JUDICIAL TRENDS IN PUBLIC HEALTH – CASE ABSTRACTS 2023

The Network's quarterly reporter, **Judicial Trends in Public Health** (JTPH), highlights select, recently-published cases in public health law and policy. This document lists all 2023 case abstracts in chronological order within 11 key topics (adapted from JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL, 4TH ED. (2021)) below:

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

Mo Cann Do Inc. v. Missouri Dept. of Health and Senior Services (Mo. Ct. App., Feb. 28, 2023): After the Missouri Department of Health and Senior Services (DHSS) denied Mo Cann Do Inc.'s (MCD) application for a medical marijuana cultivation facility license, MCD appealed. DHSS had denied the license because MCD failed to include a certificate of good standing from the Missouri Secretary of State with its application, a requirement for licensure in Missouri. MCD argued that the denial was unauthorized by law because DHSS' deficiency letter to MCD only generally noted that the application was incomplete, and failed to specifically notify MCD that the initial application did not include the requisite certificate. The Missouri Court of Appeals held that the license denial was unauthorized because DHSS violated its own regulations in failing to notify the facility that its application was missing the certificate. Read the full decision here.

2. CONSTITUTIONAL RIGHTS & THE PUBLIC'S HEALTH [3 cases]

Religious Sisters of Mercy v. Becerra (U.S. Court of Appeals, 8th Cir., Dec. 9, 2022): Plaintiffs, entities associated with the Catholic Church, challenged the Biden administration's interpretations of the Patient Protection and Affordable Care Act (ACA) section 1557, which prohibits discrimination in health care on the basis of sex. The Department of Health and Human Services and the Equal Employment Opportunity Commission interpreted the provisions as including discrimination based on gender identity, requiring coverage for gender-affirming services. Plaintiffs argued this interpretation violated their First Amendment rights to religious freedom and the Religious Freedom Restoration Act (RFRA). The district court agreed, permanently blocking the federal government from enforcing its interpretation on plaintiffs. The Eighth Circuit affirmed, finding that a likely RFRA violation constitutes irreparable harm and that Section 1557 required plaintiffs to choose between "defying federal law" and "violating their religious beliefs." Read the full decision here.

Adams v. School Board of St. Johns County, Florida (U.S. Court of Appeals, 11th Cir., Dec. 20, 2022): Adams, a transgender student, alleged that a school policy separating bathrooms based on biological sex violated the Fourteenth Amendment's Equal Protection Clause and Title IX. The Eleventh Circuit disagreed, finding the policy constitutional because it advanced the important governmental objective of protecting students' privacy and was substantially related to achieving that objective. The court found that the policy did not unconstitutionally discriminate against transgender students because the discrimination was based on biological sex, not gender identity. Finally, the court determined that the bathroom policy did not violate Title IX because "sex" as used in the statute is unambiguous. The court concluded that an ambiguous interpretation (i.e., as including gender identity) would render the "statutory carve-out for 'maintaining separate living facilities for the different sexes'" meaningless. Read the full decision here.

Kluge v. Brownsburg Community School Corp. (U.S. Court of Appeals, 7th Cir., Apr. 7, 2023): Kluge, a teacher, brought a Title VII religious discrimination and retaliation action against Brownsburg Community School Corporation after being fired for refusing to refer to transgender students by their names as registered in the school's official database. Kluge alleged that the names were not consistent with the transgender students' sex recorded at birth and that using those names would infringe upon his religious beliefs. The school initially implemented an accommodation allowing Kluge to call the transgender students by their last names. This accommodation was later rescinded when it was determined that the practice was harming students and negatively impacting the learning environment for transgender students and the school in general. A federal district court rejected Kluge's retaliation claim, reasoning that the school was not required to accommodate Kluge's religious beliefs because doing so would impose an undue hardship on Brownsburg's ability to meet its educational mission. The Seventh Circuit affirmed, reasoning that "Kluge's accommodation harmed students and disrupted the learning environment." Read the full decision here.

3. PREVENTING & TREATING COMMUNICABLE CONDITIONS [2 cases]

Let Them Choose v. San Diego Unified School District (Cal. Ct. App., Nov. 22, 2022): A California appellate court invalidated San Diego Unified School District's COVID-19 vaccination requirement for students 16 and older to attend school in-person and participate in extracurricular activities. The court held the requirement was preempted because it contradicted state law in a legal area already regulated by the state. Under California law, schools "shall not unconditionally admit" students who have not been vaccinated against 10 listed diseases (excluding COVID-19). The court considered this a "negative-but-necessary implication" that schools *must* admit students who have been vaccinated against the listed diseases without adding additional vaccination mandates. Further, the extensive scope of the relevant laws—including the process under which additional diseases could be added to the enumerated list—clearly indicated the state's intention to act as the sole regulatory authority on student vaccinations. Read the full decision here.

Feds for Medical Freedom v. Biden (U.S. Court of Appeals, 5th Cir., Mar. 23, 2023): Feds for Medical Freedom, a non-profit organization comprised of various federal agency employees, challenged two Presidential Executive Orders on COVID-19 vaccination. One order required all federal employees to be vaccinated, with those failing to comply facing termination, while the other imposed the same requirements and potential consequences on federal contractors. Feds alleged that both mandates were arbitrary and violated the Administrative Procedure Act. A federal district court refused to block the contractor mandate, as it had already been blocked nationally in separate litigation, but did block the federal employee mandate. The Biden administration appealed, arguing that federal courts do not have jurisdiction to hear these challenges because of exclusive procedures and remedies available to federal employees under the Civil Service Reform Act (CSRA). The full Fifth Circuit judicial panel upheld the district court's order, finding the CSRA does not prevent federal employees from challenging a federal law on the grounds that the law was passed without authority or is otherwise unconstitutional. CSRA exclusivity applies only where an employee is challenging a negative employment action already taken. Read the full decision here.

4. SOCIAL DISTANCING MEASURES [0 cases]

5. ADDRESSING CHRONIC CONDITIONS [2 cases]

Klossner v. IADU Table Mound MHP, LLC (U.S. Court of Appeals, 8th Cir., Apr. 10, 2023): The Eighth Circuit held that landlords are not required to accept housing vouchers as a reasonable accommodation for low-income disabled tenants under the Fair Housing Amendments Act (FHAA). The FHAA requires that landlords make reasonable accommodations for tenants' disabilities. Federal law does not require landlords to accept housing vouchers, though some states prohibit source of income discrimination against tenants. Klossner, a tenant in an Iowa mobile home park, is disabled and receives certain government supports. As Klossner's rent increased, she sought to use housing vouchers to cover the additional rent. The mobile home park owner refused to accept the vouchers, consistent with their policy of only accepting vouchers when required by state law; Iowa law does not require landlords to accept vouchers. The court held that a landlord's obligation under the FHAA to make reasonable accommodations includes only those that directly ameliorate disabilities and does not include an obligation to accommodate a tenant's lack of money. Read the full decision here.

Braidwood Management Inc. v. Becerra (N.D. Tex., Mar. 30, 2023): A Texas federal district court judge held that the Affordable Care Act (ACA) PrEP coverage mandate, which requires insurance coverage for medication that helps prevent HIV transmission, violates the Religious Freedom Restoration Act (RFRA). Braidwood Management Inc., the challenging company, argued that its primary owner holds a sincere religious belief that homosexual sex and sex outside of marriage are immoral. Braidwood further alleged that requiring the company to offer employee health insurance that includes PrEP increases the likelihood that Braidwood employees will engage in homosexual sex or sex outside of marriage, and makes the Braidwood owner complicit in sexual conduct that violates his religious beliefs. Braidwood simultaneously argued that all ACA mandatory coverage requirements for preventive care services based on determinations by the U.S. Preventive Services Task Force (PSTF) are void because PSTF members were not appointed in accordance with the Constitution's Appointments Clause. The court agreed, (1) finding that Braidwood cannot be required to offer insurance covering PrEP and (2) blocking enforcement of the ACA's mandated preventive care services based on the PSTF recommendations. Read the full decision here. Defendants filed a notice of appeal on March 31, 2023, and on May 15, the Fifth Circuit Court of Appeals issued a stay of the district court order while the appeal is considered.

6. MITIGATING THE INCIDENCE & SEVERITY OF INJURIES & OTHER HARMS [3 cases]

Matthews v. Industrial Commission of Arizona (Ariz., Nov. 23, 2022): The Arizona Supreme Court held that a law limiting workers' compensation claims for mental illness to those arising from "unexpected, unusual or extraordinary" situations did not violate the Arizona Constitution. The state constitution requires the Arizona legislature to enact a law providing coverage for an "injury" due to any employment-related "accident." Analyzing the terms' definitions at the time the provision was adopted, the court concluded that "injury" does not include mental harm, and "accident" refers to an unexpected event. The court thus held that the Arizona law expanded workers' compensation eligibility by allowing for some mental illness claims, rather than unconstitutionally limiting it. The court also found no equal protection violation, concluding that *all* injured workers are required to prove their injuries arise from unexpected situations, not just those with mental illness. Read the full decision here.

U.S. v. Rahimi (U.S. Court of Appeals, 5th Cir. Feb. 2, 2023): The Fifth Circuit found unconstitutional a federal law prohibiting firearm possession by persons subject to domestic violence protection orders. Defendant Rahimi was under a civil protective order because of an alleged assault on his girlfriend. While subject to the order, Rahimi was involved in five different shootings in Texas and was charged with a violation of 18 U.S.C. § 922(g)(8), a federal criminal law prohibiting the distribution to or possession of firearms by persons subject to domestic violence protection orders. Rahimi challenged the constitutionality of § 922. Applying the historical analogue test set out by the Supreme Court in 2022 in *N.Y. State Rifle and Pistol Association v. Bruen*, the Fifth Circuit found that the government failed to show that § 922(g)(8)'s restrictions fit within the country's history of firearm regulation, making § 922(g)(8) an unconstitutional restriction on Second Amendment rights. As a result, Rahimi's conviction was vacated. Read the full decision here. The Department of Justice has asked the Supreme Court to hear the case.

National Rifle Association v. Bondi (U.S. Court of Appeals, 11th Cir., Mar. 9, 2023): The National Rifle Association (NRA) challenged the constitutionality of Florida's Marjory Stoneman Douglas High School Public Safety Act, alleging that the Act violated the Second Amendment. The Florida Legislature passed the Act in response to a 19-year-old man shooting and killing 17 people at Marjory Stoneman Douglas High School. The purpose of the Act was to ban the sale of firearms to 18 to 20 year-old people "to comprehensively address the crisis of gun violence, including but not limited to, gun violence on school campuses." The district court found no constitutional issue with the law, and the NRA appealed. The Eleventh Circuit conducted the historical analysis spelled out by the Supreme Court in *N.Y. State Rifle and Pistol Association v. Bruen* and affirmed the district court's decision, explaining that the Act paralleled the adoption of firearm restrictions for 18 to 20 year-old people in several states during the U.S. Reconstruction Era. Listing the historical analogues in an Appendix, the court found no Second Amendment violation. Read the full decision here.

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

Chicago Sun-Times v. Cook County Health & Hospitals System (Ill., Nov. 30, 2022): The Illinois Supreme Court held that information concerning years of gunshot-wound patient admissions and corresponding law enforcement notifications were not exempt from disclosure under either the Health Insurance Portability and Accountability Act (HIPAA) or Freedom of Information Act (FOIA). The dispute arose after the Cook County Health & Hospitals System refused to comply with a newspaper's request for records reflecting the times and dates patients with gunshot wounds were admitted to the hospital and law enforcement officials were notified. The court emphasized that FOIA should be "liberally construed" to allow public access to information Further, revealing only the year patients were admitted to a hospital does not constitute the release of identifying information that would be prohibited under HIPAA or Illinois state statutes protecting patient privacy. Read the full decision here.

8. REGULATING COMMUNICATIONS [3 cases]

R.J. Reynolds Tobacco Co. v. FDA (E.D. Tex., Dec. 7, 2022): A Texas district court held that the Food and Drug Administration (FDA)'s requirements for warning labels on tobacco and cigarette products violated the First Amendment. Cigarette manufacturers and retailers challenged an FDA rule requiring the display on cigarette packages of visual graphics demonstrating the dangers of smoking. Plaintiffs argued that the rule forced them to market an anti-smoking message, in violation of the First Amendment's freedom of speech. The court determined that the graphics could be interpreted inaccurately and that the rule requiring these graphics is not narrowly-tailored enough to be constitutional. The court suggested alternative public education campaigns like school speakers and social media advertisements could meet the government's public health goals without infringing on commercial speech and vacated the FDA rule. Read the full decision here.

Upcoming Supreme Court Decisions: ***Gonzalez v. Google, LLC*** and ***Twitter, Inc. v. Taamneh*** (U.S., *cert granted* Oct. 3, 2022, oral arguments scheduled Feb. 21-22, 2023): Plaintiffs seek to break through longstanding immunities of social media giants, Google and Twitter, for information policies contributing to the deaths of family members in ISIS terrorist attacks. Oral arguments will be held on February 21 and 22, with potentially broad communications-based implications. ***Gonzalez*** asks whether Section 230(c)(1) of the Communications Decency Act immunizes online platforms making "targeted recommendations" of "information provided by another [] content provider" (e.g., ISIS). Five circuit courts have held that § 230(c)(1) immunizes online platforms, while three others have rejected immunity. Read the petition for cert here. ***Taamneh*** concerns Section 2333(d)(2) of the Anti-Terrorism Act, which states that individuals who "aid and abet" terrorists "by knowingly providing substantial assistance" may be liable for injuries arising from international terrorism. The questions presented are whether online platforms "knowingly" provide substantial assistance to terrorist groups in failing to take more aggressive action to prevent terrorists' use of their services, and whether online platforms can be liable if their services were not used for the specific terrorism event underlying the lawsuit. Read the petition for cert here.

Center for Environmental Health v. Perrigo Company (Cal. Ct. App., Mar. 9, 2023): A California appellate court affirmed the dismissal of failure-to-warn claims against generic drug manufacturers because it was impossible for the defendants to comply with state labeling requirements regarding known carcinogens while complying with the federal requirement that generic drugs have the same labeling as their brand-name equivalents. Under Proposition 65, which was passed in California in 1986, California requires products containing certain carcinogens to carry label warnings about those carcinogens. The Center for Environmental Health alleged that manufacturers of certain generic drugs were violating Proposition 65 by not labeling the drugs with known carcinogen warnings, but also that adding the required Proposition 65 warnings to drug labels would cause the companies to be in violation of federal law, which severely restricts permissible content on generic drug labels so that those labels are as similar as possible to the labels on brand name equivalent drugs. When the case was filed, the brand name drug labels did not include the Proposition 65 warnings. The court agreed with the manufacturers, finding that federal drug labeling laws preempted the state's known carcinogen labeling requirement. Read the full decision here.

9. MONITORING PROPERTY & THE BUILT ENVIRONMENT [1 case]

In re Hawai'i Elec. Light Co. (Haw., Mar. 13, 2023): The Hawai'i Supreme Court affirmed the state Public Utility Commission's rejection of a power purchase agreement that proposed burning trees to produce energy. The Hawai'i Electric Light Company proposed to purchase energy from Hu Honua Bioenergy; that energy would be produced by burning trees and other biomass. Life of the Land, a community-based organization, opposed the proposal, arguing that the biomass burning would increase greenhouse gases (GHG) beyond the current Hawai'ian plan for zero GHG emissions. In its opinion, the court acknowledged that the people of Hawai'i have declared a climate emergency, citing 2021 legislation, and recognized that the right to a clean and healthful environment under the Hawai'i Constitution includes "the right to a life-sustaining climate system." The court upheld the Commission's rejection of the proposal, ruling that state regulators fulfilled a "public interest-minded mission" in rejecting the agreement based on the power project's environmental repercussions. Read the full decision here.

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

Hudak v. Elmcroft of Sagamore Hills (U.S. Court of Appeals, 6th Cir., Jan. 23, 2023): The Sixth Circuit declined full Public Readiness and Emergency Preparedness (PREP) Act preemption, holding that claims against an Ohio assisted care facility must be tried in state, not federal, court. Hudak sued an assisted care facility where her father lived after he died of COVID-19, alleging wrongful death and other claims. The facility sought to remove the case to federal court, arguing that the claims "ar[o]se under" federal law (the PREP Act). The court reasoned that plaintiff's claims did not fall within the scope of the federal cause of action under the PREP Act because they did not allege *willful* misconduct in the administration of a covered COVID-19 countermeasure. The court emphasized that the nursing home could invoke the PREP Act as a defense, but not a basis for removal. Read the full decision here.

Louisiana et al. v Biden (U.S. Court of Appeals, 5th Cir., Dec. 19, 2022): The Fifth Circuit upheld a decision blocking enforcement of President Biden's "federal contractor mandate," finding that the President exceeded his authority under the Federal Property and Administrative Services Act of 1949 (the "Procurement Act"). The mandate required covered contractors to ensure employee vaccination against COVID-19, unless entitled to an accommodation. The court held that Congress has not spoken clearly enough to allow this kind of mandate under the Procurement Act, which is based on notions of economy and efficiency. Though the court did not "rule on the efficacy of the vaccine," it decided blocking the mandate would serve the public's best interest. Read the full decision here. Similarly, the Sixth Circuit separately concluded that President Biden exceeded his authority under the Procurement Act in mandating that federal contractors wear masks and be vaccinated against COVID-19.

11. REPRODUCTIVE LIBERTIES & CARE ACCESS [4 cases]

Planned Parenthood South Atlantic v. South Carolina (S.C., Jan. 5, 2023): The South Carolina Supreme Court held that the state's abortion ban unconstitutionally infringed the right to privacy guaranteed by the South Carolina Constitution. The ban prohibited abortions after six weeks gestation, which the court recognized "severely limits—and in many instances completely forecloses—abortion . . . ." The court found the state constitution's provision guaranteeing citizens' rights against "unreasonable invasions of privacy" was not limited to searches and seizures. Instead, the court determined "that the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable," thus implicating the constitutional right to privacy. Read the full decision here. Notably, on the same day, the Idaho Supreme Court came to the opposite conclusion, finding that the Idaho Constitution does *not* recognize a fundamental right to abortion. Read the Idaho decision here.

Alliance for Hippocratic Medicine v. U.S. Food & Drug Administration (N.D. Tex., Apr. 7, 2023): District Court Judge Matthew Kacsmaryk struck down FDA's prior approval of mifepristone, a drug used in medication abortion, in a challenge seeking to eliminate U.S. availability of the drug. Typically, medication abortion occurs via the use of two drugs together—mifepristone and misoprostol. The availability of medication abortion helped offset serious impacts to abortion access in the U.S. following the Supreme Court's overturning *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization* in June 2022.

Anti-abortion advocates including the Alliance challenged FDA's mifepristone approval on November 18, 2022, over 20 years after FDA first approved it in 2000. They argued primarily that FDA "lacked legal authority" to approve mifepristone and that mailing abortion drugs violates the federal Comstock Act of 1873. Judge Kacsmaryk, an appointee of President Donald Trump, agreed with the Alliance, concluding that pregnancy is not an "illness" addressable by FDA's mifepristone approval and that "[c]hemical abortion drugs do not provide a 'meaningful therapeutic benefit,'" contrary to FDA's expert analysis. The judge also found that the Comstock Act "prohibits the mailing of chemical abortion drugs," disagreeing with an earlier Department of Justice interpretation. His decision draws on slim scientific evidence which FDA had already considered and found irrelevant or mischaracterized by the challengers.

Judge Kacsmaryk's order also indicates support of "fetal personhood," e.g., bestowing a fetus with all rights and privileges extended to humans under the U.S. Constitution. In assessing whether the FDA's actions caused irreparable injury to the challengers, Judge Kacsmaryk opined that the analysis also "arguably applies to the unborn humans extinguished by mifepristone." Finally, whether the challengers were even able to bring the suit in the first place involves questions of standing, which generally requires parties to prove that they have experienced, or imminently will experience, a concrete and particularized injury. Several analyses of the standing issues in this case indicate that the challengers *did not* have any such injury, and the suit should not have been allowed to move forward. Judge Kacsmaryk's decision is another in a long line of individually-authored decisions this decade seriously limiting public health and health authorities nationwide. Read the full decision here.

Judge Kacsmaryk stayed his order for seven days to allow the FDA to appeal his ruling. Within hours, both the FDA and Danco Laboratories, LLC (the manufacturer of Mifeprex) filed notices of appeal with the Fifth Circuit Court of Appeals.

Washington v. U.S. Food & Drug Administration (E.D. Wash, Apr. 7, 2023): A second District Court decision was issued on April 7, 2022, in the Eastern District of Washington, further convoluting

the status of mifepristone in the United States. District Court Judge Thomas O. Rice's decision blocking the FDA from altering its mifepristone control program was issued just minutes after Judge Kacsmaryk issued his decision. At the heart of the case is the FDA's 2023 Risk Evaluation and Mitigation Strategy (REMS) for mifepristone; REMS programs are generally used for drugs "with serious safety concerns." The updated 2023 REMS for mifepristone allowed retail pharmacies to become certified to dispense mifepristone and removed a requirement that it be dispensed in-person, among other modifications.

On February 24, 2023, seventeen states and the District of Columbia sought an order from the court prohibiting the FDA from "enforcing or applying the 2023 REMS" and further prohibiting the agency from limiting the availability of mifepristone or removing it from the market. The plaintiffs argued that the FDA violated the Federal Food, Drug, and Cosmetic Act (FDCA) by issuing the 2023 REMS because mifepristone does not meet the statutory definition of a drug that requires a REMS or the more restrictive Elements to Assure Safe Use (ETASU).

Judge Rice granted plaintiffs' motion in part, finding that the plaintiffs were likely to succeed because "FDA did not assess whether mifepristone qualifies for REMS and ETASU based on the criteria set forth under" the FDCA in likely violation of the Administrative Procedures Act. Judge Rice also noted that the FDA presented "potentially internally inconsistent…findings regarding mifepristone's safety profile." Judge Rice cited multiple scientific studies on the safety and efficacy of mifepristone, in the United States and abroad, as well as the drug's use in the treatment of Cushing's disease. Although the plaintiffs requested a nationwide order, Judge Rice limited his order to the plaintiff jurisdictions, blocking the FDA from "altering the status quo and rights as it relates to the availability of Mifepristone under the current operative January 2023 Risk Evaluation and Mitigation Strategy." Read the full decision here.

On April 10, 2023, the Defendants filed a Motion for Clarification, requesting that the Court clarify the FDA's obligations in light of the *Alliance for Hippocratic Medicine* decision.

Oklahoma Call for Reproductive Justice v. Drummond (Okla., Mar. 21, 2023): A group of abortion care provider organizations petitioned the Oklahoma Supreme Court to find state laws that criminalize abortion unconstitutional, arguing the laws violate Oklahoma constitutional protections of inalienable rights and substantive due process, independent of federal law. The Oklahoma Supreme Court ruled that the state constitution protects a limited right to abortion in life-threatening situations but declined to rule on whether it protects a broader right to abortion. The Court recognized that the Oklahoma Constitution "creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life" and that doctors may use their individual medical judgment to determine if an abortion is required pursuant to life-threatening circumstances presenting or likely to present during a pregnancy. Read the full decision here.