The Network for Public Health Law

Ideas. Experience. Practical answers.

JUDICIAL TRENDS IN PUBLIC HEALTH – CASE ABSTRACTS 2021

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 January 2021 – December 2021 within 10 key topics (adapted from JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL, 3RD ED. (2018)) below:

1. SOURCE & SCOPE OF PUBLIC HEALTH LEGAL POWERS [10 cases]
2. CONSTITUTIONAL RIGHTS & THE PUBLIC'S HEALTH [12 cases]
3. PREVENTING & TREATING COMMUNICABLE CONDITIONS [4 cases]
4. SOCIAL DISTANCING MEASURES [1 case]
5. ADDRESSING CHRONIC CONDITIONS [7 cases]
6. MITIGATING THE INCIDENCE & SEVERITY OF INJURIES & OTHER HARMS [16 cases]
7. PUBLIC HEALTH INFORMATION MANAGAGEMENT, PRIVACY & SECURITY [4 cases]
8. REGULATING COMMUNICATIONS [6 cases]
9. MONITORING PROPERTY & THE BUILT ENVIRONMENT [5 cases]
10. PUBLIC HEALTH EMERGENCY: LEGAL PREPAREDNESS/RESPONSE [6 cases]

1. SOURCE & SCOPE OF PUBLIC HEALTH LEGAL POWERS [10 cases]

Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. et al. v. Kauffman et al. (U.S. Court of Appeals, 5th Circuit, November 23, 2020): In a split decision, the 5th Circuit concluded that Texas and Louisiana can cut Medicaid funding for Planned Parenthood, holding that patients do not have an unambiguous right to challenge a state determination that a provider is not "qualified." This decision overruled *Planned Parenthood of Gulf Coast, Inc. v. Gee*, which found that a state agency or actor could not find that a Medicaid provider was unqualified unless the provider was unqualified under state or federal law. The court's decision largely rested on the text of 42 U.S.C. § 1396(a)(23), which does not unambiguously state that Medicaid patients may contest a state's determination that a provider is not "qualified." Whether a particular provider is deemed "qualified" statutorily is a matter to be left to the provider and the state or federal government. Read the decision here.

American Hospital Association, et al. v. Azar (U.S. Court of Appeals, D.C. Circuit, December 29, 2020): The D.C. Circuit upheld a Department of Health and Human Services (HHS) regulation requiring that hospitals publish the prices they charge insurance companies for services/medications. The Affordable Care Act (ACA) requires hospitals to publicize "standard charges," which HHS construed to include the negotiated prices paid by insurers. The American Hospital Association (AHA) challenged the regulation, arguing that HHS misconstrued the ACA, failed to properly weigh the rule's benefits/burdens, and compelled speech in violation of the First Amendment. On this latter claim, AHA acknowledged the government's legitimate interest in promoting price transparency and lowering healthcare costs. Yet, it claimed the rule did not achieve those goals because consumers could not make effective use of the required information. Rejecting each of these arguments, the court upheld the rule. Read the full decision here.

Hayes v. Oregon (U.S. District Court, District of Oregon, February 3, 2021): After Hayes was denied entry to a farm store for refusing to wear a face covering, a federal court rejected his constitutional challenges to Oregon's COVID-19 emergency declaration. Hayes asserted that the state's emergency declaration violated his Due Process rights, clarifying on reconsideration that he was challenging the declaration of emergency itself as unjustified, rather than challenging a specific mask requirement. The court strained to identify any cognizable harms Hayes was alleging from his broad challenge. It noted as well that the requested relief would also invalidate every order made pursuant to the Governor's emergency declaration. The public harm in granting such relief outweighed the potential harm identified in the complaint. Read the decision here.

Association of Community Cancer Centers, et al. v. Azar II, et al. (U.S. District Court, District of Maryland, December 23, 2020): A federal court blocked the Trump administration's recently issued "Most-Favored Nation Rule." It sought to implement a new Medicare payment model to control Medicare spending by (1) aligning payment for Medicare Part B drugs with international pricing and (2) removing incentives to use more expensive drugs. The court found that the Centers for Medicare and Medicaid Services (CMS) rushed to finalize the rule without providing the notice and public comment period required under the Administrative Procedure Act. While acknowledging that controlling drug costs is an important objective, the court rejected CMS's argument that it had "good cause" to bypass public comment and found that the Centers relied "more on speculation than on evidence" that the COVID-19 pandemic necessitated dispensing with notice and comment procedures. Read the decision here.

Terkel, et al. v. Centers for Disease Control and Prevention (CDC), et al. (U.S. District Court, Eastern District of Texas, February 25, 2021)***:*** A Texas federal court held that CDC lacked the constitutional authority to enforce a nationwide eviction moratorium. CDC argued that the moratorium fell within its authority to regulate interstate commerce. The court disagreed, reasoning that evicting tenants does not affect interstate commerce because "real estate is inherently local." The court also noted that the federal government does not have the same broad authority as states to regulate for the public good ("police powers"). Rather, federal authorities are limited to those granted to it expressly by the Constitution. A lack of historical precedent for a nationwide moratorium intimates a "severe constitutional problem," suggested the court. It did not purport to block the moratorium nationally, but rather issued a judgment specific to the moratorium's application to the plaintiff landlords in the case. CDC has appealed to the 5th Circuit Court of Appeals. Read the decision here.

Skyworks, Ltd. et al. v. Centers for Disease Control & Prevention et al. (U.S. District Court, Northern District of Ohio, March 10, 2021): A federal district court found that the Centers for Disease Control and Prevention's (CDC) eviction moratorium exceeded the agency's statutory authority. Plaintiffs, landlords and property managers with tenants claiming protection under the moratorium, argued that moratorium exceeded the authority granted to the CDC by the federal Public Health Service Act. The court agreed, stating that the Act did not "authorize such boundless action . . . ." It also held that the Consolidated Appropriations Act of 2021, which provided a one-month extension to the CDC's moratorium, did not authorize the agency's action. While the court set aside CDC's moratorium, it refused to permanently block it in lieu of monetary remedies. Read the decision here. Despite the court's decision, CDC renewed the eviction moratorium on March 28, 2021 and extended it to June 30, 2021.

City and County of San Francisco v. U.S. Citizenship and Immigration Services (U.S. Court of Appeals, 9th Circuit, April 8, 2021): The 9th Circuit refused to permit multiple states to intervene in existing suits (brought by the City and County of San Francisco and others) and defend the Trump

administration's immigration "public charge" rule. The rule re-defined "public charge," a general designation of inadmissibility to the U.S., as including those likely to participate in non-cash federal assistance programs. The rule as amended also directed officials to consider English language proficiency in determining "public charge" status. After President Biden's administration ceased defending the public charge rule in lawsuits, 13 states, including Alabama, Arkansas, and Arizona, sought to intervene in pending suits to defend it. A 9th Circuit panel summarily denied these motions to intervene. Judge Fletcher VanDyke, who would have allowed the intervention, issued a lengthy dissent. Read the full decision and dissent here.

Alabama Association of Realtors, et al. v. U.S. Department of Health & Human Services, et al. (U.S. District Court, District of Columbia, May 5, 2021): The U.S. District Court for the District of Columbia issued a nationwide injunction preventing enforcement of the eviction moratorium because the Centers for Disease Control and Prevention (CDC) exceeded its authority when issuing the moratorium designed to protect renters facing hardship due to the COVID-19 pandemic. The Public Health Service Act (PHSA) authorizes CDC to combat the spread of disease through a range of measures. As broad as those powers are, however, the court found the eviction moratorium to be outside the boundaries of the PHSA, concluding that the government's interpretation of the PHSA would grant "nearly unlimited" power to CDC, which Congress did not intend. State or local eviction moratoriums are not impacted by the ruling. The U.S. Department of Justice has filed an appeal and secured a stay of the injunction. Read the full decision here.

California v. Texas (U.S. Supreme Court, June 17, 2021): In a brief, 7-2 majority Opinion, the U.S. Supreme Court rejected all constitutional and other claims brought against the continued enforcement and implementation of the Affordable Care Act's (ACA) individual mandate, dismissing multiple state and individual plaintiffs' claims for lack of standing. Justice Breyer, writing for the majority, concludes "the plaintiffs . . . failed to show a concrete, particularized injury fairly traceable to enforcement of the individual mandate provision of the ACA." Since Congress zeroed out the penalty for the individual mandate through the Tax Cuts and Jobs Act of 2017, individuals cannot assert a specific injury because the mandate can no longer be enforced. As for Texas and 17 other states' alleged injuries the Court viewed their claims as similarly specious. States "have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, will harm them by leading more individuals to enroll in these programs." In a biting, dissenting opinion, Justices Alito and Gorsuch criticize the Court for brokering an "improbable rescue" of the ACA (as per its prior Opinions) through a "fundamental distortion" and "flat-out misstatements" of long-standing jurisprudence on standing. In essence, as Justice Alito argues, the injuries alleged by the states related to ACA implementation are directly "traceable," or at least sufficiently tied to, the unlawful mandate provisions. Determining the lawfulness of the ACA's individual mandate is the only way to redress these injuries. While the dissent deems the mandate unconstitutional, along with the rest of the ACA, the majority disagrees, and the case is dismissed.

State of Florida v. Becerra, et al. (U.S. District Court, M.D. Florida, Tampa Division, June 18, 2021)***:*** A Florida federal court prevented enforcement of the CDC's "conditional sailing order," issued in October 2020 with the purpose of safely reopening the cruise industry under a four-phased "framework." Florida challenged the conditional sailing order on several grounds, all of which the court affirmed: (1) the order exceeded CDC's statutory and regulatory authority; (2) the order was arbitrary and capricious, because CDC failed to consider the prevalence of vaccination rates, success of COVID-mitigation measures, success of foreign cruise lines in reopening, and less restrictive alternatives; (3) CDC unreasonably delayed action in reopening; (4) CDC failed to conduct public notice and comment for rulemaking, relying improperly on the "good cause" exception; and (5) the order constituted an unconstitutional delegation of legislative authority. After rejecting CDC's contention that Florida lacked standing to bring the claims, the court found that Florida was "highly

likely to prevail on the merits" of the claim that CDC's conditional sailing order exceeded its statutory authority. Citing the significant threat of injury to the state's revenue and economy in the face of continued sailing restrictions, the court held that "the balance of harm and public interest favor Florida." Read the full decision here.

2. CONSTITUTIONAL RIGHTS & THE PUBLIC'S HEALTH [12 cases]

Machovec, et al. v. Palm Beach County (Florida District Court of Appeal, 4th District, January 27, 2021)***:*** A Florida appeals court denied a request to temporarily prevent enforcement of a county emergency order that mandates wearing "facial coverings" at businesses, public places, county and municipal government facilities, and while using public transportation. Private citizens argued that the mask mandate amounted to an unconstitutional infringement on their right to privacy. The appeals court agreed with the lower court that a person's right under the state constitution to be "let alone and free from governmental intrusion into the person's private life," while important is not absolute. Rather, citizens' private rights must be weighed in the context of societal circumstances and values. Ultimately, the court upheld the county mask mandate during a public health emergency as having a "clear rational basis based on the protection of public health." Read the decision here.

Next Level Arcade Tucson, LLC v. Pima County (Arizona Superior Court, Pima County, January 19, 2021): The Arizona Superior Court found that Pima County's mandatory overnight curfew to curb the spread of COVID-19 was constitutional, but still preempted by the Governor's executive orders. Because the curfew applied to all Pima County individuals and businesses, the court determined there was no violation of the privileges and immunities clause. The court also found no due process violation because the curfew did not mandate closure of businesses. However, Pima County's Board of Supervisors exceeded its legal authority because the curfew conflicted with Governor Doug Ducey's executive orders barring local governments from adopting stricter restrictions. Read the decision here.

In re: Da Graca et al. (U.S. Court of Appeals, 1st Circuit, March 17, 2021): The 1st Circuit reaffirmed the denial of a bail request submitted by immigrant detainees who feared COVID-19 exposure at their detention center. Petitioners were part of a class that sued U.S. Immigration and Customs Enforcement (ICE) seeking release on bail because of the risk of contracting COVID-19 in their overcrowded detention center. Many of the detainees were released, but the petitioners were denied bail. The court reasoned that (1) the unconstitutional overcrowding was addressed by the release of the other detainees; and (2) granting bail under these circumstances requires individualized determinations focused first on detainees who have not committed violent crimes. Since each of the current petitioners had committed violent crimes and posed dangers to the community, the court reaffirmed the denial of bail. Read the decision here.

Tandon v. Newsom (Supreme Court of the United States, April 9, 2021): The Supreme Court overturned a 9th Circuit decision upholding California's COVID-19 restriction barring the meeting of more than 3 families to worship in a private home as violating the First Amendment free exercise clause. In its Per Curiam Opinion, the Court determined that treating "*any* comparable secular activity more favorably than religious exercise" triggers strict scrutiny under the First Amendment. Comparability is determined based on "the risks various activities pose, not the reasons why people gather." Justice Kagan, joined by Justices Breyer and Sotomayor, dissented, concluding that California's blanket restriction of all at-home gatherings exceeding 3 households, whether for religious or secular bases, did not violate the First Amendment. The dissenters explained that the Court seems to require *like* treatment of *unlike* activities (i.e., treating at-home religious gatherings the same as hardware stores and hair salons). Read the full Opinion here.

Torres v. Madrid et al. (U.S. Supreme Court, March 25, 2021): The U.S. Supreme Court expanded the definition of a Fourth Amendment seizure in a new excessive force opinion, ruling in favor of a New Mexico woman who filed a civil rights lawsuit after being shot by police officers. The officers approached Plaintiff Torres in the parking lot of an apartment complex, but she mistook them for carjackers and sped away. The officers then fired at Torres, hitting her twice. Torres escaped to a hospital and was arrested the next day. She later sued seeking damages for excessive force. The officers argued there could be no constitutional violation since Torres's escape obviated her "seizure" under the 4th Amendment. The Court disagreed, holding that application of physical force, with the intent to restrain, constitutes a seizure, even if the person neither submits nor is subdued. Read the full Opinion here.

In re DD (Maryland Court of Special Appeals, April 28, 2021): The second highest court in Maryland ruled that police officers cannot make stops based solely on the smell of marijuana. The Maryland Court of Appeals held that the trial court improperly denied the defendant's motion to suppress evidence based on an illegal stop. To stop someone, police must have "reasonable suspicion" that a crime has been, is being, or will be committed. "Reasonable suspicion" requires some minimal level of justification. It is a far lower standard than probable cause. In 2014, the Maryland General Assembly decriminalized the possession of less than 10 grams of marijuana. Since then, the courts have wrestled with the effect of decriminalization on searches and seizures. Because possessing under 10 grams of marijuana in is no longer a criminal offense, an officer must suspect that a person possesses more than 10 grams to justify a stop. Since odor alone does not indicate quantity, it cannot provide reasonable suspicion to support a stop and is unreasonable under the Fourth Amendment protection against unreasonable searches and seizures. Read the full decision here.

Jones v. Mississippi (U.S. Supreme Court, April 22, 2021): In a majority opinion drafted by Justice Kavanaugh, the Supreme Court held by 6–3 that juveniles may be sentenced to life in prison without the possibility of parole without requiring judges to make a finding of "permanent incorrigibility." The Court held that this does not violate the Eighth Amendment protection against cruel and unusual punishment. The petitioner, Brett Jones, who was convicted of murder at age 15 and sentenced to life without parole, asserted that the Supreme Court's rulings in *Miller v. Alabama,* 567 U.S. 460 (2012) *and Montgomery v. Louisiana,* 577 U.S. 190 (2016) prevent a judge from ordering a prison sentence of life without parole unless first finding that a person is permanently incorrigible. In the majority opinion, Justice Kavanaugh argues that this is a misinterpretation of the prior case law and that those cases simply require a judge to consider a defendant's age as one factor when issuing the sentence. Justice Sotomayor issued a scathing dissent noting that the Court "guts" precedents that have strictly limited juvenile life without parole sentences, and "distorts" those cases "beyond recognition." Read the full Opinion here.

B.W.C. v. Williams (U.S. Court of Appeals, 8th Circuit, March 5, 2021): Parents of public-school children, on behalf of their children, alleged Missouri's religious exemption from mandatory vaccination form was unconstitutional and violated the First and Fourteenth Amendment rights of free exercise and equal protection, respectively. Parents objected to a statement on the mandatory form, issued by Missouri's Department of Health and Senior Services (DHSS), which advised parents to vaccinate their children. The 8th Circuit, agreeing with the trial court, found the form neither required signers to support DHSS' statement, nor act in a way contrary to their religious beliefs. The court also found the form was neutrally drafted and did not unfairly target religious individuals, precluding an equal protection violation. The plaintiffs also failed to articulate a viable hybrid rights claim (i.e., combining a free exercise claim with another constitutional claim). Read the full decision here.

Preterm-Cleveland, et al. v. McCloud (Ohio Department of Health) (U.S. Court of Appeals, 6th Circuit, April 13, 2021): The 6th Circuit Court of Appeals refused to block implementation of an Ohio

statute that makes it a crime for a doctor to perform an abortion if the doctor is aware that the pregnant person is seeking the abortion because the fetus has Down syndrome. The court found that the State had a legitimate reason for the law; namely, the statute: 1) protects the Down syndrome community from the stigma of selective abortion of fetuses; 2) protects pregnant people from coercion by doctors who advocate for abortion of fetuses with Down syndrome; and 3) supports the integrity and ethics of the medical community. The court also found that the physicians who brought the case were not likely to be able to prove that the statute creates an undue burden as there is no prohibition on a pregnant person getting an abortion because the fetus has Down syndrome, and any increased cost or delay created by the statute did not rise to the level of undue burden. Read the full decision here.

Slattery, et al, v. Cuomo (U.S. District Court, District of New York, March 31, 2021): The federal district court dismissed claims brought by the owner of several anti-abortion pregnancy crisis centers challenging a New York statute that prohibits employers from taking negative employment action against employees because of their reproductive health decisions, including using birth control or having an abortion. The plaintiff requires that all employees abide by certain moral standards, including not having an abortion and not engaging in sex outside of marriage. The plaintiff contended that the statute violates his First Amendment rights to free speech, exercise of religion, and association, and is unconstitutionally vague. In upholding the statute, the court found that the statute: (1) is neutral and does not target or interfere with religious exercise; (2) regulates conduct and not speech; (3) has a rational basis for the minor associational restriction (if any); and (4) clearly establishes the prohibited conduct and consequences for violations and thus is not vague. The plaintiffs have appealed to the U.S. Court of Appeals for the 2nd Circuit. Read the full decision here.

Brnovich v. Democratic National Committee (U.S. Supreme Court July 1, 2021): In a 6-3 Opinion authored by Justice Alito, the U.S. Supreme Court rejected challenges under Section 2 of the Voting Rights Act of 1965 (VRA) and the 15th Amendment against Arizona state voting rules. The Opinion poses potential health impacts, as voting influences structural determinants of health by shaping governmental systems and resulting policies affecting individuals. The challenged rules provide that (1) in-person election day votes cast in the wrong precinct in counties using a precinct system will not be counted, and (2) for mail-in voting, no person other than "a postal worker, an elections official, or a voter's caregiver, family member, or household member" may "knowingly collect an early ballot." The Democratic National Committee argued these restrictions disparately impacted Black, Native American, and Hispanic citizens and that the ballot-collecting restriction was enacted with discriminatory intent. The Court, considering the VRA's language, concluded the touchstone under §2 is whether voting is "equally open." "Equal opportunity" is not a separate requirement, but rather a means of assessing openness via a totality of the circumstances analysis. In applying this analysis, the precinct-based voting requirement imposed "modest burdens" and its disparate impact was "small" as measured against state interests in establishing and maintaining precinct-based voting; therefore, the requirement did not violate §2. The ballot-collecting restriction similarly did not violate §2 because plaintiffs "were unable to provide statistical evidence showing [it] had a disparate impact on minority voters" as measured against state interests in preventing election fraud, intimidation, and pressure. The Court also reinstated the District Court's finding that the ballot-collecting restriction was not enacted with discriminatory purpose. Justice Kagan, joined by Justices Breyer and Sotomayor, issued a scathing dissent, arguing that the Majority rewrote the broad language of the VRA, cabining it for fear of Congressional language being "too 'radical.'" The "radical" reading, in the Majority's words, could potentially invalidate "just about any voting rule a State adopts." Justice Kagan explained in holding, "the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness, and protects against its basest impulses." Read the full Opinion here.

Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Parson (U.S. Court of Appeals, 8th Circuit, June 9, 2021): The 8th Circuit blocked Missouri laws that prohibit (1) abortions after 8, 14, 18, and 20 weeks of pregnancy; and (2) abortions performed "solely because of" a prenatal test result indicating the potential or presence of Down Syndrome. The court emphasized that although pre-viability *regulations* on abortions might be constitutional if not unduly burdensome, *bans* on pre-viability abortions are unconstitutional. The court classified the provisions at issue as bans rather than regulations because the laws did not set conditions that, once complied with, would make a pre-viability abortion lawful. Rather, the provisions *completely* restricted pre-viability abortions in each circumstance. Since the restrictions operate as *bans* on pre-viability abortions, the court found them unconstitutional. Read the full decision here.

3. PREVENTING & TREATING COMMUNICABLE CONDITIONS [4 cases]

Big Tyme Investments v. Edwards (U.S. Court of Appeals, 5th Circuit, January 13, 2021): The appellate court found that a July 2020 COVID-19 emergency order issued by Louisiana's Governor prohibiting on-site consumption of alcohol and food at bars (while allowing on-site consumption at restaurants) did not violate the Equal Protection Clause. Multiple Louisiana bar owners argued that the order unconstitutionally treated bars and restaurants differently. The 5th Circuit Court of Appeals explained that a classification is not unconstitutional simply because "in practice it results in some inequality." The classification, based on a business permit, did not differentiate on the basis of a suspect class. Consequently, the differential treatment was at least rationally-related to reducing COVID-19's spread in higher risk environments. Read the full decision here.

LaBarbera v. NYU Winthrop Hospital (U.S. District Court, Eastern District of New York, March 16, 2021): The U.S. District Court for the Eastern District of New York found that a pregnant employee fired for non-compliance with her hospital's employee flu vaccination requirement did not have a claim under the federal Pregnancy Discrimination Act (PDA) or the New York State Human Rights Law (NYSHRL). While New York requires all unvaccinated healthcare workers to wear a surgical mask during the flu season near patients, the defendant hospital mandated the flu vaccine for all employees, subject to religious/medical exemptions. The policy did not consider pregnancy an acceptable medical contraindication, in line with CDC's determination that "[p]regnant women may receive any licensed, recommended, age-appropriate influenza vaccine." When the plaintiff's request for a medical exemption based on her pregnancy was refused, she was fired lawfully under the PDA and NYSHRL because she failed to provide sufficient evidence that pregnant employees were treated differently under the policy. Read the decision here.

Leigh-Pink v. Rio Properties (U.S. Court of Appeals, 9th Circuit, March 3, 2021): Plaintiffs sued the Rio hotel in Las Vegas for fraudulent concealment of material fact and for consumer fraud after it allegedly failed to warn the plaintiffs of a known legionella contamination on the premises. Plaintiffs claimed economic damages of $34.01 per day (the resort fee), despite staying in the hotel complimentary, claiming they would not have stayed at the Rio had they known it was contaminated with legionella. The 9th Circuit noted that Nevada lacked laws addressing whether a plaintiff can claim such damages and looked to other jurisdictions' divergent guidance. The court held back making a decision and requested that the Supreme Court of Nevada determine whether a plaintiff under these circumstances has suffered damages. Read the full decision here.

Bridges v. Houston Methodist Hospital (U.S. District Court, S.D. Texas, June 12, 2021): A federal court rejected arguments by a Texas hospital employee that the hospital's COVID-19 employee vaccination mandate requiring vaccination or face termination, was unlawful. Texas law only protects employees against termination for refusing to commit criminal acts, and receiving the COVID-19 vaccine is not an illegal act. Additionally, the hospital did not coerce the employees into receiving the vaccine. Employees could still choose to refuse vaccination. Further, while language in the Federal Food, Drug, and Cosmetic Act highlighting individuals' option to refuse an emergency use vaccine sets standards for HHS, it does not prevent employer-based mandates. Read the full decision here.

4. SOCIAL DISTANCING MEASURES [1 case]

Alliance for Children's Rights v. Los Angeles Unified School District (Supreme Court of California, January 20, 2021): California's Supreme Court refused to immediately force the Los Angeles Unified School District (LAUSD) to provide instruction and other services in person to students allegedly harmed most via distance learning. After LAUSD temporarily suspended certain programs, learning and children's rights groups sued, arguing that the shutdown violated legislation requiring public schools to offer classroom-based instruction whenever possible. In considering the request, the court ordered briefing on whether Governor Newsom's "State Safe Schools for All" plan impacted the issues raised. The court ultimately denied the petition without an order, allowing LAUSD to continue its online instruction policies during the pandemic. Read the Petition for Extraordinary relief, including writ of mandate and request for immediate injunctive relief and Denial of petition for writ of mandate and application for stay here.

5. ADDRESSING CHRONIC CONDITIONS [7 cases]

Harrisburg Area Community College v. Pennsylvania Human Relations Commission (Commonwealth Court of Pennsylvania, October 29, 2020): The court ruled that Pennsylvania's Medical Marijuana Act (1) does not require employers to make accommodations for medical marijuana patients and (2) is silent on the rights of college students to use medical marijuana. In 2018, a nursing student argued she was denied accommodation to use medical marijuana to treat posttraumatic stress disorder and irritable bowel syndrome. She alleged that, in failing to accommodate her medical marijuana use, Harrisburg Area Community College violated anti-discrimination provisions of the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act. The court disagreed. These laws do not "limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position." Even if the law required employers to make such accommodations, it would not mean that students must also be accommodated. Read the decision here.

Doe v. CVS Pharmacy (U.S. Court of Appeals, 9th Circuit, December 9, 2020): The 9th Circuit reinstated a previously dismissed Affordable Care Act (ACA) disability discrimination claim brought by individuals living with HIV/AIDS whose pharmacy benefits manager (CVS Caremark) required them to obtain specialty medications through its designated specialty pharmacy to be considered "in network." The requirement meant that prescriptions at "in network" prices could only be filled by mail order or drop shipment to a CVS pharmacy for pickup. Plaintiffs argued these requirements deprived them of the ACA's prescription drug benefit, including medically appropriate dispensing and access to necessary counseling. The 9th Circuit concluded the patients adequately stated a claim for disability discrimination under the ACA, which requires health plans to cover prescription drugs as an "essential health benefit." Read the decision here.

U.S. Equal Employment Opportunity Commission (EEOC) v. West Meade Place LLP (U.S. Court of Appeals, 6th Circuit, February 8, 2021)***:*** The 6th Circuit ruled that a nursing home must face a suit brought by EEOC alleging that it unlawfully denied accommodation and fired a worker who suffers from anxiety. There was sufficient evidence for a jury to reasonably find that the worker's disorder falls within the Americans with Disabilities Act (ADA)'s definition of "disability." The court noted that a condition qualifies as a disability under the ADA if "the employer regards the employee as disabled." Consequently, the so-called "regards provision" does not require a "showing about the severity of the impairment," but only that the employer perceived one to exist. Read the decision here.

O'Hanlon et al. v. Uber Technologies Inc. et al. (U.S. Court of Appeals, 3rd Circuit, March 17, 2021): The 3rd Circuit found that Uber could not compel arbitration of an Americans with Disabilities Act (ADA) claim brought against the company for failing to provide wheelchair access vehicles. Motorized-wheelchair users and a nonprofit entity focused on increasing transportation accessibility alleged that Uber discriminated against individuals with mobility disabilities contrary to the ADA. Uber asserted that the controversy had to be addressed through arbitration, even though the plaintiffs had never signed the company's arbitration agreement. The court held that an arbitration agreement could only be enforced against non-signatories when they knowingly exploit the agreement for their own benefit. Since plaintiffs never availed themselves of the agreement and received no benefit from it, plaintiffs could not be compelled to arbitrate the discrimination claim. The case proceeds now to trial. Read the decision here.

EEOC v. West Meade Place LLP (U.S. Court of Appeals, 6th Circuit, February 6, 2021): The Sixth Circuit reversed a lower court's decision which held that a jury could not find that an employee with an anxiety disorder who was terminated from a nursing home meets the definition of "disabled" under the Americans with Disability Act (ADA). The lower court erroneously granted a motion for summary judgment, meaning that there were no factual disputes in question and that the employee in this matter could not prevail as a matter of law. The Sixth Circuit disagreed and held that there were significant factual disputes in question and that a jury **could** reasonably find that a nursing home's employee, Ms. Kean, who**se employment** was terminated and **who** suffers from an anxiety disorder, has an "impairment" which entitles her to protection under the ADA. It is not necessary that the nursing home "perceived the disability to limit a major activity**,**" **but** only that "there was a perceived impairment." There also need not be a "showing about the severity of the impairment.**"** Read the full decision here.

Valentine v. Collier (U.S. Court of Appeals, 5th Circuit, March 26, 2021): Inmates at a Texas prison sued the senior warden and the executive director of the Texas Department of Criminal Justice alleging violations of the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the 8th Amendment. Plaintiffs claimed defendants had shown "deliberate indifference" and failed to accommodate disabled inmates in pandemic policies through lack of handwashing station access, among other issues. The 5th Circuit found no such evidence, concluding defendants had responded reasonably to inmate complaints. Though the court agreed there was a lack of equal access to hand washing stations for disabled inmates, it denied the ADA and Rehabilitation Act claims because the inmates failed to alert defendants to the discrimination and it was not "open, obvious, and apparent." Read the full decision here.

Hager v. M&K Construction (New Jersey Supreme Court, April 13, 2021): The court upheld a workers' compensation court order requiring M&K Construction to reimburse plaintiff Vincent Hager for the ongoing costs of the medical marijuana Hager was authorized and recommended to use after sustaining a work-related injury while employed by M&K. The employer alleged that the federal Controlled Substances Act (CSA), under which marijuana is illegal, preempts the New Jersey medical marijuana statue; that requiring the company to pay for marijuana places it in jeopardy of violating federal law; and that medical marijuana is not compensable under the state worker compensation statute. The court upheld the workers' compensation order, finding that (1) medical marijuana could constitute reasonable and necessary care under the NJ workers' compensation statute; (2) the CSA, as currently applied and enforced by the federal government, does not preempt state medical marijuana law; and (3) the fact that the employer is compelled by state order to reimburse for the marijuana eliminates the already infinitesimal possibility that the employer could be subject to federal criminal charges. Read the full decision here.

6. MITIGATING THE INCIDENCE & SEVERITY OF INJURIES & OTHER HARMS [16 cases]

Dix v. Live Nation Entertainment, Inc. (Court of Appeals of California, Second District, October 26, 2020): The California Court of Appeals held that an electronic music festival operator that assumes responsibility to provide security and medical care owes a duty of reasonable care to festival attendees. The parents of a deceased festival attendee alleged that Live Nation Entertainment was negligent after an attendee collapsed at one of its festivals due to illegal drug use and later died from Ecstasy-related dehydration. Live Nation argued that it did not owe the attendee a duty because the attendee voluntarily consumed illegal substances. The court found no justification to create a policy-based exception to the legal duty of ordinary care noting it is foreseeable that numerous festival attendees may suffer from dehydration, drug overdose, or physical exhaustion, which can cause death if not timely treated. Read the decision here.

Scalia v. Wynnewood Refining Co., LLC (U.S. Court of Appeals, 10th Circuit, October 27, 2020): A boiler at a refinery was held to be part of a "process" to which highly hazardous chemical process safety management regulations applied. After a boiler explosion caused the death of 2 workers, the Occupational Safety and Health Administration (OSHA) cited the owner of Wynnewood Refining Company for violating 29 C.F.R. § 1910.119, which outlines certain requirements for managing highly hazardous chemicals. The refinery's owner argued that the section did not apply to the boiler that exploded because it was not a "process" involving a threshold amount of highly hazardous chemicals. OSHA determined that a boiler can be a "process" even if it does not contain highly hazardous chemicals because the boiler is interconnected with 2 units deemed "processes" under the section and the boiler's location made it possible that a highly hazardous chemical could be released. Read the decision here.

Davis, et al. v. Benson (Michigan Court of Claims, October 27, 2020): A Michigan judge temporarily halted a state directive banning the open carry of firearms at polling places on Election Day. The directive also banned open carry of guns near municipal clerk's offices, places where ballots are counted, and within 100 feet of these locations. The decision was not based on the 2nd Amendment. Rather the rule was not promulgated in accordance with the Administrative Procedures Act (APA). Because the directive had the "force and effect of law, [was] of general applicability, and cover[ed] a substantive matter," it would likely require promulgation as a rule via the Act. The court emphasized that the directive was partially inconsistent with state law because numerous state laws already restrict openly carrying firearms in public places. Directives contrary to existing state laws are rules that would require promulgation under the APA. Although an appeal was filed, the parties agreed to dismissal on December 11, 2020, after Election Day. Read the decision here.

Association for Accessible Medicines v. James, et al. (U.S. Court of Appeals, 2nd Circuit, December 18, 2020). The 2nd Circuit refused to review its decision which left undisturbed the New York Opioid Stewardship Act (OSA), imposing $600 million in payments on several opioid distributers. The law included a "pass through" prohibition preventing the passing of costs of payments on to purchasers. Two trade groups and an opioid maker/distributor challenged the OSA. In December 2018, the trial court classified the OSA payment as a regulatory penalty, striking down the law under principles of interstate commerce. In September 2020, the 2nd Circuit reversed on grounds that federal courts lacked subject matter jurisdiction. The payment is not a regulatory penalty but rather a state tax because it was imposed by the legislature and the funds are designated for health and wellness services. Federal courts may not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." The court then denied a request to review the decision just 2 months later. Read the order here. Read the September 2020 decision here.

Parkes v. Hermann (Supreme Court of North Carolina, December 18, 2020): North Carolina's highest court affirmed a lower court ruling in favor of Dr. James Hermann in a suit accusing him of failing to timely administer medication to a patient exhibiting signs of stroke; the patient ultimately suffered permanent injuries. The patient asserted that the doctor's failure to provide the medication diminished her likelihood of recovery because, had it been administered, she would have had a 40% chance of a better outcome. The court held that the "loss of chance" doctrine is not recognized in North Carolina. As such, a plaintiff may only recover if they can show that more likely than not the healthier outcome could have been achieved but for the defendant's negligence. A 40% chance of a better outcome does not meet the "more likely than not" standard. The court therefore held that presenting evidence of only a 40% chance fails to show it was more likely than not that defendant's negligence caused plaintiff's permanent injury. Departing from this common law interpretation would require new legislation, deemed the court. Read the decision here.

Olson v. United States (U.S. Court of Appeals, 9th Circuit, November 23, 2020): The 9th Circuit ruled that the standard for "willfulness" adopted by the Supreme Court for Fair Labor Standards Act (FLSA) claims also applies to Family and Medical Leave Act (FMLA) claims: *whether the employer knows or shows reckless disregard for whether its conduct violates the statute*. An employee argued that Bonneville Power Administration (BPA) willfully interfered with her FMLA rights. Applying FLSA's willful test, the trial court found the alleged interference was not willful. The 9th Circuit agreed that the FLSA's "willful" test applied. It affirmed the lower court's conclusion that the interference was not "willful" because BPA consulted with its legal department about the individual's FMLA leave, opted not to terminate her, offered a trial work option, and made some effort to restore her to an equivalent position. Read the full decision here.

United States v. Safehouse, et al. (U.S. Court of Appeals, 3rd Circuit, January 12, 2021): The 3rd Circuit found that a Philadelphia planned safe injection facility would violate the federal Controlled Substances Act's (CSA) so-called crack house provision. Safehouse planned to open a facility that would allow people to inject illicit drugs under the supervision of medical professionals. The site would also offer substance use treatment options, social services, and other resources. The Mayor and City Council supported the Safehouse plan. The federal Department of Justice sued to prevent the facility's opening arguing that federal law prohibits the operation of establishments for the purpose of using illicit drugs. In a 2-1 decision, the court found that CSC prohibits operation of safe injection facilities, which only Congress can amend. Read the full decision here.

Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Limited (U.S. District Court, Middle District of Florida, December 17, 2021): A federal district court dismissed a Florida sport bar's claim seeking insurance coverage for loss of business due to the COVID-19 pandemic and the State's reductions in restaurant capacity for a period of time. The sports bar was not entitled to business interruption coverage because it did not suffer any direct physical losses. Acknowledging that the sports bar suffered economic losses due to the pandemic and state policies, the court found that the plain language of the business interruption clause of the policy covered only direct physical losses and not all externally caused economic losses. Read the full decision here.

Wartluft v. The Milton Hershey School and School Trust (U.S. Court of Appeals, 3rd Circuit, February 1, 2021)***:*** The 3rd Circuit ruled that a free, private boarding school was not a licensed mental health or residential treatment facility and was thus not responsible for a student's death by suicide. Specifically, the court held that the school no longer stood *in loco parentis* (in place of the parent) after the student left school and was released into her parents' care, and that there was no evidence of a "continuing duty of care" on behalf of the school. The school also did not violate the Fair Housing Act (FHA) by barring the student from her 8th grade graduation and end-of-year barbeque, because

she was not a "renter" under the meaning of the FHA and the graduation ceremony was not a service related to student housing. Read the decision here.

Perez v. People (Colorado Supreme Court, January 19, 2021): The Colorado Supreme Court ruled that a *Miranda* warning was unnecessary before asking gun-related questions under the "public safety" exception to the *Miranda* rule. The defendant, Perez, stated that he was chased on foot by an officer. After the officer asked, "[w]here is the gun?", Perez responded that he "threw [the gun] away." Perez moved to suppress his answer, arguing that it was obtained in violation of *Miranda* because he was not provided *Miranda* warnings before the question was asked. The court reasoned that the public safety exception to the *Miranda* warning applied. The appropriate inquiry is whether, considering all the circumstances, the officer's questions relate to an objectively reasonable need to protect the public from immediate dangers, not whether the officer has every reason to believe that a weapon is in play. Read the decision here.

Maney v. Brown (U.S. District Court, District of Oregon, February 2, 2021): A federal district court in Oregon ruled that Oregon's Adults in Custody (AIC) must be offered COVID-19 vaccines at the earliest date for eligibility in Phase 1A, Group 2 of Oregon's Vaccination Plan. Oregon inmates represented by the Oregon Justice Resource Center alleged that the Oregon Department of Corrections (ODOC) violated the 8th Amendment by offering the COVID-19 vaccine to individuals working in correctional settings and individuals living and working in congregate care settings, while deciding not to offer the vaccine to AIC. The court found that by prioritizing these other groups over AICs, ODOC demonstrated there was a sufficient COVID-19 vaccine available and acted with deliberate indifference to the serious risk of harm faced by AICs, in violation of the 8th Amendment. Read the decision here.

Appeal of Panaggio (New Hampshire Supreme Court, March 2, 2021): The New Hampshire Supreme Court held that federal law did not preempt an order of the state's compensation appeals board requiring reimbursement for medical cannabis. The petitioner suffered a work-related injury which he treated through the state's medical cannabis program. His insurer refused reimbursement, claiming medical cannabis was not reasonable or medically necessary. He appealed to the New Hampshire Compensation Appeals Board, which found the treatment reasonable and medically necessary. However, it held that the insurer was federally preempted from reimbursing the treatment since marijuana is still illegal under federal law. The insurer would commit a federal crime, reasoned the court, by aiding and abetting its purchase. The New Hampshire Supreme court disagreed and held that federal preemption did not exist for several reasons: (1) the Controlled Substance Act (CSA) does not directly prohibit reimbursement for medical marijuana; (2) reimbursement does not rise to the level of aiding and abetting because the insurer lacked the requisite intent; and (3) the tension between state and federal policy in this area does not present an obstacle to federal CSA enforcement. Read the decision here.

Young v. Hawai'i (U.S. Court of Appeals, 9th Circuit, March 24, 2021): In a 7-4 ruling, the 9th Circuit Court of Appeals upheld Hawai'i's limits on openly carrying firearms in public, rejecting a challenge from resident George Young, who had sued over the state's prohibition of carrying a handgun outside the home. Hawai'i's law requires residents seeking to openly carry firearms to demonstrate "the urgency or need" to do so, be of good moral character, and be "engaged in the protection of life and property." Upon filing applications, Young failed to demonstrate a specific "urgency or need" to open carry beyond a general desire to engage in self-defense. After his applications were denied, Young claimed the law violated the 2nd Amendment. The 9th Circuit disagreed. The 2nd Amendment does not guarantee a right to openly carry firearms in public. Read the full decision here.

Gallina v. Robert M. Wilkinson, Acting U.S. Attorney General (U.S. Court of Appeals, 2nd Circuit, February 2, 2021): On review of a Board of Immigrations Appeals decision, the 2nd Circuit refused to stop the deportation of an Italian national, Ferdinando Gallina, denying relief under the Convention Against Torture. Prior to Mr. Gallina's arrival in the U.S. he served more than six years in solitary confinement in Italy's prison system for mafia-related criminal convictions. After his release from jail and travel to the U.S. in 2016, an arrest warrant was issued in Italy for his involvement in a 2000 murder. Now facing deportation, Mr. Gallina contends he would be placed in solitary confinement if returned to Italy, the conditions of which would constitute torture under the Convention Against Torture. The court disagreed and argued that the Convention Against Torture requires the intentional infliction of severe physical pain or suffering. However, the conditions of Mr. Gallina's detention were established to prevent him and other members of dangerous criminal organizations from participating in further criminal activity. The court also held that no international tribunal/body has found that solitary confinement, without additional factors, would meet the definition of torture and failed to grant the requested relief. Read the full decision here.

United States v. Rattini et al. (U.S. District Court, Southern District of Ohio, March 5, 2021): Judge McFarland denied an opioid distributor, two former executives, and two pharmacists' motions to dismiss criminal indictments which accuse them of conspiring to inundate rural towns with opioids and addictive pain killers. In their request, the opioid distributor and former executives asserted that the U.S. government impermissibly based its case on their supposed nonconformity with the U.S. Drug Enforcement Administration guidance letters and that the alleged violations were not clear under the law. Any such charges resulting from unclear law, they argued, are unconstitutional. Judge McFarland, however, disagreed and indicated that this is a gross mischaracterization of the charges filed against them. Instead, the defendants have been charged with "conspiracy to knowingly and intentionally distribute and dispense controlled substances outside the scope of professional practice and not for a legitimate medical purpose" which violates the Controlled Substances Act. The court also denied the two pharmacists' motions to dismiss. Read the orders here and here.

City of Los Angeles v. Superior Court of Los Angeles County (California Court of Appeal, 2nd District, Division 4, March 18, 2021): A police officer's wife sued the City of Los Angeles for negligence and "a dangerous condition of public property" after her husband contracted typhus from "unsanitary conditions" at or around a police station and transmitted it to her. The trial court overruled the City's allegation that it had no duty of care to the officer's wife since she had not come in personal contact with the station. The court also overruled the City's argument that California's Government Code § 855.4 granted it immunity. The city petitioned the California Court of Appeals to contest the lower court's ruling. The appeals court found the City immune and stated that "[a] public entity's liability must be based on statute," which was not satisfied here. Read the full decision here.

7. PUBLIC HEALTH INFORMATION MANAGEMENT, PRIVACY & SECURITY [4 cases]

University of Texas M.D. Anderson Cancer Center v. U.S. Department of Health and Human Services (U.S. Court of Appeals, 5th Circuit, January 14, 2021): The 5th Circuit vacated a $4.3 million HIPAA-related penalty imposed on the M.D. Anderson Cancer Center due to loss of technologic equipment containing electronic personal health information (ePHI) of more than 33,000 people. The court held that fine was arbitrary and capricious in contravention of the Administrative Procedure Act based on 4 separate grounds: (1) M.D. Anderson maintained an encryption "mechanism" in compliance with the Encryption Rule; (2) M.D. Anderson lost control of the ePHI, but did not *affirmatively* release it; (3) the administrative law judge failed to "treat like cases alike," declining to utilize a comparative standard; and (4) the penalty amounts exceeded per-year reasonable limitations. Read the full decision here.

In re Univ. of Tex. at San Antonio (Court of Appeals of Texas at San Antonio, January 20, 2021): The Texas Court of Appeals found that a trial court abused its discretion by compelling disclosure of a University of Texas at San Antonio (UTSA) employee's medical records. The employee, Jimenez, refused to speak with a UTSA police officer about a workplace dispute, and subsequently sought medical attention for stress arising from the encounter. After the police officer was fired, the officer filed an EEOC discrimination claim and requested Jimenez's medical records. The trial court compelled UTSA to disclose them, but the court of appeals disagreed since the documents were not within UTSA's possession, custody, or control. Though Jimenez had voluntarily disclosed the documents to UTSA, the university did not have physical possession, nor did it have a right to possession equal or superior to that of Jimenez. Read the decision here.

Shepherd v. Costco Wholesale Corp. (Supreme Court of Arizona, March 8, 2021): The Supreme Court of Arizona held that a plaintiff alleging negligent disclosure of medical information does not have to allege bad faith or rebut the good faith presumption to withstand a motion to dismiss based on the "good faith" immunity provided in Arizona Revised Statute § 12-2296. Shepherd sued Costco for publicly disclosing a medication that he claims to have rejected twice, alleging public disclosure of private facts, negligence, fraud, negligent misrepresentation, and more. The court found that Costco was not entitled to dismissal based on good faith statutory immunity for health care providers because Shepherd was not required to anticipate this potential defense in his complaint, nor was he required at that point to prove that Costco did not act in good faith. Read the decision here.

People v. Marrero (Supreme Court, New York County, April 13, 2021): Defendant, indicted for attempted robbery, challenged the propriety of an *ex-parte* subpoena for his hospital records in the absence of a Health Information Portability and Accountability Act (HIPAA) Privacy Rule authorization. Defendant allegedly attempted to rob a person on the subway at knife point, sustaining cuts to his hands. After arrest, he was brought to the hospital for treatment. During grand jury proceedings, the prosecution submitted a subpoena for defendant's hospital records, which the judge granted *ex parte* (to one party). Defendant argued that the release of his medical records was a violation of his HIPAA privacy rights and submitted a motion asking the state to relinquish the records to the court, for the court to keep the records under seal, and for the district attorney who requested the records to be removed from the case. The court noted "some troubling aspects to the process" of granting an *ex-parte* subpoena for medical records and questioned "the necessity for overriding the

defendant's HIPAA protections." However, it ultimately held that the subpoena was a valid court order, and as such, eliminated the requirement for authorization. Read the full decision here.

8. REGULATING COMMUNICATIONS [6 cases]

Krueger v. Wyeth, Inc. (U.S. District Court for the Southern District of California, November 12, 2020): A California federal court granted a distribution of Class Settlement funds in a case alleging that Wyeth Pharmaceuticals violated California consumer protection laws via long-term, widespread marketing campaigns intended to misrepresent risks and benefits associated with the company's hormone replacement therapy (HRT) drugs. April Krueger brought this class action alleging that Wyeth Pharmaceuticals misrepresented that its HRT drugs lowered cardiovascular, Alzheimer's and/or dementia risk, and did not increase the risk of breast cancer. Because of the suit's central allegations, the court reasoned that a preference would be given for distributing any excess funds to major California medical centers or targeted research groups that specialized in the prevention, detection, and treatment of breast cancer, cardiac issues, Alzheimer's, and early-onset dementia, especially for the treatment of women in California communities historically lacking treatment. Read the decision here.

Hubbard, et al v. Bayer Healthcare Pharmaceutical, et al (U.S. Court of Appeals for the 11th Circuit, December 22, 2020): The 11th Circuit affirmed the denial of a claim that Bayer did not give adequate warning that its birth control pills could lead to stroke. Karen Hubbard suffered a catastrophic stroke after taking Beyaz, a contraceptive marketed by Bayer. Bayer previously revised its warning labels for Beyaz to report that the drug poses a higher risk of blood clots which can cause strokes. Hubbard sued Bayer alleging that the company did not sufficiently warn about increased risk of blood clots. To prevail under Georgia law, an injured party must show a breach of a duty to warn that proximately caused the injury. A drug company's duty to warn extends only to the prescribing physician, not to the user. Even if there was a breach of the duty to warn, Hubbard could not establish that it would have caused the physician to change his prescription of the drug. Read the decision here.

Cosgrove et al. v. Blue Diamond Growers (U.S. District Court, Southern District of New York, December 7, 2021): Finding that consumers consider vanilla to be a flavor and not a particular ingredient, a federal district court dismissed a case filed against Blue Diamond Growers based on their marketing of vanilla almond milk. Parties alleged that the marketing was deceptive and misleading in violation of the federal Food, Drug and Cosmetics Act and federal/state consumer protection laws because the so-called vanilla milk contained only trace amounts of vanilla. Neither vanilla bean nor extract were listed as ingredients, even though the plaintiffs admitted the milk tasted like vanilla. In dismissing the claims, the district court found that identifying a product as vanilla implies only the taste of vanilla and not that the product contains vanilla bean or extract. As a result, there was no legal deception in the marketing. Read the full decision here.

Ariix, LLC v. NutriSearch Corp. (U.S. Court of Appeals, 9th Circuit, January 22, 2021): Nutritional supplement maker Ariix LLC could pursue a false advertising suit against NutriSearch Corp., a guidebook publisher, over allegedly rigged ratings in favor of a competitor, ruled the 9th Circuit. Ariix argued that NutriSearch, a supposedly independent publisher, was paid to favor certain products over Ariix's products, causing it to improperly prevent Arixx from obtaining top medal certification in NutriSearch's Guide. NutriSearch argued the guide was protected by the First Amendment. The court reasoned that the Guide constituted commercial speech, without full First Amendment protection, because economic motivation involves direct and indirect benefits. Ariix's argument that the Guide was published with the economic goal of benefitting from its sales was sufficient to plausibly claim it constituted commercial speech. Read the decision here.

Weiss v. Trader Joe's Company (U.S. Court of Appeals, 9th Circuit, March 3, 2021): After Plaintiff Weiss sued Trader Joe's, claiming statements misled her into believing a beverage would balance her internal bodily pH and provide superior hydration, the 9th Circuit ruled that a reasonable consumer would not interpret any of the challenged language to suggest these benefits. Trader Joe's "Alkaline Water + Electrolytes" bottle includes statements such as "ionized to achieve the perfect balance," "refresh & hydrate," and holographic plus signs. Weiss brought consumer protection claims against Trader Joe's, arguing that these and similar statements in Trader Joe's online newsletter misled her. The court ruled that a reasonable consumer would not interpret any of the challenged representation to suggest internal PH balancing or superior hydration compared to other beverages. Read the full decision here.

In re: Zofran (Ondansetron) Products Liability Litigation (U.S. District Court, D. Massachusetts, June 1, 2021)***:*** A Massachusetts federal judge ruled that state-law claims of failure to provide an adequate warning label are preempted by federal law. The decision shuts down multi-district litigation consolidating more than 420 lawsuits against GlaxoSmithKline alleging its anti-nausea medication, Zofran, caused birth defects. The court held that the claims were preempted because the Food and Drug Administration (FDA) declined to add a warning label to the drug for pregnant women despite (1) several opportunities to do so and (2) knowledge that the drug was being prescribed to pregnant women in large numbers. The same judge had denied an earlier petition for summary judgment in 2019, opting to send the preemption question to a jury, but the Supreme Court's 2019 ruling in *Merck v. Albrecht* found that judges, not juries, should resolve issues regarding FDA regulation. Read the full decision here.

9. MONITORING PROPERTY & THE BUILT ENVIRONMENT [5 cases]

Southwest Organizing Project v. Albuquerque-Bernalillo County Air Control Board (New Mexico Court of Appeals, October 15, 2020): The court upheld the grant of an authority-to-construct permit for a gasoline plant pursuant to the New Mexico Air Quality Control Act, determining that the Board and the City of Albuquerque Environmental Health Department (EHD) did not have to consider whether there was a reasonable probability that granting the permit would cause injury to health or property. EHD's issuance of a permit for operation of a bulk gasoline plant was challenged by the Southwest Organizing Project, which alleged that the Board and EHD failed to consider whether air emissions pose a reasonable public health risk. While the court found that the Board must determine which quantities of air contaminants may cause reasonably probable injury to engage in rulemaking, this does not establish an independent standard applicable to the permitting process. Read the decision here.

Bard v. Monsanto Co. (Court of Appeals of Washington, Division 1, November 2, 2020): The appellate court found that the explicit purpose of Washington Revised Code § 43.20.050, authorizing the state board of health to adopt regulations regarding environmental conditions in public facilities, did not imply a cause of action for failure to enforce such regulations. A group of students, parents, teachers, and staff alleged that serious toxic chemical exposure injuries were sustained at Sky Valley Education Center. They sued Snohomish Health District, arguing that § 43.20.050 created an implied cause of action. The court concluded that (1) the statute does not specifically protect people in schools; (2) the legislature did not intend to imply a cause of action; and (3) implying a cause of action was unwarranted by the statute's general purpose of protecting public health. Read the full decision here.

BP P.L.C., et al. v. Mayor & City Council of Baltimore (U.S. Supreme Court, May 17, 2021): The U.S. Supreme Court reversed the 4th Circuit in an environmental case, holding that the lower court should consider all reasons the defendants raised for seeking to have the case removed from state court to federal court. In 2018, the City of Baltimore filed a lawsuit against BP and other energy companies alleging the companies concealed the environmental impact of fossil fuels that contributed to climate change. Similar lawsuits have been filed in state courts around the country. Localities believe they have a higher likelihood of success in state court. The defendants sought to remove the case to federal court where they believe they have a better chance to prevail. Maryland's federal district court denied the request. The 4th Circuit Court of Appeals found that the defendants were not entitled to removal based on being "federal officers," Rejecting other bases for removal as well. The Supreme Court reversed, finding that the 4th Circuit should have considered all grounds for removal to federal court and not just the "federal officer" argument. Read the full decision here.

LA Alliance for Human Rights v. City of Los Angeles (U.S. District Court, C.D. California, April 20, 2021): In response to L.A.'s homelessness crisis and the City and County's lack of satisfactory action, a federal court, on its own motion, issued an order mandating certain actions. The court was particularly concerned with the history of systemic discrimination underpinning homelessness and its impacts on public health, especially in the context of COVID-19. Portions of the court's order are intended to support accountability and action via application of specific reporting requirements. Certain provisions included reporting on (1) "all land potentially available within each district for housing and sheltering the homeless" and (2) specific actions intended to address "the possibility of rezoning" to provide additional multi-family zoning areas. Additional provisions apply specifically to L.A.'s Skid Row. Read the decision here.

Martinez v. City of Chicago (U.S. District Court, N.D. Illinois, Eastern Division, April 14, 2021): A federal judge rejected plaintiffs' motion to prevent the relocation of a large recycling facility to the southeast side of Chicago, "an area that is a majority-minority, with the most recent census data showing that 55.80% of residents are African-American and 37.7% are Hispanic." Plaintiffs, a pastor, nurse, and residents of the southeast side of Chicago, argued that the relocation is discriminatory and in violation of Title VI of the federal Civil Rights Act of 1964 and federal and state constitutional Equal Protection Clauses, and that the relocation violates state nuisance law. Plaintiffs raised concern "that an increase of air pollution and particulate matter will exacerbate the existing health conditions of the most vulnerable in the community—senior citizens and children," and that poor air quality has negatively impacted property values in the neighborhood. The court shared their concerns about the "disproportionate burden borne by Black and Latinx communities from pollution, particularly during the pandemic," but denied the motion because they had not met their burden of proving the discriminatory intent required for success on equal protection or Title VI claims. Read the full decision here.

10. PUBLIC HEALTH EMERGENCY: LEGAL PREPAREDNESS/RESPONSE [6 cases]

Desrosiers, et al. v. Baker (Massachusetts Supreme Judicial Court, December 10, 2020): (Massachusetts Supreme Judicial Court, December 10, 2020): The Massachusetts Supreme Judicial Court upheld Governor Baker's use of the Civil Defense Act (CDA) to order the closure of nonessential businesses and establish a reopening plan in response to the COVID-19 pandemic. Business owners alleged that the Governor's use of the CDA was unlawful because (1) the virus is not a "natural cause" contemplated by the legislature; and (2) local boards of health hold exclusive power to act under the Public Health Act. The court rejected the challenge. The COVID-19 pandemic "is a natural cause for which action is needed to 'protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth.'" Read the full decision here.

South Bay United Pentecostal Church v. Newsom (U.S. Supreme Court, February 5, 2021): The Supreme Court blocked California's COVID-19 order banning all indoor religious services, while leaving undisturbed categorical bans on singing/chanting amid services and occupancy limitations. The State prohibited indoor religious services because services involve (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended time periods; (4) with singing. The Court's brief order did not explicate its reasoning fully. Justice Gorsuch issued a statement explaining that California had "target[ed] religion for differential treatment" because most retail or other business operations could proceed indoors under occupancy limitations, while worship services could not. Justice Kagan, in dissent, argued that the Court's treatment of retail/business operations like churches ignores neutrality, treats "unlike cases . . . equivalently," and ultimately "injects uncertainty into an area where uncertainty has human costs." Read the full Opinion here.

Garcia v. Welltower OpCo Group LLC et al. (U.S. District Court, Central District of California, February 10, 2021): A California federal court found that the Public Readiness and Emergency Response (PREP) Act provided immunity in a suit alleging elder abuse and neglect, wrongful death, and intentional infliction of emotional distress. Defendants operated and managed a senior living facility where Gilbert Garcia resided during the COVID-19 pandemic. Garcia was considered to be "at extremely high risk for complications or death" related to the disease, having had a history of heart attacks, stroke, glaucoma, and hypertension. After Garcia passed away from COVID-19, his successors filed suit. Defendants argued they were shielded from liability by the PREP Act, which immunizes covered persons engaged in activities related to medical countermeasures. The court granted defendants' motion to dismiss, finding the defendants' actions fell within the scope of the PREP Act's immunity provisions. Read the full decision here.

State v. Riggin (Supreme Court of North Dakota, May 20, 2021): Riggin was charged with violating North Dakota Governor Doug Burgum's executive order requiring the cessation of licensed cosmetologist operations within the state to mitigate the spread of COVID-19. Riggin claimed (1) the Governor exceeded his statutory authority and (2) that the executive order unconstitutionally violated separation of powers principles and Riggin's right to conduct business. The North Dakota Supreme Court affirmed Governor Burgum's power to suspend state business operations during a declared state of emergency per the North Dakota Disaster Act of 1985. It also concluded that Riggin failed to adequately support the challenge involving her right to conduct business. The executive order also did not violate separation of powers principles because the legislature properly delegated emergency powers to the Governor. Read the full decision here.

Tavern League of Wisconsin, Inc. v. Palm (Supreme Court of Wisconsin, April 14, 2021)***:*** The highest court in Wisconsin upheld the appeals court decision that the state Department of Health Services Secretary-designee's COVID-19-related emergency order that limited the size of indoor public gatherings was unlawful and unenforceable as a matter of law, because the order met the definition of a "rule" and therefore should have been promulgated according to rulemaking procedures outlined in state law. The court took up the question of the order's legitimacy despite the order's expiration rendering the appeal moot. Read the full decision here.

State ex. rel. Riddle v. Oliver (Supreme Court of New Mexico, May 6, 2021): Plaintiffs, 27 New Mexico county clerks, filed an emergency request to compel the Secretary of State to mail ballots to registered voters in New Mexico during the COVID-19 pandemic. Instead of granting this request, the court required the Secretary of State to mail absentee ballot *applications* to all eligible New Mexico voters. The court first expounded that the Secretary could only mail ballots after a direct request from individual voters. Nevertheless, the court found that the Secretary could, and indeed had a duty to, mail applications for absentee ballots to those eligible given her duty to "exercise her power to the fullest extent of the law to promote the safety of election workers and voters while conducting the June 2020 primary election." Read the full decision here.