The Network for Public Health Law

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# JUDICIAL TRENDS IN PUBLIC HEALTH – AUGUST 15, 2023

The Network for Public Health Law monitors key court cases and relevant judicial trends in public health. The Network's quarterly reporter, ***Judicial Trends in Public Health*** (JTPH), highlights select, recently published cases in public health law and policy from the prior 3 months. Case abstracts are organized within 11 key topics (adapted from JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL, 4TH ED. (2021)), including hyperlinks to the full decisions (where available). Contact the Network for more information, questions, or comments.

## JTPH TOPIC DIGEST



## 1. SOURCE AND SCOPE OF PUBLIC HEALTH LEGAL POWERS

***Abbott v. Harris County*** (Supreme Court of Texas, June 30, 2023) In *Abbott v. Harris County*, the Supreme Court of Texas upheld the authority of the Governor to issue an Executive Order prohibiting local jurisdictions from mandating the wearing of masks during the COVID-19 pandemic. Read the full Opinion here.

In July 2021, Texas Governor Abbott issued an Executive Order prohibiting counties, cities, school districts, and public health authorities from requiring any person to wear a face covering, relying on powers granted to the Governor in the Texas Disaster Act. Harris County, Texas, issued a mask mandate based on local powers granted in the Act. The County challenged the Governor's Order, arguing that the Act did not give the Governor power to preempt local action and that if construed so broadly, the Act violated separation of powers by giving the executive branch the powers of the legislative branch. The Court rejected the County's argument and upheld the mask mandate prohibition, find that the Disaster Act and the Health and Safety Code supported the Governor's power to issue the Order and to preempt local action that conflicts with the Order. This issue is not likely to

recur because the Texas Legislature recently adopted a statute consistent with the Executive Order, applicable permanently. Read the full Opinion here.

***T&V Associates, Inc. v. Director of Health and Human Services*** (Mich. Ct. App., June 23, 2023) In *T&V Associates, Inc. v. Director of Health and Human Services*, the Michigan Court of Appeals found that the state's epidemic emergency powers act unconstitutionally granted legislative powers to the executive branch. Read the full Opinion here.

The Michigan Court of Appeals reversed the trial court's decision and held that the state's epidemic emergency order statute was an unconstitutional delegation of legislative authority. A catering service and banquet facility challenged the statute under which the Director of Health and Human Services issued a COVID-19 emergency order limiting gatherings at food service establishments. The challenged statute authorized the Director to issue an emergency order prohibiting gatherings and establishing procedures to follow upon determination "that control of an epidemic [wa]s necessary to protect the public health." In its analysis, the court focused on the absence of a definition of "epidemic" in the statute and the lack of limitation set forth by the statute's "necessary" standard. The court found that the statute was an "extremely broad" and "essentially unlimited" grant of authority and thus an unconstitutional delegation of legislative authority to the executive branch. The Court of Appeals followed similar reasoning to the Michigan Supreme Court's decision in *In re Certified Questions*, which struck down the Governor's authority under the Emergency Powers of the Governor Act (EPGA) as an unconstitutional delegation of legislative authority. The Court also addressed and dismissed arguments of mootness and lack of standing. Read the full Opinion here.

## 2. CONSTITUTIONAL RIGHTS AND THE PUBLIC'S HEALTH

***Haaland v. Brackeen*** (U.S. Supreme Court, June 15, 2023): In *Haaland v. Brackeen*, the United States Supreme Court upheld the Indian Child Welfare Act (ICWA), finding that ICWA's preference in favor of placing foster or adoptive Native children with Native families is constitutional. Read the full Opinion here.

ICWA was passed in 1978 in response to extensive history of the federal government and private adoption agencies placing Native American and Alaska Native children outside their communities, harming the children and Tribes. ICWA requires that preference be given to Native families when placing Native children in foster care or in the adoption system. The Court addressed whether ICWA's preference, applicable in state courts, improperly invades states' traditional powers in family law matters. Finding Congress' authority on Tribal issues broad and exclusive, the Court found that ICWA lawfully supersedes state family law. The Court also rejected the argument that ICWA violates anti-commandeering principles that prohibit the federal government from requiring states to enforce federal law, finding that ICWA provisions apply to private agencies and government entities and that the Constitution allows Congress to assign state courts certain tasks. The Court did not address whether ICWA's preferences violate equal protection or whether Congress improperly delegated legislative power to tribes because neither of the parties had standing to raise those issues. Read the full Opinion here.

***Mast v. County of Fillmore, Minnesota*** (Minnesota Ct. App, July 10, 2023) In *Mast v. County of Fillmore*, the Minnesota Court of Appeals ruled that the Amish community is not required to comply

with county laws requiring the use of septic tanks in certain settings, finding that applying the laws to the community would violate the Free Exercise Clause of the First Amendment. Read the full Opinion here.

Fillmore County law requires that landowners use a septic tank to dispose of "gray water," water discharged after being used for dishwashing, laundry, bathing, and other tasks not involving toilet waste. The Amish community refused to abide by the local law, arguing that the use of certain technologies, such as the septic tanks, violates their religious beliefs. Under the federal Religious Land Use and Institutionalized Persons Act, if land-use regulations substantially burden a claimant's sincere exercise of religion, the government must demonstrate a compelling state interest in applying the regulation to the claimant. The Court found that application of the septic tank requirement substantially burdens the Amish community's exercise of religion and that although the County showed a compelling interest in regulating grey water generally, the County failed to demonstrate a compelling interest in applying the requirement to the claimants. The Court prohibited the County from enforcing the septic tank requirement against the Amish community claimants. Read the full Opinion here.

## 3. PREVENTING AND TREATING COMMUNICABLE CONDITIONS

## 4. SOCIAL DISTANCING MEASURES

## 5. ADDRESSING CHRONIC CONDITIONS

***Magellan Technology, Inc. v. FDA*** (U.S. Court of Appeals, 2nd Cir., June 16, 2023) In *Magellan Technologies v. FDA*, the United States Court of Appeals for the Second Circuit upheld the FDA's denial of a marketing order that would have allowed Magellan to sell flavored vape products. Read the full Opinion here.

The FDA may only permit vape products on the market if doing so is appropriate for the protection of the public health. Magellan submitted an application for approval of its pod-based, flavored vape products; that application did not include long-term studies revealing the public health basis for approval, though the application did contain some scientific evidence in support. Magellan alleged that the FDA applied a new standard requiring long-term scientific studies without following required processes when rejecting the company's application. The Court found that the FDA's application of the public health standard and the value the Agency places on long-term studies was not arbitrary or capricious. The Ninth Circuit reached the same outcome in a similar case, *Lotus Vaping Technologies v. FDA*. The FDA is continuing to work through applications for more than 26 million vape products. Read the full Magellan Opinion here.

## 6. MITIGATING THE INCIDENCE AND SEVERITY OF INJURIES AND OTHER HARMS

***Arizona v. Navajo Nation*** (U.S. Supreme Court, June 22, 2023): In *Arizona v. Navajo Nation*, the United States Supreme Court found that an 1868 treaty creating the Navaho Reservation does not explicitly require the federal government to take affirmative steps to secure water for the Navaho tribe. Read the full Opinion here.

The 1868 treaty created the Navaho Reservation, implicitly reserving for the Tribe the right to use needed water on or below the land. As drought conditions persist in the West, the Tribe alleged that

the federal government breached its trust obligations under the treaty by not assisting the Tribe with gaining access to the water present on or below the lands. The Court found that while the treaty gave rights to the water, it did not impose an affirmative obligation on the federal government to identify new water sources or means of accessing water. Read the full Opinion here.

***Allen v. Milligan*** (U.S. Supreme Court, June 8, 2023): In *Allen v. Milligan*, the U.S. Supreme Court held that Alabama's congressional map was inherently discriminatory against minority voters in violation of Section 2 of the Voting Rights Act. Read the full Opinion here.

Section 2 of the Voting Rights Act prohibits voting practices that deny or abridge the right of U.S. citizens to vote on account of race and has been found to apply to vote dilution based on race. Alabama's congressional redistricting resulted in only 1 in 7 majority-Black districts despite that Black people comprise 27% of the voting-age population. Black Alabamans challenged the redistricting as a violation of Section 2, arguing that the redistricting dilutes the voting power of the state's Black population, limiting Black voters' ability to elect their preferred candidates. The Court agreed, rejecting Alabama's challenge to the constitutionality of Section 2. Alabama also argued that a race-neutral redistricting process is all that is required. Rejecting this argument, the Court reaffirmed its precedent that "a district is not equally open when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State." Because the Court had not issued an interim order before the election, the 2022 congressional election in Alabama used the unconstitutional redistricting. Read the full Opinion here.

## 7. PUBLIC HEALTH INFORMATION MANAGEMENT, PRIVACY & SECURITY

## 8. REGULATING COMMUNICATIONS

## 9. MONITORING PROPERTY AND THE BUILT ENVIRONMENT

***Courage to Change v. El Paso County, Colorado*** (U.S. Court of Appeals, 10th Cir., July 18, 2023) In *Courage to Change v. El Paso County, Colorado*, the United States Court of Appeals for the Tenth Circuit found that a Colorado county's zoning code discriminated against group homes for the disabled community. Read the full Opinion here.

The Tenth Circuit found that zoning laws in El Paso County, Colorado, violated the federal Fair Housing Act by imposing more rigorous limitations on group homes for people who are disabled than for other group homes. Courage to Change Recovery Ranch (now Soaring Hope Recovery Center) sought to open a group home for people recovering from drug and alcohol addiction in a residential neighborhood but was denied a special exemption. County law required lower occupancy levels and additional hurdles for group homes for disabled people than for other structured group-living arrangements, such as those for the elderly or foster children. The Court rejected the County's purported public health and safety justification for the differences, finding the zoning law discriminatory based on disability in violation of the Fair Housing Act. Read the full Opinion here.

***Ani Creation Inc. v. City of Myrtle Beach, South Carolina*** (Supreme Court of South Carolina, re-issued June 28, 2023) In *Ani Creation v. City of Myrtle Beach*, the Supreme Court of South Carolina upheld a city zoning ordinance that prohibited smoke shops in the historic area of the city. Read the full Opinion here.

The City of Myrtle Beach created a special zoning district, comprised of the tourist-centric historic downtown area, and prohibited certain businesses in that zone, including smoke shops. The express purpose of the new zoning was to foster a tourist and family-friendly area, by eliminating businesses that are "repulsive to families, including unhealthy tobacco use, crudity and the stigma of drug use and paraphernalia." Prohibited business that were cited for violations after a grace period sued, claiming the new zoning was unconstitutional in violation of the Equal Protection Clause (for treating businesses inside the zone differently than those outside the zone) and was arbitrary and capricious (adopted without proof that the banned shops present a public health or safety concern). The Court rejected the smoke shop claims and upheld the zoning. Read the full Opinion here.

## 10. PUBLIC HEALTH EMERGENCY: LEGAL PREPAREDNESS AND RESPONSE

## 11. REPRODUCTIVE LIBERTIES AND CARE ACCESS

***Weems v. Montana*** (Supreme Court of Montana, May 12, 2023) In *Weems v. Montana*, the Supreme Court of Montana upheld the state constitutional right to access abortion while striking down a law that prohibited advanced practice registered nurses from providing abortion care. Read the full Opinion here.

Advanced practice registered nurses (APRNs) filed suit to block a Montana law that prohibits APRNs from providing abortion care, alleging that the prohibition interferes with pregnant people's right to access to abortion as provided in the Montana Constitution. The state argued that the legislature has power to determine the scope of practice of APRNs and that the law was based on safety concerns because APRNs are not qualified to provide abortion care. The Court disagreed, finding that the "Montana Constitution guarantees a woman a fundamental right to privacy to seek abortion care from a qualified health care provider of her choosing, absent a clear demonstration of a medically acknowledged, bona fide health risk." The Court further found that the state failed to produce evidence of a public health risk associated with APRNs providing abortion care, noting that "abortion care is one of the safest forms of medical care in this country and the world and that advanced practice registered nurses are qualified providers." Read the full Opinion here.

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*Judicial Trends in Public Health is published quarterly by the Network for Public Health Law. If you have questions about any of the covered cases, please contact the Network here.*