The Network for Public Health Law

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JUDICIAL TRENDS IN PUBLIC HEALTH – CASE ABSTRACTS 2022

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 2022 within 11 key topics (adapted from JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL, 4TH ED. (2021)) below:

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1. SOURCE & SCOPE OF PUBLIC HEALTH LEGAL POWERS [16 cases]

Adventist Health Systems/SunBelt, Inc., et al. v. U.S. Department of Health and Human Services, et al. (U.S. Court of Appeals, 8th Cir., Nov. 8, 2021): A federal court denied plaintiffs' request to stop an Organ Procurement and Transplant Network (OPTN) rule change from taking effect because the plaintiffs could not show that the HHS-sponsored entity tasked with establishing procedures for organ transplants violated principles of federal law in adopting the rule. Plaintiffs, a group of hospitals and a kidney waitlist patient, challenged an OPTN rule changing how available kidneys are allocated to waitlist patients. In part, plaintiffs alleged that OPTN acted arbitrarily and capriciously by abandoning the preexisting rule for the new rule without any consideration of the merits of the existing rule. The court disagreed, finding that the OPTN properly abandoned the preexisting rule based on long-standing and widespread criticism and in a reasonable effort to improve kidney transplant procedures. Read the full decision here.

Mississippi v. Tennessee, et al. (U.S. Supreme Court, Nov. 22, 2021): In a unanimous decision, the Supreme Court dismissed a claim by Mississippi seeking money damages against Tennessee for pumping water out of an aquifer that runs under the land of both states. The Court decided that the water in the aquifer should be apportioned equitably between the states because although states typically have complete control over waters contained within their borders, the same is not true regarding waters that flow between states. While this method of apportionment is often used to decide disputes over water between states, this decision marks the first time the

rule was applied to water in an aquifer, an area of groundwater held in rocks. The Court did not determine what an equitable apportionment of the water would be because Mississippi asked only for money damages and opposed apportionment. Read the full decision here.

National Federation of Independent Business v. Department of Labor and Ohio v. Department of Labor (U.S. Supreme Court, Jan. 13, 2022): On request by various states, businesses, and other organizations, the U.S. Supreme Court temporarily halted the Occupational Safety and Health Administration (OSHA) emergency temporary standard mandating COVID-19 vaccination or testing in many U.S. workplaces. The OSHA rule required that employers with 100 or more employees, regardless of industry, implement a mandatory COVID-19 vaccination program in the workplace, or opt for a weekly testing alternative. The Court, stating that the OSHA rule "is no 'everyday exercise of federal power,'" but "instead a significant encroachment into the lives—and health—of a vast number of employees," concluded that the Secretary of Labor, via the Occupational Safety and Health Act, lacked the authority to issue the standard. Specifically, the Secretary, through OSHA, is granted authority over occupational safety and work-related dangers, "not broad public health measures" which lack a causal relationship to one's occupation. Justices Breyer, Sotomayor, and Kagan, in a strong dissent, explained that the majority had placed limitations on OSHA's authority that were nowhere to be found in statute. Read the full decision here.

Biden v. Missouri and Becerra v. Louisiana (U.S. Supreme Court, Jan. 13, 2022): The U.S. Supreme Court allowed a Centers for Medicare and Medicaid Services (CMS) rule to take effect which requires facilities participating in Medicare and Medicaid to ensure that their staff receive COVID-19 vaccinations, subject to religious or medical exemptions. The Secretary of Health and Human Services implemented the rule in part because employees in such contexts often work with higher risk elderly populations, some prospective patients have avoided receiving care out of fear of contracting COVID-19, and staffing shortages disrupt work. The Supreme Court concluded that the Secretary did not exceed his authority when issuing this rule, since it relates to his duty to "impose conditions on the receipt of Medicaid and Medicare funds that '[he] finds necessary in the interest of the health and safety of individuals who are furnished services.'" Additionally, the rule was not "arbitrary and capricious," and it was not promulgated with inappropriate speed via emergency rulemaking processes. The Court thereby temporarily blocked lower court judgments which had halted the rule. Justices Thomas, Alito, Gorsuch, and Barrett dissented, arguing CMS lacked the authority to impose the vaccine mandate. Read the full decision here.

Arizona School Boards Association, Inc. v. Arizona (Ariz. Sup. Ct., Jan. 6, 2022): Plaintiffs challenged four Arizona legislative budget reconciliation bills containing substantive provisions outlawing various COVID-19 intervention measures. The lower court found that the bills violated the Arizona state constitution's title requirement and single subject rule. The single subject limits each bill to addressing only one topic, while the title requirement stands for the proposition that "a reasonable person [c]ould be expected to know what an act deals with based on its title." After the State of Arizona appealed, the Arizona Supreme Court affirmed the lower court's decision. Specifically, the challenged bills violated the title requirement because the bills' titles referenced appropriations or budgetary concerns and did not indicate the presence of substantive COVID-19 measures therein. Additionally, one of the bills was found fully void as violating the single subject rule because it dealt with several varied subjects beyond the budget, including elections, emergency powers, and COVID-19. Read the full decision here.

Western Growers Association v. Occupational Safety and Health Standards Board (Cal. Ct. App., 1st Dist., Dec. 21, 2021): Plaintiff employers alleged the California Occupational Safety and

Health Standards Board exceeded its statutory authority in enacting a COVID-19 emergency temporary standard. The standard required COVID-19-exposed workers to be excluded from workplaces for 10 days while receiving "pay, benefits, and seniority." The district court denied the employers' request to halt enforcement of the temporary standard, finding the "public interest in curbing the spread of COVID-19 weighed 'heavily' in favor of ongoing enforcement." Plaintiff employers appealed, and the appellate court affirmed the lower court's holding, finding the district court proceeded appropriately, that the Board did not exceed its statutory authority, and that the Board's decision to issue the temporary standard deserved deference. Moreover, the Board's findings specifically outlined "the emergency and the need for immediate action." Read the full decision here.

State of Louisiana v. Biden (U.S. Court of Appeals, 5th Cir., Mar. 16, 2022): The Fifth Circuit unanimously reinstated a Biden administration climate policy that had been blocked by a district court, holding that the ten southern states challenging the policy were unlikely to succeed against the government and that they lacked standing to challenge the policy because their claimed injury is only "hypothetical." At issue is a set of standards for calculating the social costs of greenhouse gas emissions that administrative agencies must use in the cost-benefit analyses required for major regulatory decisions and actions. The challenging states claimed the additional cost estimates could increase their regulatory burdens, but the court reasoned that the estimates would realistically have little to no effect on states, calling their concerns merely "generalized grievances" that did not rise to the level of injury required to sue. Read the full decision here.

Bentonville School District v. Sitton (Supreme Court of Arkansas, Apr. 14, 2022): The Arkansas Supreme Court reversed an order blocking a school district's mask mandate, holding that state law gave schools broad authority to establish internal policies. The school board had approved a mask mandate requiring staff and students age 3 and older to wear masks indoors and in school vehicles, with some exceptions. Parents challenging the policy argued it violated their fundamental liberty interests in the care, custody, and maintenance of their children under the Arkansas constitution. The state Supreme Court held that the masking policy did not infringe on the parents' constitutional rights, referencing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld the power of states to mandate vaccination. The court also held that the policy was a valid use of the school board's powers under state law. Read the full decision here.

Health Freedom Defense Fund, Inc., et al. v. Biden, et al. (U.S. District Court, M.D. Fla., Apr. 18, 2022): A federal judge struck down the Centers for Disease Control and Prevention (CDC) mask mandate for public transportation as unlawful, concluding the CDC lacks authority to require face coverings on public transportation. On February 3, 2021, the CDC issued an order requiring face masks on public transportation under the authority of the Public Health Services Act of 1944 (PHSA). CDC argued that requiring masks on public transportation falls within the PHSA's definition of sanitation, a subject over which CDC has regulatory power. Rejecting CDC's argument, the court found that sanitation is limited to cleaning measures for property and not humans. Although masks reduce the spread of COVID-19 droplets, mask use does not result in cleansing property; thus, the mandate does not fall within CDC power to regulate sanitation. The court held that the mask mandate exceeds CDC's statutory authority under the PHSA. CDC appealed the decision to the Eleventh Circuit. Read the full decision here.

In re: Greg Abbott et al. (Texas Supreme Court, May 13, 2022): The Texas Supreme Court reversed an order forbidding the Texas Department of Family and Protective Services (DFPS) from investigating parents of transgender children for potential child abuse. The Texas attorney general

issued an opinion in February 2022 concluding that "sex change procedures and treatments" constituted child abuse under Texas law and directed DFPS to investigate them as such. Parents of a child with gender dysphoria and a doctor who treats transgender children sued, arguing the opinion and subsequent DFPS media statements improperly announced a new agency rule without complying with administrative requirements under Texas law. A state court temporarily blocked the directive's enforcement, which an appellate court affirmed. The Texas Supreme Court reversed, holding that DFPS has discretion to investigate reports of child abuse but that the attorney general does not have the authority to order DFPS to take action against parents of transgender children. Read the full decision here.

Arizona v. Yellen (U.S. Court of Appeals, 9th Circuit, May 19, 2022): The Ninth Circuit Court of Appeals held that Arizona has standing to challenge the American Rescue Plan Act (ARPA), a federal pandemic response package. Arizona challenged ARPA's "tax mandate" barring states from "directly or indirectly" using ARPA aid funds to offset state tax revenue. The state attorney general argued that ARPA was unconstitutionally coercive and violated the Spending Clause and the Tenth Amendment, asking a federal district court to block the tax provision. The court dismissed the case, finding that Arizona had not demonstrated harm and thus did not have standing to challenge the law. The Ninth Circuit reversed, holding that Arizona has standing because of the "realistic danger" that ARPA's enforcement would require the state to return ARPA funds, creating a concrete injury for standing purposes. Further, states generally have authority to set their own tax policy and have an "interest in being free from coercion impacting" that policy. Read the full decision here.

West Virginia, et al. v. EPA, et al. (U.S. Supreme Court, June 30, 2022): In response to a challenge brought by members of the coal industry and several states, led by West Virginia, the Supreme Court struck down an Obama-era Environmental Protection Agency (EPA) rule allowing states to adopt regulations promoting a transition to clean energy sources, concluding that the rule exceeded EPA's statutory authority. The majority reasoned that a widespread transition to clean energy would significantly impact the economy, not just the energy producers directly targeted, and that agency rules with such large-scale economic impact cannot be based on the kind of "vague" or "obscure" Congressional grant of authority that the EPA relied upon. The dissent argued instead that Congress used broad language intentionally, to allow EPA to appropriately respond to new and significant issues. Read the full decision here.

American Hospital Association, et al. v. Becerra (U.S. Supreme Court, June 15, 2022): In a unanimous decision, the Supreme Court invalidated the Department of Health and Human Services' (HHS) recent cuts in payments for prescriptions to hospitals serving communities with low incomes (340B hospitals). Under the Medicare statute, HHS must reimburse hospitals for outpatient prescriptions based on either a survey of hospitals' costs in acquiring the prescriptions or the average sale price of the prescriptions. The first approach offers some flexibility which the second, according to the Court, does not: if HHS bases reimbursements off a cost survey, it may vary reimbursement rates between groups of hospitals. However, HHS did not collect data or conduct a survey before cutting reimbursement rates by $1.6 billion in 2018 and 2019. The Court found HHS did not have discretion under the statute to vary reimbursement rates for certain hospitals without such a survey, and thus found the cuts impermissible. The Court did not dictate remedies, or explicitly state how the decision would affect cuts in the years following 2019. Read the full decision here.

Texas v. Becerra (N.D. Tex., Aug. 23, 2022): A federal court in Texas temporarily blocked enforcement, in Texas, of a U.S. Department of Health and Human Services (HHS) guidance asserting that, regardless of state law, hospital emergency departments may be required to perform abortion procedures under certain circumstances pursuant to the federal Emergency Medical

Treatment and Active Labor Act (EMTALA). EMTALA requires hospitals with emergency departments that receive Medicare funding to provide emergency stabilizing care, which may include abortion services if necessary to stabilize a pregnant individual's emergent medical condition. Texas challenged the guidance, arguing that it infringed on state rights. In preliminarily blocking the guidance in Texas, the court concluded that (1) HHS likely exceeded its statutory authority in promulgating the guidance, which impermissibly construed EMTALA; and (2) under the Medicare Act, HHS was required to hold a notice-and-comment period before issuing the guidance. Read the full decision here.

Gripum, LLC v. U.S. Food and Drug Administration (U.S. Court of Appeals, 7th Cir., Aug. 29, 2022): Reviewing an administrative decision by the Food and Drug Administration (FDA) according to the Administrative Procedure Act, the U.S. Court of Appeals, Seventh Circuit, held that the agency did not act in an arbitrary or unreasonable manner in issuing a marketing denial order that prevented Gripum from selling hundreds of flavored liquids for use in e-cigarette devices. The court agreed with the FDA's finding that the public health benefits of the flavored liquid products were too speculative to outweigh the health risks to youth who would use them, and upheld FDA's determination. Read the full decision here.

Texas v. U.S. (U.S. Court of Appeals, 5th Cir., Oct. 5, 2022): Multiple states, led by Texas, sued the Department of Homeland Security (DHS), arguing that the Deferred Action for Childhood Arrivals (DACA) program, which protects from deportation undocumented immigrants brought to the U.S. as children, violates the Administrative Procedures Act (APA). The Fifth Circuit held that DACA was not a statement of general policy, as argued by DHS, but grants significant rights and obligations, subjecting it to APA requirements. The court then found DACA violates both substantive and procedural APA requirements because DHS did not follow a proper notice and comment period for the rule and because the rule is directly opposed to Congress' comprehensive statutory scheme of immigration laws. The Court sent the case back to the district court to determine whether new APA-compliant regulations change its findings. Read the full decision here.

2. CONSTITUTIONAL RIGHTS & THE PUBLIC'S HEALTH [14 cases]

Whole Woman's Health v. Jackson (U.S. Supreme Court, Dec. 10, 2021): The Supreme Court allowed private abortion providers in Texas to challenge Texas's restrictive abortion law, SB8, but reasoned that the suit could not proceed against state court officers or the Texas Attorney General, allowing it to proceed only against state licensing officials. SB8, the bill in question, incentivized private citizens with enforcing a ban on abortions performed after fetal heartbeat detection. The law awards plaintiffs a minimum of $10,000 per successful lawsuit against a broad range of persons involved with post-fetal heartbeat abortions (including persons providing transportation to and from abortion clinics, or persons providing funding). SB8 attempted to sidestep judicial review by placing enforcement power in the hands of private citizens, rather than the state attorney general, as courts can generally block *governmental actors*, but not *the public at large*, from enforcing unconstitutional laws. The Court, in assessing challenges filed by abortion providers, reasoned that no suit could proceed against state court officers or against the Texas Attorney General, as the attorney general has no "enforcement" power under the law, and principles of sovereign immunity protect state court officers from being sued in federal court. However, the Court allowed the lawsuit to proceed against Texas state licensing officials, who can penalize or discipline state licensees (e.g., physicians, etc.) for violation of Texas Health & Safety Code (which includes SB8). Thus, the Court reasoned, state licensing officials retain some enforcement power under the law and can be prevented from seeking to enforce it. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan dissented in part, arguing that the suit should be allowed to proceed against the Texas Attorney General and state court officers. The dissenters reasoned first that the Texas Attorney General holds the same enforcement authority as state licensing officials and second that the Texas legislature's attempts through SB8 to skirt judicial review sufficiently connected court officials with enforcement powers to allow the suit to proceed. Read the full Opinion here.

Velicky v. The Copycat Building, LLC, and Walke v. The Copycat Building, LLC (consolidated) (Court of Appeals of Maryland, Nov. 29, 2021): Maryland's highest court declined to eliminate a landlord's right to seek repossession of their property upon expiration of a lease solely because the landlord is unlicensed. State law requires landlords to be licensed to ensure tenant health and safety. Although licensed landlords may take legal action to seek unpaid rent or for damages to property by renters, the Maryland Court of Appeals has held that *unlicensed* landlords may not use certain statutory ejectment laws to obtain these kinds of remedies in court. Maryland law clearly allows licensed landlords to regain their property when a tenant wrongfully remains on the property after expiration of their lease. The renters argued that an unlicensed landlord should not be permitted to request that relief from a court, much like the limit on statutory relief for unlicensed landlords. The court refused to apply the same doctrine to prevent an unlicensed landlord from seeking to remove tenants from the property at the end of a lease because doing so would interfere with the landlord's property rights and unnecessarily alter the legislatively determined balance between the rights of landlords and tenants. Read the full decision here.

Burcham v. City of Los Angeles (U.S. District Court, C.D. Cal., Jan. 27, 2022): City police department employees brought an action against the city, mayor, police chief, and city administrator alleging that a city ordinance requiring employees to disclose their COVID-19 vaccination status or

undergo testing resulted in numerous constitutional violations, including arguments pursuant to the Fourth Amendment, right to privacy, substantive due process, Title VII of the Civil Rights Act, and Fair Employment and Housing Act religious protections violations. Plaintiffs sought to halt the ordinance's enforcement, while Defendants moved to dismiss. The district court upheld the ordinance and granted Defendants' motion to dismiss, finding that the testing requirement constituted a reasonable special-needs search for Fourth Amendment purposes, did not violate employees' right to privacy, was rationally related to the city's legitimate interest in preventing the spread of COVID-19, and was not discriminatory. Read the full decision here.

Whole Woman's Health v. Jackson (Supreme Court of Texas, Mar. 11, 2022): After the U.S. Supreme Court rejected most challenges to Texas' novel and restrictive abortion law, SB8, Texas's Supreme Court rejected remaining challenges against state licensing officials. Generally, courts block unconstitutional restrictions by preventing state actors from enforcing them. However, SB8, which enabled private citizens to enforce a ban on abortions performed after fetal heartbeat detection, was specifically drafted to avoid state enforcement. In December 2021, the U.S. Supreme Court dismissed challenges against Texas's Attorney General and state court clerks and judges on the basis of sovereign immunity and a lack of enforcement power held by these individuals. The Court allowed the suit to proceed against Texas licensing officials, who can discipline licensees that act contrary to Texas state law. In this decision, the Texas Supreme Court concluded the challenges against licensing officials could not proceed, because the "Texas law does not authorize the state-agency executives to enforce the Act's requirements, either directly or indirectly." Private civil actions provide the "exclusive" means of enforcing the Act, pursuant to the Act's text, effectively curtailing pre-enforcement challenges of the law. Read the full decision here.

Pisano v. Mayo Clinic Florida (Florida Court of Appeals, First District, Jan. 27, 2022): A Florida court held that family members of a critically ill patient could not compel the Mayo Clinic to administer medical treatment contrary to the Clinic staff's "medical judgment and perceived ethical obligations" and the Clinic's approved course of treatment for COVID-19 related illnesses. The patient was in a medically induced coma for COVID-19 related illness when his wife and son, acting as his healthcare proxies, obtained a prescription from a doctor outside the Clinic for a course of treatment including ivermectin, melatonin, and other substances. The family claimed they could compel the Clinic to administer the treatment pursuant to the patient's rights to privacy and self-determination, and a state probate rule requiring expedited judicial decision-making in cases where patients wish to refuse medical treatment. While the legal principles the family put forward protect some medical decision-making, the court held that no precedent or legal principles allowed the family members to compel the Mayo Clinic to use a particular treatment against its institutional policies. Read the full decision here.

Plata v. Newsom (U.S. Court of Appeals, 9th Cir., Apr. 25, 2022): The Ninth Circuit vacated a lower court order requiring the California Department of Corrections and Rehabilitation (CDCR) to require vaccination of all staff who regularly access CDCR facilities. After CDCR implemented a policy requiring vaccination of staff working in healthcare settings, the district court ruled that CDCR acted with "deliberate indifference" to inmate health—in violation of the 8th Amendment—by failing to require all staff to be vaccinated. The appellate court disagreed, concluding that CDCR took "significant action" to address COVID-19 health and safety risks. The court noted a lack of evidence establishing that a total vaccine mandate would be more effective in mitigating the spread of COVID-19 than existing CDCR policies and held that a "decision to adopt an approach that is not the most medically efficacious does not itself establish deliberate indifference." Read the full decision here.

Bongo Productions, LLC, et al. v. Lawrence, et al. (U.S. District Court, M.D. Tenn., May 17, 2022): A federal judge struck, as unconstitutional compelled speech, a Tennessee law requiring businesses that allow transgender people to use the public restroom that matches their gender to post warning signs. A law that compels specific speech must be narrowly tailored to serve a compelling government interest, satisfying the strict scrutiny standard, though compelled speech that is commercial and purely factual is subject to a lower standard. The court rejected the State's argument that the warning signs are purely factual commercial communications instead finding the warning to contain "contestable ideological premises that [the plaintiffs] find highly objectionable" on a controversial subject. Applying the strict scrutiny standard, the court found that the State fell far short of articulating a compelling—or even a rational—basis. Read the full decision here.

N.Y. State Rifle & Pistol Ass'n v. Bruen (U.S. Supreme Court, June 23, 2022): In a 6-3 decision, the Supreme Court held that New York state handgun restrictions violated the Second and Fourteenth Amendments. New York state law required residents seeking a concealed handgun license to show "proper cause." State courts interpreted this language to require those seeking a license to demonstrate a special, non-generalized need for self-defense. Two men whose license applications were denied for failing to meet this standard challenged the law, alleging Second and Fourteenth Amendment violations. A federal district court dismissed the complaint. The Second Circuit Court of Appeals affirmed the dismissal, finding that the state law was substantially related to important government interests of public health and safety. Justice Clarence Thomas, writing for the majority, held that New York's legal requirement for license applicants to show a "special need for self-defense" violated the Constitution. Revamping Second Amendment tests for validating gun control measures, the Court held that gun restrictions "may not simply posit that the regulation promotes an important interest." Rather, they must be "consistent with this Nation's historical tradition" of the Second and Fourteenth Amendment protections of "an individual's right to carry a hand-gun for self-defense outside the home." Read the full Opinion here.

Dobbs v. Jackson Women's Health Organization (U.S. Supreme Court, June 24, 2022): The Supreme Court upheld Mississippi's 15-week abortion ban and dispensed with federal Constitutional protections of the right to abortions, overruling *Roe v. Wade* and *Planned Parenthood v. Casey*. Mississippi enacted the law in 2018 to ban abortions after 15 weeks' gestation except in cases of medical emergency or "severe fetal abnormality." Jackson Women's Health Organization, the only operating abortion provider in the state of Mississippi, challenged the statute. The federal district court and the 5th Circuit Court of Appeals invalidated the statute because abortion bans prior to viability, measured at roughly 24 weeks' gestation, were unconstitutional. The Supreme Court's Opinion, authored by Justice Samuel Alito, overruled *Roe* and *Casey*, concluding that the Constitution does not protect a right to abortion and returning to the states the ability to regulate abortions under a minimal "rational basis" standard. The Court reasoned that abortion is not explicitly mentioned in the Constitution nor rooted in the nation's history and traditions sufficient to establish it as a fundamental constitutional right. It further explained that five factors weighed in favor of overruling long-standing precedents in *Roe* and *Casey*: the nature of the Court's error, the quality of the reasoning, the workability of the Court's rule, the effect of the rule on other areas of the law, and the absence of reliance interests. Justices Breyer, Kagan, and Sotomayor proffered a strongly-worded Dissenting Opinion. Read the full Opinion here.

Planned Parenthood of the Heartland, Inc. v. Iowa (Supreme Court of Iowa, June 17, 2022): The Iowa Supreme Court held that the Iowa Constitution does not provide a fundamental right to abortion. State law required patients seeking abortion services to attend two appointments and wait 24 hours

after an ultrasound before receiving the procedure. Planned Parenthood challenged the law as unconstitutional under a 2018 Iowa Supreme Court case holding that abortion was a fundamental right under Iowa's Constitution. A state court agreed and dismissed the lawsuit. The Iowa Supreme Court, however, reversed its 2018 decision, holding that the Iowa Constitution is "not the source of a fundamental right to an abortion." The supreme court also held that the right to an abortion does not necessitate a strict scrutiny standard of review (e.g., requiring that a law be narrowly tailored to achieve a compelling government interest) but did not clarify which level of scrutiny was applicable. Read the full decision here.

Anthony Petro, et al. v. Matthew J. Platkin (Superior Court of New Jersey, Appellate Division, June 10, 2022): A state appellate court upheld the dismissal of a case challenging a New Jersey law allowing terminally ill patients to choose to end their lives with the assistance of medication and their physicians. Plaintiffs—a terminally ill man, a physician, and a pharmacist—claimed the law violates the New Jersey constitutional right to enjoy and defend life, the Free Exercise Clause of the U.S. Constitution, and several state and federal statutes. The trial court and appellate court agreed that the plaintiffs did not have standing to challenge the law because participation in medication-assisted dying is voluntary for both patients and doctors, so plaintiffs would not suffer harm if the law remains in effect. The court also found that the state constitutional right to enjoy and defend life does not apply to defending the lives of other people and that plaintiffs' free exercise of religion was not being infringed upon, again emphasizing the voluntary nature of the actions permitted by the law. Read the full decision here.

SisterSong Women of Color Reproductive Justice Collective, et al. v. Governor of the State of Georgia, et al. (U.S. Court of Appeals, 11th Cir., July 20, 2022): Following the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization,* which removed the federal constitutional protection of abortion, the 11th Circuit reinstated a previously invalidated Georgia law banning most abortions after detection of a heartbeat. The law changed the state's definition of "natural person" to include the unborn at any stage of conception and bans abortions after a heartbeat is detected, except in the case of miscarriage or ectopic pregnancy. The district court had prohibited enforcement of the law because it banned pre-viability abortions in violation of the previous constitutional standard set by *Roe v. Wade* and *Planned Parenthood v. Casey*. The lower court also found that the new definition of natural person was unconstitutionally vague because, in certain applications of the definition, it would be unclear whether the abortion providers challenging the law could be subject to criminal liability. The circuit court, applying *Dobbs'* analysis of abortion laws and clarifications of the standards for claims such as unconstitutional vagueness, overturned the district court's ruling and reinstated the Georgia law. Read the full decision here.

Dylan Brandt et al. v. Leslie Rutledge et al. (U.S. Court of Appeals, 8th Circuit, Aug. 25, 2022): In an Equal Protection-based sex discrimination challenge, the Eighth Circuit upheld a ruling preliminarily blocking an Arkansas law which banned certain health care procedures for transgender minors. Transgender youths, their parents, and doctors challenged the state law, arguing that it inhibited minors from accessing medical care as prescribed. The Eighth Circuit found that the law constituted unlawful sex discrimination because it specifically prohibited medical care access on the basis of sex determined at birth. Arkansas justified the law as protecting against "experimental" treatment and regulating medical ethics, but the court reasoned that these interests do not outweigh the law's discriminatory effect. The court also found sufficient evidence demonstrating that gender-affirming treatment is not experimental and conforms with recognized standards of care. Read the full decision here.

Green v. Miss USA LLC (U.S. Court of Appeals, 9th Cir., Nov. 2, 2022): A Ninth Circuit panel held that the First Amendment's protection against compelled speech applies to the Miss USA Pageant's

“natural born female” eligibility requirement. Plaintiff Anita Green, a transgender woman who competes in beauty pageants, applied to compete in the Miss USA pageant but was denied entry. She sued the organization, arguing that under Oregon law the Pageant discriminated unlawfully based on gender. The Pageant claimed that the forced inclusion of Green and other transgender contestants in the pageant would violate its free speech rights, and the appellate court agreed. The court reasoned that the organization has a right to express its ideal version of womanhood and that the decision to limit contestants to “naturally born women” conveys a message that is protected by free speech. Read the full decision here.

3. PREVENTING & TREATING COMMUNICABLE CONDITIONS [6 cases]

Doe v. San Diego Unified School District (U.S. Court of Appeals, 9th Cir., Dec. 4, 2021): A high school student challenged San Diego Unified School District's COVID-19 vaccination mandate, which requires students 16 years or older to be fully vaccinated against COVID-19 to participate in in-person learning and extracurricular activities. The policy does not provide for religious exemptions. The student sought to block enforcement of the policy as violating the Free Exercise Clause because she was not able to obtain an exemption for religious reasons. The 9th Circuit held that the mandate was likely neutral and generally applicable, rather than singling out religious practice, and because of this, the district court was likely correct in applying rational basis review, a level of review which most laws/requirements will satisfy. Accordingly, the Ninth Circuit allowed the mandate to stand, pending further litigation. Read the full decision here.

Hayes v. University Health Shreveport, LLC (La. Sup. Ct., Jan. 7, 2022): The Supreme Court of Louisiana upheld a private health provider's right to dismiss employees for failure to comply with vaccination mandate. Defendant medical centers imposed an employee COVID-19 vaccination requirement (with exceptions permitted for medical or religious reasons), noting that non-compliant employees could face disciplinary action including dismissal. Plaintiff employees sought to block the policy, arguing it was unlawful and violated rights to privacy and to refuse medical treatment. The Louisiana Supreme Court determined that because the plaintiffs were at-will employees, their employer was permitted to dismiss them for non-compliance with company policies, and, likewise, employees were able to leave employment at any time to seek new employment. Constitutional arguments concerning privacy additionally failed, as these provisions limit the actions of governmental actors, not private employers. Read the full decision here.

Together Employees, et al. v. Mass General Brigham, Inc. (U.S. Court of Appeals, 1st Cir., Apr. 27, 2022): The First Circuit allowed the defendant private hospital's COVID-19 vaccination mandate for employees to remain in place pending trial because the employees failed to demonstrate irreparable harm. Employees asserted as irreparable harm loss of income, loss of benefits, emotional distress, and chilled religious exercise. The court found that monetary damages could compensate for loss of income and benefits and emotional distress, making those reparable harms. Additionally, private actors, such as the hospital, are not subject to constitutional limitations under the Free Exercise Clause. The hospital did not violate Title VII of the Civil Rights Act, which prohibits religious discrimination in employment, because firing employees for refusing to get vaccinated does not require them to violate their religious beliefs; hence, there was no irreparable harm. Read the full decision here.

Valdez v. Grisham (U.S. Court of Appeals, 10th Cir., June 14, 2022): The Tenth Circuit Court of Appeals affirmed a district court decision leaving in place New Mexico's vaccine requirements for health care workers. A New Mexico nurse challenged a state public health order requiring health care workers at hospital and congregate care facilities to be vaccinated against COVID-19. The order permitted exemptions for medical and religious reasons. The nurse alleged that the public health order violated the U.S. Constitution's Equal Protection Clause and principles of substantive due process and requested that the order be blocked. A federal district court declined to block the order, finding that the nurse had not shown irreparable harm, and that public interest weighed against blocking the vaccination requirements. The Tenth Circuit agreed and held that the lower court did not abuse its discretion in finding that the nurse was not likely to succeed on the merits of her claims. Read the full decision here.

State of Texas v. San Antonio Independent School District et al. (Texas 4th Court of Appeals, July 27, 2022): A Texas appellate court affirmed a decision not to block San Antonio Independent School District's COVID-19 vaccine mandate, affirming that the policy is within the district's authority. In August 2021, Texas Governor Greg Abbott issued an executive order prohibiting government vaccine mandates, including for Texas public schools. The San Antonio Independent School District, which had announced mandatory COVID-19 vaccinations for teachers and staff, challenged the order. Texas argued that the order preempted the school district's internal vaccination policy under the Texas Disaster Act (TDA), which grants the governor overriding authority as the state's "commander-in-chief." The court held that TDA limits the governor's authority to state agencies, boards, and commissions and does not grant the governor authority to prohibit school districts from implementing their own health policies. Read the full decision here.

Daphne Jane Andre-Rodney, et al. v. Kathy Hochul, et al. (U.S. District Court, N.D. New York, Aug. 1, 2022): A New York district court dismissed the claims of New York State hospital security officers who alleged that a state mandate that they be fully vaccinated against COVID-19 violated their Fourteenth Amendment rights to equal protection and due process. The court held that the state mandate for hospital workers did not burden the officers' liberty interest in refusing unwanted medical treatment as it did not force officers to consent to vaccination, but rather conditioned their right to be employed at the hospitals on their vaccination status. The court found that while officers asserted a "general liberty interest" in refusing unwanted medical treatment, they did not show that such liberty interest was a fundamental right or broad enough to cover the right to refuse a vaccination requirement imposed in the public interest during a public health emergency pursuant to the state's police powers. Read the full decision here.

4. SOCIAL DISTANCING MEASURES [0 cases]

5. ADDRESSING CHRONIC CONDITIONS [4 cases]

Arc of Iowa v. Reynolds (U.S. Court of Appeals, 8th Cir., Jan. 25, 2022): Plaintiffs sought to block enforcement of an Iowa statute prohibiting mask requirements in schools. Plaintiffs alleged that the law placed children with disabilities at heightened risk of injury or death from COVID-19. The district court blocked the law, holding that the state law violated the federal Americans with Disabilities Act and the Rehabilitation Act. The 8th Circuit upheld the district court's decision in part because federal disability law requires reasonable accommodations for persons with disabilities, and mask requirements constitute these kinds of reasonable accommodations. Still, the 8th Circuit found the lower court's order "more broad[] then necessary," and returned the case to the lower court for a more tailored order prohibiting the defendants from preventing reasonable accommodations in schools and ensuring that schools provide reasonable accommodations for children with disabilities. Read the full decision here.

Doe 1, et al., v. Upper St. Clair School Dist., et al. (U.S. Court of Appeals, 3rd Cir., Jan. 23, 2022): The Third Circuit Court of Appeals ordered a school district to temporarily maintain its mask mandate pending allegations from parents of children with disabilities that the mask-optional policy is a violation of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973. The parents claim the policy forces students with disabilities to choose between an increased risk of contracting COVID-19 and attending less effective online classes. The District Court held that the parents likely did not have standing to challenge the policy because they were unlikely to be able to demonstrate actual injury; mere risk is insufficient. Additionally, the District Court held that the parents' request for a policy indefinitely mandating masks would likely not be a reasonable accommodation. Without a substantive opinion, the Third Circuit reversed the District Court, reinstating the mandate. Notably, in a separate case with a different judge presiding, the District Court sided with the parents and ordered the mandate to remain in place pending trial. The Third Circuit is likely to issue a more formal decision as this case progresses. Read the full District Court opinion here.

United States v. Bilodeau (U.S. Court of Appeals, 1st Cir., Jan. 26, 2022): The First Circuit affirmed the district court's judgment denying defendants' claims that the U.S. Department of Justice ("DOJ") misappropriated federal funds to prosecute medical marijuana business associates from Maine, who were accused of running an underground operation despite obtaining Maine marijuana business licenses. In response to the growing discrepancies between federal and state law, Congress enacted appropriations legislation prohibiting the DOJ from spending appropriated funds to prevent states from implementing medical marijuana laws. The appropriations rider placed a practical limit on federal prosecutors' ability to enforce the Controlled Substances Act with respect to certain conduct involving medical marijuana. The court explained that the DOJ "may not spend funds to bring prosecutions if doing so prevents a state from giving practical effects to its medical marijuana laws." Because the defendants engaged in cultivation, possession, and distribution activities that were clearly in violation of Maine law, the DOJ was not prohibited from using funds to prosecute the defendants. An overly strict interpretation of the rider would allow rogue marijuana operations and disincentivize businesses from abiding the state regulatory scheme. Read the full decision here.

Paine v. Ride-Away, Inc. (Supreme Court of New Hampshire, Jan. 14, 2022): The New Hampshire Supreme Court held that an employee who was legally prescribed therapeutic cannabis for his post-traumatic stress disorder (PTSD) could have been exempted from his employer's drug testing requirements as a reasonable accommodation for his disability. The court found that the lower court was erroneous in concluding that accommodating an employee's use of cannabis was facially unreasonable because cannabis remains illegal at the federal level. Importantly, the disability that

was being accommodated was PTSD, not cannabis use, and the employee was not requesting an accommodation to allow him to use cannabis while at work. Read the full decision here.

6. MITIGATING THE INCIDENCE & SEVERITY OF INJURIES & OTHER HARMS [11 cases]

Cargill v. Garland (U.S. Court of Appeals, 5th Cir., Dec. 14, 2021): The 5th Circuit affirmed a lower court decision upholding the federal Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) new rule classifying bump stocks as "machine guns" for purposes of the National Firearms Act. The plaintiff, challenging the rule, argued that it exceeded ATF's statutory authority and contradicted the plain language of the National Firearms Act. A federal district court rejected the plaintiff's claims. Agreeing with the lower court, the 5th Circuit explained that bump stocks qualify as machine guns because they "allow a shooter to shoot more than one shot by a single pull of the trigger." Furthermore, the 5th Circuit found that firearms with bump stocks shoot "automatically" for purposes of the statute. Accordingly, the 5th Circuit affirmed the lower court's decision, holding that bump stocks qualify as "machineguns" under the "best interpretation of the statute." Read the full decision here.

Guns Save Life, Inc. v. Ali (Supreme Court of Illinois, Oct. 21, 2021): The Supreme Court of Illinois held that Cook County's firearm and ammunition taxes are unconstitutional because the relationship between the tax classification and the use of the tax proceeds is not sufficiently tied to the county's purported objective of lessening gun violence. The county passed an ordinance imposing a tax of $25 per firearm, later adding a tax on ammunition. The county argued that the taxes helped pay for costs associated with gun violence, such as prosecution, defense, and adjudication of gun crimes. The court unanimously held that the county failed to demonstrate a sufficient link to justify imposing a burden on "a fundamental right protected by the Second Amendment." The court noted that the ordinance did not direct revenue generated from the tax to any fund specifically aimed at curbing gun violence. When a tax classification bears on a fundamental right, the government must show a closer tie between the tax and its intended funding. Read the full decision here.

FTC, et al. v. Vyera, et al. (U.S. District Court, S.D.N.Y., Jan. 14, 2022): A federal judge in New York banned former pharmaceutical executive, Martin Shkreli, from participating in the pharmaceutical industry and ordered him to pay $64.6 million for his involvement in dramatically increasing the price of a lifesaving drug and successfully blocking the development of generic versions. Shkreli increased the price of a drug that quickly treats life-threatening parasitic infections by 4,000%, from $17.50 to $750 per tablet, blocked generic drug manufacturers from accessing samples of the drug, and prevented the manufacturer of the drug's active ingredient from selling it to anyone else. The judge referred to this behavior as "flagrant and reckless." A generic version of the drug did not launch until 2020, when the Federal Trade Commission (FTC) and seven states went after Shkreli for violations of federal law governing competition and monopoly. The Chair of the FTC called the decision a warning to corporate executives that they could be held individually responsible for their anti-competitive actions. Read the full decision here.

Ace American Insurance Co., et al., v. Rite Aid Co., et al. (Del. Sup. Ct., Jan. 10, 2022): The Delaware Supreme Court ruled that an insurer is not required to provide coverage and defend Rite Aid in lawsuits brought by governmental entities alleging the pharmacy fueled the opioid epidemic. The court examined whether insurance policies that cover lawsuits for personal injury require insurers to defend policyholders against claims seeking only economic damages, not damages for personal injury. The court concluded that when insurance policies only cover personal injury claims, the insurer is not required to defend policyholders against lawsuits seeking only economic damages. For Rite Aid to have received coverage here, the lawsuit(s) against it had to have been brought by or on behalf of people injured by opioids. The court noted that "this claim is not directed to an individual injury but to a public health crisis[.]" Justice Vaughn dissented, arguing the policy language should be

interpreted broadly to cover all damages brought against Rite Aid for the care, loss of services, or death of an individual due to opioid addiction. Read the full decision here.

Barton v. City of Valdez (Alaska Sup. Ct., Jan. 21, 2022): After falling from a cliffside tire swing in an undeveloped section of a city park, plaintiff Barton sued the City of Valdez, alleging that although the swing had not been built by the city, the city was negligent in failing to remove it. Barton was confined to a wheelchair and partially paralyzed as a result of the fall. The superior court granted the city discretionary function immunity, a form of immunity meant to avoid court intrusion into certain planning-related policy decisions. The court dismissed the suit after finding the city did not have "a policy to inspect or remove hazards from undeveloped areas of parks." The Alaska Supreme Court reversed, finding that failure to remove the swing was not a policy planning decision, but an operational decision, and there were "no conceivable policy reasons for declining to remove the unauthorized swing—a human-made hazard that was not known, easily accessible, and simple to remove." Read the full decision here.

In re: National Prescription Opiate Litigation (U.S. District Court, Northern District of Ohio Eastern Division, Mar. 7, 2022): Pharmacy retailers CVS, Walgreens, and Walmart failed to convince a federal judge to override a jury verdict that found them liable for public nuisance for fueling the opioid crisis in two Ohio counties. The retailers claimed the evidence presented at trial was insufficient because the counties did not present evidence of specific instances of misconduct. The judge reasoned that evidence of specific instances was not necessary, because the counties presented evidence sufficient for a finding of liability, including aggregate evidence regarding the retailers' opioid dispensing and evidence regarding their failure to adequately safeguard against diversion of prescription opioids as required by law. The counties are expected to seek over $1 billion each from the retailers in proceedings in the coming months. Read the full decision here.

R.J. Reynolds Tobacco Co. v. Los Angeles (U.S. Court of Appeals, 9th Cir., Mar. 18, 2022): The Ninth Circuit held that a Los Angeles ban on menthol cigarette and other flavored tobacco product sales is valid because the Family Smoking Prevention and Tobacco Control Act (TCA), a federal law, allows it. Tobacco companies challenged the L.A. ban, arguing that it was completely preempted, or blocked, by federal regulations. However, the court upheld the L.A. ban. The court noted that the TCA "carefully balances" federal, state, local, and tribal powers by "carving out the federal government's sole authority to establish the standards for tobacco products," preserving local authorities to regulate the *sale* of tobacco products. The TCA therefore allows local authorities to regulate tobacco product sales, including imposing bans on select products. Read the full decision here.

Jones, et al. v. California Att'y General Rob Bonta, et al. (U.S. Court of Appeals, 9th Cir., May 11, 2022): A three-judge panel of the Ninth Circuit Court of Appeals held that a California law banning the sale of semiautomatic weapons to adults under the age of 21 violated the Second Amendment right to bear arms. Before 2020, California law allowed people ages 18-21 to buy semiautomatic weapons if they had a hunting license. Following a 2020 mass shooting at a synagogue, California lawmakers amended the law to fully ban sales for the age group. A federal district court in San Diego rejected challenges to the law, upholding it as a valid public safety measure. The Ninth Circuit panel reversed, holding that the Second Amendment "protects the rights of young adults to keep and bear arms, which includes the right to purchase them." Read the full decision here.

John D. Carson v. Monsanto Company (U.S. Court of Appeals, 11th Cir., July 12, 2022): The court found that a state "failure to warn" claim against Monsanto for chemicals in its Roundup weedkiller was not preempted by federal regulation of Roundup under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or the Environmental Protection Agency's (EPA) actions implementing

FIFRA. A man who had used Roundup for 30 years and was diagnosed with cancer filed state tort law claims against Monsanto, claiming the product's main ingredient, glyphosate, caused his cancer. The failure to warn claim alleges that Monsanto did not adequately warn customers about the risks of using Roundup. While EPA, through FIFRA, requires pesticides like Roundup to be registered and meet certain labeling requirements, EPA's registration process is not formal enough to carry the force of law and preempt a state action. Finally, while FIFRA is a federal statute which clearly carries the force of law, a Georgia "failure to warn" claim would simply enforce FIFRA provisions requiring product warnings, so the claim is not preempted. Read the full decision here.

Dearinger v. Eli Lilly and Co. (Supreme Court of Washington, June 2, 2022): The Washington Supreme Court held that drug companies are not obligated to warn patients about risks associated with medications directly marketed to consumers. Dearinger sued Eli Lilly in 2021, alleging he suffered a stroke after taking Cialis, which Eli Lilly markets directly to consumers. Dearinger argued that Eli Lilly failed to adequately warn consumers about risks of stroke associated with Cialis. Eli Lilly argued that manufacturers can satisfy their duty to warn by providing warnings to prescribing physicians, who then can provide that information to patients, under the "learned intermediary doctrine." The state supreme court rejected Dearinger's argument to carve out an exception for drugs marketed to consumers, holding that manufacturers meet obligations to warn patients as long as they have adequately warned physicians, who are better equipped to communicate risks to patients than drug manufacturers. Read the full decision here.

Acuity v. Masters Pharmaceutical, Inc. (Supreme Court of Ohio, Sept. 7, 2022): Ohio's highest court ruled via a 5-2 majority that Acuity, an insurer, did not have a duty to defend its insured, Masters Pharmaceutical (Masters), in lawsuits brought by West Virginia, Michigan, and Nevada localities for economic losses caused by the opioid epidemic. These lawsuits represent increasing state and local government challenges against opioid manufacturers, distributors, and retainers for allegedly misleading and dangerous practices that fueled the opioid epidemic. The insurance policy required Acuity to defend Masters against lawsuits alleging "damages because of bodily injury." Acuity argued that the damages alleged did not involve "bodily injury," falling outside the scope of policy coverage. The trial court agreed. The appeals court reversed, finding that economic damages alleged by the localities came about "because of physical harm from opioid addiction." The Supreme Court of Ohio reversed again and reinstated the trial court's decision, finding that "the governments' claims for increased public-service costs are untethered to any one person's bodily injury—but, rather, to the costs of the opioid epidemic generally" and that the lower court's interpretation of "damages because of bodily injury" was overbroad. Read the full decision here.

7. PUBLIC HEALTH INFORMATION MANAGEMENT, PRIVACY & SECURITY [1 case]

McDonald v. Symphony Bronzeville Park, LLC (Supreme Court of Illinois, Feb. 3, 2022): The Supreme Court of Illinois unanimously held that exclusivity provisions of the state Workers' Compensation Act did not prevent an employee from seeking recovery from her employer for violations of the Biometric Information Privacy Act (BIPA). The employer allegedly violated BIPA when it used a fingerprint timekeeping system and stored employees' fingerprint data without informing the employees (1) that their data would be stored, (2) the purposes or duration of the storage, and (3) without seeking consent from employees to do so. The employer claimed it could not be held liable for violation of BIPA, because the Workers' Compensation Act is the exclusive remedy for injuries in the workplace. The court disagreed, finding that the loss of the ability to maintain a person's privacy rights are different in nature and scope than the injuries covered exclusively by Workers' Compensation. Read the full decision here.

8. REGULATING COMMUNICATIONS [2 cases]

Philip Morris USA, Inc. v. Cuddihee (Florida Court of Appeals, First District, May 4, 2022): A Florida appeals court upheld a $2.5 million verdict against Philip Morris for conspiring to conceal information about the risks and addictive nature of cigarette smoking. Philip Morris appealed the verdict won by the daughter of a smoker who alleged the cigarette manufacturer was responsible for her father's death, claiming that the plaintiff failed to prove her father detrimentally relied on any health-related statements from Philip Morris. Plaintiff presented evidence of detrimental reliance that sufficiently tied the father's smoking, cancer, and death to misleading advertisements for innovative cigarette products. Evidence shows plaintiff's late father switched to a supposedly low-tar, less addictive brand of cigarettes for health reasons based on these advertisements. The court concluded that evidence at trial was sufficient for the jury to conclude the man relied on the company's advertising to his detriment. Read the full decision here.

Jane Lavoie-Fern, et al., v. The Hershey Company (U.S. District Court, M.D. Pennsylvania, July 11, 2022): A Pennsylvania district court denied Hershey's motion to dismiss a claim for strict products liability and negligence for failure to warn customers of the potential harmful health effects of glycyrrhizin, a component of black licorice. Hershey argued that the claims were expressly preempted by the Nutrition Labeling and Education Act (NLEA), which requires food labels to include the "common or usual name" of each ingredient "in descending order of prominence by weight." The NLEA contains an express preemption clause that prohibits states from imposing any requirement that is not identical to those in the NLEA, but also states that the preemption clause "shall not be construed to apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food." The court noted that, due to the presumption against preemption, when presented with two plausible readings of a statute, the court must accept the reading that disfavors preemption. Read the full decision here.

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

Center for Community Action & Environmental Justice v. Federal Aviation Administration (U.S. Court of Appeals, 9th Cir., Nov. 18, 2021): The 9th Circuit upheld a Federal Aviation Administration (FAA) decision finding "no significant environmental impact" with respect to a planned construction project in San Bernardino, California. The construction project, a planned cargo facility at San Bernardino International Airport, necessitated issuance of an FAA environmental assessment. While a California-specific report found that the project "could result in significant impacts on air quality, greenhouse gas, and noise," the 9th Circuit panel concluded that the FAA had not acted arbitrarily and capriciously in coming to a different conclusion. One judge strongly dissented, arguing that the case "reeks of environmental racism." The dissenting judge found it difficult to square the FAA's findings with California's and highlighted high pre-existing pollution levels and the large population of people of color and people experiencing poverty living in the project area site. Read the full decision here.

Tonoga, Inc. v. New Hampshire Insurance Co. (N.Y. Ct. App., Jan. 6, 2022): The New York Court of Appeals held that two insurance companies were not obligated to defend their insured, a manufacturer, in lawsuits claiming the manufacturer polluted groundwater with "forever chemicals" because the pollution fell squarely within the policy's exceptions. Between 1961 and 2013, Tonoga, Inc. manufactured materials with nonstick, heat-resistant synthetic polymers known as PFAS, coined "forever chemicals" due to their inability to break down in the environment and disastrous effects on human health. Facing six lawsuits alleging injury as a result of negligent discharge of the chemicals, Tonoga sought legal representation from two insurance companies through whom Tonoga held insurance policies during the time of the alleged contamination. The insurers refused, citing pollution exemptions in their policies. The court sided with the insurers despite acknowledging an insurer's broad duty to defend its policyholders. Tonoga's use and disposal of PFAS qualifies as pollution exempted from coverage even though the chemicals were not named as pollutants in the insurance policy and the chemicals' negative effects were not understood at the time the policy was executed. Read the full decision here.

Residents of Gordon Plaza v. Cantrell (U.S. Court of Appeals, 5th Cir., Feb. 1, 2022): Residents of Gordon Plaza, Louisiana, sued the city under the Resource Conservation and Recovery Act ("RCRA"), claiming that the city did not disclose the presence of hazardous chemicals originating from a landfill under their homes and ignored its obligations to remedy chemical contamination. A district court found that the city was taking proper steps to protect the health of its citizens. A three-judge panel of the 5th Circuit Court of Appeals upheld the district court decision, ruling that the RCRA prevented citizen suits when "a responsible party is diligently conducting a removal action," and that the city had been actively working at the site. The panel further determined that the Environmental Protection Agency ("EPA") has never authoritatively defined an RCRA "removal" action, and that, following regular reviews and reports, the EPA had determined that the city was in compliance. Read the full decision here.

Heights Apartments, LLC v. Walz (U.S. Court of Appeals, 8th Cir., Apr. 5, 2022): The Eighth Circuit allowed a Minnesota rental property owner to pursue claims alleging that the 2020 statewide residential eviction moratorium was an unconstitutional taking and interfered with the property owner's contracts. Responding to the COVID-19 pandemic's economic disruptions, in 2020, Governor Tim Walz signed executive orders forbidding landlords from issuing notices of termination, non-renewal, or eviction for failures to pay rent. Plaintiff property owner alleged the moratorium impeded

its ability to manage properties and interfered with rent collection, violating constitutional rights under the contract clause, takings clause, due process clauses, and the First Amendment. A district court dismissed the claims, but the Eighth Circuit reversed dismissal of contract clause and takings clause claims, holding that the plaintiff had "plausibly pleaded" the moratorium "substantially impaired" its contractual bargains with tenants. Read the full decision here.

Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale (U.S. Court of Appeals, 11th Cir., Aug. 26, 2022): The Eleventh Circuit affirmed the lower court's decision in favor of the City of Fort Lauderdale against owners of a for-profit sober-living home, which houses people recovering from addiction. Plaintiffs sued the city under the Fair Housing Act and Title II of the Americans with Disabilities Act, alleging that the city's code enforcement decisions were motivated by hostility toward the disabled and that the zoning ordinance was facially discriminatory against people with disabilities. The court held that an ordinance allowing unrelated disabled individuals to live in groups of more than three in residential zones with certain conditions was not discriminatory, but actually favored people with disabilities by carving out an exception to the city's zoning ordinance that otherwise prohibits more than three unrelated individuals from living together in residential areas. The court also held that the city's denial of plaintiff's request for an exemption from a fire sprinkler requirement did not violate reasonable accommodation requirements under the FHA or ADA and that the city's enforcement of its fire prevention code was not discriminatory. Read the full decision here.

Kia'i Wai O Ale'Ale' v. Dept. of Water (Haw. Supreme Ct., Sept. 23, 2022): The Supreme Court of Hawaii reversed a judgment for the Department of Water, holding that environmental impact reports under the Hawaii Environmental Protection Act (HEPA) must analyze secondary impacts and cannot segment a project analysis from related projects. The Kaua'i Department of Water proposed the installment of a 9,000-foot-long water transmission line and published a final environmental assessment (EA) finding that the project would have no significant environmental impact. Plaintiffs argued that the EA lacked information on the potential impact on water withdrawals and streams in the island's southeastern watersheds. The state supreme court agreed, holding that the relief line could not be "segmented" from other planned development projects. It also emphasized that HEPA requires the analysis of secondary impacts which can occur outside the immediate physical impacts of the project. Read the full decision here.

10. PUBLIC HEALTH EMERGENCY: LEGAL PREPAREDNESS/RESPONSE [2 cases]

Saldana v. Glenhaven Healthcare LLC (U.S. Court of Appeals, 9th Cir., Feb. 22, 2022): Relatives of Ricardo Saldana, a Glenhaven nursing home resident, sued the facility after Saldana died from COVID-19, alleging elder abuse, willful misconduct, negligence, and wrongful death. Defendant nursing home removed the case to federal court, arguing that federal jurisdiction existed under the Public Readiness and Emergency Preparedness (PREP) Act, which provides immunity from suit for public health emergency uses of covered countermeasures. The 9th Circuit Court of Appeals found the state law claims were not fully blocked by the PREP Act. While a Department of Health and Human Services' General Counsel advisory opinion had previously explained that the PREP Act provided "complete preemption," effectively blocking state-law claims, the 9th Circuit held that the Act was not intended to "completely preempt all state-law claims related to the pandemic." This conclusion effectively allows the case to continue in state court despite the PREP Act's broad language. Read the full decision here.

Hebert v. Louisiana Medical Mutual Insurance Company (La. App. 3rd Cir., Oct. 26, 2022): A mother filed suit against a doctor, hospital, and hospital's insurer after the mistreatment of her son's strep throat resulted in amputation of both his legs, for gross negligence, willful misconduct, and intentional torts. Defendants argued that the mother's claims were governed by the Louisiana Medical Malpractice Act (LMMA) and thus required initial review from a medical review panel, which the mother did not secure. In turn, she argued that, because her son's treatment was provided during the COVID-19 pandemic, the Louisiana Health Emergency Powers Act (LHEPA), which does not require prior assessment by a medical review panel, preempted LMMA. A state court dismissed the case. On appeal, Louisiana's Court of Appeals found that LEHPA did not supplant LMMA, and that pre-trial submission to a review panel was required. Read the full decision here.

11. COVID-19 PANDEMIC: PUBLIC HEALTH EMERGENCY LAW & POLICY RESPONSES [8 cases]

Ho v. Tulsa Spine & Specialty Hospital, L.L.C. (Oklahoma Supreme Court, Dec. 14, 2021): An Oklahoma nurse brought a wrongful discharge claim against her employer after being terminated for missing work because she refused to provide nursing services without personal protective equipment. Despite the Governor's executive order to cease or postpone elective surgeries during the COVID-19 pandemic, the nurse argued that the hospital continued its elective surgery operations, and that she did not go to work due to health concerns. The Oklahoma Supreme Court found that the nurse had a viable wrongful discharge claim. The state supreme court emphasized that reducing the spread of infectious disease is a priority of the state. Further, the termination could support a wrongful discharge claim because the legislature expressly granted emergency order authority to the Governor, and those orders established "public policy of curtailing an infectious disease," creating an exception to at-will employment under the circumstances. Read the full decision here.

Heidel v. Hochul (U.S. Dist. Court, S.D. New York, Oct. 21, 2021): Three New York City bars and restaurants were denied money damages against the state of New York and New York City for pandemic-related closures because the federal court found the business owners did not allege sufficient injury in order to recover damages. The business owners claimed their bars and restaurants were financially destroyed as a result of restrictions put in place by the city and state in response to the pandemic. They claimed that requiring them to close constituted an impermissible taking without compensation. The court dismissed that claim because the businesses remained open for takeout, delivery, and outdoor dining and because they failed to describe how their revenue was affected by the restrictions. The businesses also claimed they were subject to arbitrary and irrational classifications in violation of the Equal Protection Clause. Restrictions were different for essential and non-essential businesses; because bars and restaurants were classified as "essential retail," the Equal Protection claim was dismissed. Read the full decision here.

Armstrong v. Newsom (U.S. Court of Appeals, 9th Cir., Dec. 22, 2021): Plaintiff Armstrong sued California Governor Gavin Newsom, alleging that Governor Newsom's March 2020 Executive Order ordering Californians to "stay home" to prevent the spread of COVID-19 violated the Due Process Clause of the Fourteenth Amendment. The district court dismissed all claims, and the 9th Circuit Court of Appeals upheld the dismissal. The appellate court held that the claims were barred by qualified immunity because the Governor "did not violate clearly established law," referencing *Jacobson v. Massachusetts*, a 1905 Supreme Court case upholding state authority to impose a smallpox vaccine mandate. The court held that the stay-at-home order had a "real or substantial relation to protecting public health" and was not an "invasion of rights." Requiring Californians to stay home was clearly related to the order's purpose of "bend[ing] the curve[] and disrupt[ing] the spread of the virus." Read the full decision here.

Church v. Polis (U.S. Court of Appeals, 10th Cir., Jan. 24, 2022): Several Colorado churches challenged state-level COVID-19-related restrictions and awards of federal pandemic funding, arguing that Colorado's restrictions violated First Amendment free exercise of religion rights, that Colorado's emergency disaster statute unconstitutionally infringed on religious freedoms by providing secular exemptions and not religious exemptions, and that federal aid awards violated federal statutes prohibiting religious discrimination. The 10th Circuit dismissed the state-level claims, finding that because Colorado no longer imposed COVID-19 restrictions, was not likely to re-institute any pandemic restrictions, the claims were moot. The appellate court also held that Colorado's emergency disaster statute is not facially unconstitutional because it is neutral and generally applicable.

Regarding the federal aid claims, the court held that plaintiffs were unlikely to succeed because they failed to show their injuries were traceable to the federal funds or redressable by court action directing the use of those funds. Read the full decision here.

Grisham v. Hudson (Supreme Court of New Mexico, Mar. 7, 2022): The New Mexico Supreme Court invalidated a series of citizen-initiated petitions convening grand juries to investigate the governor's response to the COVID-19 pandemic. Although the state constitution allows citizens to submit petitions to investigate alleged criminal conduct by a public official, any petitions involving Governor Michelle Lujan Grisham's pandemic response were invalid. The court noted that Governor Lujan Grisham "acted lawfully and within the scope of her executive authority when she declared a public health emergency… and delegated power to the Secretary of Health" for further actions to protect public health and safety, and that public health orders issued under the emergency declaration are a "reasonable exercise of the police power to protect public health." The court therefore denied the petitions as invalid because they described only lawful activity, and not any unlawful activity. Read the full decision here.

The Gym 24/7 Fitness, LLC v. Michigan (Michigan Court of Appeals, Mar. 31, 2022): A gym owner unsuccessfully sued the State of Michigan, alleging an unconstitutional taking of its business property resulting from Governor Whitmer's executive orders that closed businesses in response to COVID-19. The business owner argued that the Michigan and U.S. Constitutions require just compensation because eminent domain proceedings never commenced when the Governor ordered businesses to close temporarily. The State countered that the business owner was not entitled to just compensation because the Gym was not deprived of *all* economically productive or beneficial use of its property while closed for six months. The court found that executive orders that temporarily closed the gym owner's business during the COVID-19 pandemic did not constitute a regulatory taking because the closure was temporary, the property still had value, and the executive orders were issued solely for the public purpose of preventing the spread of a deadly virus. Read the full decision here.

Flower World v. Sacks (U.S. Court of Appeals, 9th Circuit, Aug. 11, 2022): The Ninth Circuit Court of Appeals rejected challenges to state public health measures applicable to agricultural workers. In 2020, Washington Governor Jay Inslee issued an order requiring agricultural industry health protocols to prevent the spread of COVID-19, including employer-provided personal protective equipment (PPE), social distancing, and temperature checks. Flower World challenged these orders after it received citations for failure to comply during an occupational safety and health inspection. The Ninth Circuit affirmed the district court's dismissal, finding Flower World failed to state a claim and that the state health orders were not preempted by federal laws. In upholding the mandate, the Ninth Circuit concluded that the Supreme Court's January 2022 decision overturning the Occupational Safety and Health Administration's COVID-19 vaccine-or-test rule for large employers did not preempt Washington's general state authority to regulate public health and safety. Read the full decision here.

Ritter et al. v. Oklahoma (Ok. Sup. Court, Sep. 20, 2022): Parents of Oklahoma public school children and the Oklahoma State Medical Association challenged state laws prohibiting local school boards from implementing mask mandates or vaccine requirements. The laws only allowed such measures when both (1) taken in consultation with a local health department and (2) occurring in a jurisdiction in which the governor has declared a state of emergency. The Oklahoma Supreme Court found the provisions unconstitutionally delegated legislative authority to the governor. Oklahoma's Constitution purposely sets significant limits on the power of the governor, intentionally allowing the governor to exercise "only the power specifically granted by the Legislature." Additionally, while the legislature can delegate rulemaking authority to the governor, control over local school board decisions cannot be delegated, because the state constitution specifically protects local control over local affairs. Read the full decision here.