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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 31–Feb. 6, 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.

- **Abortion:** A divided, en banc Sixth Circuit allowed enforcement of a Tennessee law banning abortions because of the race, sex, or Down syndrome of the fetus, pending en banc consideration of a challenge to the law. A district court earlier issued a preliminary injunction halting enforcement of the abortion restriction after concluding plaintiffs were likely to succeed on their claim that the restriction was unconstitutionally vague. (That decision was initially upheld by a divided three-judge Sixth Circuit panel before the

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circuit court decided to hear the case en banc, vacating the three-judge panel opinion.) The en banc order stays enforcement of the district court's preliminary injunction pending consideration of the appeal. The en banc order does not modify the part of the district court order that enjoined enforcement of a different provision in Tennessee law that makes it a crime to perform an abortion at certain points pre-viability (*Memphis Center for Reproductive Health v. Slatery*).

- **Administrative Law:** The Ninth Circuit held it lacked jurisdiction to review a response letter from the Drug Enforcement Administration to a physician's inquiry on whether he could administer a controlled substance to a terminally ill patient without violating the Controlled Substances Act (CSA). Joining at least two other circuits, the Ninth Circuit construed the CSA limitation on federal appellate jurisdiction over "final" agency decisions as similar to the Administrative Procedure Act's jurisdictional provisions concerning "final" agency action. The court concluded the CSA did not confer appellate courts with jurisdiction to review informational documents like the one at issue here, because it was a routine guidance letter on the application of a statute, which was not preceded by agency factfinding or a public hearing, and had no legal consequences for the physician (*Advanced Integrative Med. Science Inst., PLLC v. Garland*).
- **Civil Procedure:** In consolidated cases, the Seventh Circuit held that plaintiffs satisfied constitutional standing requirements when bringing claims against debt-collection companies under the Fair Debt Collection Practices Act (FDCPA). The plaintiffs alleged that the collection companies failed to notify credit reporting agencies of disputed debts. The cases required the appeals court to apply the Supreme Court's decision in *TransUnion LLC v. Ramirez*, where the Court observed that when a federal statute provides a plaintiff with a cause of action based on a defendant's violation of federal law, the plaintiff must still satisfy all constitutional requisites for standing, including identifying a "concrete harm" suffered. *TransUnion* held that courts must consider whether the alleged harm has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. Here, the Seventh Circuit concluded that the plaintiffs alleged reputational injury under the FDCPA—caused by the debt collectors' dissemination of false information about them to credit reporting agencies—was analogous to the recognized harm of defamation and satisfied constitutional standing requirements (*Ewing v. MED-1 Solutions, LLC*; *Webster v. Receivables Performance Management, LLC*).
- **Criminal Law & Procedure:** The Ninth Circuit vacated a criminal defendant's conviction under the federal kidnapping statute, 18 U.S.C. § 1201, after concluding the defendant's actions in the course of a violent domestic assault did not constitute "kidnapping," even though they were punishable under other laws. The panel endorsed the Third Circuit's four-factor approach to assessing when conduct constitutes kidnapping, which considers (1) the duration of the detention or movement of the victim; (2) whether that conduct occurred during the commission of a separate offense; (3) whether the detention or movement of the victim is an inherent element of a separate, non-kidnapping offense; and (4) whether the conduct created a significant danger to the victim, independent from the threat posed by a separately committed offense (*United States v. Jackson*).
- **Education:** A divided Sixth Circuit panel ruled that a district court's denial of plaintiffs' preliminary injunction request was based on error in a case where it was alleged that a university violated Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education programs and activities that receive federal funding, by eliminating its women's swimming and diving team. Although the university terminated

both its men's and women's swimming teams, that was not pertinent to the court's analysis because the relevant Title IX regulations and Department of Education guidance focus on the substantial proportionality of overall participation opportunities available to male and female students. Here, the panel majority held, among other things, that the district court erred by evaluating the participation gap between male and female students as a percentage of the overall university athletic program, rather than looking at the raw number of male and female student-athletes in that program. Using the latter framework may have led the district court to conclude that substantial proportionality did not exist due to the elimination of the women's swim team. The panel remanded the case to the district court to assess whether the university violated Title IX and, if so, whether the court should preliminary enjoin the university from eliminating the women's swimming team while litigation continued (*Balow v. Michigan State University*).

- **Environmental Law:** The Fifth Circuit affirmed the dismissal of a resident association's citizen suit against the City of New Orleans, seeking the cleanup of hazardous chemicals under the Resource Conservation and Recovery Act (RCRA). RCRA bars such suits against a party that is already "diligently conducting a removal action" pursuant to an Environmental Protection Agency (EPA) consent decree. Noting that the circuit earlier recognized that Congress intended RCRA's use of the term "removal action" to be construed broadly, the court held the term applied to the City's operation and maintenance of a protective cover placed over contaminated soil. The court declined to give deference to a narrower interpretation of "removal action" contained in a proposed EPA rule, but was not ultimately included in the final rule (*Residents of Gordon Plaza, Inc. v. Cantrell*).
- **Environmental Law:** A Ninth Circuit panel issued two opinions on Forest Service decisions affecting segments of the Los Padres National Forest. In one case, a divided panel concluded that a Forest Service regulation authorizing "thinning . . . to reduce fire hazard" in protected areas allowed for commercial harvesting of trees that were identified for removal under the regulation. The majority also concluded that the challenged project did not violate the requirements of the National Environmental Policy Act (NEPA) or the National Forest Management Act (*Mountain Communities for Fire Safety v. Elliott*). In a second case, the majority held that the Forest Service's decision in a different project area to allow commercial timber harvesting of trees under a particular size was arbitrary and capricious under the 2001 Roadless Rule, which greatly limits timber harvesting in inventoried roadless areas of the national forest system, though the panel concluded the agency acted permissibly under NEPA when it chose not to prepare an environmental assessment or environmental impact statement for the project (*Los Padres Forestwatch v. U.S. Forest Service*).
- **Freedom of Information Act (FOIA):** In a redacted opinion, the Second Circuit reversed a district court decision and held that certain documents relating to the Central Intelligence Agency's detention and interrogation program in the aftermath of the September 11, 2001, terrorist attacks were exempted from the FOIA's general disclosure requirements on the grounds that those records involved intelligence activities, sources, and methods (*American Civil Liberties Union v. CIA*).
- **Immigration:** Joining the Fifth Circuit, a Ninth Circuit panel held that an alien placed in removal proceedings must receive a notice to appear in a single document containing the time and place of the proceeding. If the alien does not receive such a document, any subsequent removal order issued for the person *in absentia* is subject to rescission (*Singh v. Garland*).

- **Indian Law:** A divided D.C. Circuit panel ruled that under the Michigan Indian Land Claims Settlement Act, the Department of the Interior was not required to hold in trust a parcel of land purchased by a covered tribe using funds made available under the Act for "enhancement of tribal lands." The majority held that under the statute's plain meaning, the Department had authority to determine whether the tribe properly acquired the land using the authorized funds. The majority further held that the Department properly declined to take the lands into trust because the tribe failed to show how the parcel would improve the quality or value of existing lands, rather than simply increasing the overall size of the tribe's landholdings (*Sault Ste. Marie Tribe of Chippewa Indians v. Haaland*).
- **International Law:** The Second Circuit vacated a district court's denial of the Nigerian government's request for judicial assistance in obtaining discovery under 28 U.S.C. § 1782, and remanded the case for further consideration. The Second Circuit held that neither the U.S.-Nigeria Mutual Legal Assistance Treaty (MLAT) nor any source of U.S. policy identified by the lower court required Nigeria to use the MLAT before or instead of § 1782 to seek U.S. assistance (*Fed. Republic of Nigeria v. VR Advisory Services, Ltd.*).
- **Labor & Employment:** The D.C. Circuit vacated a 2020 Federal Labor Relations Authority (FLRA) policy statement that raised the threshold for when federal employers have a duty to engage in collective bargaining with workers' unions over a management-initiated change to workers' employment conditions. The court held that the FLRA's decision to raise the threshold for when the duty is triggered—from when a change has more than a de minimis effect on work conditions to when the change has "a substantial impact" on employment conditions—was not sufficiently reasoned, and thus arbitrary and capricious under the Administrative Procedure Act (*American Federation of Gov't Employees, AFL-CIO v. FLRA*).
- **Labor & Employment:** The Seventh Circuit issued an opinion that addressed the interplay between the Federal Employees Compensation Act (FECA), which provides the exclusive avenue for federal workers compensation for on-the-job injuries and the consequences of those injuries, and the Federal Tort Claims Act (FTCA), which provides a basis for suit against the United States for wrongful injuries caused by a federal employee. The case before the court concerned whether FECA or the FTCA controlled where a federal employee was exposed to fumes at his agency workplace, and subsequently sought treatment at a government hospital where he was injured due to medical malpractice. The Seventh Circuit held that FTCA liability is only precluded after the Department of Labor determines in a FECA adjudication that the claimant's injury stemmed from the job-related injury (*Bourke v. United States*).
- **Transportation:** The Eleventh Circuit held that a lower court improperly dismissed a class action claim against an airline for requiring passengers to pay an additional fee not disclosed in the contract of carriage. The panel held that the Airline Deregulation Act did not preempt the plaintiffs' breach of contract claim against the airline, because the suit did not invoke state laws in an attempt to alter an agreed-upon price, but instead sought to enforce the parties' existing agreement regarding the cost of the flight (*Cavalieri v. Avior Airlines C.A.*).

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