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Legal Sidebar

Congressional Court Watcher: Circuit Splits from November 2024

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The U.S. Courts of Appeals for the thirteen "circuits" issue thousands of precedential decisions each year. Because relatively few of these decisions are ultimately reviewed by the Supreme Court, the U.S. Courts of Appeals are often the last word on consequential legal questions. The federal appellate courts sometimes reach different conclusions on the same issue of federal law, causing a "split" among the circuits that leads to the non-uniform application of federal law among similarly situated litigants.

This Legal Sidebar discusses circuit splits that emerged or widened following decisions from the last month on matters relevant to Congress. The Sidebar does not address every circuit split that developed or widened during this period. Selected cases typically involve judicial disagreement over the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress's lawmaking and oversight functions. The Sidebar only includes cases where an appellate court's controlling opinion recognizes a split among the circuits on a key legal issue resolved in the opinion.

Some 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 click here to subscribe to the *CRS Legal Update* and receive regular notifications of new products and upcoming seminars by CRS attorneys.

- **Arbitration:** The Tenth Circuit affirmed the lower court's decision that a Colorado distributor of baked goods produced by an out-of-state retailer fell under the exemption from the Federal Arbitration Act (FAA) for transportation workers engaged in foreign or interstate commerce, meaning that the arbitration clause in the agreement between the distributor and retailer was not enforceable under the FAA. Examining both federal caselaw and the particular business relationship between the defendant and plaintiff, the panel concluded that the distributor fell under the exemption because it was involved in the final, intrastate leg of an interstate delivery route on behalf of the retailer. The panel noted its disagreement with the approach taken by the Fifth Circuit, which has held that "last-mile" delivery drivers whose routes are entirely in-state do not fall under the FAA exemption (*Brock v. Flowers Foods, Inc.*).
- **Criminal Law & Procedure:** The Third Circuit affirmed a lower court's decision that a prisoner had not shown "extraordinary and compelling reasons" to warrant a sentencing

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reduction under the federal compassionate release statute. The court acknowledged circuit splits on two legal questions relevant to its ruling. Joining the Sixth, Seventh, Eighth, and D.C. Circuits while disagreeing with the First, Fourth, Ninth, and Tenth Circuits, the court held that the First Step Act's change to the mandatory minimum applicable to the statute that the defendant violated could not be considered as an "extraordinary and compelling" reason supporting a sentence reduction, because Congress expressly made the change non-retroactive. Splitting with the Eleventh Circuit, the Third Circuit also held that an appeals court could give retroactive effect to the U.S. Sentencing Commission's 2023 Amended Policy Statement, which provides that non-retroactive changes in law can be considered an extraordinary and compelling reason to grant compassionate release if certain conditions are met. The court nonetheless ruled that the Amended Policy Statement did not support the prisoner's sentencing reduction motion because the Amended Policy Statement was inconsistent with congressional intent expressed in the First Step Act and did not supersede conflicting circuit caselaw (*United States v. Rutherford*).

- **Criminal Law & Procedure:** A Fourth Circuit panel issued a ruling on when courts may defer to the U.S. Sentencing Commission's official commentary interpreting the U.S. Sentencing Guidelines—a question that has not only split the federal circuits, but also has sparked disagreement among different appellate panels within the Fourth Circuit itself. In this case, the panel agreed with the Third, Sixth, Ninth, and Eleventh Circuits that, following the Supreme Court's ruling in *Kisor v. Wilkie*, courts may defer to the U.S. Sentencing Commission's official commentary interpreting the U.S. Sentencing Guidelines only after the court determines that the relevant Guideline is genuinely ambiguous and the court has exhausted all traditional tools of construction. The panel acknowledged a split with the Second, Fifth, Seventh, Eighth, and Tenth Circuits, which have all held that the Supreme Court's pre-*Kisor* ruling in *Stinson v. United States* remains controlling, under which the Commission's official commentary is binding unless it is plainly erroneous, inconsistent with the Guideline provision itself, or violates the Constitution. The panel also acknowledged an apparent conflict between prior Fourth Circuit panels, with one panel deciding that *Kisor* was controlling and another panel ruling shortly thereafter that *Stinson* remained dispositive. The panel here held that, to the extent that the prior two panels were in conflict, the first-decided case was controlling on future circuit panels (*United States v. Mitchell*).
- **Criminal Law & Procedure:** A divided Fifth Circuit held that the lower court inappropriately applied the U.S. Sentencing Guidelines' career-offender sentencing enhancement to a criminal defendant. A defendant qualifies for a sentencing enhancement under the Guidelines if the defendant "has at least two prior felony convictions of ... a controlled substance offense," and courts in the Fifth Circuit look to the definition of "controlled substance" in the Controlled Substances Act (CSA) to determine the offenses covered by the enhancement. The lower court had determined the defendant was subject to the enhancement based on three prior federal marijuana-related offenses more than a decade earlier. In its sentencing of the defendant, the lower court had reasoned that even if the defendant's prior marijuana offenses would not be considered "controlled substance" offenses after changes made by a 2018 amendment to the CSA, those offenses would have satisfied the CSA definition at the time of the convictions and therefore qualified as controlled substances offenses. A majority of the Fifth Circuit panel disagreed, holding that the sentencing court needed to determine whether those earlier convictions would qualify as controlled substance offenses under the CSA at the time of the defendant's sentencing for his most recent offense. The majority observed that its

approach was consistent with the views of several circuits, while acknowledging that the Third, Sixth, and Eighth Circuits do not follow the time-of-current sentencing approach (*United States v. Minor*).

- **Education:** In consolidated cases, the Eleventh Circuit held that Title IX of the Education Amendments of 1972, which generally bars sex discrimination at educational institutions receiving federal funding, does not confer on employees an implied right to bring suit against those institutions for sex discrimination in the workplace. The panel described its determination as consistent with the Supreme Court's 2001 decision in *Alexander v. Sandoval*, which the panel characterized as recognizing that, where Congress has not expressly created a private right of action to enforce a federal statute, courts may only find an implied right when congressional intent is clear. The panel found no indication that Congress intended to create such a right. The panel noted that Title IX's antidiscrimination protections were focused on students, not employees, and concluded that the statute was not intended to supplant Title VII of the Civil Rights Act of 1964, which specifically addresses sex discrimination in the workplace and expressly provides a private right of action to employees. The court also reasoned that the Supreme Court's 2005 ruling that in *Jackson v. Birmingham Board of Education*, which held that Title IX gives rise to an implied private right of action for retaliation when an individual complains of sex discrimination, does not extend to non-retaliatory employment discrimination claims. The Eleventh Circuit's decision is generally consistent with rulings by the Fifth and Seventh Circuits limiting the availability of employment lawsuits under Title IX, but diverges from decisions by the First, Second, Third, Fourth, Eighth, and Tenth Circuits that have recognized non-retaliatory employment discrimination claims under Title IX (*Joseph v. Bd. of Regents of the Univ. System of Georgia; Georgia Tech. Athletic Ass'n*).
- **Health:** A divided Seventh Circuit panel vacated a preliminary injunction that blocked enforcement of an Indiana law barring physicians from treating gender dysphoria in minors by altering a child's sex characteristics through medication or surgery or aiding and abetting such treatment. On the merits, the majority held that the plaintiffs were unlikely to succeed in their arguments that the law violated parents' constitutional due process rights to control their children's medical care, or that the law violated physicians' First Amendment rights by limiting their ability to provide minor patients with advice on gender transition procedures. The panel majority also held that the plaintiffs were unlikely to show that the law violated constitutional equal protection principles. Joining the Sixth and Eleventh Circuits, but splitting with the Eighth Circuit, which all reviewed similar state laws, the majority held that the ban on certain medical treatments for minors did not merit heightened constitutional scrutiny. This term the Supreme Court is considering *United States v. Skrmetti*, which asks whether state restrictions on certain medical treatments for gender dysphoria in minors are constitutional (*K.C. v. Individual Members of Med. Licensing Bd. of Indiana*).
- **Immigration:** The Fifth Circuit affirmed an alien's conviction for unlawfully reentering the United States following his removal from the country and, in so doing, decided that the lower court appropriately rejected the alien's collateral attack on his underlying removal order. The defendant claimed that his stipulation to removal and waiver of his rights to challenge his deportation were invalid because they were not done knowingly. The Fifth Circuit joined several circuits in holding that the defendant bears the burden of proving the invalidity of a signed written waiver of rights in the underlying removal proceeding, and the court split with the Ninth Circuit, which holds that the government carries the burden of proving the waiver was valid. The Fifth Circuit held that the alien in

this case did not meet that burden by demonstrating through a preponderance of evidence that the waiver was invalid (*United States v. Hernandez Velasquez*).

- **Labor & Employment:** A divided Ninth Circuit panel held that Executive Order 14026 and an implementing Department of Labor (DOL) rule imposing a $15 minimum hourly wage requirement on most federal contractors were legally invalid. The panel majority held that the executive action exceeded the President and DOL's authority under the Federal Property and Administrative Services Act (FPASA). While the executive branch argued that the minimum wage mandate aligned with FPASA's stated purpose of providing the government "with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services," the panel majority concluded that this purpose statement was not operative language, and that nothing in FPASA authorized a $15 minimum wage mandate. The panel majority observed that its reading tracked with decisions from other circuits recognizing FPASA's purpose statement as non-operative, but diverged from decisions by the Fourth, Tenth, and D.C. Circuits holding that executive action under FPASA is permissible when it has a nexus with economy and efficiency. The panel also concluded that the DOL's implementing rule was arbitrary and capricious because the agency did not consider alternatives to the minimum wage mandate. As a result, the Ninth Circuit panel reversed the lower court's dismissal of the plaintiffs' challenge and remanded for further consideration of the plaintiffs' request for injunctive relief (*Nebraska v. Su*).

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