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Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 24–Jan. 30, 2022)

January 31, 2022

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

Decisions of the Supreme Court

Associate Justice Stephen Breyer announced last week that he will retire from active service as a Justice when the Court begins its summer recess, assuming that his successor has been confirmed by that time. A CRS Legal Sidebar provides more information about Justice Breyer's service on the Court. As with prior Supreme Court vacancies, CRS will provide comprehensive support to Congress as it considers the nomination to fill Justice Breyer's seat.

Last week, the Supreme Court issued a decision on the merits in one case:

- **Employee Benefits:** In an 8-0 decision (Justice Barrett did not take part in the case), the Supreme Court held that the plaintiffs could proceed with their claims that retirement plan fiduciaries breached their duties under the Employee Retirement Income Security Act by paying excessive recordkeeping and investment management fees. The lower courts held that, despite the high fees paid to some funds, the plan fiduciaries had fulfilled their duties by offering a broad array of investment options within the plans, including lower-fee funds. The Supreme Court vacated and remanded the case, holding that a fiduciary does not fulfill its duty simply by offering a broad array of plan options; it

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LSB10692

must also remove imprudent investments from a plan within a reasonable time. Because the evaluation of that duty is context-dependent, the Court ordered the lower courts to reconsider the plaintiffs' claims (*Hughes v. Northwestern University*). A CRS Legal Sidebar provides more detail about this decision.

The Court also issued an emergency order:

- **Civil Rights:** By a 5-4 vote, the Supreme Court allowed Alabama to proceed with the scheduled execution of a death-row inmate. Earlier in the week, the Eleventh Circuit had stayed the execution on the grounds that the state failed to provide a reasonable accommodation for the inmate's disability, as required under Americans with Disability Act, when it did not allow him the option of choosing death by nitrogen hypoxia in lieu of lethal injection (*Hamm v. Reeves*).

The Supreme Court granted certiorari in four cases, two of which have been consolidated for oral argument:

- **Civil Procedure:** The Court agreed to review a case from the Ninth Circuit concerning federal-court jurisdiction. The Court is asked to consider whether the Federal Trade Commission (FTC) Act—which gives federal appellate courts "exclusive" jurisdiction to "affirm, enforce, modify, or set aside" FTC cease-and-desist orders—impliedly strips federal district courts of jurisdiction to consider constitutional challenges to the FTC's structure and procedures (*Axon Enterprise, Inc. v. FTC*).
- **Education:** The Court granted consolidated review of two cases challenging the race-conscious admission policies of two institutions of higher education. In both, the Court is asked to reconsider its 2003 decision in *Grutter v. Bollinger*, which recognized that the educational benefits flowing from a diverse student body may justify some consideration of race by a university in student admission decisions. The plaintiffs in one case argue that the race-conscious admissions policy of the University of North Carolina violates the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964 because the public university failed to consider adequately viable race-neutral alternatives for achieving the school's diversity goals (*Students for Fair Admissions, Inc. v. University of North Carolina*). The plaintiffs in the other case likewise challenge Harvard College's race-conscious admissions policy, and additionally contend that Harvard employs racial balancing that disfavors Asian American applicants. Because Harvard is a private university, that case turns on the statutory requirements of Title VI, which federal courts generally interpret coextensively with constitutional prohibitions applicable to state actors (*Students for Fair Admissions Inc. v. President & Fellows of Harvard College*).
- **Environmental Law:** The Court granted a petition to consider the appropriate standard for identifying "waters of the United States" under the Clean Water Act. The Court most recently addressed that question in its 2006 decision in *Rapanos v. United States*, but that case did not result in a majority opinion. The petitioners are expected to argue that the Court should now formally adopt Justice Scalia's plurality opinion from *Rapanos*, which would generally afford the Act a narrower scope than the courts of appeals have since adopted (*Sackett v. EPA*).

Decisions of the U.S. Courts of Appeals

- **Civil Procedure:** The D.C. Circuit rejected a "de-platforming" claim by a health care interest group against a Member of Congress. The group alleged that the Member had written a letter to online platforms such as Google requesting information about their

efforts to stop vaccine-related misinformation, and that those platforms subsequently deprioritized the group's information. The D.C. Circuit held that the group lacked standing to sue the Member, because it had not adequately alleged the necessary connections between the Member's letter, the platforms' actions, and legal injury to the group. The Court did not reach the separate question of whether the Member's actions might be protected under the Speech or Debate Clause of the Constitution (*Association of American Physicians & Surgeons v. Schiff*).

- **Civil Rights:** A divided Ninth Circuit panel affirmed a decision in favor of the University of Arizona in a suit under Title IX of the Education Amendments of 1972 involving an alleged assault by a student-athlete against another student off-campus. The majority held that the university lacked substantial control over the context in which the assault allegedly occurred, notwithstanding its approval of the student-athlete's off-campus housing and payment of such housing through scholarship funds (*Brown v. Arizona*).
- **Commerce:** The Third Circuit held that Pennsylvania did not violate the "dormant" Commerce Clause of the Constitution by executing a subpoena to enforce its usury laws against an out-of-state title lender. The "dormant" Commerce Clause doctrine recognizes that states are implicitly limited from regulating interstate commerce that occurs entirely outside its borders. The court reasoned that, unlike a simple out-of-state sale of goods, an out-of-state title loan creates a continuing creditor-debtor relationship that may involve activities within Pennsylvania. It held that Pennsylvania's strong interest in prohibiting usury in such relationships outweighed any incidental burden on interstate commerce (*TitleMax of Delaware, Inc. v. Weissman*).
- **Communications:** The Ninth Circuit declined to block enforcement of California's "net neutrality law" after concluding that the plaintiffs were unlikely to succeed in their arguments that federal law preempts the California statute. "Net neutrality" generally refers to the idea that broadband service providers should neither control how consumers use their networks nor discriminate among content providers using those networks. In 2018, the Federal Communications Commission (FCC) rescinded its "net neutrality" rules after reclassifying broadband as an information service under Title I of the Communications Act, over which the FCC has limited regulatory authority. Agreeing with the D.C. Circuit, the Ninth Circuit held that, as a result of this decision, the FCC lacked regulatory authority to adopt "net neutrality" rules or prevent states from adopting them. It further held that the Communications Act left room for states to regulate intrastate communications, and that the California law did not intrude in the field of interstate communications (where the FCC has exclusive authority) or otherwise conflict with the Communications Act. The Ninth Circuit therefore allowed the California law to remain in place while the plaintiffs continued their legal challenge to it (*ACA Connects v. Bonata*).
- **Criminal Law & Procedure:** The First Circuit allowed a federal prosecution to proceed against a large-scale marijuana growing operation in Maine. The defendants argued that the prosecution was illegal under an appropriations rider—enacted by Congress each year since 2015—that prohibits the Department of Justice from using federal funds to interfere with the implementation of state medical marijuana laws. The panel agreed with the district court that the prosecution was valid because the operation was a facade for selling marijuana to unauthorized users (*United States v. Bilodeau*).
- **Criminal Law & Procedure:** The First Circuit allowed a district court to enforce a Drug Enforcement Agency (DEA) subpoena requiring a New Hampshire state employee to turn over prescription drug records maintained in a state database. The Controlled Substances

Act authorizes the DEA to issue subpoenas to witnesses with information relevant to the agency's investigations and authorizes judicial enforcement of such subpoenas against "any person." The First Circuit construed the provision to authorize subpoena enforcement against state officers to obtain state records. The court also held that the Fourth Amendment does not bar enforcement of the challenged subpoena because individuals lack a reasonable expectation of privacy in the prescription drug records stored in the state database (*Dep't of Justice v. Ricco Jonas*).

- **Criminal Law & Procedure:** The Second Circuit upheld the conviction of Joaquin Archivaldo Guzman Loera, also known as "El Chapo," for conducting a criminal enterprise comprising large-scale narcotics violations and a murder conspiracy. The court of appeals rejected an array of error claims, including constitutional claims under the Fourth Amendment and Sixth Amendment. Among other points, it held that Mexico had validly agreed to the prosecution pursuant to its extradition treaty with the United States, and that the district court had properly handled the possibility of juror misconduct (*United States v. Guzman Loera*).
- **Criminal Law & Procedure:** In affirming a criminal defendant's conviction under 18 U.S.C. § 2252(a)(2) for knowingly distributing child pornography "using any means or facility of interstate or foreign commerce," the Sixth Circuit held that the government satisfied its burden by showing that the defendant distributed child pornography using the internet. The court had previously recognized the internet as a "means" of interstate or foreign commerce, and the panel observed that the government did not need to prove the actual transfer of child pornography across state lines to sustain a conviction (*United States v. Clark*).
- **Criminal Law & Procedure:** The Ninth Circuit held that, for a criminal defendant to be culpable under 18 U.S.C. § 1029(a)(3) and (a)(4) for possessing counterfeit or unauthorized "access devices" (i.e., credit cards) or device-making equipment with the "intent to defraud," the government must show the defendant acted with the intent to deprive a victim of money or property by deception (*United States v. Saini*).
- **Environmental Law:** The Fourth Circuit once again vacated federal approvals related to the construction of the Mountain Valley Pipeline, an interstate natural gas pipeline, in Virginia and West Virginia. The court held that the U.S. Forest Service and the Bureau of Land Management violated the National Environmental Policy Act and other statutes by relying on modeling about sediment and erosion but not real-world data, by approving the use of a new construction method without fully considering its impacts, and by failing to apply relevant Forest Service regulations (*Wild Virginia v. U.S. Forest Service*).
- **False Claims Act:** The Fourth Circuit affirmed the dismissal of an action brought by a private party on the government's behalf under the False Claims Act (FCA) against a drug manufacturer that allegedly engaged in fraudulent price reporting under the Medicare Drug Rebate Statute. Like other courts, the Fourth Circuit held that a defendant does not "knowingly" violate the FCA when its interpretation of the underlying statute is reasonable and the government has not issued contrary, authoritative guidance (*United States ex rel. Sheldon v. Allergan Sales, LLC*).
- **First Amendment (Speech)**: When it enacted the Paycheck Protection Program in response to the Coronavirus Disease 2019 pandemic, Congress excluded certain categories of businesses from the program—including businesses that offer live adult entertainment. The Seventh Circuit held that this exclusion did not violate the First Amendment rights of these businesses because it did not suppress their expressive

activities; it only declined to subsidize them (*Camelot Banquet Rooms v. U.S. Small Business Administration*).

- **Health:** The Second Circuit upheld a district court order requiring the Department of Health and Human Services to create an administrative review process allowing a patient to appeal a Medicare decision reclassifying him or her from an "inpatient" to an outpatient receiving "observation services," a change affecting share of costs to the patient. The circuit court held that the district court had properly certified a class action on behalf of affected patients, that those patients have a protected property interest in Medicare coverage that depends on their classification as inpatients, and that constitutional due process requires some recourse to challenge a reclassification (*Barrows v. Becerra*).
- **Labor & Employment:** The D.C. Circuit decided in favor of federal employees' unions in their dispute with the Federal Labor Relations Authority (FLRA) over "zipper clauses." A "zipper clause" may be included in a collective bargaining agreement to prevent further bargaining for the duration of the agreement. The unions challenged the FLRA's announcement that whether to include a zipper clause in a collective bargaining agreement is a "mandatory" bargaining subject under federal labor law and that the Federal Services Impasse Panel could therefore impose such a clause if the unions declined to bargain over it. The D.C. Circuit held that the FLRA's decision that zipper clauses are a mandatory subject of collective bargaining was arbitrary and capricious, concluding that there were several flaws in the agency's consideration of ambiguous statutory language (*American Federation of Government Employees v. FLRA*).
- **Public Health:** A divided Eighth Circuit panel partially upheld an injunction that blocked an Iowa state law prohibiting mask requirements in schools. The district court had completely enjoined the law, ruling that it violated the Americans with Disabilities Act. On appeal, the panel majority held that mask requirements are reasonable accommodations required by federal disability law to protect covered persons' access to public education. However, it narrowed the district court's injunction to apply only to those schools and districts that "encounter" such individuals, holding that Iowa may enforce its prohibition against mask requirements in other schools (*Arc of Iowa v. Reynolds*).

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