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Legal Sidebar

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 3–Jan. 9, 2022)

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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 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

No Supreme Court opinions were issued last week, and no new cases were added to the Court's docket.

## 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.

- **Civil Procedure:** The Eighth Circuit joined two other circuits in recognizing that the Price-Anderson Act, which provides original federal question jurisdiction over "any public liability action arising out of or resulting from a nuclear incident," applies to all nuclear incidents, regardless of whether the defendant had an applicable indemnity

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agreement. The panel reversed a district court's narrower reading and remanded the case for further proceedings (*In re Cotter Corp.*).

- **Civil Rights:** The Tenth Circuit held that an Americans with Disabilities Act (ADA) "tester," who visited an inn's online reservation website to determine whether it was ADA-compliant but had no intention to stay at the lodging, failed to allege a concrete and particularized injury flowing from the alleged ADA violation, and therefore failed to satisfy constitutional standing requirements (*Laufer v. Looper)*.
- **Communications:** The First Circuit concluded that express preemption provisions of the Cable Communications Policy Act of 1984 (Cable Act) did not apply to a Maine law that requires cable operators to provide pro rata credits or rebates to subscribers who cancel their cable service three or more days before the end of the billing period. The Cable Act preempts states from regulating "rates for the provision of cable service" in many cases, and the circuit panel held that this provision does not cover a state's regulation of termination rebates, which govern a period after cable service ends (*Spectrum Northeast, LLC v. Frey*).
- ***Communications:** Splitting with a Third Circuit panel that reached the opposite conclusion, the Second Circuit held that an unsolicited faxed invitation to participate in market research surveys in exchange for money is not an "unsolicited advertisement" prohibited under the Telephone Consumer Protection Act of 1991 (*Katz v. Focus Forward, LLC*).
- **Criminal Law & Procedure:** Joining eleven other circuits, the Fourth Circuit held that, following a 2002 amendment to 21 U.S.C. § 841, criminal defendants convicted of certain controlled substance offenses under that provision are subject to the supervised release terms particular to the statute, which imposes no maximum limit to the term of supervised release. In so doing, the court recognized that the 2002 amendment abrogated an earlier circuit decision holding that certain periods of supervised release under § 841 could not exceed the maximum term set by 18 U.S.C. § 3583, the statute that generally governs the imposition of a term of supervised release after imprisonment (*United States v. Perez*).
- **Criminal Law & Procedure:** In reviewing a criminal defendant's convictions and sentence for various federal firearms offenses, the Eighth Circuit declined to adopt the standard employed by some circuit courts to sustain a conviction under 18 U.S.C. § 922(g) for possessing a firearm while being an unlawful user of a controlled substance. The panel concluded that the government need not show regular drug use over an extended period to sustain a conviction, and that the government satisfied its burden in the present case by showing the defendant "was actively engaged in the use of a controlled substance during the time he possessed firearms" (*United States v. Carnes*).
- **Criminal Law & Procedure:** The Ninth Circuit affirmed in part and reversed in part a criminal defendant's convictions and vacated his sentence for a fraudulent scheme involving state commercial drivers' licenses. A divided panel reversed the defendant's convictions under the *federal* identification document fraud statute, 18 U.S.C. § 1028, after concluding the district court erred in instructing the jury that the improperly issued *state* identification documents were necessarily covered by the statute. Instead, the majority held that § 1028 proscribes fraudulent activity related to identification documents produced by a state (as opposed to the federal government) only when there is some further federal nexus, such as when the activity has an effect on interstate commerce or involves the use of U.S. mail (*United States v. Turchin*).

- **Election Law:** The Eleventh Circuit upheld a Georgia ballot-access law which, among other things, requires independent and third-party candidates running for a non-statewide office, including for the U.S. House of Representatives, to obtain signatures from a number of voters equal to five percent of the total number of registered voters who were eligible to vote in the last election. Relying on decades-old Supreme Court precedent that rejected similar ballot-access laws and more recent circuit jurisprudence, the panel held the district court erred in holding that the Georgia law unconstitutionally burdened the plaintiffs' associational and voting rights protected by the First and Fourteenth Amendments. The panel also affirmed the lower court's conclusion that the law did not violate equal protection principles by providing different ballot-access rules for third-party candidates running for statewide and non-statewide office (*Cowen v. Secretary of State of the State of Georgia*).
- **Health:** The Federal Circuit construed "residual effects," as used by the National Childhood Vaccine Injury Act of 1986 (Vaccine Act), to refer to continuing health effects caused by the vaccine injury, and not minimally invasive diagnostic testing or monitoring to determine whether any lingering effects from a purported injury had been resolved. The Vaccine Act authorizes compensation for certain persons who suffered vaccine-related injuries, but requires those petitioners who were not hospitalized to show they suffered "residual effects" for at least six months (*Wright v. Secretary of Health & Human Services*).
- **Indian Law:** In ruling that a state court lacked jurisdiction over a contract dispute between an Indian tribe and a non-Indian person for conduct arising on a tribal reservation, a divided Tenth Circuit panel held that even if the contract purported to waive the tribe's sovereign immunity, the state court still lacked subject-matter jurisdiction over the dispute. Under 25 U.S.C. § 1322, tribal consent is necessary for state-court jurisdiction over disputes arising in "Indian country," and consent is obtained only by holding a special tribal election under 25 U.S.C. § 1326. The panel majority held that the state court lacked jurisdiction because no such election was held (*Ute Indian Tribe v. Lawrence*).
- ***Labor & Employment:** The Fourth Circuit vacated a lower court's dismissal of a plaintiff's claim under the Fair Labor Standards Act (FLSA), holding that the employee alleged a viable "overtime gap" claim premised on her employer underpaying her for non-overtime hours during weeks when she also worked overtime. While the FLSA is silent on this issue, the Fourth Circuit held that an overtime gap claim was cognizable under the Department of Labor's interpretation of the FLSA, and that interpretation was entitled to deference under the framework set forth by the Supreme Court in *Skidmore v. Swift*. The court observed that its ruling created a split with the Second Circuit, which found the Department's interpretation unpersuasive and ruled the overtime gap claims were not cognizable under the FLSA (*Connor v. Cleveland County, North Carolina*).
- **Public Health:** A divided Sixth Circuit panel declined to stay a lower court's preliminary injunction that bars implementation of a Coronavirus Disease 2019 (COVID-19) vaccination policy for federal contractors in Kentucky, Ohio, and Tennessee while litigation challenging the policy continues. The case centers on an executive order requiring federal contractors to comply with a COVID-19 vaccination policy established by the Safer Federal Workforce Task Force. That policy, issued in November 2021, requires covered contractors to ensure contractor-employees are fully vaccinated, subject to certain exemptions and other terms. Several plaintiffs filed lawsuits challenging the vaccination policy as exceeding the executive's authority over procurement matters under the Federal Property and Administrative Services Act. Several district courts, after

concluding that plaintiffs were likely to prevail on the merits, issued preliminary injunctions of differing scopes barring implementation of the policy during the pendency of litigation. In rejecting the government's request to stay one of these injunctions pending appeal, a divided Sixth Circuit panel held that the government failed to satisfy its burden of showing a strong likelihood of success on the merits. In addition to the preliminary injunction reviewed by the Sixth Circuit (which covers three states), the Eleventh Circuit recently declined to stay, before holding oral argument, a nationwide preliminary injunction of the federal contactor COVID-19 vaccination policy that was issued by a federal district court in Georgia (*Kentucky v. Biden*).

- **Sovereign Immunity:** A Ninth Circuit panel held that the Randolph-Sheppard Act—which gives preferences to blind applicants for vending licenses at federal facilities and, through a cooperative federal-state program, certain other properties—did not waive a state's sovereign immunity from liability for monetary damages, attorney's fees, or costs associated with alleged statutory violations. In so doing, the Ninth Circuit recognized that prior, contrary circuit precedent was abrogated by an intervening Supreme Court ruling requiring a state's waiver of sovereign immunity from suit in federal court to be explicit (*Bird v. Oregon Commission for the Blind*).
- ***Tax:** A divided Sixth Circuit panel affirmed a district court's conclusion that it could not review a challenge to an Internal Revenue Service (IRS) administrative summons to the banks of a taxpayer's spouse and lawyers, who were not notified of the summons, where the agency sought to determine whether their bank accounts were used to hide the taxpayer's assets. The majority held that the plain language of the governing provision, 26 U.S.C. § 7609(c)(2)(D)(i), does not require giving notice to persons that a summons has been issued for their bank records—even if they are not the direct target of the IRS's investigation—when (1) an assessment was made or judgment entered against a delinquent taxpayer and (2) the summons is "in aid of the collection" of the delinquent taxpayer's unpaid liabilities. The majority rejected the approach taken by the Ninth Circuit, which held that no notice is required under this provision only when the assessed taxpayer himself has a recognizable legal interest or title in the object of the summons (*Polselli v. IRS*).

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