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Legal Sidebar

Congressional Court Watcher: Circuit Splits from September 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 September 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.

- **Employee Benefits:** The Seventh Circuit decided a case concerning the calculation of an employer's liability to a multiemployer pension plan for unfunded vested pension benefits when the employer, after having partially withdrawn from the plan years earlier, completely withdrew its participation. The case turned on how to apply a liability credit from a prior partial withdrawal as part of a four-step calculation process for complete withdrawal from a plan set forth under the Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act. The Ninth and Eleventh Circuits previously held that the partial credit is applied at step two of the process, which, in the instant case, would have resulted in the employer owing a larger amount. The Seventh Circuit disagreed and decided that the credit should be applied after the completion of the four-step calculation process, which would result in the employer

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owing the plan a lesser amount (*Consumers Concrete Corp. v. Central States, Southeast and Southwest Areas Pension Fund*).

- **Firearms:** The Fifth Circuit held that three provisions in federal statute (18 U.S.C. § 922(a)(3), (a)(5), and (b)(3)), which together generally barred the direct sale of handguns across state lines by a licensed firearms dealer, violated the Second Amendment. The panel observed that its Second Amendment analysis was governed by the framework set forth by the Supreme Court in *New York State Rifle & Pistol Association, Inc. v. Bruen*. The *Bruen* framework 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 Fifth Circuit first concluded that the challenged provisions were covered by the plain text of the Second Amendment because they constituted a categorical ban on a class of otherwise legal commercial firearms transactions, rather than the kind of condition or qualification on a firearms purchase that the Supreme Court had earlier suggested would not raise Second Amendment concerns. Turning to the second part of the *Bruen* test, the panel decided that the nation's historical tradition of firearms regulation did not support the federal ban on direct handgun sales across state lines. In doing so, the panel split with the Second Circuit, which concluded that the historical record supported the constitutionality of such restrictions (*Elite Precision Customs L.L.C. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*).
- **Immigration:** The Second Circuit held that a previously removed alien was time-barred from challenging Custom and Border Protection's (CBP's) reinstatement of the removal order, but a majority of the panel also concluded that the alien could seek judicial review of CBP's denial of his motion to reopen, reconsider, and rescind the reinstatement order. The panel interpreted 8 U.S.C. § 1252(b)(6) as giving it jurisdiction to review the denial of a motion to reconsider a final order of removal. That provision stipulates that when a petitioner seeks review of a final order of removal, "any review sought" by a petitioner "of a motion to reopen or reconsider" that order "shall be consolidated with the review of the order." The panel disagreed with the government's argument that the provision only conferred jurisdiction over administrative adjudicatory orders of removal by the Board of Immigration Appeals, and not, as was the case here, expedited removal orders issued by CBP. The majority also rejected CBP's argument that the agency had no prescribed mechanism for reopening a reinstatement order, citing 8 C.F.R. § 103.5(a)(1), which authorizes an immigration officer "who made the latest decision in ... [a] proceeding" to "reopen the proceeding or reconsider the prior decision" following a motion by an affected party. The majority reasoned that the regulation authorized CBP to reconsider its reinstatement of the petitioner's removal order, splitting with the Fifth Circuit's conclusion that § 103.5(a) more narrowly addresses the reopening of applications for immigration benefits (as well as with a Tenth Circuit determination that the majority characterized as nonprecedential dicta). Because the CBP had denied the petitioner's motion under the belief that it lacked authority to do so, the panel remanded the case so CBP could consider the merits of the petitioner's motion in the first instance (*Santos v. Blanche*).
- **Immigration:** A divided Fourth Circuit panel widened a circuit split over when an alien taken into immigration custody after unlawfully entering the country may be detained without bond during removal proceedings, a legal question the Supreme Court has agreed to review in its current term. 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]" (emphasis 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 terms, meaning that aliens present in the United States but not lawfully admitted are subject to mandatory detention under § 1225(b)(2)(A). The Fourth Circuit panel majority disagreed, joining the First, Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits that previously held that an "alien seeking admission" under § 1225(b)(2)(A) is not synonymous with an "applicant for admission," and that § 1225(b)(2)(A) mandates detention only for unlawfully present aliens who are actively seeking lawful admission into the country (*Lopez Garcia v. Guadian*).

- **Immigration:** The Eighth Circuit held that it lacked jurisdiction to consider an immigration judge's determination that the alien did not qualify for deferral of removal under the Convention Against Torture (CAT). The alien sought review of his CAT claim under 8 U.S.C. § 1252(a)(1), which grants federal appellate courts jurisdiction to review final orders of removal. The panel held that it lacked jurisdiction because the petitioner's challenge was not to the final order of removal issued against him, but only to the denial of CAT relief from execution of that order. The court alternatively held that even if the petition was framed as a challenge to a final order of removal, it was time barred. Under 8 U.S.C. § 1252(b)(1), a final order of removal must be appealed to a U.S. circuit court within 30 days. The court held the alien's petition was untimely because it was filed several years after the administrative removal order. The court viewed it as immaterial that the petition was filed within 30 days of the completion of administrative proceedings involving his CAT claim. Describing itself as aligning with the views of the Ninth and Fifth Circuits, the panel decided that § 1252(b)(1)'s statutory deadline was a mandatory claims-processing rule, meaning that the deadline is to be enforced if, as here, it was raised by the government against a petition filed after the 30-day period. The panel split with the Fourth, Sixth, and Seventh Circuits, which have treated the statutory deadline for appellate review as potentially subject to equitable tolling that might permit a petitioner to seek review after the 30-day clock had run (*B.P. v. Blanche*).
- **Securities:** In consolidated cases, the Sixth Circuit declined to halt enforcement of Ohio and Tennessee gambling laws against sports event contracts offered by Kalshi, a prediction markets platform. The Commodity Exchange Act (CEA) gives the Commodity Futures Trading Commission exclusive jurisdiction over "transactions involving swaps . . . traded or executed on" a designated contract market (DCM). Although Kalshi is a regulated DCM, the Sixth Circuit panel held that Kalshi had not shown that its sports event contracts were "swaps" under the CEA, which are defined to cover "any agreement . . . that provides for any purchase, sale, payment, or delivery . . . that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an *event* or contingency *associated with* a potential financial, economic, or commercial consequence" (emphasis added). Although the Sixth Circuit panel decided that the sports contracts concerned "events," the panel determined that the "associated with" language in the "swap" definition was intended to cover only those events inherently associated with a financial, economic, or commercial consequence (e.g., financial risk-hedging interests). The Sixth Circuit reasoned that the economic consequences of sports event contracts (e.g., predictions on who might be selected as Most Valuable Player of the Super Bowl)

depend on external, downstream events and should not be considered sufficiently "associated with" an event to satisfy the CEA's definition of "swap." Separately, the Sixth Circuit concluded that even if Kalshi's sports-events contracts were indeed "swaps" under the CEA, the Act did not expressly or impliedly preempt state gambling laws. The Sixth Circuit's decision widens circuit splits over the preemptive effect of federal law on state regulation of such contracts. The panel's decision aligns with the Ninth Circuit and splits with the Third Circuit in deciding that Kalshi's sports event contracts are not "swaps" under the CEA and that the CEA does not impliedly preempt state gambling laws. The panel splits with the Ninth Circuit, which held that the CEA expressly preempts all state laws regulating swaps traded on DCMs, although both courts agree that express preemption does not shield Kalshi's sports event contracts from state gambling laws because they do not constitute "swaps" (*KalshiEx LLC v. Schuler*).

- **Separation of Powers:** The Eleventh Circuit held that members of regional fishery councils under the Magnuson-Stevens Act were improperly appointed under the Appointments Clause. The Act establishes councils that are tasked with proposing rules to the Secretary of Commerce for the regulation of fisheries. The council may also, among other things, block ("veto") the Secretary from taking certain actions. The plaintiffs challenged a rule issued by the Secretary that one such council proposed, arguing that the rule should be deemed invalid because the council members were unconstitutionally appointed. The plaintiffs also alleged that statutory removal protections for council members violated the separation of powers. Turning first to the issue of standing, the Eleventh Circuit split with the First Circuit, but joined the Third and Fifth Circuits, in recognizing that the participation of an unconstitutionally appointed body can lead to cognizable harms whether or not the challenged rulemaking itself involved the specific powers that the plaintiffs contest. On the merits, the Eleventh Circuit agreed with the petitioners (and with prior Third and Fifth Circuit rulings) that at least some of the council members—such as those appointed by a state governor—were improperly appointed. The court reasoned that council members wielded significant power through their ability to veto actions by the Secretary. This power, the court concluded, made those members, at minimum, inferior officers of the United States, who by default must be appointed by the President with the Senate's advice and consent. Although a department head can appoint inferior officers in some circumstances, only some of the council members were appointed by the Secretary. The circuit panel concluded that other functions of the council, including the proposal of fishery rules for the Secretary's approval, were advisory in nature and did not implicate the Appointments Clause. Turning to the question of remedy, the circuit panel—again like the Third and Fifth Circuits—held that it would be improper to declare invalid every action taken by the council, determining instead that only those actions taken under unconstitutionally delegated executive authority should be invalidated. Accordingly, the panel rejected the plaintiff's request to vacate the challenged rule, because the statutory veto provisions giving rise to the Appointments Clause violation were not implicated in the issuance of the rule (*Russo v. Sec'y, U.S. Dep't of Commerce*).

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