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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Dec. 13–Dec. 19, 2021)

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The federal courts issue hundreds of decisions every week in cases involving diverse legal disputes. This Sidebar series selects decisions from the past week that may be of particular interest to federal lawmakers, focusing on the orders and decisions of the Supreme Court and precedential decisions of the courts of appeals for the thirteen federal circuits. Selected cases typically involve the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress's lawmaking and oversight functions.

Some of the 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 contact the author to subscribe to the *CRS Legal Update* newsletter and receive regular notifications of new products published by CRS attorneys.

Decisions of the Supreme Court

On December 13, 2021, the Supreme Court declined requests to enjoin New York's emergency rule that certain health care workers be vaccinated against Coronavirus Disease 2019 (COVID-19), a requirement subject to limited exemptions for medical but not religious reasons. Three Justices would have granted the stay. The underlying circuit court decisions are described in two prior *Congressional Court Watcher* Sidebars (*Dr. A. v. Hochul*; *We The Patriots USA, Inc. v. Hochul*).

The Court also added three cases to the term's docket last week:

- **Arbitration:** The Court granted certiorari to consider an appeal of a California state court decision concerning the interplay between the Federal Arbitration Act—which permits parties to contract for arbitration of disputes and, in so doing, forfeit their rights to bring suit over matters covered by the agreement—and a state law that allows employees to raise certain representative claims, on behalf of both themselves and other workers, against their employer (*Viking River Cruises, Inc. v. Moriana*).

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- **Transportation:** The Court agreed to review a case from the Seventh Circuit, in which it is asked to consider when a locomotive is in "use" on a railroad line for purposes of the Locomotive Inspection Act and its implementing safety regulations, a question that has elicited differing approaches from lower courts (*LeDure v. Union Pacific Railroad Co.*).
- **Veterans:** The Uniformed Services Employment and Reemployment Rights Act bars adverse employment actions against workers based on their military service, and a state employer may be sued under the Act for monetary damages in state court. On appeal from a Texas state court, the Supreme Court is asked whether the doctrine of sovereign immunity renders the Act's state-suit provision invalid against nonconsenting states, or whether Congress may authorize such suits pursuant to its constitutional war powers (*Torres v. Texas Dep't of Public Safety*).

Decisions of the U.S. Courts of Appeals

Topic headings marked with an asterisk (*) indicate cases where the appellate court's controlling opinion recognizes 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.

- **Criminal Law & Procedure:** The Second Circuit largely affirmed a criminal defendant's convictions for gang-related activities, but vacated his conviction under 18 U.S.C. § 924(j)(1), murder through the use of a firearm during and in relation to "a crime of violence." The panel concluded that under binding Supreme Court precedent, the defendant's conviction for conspiring to violate the Racketeer Influenced and Corrupt Organizations Act was not a "crime of violence" that could serve as a predicate for conviction under § 924(j)(1) (*United States v. Capers*).
- **Criminal Law & Procedure:** The Eleventh Circuit affirmed a criminal defendant's cyberstalking convictions under 18 U.S.C. § 2261A(2)(B) and, in so doing, rejected the defendant's facial and as-applied First Amendment challenge to the statute. Like other circuits that have considered facial First Amendment challenges to the statute, the court rejected the defendant's argument that the cyberstalking law was overbroad after concluding it targeted threatening conduct, not protected speech (*United States v. Fleury*).
- **Firearms:** The Fifth Circuit joined three other circuits in rejecting a challenge to a Bureau of Alcohol, Tobacco, Firearms, and Explosives' 2018 rule that bump-stock type devices—which enable a shooter of a semiautomatic firearm to start a continuous firing cycle with a single pull of the trigger—fall under the federal statutory prohibition on machineguns (*Cargill v. Garland*).
- **Immigration**: The Fifth Circuit upheld a district court's ruling instructing the Department of Homeland Security (DHS) to restart the Migrant Protection Protocols (MPP), a policy implemented in 2019 that requires most asylum seekers arriving at the southern border to wait in Mexico while their asylum claims are processed. DHS announced it was terminating the MPP in early 2021. The district court ordered a recommencement of the MPP, and the Supreme Court declined an application to stay this order. On appeal, the Fifth Circuit affirmed the district court's judgment, concluding that DHS's termination decision was arbitrary and capricious under the Administrative Procedure Act and, in addition, contravened governing immigration statutes (*Texas v. Biden*).
- **Immigration:** Under 8 U.S.C. § 1231(a)(5), an alien who reenters the United States "illegally" after being removed remains subject to the earlier order of removal, which is reinstated. The Ninth Circuit, sitting en banc, held that a petitioner's prior deportation rendered his subsequent reentry illegal under § 1231(a)(5), regardless of the veracity of

defendant's claim that he only reentered the country after a border officer mistakenly allowed him to do so (*Tomczyk v. Garland*).

- **Labor & Employment:** A divided Sixth Circuit panel allowed to go into effect an Occupational Safety and Health Administration (OSHA) emergency temporary standard (ETS) directing employers with 100 or more workers to adopt a COVID-19 vaccination policy. Soon after its issuance in November 2021, the ETS was challenged by plaintiffs in several circuits, with the Sixth Circuit ultimately selected to hear the consolidated petitions. Prior to this consolidation, the Fifth Circuit had issued a stay of the mandate's implementation. In lifting the stay, the Sixth Circuit panel majority held that the plaintiffs were unlikely to succeed on their claims that the ETS exceeded OSHA's statutory authority, lacked adequate justification, and violated the Constitution's Commerce Clause and nondelegation doctrine. The panel's decision came days after the en banc Sixth Circuit deadlocked on whether to hear the consolidated petitions en banc, with the tie meaning the case would be heard by a three-judge panel. The eight judges who favored initial en banc review joined opinions concluding the OSHA rule was likely invalid, while the eight judges who voted against en banc review did not address the case's merits (*In re MCP No. 165, OSHA Rule on COVID-19 Vaccination & Testing, 86 Fed. Reg. 61402*).
- **Labor & Employment:** The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, requires employers to provide workers returning from military service with any seniority-based benefit the employee would have otherwise accrued but for the military leave. The Seventh Circuit joined at least two other circuits in concluding that sick-time accrual is not a seniority-based benefit under the Act (*Moss v. United Airlines, Inc.*).
- **Public Health:** The Fifth Circuit partially stayed a district court's preliminary injunction barring enforcement of a federal COVID-19 vaccination mandate for many health providers, limiting the injunction's reach to the plaintiff-states, but declined the government's request to stay the injunction in full after concluding it failed to show it would succeed on its defense of the mandate. The challenged mandate, issued as an interim rule by the Centers for Medicare & Medicaid Services (CMS) in November 2021, generally requires certain types of health care entities participating in the Medicare and Medicaid programs to ensure staff are vaccinated against COVID-19 unless an individual is exempted for religious, medical, or other prescribed reasons. Legal challenges against the CMS rule have been brought in several courts, and to date, three district courts have issued preliminary injunctions of varying scope while litigation challenging the CMS rule continues. (As discussed in a prior edition of the *Congressional Court Watcher*, the Eleventh Circuit declined to enjoin the CMS rule pending appeal in a different case, where the lower court had rejected Florida's preliminary injunction request.) The immediate effect of the Fifth Circuit's partial stay of one of these injunctions is to allow CMS to implement the rule—unless enjoined by other courts—in locations outside the 25 states that are parties to the cases where injunctions have been issued (*Louisiana v. Becerra*). Following the Fifth Circuit's order, the Biden Administration asked the Supreme Court to stay in full the district court's injunction of the CMS rule pending appeal.
- ***Securities:** Sitting en banc, a divided Fifth Circuit added to a circuit split in holding that a provision of the Securities Exchange Act, 15 U.S.C. § 78y, does not strip federal district courts of subject-matter jurisdiction to hear structural constitutional challenges to the Securities and Exchange Commission (SEC). The court, however, remanded the case to the district court so it could consider the plaintiff's claims that the SEC's administrative

- law judges were unconstitutionally insulated from the President's removal power (*Cochran v. SEC*).

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