendment, and with the Ninth and D.C. Circuits on LCM bans specifically (*Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*).

- **Food & Drug:** In consolidated cases, the Second Circuit largely upheld the lower court's dismissal of civil claims brought against the makers of over-the-counter nasal decongestants containing oral phenylephrine, which the plaintiffs alleged the drug makers knew was ineffective as a decongestant. The panel concluded, among other things, that the Federal Food, Drug, and Cosmetic Act (FDCA) expressly preempted most of the plaintiffs' state-law consumer protection and false advertising claims because they were based on labeling required by the Food and Drug Administration's (FDA's) OTC monograph for nasal decongestants. The panel reasoned the FDCA generally preempts state laws imposing requirements "different from or in addition to, or ... otherwise not identical with" federal requirements. The panel acknowledged a split with the Ninth Circuit, which has held that a similar FDCA preemption provision did not preempt state claims that, like the FDCA itself, recognize a manufacturer's duty to avoid false or misleading labeling. The Second Circuit did, however, conclude that the FDCA did not preempt the plaintiffs' claims to the extent they challenged the manufacturers' use of statements such as "Maximum Strength" or "Max Strength" on certain products because those statements were not required by the FDA. The panel also remanded for further consideration of whether the FDCA preempted claims related to decongestants that were not subject to OTC monograph labeling but instead were approved through the FDA's New Drug Application process (*Yousefzadeh v. Johnson & Johnson Consumer Inc.*).
- **Immigration:** A divided Fourth Circuit panel held that a federal district court had proper habeas jurisdiction to consider the lawfulness of an alien's detention by immigration authorities prior to the issuance of a final removal order. Federal courts exercising habeas jurisdiction typically may review the legality of an individual's incarceration. Immigration detention raises separate questions of that jurisdiction under federal law, however. Under 8 U.S.C. § 1252(b)(9), any action taken or proceeding brought to remove an alien from the United States judicial review related to "any action taken or proceeding brought to remove an alien from the United States" is generally permitted only as part of a federal appeals court's consideration of a petition for review of a final removal order. Other provisions of Section 1252 also limit habeas review of certain immigration-related matters. In this case, the alien was arrested and detained pending removal proceedings based on the government's allegations that he was removable on foreign policy grounds. Before those proceedings were completed, the alien sought habeas relief, claiming that his detention constituted unlawful retaliation for engaging in protected political speech under the First Amendment. Splitting with the Third Circuit and the Second Circuit, the Fourth Circuit panel majority held that neither Section 1252(b)(9) nor other federal statutes prevent aliens from challenging their detention in habeas proceedings before the issuance of a removal order (*Suri v. Trump*).
- **Immigration:** In consolidated cases, a divided Seventh Circuit panel widened a circuit split over whether the 30-day deadline for appealing a final order of removal is subject to equitable tolling. The petitioners had been ordered removed from the United States—one after the completion of administrative removal proceedings, the other following

reinstatement of a prior removal order, and both thereafter sought relief through administrative withholding-of-removal proceedings. 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. In *Riley v. Bondi*, the Supreme Court resolved a circuit split by holding that the 30-day clock is tied to the final administrative order that concludes that the alien is removable, not to the conclusion of any later withholding-of-removal proceedings, during which the alien does not contest the finality of the order of removal but only relief from its enforcement. The Court's decision, according to the Seventh Circuit panel majority, abrogated contrary Seventh Circuit precedent that linked the 30-day clock to later in time withholding-of-removal proceedings, but the *Riley* decision did not address the issue of equitable tolling or how the decision applied to the reinstatement of a prior removal order. In this case, the Seventh Circuit panel first held that an alien's reinstated removal order constitutes the final administrative order to which the 30-day clock is tied, not the initial removal order. It then joined the Sixth Circuit, but split with the Fifth Circuit, in holding that 30-day deadline to appeal a final administrative removal order is subject to equitable tolling. Because the 30-day deadline could be equitably tolled, the panel majority held that it could consider a petition filed after the deadline when the alien pursued his or her rights diligently and the delay resulted from extraordinary circumstances beyond the petitioner's control—in the case, the petitioners' reliance on circuit precedent abrogated by *Riley* (*E.E.V. v. Blanche*).

- **Immigration:** Divided panels of the Seventh and Ninth Circuits issued opinions on the same day addressing when an alien taken into immigration custody after unlawfully entering the country may be detained without bond during removal proceedings—an issue that has been the subject of a widening circuit split. Under federal statute, an alien often may be released from custody on bond or on the alien's own recognizance while removal proceedings are pending. 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 it does not define an "alien seeking admission." The Fifth and Eighth Circuits have treated "applicant for admission" and "alien seeking admission" as synonymous, meaning that aliens present in the United States but not lawfully admitted are subject to mandatory detention under Section 1225(b)(2)(A). In July 2026, divided panels of the Seventh Circuit (in *Cirrus Rojas v. Olson*) and the Ninth Circuit (in *Rodriguez Vazquez v. Bostock*) joined the Second, Sixth, Tenth, and Eleventh Circuits 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) mandates detention only for unlawfully present aliens who are actively seeking lawful admission into the country.
- **Labor & Employment:** The D.C. Circuit affirmed a lower court's dismissal of a foreign service officer's discrimination claims against the State Department but vacated the lower court's *sua sponte* transfer of the plaintiff's Fair Labor Standards Act (FLSA) damages claim to the Court of Federal Claims. As an initial matter, the panel held that it had jurisdiction to review the transfer order. It rejected the position of the Ninth Circuit that the Federal Circuit has exclusive jurisdiction under 28 U.S.C. § 1292(d)(4)(A) to review grants and denials of transfer orders to the Court of Federal Claims. The D.C. Circuit reasoned that the provision addresses only district court decisions granting or denying a

- party's transfer motion, not instances in which a district court orders transfer *sua sponte*. The D.C. Circuit also held that either federal district courts or the Court of Federal Claims may exercise jurisdiction over FLSA damages claims against the United States for more than $10,000 in damages. The panel overruled an earlier D.C. Circuit opinion holding that the Court of Federal Claims had exclusive jurisdiction in those circumstances, concluding that the earlier opinion conflicted with the Supreme Court's intervening decision in *United States v. Bormes*. The panel acknowledged a split with the Federal Circuit, which treats the Court of Federal Claims as having exclusive jurisdiction over claims against the United States for more than $10,000 in damages (*Ruppe v. Rubio*).

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