

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 17–June 23, 2024)

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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.

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Decisions of the Supreme Court

Last week, the Supreme Court issued decisions in nine cases for which it heard arguments:

- **Criminal Law & Procedure:** In a 6-3 decision, the Court held that if a person brings suit against a government entity raising a [Fourth Amendment malicious prosecution claim](#), probable cause supporting one criminal charge in the prosecution does not categorically bar the malicious prosecution claim relating to another, baseless charge (*Chiaverini v. City of Napoleon*).
- **Criminal Law & Procedure:** In a 6-3 ruling, the Court held that the [Fifth](#) and [Sixth](#) Amendments require the government to prove beyond a reasonable doubt to a unanimous jury that a defendant’s prior convictions were “committed on occasions different from one another” to impose an enhanced sentence under the Armed Career Criminal Act, [18 U.S.C. § 924\(e\)\(1\)](#) (*Erlinger v. United States*).

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- **Criminal Law & Procedure:** The Court issued a decision addressing the application of its 2019 ruling in *Nieves v. Bartlett*. In *Nieves*, the Court held that a First Amendment retaliatory arrest claim will not succeed if there was probable cause to make the arrest, unless the claim is supported by objective evidence that police had declined to arrest others in similar circumstances when they were not engaged in the same sort of protected speech. In an 8-1 decision, the Court held that a person raising a retaliatory arrest claim might satisfy this evidentiary burden by presenting evidence, for example, that he or she was the only person arrested for engaging in a particular type of conduct under a long-standing criminal prohibition. The Court held that the person need not provide specific evidence that others who engaged in the same conduct in virtually identical circumstances were not arrested (*Gonzalez v. Trevino*).
- **Criminal Law & Procedure:** In a 5-4 opinion, the Court held that when an expert witness for the prosecution gives testimony that relies on findings of a nontestifying forensic analyst, and the testifying witness's conclusions are dependent on the accuracy of the analyst's findings, those findings have been introduced for their truth and implicate the Sixth Amendment's **Confrontation Clause**. As a result, testimonial out-of-court statements by a forensic analyst may not be introduced in a criminal trial unless the analyst is unavailable and the defendant had an earlier chance to cross-examine the analyst (*Smith v. Arizona*).
- **Criminal Law & Procedure:** In a 6-3 decision, the Court ruled that when a criminal offense requires the government to prove as an element that the defendant knew she was carrying illegal drugs, **Federal Rule of Evidence 704(b)**, which generally bars expert opinion testimony on whether a criminal defendant had a requisite mental state, does not prohibit an expert witness for the government from testifying that drug couriers typically know they are carrying drugs (*Diaz v. United States*).
- **Firearms:** In an 8-1 ruling, the Court held that **18 U.S.C. § 922(g)(8)**, which prohibits the possession of firearms by persons subject to certain domestic violence restraining orders, is consistent with the **Second Amendment** and was constitutional as applied to the challenging party. The Court applied the text-and-history-based test announced in *New York State Rifle & Pistol Association v. Bruen*, which is used to assess whether a law violates the Second Amendment. The *Bruen* Court decided that if a government restriction applies to conduct covered by the plain text of the Second Amendment, the Constitution presumptively protects that conduct and the restriction can only be justified if the government shows it is consistent with a historical tradition of firearm regulation. Here, the majority underscored that a historical analogue must be "relevantly similar," but not necessarily identical, to the challenged restriction. The Court decided that Section 922(g)(8) aligned with a historical tradition of temporarily disarming persons who posed a clear threat of physical violence to others (*United States v. Rahimi*).
- **Immigration:** The Court ruled 6-3 that the State Department's denial of a visa application for the alien husband of a U.S. citizen was not subject to judicial review. The **doctrine of consular nonreviewability** generally precludes judicial review of government decisions to issue or withhold a visa, but a narrow exception permits a U.S. citizen to challenge a visa denial that burdens the citizen's constitutional rights. The controlling opinion of the Court, joined by five Justices, ruled that the U.S. citizen in the case lacked a procedural or substantive due process right to reside in the United States with her alien spouse, and therefore the narrow exception to the consular nonreviewability doctrine did not apply (*Dep't of State v. Munoz*).

- **Interstate Compacts:** In a case over which it exercised [original jurisdiction](#), the Court declined by a 5-4 vote to approve a proposed consent decree between Texas and New Mexico to end litigation over the allocation of each state's share of waters under the Rio Grande Compact. The majority observed that in an earlier decision related to the dispute, the Court recognized that the federal government had a separate, distinct interest from Texas in holding New Mexico to its Compact obligations because the Compact is closely connected to the U.S. operation of the Rio Grande Project. The Court here declined to approve the consent decree between the two states because it would improperly dispose of the federal government's valid claims under the Compact and the government timely opposed the proposed consent decree (*Texas v. New Mexico*).
- **Tax:** The Court decided 7-2 that the [Mandatory Repatriation Tax \(MRT\)](#) in the Tax Cuts and Jobs Act of 2017 is a valid exercise of Congress's taxing power. The MRT imposes a one-time tax on certain U.S. shareholders' pro rata share of the post-1986 untaxed and undistributed foreign earnings of a specified foreign corporation. The controlling opinion, joined by five Justices, held that the MRT taxes realized income of the corporation, attributed to the corporation's shareholders. Because the Court found that the MRT was a tax on realized income (that of the corporation), the broader question of whether the Sixteenth Amendment requires realization to tax income without apportionment among the states was not at issue, and the Court declined to address it (*Moore v. United States*).

The Court also granted certiorari to consider the following cases next term:

- **Criminal Law & Procedure:** The federal circuits are split almost evenly on whether a criminal defendant can be convicted of [mail](#) or [wire](#) fraud on a theory of fraudulent inducement. The Court agreed to hear a case to decide whether using deception to induce a commercial exchange can constitute mail or wire fraud, even if the object of the scheme is not to inflict economic harm on the alleged victim but is instead to avoid compliance with statutory, regulatory, or policy interests as material terms of a contract (*Kousisis v. United States*).
- **False Claims Act:** The Court agreed to address a split between the Fifth and Seventh Circuits regarding whether reimbursement requests made to private, nonprofit corporations administering federal programs are actionable "claims" under the [False Claims Act](#) (FCA). The FCA [defines](#) a "claim," in part, as a request for money that is presented to either a federal government agent or a federal contractor, grantee, or funding recipient, if the federal government provides any portion of the requested money. The corporation at issue in the case, which subsidizes telecommunications services for schools and libraries, was created pursuant to authority delegated to the Federal Communications Commission but is private and financed by private entities (*Wisconsin Bell, Inc. v. United States ex rel. Heath*).
- **Labor & Employment:** The Court agreed to hear a case to decide the appropriate standard for assessing whether an employer has demonstrated the applicability of an overtime exemption to the [Fair Labor Standards Act](#). The appropriate evidentiary standard is the subject of a split among the circuits, with six circuits using a preponderance-of-the-evidence standard and one circuit—the Fourth—using the more stringent clear-and-convincing-evidence standard (*E.M.D. Sales, Inc. v. Carrera*).
- **Securities:** The Court agreed to hear a case to determine the appropriate pleading requirements for plaintiffs who file securities fraud class actions under the [Private Securities Litigation Reform Act](#). Specifically, the Court agreed to consider whether plaintiffs who allege scienter based on allegations regarding internal company documents must plead with particularity the contents of those documents, and whether plaintiffs can

satisfy the act's falsity requirement by relying on expert opinions in lieu of particularized allegations of fact (*NVIDIA Corp. v. E. Ohman J:or Fonder AB*).

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 Rights:** The Tenth Circuit reversed a district court's dismissal of an [equal protection claim](#) in a case brought by transgender Oklahoma residents alleging unconstitutional discrimination on the basis of transgender status and sex in the state's denial of "sex-designation amendments" on their birth certificates. The court concluded that the plaintiffs sufficiently stated an equal protection claim because the state's birth certificate policy intentionally discriminated based on transgender status and sex, and the policy failed to withstand [rational-basis review](#) (the controlling opinion did not reach the issue of whether the more stringent [intermediate-scrutiny](#) standard applied). The circuit panel, applying Supreme Court [precedent](#) regarding discrimination in [Title VII](#) suits, found that the plaintiffs had met their burden of "negating every conceivable basis" that may show a legitimate state interest. The panel affirmed the district court's dismissal of the plaintiffs' privacy-related [substantive due process](#) claims (*Fowler v. Stitt*).
- **Criminal Law & Procedure:** The Fourth Circuit held that where a record is ambiguous as to whether a trial court accepted or rejected a plea agreement negotiated between the government and a criminal defendant under [Federal Rule of Criminal Procedure 11\(c\)\(1\)\(C\)](#), the ambiguity must be construed in favor of the defendant. The defendants in the case asserted that the district court accepted their plea agreements but imposed a higher sentence than that which was agreed to between the parties. The government argued that the district court had, in fact, rejected the plea agreements altogether. In finding that an ambiguity on this question existed, the Fourth Circuit ruled the ambiguity must be construed in favor of the defendants and that therefore it would deem the district court to have accepted and been bound by the terms of the plea agreements. Because the district court failed to adhere to those terms in departing from the agreed-upon sentencing recommendation, the court vacated and remanded with instructions to reenter the judgments consistent with those terms (*United States v. Dunlap*).
- ***Criminal Law & Procedure:** The Seventh Circuit, in a per curiam decision, concluded that it remains appropriate to defer to the [commentary](#) of the U.S. Sentencing Guidelines in determining a sentence for a criminal defendant, confirming a prior ruling that such commentary can be relied upon. The defendant argued that a 2019 [Supreme Court decision](#) holding that commentary cannot be relied upon where it is inconsistent with the provisions of law it purports to interpret upended an earlier, general [principle](#) that such commentary may be entitled to deference. Reaffirming prior circuit precedent while acknowledging a growing circuit split on the matter, the panel interpreted the 2019 Supreme Court decision as merely prohibiting deference to commentary where it violates the Constitution or federal law or is inconsistent with, or a plainly erroneous reading of, the guideline. The circuit panel affirmed the district court's sentence and, in particular, its reliance on commentary in calculating the total amount of loss attributable to the defendant's fraud (*United States v. Johnson*).
- **Criminal Law & Procedure:** The Seventh Circuit affirmed a ruling of the district court that supervised release revocation proceedings under [18 U.S.C. § 3583\(e\)\(3\)](#) do not

constitute proceedings guaranteed by the Constitution to be heard by a jury. Ahead of a court hearing on revoking his supervised release, the defendant moved for a trial by jury under [Article III, Section 2](#) of the Constitution and the [Sixth Amendment](#), which the district court denied. The district court then presided over the hearing without a jury and, upon concluding the defendant was guilty of several violations, exercised its discretion to revoke his supervised release. The Seventh Circuit agreed with the district court's denial of the defendant's motion for a jury trial, ruling that these types of revocation proceedings do not amount to a "trial of [a] crime" or a "criminal prosecution" for which a defendant is afforded jury rights under the Constitution (*United States v. Carpenter*).

- **Health:** The Fifth Circuit affirmed a lower court's ruling that members of the U.S. Preventive Services Task Force—one of multiple entities that may issue preventive-care recommendations that insurers must cover under the [Affordable Care Act \(ACA\)](#)—are principal officers whose selection did not undergo the presidential appointment and Senate confirmation process required by the [Appointments Clause](#). The panel held that on balance, the Task Force's structural and decisional independence rendered its members principal officers even though the Secretary of Health and Human Services (HHS Secretary) may exercise some control over the Task Force through the power to remove its members at will. Although the panel held that the lower court properly enjoined enforcement of the Task Force recommendations, the panel ruled that the lower court erred in more broadly vacating all agency actions taken to enforce those requirements and issuing a nationwide injunction blocking their enforcement. The circuit panel enjoined the government from enforcing the affected Task Force requirements against the plaintiffs only. The appeal also concerned the constitutionality of two other administrative entities that make preventive-care recommendations. The panel suggested that the HHS Secretary may have the power to cure any Appointments Clause defects with those other two entities by ratifying their preventive-care recommendations, but it remanded so the lower court could consider whether the HHS Secretary had properly done so (*Braidwood Mgmt., Inc. v. Becerra*).
- ***Immigration:** The Third Circuit ruled on the meaning and effect of the 30-day deadline for seeking judicial review of a final order of removal under [8 U.S.C. § 1252\(b\)\(1\)](#) and, in so doing, contributed to circuit splits on two different issues. The panel held that Section 1252(b)(1)'s 30-day deadline is a claims-processing rule subject to equitable tolling. While circuit precedent previously recognized this deadline to be an absolute, jurisdictional rule, the panel decided that the Supreme Court's decision in *Santos-Zacaria v. Garland*, which interpreted a separate but similar provision as a nonjurisdictional claims-processing rule, abrogated this precedent. The Third Circuit's holding that Section 1252(b)(1) is a claims-processing rule is consistent with the views of the Fifth and Ninth Circuits but contrary to decisions by the Fourth and Seventh Circuits. The Third Circuit also widened a circuit split over when an order of removal is "final" under Section 1252(b), joining the majority of reviewing circuits in holding that an order is not final until a decision is made on the alien's request for withholding of removal. The panel acknowledged a split with some circuits that have held that, where an alien is subject to a reinstated order of removal after unlawfully returning to the United States, the 30-day clock begins on the date of reinstatement regardless of whether withholding of removal is requested (*Carlos Alberto Inestroza-Tosta v. Att'y Gen.*).
- **Immigration:** A divided Ninth Circuit panel, in a per curiam opinion, affirmed the denial of a motion to dismiss an indictment for illegal reentry under [8 U.S.C. § 1326](#). The petitioner collaterally attacked his underlying 1994 deportation order as fundamentally unfair, arguing that immigration authorities violated his due process rights by ordering

him deported *in absentia*, despite notice of the hearing being returned as undeliverable or unclaimed. The panel majority ruled that the government had followed statutory obligations in effect in 1994 and had reasonably attempted to inform the petitioner by mailing notice to his last provided address. The majority also rejected the petitioner's arguments that here the government should have taken such additional reasonable steps to inform him of his deportation hearing. The majority held that Supreme Court [precedent](#) that requires a state to take additional reasonable steps to inform an individual when it plans to sell his property in the case of an undeliverable notice did not apply in the immigration context (*United States v. Rivera-Valdes*).

- **Immigration:** The Eleventh Circuit affirmed a decision by the Board of Immigration Appeals upholding an immigration judge's denial of a petition to reopen removal proceedings. The petitioner, who had been ordered removed *in absentia*, moved to reopen her removal proceedings on the ground that she did not receive proper notice of the removal hearing. The Eleventh Circuit held that, because she had failed to provide a correct address, immigration authorities were excused under [8 U.S.C. § 1229a\(b\)\(5\)\(B\)](#) from providing notice of her removal hearing. The court also pointed to [implementing regulations](#) that clarify that it is the petitioner's obligation to correct any errors in the address provided (*Rosales-Mendez v. U.S. Att'y Gen.*).
- **Intellectual Property:** The First Circuit reversed a ruling of the district court in a case interpreting the [Digital Performance Right in Sound Recordings Act of 1995](#). The act entitles the recording artist or artists "featured on [a] sound recording" to 45% of certain copyright royalties the recording generates. A former member of a Puerto Rican band and the lead vocalist for many of the band's songs alleged that he and other members of the band were "featured" artists entitled to these royalties. The opposing party argued that only the band, as a distinct legal entity, was the "featured" artist and that the royalties must go to the sole corporate owner of the band, and not to the band's individual members. The court ruled that even though the disputed recordings' album covers only referred to the band itself (and not the individual members), the defendant was indeed a "featured" artist entitled to a share of the royalties (*Ithier v. Aponte-Cruz*).
- **Labor & Employment:** The Federal Circuit vacated and remanded a Merit Systems Protection Board (MSPB) decision that had partially denied a government employee's request for compensatory and consequential damages for retaliatory action she faced because of protected whistleblower activity. The panel held that the MSPB erred in dismissing the whistleblower's claim for future lost earnings. The MSPB had held that such earnings are not consequential damages under the Whistleblower Protection Enhancement Act of 2012, [5 U.S.C. § 1221\(g\)\(1\)](#). The circuit panel found it unnecessary to decide whether future lost earnings could be awarded as consequential damages, because it determined such earnings could be awarded as compensatory damages under Section 1221(g)(1). Remanding the case, the panel directed that the MSPB use a preponderance-of-the-evidence standard to determine whether the petitioner satisfied her burden to prove entitlement to pecuniary compensatory damages in the form of future lost earnings (*Perlick v. Dep't of Veterans Affairs*).
- **Labor & Employment:** The Fifth Circuit reversed and remanded in part a district court decision affirming an MSPB ruling that sustained the suspension of a Department of Veterans Affairs (VA) employee. The court concluded that the MSPB erred by refusing to review the entirety of the VA's disciplinary decision and by failing to analyze all of the so-called [Douglas factors](#) when determining the appropriate penalty for employee misconduct—rejecting the contention that the [Department of Veterans Affairs](#)

[Accountability and Whistleblower Protection Act of 2017](#) authorized the MSPB's departure from this framework (*Strickland v. Wilkie*).

- **Labor & Employment:** The Eleventh Circuit affirmed the lower court's judgment in favor of an employer in a suit brought under the [Family Medical Leave Act \(FMLA\)](#) by a former employee who was terminated due to unexcused work absences that occurred in the days prior to the birth of his son. The former employee claimed that his absences were childbirth-related and that the company interfered with the exercise of his rights under the FMLA, with his dismissal constituting unlawful retaliation. The panel held that under the plain text of the FMLA and its implementing regulations, an eligible employee's entitlement to up to 12 workweeks of unpaid family leave for the birth of a child begins on the date of childbirth and ends 12 months immediately thereafter. The panel ruled that the plaintiff's unexcused absences did not occur during a period where the FMLA applied and that the company's decision to terminate the employee for unexcused absences did not interfere with his FMLA rights. The panel also decided that, based on the evidence before it, the district court reasonably concluded that the employer's proffered reason for the termination was not pretextual (*Tanner v. Stryker Corp. of Michigan*).

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