The Network for Public Health Law

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JUDICIAL TRENDS IN PUBLIC HEALTH – CASE ABSTRACTS 2019-2020

The Network's monthly reporter, **Judicial Trends in Public Health** (JTPH), highlights select, recently-published cases in public health law and policy. This document lists all case abstracts in chronological order from November 2019 – December 2020 within 10 key topics (adapted from JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL, 3RD ED. (2018)) below:

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1. SOURCE & SCOPE OF PUBLIC HEALTH LEGAL POWERS [17 cases]

Clean Water Action et al. v. EPA et al. (5th Cir. Aug. 28, 2019): A 3 judge appellate panel declined review of EPA's 2017 "Postponement Rule." The rule postponed the earliest compliance dates for parts of a 2015 rule limiting how much toxic metal could be discharged by 2 types of waste streams (flue gas desulfurization wastewater and bottom ash transport water) produced by certain power plants. A consortium of environmental groups sought review of the Postponement Rule challenging EPA's statutory authority to issue it. The court held the Postponement Rule was a narrow reconsideration of compliance dates that potentially imposed needless compliance costs, which EPA substantiated through notice-and-comment rule making. Most elements of the prior rule remained intact. Further, EPA was: (i) statutorily authorized to pass the rule; (ii) had provided a reasoned basis for its decision; and (iii) implementing the rule was reasonable and not arbitrary or capricious. Read the decision here.

State of New York, et al. v. U.S. Department of Homeland Security (U.S. District Court for the Southern District of New York, Oct. 11, 2019): The federal district court ordered a nationwide preliminary injunction blocking the implementation of the Department of Homeland Security's (DHS) revised public charge rule, previously set to go into effect on October 15, 2019. New York, Connecticut, and Vermont, as well as New York City, sued DHS and the U.S. Citizenship and Immigration Services for declaratory and injunctive relief challenging revisions to the public charge rule. The revised rule would redefine "public charge" and establish new criteria for determining whether a noncitizen applying for admission into the U.S. or for adjustment of status is ineligible because he or she is likely to become a public charge. Granting the injunction, the court ruled the plaintiffs had demonstrated a "likelihood of success on the merits" of their claims, namely that the revised rule exceeds DHS's statutory authority, is arbitrary and capricious, constitutes an abuse of discretion, and may have a chilling effect on enrollment in benefits programs, which would harm the plaintiffs' proprietary interests as operators of hospitals and health care systems. Read the decision here.

City & County of San Francisco v. U.S. Citizenship & Immigration Services (N.D. Cal. Oct. 11, 2019): A federal district court issued a preliminary injunction blocking the Department of Homeland Security's (DHS) public charge rule from taking effect. Under the Immigration and Nationality Act (INA) an "alien" who is a "public charge" is inadmissible. DHS' rule redefined "public charge" to mean an individual who receives a specified public benefit for over 12 months in the aggregate in a 36-month period. Under the rule, receiving 2 public benefits within 1 month counted as 2 months of public benefits. DHS also expanded the meaning of "public benefits" to include most forms of Medicaid and other benefits like the Supplemental Nutrition Assistance Program (SNAP). The court found that some of the plaintiffs' claims that the rule violates the federal Administrative Procedure Act (APA) were likely to succeed on their merits. Specifically, it found the rule was not a reasonable or permissible construction of the term "public charge" as used in the INA given: (i) the history of the term, including a longstanding focus on an individual's ability and willingness to work and allowances for short-term aid; and (ii) Congress had previously rejected similar "public charge" definitions. The court also found DHS acted arbitrarily and capriciously by failing to consider the rule's costs to state and local governments, costs associated with Medicaid disenrollment rates, and its negative public health consequences, such as lower vaccination rates. Read the decision here.

State of California v. The Little Sisters of the Poor (9th Cir. Oct. 22, 2019): A federal appellate panel ruled 2-1 to uphold a district court's preliminary injunction applying to 13 plaintiff states and D.C. The injunction bars enforcement of final rules exempting all entities with either sincerely held religious or moral objections to contraceptives from the Affordable Care Act's (ACA) requirements to provide contraceptive coverage to employees without cost sharing. The appellate panel agreed that the plaintiffs were likely to succeed on the merits of their claim that the rule was arbitrary and capricious in violation of the federal Administrative Procedure Act (APA). In particular, the district court did not err in concluding the agencies lacked statutory authority to issue the exemption—initial evidence was sufficient to hold that providing free contraceptive services was a core purpose of the Women's Health Amendment to the ACA. The district court properly concluded that the accommodation process (permitting eligible religious organizations to opt out of arranging for or paying for coverage via self-certification forms) likely does not violate the federal Religious Freedom Restoration Act. Read the decision here. The Third Circuit upheld a similar injunction, accessible here.

New York v. U.S. Department of Health & Human Services (U.S. District Court, Southern District of New York, Nov. 6, 2019): The U.S. District Court for the Southern District of New York struck down a rule recently promulgated by the U.S. Department of Health and Human Services (HHS) that would have allowed health care providers and health care organizations to abstain from providing certain procedures, services, or research activities on the basis of moral or religious objections. The court concluded HHS' promulgation of the so-called conscience rule was "arbitrary and capricious" and in excess of its rulemaking and enforcement authority. The court also determined that the rule's provision authorizing termination of HHS funding violated separation of powers principles and the Spending Clause of the U.S. Constitution. The lawsuit was brought against HHS by New York and 18 other states; the District of Columbia, New York City, Chicago, and Cook County (IL); and health advocacy groups. Plaintiffs argued that the conscience rule would: (1) prioritize the personal views of health care providers over patients' needs, and (2) impede the ability of health care facilities to provide effective care. Read the decision here.

RPF Oil Company v. Genesee County (Michigan Court of Appeals, Dec. 3, 2019): The Michigan Court of Appeals held that the state's Age of Majority law, establishing that an individual age 18 is entitled to all rights, privileges, and responsibilities not otherwise excluded by statute or the constitution,

preempted localities from prohibiting the sale of tobacco products to those under the age of 21. Under Michigan law, a local jurisdiction derives its powers from the state, which are to be liberally construed. Local law is preempted by state law, however, if it conflicts with the state law. If a state law imposes certain restrictions or prohibitions, a local law that enhances or extends those prohibitions is not in conflict and is thus not preempted. However, if a state law affords certain rights or privileges, local laws that interfere with or limit those rights or privileges are preempted. Since the Age of Majority law provides for rights to those 18 and older, a county law restricting access to tobacco for those 18-20 years old is preempted by state law. Read the decision here.

Nicopure Labs v. U.S. Food & Drug Administration (U.S. Court of Appeals for the Federal Circuit, Dec. 10, 2019): The Federal Circuit Court of Appeals upheld FDA's deeming rule, which brought under FDA regulation all tobacco products, including electronic cigarettes (vapes). Vape industry plaintiffs challenged the rule alleging: (1) the requirement that any new tobacco product, including vapes, be subject to a rigorous pre-market approval process before being marketed is arbitrary and capricious; and (2) the prohibition of vape manufacturers from marketing their products as presenting less risk of harm than cigarettes as well as bans on giving away vape products violates the First Amendment. The court found that FDA acted rationally by requiring manufacturers to demonstrate that allowing vapes on the market is consistent with public health given evidence of the product's harms. Considering the addictiveness of nicotine, the complex health risks of tobacco use, and the tobacco industry's history of misleading consumers about product safety, the court upheld the requirement that vape manufacturers must prove their products present less risks before making such claims to consumers. Read the decision here.

Juliana v. U.S. (U.S. Court of Appeals - Ninth Circuit, Jan. 17, 2020): The Ninth Circuit ordered a federal district court to dismiss a climate change lawsuit against the federal government, holding the court lacked the power to order the government to develop a plan to eliminate fossil fuel emissions and reduce CO_2. The plaintiffs argued the government violated their constitutional right to a "climate system capable of sustaining human life" by promoting fossil fuel use. After considering the plaintiff's evidence, the Ninth Circuit found that climate change is rapidly occurring, the federal government has known of the risks of fossil fuel use and increasing CO_2 emissions, and it affirmatively promotes fossil fuels. The plaintiffs sought to stop government from "permitting, authorizing, and subsidizing fossil fuel use," and to develop a plan to reduce harmful emissions. The Ninth Circuit found the plaintiffs lacked standing, which requires, in part, that the alleged injury is likely to be redressable by a favorable judicial decision. The court ordered the case's dismissal, concluding the injury was not redressable because "it is beyond the power of an Article III court to order, design, supervise, or implement" a remedial plan involving complex legislative and executive policy decisions. Read the decision here.

California v. Texas (U.S. Supreme Court, denial of expedited certiorari, Jan. 21, 2020): The Supreme Court declined to grant *expedited* review of petitioners' request for certiorari on the constitutionality of the Affordable Care Act's (ACA) individual mandate, and will consider the requests within a normal time frame. At issue is the December 2019 ruling by the Fifth Circuit Court of Appeals holding that the ACA's individual mandate is unconstitutional. The court reasoned that the individual mandate can no longer be read as an exercise of Congress' taxing power, under *NFIB v. Sebelius* (2012), because the 2017 Congress set the shared responsibility payment to $0 through the Tax Cuts and Jobs Act. The individual mandate is therefore a legal command to purchase insurance that lacks constitutional authority. The Fifth Circuit also reversed the district court's holding that individual mandate is inseverable from the rest of the ACA. It ordered the district court to conduct "a more searching inquiry" on the issue of severability. In separate, but related, petitions, states and the House of Representatives argued the Supreme Court should expedite review to address the intolerable and prolonged uncertainty in the healthcare sector, if

required to wait for the case to wind its way through the lower courts. Read the Fifth Circuit's decision here. Read the Supreme Court filings in *California v. Texas* here and in *U.S. House of Representatives v. Texas* here.

Department of Homeland Security v. New York (U.S. Supreme Court, Jan. 27, 2020): The U.S. Supreme Court stayed the nationwide injunction issued by a NY federal district court (covered in JTPH January 2020) preventing enforcement of the final public charge rule. The Department of Homeland Security's (DHS) final public charge rule allows the federal government to deny green cards to individuals found likely to become a "public charge." A public charge is an individual who is likely to receive certain designated "public benefits," including SNAP and most forms of Medicaid, for 12 months in the aggregate within a three year period. New York, Connecticut, and Vermont had requested a nationwide preliminary injunction to block enforcement of the final rule. The Supreme Court, however, granted DHS's request to stay the district court's injunction pending appeal. Justice Gorsuch concurred with the order and denounced the practice of lower courts issuing nationwide injunctions because "they direct how the defendant must act toward persons who are not parties to the case." DHS can now enforce the final public charge rule as the case proceeds. A separate statewide injunction issued by a federal district court in Illinois, blocking enforcement of the rule in Illinois, remains in effect. Read the Supreme Court order here.

Flores v. Barr (U.S. District Court, Central District of California, 6/26/20): As part of the ongoing Flores Settlement Agreement (limiting the length of time and conditions under which migrant children can be incarcerated in immigration detention), the U.S. District Court in Los Angeles ruled that Immigration and Customs Enforcement ("ICE") and the Office of Refugee Resettlement ("ORR") must strictly follow COVID-19 protocols. The court found ICE and ORR failed to take court-ordered steps to ensure sanitary conditions in detention centers where families and unaccompanied minors are held. After several persons at the detention centers tested positive for COVID-19, Judge Dolly Gee condemned "ICE's incomplete, infrequent, and at times, inaccurate, parole determinations and failure to implement best public health practices." She highlighted the dangers for contagion spread in congregate living settings and ordered defendants to immediately transfer minors who have resided at the detention centers for more than 20 days to non-congregate settings, providing specific explanations for any delays in releases. Defendants must also "urgently enforce" COVID-19 protocols, particularly social distancing, masking, and enhanced testing. Read the full opinion here.

In re S.P. (California Court of Appeals, 2nd Appellate District, District 6, August 6, 2020) – A California appellate court ruled that a juvenile court has authority to order vaccinations. After confirming that earlier medical exemptions from immunization were invalid, the Court authorized the vaccination of 2 dependent children. California's Health and Safety Code provides that a state public health officer (SPHO) or a doctor designated by a SPHO "may revoke the medical exemption" previously issued. The Court reasoned that the statute should be read in light of the legislative purpose of preventing the adverse public health consequences of doctors issuing improper exemptions, as divesting the court of this authority would be inapposite. Further, the juvenile court had valid reasons to reject the physician's recommendations because his court letters did not state the medical reason for exemption, he was neither a pediatrician nor one of the children's current treating doctors, and his view that vaccines are unsafe was rejected by the courts. Read the full opinion here.

In re National Prescription Opiate Litigation (U.S. Court of Appeals, 6th Circuit, September 24, 2020) – The appellate court rejected a lower court's decision to certify a "negotiation class" representing cities, towns, and counties that would negotiate and vote on whether to accept settlements with drug manufacturers, distributors, and pharmacies. This proposed class would have bound municipalities that

had not yet filed a lawsuit so long as 75% of the class members accepted a settlement. Typically, class certification occurs at the time of a proposed settlement when all parties are aware of the terms. The novel negotiation class certified by the lower court would bind parties to settlement before such details are available. In a 2-1 decision, the Sixth Circuit rejected the class certification at the negotiation stage, finding that the Federal Rules of Civil Procedure do not allow for class formation that would bind all municipalities to a settlement before settlement terms are available. Read the full opinion here.

Sierra Club v. U.S. Environmental Protection Agency (U.S. Court of Appeals, 3rd Circuit, August 27, 2020) – The court found that EPA acted in an arbitrary and capricious manner when approving Pennsylvania's ozone compliance plan principally because the plan was not based on any supporting science and lacked a reporting requirement. Some Pennsylvania municipalities struggled to comply with EPA's 2008 ozone protection requirements, so the Commonwealth submitted a new plan that would allow increased pollution from power plants under certain circumstances. However, no basis was provided for why the proposed circumstances justified permitting increased pollution. Moreover, compliance with the plan focused on an honor code, with no actual reporting requirements. An administrative agency is not entitled to a "blank check" of deference and the utter lack of basis for the EPA approval of the Pennsylvania plan eliminated any deference in this case. Read the full opinion here.

CA Smoke & Vape Ass'n v. County of Los Angeles (U.S. District Court, Central District of California, August 7, 2020): A California district court found no due process claim where plaintiffs, CA Smoke & Vape Association Inc. and Ace Smoke Shop, could not obtain necessary tobacco retail licensing amid the COVID-19 emergency. At issue is Los Angeles County Code § 11.35, which regulates the sale of tobacco and imposes licensing requirements. The smoke shops argued the County was unable to process applications during the epidemic, preventing satisfaction of the code's requirements after May 1, 2020. The court rejected their due process claim because they did not have a property interest in obtaining a business license. The court dismissed the complaint with prejudice. Read the full opinion here.

District of Columbia, et al. v. U.S. Department of Agriculture, et al. (U.S. District Court, District of Columbia, October 18, 2020): A federal court blocked the first of the U.S. Department of Agriculture's 3 measures planned to restrict access to SNAP benefits, calling the measures "arbitrary and capricious," as they ignored the conditions of local labor markets and were not based on evidence. The court granted summary judgment to a coalition of 19 states, D.C., New York City, and private entities that sued to block the rule, which eliminates state discretion to waive work requirements in areas experiencing economic distress, resulting in sweeping cuts for adults without children. The court held that, "[d]espite the agency's blinkered effort to downplay or disregard the predicted outcomes of the Final Rule, the backdrop of the pandemic has provided, in stark relief, its procedural and substantive flaws." Read the full opinion here.

Mayor and City Council of Baltimore v. Azar (U.S. Court of Appeals, Fourth Circuit, September 3, 2020): In a split decision, the Fourth Circuit held that the U.S. Department of Health and Human Services (HHS) could not enforce a rule banning federally-funded health care providers from referring patients for abortion, instead requiring them to refer patients to prenatal care. The rule also required federally-funded entities providing separately funded abortion services to physically separate those services from federally-funded ones. The court blocked the rule in Maryland, writing that HHS policy "failed to recognize and address the ethical concerns of literally every major medical organization in the country." The rule contravenes a mandate barring HHS from placing "unreasonable barriers" between patients and appropriate health care. HHS also improperly estimated physical separation costs in an arbitrary and capricious manner. Read the full opinion here.

2. CONSTITUTIONAL RIGHTS & THE PUBLIC'S HEALTH [32 cases]

Little Rock Family Planning Services. v. Rutledge (E.D. Ark. Aug. 6, 2019): A federal district court preliminarily enjoined implementation of Arkansas laws that: (i) generally ban abortion after the 18th week of pregnancy with narrow exceptions; (ii) ban physicians from performing an abortion if they know it is sought solely on the basis of a test, prenatal diagnosis, or a belief a fetus has Down syndrome; and (iii) require physicians who perform abortions to be board-certified or board-eligible in obstetrics and gynecology (OBGYN). The court held plaintiffs were likely to succeed on the merits of their facial constitutional challenges to all 3 laws. Plaintiffs were found to likely prevail on their arguments that the 18 week and the Down syndrome bans were facially unconstitutional because they restricted pre-viability abortions. Regarding the physician certification requirements the court concluded plaintiffs were likely to prevail on the argument that the law fails to advance the state's purported interests more effectively than existing state law, provides no discernable benefits, and creates an undue burden on women seeking abortions in the state. Read the decision here.

Tulsa Women's Reproductive Clinic v. Hunter et al. (Oklahoma County District Court, Oct. 29, 2019): The District Court for the County of Oklahoma temporarily blocked an Oklahoma state law requiring physicians to tell patients that medication abortions may be reversible and to refer patients to an abortion reversal hotline and website. Tulsa Women's Reproductive Clinic filed a petition alleging, in part, that under Oklahoma's Constitution, the law violates physicians' rights to free speech. It alleged the law compelled physicians to deliver a content-based message about an experimental practice (medication abortion reversal) that is unsupported by reliable, scientific evidence and has not been deemed safe or effective by the Food and Drug Administration. The court granted plaintiff's request to temporarily block the law. Read the decision here.

Yanakos, et al. v. UPMC, et al. (Supreme Court of Pennsylvania, Oct. 31, 2019): Pennsylvania's Supreme Court found that the state's statute of repose for medical malpractice claims, which established a deadline by which a lawsuit must be brought, was unconstitutional. Plaintiffs sued the University of Pittsburg Medical Center (UPMC) and 2 physicians for faulty medical care associated with a liver transplant more than 12 years after the transplant. UPMC asserted the claim was barred by the state's Medical Care Availability and Reduction of Error Act. This statute limits the right to a civil action to 7 years following the alleged malpractice, with exceptions for foreign objects left inside the patient's body and lawsuits brought on behalf of minors. The act was intended to help control malpractice costs. The court found that the 7 year time limit violated the "Open Courts" provision in Pennsylvania's constitution, guaranteeing that "[a]ll courts shall be open; and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . . ." PA. CONST. art. I, § 11. The 7 year limit unconstitutionally infringed on the guarantee of court access as an arbitrary restriction not substantially related to the state's goal of restricting malpractice costs. Read the decision here.

Ms. J.P. et al. v. Barr (U.S. District Court, Central District of California, Nov. 5, 2019): A California district court ordered the federal government to provide a class of migrant parents subject to the "family separation policy" with mental health screenings and appropriate treatment for mental health conditions caused by the policy. The parties agreed that detainees currently under the government's control have due process rights to adequate medical care. Parents asked the court for injunctive relief arguing adequate medical care includes evidence-based mental health and trauma services—during and after release from custody—to treat "substantial trauma" caused by the separation policy. The court concluded the parents were likely to succeed on the merits of their due process claims. Parents separated from their minor children at the border, who are in federal custody or will be in the future (the "custody subclass"), presented substantial evidence that the policy placed them at substantial risk of serious mental health

injury and federal officials alleged to be responsible for the separation policy showed deliberate indifference to these risks. The court also ordered screening and treatment for parents subject to the family separation policy but who had been released from custody (the "released subclass"). Read the decision here.

EMW Women's Surgical Center, P.S.C. v. Meier (U.S. Supreme Court denial of certiorari, Dec. 9, 2019): The U.S. Supreme Court denied EMW Women's Surgical Center's petition for certiorari, leaving in place Kentucky's Ultrasound Informed Consent Act, which requires physicians to: (1) show a prospective abortion patient an ultrasound of her fetus; (2) describe the fetus in detail prior to providing an abortion; and (3) make the fetal heartbeat audible for the patient. In 2019, the Sixth Circuit Court of Appeals upheld the law against a challenge brought by Kentucky's only abortion clinic and its 3 doctors. They were supported through amicus curiae briefs from the American Public Health Association American College of Obstetrics and Gynecology, American Medical Association, American Academy of Family Physicians, and the American Civil Liberties Union, among others. The clinic argued that the Act violates the doctors' First Amendment rights, forcing them to provide unnecessary information, often over the patient's objections, and interferes with the doctor-patient relationship. The court upheld the Act, finding it to be a legitimate informed consent provision requiring only the disclosure of "truthful, non-misleading, and relevant information about an abortion," relying heavily on the Supreme Court's plurality decision in *Planned Parenthood v. Casey*. Read the Sixth Circuit's decision here. Read the Supreme Court filings and certiorari denial here.

City of Boise v. Martin (U.S. Supreme Court denial of certiorari, Dec.16, 2019): The U.S. Supreme Court denied the City of Boise's petition for certiorari on whether the enforcement of generally applicable laws regulating public camping and sleeping constitutes cruel and unusual punishment via the Eighth Amendment. In 2018, the Ninth Circuit Court of Appeals held that the Eight Amendment's prohibition on cruel and unusual punishment bars localities from prosecuting people criminally for sleeping outside on public property when they have no home or other shelter to go to. After its issuance, Boise stated that the Ninth Circuit's decision "effectively creates a constitutional right to camp." Several cities and states supported Boise's petition via amicus briefs. Read the Ninth Circuit's decision here. Read the Supreme Court filings and certiorari denial here.

State of Texas, et al. v. U.S. (U.S. Court of Appeals for the 5th Circuit, December 18, 2019): After establishing that the parties had sufficient standing to raise their claims, the 5th Circuit agreed with the lower district court that the individual mandate of the Affordable Care Act (ACA) of 2010 is unconstitutional. In *NFIB v. Sebelius* (2012), the U.S. Supreme Court pre-determined that the sole route through which Congress could require individuals to purchase health insurance via the ACA was pursuant to the federal power to tax. When Congress zeroed out the ACA's "shared responsibility payment" in 2017, the tax power was negated, invalidating the mandate itself. Although the lower court previously concluded that the elimination of the individual mandate rendered the entire ACA unconstitutional, the 5th Circuit majority did not agree. It rebuked federal district court Judge Reed O'Connor for his over-reaching analyses, remanding the case back to his court for "a more searching inquiry" of which ACA provisions are severable from the individual mandate. As the process of reviewing the severability of ACA provisions may take months, questions have already surfaced regarding potential immediate appeals to the U.S. Supreme Court. Read the decision here

Kliger v. Healey, (Massachusetts Superior Court, Dec. 31, 2019): A state court held plaintiffs failed to demonstrate that their due process or equal protection rights were violated by Massachusetts' prohibition of Medical Aid in Dying (MAID). A terminally ill patient and his physician sought a declaration on whether: (1) the practice of MAID constitutes involuntary manslaughter under Massachusetts law; (2)

applying the law of involuntary manslaughter to MAID violates the Massachusetts Constitution; and (3) whether physicians may provide information and advice about MAID to terminally ill patients. The court noted that in recent years there has been growing public acceptance of physician-assisted suicide. Given legitimate public interests in prohibiting MAID, however, plaintiffs failed to demonstrate a violation of their due process or equal protection rights. Nonetheless the court concluded providing advice and information about MAID is permitted. It further stated that the legislature, not the court, is best positioned to weigh the difficult moral, societal, and governmental questions involved and to decide under what restrictions MAID may be legally authorized. Read the decision here.

Roe v. Department of Defense (U.S. Court of Appeals - Fourth Circuit, Jan. 10, 2020): The Fourth Circuit upheld a Virginia district court's nationwide preliminary injunction preventing the Air Force and Department of Defense from enforcing deployment policies in a manner that limited deployment of servicemembers diagnosed with HIV and that consequently resulted in their discharge. Per the policies, Air Force servicemembers diagnosed with HIV were subject to limited deployment. As a result, some servicemembers were determined to be unfit for duty and discharged. They sued alleging their discharge and the deployments policies, with respect to HIV-positive servicemembers, violated their right to equal protection, the federal Administrative Procedure Act (APA), and were based on outdated notions not supported by current HIV medical evidence. The Fourth Circuit held the district court properly concluded the servicemembers were likely to succeed on the merits of their APA claim. Therefore, the preliminary injunction will stay in place while the case proceeds. Read the decision here.

Horvath v. City of Leander (U.S. Court of Appeals - Fifth Circuit, Jan. 13, 2020): The Fifth Circuit affirmed the district court's grant of summary judgment to Leander, Texas (the City) regarding discrimination and First Amendment claims by a fire department employee who objected to the City's TDAP vaccine requirement on religious grounds. The City offered two accommodations: (1) reassignment to a different position with the same pay; or (2) use of protective measures, like wearing a respirator while on duty. After refusing to select one of the offered accommodations, the employee was fired for insubordination. The Fifth Circuit concluded that the City did not engage in religious discrimination or retaliation under Title VII or the Texas Commission on Human Rights Act. Its offer to transfer the employee to a new position with the same salary was reasonable as a matter of law. Despite schedule differences, a "reasonable" accommodation need not be the employee's preferred accommodation. Additionally, insubordination constituted a non-discriminatory reason for his termination. Finally, the City's offer for him to wear a respirator on duty enabled him to freely exercise his religion in his current position and did not burden his First Amendment rights. Read the decision here.

City of Flint v. Guertin (U.S. Supreme Court, denial of certiorari, Jan. 21, 2020): The Supreme Court declined to hear a case in which city officials and state regulators involved in the Flint, Michigan water crisis sought dismissal of a lawsuit by asserting immunity. In 2014, when Flint changed the source of public water from Lake Huron to the Flint River, it failed to take adequate measures to prevent pipe corrosion and otherwise ensure the water was potable. Shari Guertin, mother of a child exposed to Flint lead-laden water, along with others, sued state regulators and local officials alleging a violation of their constitutional right to bodily integrity by switching to unsafe water. Several defendants moved to dismiss claiming they had qualified immunity, which stops lawsuits against government actors unless they commit a deprivation of a clearly established constitutional right that is "repugnant" or shocks the conscience. City defendants also claimed sovereign immunity, normally reserved for states, arguing they had operated as an "arm of the state" during the state's emergency management efforts. The Sixth Circuit determined dismissal of the case against several defendants was not warranted. Following the Supreme Court's denial of review, Guertin's case will proceed. Read the Sixth Circuit's decision here. Read the Supreme Court filings and certiorari denial here.

Parents for Privacy v. Barr (U.S. Court of Appeals – Ninth Circuit, Feb. 2, 2020): The Ninth Circuit affirmed the dismissal of a lawsuit brought by parents and students who alleged a school district's policy that permits students to use facilities that match their gender identity violated the constitution and federal civil rights protections under Title IX. The district developed the policy (which applies to restroom, locker room, and shower facilities) to avoid negative health effects that transgender students experience from being unable to use facilities matching their gender identity. The Ninth Circuit affirmed the district court's ruling that the plaintiffs' claims were non-cognizable. The Fourteenth Amendment's right to privacy does not include a broad right to be protected against all risk of intimate exposure to or by a transgender individual. Additionally, the right to direct the education of one's children does not include a right to determine a district's facility use policies. As to the Title IX claim alleging the policy created a sexually harassing environment, a transgender student's normal use of facilities alone does not constitute actionable "harassment" even if some students felt subjectively harassed. The court also rejected the plaintiffs' First Amendment free exercise of religion claim. Read the decision here.

White v. Cuomo (Supreme Court, Appellate Division, Third Department, New York, Feb. 6, 2020): A New York appellate court ruled that fantasy sports contests constitute illegal gambling in violation of the state's constitutional ban on gambling. State taxpayers, alleging they currently or in the future will be adversely impacted by gambling, challenged the constitutionality of legislative amendments to the Racing, Pari-Mutuel Wagering and Breeding Law which authorized interactive fantasy sports (IFS) contests with monetary prizes. Article 14 of the law states that IFS contests do not constitute gambling, provides for consumer safeguards, minimum standards, and the registration, regulation, and taxation of IFS providers. The court held IFS contests with monetary prizes are prohibited by the New York Constitution's anti-gambling provision. It also concluded that the provision of Article 14 that removed IFS from the criminal code was inseverable and therefore also invalid. Read the decision here.

Roger v. Lyft & Verhines v. Uber (Superior Court of California, County of San Francisco): On March 11, 2020, Uber and Lyft drivers filed a class action lawsuit accusing the companies violated state law respecting paid sick leave in response to COVID-19. The drivers argue they are employees, not independent contractors ("gig workers"). By failing to classify them as employees, the companies violate CA state law. They asked the court to order the companies to correctly classify and, in turn, provide them with employee sick leave mandated under CA law. Representatives for Uber and Lyft recently said they will provide drivers with up to 14 days paid sick leave if a driver tests positive for COVID-19 or is placed in quarantine for COVID-19 by a public health authority. Drivers in Massachusetts have signaled they will take similar action.

Dalton v. Princess Cruise Line, Ltd. (U.S. District Court – Central District of California): On March 13, 2020, 2 former passengers brought a negligence action against Princess Cruise Line, claiming it should have taken greater precautions to keep its passengers safe from COVID-19. The couple embarked on a cruise on Grand Princess ship in late February, which later docked off the coast of California when other passengers tested positive for COVID-19. In their complaint, they allege that Princess was negligent because it operated the cruise even though it knew 2 passengers on a prior Grand Princess cruise had COVID-19 symptoms and that there were dozens of carry-over passengers. Princess allegedly failed to warn the couple or implement COVID-19 screening.

Guns Save Life, Inc. v. Ali (Appellate Court of Illinois - First District, March 13, 2020) An Illinois appellate court upheld a Cook County ordinance taxing the sale of firearms and ammunition. Cook County passed an ordinance imposing a tax of $25 per firearm, later adding a tax on ammunition. The tax revenues were allocated to a Public Safety Fund. Plaintiffs, a gun-rights advocacy group, a gun

retailer, and a gun consumer, challenged the taxes as a violation of the 2nd Amendment and Illinois State Code provisions regulating the sale of firearms. The appellate court upheld the trial court's summary judgment in favor of the County. The 2nd Amendment does not prohibit taxes that do not restrict who may purchase a weapon or ammunition or what types of weapons or ammunition are available. Standard sales taxes on consumer products that are neither prohibitory or exclusionary do not interfere with 2nd Amendment rights merely by making the right more expensive or difficult to exercise. The appellate court rejected similar state law claims. Read the decision here.

Sumba v. Decker (U.S. District Court - Southern District of New York): On March 20, 2020, the Legal Aid Society and The Bronx Defenders sued U.S. Immigration and Customs Enforcement in federal court seeking the immediate release of 7 individuals in civil immigrant detention. These detainees, by virtue of their age or underlying medical conditions (including aortic valve disease, congestive heart failure, and diabetes), are particularly vulnerable to illness or death if infected with COVID-19. The complaint seeks their immediate release on the grounds that their continued incarceration constitutes "deliberate indifference to the risk of serious medical harm" violating the Fifth and Fourteenth Amendments.

***Disability Rights Washington*:** On a March 23, 2020, disability rights advocates filed a complaint with HHS' Office of Civil Rights (OCR) alleging the State of Washington's plan to ration care in response to COVID-19 constitutes disability discrimination in violation of federal law. Specifically, early indications are that Washington State Department of Health and state hospitals intend to weigh the survival of young and healthy patients over older, chronically debilitated patients. Rights advocates argue that doing so "rations care on the basis of disability." On March 28, 2020, OCR released a bulletin reminding covered entities that federal civil rights law remains operative during emergencies. The bulletin also states that "[p]ersons with disabilities, with limited English skills or needing religions accommodations should not be put at the end of the line for health services during an emergency."

Thakker v. Doll (U.S. District Court - Middle District of Pennsylvania, March 31, 2020): The federal district court issued a temporary restraining order requiring the immediate release of the ten petitioners, health-vulnerable immigrants held in civil detention under order of Immigration and Customs Enforcement (ICE) in Pennsylvania correctional facilities. They alleged violations of their 5th Amendment Due Process rights based on prison conditions, including tight confines that do not allow for appropriate distancing, few shared toilets and showers for many detainees, and frequently broken laundry facilities that prevent washing of clothing and bedding. Furthermore, they argued that ill detainees have not and cannot be effectively distanced from well detainees and that the conditions create a tinderbox ripe for rampant COVID-19 infection. The court agreed: "[S]hould we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result. Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue. This is true even for those who have lost a measure of their freedom. If we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize Petitioners' plight." Read the decision here.

Fraihat v. U.S. Immigration & Customs Enforcement (U.S. District Court - Central District of California, April 20, 2020): A California district court ordered Immigration and Customs (ICE) to identify and track detainees with COVID-19 risk factors and make timely custody determinations. The court certified subclasses of all persons detained in ICE custody who have risk factors or disabilities that place them at heighted risk of COVID-19 severe illness or death. The subclasses partly argued that ICE's COVID-19 response constitutes "medical indifference" and "punitive conditions of confinement" via the 5th Amendment. Risks of infectious diseases in detention centers are heightened as social distancing is "often impossible," facilities often lack resources to diagnose and/or treat conditions, and incarcerated

persons are more likely to have chronic underlying conditions. In many cases detention conditions consisted of an absence of accessible information on COVID-19, staff not wearing—and detainees not being provided with—personal protective equipment, and group confinement of numerous detainees with or without COVID-19 symptoms. At the time of the court's order, several detention centers had confirmed COVID-19 cases. ICE was ordered to define minimum acceptable detention conditions for detainees with risk factors to ensure detainees are confined in constitutionally permissible conditions of detention. Read the decision here.

Gary B. v. Whitmer (U.S. Court of Appeals – Sixth Circuit, April 23, 2020): In a landmark decision, the Sixth Circuit Court of Appeals recognized a federal constitutional right to a basic minimum education and access to literacy. In doing so, the court identified the substantive due process right to a basic education as a fundamental right. The trial court had dismissed all claims brought by students who matriculated into the Detroit public school system. Plaintiffs, students at Detroit's worst performing schools, claimed that conditions at the schools were so poor that children were unable to attain an education and achieve literacy. The three-judge Sixth Circuit panel revived the case (with a 2-1 vote) and sent it back for trial, finding that there is a fundamental right to a basic education that allows a student to achieve literacy. In lieu of trial, on May 14, Governor Whitmer announced a settlement of the lawsuit. Subsequently, the full Sixth Circuit vacated the three-judge decision and set the case for hearing before the Sixth Circuit's full panel of judges. The State, the city of Detroit, and the plaintiffs argue that the case is moot because of the settlement. Read the decision here.

Maine Community Health Options v. U.S. (U.S. Supreme Court, April 27, 2020): The Supreme Court ordered the federal Department of Health and Human Services (HHS) to pay health insurers for losses under a now-defunct provision of the Affordable Care Act (ACA). From 2014 through 2016, the ACA contained a so-called "risk corridor" provision requiring insurers to pay excess profits to HHS while mandating HHS cover losses of insurers that participated in the health benefit exchanges. Because losses far exceeded profits, the provision resulted in a $12 billion deficit for HHS. During these years, Congress legislatively prohibited HHS from using the funds to pay the insurers. Several insurers sued to recover monies owed, losing in multiple circuit courts of appeals. The Supreme Court overturned those decisions, finding that HHS' obligation to pay was not repealed by subsequent Congressional appropriation riders. Read the decision here.

Valentine v. Collier (U.S. Supreme Court, May 14, 2020): The U.S. Supreme Court denied a request to vacate the Fifth Circuit's stay of a preliminary injunction against a Texas geriatric prison. Inmates argued that the prison violated their 8th Amendment rights by failing to implement measures to adequately protect them from the spread of COVID-19. The district court found they sufficiently alleged deliberate indifference under the 8th Amendment and granted a preliminary injunction requiring the prison to follow extensive cleaning protocols. The Fifth Circuit stayed the injunction, pending appeal. In concurrence, Justice Sotomayor, joined by Justice Ginsberg, found that the inmates did not file any grievance with the prison itself, therefore failing to exhaust administrative remedies as required by the Prison Litigation and Reform Act of 1995 (PLRA). Justice Sotomayor, however, critiqued the Fifth Circuit's reasoning on "exhaustion," with respect to a PLRA exception allowing inmates to bypass this requirement when the administrative grievance procedure is incapable of responding to imminent harm. She also highlighted "disturbing" allegations brought by the prisoners, including the prison's failure to apply its own safety protocols. Read the decision here.

Don't Shoot Portland v. City of Portland (U.S. District Court, District of Oregon, June 9, 2020): The court granted (in part) the non-profit Don't Shoot Portland's request that the City of Portland be prohibited from using tear gas as a crowd control tactic in response to recent protests. While the City had internal policies in place limiting tear gas use, video evidence showed officers using it in response to peaceful

gatherings protesting the death of George Floyd and other acts of police violence. The court held that the tear gas use against peaceful protestors could be considered excessive force in violation of the Fourth Amendment and may infringe on constitutionally protected expression under the First Amendment. Additionally, such use could compromise protestors' health by exacerbating the spread and effects of COVID-19. Because the threat of immediate, irreparable harm to protestors outweighed any harm to police officers' ability to protect themselves, the City could not use tear gas to disperse crowds where the lives or safety of the public or police were not at risk. The order lasted for 14 days. Read the full opinion here.

June Medical Services v. Russo (U.S. Supreme Court, June 29, 2020): In a 5-4 decision the Supreme Court held that a Louisiana law requiring abortion providers to obtain hospital admitting privileges is unconstitutional under the Court's precedent in *Whole Woman's Health v. Hellerstedt* (2016). Louisiana Act 602 requires a provider to have hospital admitting privileges within 30 miles of a center where an abortion is performed or induced. The district court made detailed factual findings, concluding the Act provides no significant health-related benefit and "place[d] a substantial obstacle in the path of women seeking an abortion in Louisiana." The Fifth Circuit Court of Appeals reversed, rejecting most of the district court's findings. Writing for the plurality, Justice Breyer held that the district court's findings are supported under the deferential clear error standard. The Act served no "relevant credentialing function"; hospitals routinely deny admitting privileges (irrespective of a physician's ability to safely perform abortions). The Act would leave one clinic with one provider "to serve the 10,000 women annually who seek abortions in the State." Women would experience long wait times, increased crowding, and greater driving times (1-4 hours)—burdens that would be exacerbated especially for poorer women. Justice Roberts issued a concurrence under principles of stare decisis. Read the decision here.

Agency for International Development et al. v. Alliance for Open Society International, Inc., et al. (U.S. Supreme Court, June 29, 2020): The Supreme Court held that a federal funding condition requiring foreign affiliates of U.S. non-governmental organizations (NGO) to have a policy explicitly opposing prostitution and sex trafficking was constitutional. In 2013, this funding requirement, which was created by the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, was found to violate the 1st Amendment when applied to U.S. NGOs. However, the court reasoned that foreign citizens who are physically outside of the United States have no constitutional rights and that foreign NGOs are foreign citizens under corporate law regardless of an affiliation with an American organization. As a result, foreign affiliates lack First Amendment rights and the funding condition was constitutional as applied to these NGOs. Read the decision here.

Hartkemeyer v. Barr et al. (U.S. District Court – District of Indiana, July 14, 2020): The court denied a request for a stay of execution based on the claim that scheduling the execution during the COVID-19 pandemic violated the Religious Freedom and Restoration Act of 1993 (RFRA) and the Administrative Procedures Act (APA). The plaintiff and intervenor plaintiff were the ministers of record for Wesley Purkey and Dustin Lee Honken, who were respectively scheduled for execution on July 15, 2020 and July 17, 2020. The ministers argued that scheduling the executions during the pandemic substantially burdened their religious beliefs because the risk of catching the disease at the prison facilities prevented them from attending to the spiritual needs of Mr. Purkey and Mr. Honken. A successful claim under the RFRA requires the plaintiff to show that a government action substantially burdens a sincerely held religious belief. The court held that the pandemic was not a government action and it could not serve as the basis of the RFRA claim. Under the APA, the plaintiffs argued that scheduling the executions during the pandemic was a violation of agency authority because it was arbitrary and capricious. The court rejected this argument citing that the Bureau of Prisons had "unconstrained discretion" to set an execution date. As a result, the stay of execution was denied, and the men were executed. Read the decision here.

Slidewaters LLC v. Washington Department of Labor (U.S. District Court, Eastern District of Washington, July 14, 2020): Slidewaters, a local water park, sued Governor Inslee and the Washington Department of Labor & Industries ("LNI") alleging constitutional violations stemming from COVID-19 closure orders. Slidewaters argued its seasonal opening is imperative to its business survival, but prohibited by the Governor's COVID-19 State of Emergency order and resulting restrictions, even with cleanliness and social distancing measures in place. Plaintiffs argued the Governor's order prohibiting operation of waterslide parks wrongfully deprived them of property interests without due process. The court disagreed. Governor Inslee's emergency power granted by the Legislature "clearly encompasses an outbreak of a pandemic disease." LNI was legally authorized to create rules enforcing the Governor's emergency proclamations. Quoting *Jacobson v. Massachusetts,* state governments can enact public health laws via their police powers, provided the laws are reasonable, equally applied, and not overly broad despite limited infringements of other protected interests. Read the full opinion here.

County of Butler v. Wolf (U.S. District Court for the Western District of Pennsylvania, September 14, 2020) – The U.S. District Court for the Western District of Pennsylvania ruled that several provisions contained in executive orders issued by Pennsylvania Governor Wolf and Secretary of Health Levine to address the COVID-19 pandemic were unconstitutional. The court found that: (1) the stay-at-home order, applicable across the Commonwealth and subsequently lifted on a county-by-county basis, violated Substantive Due Process under the 14th Amendment; (2) the provision limiting the size of indoor and outdoor gatherings violated the 1st Amendment right to assemble; and (3) closing "non-life-sustaining" businesses violated the Due Process and Equal Protection Clauses of the 14th Amendment. The court was particularly troubled by classifications of various businesses allowing a big-box store to remain open while closing smaller business that sell similar products (for example, furniture stores). It found that the Governor was well-intentioned and his goals laudable, but Constitutional liberty interests are not diminished in times of emergency. Read the full opinion here.

Texas Democratic Party v. Abbott (U.S. Court of Appeals, Fifth Circuit, October 14, 2020): The Fifth Circuit concluded that a Texas statute requiring voters under age 65 to provide a justification for voting by mail was not, on its own, unconstitutional via the 26th Amendment "right to vote" protections, regardless of the COVID-19 pandemic. Under Texas Law, only voters 65 years and older may vote by mail without providing an excuse. The Texas Democratic Party and several voters challenged the law, alleging it violated either the 26th Amendment or the 14th Amendment's equal protection clause of the U.S. Constitution. The lower court concluded that treating older voters differently than younger voters violated the 26th Amendment. The appellate court found no denial or abridgment of the right to vote contrary to the 26th Amendment. However, the court remanded for the case for lower court consideration of the "real issue" – equal protection. Read the full opinion here.

Texas League of United Latin American Citizens, et al. v. Hughs (U.S. Court of Appeals, Fifth Circuit, October 12, 2020): The 5th Circuit upheld the Texas Governor's proclamation allowing only one ballot drop box per county where voters can hand deliver their absentee ballots. The court accepted the Governor's rationale that multiple ballot delivery locations "threatened election uniformity and security" and rejected voters' contention that the one-location-per-county policy restricted their absentee voting options. Rather, because pre-COVID election rules allowed hand delivery of ballots only on election day, while the Governor's new rules allow for hand delivery for forty extra days leading up to election day (albeit to one location per county), the court found that the Governor's policy "still gives Texas absentee voters many ways to cast their ballots…these methods for remote voting outstrip what Texas law previously permitted in a pre-COVID world." Read the full opinion here.

Republican National Committee v. Common Cause Rhode Island (U.S. Supreme Court, August 13, 2020): The U.S. Supreme Court rejected a challenge by the Republican National Committee and state Republican Party to a consent decree suspending Rhode Island's requirement that 2 witnesses sign an absentee ballot. In granting the decree, the lower court held that the witness requirement unconstitutionally burdened the right to vote during the COVID-19 pandemic, and the First Circuit appellate court agreed. Even though the Supreme Court previously allowed a similar Alabama witness requirement to stand (*Merrill v. People First of Alabama, decided July 2, 2020),* it declined to equate the matters. The Court noted that to the extent Rhode Island's Governor suspended the witness requirement for the presidential primary in June 2020, many voters might already assume it was also suspended for the November election. Additionally, Alabama state officials had defended the need for a witness requirement, whereas Rhode Island election officials support the decree. Read the full opinion here.

3. PREVENTING & TREATING COMMUNICABLE CONDITIONS [4 cases]

F.F. on behalf of Y. F. v. State (N.Y. Sup. Ct. Aug. 23, 2019): In June 2019, the New York legislature repealed a statute that allowed non-medical religious exemptions from mandatory school-entry vaccinations for children attending most schools in New York. Parents, on behalf of their minor children, challenged the repeal. They claimed the repeal constituted religious discrimination and violated the Equal Protection Clause of the U.S. Constitution. The Supreme Court, Albany County (NY) "acknowledge[d] respect for religious beliefs, but expresse[d] the view that public health concerns must prevail" and denied the motion for preliminary injunction. Read the decision here.

Boatmon and Cupid v. Secretary of Health & Human Services (U.S. Court of Appeals for the Federal Circuit, Nov. 7, 2019): The U.S. Court of Appeals for the Federal Circuit affirmed a lower court decision finding that the parents of a child who died from Sudden Infant Death Syndrome (SIDS) failed to prove that vaccinations caused the child's death. The infant, J.B., died of SIDS 2 days after receiving typical childhood vaccines. The National Vaccine Injury Act allows recovery for certain injuries established as causally related to vaccines. SIDS is not listed on the act's Injury Table. Recovery under the act is only allowed for other injuries if one proves a vaccine caused the injury. After trial, the Special Master found that the vaccines caused J.B.'s death from SIDS. The U.S. Court of Federal Claims reversed that decision. On appeal, the Federal Circuit upheld the reversal. The U.S. Department of Health and Human Services' experts testified that there is no evidence linking vaccines to SIDS in general and no evidence linking vaccination to J.B.'s death. Although the plaintiff's expert testified that there was a causal link, the court found that the testimony was unsupported by "reputable medical or scientific explanation." Read the decision here.

N.C. v. Department of Children & Families (Florida Second District Court of Appeal, Jan. 31, 2020): A Florida state appellate court found in favor of a mother whose children were placed in foster care, stating that the Florida Department of Children and Families could not provide immunizations to the children over their mother's objection. The Department asked the trial court to grant its request to provide the children with "their necessary immunizations." It alleged that no daycare providers or pediatricians in the area would take children without immunizations and that the foster family could lose its license by having unvaccinated children in the home. The trial court ruled in the Department's favor. Reversing the trial court's interlocutory order, the court found insufficient statutory basis for the trial court to authorize the Department to have the children immunized over the mother's religious-based objection. It further noted that the trial court's ruling would have resulted in an injury that could not be corrected at a later stage because vaccinations cannot be undone. Read the decision here.

In re: HCV Prison Litigation (U.S. District Court – District of Nevada, Feb. 18, 2020): A district court granted class status to incarcerated persons challenging the Nevada Department of Correction's (NDOC) Hepatitis C Virus (HCV) treatment policy. Per NDOC's policy, direct-acting antiviral drugs (DAA) treatment, a highly effective HCV treatment, is administered according to three priority levels based on the severity of HCV-positive inmates' symptoms. Priority level three inmates are less likely to receive DAA treatment. Inmates alleged the policy conflicts with medical standards of care recommending DAA treatment for most HCV-positive individuals. Further, delaying or denying DAA treatment constitutes deliberate indifference under the Eighth Amendment, exposing them to an unreasonable risk of harm—essentially requiring them to get sicker before getting the treatment. The court granted class certification to all persons challenging the policy who: (1) are (or will be) in NDOC's legal custody; (2) have been incarcerated for at least 21 days with three months remaining; (3) are HCV-positive and candidates for DAA treatment under proper medical standards of care; and (4) will have DAA treatment denied, delayed, or withheld because of the policy or other considerations outside of proper medical standards.

4. SOCIAL DISTANCING MEASURES [4 cases]

City of Costa Mesa v. U.S. (U.S. District Court – Central District of California, Feb. 21, 2020): A California district court lifted a temporary restraining order blocking the transfer of individuals exposed to, or infected with, COVID-19 to a state-owned facility in Costa Mesa. The city initially sought to stop the transfer, arguing that the facility had not been properly assessed nor had local public health officials been informed as to how the community would be protected. When federal authorities decided to no longer pursue the transfer to Costa Mesa, the court removed the injunction and dismissed the case. Similarly, San Antonio sued to block the Centers for Disease Control and Prevention (CDC) from releasing over 120 COVID-19 evacuees from quarantine at Joint Base San Antonio-Lackland. CDC allowed a patient, who tested negative for COVID-19 twice, to leave quarantine before receiving a third positive test result. The city asked the court to maintain the quarantine and require individuals to undergo three—not two—COVID-19 tests before being released. The court rejected the city's requests on grounds that it lacked authority to second-guess the federal government's social distancing efforts.

Coming Attractions Bridal and Formal, Inc. v. Texas Health Resources (Supreme Court of Texas, Feb. 21, 2019): The Texas Supreme Court affirmed the dismissal of a case by a bridal shop that went out of business after it was visited by a nurse who contracted Ebola. The nurse went to the Ohio shop after caring for an Ebola patient at a Texas hospital. She was later diagnosed with Ebola. The shop temporarily closed to prevent the virus' spread, but its business never recovered, and it later permanently closed. It sued the owners of the hospital alleging the hospital negligently failed to prevent the spread of Ebola in its control and management of its employees. The Texas Medical Liability Act (TMLA) requires a "claimant" alleging a "health care liability claim" to submit an expert report detailing the support and factual basis for the claim. The court concluded the TMLA's definition of "claimant" includes corporations regardless of the type of injury alleged (economic or physical). The shop's allegations that the hospital was negligent in controlling the spread of the virus also implicated health care related safety standards. As such, the claims constituted health care liability claims under the TMLA. Because the shop did not submit the required report, the case was dismissed. Read the decision here.

Binford v. Sununu (Merrimack Superior Court, New Hampshire): On March 17, 2020, a day after Governor Sununu prohibited gatherings of more than 50 individuals to prevent the spread of COVID-19, individuals in New Hampshire filed a lawsuit. They alleged the Governor's order violates the state constitutional ban on martial law and infringes on their federal and state constitutional freedoms of religion and right to assemble. The complaint also alleges the Governor cannot meet the burden of showing an "emergency" under state law because "[p]resently, many more people die from, are diagnosed with, or hospitalized with the flu [] than Covid-19." The Governor filed an objection on March 19, 2020, generally arguing that their claims lacked merit. The court agreed, dismissing the lawsuit on March 21. An opinion is expected soon.

In re Texas (Texas Supreme Court, May 27, 2020): The Texas Supreme Court determined that a lack of immunity to COVID-19 did not qualify as a "physical condition" that would entitle a voter to qualify to vote-by-mail under the "disability" category of the state's election code. The court found that voting by mail is limited to "those who will be absent from their county of residence during an election period, who have a 'disability,' who are over 65 years of age, who are incarcerated, or who are participating in the address confidentiality program administered by the Attorney General." The Texas Democratic Party (TDP) had argued that the election code permits voters to vote-by-mail if they believe social distancing is necessary to stop the spread of COVID-19 because lack of immunity constitutes a disability under the code. In another case, ***Texas Democratic Party v. Abbott***, TDP also sued in federal district court. That court granted a preliminary injunction ordering that voters wishing to avoid transmission of COVID-19

could vote by mail during the pandemic. It held the age restriction, banning individuals under 65 from mail-in voting, violates the 14th Amendment's equal protection provision. On June 4, the Fifth Circuit Court of Appeals temporarily stayed the federal district court's injunction pending appeal. Read the *In re Texas* decision here. Read the *Texas Democratic Party v. Abbott* decision here.

5. ADDRESSING CHRONIC CONDITIONS [8 cases]

U.S. v. Safehouse, et. al. (E.D. Pa. Oct. 2, 2019): A federal judge from the Eastern District of Pennsylvania ruled that Safehouse's plan to open a supervised injection site in Philadelphia did not violate the federal Controlled Substances Act (CSA). At this facility, Safehouse, a non-profit, intends to offer a variety of services including medication assisted treatment, medical care, referrals to a variety of social services, and medically supervised consumption and observation rooms. The federal government filed suit to prevent the opening of this supervised injection site, alleging that it violated CSA, specifically 21 U.S.C. § 856(a)(2), known colloquially as the "crack house statute." This provision makes it illegal to manage or control any place for the purpose of facilitating illicit drug use. The judge held that Safehouse did not violate this provision because the purpose of the site was not to facilitate unlawful drug use but rather to reduce the harm of drug use, administer medical care, encourage drug treatment, and connect participants with social services. The Department of Justice has indicated its plans to appeal the case. Read the decision here.

New York v. United Parcel Service, Inc. (U.S. Court of Appeals, Second Circuit, Nov. 7, 2019): The Second Circuit Court of Appeals found that United Parcel Service (UPS) shipped untaxed cigarettes from Native American reservations to locations throughout New York, knowingly violating state and federal laws designed to curtail cigarette tax evasion. The State and City of New York claimed UPS violated federal laws (Contraband Cigarette Trafficking Act (CCTA) and Prevent All Cigarette Trafficking (PACT)), state law (Public Health Law §1399-*ll*), and an Assurance of Discontinuance (AOD). Although significant state and city excise taxes are imposed on cigarettes to reduce youth access and deter adult use, federal law prohibits states from imposing such taxes on reservations for sales to tribe members for personal use. Tribes have refused to participate in the tax stamp process, complicating enforcement of excise tax provisions for reservation-based sales. As a result, New York State passed PHL §1399-*ll*, prohibiting all but face-to-face cigarette sales, imposing liability on shippers that violate the law. Despite agreeing in the AOD to stop certain practices, UPS continued to ship unstamped cigarettes to "numerous contraband cigarette enterprises." The trial court found UPS liable, awarding $9.4 million in unpaid taxes and $237.6 million in penalties. The Second Circuit affirmed the trial court's liability ruling, increasing the award of unpaid taxes to $18.8 million but reducing penalties to $78.8 million. Read the decision here.

Vapor Technology Association et al. v. Oregon Health Authority (Oregon Court of Appeals, Nov. 14, 2019): An Oregon appellate court blocked an effort by Oregon Health Authority (OHA) to promulgate a temporary rule banning the sale of flavored nicotine vaping products. The court temporarily stayed the rule, pending judicial review, finding that petitioners (*e.g.*, the vaping industry) were likely to succeed on their claim that the rule exceeded OHA's statutory authority. Although Oregon law gave OHA "direct supervision of all matters relating to the preservation of life and health of the people," neither these powers, nor the Governor's executive order, granted OHA such rulemaking authority. Additionally, petitioner's claim that there was a likelihood of irreparable harm to petitioners, including destruction of the industry in the state, was uncontested. The court rejected OHA's argument that the public would be harmed if the rule was blocked. The court deemed that any connection to national vaping related deaths and lung injuries was speculative because vaping flavors had not been shown to cause these harms. Instead, the court found the rule could potentially harm the public because some vaping customers would return to "smoking combustible cigarettes" or black market products. The court later issued a similar order relating to cannabis vaping products. Read the decision here.

Callahan v. U.S. Department of Health & Human Services (U.S. District Court – Northern District of Georgia, Atlanta Division, Jan. 16, 2020): A district court declined to issue a preliminary injunction against the U.S. Department of Health and Human Services (HHS) and United Network for Organ

Sharing. Transplant patients, hospitals, and transplant centers claimed that HHS failed to follow legal procedures in developing its liver allocation policy, instead choosing to defer virtually all decision-making to a private government contractor. They also argued that these actions violated the Administrative Procedure Act as well as the Fifth Amendment's Due Process Clause. The court held the plaintiffs did not show a substantial likelihood of success on the merits of their claims. In declining to issue the injunction, it acknowledged the case was "difficult and wrenching" and fraught with complexities and policy tensions. It observed that "implementation of transition measures to mitigate disruption and patient harm" should be a priority, but that "is an observation, not an order." Read the decision here.

District of Columbia v. U.S. Department of Agriculture (U.S. District Court - District of Columbia, March 13, 2020): The federal district court issued a nationwide preliminary injunction halting a federal rule that would remove an estimated 700,000 individuals from the Supplemental Nutrition Assistance Program (SNAP). The challenged rule limits a state's ability to request a waiver of SNAP work requirements for Abled Body Adults without Dependents. USDA is prevented from enforcing the regulation while the court evaluates the legality of the challenged measure. The court reasoned that the plaintiffs were likely to win on the merits of the case because aspects of the rule are "likely unlawful because they are arbitrary and capricious." The court also held that the injunction was needed to prevent irreparable harm to multiple states, nonprofits, and SNAP recipients. The court highlighted SNAP's importance to national pandemic response efforts "[e]specially now, as a global pandemic poses widespread health risks, guaranteeing that government officials at both the federal and state levels have flexibility to address the nutritional needs of residents and ensure their well-being through programs like SNAP, is essential." Read the decision here.

Ozark Mountain Regional Public Water Authority v. Arkansas Attorney General (Arkansas Court of Appeals Division III, March 18, 2020): The Arkansas Court of Appeals affirmed the decision of the Boone County Circuit Court that the Ozark Mountain Regional Public Water Authority (Ozark) was subject to Arkansas Code Annotated § 20-7-136 (Act 197), which was not unconstitutionally vague. The Arkansas Department of Health issued an order and notice of hearing in February 2016 in response to Ozark's failure to implement a fluoridation program pursuant to Act 197. Ozark argued it did not qualify as a "water system," and thus the Act's mandatory fluoridation requirement did not apply. Ozark also argued that Act 197 was vague and unconstitutional as applied. Following a 2016 hearing, the Arkansas Board of Health issued an order stating Act 197 did apply to Ozark and rejected Ozark's constitutional challenge. Ozark petitioned for judicial review. The Boone County Circuit Court found substantial evidence supported the Board's decision and affirmed. On appeal, the court found Ozark met the definition of water system under the plain and unambiguous language of Act 197, noting it was precluded from ruling on Ozark's constitutional objection because the Circuit Court did not issue a specific ruling on the challenge. Read the decision here.

Colpitts v. W.B. Mason Co., Inc., (Rhode Island Supreme Court, May 29, 2020): The Rhode Island Supreme Court upheld the termination of a driver who refused drug testing because he uses medical cannabis. The driver alleged the employer violated the state's employer drug testing statute when it required him to take a drug test, purportedly without reasonable grounds, and terminated him for refusing. The issue on appeal was whether the trial court erred in finding that the employer had reasonable grounds to believe, "based on specific aspects of [the driver's] performance and specific documented observations, concerning [his] appearance, behavior and speech, that he might have been under the influence of a controlled substance." Applying a deferential standard of review, the Rhode Island Supreme Court held there were reasonable grounds for drug testing based on lower court testimony regarding the driver's language and behavior at work. State law does not require "actual knowledge" or

specific symptoms of drug use, but only reasonable grounds to believe the employee is under the influence. Read the decision here.

Schmitt v. Kaiser Foundation Health Plan of Wash. (U.S. Court of Appeals, 9th Circuit, July 14, 2020) – The 9th Circuit Court of Appeals found Kaiser Health Plan did not violate the Affordable Care Act's (ACA) discrimination provisions by failing to provide Plaintiffs with proper hearing loss treatment because the Plan did not *categorically* exclude coverage of hearing loss treatment. Plaintiffs alleged discrimination by arguing that hearing *loss* is a proxy for hearing *disability*, and that all individuals with hearing *disability* have hearing *loss* because the definition of "disability" includes "a physical or mental impairment that substantially limits one or more major life activities." The court questioned whether the proxy's "fit" was "sufficiently close" to make a discriminatory inference plausible. Since not all hearing loss is substantial, the court reasoned, "at least some individuals with that condition are not deemed disabled." Therefore, while the insurer's coverage of cochlear implants was inadequate to serve plaintiffs' health needs, it might adequately serve the needs of hearing disabled people as a group. Read the full opinion here.

6. MITIGATING THE INCIDENCE & SEVERITY OF INJURIES & OTHER HARMS [22 cases]

State of Oklahoma, ex. rel. Hunter v. Purdue Pharma, L.P., et. al. (Okla. Dist. Ct. Aug. 26, 2019): An Oklahoma court ruled that Johnson and Johnson® and other pharmaceutical companies violated the state's public nuisance law. The court found the defendants engaged in false, misleading, and dangerous opioid marketing campaigns promoting opioids as under-prescribed and as having a low risk for abuse. These campaigns exponentially increased Oklahoma's opioid addiction rates and overdose deaths and injured or endangered the health or safety of communities in violation of the state's public nuisance law. Read the decision here.

Hayden v. Maryland Department of Natural Resources (Maryland Court of Special Appeals, Sept. 3, 2019): The Maryland Court of Special Appeals upheld a ruling that an oyster harvester violated state food safety laws by removing oysters in the Chesapeake Bay from an area that had been closed due to pollution. While the court focused on the statutory language, it noted that the Maryland Department of the Environment is "authorized to close areas of the Chesapeake Bay and its tributaries to oyster harvesting when [it] determines that those areas are polluted and that the shellfish from the polluted areas are hazardous to public health." The harvester testified that he knew the area had been closed due to pollution, but planned to let the oysters "'filter[] out' for several weeks" before selling them. Consequently, the court affirmed the revocation of his oyster harvesting license. Read the decision here.

Bowen, et al. v. Telfair County School District, et al. (S.D. Ga. Sept. 17, 2019): A high school football player sued the Telfair County School District and football coach, among others. After the player sustained prolonged cognitive injuries in a game, the coach allowed him to return to play despite the player exhibiting symptoms of a concussion. A federal judge found that the school district was entitled to sovereign immunity on state tort claims. While the court concluded that the football coach was entitled to qualified immunity related to claims brought via 42 U.S.C. § 1983 and official immunity on state intentional tort claims, it found no immunity for a "negligence claim based on his failure to follow concussion treatment and prevention procedures." Read the decision here.

Harris County v. S.K. & Bros. (Court of Appeals - 14th District of Texas, Nov. 5. 2019): A Texas appellate court held that a local government could sue dry-cleaners for violating the Texas Water Code's (TWC) prohibition on unauthorized discharge of industrial waste into water. Harris County and the State of Texas, acting by and through the Texas Commission of Environmental Quality (TCEQ), sued the dry-cleaner owners and landlords alleging the business had unlawfully caused groundwater contamination with perchloroethylene. The trial court initially dismissed the suit, finding Harris County and TCEQ did not have standing to sue, but the appeals court reversed. It held that the TWC provision allowing localities to sue for civil penalties and injunctive relief was not preempted by the Texas Health and Safety Code since there was no irreconcilable conflict between the code and TWC. As a result, Harris County and TCEQ had standing to pursue a civil enforcement action. Read the decision here.

Safer Chemicals et al. v. U.S. Environmental Protection Agency (EPA), et al. (U.S. Court of Appeals for the Ninth Circuit, Nov. 14, 2019): The court concluded that under the Toxic Substance Control Act (TSCA), EPA must consider the outdated uses of a chemical (legacy activities) when evaluating the health and environmental risks of chemical substances. Petitioners challenged several aspects of EPA's new Risk Evaluation Rule (Rule). The TSCA requires EPA to evaluate chemical substances' "conditions of use" in its risk evaluation. The court held the Rule's categorical exclusion of "legacy activities" (like the use of asbestos in insulation) from the definition of "conditions of use" violated the Act. Under the TSCA, "conditions of use" include chemical substances, like asbestos, that are no longer manufactured for a

particular use, but will be used or disposed of in the future. The court, however, rejected Petitioners' additional arguments finding, in part, that: (1) the exclusion of "legacy disposals" (disposals that have already occurred) did not violate TSCA; and (2) Petitioners' challenges to the process by which EPA intends to conduct risk determinations were non-justiciable. Read the decision here.

Doe v. Trustees of Boston College (U.S. Court of Appeals - First Circuit, Nov. 20, 2019): The First Circuit reversed a district court's preliminary injunction prohibiting Boston College from imposing a one year suspension of a student responsible for sexual assault. The student claimed the investigation process in the college's policies (the Contract) violated state and federal law. Boston College adhered to the Contract's investigation and adjudication procedures. The student argued, however, some form of cross-examination was required. The district court found the student was likely to succeed on his claim that he was deprived of basic fairness under state contract law because the process lacked "quasi-cross-examination in real time." The First Circuit reversed. A private institution is not required to comply with federal due process standards to meet the "basic fairness" requirement in campus adjudications; nor did state contract law require such cross-examinations. The district court unduly interfered with the right of academic institutions to make disciplinary decisions. The court spoke of the need for judicial modesty in defining the law, as a federal court "must take state law as it finds it" and not import federal due process standards to reshape state contract law. Such decisions amounted to "policy choices for the Supreme Judicial Court and/or state legislature to make." Read the decision here.

Beverly v. Grand Strand Regional Medical Center, LLC (South Carolina Court of Appeals, Jan. 15, 2020): A state appellate court held that a plaintiff insured through Blue Cross Blue Shield (BCBS) was a third party beneficiary to a contract between BCBS and Grand Strand Regional Medical Center through which the Center agreed to provide care to BCBS insureds at established rates. As a result, the plaintiff may proceed on her claim that the Center was not allowed to bill her directly for services or to bill her at rates higher than those established in the contract between BCBS and the Center. The court found that despite explicit contractual language that there are no intended third party beneficiaries, the contract as a whole established that the fundamental purpose of the contract was to allow BCBS insureds to receive care from the Center at established rates. The court therefore found that insureds were indeed third party contract beneficiaries. The plaintiff's breach of contract claim alleging that the Center must only bill BCBS at the contractually agreed rates will proceed to trial. Read the decision here.

Bottomlee v. State of Arizona (Arizona Court of Appeals, Jan. 28, 2020): A state appellate court reversed the dismissal of a wrongful death lawsuit by the mother of an infant who suffocated at a daycare. The court held she had stated a claim for gross negligence against the State and a state inspector who directed the daycare to use pillows for tummy time. The mother alleged the inspector investigated the daycare based on alleged violations of the Arizona Department of Health Services' rules by using pillows in cribs. The inspector signed a correction plan directing the daycare to use pillows only for infant tummy time. The mother alleged the plan violated governmental authorities advising against the use of pillows during tummy time. In assessing the mother's negligence claim, the court rejected the State's argument that the inspector owed no specific duty to the infant or the mother. It held the State owed the infant a duty to conform to certain standards of care. The inspector created a special relationship with the infants at the daycare and therefore created the duty when, to protect the infants, he directed how the daycare should remedy its violation. Read the decision here.

Cigar Association of America v. U.S. Food & Drug Administration (U.S. District Court – D.C. Feb. 3, 2020): The U. S. District Court for D.C. granted summary judgment in favor of the cigar industry rejecting the U.S. Food and Drug Administration's (FDA's) argument that its health-warning label requirements under the deeming rule apply to premium cigars. Cigar merchants' associations,

manufacturers, and retailers brought an action against FDA and others challenging FDA's application of the deeming rule's health warning requirements to premium cigars. The court held that requiring premium cigars to include health-warnings labels for packaging and advertisements violated the Administrative Procedures Act because it was arbitrary and capricious and not a product of reasoned decision making. FDA claimed the warnings were necessary to address misimpressions about the health risks of cigar use. However, FDA failed to analyze whether consumers were actually mis- or under-informed about the health effects of premium cigars. The court vacated the deeming rule's warning requirements for premium cigars and remanded the rule back to FDA for further proceedings. Read the decision here.

Cajun Conti LLC v. Certain Underwriter's at Lloyd's, London (Civil District Court for the Parish of Orleans, Louisiana)*:* On March 16, 2020, Oceana Grill, a popular restaurant in the French Quarter of New Orleans sued its insurer, Lloyd's, Louisiana's Governor, and the State, seeking a declaratory judgment affirming that the restaurant is entitled to insurance coverage for business interruption due to operating restrictions affecting restaurants due to COVID-19. It also seeks a judgment that the insurance policy would cover physical losses from any COVID-19 contamination. Additionally the complaint asks the court to clarify whether the recent Louisiana order, banning gatherings of 250 or more, and the New Orleans order, ordering restaurants to reduce seating to 50% capacity, apply to Oceana which has a capacity of 250 at 50% capacity.

Center for Science in the Public Interest v. Perdue (U.S. District Court – District of Maryland, April 13, 2020): The federal district court vacated and remanded USDA's December 2018 final rule on sodium and whole grain requirements for federal school lunch and breakfast programs. Under the federal Administrative Procedures Act, federal agencies like USDA must provide sufficient notice of a regulation's content to allow public comment. USDA's final rule on sodium and whole grain violated this notice and comment requirement. In 2012, the agency passed regulations to decrease student intake of sodium and increase consumption of whole grains. The sodium restrictions were to be implemented in 3 phases over 10 years. The whole grain regulations required that all grain products served to students be whole grain rich. In 2017, USDA published an interim final rule which discussed delaying the implementation of the sodium restrictions and providing state hardship exemptions to the whole grain rich requirement. USDA's 2018 final rule eliminated the final sodium target and the whole grain requirement. The court found that the final rule was not a logical outgrowth of the interim final rule and as a result failed to provide the required notice of USDA's intended regulatory approach. Read the decision here.

In re: National Prescription Opiate Litigation (U.S. Court of Appeals – Sixth Circuit, April 15, 2020): The Sixth Circuit held an opioid multidistrict litigation (MDL) trial court abused its discretion by allowing counties to amend their complaints 19 months after a judicial deadline. Petitioners are 12 retail pharmacy chains operating in Ohio counties. The counties are plaintiffs in 2 opioid-related cases pending in Ohio federal court. The counties' complaints in those cases initially did not include claims against the retail pharmacy chains ("dispensers" that fill prescriptions), but instead asserted claims against distributors of prescription opioids (which ship pharmaceuticals wholesale). In an order (dated more than 1.5 years after the deadline for amendments to the counties' complaints, and almost a year after discovery had closed) the trial court granted the counties' motion to amend their complaints and ordered new discovery. While the trial court has broad discretion to "create efficiencies and avoid duplication" across cases in an MDL, the Sixth Circuit held it may not "distort or disregard the rules of law applicable to each of those cases." By allowing counties to amend their complaints after disavowing those claims and completing discovery, the trial court failed to respect the pharmacies' procedural rights. Read the decision here.

Slis v. State of Michigan (Court of Appeals of Michigan, May 21, 2020): A Michigan state appellate court upheld an injunction against an emergency ban on the sale of flavored vape products. To combat "a vaping crisis among the youth" in Michigan, emergency rules prohibit the sale and distribution of

flavored nicotine products. Sellers of vapor products banned under these rules sued, arguing that the rules are procedurally invalid, threatened irreparable harm to the sellers, and would negatively impact adults who use vapor products to quit smoking. The appellate court held that the Governor and state health department are entitled to deference on their decisions, "but not complete capitulation." They failed to provide evidence that an "emergency" existed such that a "period of delay" in issuing rules under existing procedures, "would make any relevant difference in preserving the public's health, welfare, or safety." Read the decision here.

County of San Mateo v. Chevron Corp* & *City of Oakland v. BP PLC (U.S. Court of Appeals – Ninth Circuit, May 26, 2020): In companion cases brought by California cities and counties, the Ninth Circuit denied energy companies' requests to move climate change lawsuits to federal court holding neither suit raises federal claims. The cases raised claims of public nuisance (*Oakland*, *San Mateo*) and other state law claims (*San Mateo*), arising generally from the energy companies' production of fossil fuels, contributing to rising seas and costly coastal flooding. The court concluded in *Oakland* that the federal district court erred in holding that it had jurisdiction over the claims. It held in part that the federal Clean Air Act does not completely preempt state common law claims of public nuisance. In *San Mateo*, the court affirmed that the federal district court did not have subject-matter jurisdiction under the federal-officer removal statute (which allows removal of civil cases against persons acting under the authority of a federal officer from state to federal court). An arm's length business arrangement with the federal government is insufficient to meet this standard. Read the *County of San Mateo* decision here. Read the *City of Oakland* decision here.

Bostock v. Clayton County, Georgia (U.S. Supreme Court, June 15, 2020): The U.S. Supreme Court held that an employer who fires an employee for being gay or transgender commits unlawful sex discrimination under Title VII of the federal Civil Rights Act of 1964. Title VII generally prohibits employers from engaging in workplace discrimination on the basis of protected characteristics like sex. Employers, who fired employees for being gay or transgender, argued that Title VII's prohibition on sex discrimination does not include discrimination against an employee for being transgender or gay. In a 6-3 decision, the Court rejected this argument. An employer who takes an adverse employment action against an employee for traits or actions it would not have questioned with respect to members of a different sex necessarily discriminates on the basis of sex. The Court reasoned that such discrimination "requires an employer to intentionally treat individual employees differently because of their sex." Under Title VII as long as an employee's sex is part of the reason for the termination an employer cannot avoid liability simply because there may have been another reason for that the employee was fired. Read the decision here

Ingham v. Johnson & Johnson (Missouri Court of Appeals – Eastern District, June 23, 2020): A Missouri appellate court upheld a judgment for persons claiming injuries caused by talc powder products manufactured by Johnson & Johnson Consumer Companies Inc. (JJCI) and its parent company Johnson & Johnson (J&J). Plaintiffs argued that they developed ovarian cancer as a result of continued use of JJCI's talc powder products. A jury awarded each plaintiff $25 million in actual damages (for a total of $550 million) plus $4.14 billion in punitive damages. The appellate court affirmed the trial court's ruling in part. It reduced (1) actual damages (based a lack of jurisdiction for certain parties) and (2) punitive damages to $900 million to JJCI and approximately $715 million for J&J, despite contrary arguments by the defendants that punitive damages were unwarranted. Plaintiffs' clear and convincing evidence was sufficient such that a reasonable jury could have concluded the defendants "disregarded the safety of consumers despite their knowledge the talc in the Products caused ovarian cancer." Read the decision here.

Funes v. Maryland (Court of Appeals of Maryland, June 30, 2020): The Court of Appeals of Maryland held that, when providing advice of rights prior to administering a chemical breath test, police officers must reasonably convey the warnings and rights in the implied consent statute. Maryland law requires all drivers to submit to chemical testing when appropriately requested as a condition for the privilege of driving in the state; this is referred to as implied consent. This consent is withdrawn if the driver refuses the test which results in the loss of the privilege to drive. Under Maryland law, a police officer must provide advice of rights prior to administering a chemical test. The advice of right informs the driver of the potential criminal ramifications for failing a chemical test and the administrative ramifications for refusing to take the test. This allows drivers to make an informed decision regarding the withdrawal of their implied consent to testing. In the case at hand, the driver was a native Spanish speaker with limited English proficiency. The court held that the police officers failed to properly administer the advice of rights when they read these rights to the driver in English. These actions failed to meet the legal standard that requires police to use methods that reasonably convey the warning and rights of the implied consent statute. Read the decision here.

C.Y. Wholesale, Inc., et al., v. Eric Holocomb, et al. (U.S. Court of Appeals – Seventh Circuit, July 9, 2020): The court vacated an injunction that had blocked the enforcement of Indiana's smokable hemp regulations. The 2018 Farm Bill removed industrial hemp from the Controlled Substances Act, effectively legalizing its production under federal law. Indiana passed a law in 2019 that criminalized the manufacture, financing, delivery, or possession of smokable industrial hemp. A group of hemp and CBD sellers sued Indiana to prevent enforcement of this ban. The district court held that the ban was preempted by the Farm Bill and granted an injunction that prevented Indiana from enforcing its smokable hemp ban. The Seventh Circuit found that only a ban on the interstate transportation of smokable hemp was preempted and that the Farm Bill expressly authorized states to regulate the production of hemp, even if these regulations were stricter than the federal standard. As a result, the injunction was vacated and remanded to the district court to determine if a narrowly tailored injunction that followed the Seventh Circuit's findings was appropriate. Read the decision here.

York v. Wellmark in d/b/a Wellmark Blue Cross and Blue Shield of Iowa (U.S. Court of Appeals, Eighth Circuit, July 13, 2020): The court affirmed the dismissal of a lawsuit brought by women denied reimbursement for out-of-network providers of lactation services. The Affordable Care Act (ACA) requires no cost-sharing for preventative health services, including comprehensive lactation and support for counseling lactation services (CLS). The women brought breach of contract claims under Iowa law and breach of fiduciary duty claims under the Employee Retirement Income Security Act ("ERISA"). They alleged that Wellmark (1) violated ACA's cost-sharing and "information and disclosure" requirements; and (2) failed to provide a list of in-network CLS providers which amounted to a failure to provide "coverage." The court disagreed. Neither the ACA mandate nor its implementing regulation requires insurers to offer a list of providers. Requiring such a list would prescribe substantive disclosure requirements under the ACA and its regulations without proper rulemaking procedures. "'[C]overage' under the ACA," noted the court, "refers to the type or amount of benefits or services covered under a plan, not the hassle associated with utilizing those services." Read the full opinion here.

Colvin v. Inslee (Supreme Court of Washington, July 23, 2020) – Petitioners sued the Washington State Department of Corrections seeking a writ of mandamus to direct Governor Inslee and Secretary Sinclair to immediately release about 13,000 at-risk inmates amid the COVID-19 pandemic. Petitioners argued that constitutional and statutory sources impose a duty on the Governor and Secretary to take all "reasonable steps to protect the inmate population from COVID-19". The Washington Supreme Court found that "no matter how dire the emergency," there was no duty to release prisoners, because doing

so would violate separation of powers principles. The Court explained that a writ of mandamus is often forbidden because it allows a court to command another governmental branch to take a particular action. Additionally, because respondents claim release is the only reasonable step, and no law commands the Governor or Secretary to release inmates, the Court would be exceeding its constitutional authority in requiring specific actions not required by law. Read the full opinion here.

Watson v. Oppenheim (Mississippi Supreme Court, September 18, 2020) – The Mississippi Supreme Court found that voters with pre-existing conditions putting them at higher risk for severe illness from COVID-19 do not have a disability that automatically qualifies them to vote absentee. Mississippi law permits individuals with a disability preventing them from voting in person or "whose attendance at the voting place could reasonably cause danger to himself" to vote absentee. The legislature also passed a COVID-19 emergency measure allowing individuals under a physician-imposed quarantine to vote absentee. Plaintiffs, who have pre-existing conditions putting them at higher risk for severe illness upon contracting COVID-19, requested an order that they are entitled to vote absentee under the law and emergency measure because doctors recommend people with such pre-existing conditions avoid in-person voting. The court rejected both arguments, narrowly construing which disabilities qualify an individual for absentee voting and finding that a physician recommendation against in-person voting is not a physician-imposed quarantine. Read the full opinion here.

Duncan v. Becerra (U.S. Court of Appeals, Ninth Circuit, August 14, 2020): The Ninth Circuit held California's near-categorical large capacity magazine (LCM) ban violated the 2nd Amendment of the U.S. Constitution. California Rifle & Pistol Association, Inc. and several LCM supporters sued California Attorney General, Xavier Becerra. They alleged that (1) California's ban struck at the core of the 2nd Amendment's right to armed self-defense; and (2) the COVID-19 pandemic aggravates the need for self-defense, especially as the Asian-American community has become a target of physical attacks. The appellate court reasoned that the law struck at the heart of the 2nd Amendment by banning LCMs within the home, and that the near-categorical nature of the ban substantially burdened core rights to keep and bear arms. Applying strict scrutiny analyses, the Ninth Circuit found state interests compelling, but concluded that the law was not narrowly tailored to achieving those interests. Read the full opinion here.

7. PUBLIC HEALTH INFORMATION MANAGEMENT, PRIVACY & SECURITY [5 cases]

Grafilo v. Soorani (California Court of Appeals, Second Appellate District, Oct. 2, 2019): The California Court of Appeals affirmed a trial court's order compelling a psychiatrist to produce 6 patient medical records to the state medical board as part of its investigation into whether he was overprescribing controlled substances. The board had issued a subpoena for the records, but the psychiatrist refused to comply, asserting psychotherapist-patient privilege and the right to privacy under the California Constitution art. I, § 1. The appellate court held that to overcome a psychiatric patient's constitutional right to privacy, the board must demonstrate a compelling interest in the records and show good cause. It rejected the psychiatrist's arguments that the board had not made the required good cause showing. The court concluded that: (1) the board established the absence of less intrusive means, including only requesting the records that supported the psychiatrist's rationale for writing the contested prescriptions; (2) the trial court did not abuse its discretion in relying on the declaration of the state's medical consultant; and (3) the medical consultant's detailed report provided support for the trial court's finding of sufficient evidence of good cause. Read the decision here.

Clark County Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal (Nevada Supreme Court, March 25, 2020): A Nevada court held that a coroner's office was required to disclose juvenile autopsy reports requested by a newspaper under the Nevada Public Records Act. The reports concerned juveniles involved in the Department of Child and Family Services. In Nevada, a Child Death Review (CDR) team consisting of public agencies (such as law enforcement, medical providers, and coroner's office) review select records of juvenile deaths to make recommendations to improve law and policies that support child safety and prevent future deaths. The coroner's office denied the request for the reports citing a state statute that protects information obtained by a CDR team. Interpreting the statute narrowly, the court held it applied to a CDR team as a whole. It did not preclude disclosure of records held by an agency that is part of a CDR team irrespective of the team's activity. As the records contain sensitive private information, the court remanded the matter for a determination on what private medical or health related information should be redacted. Read the decision here.

Dillard v. Hoyt (U.S. Court of Appeals – Eighth Circuit, June 15, 2020): The Eight Circuit held that informational privacy is not a clearly established constitutional right and defendants, civil employees, were entitled to qualified immunity. Plaintiffs claimed defendants, police officers and a city attorney, violated their Fourteenth Amendment rights to "informational privacy" by disclosing insufficiently redacted reports of sexual abuse. Plaintiffs (minors at the time) were cast members of a reality television show in 2015. Responding to a Freedom of Information Act request from tabloids, the defendants released partially redacted copies of reports from a 2006 investigation into sexual misconduct. The media identified the plaintiffs as the victims in the reports. Qualified immunity protects public officials from civil liability if the official's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The court held the right to informational privacy had an "uncertain status" because it: (1) is only assumed to exist via interpretation by the U.S. Supreme Court but has never been definitively stated as a protected right; and (2) has never been held to be violated by the Eighth Circuit. The court concluded that the right "does not clearly exist . . . cannot be clearly established." Read the decision here.

Andrews v. Ortiz (Texas Court of Appeals, 7th District, September 1, 2020) – A Texas appellate court declined to dismiss a lawsuit filed by the grandmother of a deceased 10-year-old girl against Lubbock County's Chief Medical Examiner, Sam Andrews. The lawsuit accused Andrews of 1) "mishandling of remains," 2) interfering "with [the grandmother's] right to possession [of her grand-daughter's remains]

for final disposition," 3) committing "civil theft and conversion," and 4) engaging in a "civil conspiracy," noting that Andrews had regularly harvested organs (e.g., brain, eyes, spine, lungs, and heart) of dead children without permission in order to further a colleague's independent research. The Court reasoned the purpose underlying Andrews's decision to harvest organs was an issue of fact to be decided by a jury. As a medical examiner, Andrews claimed he was "charged to investigate criminal activity and causes of death related to criminal activity," but a reasonable factfinder could find his intent was to conduct academic research. Read the full opinion here.

Grimm v. Gloucester County School Board (U.S. Court of Appeals, 4th Circuit, August 26, 2020) – The U.S. Court of Appeals - 4th Circuit ruled that the Gloucester County School Board policy prohibiting transgender students from using the restroom consistent with their gender identity is sex-based discrimination prohibited by Title XI, a federal civil rights law prohibiting discrimination based on sex. The challenged policy punished students for not conforming to sex stereotypes and was not substantially related to protecting student privacy. Rejecting the School Board's defense that the policy allows transgender students to use single-stall bathrooms, the court noted that such a "separate but equal" policy is stigmatizing and discriminatory. Read the full opinion here.

8. REGULATING COMMUNICATIONS [6 cases]

Bellion Spirits, et al. v. U.S., et al. (D.D.C. Aug. 1, 2019): A federal D.C. trial judge ordered summary judgment for the federal government regarding a lawsuit filed by a liquor product manufacturer. Bellion Spirits manufactures vodka infused with a compound called NTX, a blend of ingredients the company alleges mitigates DNA damage caused by alcohol consumption. The company sought approval from the federal Alcohol and Tobacco Tax and Trade Bureau (TTB) to market its vodka with 8 proposed health benefit claims. For the protection of consumers, TTB rigorously regulates health claims on alcohol products. It denied Bellion's request after extensive review, including consultation with the Food and Drug Administration (FDA) and scientific examination of Bellion's evidence regarding NTX. Bellion alleged that TTB violated: (i) federal administrative law; (ii) the company's First Amendment right to free speech; and (iii) federal procedural law by consulting FDA during decision-making. Each of these arguments was rejected by the court in favor of TTB. Read the decision here.

Arora et al., v. GNC Holdings, Inc., (U.S. District Court, Northern District of California, Nov. 15, 2019): A California district court denied GNC's motion to dismiss a consumer class action alleging GNC unlawfully marketed supplements by failing to include the required Food and Drug Administration (FDA) disclaimer on its labeling. Plaintiffs alleged the absence of FDA's disclaimer that it had not evaluated the statements on the label and that the product is not intended to diagnose, treat, cure or prevent any disease violated various California and New York state consumer protection laws. Further, harms caused by GNC's deceptive marketing were compounded by misleading phrases (like "clinically studied") which suggested the supplements had therapeutic value. GNC moved to dismiss the lawsuit arguing, among other grounds, that the plaintiffs lacked standing to pursue injunctive relief. In particular, given plaintiff's allegations that the supplements were worthless and that they now know how to read the labels, they will not be harmed in the future. The court disagreed, finding plaintiffs established a future harm by alleging they could not rely on GNC's labels and they would buy the supplements in the future if they could rely on the labeling. The court also found the plaintiffs sufficiently pled fraud and misrepresentation. Read the decision here.

Turtle Island Foods SPC d/b/a/ Tofurky Co. v. Soman (U.S. District Court, Eastern District of Arkansas, Dec. 11, 2019): The district court granted Tofurky's request to block several provisions of an Arkansas law banning the misbranding or misrepresentation of agricultural products by prohibiting marketing of such products under the name of another food. The law included significant civil penalties. The court found that as applied, Tofurky would no longer be able to use terms like "sausage" or "meat" to describe its plant-based products, concluding that Tofurky was likely to succeed on its claim that the law violated its First Amendment commercial speech rights. The court rejected the state's argument that Tofurky's use of terms such as "hot dogs" and "sausage" constituted inherently misleading speech, finding the labels made disclosures "to inform consumers as to the plant-based nature of the products," like "Chorizo Style Sausage" paired with "all vegan." Tofurky was therefore likely to prevail on its claim that its labels were not misleading when read as a whole. It also concluded Tofurky was likely to succeed on its argument that the law did not further the state's interest in protecting consumers from misleading or false labeling of agricultural products and was overly-extensive in serving the state's interest. Read the decision here.

Becerra v. Dr. Pepper/Seven Up, Inc. (U.S. Court of Appeals - Ninth Circuit, Dec. 30, 2019): The Ninth Circuit Court of Appeals affirmed the dismissal of a complaint alleging that Dr. Pepper/Seven Up violated California consumer-fraud laws by use of the word "diet" in its product Diet Dr. Pepper®. The court concluded that the complaint failed to sufficiently allege that a significant portion of reasonable, or targeted, consumers would be misled and read the word "diet" in the label as promising weight loss or healthy weight management. Branding the soda with that term does not convey an implicit promise of

weight loss. Instead, the court concluded that the prevalent understanding of "diet" is that it is simply a relative claim indicating that "diet" soft drinks contain fewer calories and sugar than "regular" soft drinks. Becerra also argued that regardless of the common understanding of the word, dismissal was improper because a promise of weight loss is a plausible misunderstanding of the word. The court concluded a consumer's unreasonable interpretation does not render the use of "diet" in a soda's brand name false or deceptive. Read the decision here.

Miller v. GOJO Industries (U.S. District Court - Northern District of Ohio, Eastern Division): A class action lawsuit filed in federal court on March 13, 2020 alleges that GOJO Industries, the maker of Purell hand sanitizer, misled the public by claiming it can "prevent 99.9 percent of illness-causing germs." Filed on behalf of consumers in multiple states, the complaint alleges that the claims lack a scientific basis, rendering these representations misleading. In January, the U.S. FDA issued a letter warning GOJO against making unsubstantiated claims about its products' effectiveness, citing several claims that Purell may prevent disease or infection from MRSA, VRE, norovirus, flu, and Candida auris.

Washington League for Increased Transparency and Ethics (WASHLITE) v. Fox News (Superior Court of Washington County of King, May 27, 2020) – WASHLITE sued Fox News and others alleging intentional infliction of emotional distress and violations of the Washington Consumer Protection Act. The complaint states that Fox News "knowingly disseminated false, erroneous, and incomplete information" about COVID-19 that the public reasonably relied on. WASHLITE argues that because Fox News characterized COVID-19 as a "hoax" and "conspiracy," it hurt efforts to effectively implement mitigation and countermeasures to contain the virus and "forestall mass death." Superior Court Judge Brian McDonald dismissed the lawsuit stating that WASHLITE failed to establish a case because its "assertions do not hold up to scrutiny" and while its goal to ensure the public received accurate information about COVID-19 was "laudable," the claims "run afoul of the protections of the First Amendment." Read the full opinion here.

9. MONITORING PROPERTY & THE BUILT ENVIRONMENT [6 cases]

Totem Beverages, Inc. v. Great Falls-Cascade County City-County Board of Health (Supreme Court of Montana, Nov. 19, 2019): The Montana Supreme Court reversed a grant of summary judgment favoring bar operators (Totem) regarding the validity of a Board of Health's smoking regulations defining permissible smoking shelters. The Montana Clean Indoor Air Act (MCIAA) and the Department of Health and Human Services (DHHS) regulations prohibit smoking in "enclosed" rooms where people work. The smoking prohibition does not apply to areas completely or "partially open" to outside air. The court concluded the Board's definition of permissible "smoking shelters" as "unenclosed shelters" containing a permanent opening of 20% (or more) of the square footage of the vertical plane forming a shelter's interior was consistent with the MCIAA and DHHS' regulations. The Board's 20% requirement clarified what "partially open" means and furthered MCIAA's goal of promoting public health at work. Summary judgment for Totem was therefore inappropriate. The court, however, reversed summary judgment in favor of the Board on Totem's selective enforcement claim, in which Totem alleged the Board improperly singled out Totem when it issued a notice to stop allowing smoking in an enclosed public place. Read the decision here.

Willis et al. v. City of Seattle, et al. (U.S. Court of Appeals for the Ninth Circuit, Nov. 29, 2019): The Ninth Circuit affirmed a district court's order denying class certification for individuals seeking to challenge the City of Seattle's and Washington State's written policies for removing unauthorized encampments. Individuals (appellants) sought class certification alleging the policies violated the unreasonable search and seizure and due process clauses of the federal and state constitutions. The Ninth Circuit held the district court did not err in concluding that appellants failed to show there were questions of law or fact common to the class, as required for class certification. Although appellants provided evidence of the "sweeps," they did not demonstrate that the proposed class members suffered the same injury and had claims that depended on a common contention capable of class-wide resolution. Appellants also failed to raise a facial challenge in the district court that would have satisfied the commonality requirement. There was a partial dissent. Read the decision here.

County of Maui v. Hawaii Wildlife Fund (U.S. Supreme Court, April 23, 2020): The Supreme Court answered a long-standing question of whether the Clean Water Act (CWA) applies to pollutant discharges that enter navigable waters through groundwater, holding that the CWA applies to discharges that are the functional equivalent of a direct discharge. An environmental group challenged the operation of a wastewater facility in Maui which operated without securing certain permits required by the CWA. The County argued that permits were not required because the facility discharges did not go directly into the ocean. The Hawaii Wildlife Fund alleged that the discharges made their way to the ocean through underground water. The 9th Circuit held that the CWA applied and that the facility was required to secure permits. The Supreme Court agreed, but remanded the case for reconsideration consistent with the "functional equivalent" standard established in the majority opinion. Read the decision here.

DeRuiter v. Township of Byron (Supreme Court of Michigan, April 27, 2020): Michigan's highest court held that the state medical marijuana law did not preempt a local zoning ordinance that restricted where marijuana could be cultivated. State law requires that caregivers and patients authorized to cultivate marijuana must do so in a locked, enclosed building but otherwise does not designate locations where cultivation is permissible or prohibited. The Township's zoning ordinance requires that caregivers or patients obtain a permit and pay a fee to grow marijuana and limits cultivation to within a dwelling or garage in a residentially zoned area within the Township. An authorized caregiver leased a locked, enclosed building on commercial property to grow marijuana without a permit and challenged the local

restrictions as preempted by state law. The court found that the local law did not directly conflict with state law. Read the decision here.

National Family Farm Coalition v. U.S. Environmental Protection Agency (U.S. Court of Appeals – Ninth Circuit, June 3, 2020): The Ninth Circuit vacated EPA's conditional registration of the weed-killer, dicamba, for use in soybean and cotton crops. Dicamba's toxicity extends to fruiting vegetables, certain flowers, plants, and trees. Dicamba's volatility under various conditions causes off-site drift. In 2016, EPA conditionally approved reformulated dicamba-based herbicides for use in dicamba-resistant soybean and cotton crops for two-years under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). It issued labeling restrictions to reduce drift. The court held EPA's issuance of another conditional two-year registration in 2018 violated FIFRA. FIFRA allows EPA to conditionally amend an herbicide's registration if "the new use will not significantly increase the risk of any unreasonable adverse effect on humans or the environment." EPA (1) substantially understated known risks including soaring herbicide drift complaints following the 2016 approval; and (2) did not acknowledge risks it was required to consider. Substantial evidence showed that "even conscientious applicators" would not follow the numerous "complex and onerous label requirements" that EPA added in 2018 to further mitigate off-site drift. Evidence of social costs were also ignored, including how conditional use of dicamba had "torn apart the social fabric of many farming communities" by damaging neighboring crops. Read the decision here

City of San Francisco v. Exxon Mobile Corporation (Court of Appeals, Second Appellate District of Texas – Fort Worth, June 18, 2020): A Texas appellate court ruled that Exxon Mobile could not engage in pre-trial discovery in a potential Texas-based lawsuit alleging California climate-change suits were brought in bad faith. Exxon Mobile sought to investigate and compel testimony from California municipalities and their outside counsel engaged in climate-change litigation in California. The company claimed that the California lawsuits were (1) brought "to suppress the Texas energy sector's Texas-based speech and associational activities;" and (2) a pretext to obtain its climate-change related documents. Exxon Mobile anticipated bringing claims in Texas court alleging First Amendment violations, malicious prosecution, and conspiracy. The appellate court, however, concluded Texas courts lacked jurisdiction over the potential defendants, primarily located in California. Read the decision here.

10. PUBLIC HEALTH EMERGENCY: LEGAL PREPAREDNESS/RESPONSE [19 cases]

Vapor Technology Association, et al. v. Cuomo, et al. (N.Y. App. Div. Oct. 3, 2019): In September 2019, the New York State Public Health and Health Planning Council recommended an emergency executive order banning the sale of vape products with characterizing flavors, such as bubble gum or mango e-liquid. Health officials declared youth vaping a public health emergency in need of immediate response. Governor Cuomo issued an emergency order banning flavored vapes, effective October 4. The trade group, Vapor Technology Association (VTA), filed suit seeking a temporary restraining order and preliminary injunction. VTA alleged that issuance of the ban was outside the executive branch authority to the extent it usurped the power of the legislature. VTA also alleged that the ban: (i) lacked a rational basis, and was thus arbitrary and capricious; and (ii) was procedurally defective. After the trial court denied VTA's request to immediately prohibit enforcement of the ban, the intermediate appellate court reversed that decision. It prohibited enforcement of the ban pending the outcome of a hearing on VTA's motion for a preliminary injunction, which would prevent enforcement of the ban until the case is fully resolved. Read the decision here.

In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs (U.S. Court of Federal Claims, Dec. 17, 2019): The Court of Federal Claims found the U.S. Army Corps of Engineers liable for damages to properties flooded during Hurricane Harvey. It found the government's failure to control overflowing reservoirs despite decades-long knowledge of risks of flooding of surrounding properties constituted a taking for which reasonable compensation is due. As a result of the ruling in this "test" case, hundreds of property owners may pursue damages, likely through a class action involving more than $1 billion. The damaged properties lie adjacent to the government's reservoirs, upstream of Houston. The government argued that the flooding was the result of a natural disaster and that the Army Corps was compelled to allow the reservoirs to overflow to protect downstream properties in the more densely-populated Houston. The court found, however, that the government was aware of flood risks of cataclysmic storms like Harvey. The government's inaction was therefore deemed an affirmative, advance decision and not an emergency decision. Read the decision here.

Parsons v. Shins (U.S. District Court - Arizona): On March 16, 2020, in an ongoing class action suit against the Arizona Department of Corrections (ADC), an emergency motion was filed asking the court to order ADC to engage in COVID-19 efforts to protect prison populations. The 2012 lawsuit challenges ADC's healthcare system in 10 Arizona prisons. After recently visiting one of the prisons, class attorneys sent a letter to ADC expressing concern over its lack of any plan to address COVID-19 illness in the prisons. The letter also states the prison was unhygienic and filthy. The emergency motion seeks to require ADC to suspend inmate charges for soap and imposition of medical co-pays, as well as consultation via ADC with health care expertise in developing COVID-19 management and treatment plans.

U.S. v. Steinger (U.S. District Court - Southern District of Florida): On March 18, 2020, Joel Steinger, a 70 year-old Florida prisoner incarcerated at the Federal Medical Center in North Carolina for mail and wire fraud conspiracy, filed a motion requesting that his sentence be reduced to time served due to "extraordinary and compelling reasons" related to COVID-19. A memorandum in support of the motion notes that he suffers from serious medical conditions, including spinal stenosis, heart disease, chronic obstructive pulmonary disease, sleep apnea, and Hodgkin lymphoma, which have left him bedridden. Further, Steinger states the COVID-19 outbreak "has led many experts to note the increased exposure of high risk populations to disease within prisons, which are like petri dishes of contagion" and

that he "falls within the demographic of those most highly exposed to COVID-19 disease and fatality" according to CDC.

LA Alliance for Human Rights v. City of Los Angeles (U.S. District Court – Central District of California): On March 19, 2020, a district court held an emergency hearing regarding L.A. City's efforts to homeless concerns related to COVID-19. The hearing was part of a lawsuit filed earlier in March by L.A. Alliance for Human Rights, a broad coalition of stakeholders, against L.A. city and county officials alleging violations of state and federal law arising from the city's homeless conditions. In the initial lawsuit, the coalition sought a legal mandate requiring the provision of shelters and wraparound services for homeless persons.

Friends of DeVito v. Wolf (Supreme Court of Pennsylvania, April 13, 2020): The Pennsylvania Supreme Court upheld Governor Wolf's order closing all non-life-sustaining businesses in response to the COVID-19 pandemic. Plaintiffs (golf club, realtors, and political candidate's campaign) challenged the order on state and federal law grounds. The Governor's order was found to be a proper exercise of police powers under gubernatorial powers pursuant to a declared "natural disaster" under the Commonwealth's Emergency Code. Governor Wolf's action did not usurp legislative power in violation of separation of powers. The order also did not impose a regulatory taking because the businesses were not deprived of all value of their property, the measure was temporary, and there was a profound public health need. Plaintiffs' procedural due process was preserved via a waiver process allowing businesses to challenge their designation as non-life-sustaining. Plaintiffs' 1st Amendment rights to assemble, particularly related to political campaign workers, were not unconstitutional infringed because they are still able to communicate and work on the campaign through avenues other than face-to-face. Read the decision here.

Legacy Church, Inc. v. Kunkel (U.S. District Court - District of New Mexico, April 17, 2020): A district court held a church failed to demonstrate that the 1st Amendment's free exercise clause and right to freedom of assembly were violated by the New Mexico Department of Health's emergency order limiting mass gatherings. The church sought a temporary restraining order against enforcement of a ban on mass gatherings (of five people or more) to accommodate 30 staff in the church to produce live-stream services. Prior to the order, places of worship were exempt from gathering restrictions placed on nonessential business. The church argued they should at minimum be allowed to operate at 20% capacity—the same restriction placed on essential businesses. Although the order removed the exemption for places of worship, the court found it is neutral and generally applicable to all nonessential businesses, with no evidence of antipathy against religion or Christianity. Mitigating the spread of COVID-19 is a legitimate state interest. The order is narrowly tailored with ample alternatives. Legacy can conduct services remotely without any risks to others. The court also held the order is a reasonable time, place, and manner restriction on the right to assemble. Read the decision here.

Elkhorn Baptist Church v. Brown (Oregon Supreme Court, May 5, 2020): The Oregon Supreme Court temporarily stayed a state trial court's ruling that granted temporary injunctive relief blocking Governor Brown's emergency orders relating to the COVID-19 pandemic. Challengers alleged violations of their right to freedom of religion and harms from being unable to maintain their businesses. The trial court concluded that Governor Brown's emergency order exceeded the statutorily imposed 28-day time period for issuance of public health emergency orders. Any extension requires legislative approval. Further, emergency orders pertaining to the "Closure of Certain Businesses" and "Stay Home and Save Lives" provisions extending well-past that time limit were also held to be invalid. The Oregon Supreme Court ordered the court to lift its injunction or show cause for not doing so; the trial court choose the latter

option. The matter is now before the full panel of the Oregon Supreme Court for a subsequent decision forthcoming. Read the order here.

McCarthy v. Baker (U.S. District Court – District of Massachusetts, May 7, 2020): The federal district court in Massachusetts preliminarily enjoined Governor Baker's Executive Order (EO) closing non-essential businesses due to COVID-19 as applied to firearm retailers. Gun retailers and citizens seeking to purchase firearms claimed the EO violated their Second Amendment rights and amounted to a ban on obtaining guns for personal protection. The court's preliminary injunction preventing enforcement of the EO will remain in place during the trial. Read the Complaint here. Read the preliminary injunction order here.

Wisconsin Legislature v. Palm (Wisconsin Supreme Court, May 13, 2020): The Wisconsin Supreme Court held the "Safer At Home" Emergency Order extending requirements that all nonessential businesses remain closed and forbidding all nonessential travel is unlawful. The court concluded the state Secretary of Health's (Secretary) promulgation of the order did not comply with Wisconsin administrative procedure. The initial order was to expire April 24 and was based on authority granted to the Secretary by Governor Evers' Executive Order (EO) 72. The Secretary based her authority for the extension order on the EO and Wisconsin statute § 252.02(3), which states that the Secretary "may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." The Wisconsin Legislature filed an Emergency Petition for Original Action. The court concluded that the extension order was a rule subject to rule-making requirements. Because the Secretary did not follow statutory rule-making procedures, the order is unconstitutional. The court further found that the broad substance of the extension order exceeded the Secretary's statutory authority. The ruling essentially lifts multiple public health restrictions, including the three-phased opening plans proposed by Governor Evers, although local authorities like the City of Milwaukee can set their own restrictions. Read the decision here.

South Bay United Pentecostal Church v. Newsom (U.S. Supreme Court, May 29, 2020): The U.S. Supreme Court denied a church's request to enjoin Governor Newsom's Executive Order (EO) limiting attendance at places of worship to 25% of a building's capacity or a maximum of 100 attendees. In concurrence, Chief Justice Roberts held the restrictions are consistent with the First Amendment's Free Exercise of Religion Clause. Similar restrictions also affected secular activities (*e.g.*, concerts, spectator sports). The EO exempted or was less restrictive concerning some secular activities (*e.g.*, operation and patronage of grocery stores or banks). Those activities, however, are sufficiently distinct from activities at places of worship in which larger groups may congregate in enclosed settings for extended periods. Chief Justice Roberts also noted that decisions related to social distancing measures during a pandemic are best left to the broad discretion of state's politically-accountable officials. When state officials act within constitutional boundaries, their decisions should not be second-guessed by the judiciary. Read the decision here. Read the dissent here.

Bayley's Campground, Inc. v. Mills (U.S. District Court – Maine, May 29, 2020): A federal court in Maine denied a request for injunctive relief brought by a group of businesses and out-of-state individuals seeking to provide and/or access Maine lodging and campground facilities. The group challenged Maine Governor Mills' emergency executive orders warning out-of-state visitors that they cannot shelter-in-place during the COVID-19 pandemic unless they own or can rent property in Maine where they can quarantine themselves for 14 days. It argued that Governor Mills; order restricted non-Mainers fundamental rights to travel, due process, and equal protection. The court acknowledged the group's important interests, including lost profits from summer travel season and the burden on out-of-state travelers, but ultimately found that such interests do not outweigh the state's concern for public

health in the face of the pandemic. Relief sought by the plaintiffs "would upset the bedrock of the state's public health response to COVID-19." Read the decision here.

Elkhorn Baptist Church v. Brown (Oregon Supreme Court, June 12, 2020): The Oregon Supreme Court held the trial court committed fundamental legal error in preliminarily blocking Governor Brown's COVID-19 executive orders (EOs) promoting public health and safety. Churches and individuals sought to block all of Governor Brown's COVID-19 EOs on grounds they had expired by "operation of law." The trial court agreed, reasoning that the EOs were issued under Oregon Revised Statutes (O.R.S.) Chapter 433 (public health emergencies declarations), which contains a 28-day time limit. The Oregon Supreme Court, however, concluded the EOs were issued under different statutory authority [O.R.S. Chapter 401 (general emergency declarations)]. Such declarations are not subject to the 28-day time limit. Further, Chapter 401 authorizes the Governor to utilize all of the state's police powers, including "the power to regulate conduct for public health and safety." In comparison, a purpose of Chapter 403 (public health emergencies) is it to provide the Governor with an "additional tool" to address public health crises. Consistent with legislative history, declarations under either chapter are "intended to work, and do work, together." Read the decision here.

Agua Caliente Band of Cahuilla Indians v. Mnuchin (U.S. District Court – District of Columbia, June 15, 2020): A D.C. federal court ordered the Treasury Department to distribute the remainder of COVID-19 relief funds to Indian tribes according to the federal Coronavirus Aid, Relief and Economic Security (CARES) Act. Congress set aside $8 billion for tribal governments and directed its distribution within 30 days of March 27, 2020. Sixteen days after the deadline, the court denied the tribes' first request for injunctive relief (and immediate distribution of relief funds), finding that the tribes "[had] not carried their burden to show that the Secretary's delay thus far is so egregious" to require immediate relief. The court reasoned in part that the Department had begun to distribute 60% of the funds and devise a plan for distributing the rest. The Department later released additional funds but continued to withhold millions. The court then held that 80 days was "long enough" for the tribes to wait for emergency funds that Congress intended them to receive in less than half that time. Read the decision here.

Weissberger v. Princess Cruise Lines, Ltd. (U.S. District Court, Central District of California, July 14, 2020): The court dismissed plaintiff's case, finding that a couple could not hold Princess Cruise Lines liable for emotional distress because of fear of contracting COVID-19 they experienced onboard. The Weissbergers alleged the cruise line knew individuals onboard the ship had been exposed to COVID-19 but did not properly screen others for symptoms. They claimed emotional distress from being placed in immediate risk of contracting COVID-19 while quarantined on the ship. For the couple to recover damages for their claim, they must have been either (1) physically impacted or (2) placed in immediate risk of physical harm by Princess Cruise Lines' actions. The court found that for an individual to successfully bring a claim for emotional distress caused by exposure to disease, they must allege that they contracted or exhibited symptoms of the disease. This court was disinclined to make an exception to this rule, which is designed to prevents trivial lawsuits and protect businesses from unlimited liability. Read the full opinion here.

Beshear et al. v. Florence Speedway, Inc. et al., (Supreme Court of Kentucky, July 17, 2020): The Kentucky Supreme Court stayed orders by two state circuit courts that enjoined the enforcement of certain executive orders pertaining to the COVID-19 pandemic. In June of 2020, the Governor issued executive orders related to the operation of automobile racing tracks, childcare programs, and venues/event spaces, limiting the capacity of these businesses, requiring social distancing and personal protective equipment, creating additional disinfecting standards, and requiring special trainings. The

constitutionality of these executive orders and the administrative process utilized in their promulgation was challenged at the circuit court level, where orders were issued preventing enforcement of the orders. After the Kentucky Court of Appeals upheld the circuit court, the Supreme Court of Kentucky struck down the circuit court orders, allowing the Governor's contested executive order to be enforced. The Court indicated that the Governor had been given broad executive powers in a public health emergency and that all injunctive relief was stayed until the case was properly before the Court with a full record of the evidence and pleadings considered by the lower courts. Read the decision here.

National Association for the Advancement of Colored People, et al. v. Devos, et al. (U.S. District Court, District of Columbia, September 4, 2020): The court held that Secretary of Education DeVos and U.S. Department of Education (DOE) violated the clear language of the Coronavirus Aid, Relief and Economic Security (CARES) Act in issuing a regulation to illegally divert needed funds away from public school students for the benefit of private schools. The CARES Act required funds to be distributed "in the same manner as provided under section 1117" of the Elementary and Secondary Education Act, which allocates funds to non-public schools based in part on the number of children from low-income families who attend. DOE's Interim Final Rule that would have allocated funds to non-public schools equally, regardless of the income of students. The court determined Congress had spoken "with a clear voice," and DOE could not issue a rule that conflicts with the unambiguous text of the CARES Act. Read the full opinion here.

Harvest Rock Inc. v. Newsom (U.S. Court of Appeals, Ninth Circuit, October 1, 2020): The Ninth Circuit declined to enjoin enforcement of California Governor Newsom's executive orders restricting in-person worship during the COVID-19 pandemic. Initially, the district court declined to stop Governor Newsom's orders. On appeal, the Ninth Circuit found that the challenging church was unlikely to succeed on its argument that the district court abused its discretion. The appellate court reasoned that the orders had applied the same restrictions to worship services as to other indoor events, and the church failed to rebut the Governor's expert declaration that the risk of COVID-19 is elevated in indoor congregate activities. The church also failed to demonstrate that remaining open contrary to the Governor's orders was in the public's interest. Read the full opinion here.

Illinois Republican Party, et. al. v. Pritzker (U.S. Court of Appeals, Seventh Circuit, September 3, 2020): The Seventh Circuit Court of Appeals refused to block Illinois Governor Pritzker's COVID-19 order limiting all gatherings (except for religious purposes) to 50 persons. Rather, religious organizations were "encouraged" to consult and follow recommended state health department guidelines. The state Republican Party challenged the order, arguing that preferential treatment for religious gatherings contravenes the Free Speech Clause of the First Amendment, because groups larger than 50 are permitted to gather for worship, but for no other purpose. Noting that "the Free Exercise Clause has always been about more than speech," the court found the Governor's accommodation to be consistent with the "privileged position" of religious exercise under the First Amendment given the COVID-19 public health emergency. The Governor is under no obligation "to treat all gatherings alike" and was entitled to carve out protections for religious gatherings. Read the full opinion here.