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Judicial Trends in Public Health: Recent Case Decisions and Future Implications

2:00 – 3:00 p.m. EST | October 21, 2021

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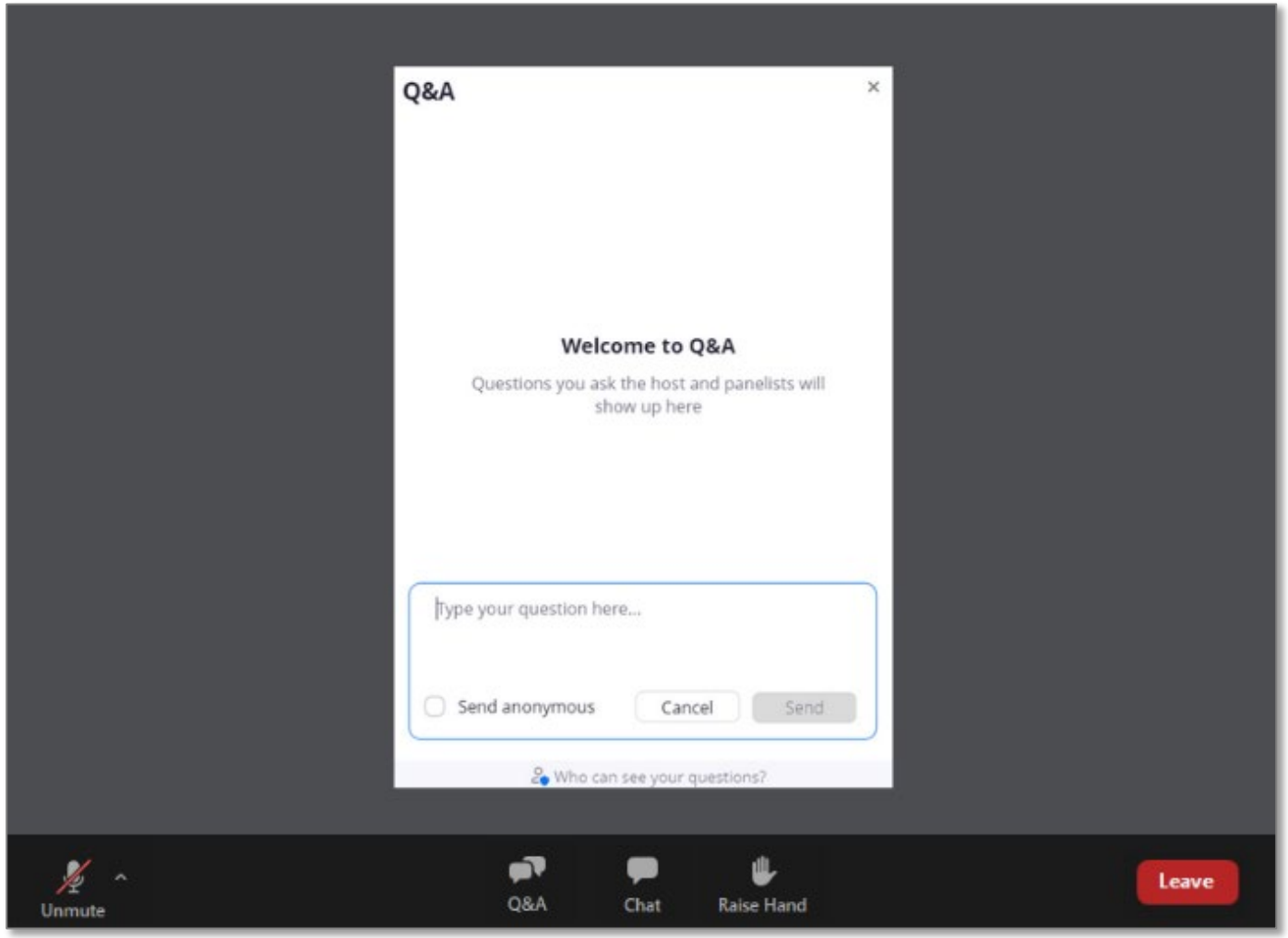

Moderator

Morgan Jones-Axtell, J.D., Staff Attorney, Network for Public Health Law-Eastern Region

Presenters

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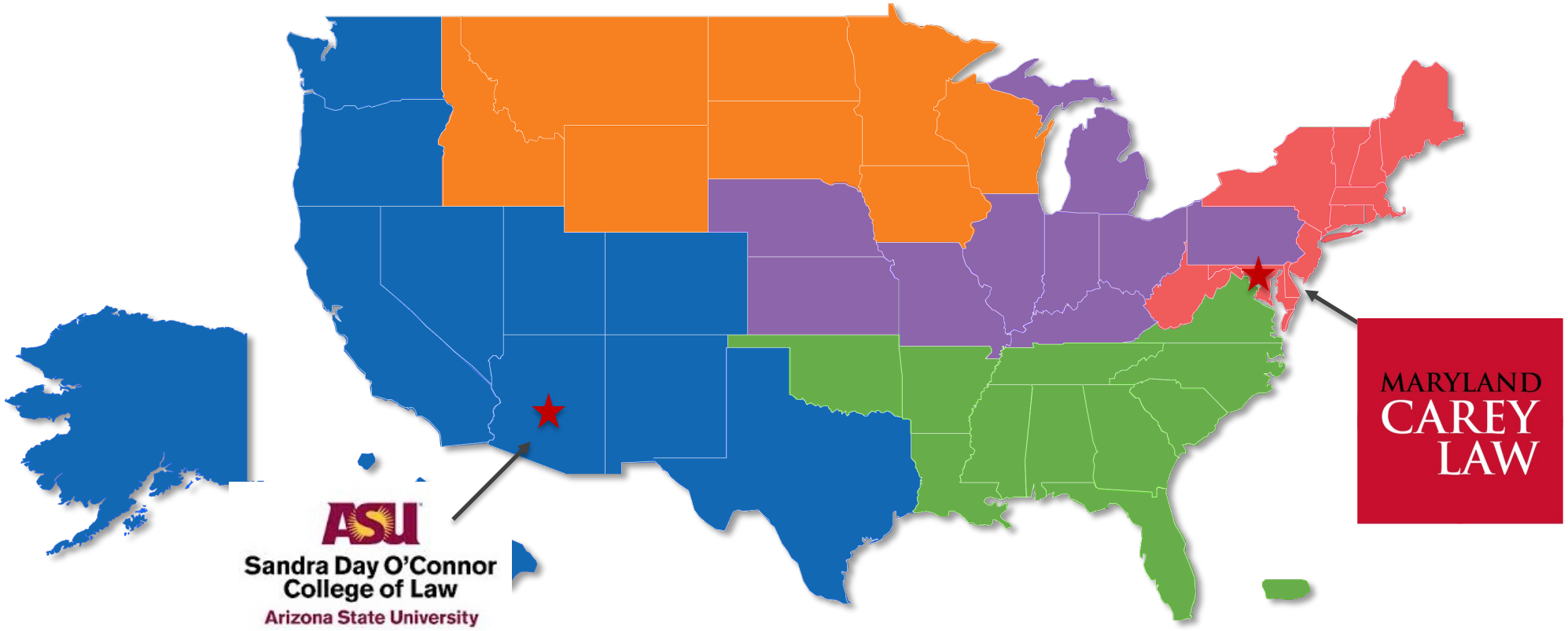
Kathleen Hoke, J.D., Director, Network for Public Health Law Eastern Region; Professor, University of Maryland Carey School of Law

Greetings from our Western & Eastern Regions



The Network for Public Health Law monitors key court cases and relevant judicial trends in public health. The Network's monthly reporter, Judicial Trends in Public Health (JTPH), highlights select published cases in public health law and policy from the prior three months. These cases are organized below by name, issuing court, date of issuance, along with a brief synopsis, and include link to the case abstract and hyperlink to the full decisions (when publicly available). For more information, including a topic digest of these and other cases, see below. Questions, comments, thoughts? Contact the Network for more information.

JTPH CASE HIGHLIGHTS – January 15, 2021

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." Read the abstract here.

Judicial Trends: Briefly

- Network's "Judicial Trends in Public Health" (JTPH) monitors relevant court cases & trends in public health
- Subscribe via the Network to receive monthly JTPH notices and occasional "blasts"
- Next edition is forthcoming on November 15
- 2019-20 Archive includes 200+ cases

Judicial Trends: Topics

1. Source & Scope of Public Health Legal Powers
2. Constitutional Rights & the Public's Health
3. Preventing & Treating Communicable Conditions
4. Social Distancing Measures
5. Addressing Chronic Conditions
6. Mitigating the Incidence & Severity of Injuries & Other Harms
7. Public Health Information Management, Privacy & Security
8. Regulating Communications
9. Monitoring Property & the Built Environment
10. Public Health Emergency: Legal Preparedness & Response

VACCINE MANDATES: CURRENT LITIGATION

B.W.C. v. WILLIAMS U.S. Court of Appeals, 8th Circuit, March 5, 2021

Parents of public-school children alleged Missouri's religious exemption from mandatory vaccination form was unconstitutional under the free exercise and equal protection clauses, objecting to a statement on the mandatory form advising 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 form was neutrally drafted and did not unfairly target religious individuals.

MACKLIN v. ARKANSAS DHS Arkansas Supreme Court, June 24, 2021

After a lower court denied a mother's request to prevent the Arkansas Department of Human Services (ADHS) from immunizing her daughter, despite the mother's objection, the mother appealed. The mother argued that ADHS (the child's temporary custodian) could not vaccinate the child over her religious or philosophical objections. The court held that the "legislature has recognized that the State's interest in promoting the health and safety of its children must yield to the rights of parents to make fundamental decisions in the lives of their offspring."

VACCINE MANDATES: CURRENT LITIGATION

NORWEGIAN CRUISE LINES HOLDINGS, LTD. v. RIVKEES, U.S. District Court, Florida, August 8, 2021

The court temporarily halted application of Florida's law banning COVID-19 vaccination "passports." Norwegian Cruise Lines Holdings and its subsidiaries planned to resume passenger cruises after 15 months of suspended services due to the pandemic.

Norwegian argued that a newly-enacted Florida law operated as an impermissible restriction on their First Amendment freedom of speech, an unjustifiable restriction of interstate commerce, and was preempted by the CDC's Conditional Sailing Order. The court agreed with the plaintiffs, finding they were likely to prevail on their claims that the law impermissibly restricts content-based free speech and likely violates the dormant Commerce Clause by imposing significant burdens on interstate commerce that would drastically impact the plaintiffs' ability to operate cruise lines.

VACCINE MANDATES: CURRENT LITIGATION

BRIDGES v. HOUSTON METHODIST HOSPITAL U.S. District Court, Texas, June 12, 2021

A federal court rejected arguments that the hospital's COVID-19 employee vaccination mandate was unlawful. Texas law only protects employees against termination for refusing to commit criminal acts, and employees were not coerced and could still refuse vaccination. Further, language in the Federal Food, Drug, and Cosmetic Act does not prevent employer-based mandates.

KLAASSEN v. TRUSTEES OF INDIANA UNIVERSITY U.S. Court of Appeals, 7th Circuit, August 2, 2021

A 7th Circuit panel denied a request to block a school policy requiring COVID-19 vaccinations for all students, faculty, and staff prior to returning to school unless exempt for religious/medical reasons. Students claimed the policy violated the Fourteenth Amendment's due process clause. Relying on the Supreme Court's 1905 *Jacobson v. Massachusetts* decision, the 7th Circuit upheld the policy. This case was even easier than *Jacobson*, because in that matter there were no exemptions and the vaccination requirement extended to the entire adult population. Here, students could seek an exemption or withdraw from the University.

What's next in vaccination litigation?

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REPRODUCTIVE JUSTICE: ACCESS TO ABORTION: *PRE-VIABILITY BANS*

UNITED STATES v. TEXAS, U.S. District Court for the W. District of Texas, October 6, 2021

The federal district court issued an order preventing enforcement of S.B. 8, which prohibits abortion if cardiac activity has been detected in the embryo, with no exceptions for rape or fetal abnormalities. The Texas law allows anyone to bring a civil case against an individual who performs an abortion or who aids an individual in securing an abortion, with at least $10,000 in damages available to successful plaintiffs. This preliminary order would remain in effect while the case proceeds to full resolution.

But wait . . . **U.S. Court of Appeals for the 5th Circuit, October 14, 2021**

The federal appellate court reversed the district court so that the Texas law will remain in effect while the case proceeds.

But wait . . . **DOJ Emergency Petition to SCOTUS, October 15, 2021**

The U.S. Department of Justice is seeking an order from SCOTUS that would prohibit enforcement of the Texas law while the case proceeds.

What is SCOTUS waiting for?

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REPRODUCTIVE JUSTICE: ACCESS TO ABORTION: *PRE-VIABILITY BANS*

DOBBS v. JACKSON WOMEN'S HEALTH ORGANIZATION Pending in SCOTUS (5th Circuit)

Mississippi passed a law prohibiting abortions after 15 weeks gestational age with exception for medical emergencies and fetal abnormalities. SCOTUS has not considered a pre-viability abortion ban since deciding *Roe v. Wade* in 1973.

Fifth Circuit Court of Appeals upheld the federal district court decision finding the Mississippi law unconstitutional and prohibiting enforcement of the law.

SCOTUS will hear arguments December 1, 2021

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REPRODUCTIVE JUSTICE: ACCESS TO ABORTION: MEDICATION ACCESS

FOOD AND DRUG ADMINISTRATION v. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS SCOTUS Shadow Docket, January 12, 2021

Federal district court issued *nationwide injunction** prohibiting the FDA from enforcing a requirement that a pill used to induce abortion in the early stages of pregnancy must be ***picked up in person from a health care provider***. The court found that enforcing the requirement ***during the pandemic*** constitutes an undue burden in violation of existing SCOTUS case law. The Fourth Circuit Court of Appeals refused to stay the injunction pending appeal so the law could not be enforced.

SCOTUS stayed the injunction, allowing the FDA to enforce the in-person pick-up requirement during the pandemic.

But then . . . ***President Biden took office and FDA lifted the in-person visit requirement during the pandemic and may soon lift the in-person requirement (decision expected by end of 2021).***

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REPRODUCTIVE JUSTICE: ACCESS TO ABORTION: *DOWN SYNDROME*

PRE-TERM CLEVELAND v. McCLOUD U.S. Court of Appeals for the 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 law will remain in effect while the case proceeds.

» Note: Different outcome with similar TN law in *Memphis Center for Reproductive Health v. Slatery* September 10, 2021

LITTLE ROCK FAMILY PLANNING SERVICES v. RUTLEDGE U.S. Court of Appeals for the 8th Circuit, January 5, 2021

The 8th Circuit Court of Appeals issued an order preventing enforcement of an Arkansas law that would prohibit a provider from performing an abortion with knowledge that the pregnant person is seeking the abortion "solely on the basis" that the fetus has Down syndrome, with exceptions for maternal life and health or if the pregnancy is the result of rape or incest.

***This creates a "circuit split" that may make the case attractive to SCOTUS. There is a Petition for Certiorari to SCOTUS in* Little Rock Family Planning.**

REPRODUCTIVE JUSTICE: *OTHER CASES*

PLANNED PARENTHOOD OF THE HEARTLAND v. REYNOLDS Iowa Supreme Court, June 30, 2021

Planned Parenthood of the Heartland challenged an Iowa statute excluding abortion providers from receiving federal education grant program funds aimed at preventing teenage pregnancies and reducing transmission of sexually transmitted infections. Iowa Supreme Court upheld the law.

SLATTERY v. CUOMO U.S. District Court, District of New York, March 31, 2021

The federal district court upheld 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 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. Pending appeal in the U.S. Court of Appeals for the Second Circuit.

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PUBLIC HEALTH POWERS: FEDERAL AND STATE

STATE OF FLORIDA V. BECERRA Federal District Court, Florida, June 18, 2021

A Florida federal court prevented enforcement of the CDC's "conditional sailing order," issued with the purpose of safely reopening the cruise industry. 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."

ALABAMA ASSOCIATION OF REALTORS V. DHHS SCOTUS, August 26, 2021

The U.S. Supreme Court blocked extension of CDC's eviction moratorium set to expire on October 3, 2021, finding the CDC clearly exceeded its authority under the Public Health Service Act. Three dissenting Justices (Kagan, Sotomayor, Breyer) argued that it is far from clear that CDC lacks authority to issue the moratorium as the Act permits CDC to adopt significant measures like quarantines, which impose greater restrictions on personal rights and state powers than the moratorium does.

PUBLIC HEALTH POWERS: FEDERAL AND STATE

ARIZONA SCHOOL BOARDS ASSOCIATION INC. v. ARIZONA

AZ Superior Court, Aug. 27, 2021

Several plaintiffs sued the state of Arizona, alleging that four recently passed budget reconciliation bills violated the title and single subject rules of the Arizona Constitution, and that one additionally violated the state constitution's equal protection clause. The single subject rule generally requires that legislative bills encompass only a single subject, while the title rule requires that the title of a bill give notice of its contents. Though passed as budget reconciliation bills, the bills in question also limited schools' abilities to implement mask mandates and other COVID-19 public health measures. Arizona's Superior Court found the bills unconstitutional.

The court's decision is being appealed.

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ACCESS TO MEDICATION/MEDICAL CARE

CVS PHARMACY v. DOE Pending in SCOTUS (9th Circuit)

Individuals living with HIV allege discriminatory impact of an employer-sponsored health plan that only covers certain HIV medications at specialty pharmacies or through the mail, making access difficult or expensive (if go to other pharmacy for in-person access). SCOTUS will determine whether the ACA or Rehabilitation Act allow disparate-impact claims and whether such a claim can be made based on a facially neutral policy.

ROSEBUD SIOUX TRIBE v. UNITED STATES U.S. Court of Appeals for the 8th Circuit, August 25, 2021

Federally recognized Rosebud Sioux Tribe sued the United States, seeking a declaratory judgment defining the Government's duty owed to the Tribe. The court found that the Government owes the Tribe "competent physician-led healthcare" based on the Treaty of Fort Laramie of 1868, which was further buttressed by the Snyder Act and Indian Health Care Improvement Act.

MANEY v. BROWN U.S. District Court, District of Oregon, February 2, 2021

Federal district court ordered that Oregon inmates be provided access to COVID vaccination as quickly as possible.

PREP ACT IMMUNITY CASES

GARCIA V. WELLTOWER OPCO GROUP LLC Federal Court, 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, neglect, and wrongful death. 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.

PREP ACT IMMUNITY CASES

THOMAS V. CENTURY VILLA INC. Federal Court, California, June 10, 2021

Plaintiffs alleged that a nursing home caring for a patient, who later died, was negligent in failing to protect him from COVID-19 and other illnesses. The nursing home claimed that the Public Readiness and Emergency Preparedness (PREP) Act, subsequent amendments, and an Advisory Opinion provided by the federal Department of Health and Human Services after the declaration of the public health emergency blocked the state law claim.

A California federal court disagreed, concluding that the PREP Act likely did not apply. The PREP Act governs the use of emergency countermeasures, which plaintiffs' claims did not implicate. Even if the PREP Act applied, it would not completely preclude a state law claim.

Where do these decisions leave us?

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CANNABIS CASES

HAWKINS v. WATSON Mississippi Supreme Court, May 14, 2021

Mississippi Supreme Court overturned a voter initiative legalizing medical cannabis in the State. The initiative amended the state constitution and passed with 68% of the vote but was challenged by the Mayor of Madison, MS. State law governing constitutional amendments had not been updated since the state lost a congressional district, creating a conundrum for how a constitutional amendment could be brought by initiative. The decision puts in jeopardy 20 years of initiatives.

APPEAL OF PANAGGIO New Hampshire Supreme Court, March 2, 2021

New Hampshire Supreme Court held that federal law did not preempt an order of the state's compensation appeals board requiring the insurer to reimburse for medical cannabis. Federal preemption did not exist because (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.

Be on the lookout for the inaugural issue of the Network's Cannabis Quarterly!

VOTING RIGHTS: SCOTUS WEIGHS IN

BRNOVICH v. DEMOCRATIC NATIONAL COMMITTEE SCOTUS, July 1, 2021

A 6-3 opinion issued by the U.S. Supreme Court rejected challenges under Section 2 of the Voting Rights Act of 1965 against Arizona state voting rules rejecting certain ballots and means of ballot collection.

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.

Potential public health impacts of this case are clear: voting influences structural determinants of health by shaping governmental systems and resulting policies affecting individuals. The recently-published Health & Democracy Index clearly illustrates that more voting access leads to better health outcomes.

VOTING RIGHTS: SCOTUS WEIGHS IN

The Court explained that the VRA requires voting to be "equally open."

The precinct-based requirement imposed "modest burdens" and its disparate impact was "small" as measured against state interests in establishing and maintaining precinct-based voting.

The ballot-collecting restriction 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.

DISSENT

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."

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SECOND AMENDMENT CASES

NEW YORK STATE RIFLE AND PISTOL ASSOC. v. BRUEN Pending in SCOTUS (2nd Circuit)

New York requires a person to show a special need for self-protection to receive an unrestricted license to carry a *concealed* firearm. After the State rejected their concealed-carry applications based on failure to show "proper cause," plaintiffs sued claiming the law violates the Second Amendment. The Second Circuit Court of Appeals found the New York law constitutional.

YOUNG v. HAWAI'I U.S. Court of Appeals, 9th Circuit, March 24, 2021

Hawai'i 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." Plaintiff failed to demonstrate a specific "urgency or need" to open carry beyond a general desire to engage in self-defense and was denied open carry. Upholding the Hawai'i law, the Ninth Circuit found that the 2nd Amendment does not guarantee a right to openly carry firearms in public.

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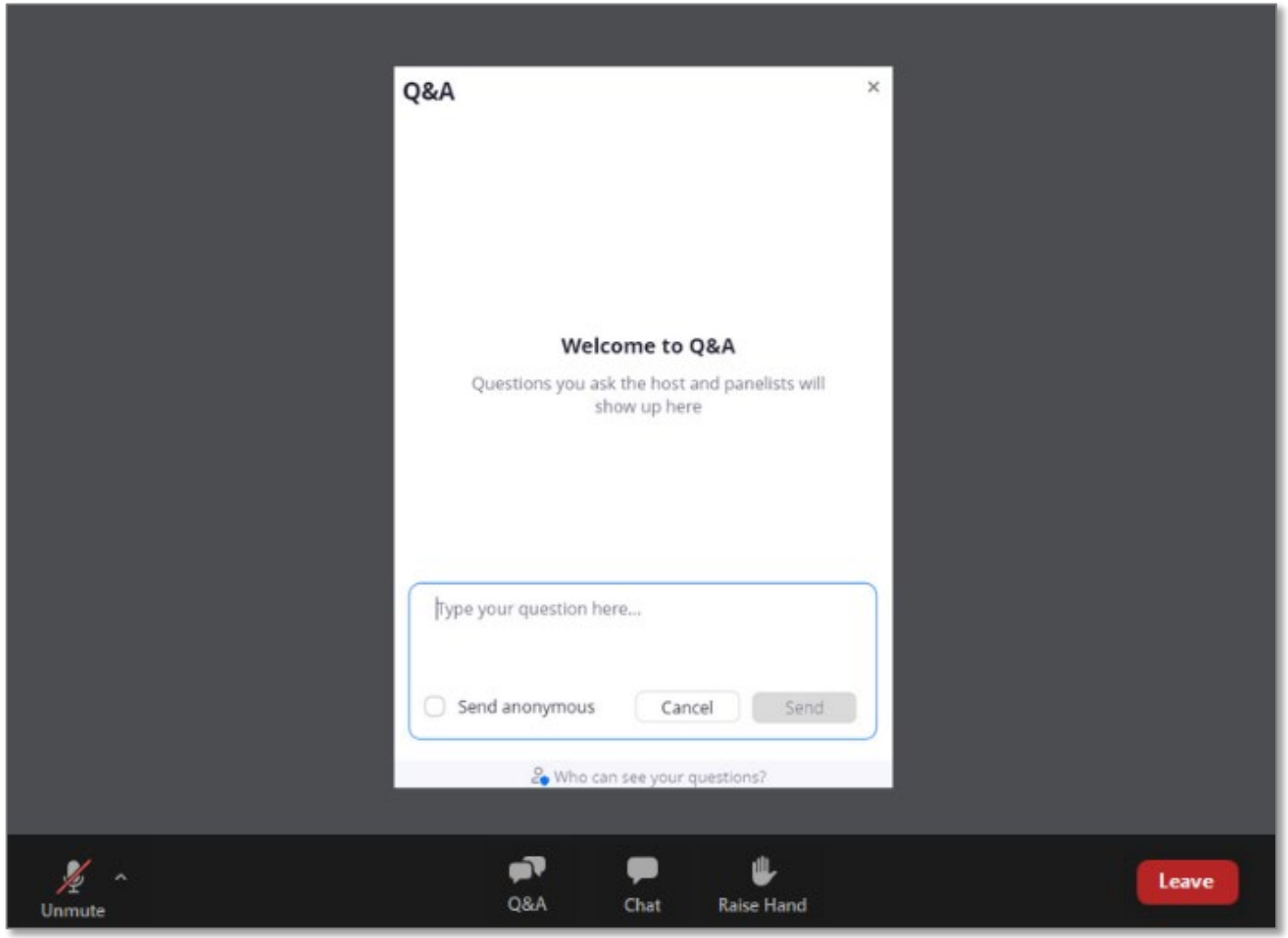

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Climate Change, Health Equity, and Public Health Law Learning and Practice Collaborative Informational Webinar

1:00 – 2:00 p.m. EST | November 16, 2021

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