The Network for Public Health Law

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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 AND SCOPE OF PUBLIC HEALTH LEGAL POWERS [5 cases]

Allstates Refractory Contractors v. Su (U.S. Court of Appeals for the 6th Circuit, August 23, 2023) The Sixth Circuit Court of Appeals held that Congress effectively and properly delegated regulatory power over workplace safety to the Occupational Safety and Health Administration (OSHA). The Court said this was a "simple but poignant challenge," asking the question of whether Congress' delegation to OSHA is constitutional. Allstates alleged that the grant of power to OSHA was so broad that it functionally gives an executive agency what is really legislative power; Congress is not permitted to delegate its legislative power. The Court examined the history behind Congress passing and President Nixon signing the Act creating OSHA in 1970, the more than five decades of OSHA regulation that has significantly improved workplace safety, and other court decisions upholding the grant of power as constitutional. That led to the finding that the Act provides an "overarching framework to guide OSHA's discretion" that falls squarely within Congress' authority to delegate regulatory power." Read the full Opinion here.

Northern Virginia Hemp and Agriculture LLC v. Virginia (U.S. District Court for the Eastern District of Va., October 30, 2023) A federal district court in Virginia refused to issue a pre-trial injunction preventing enforcement of the Commonwealth's law regulating hemp products that contain Delta-8 THC or other hemp-derived intoxicating variants. Hemp sellers argued that the 2018 Farm Bill passed by Congress deregulated most hemp products, thereby preempting states from imposing restrictions on products formerly banned under federal law. The Court rejected the argument, finding that nothing

in the 2018 Farm Bill indicated explicitly or through implication that by deregulating hemp products, the federal government was protecting those products from state regulation. The hemp sellers also argued that the Commonwealth's law impermissibly interferes with interstate commerce in violation of the Commerce Clause. This claim was likewise rejected. This decision conflicts with a federal district court decision in Arkansas and with a Maryland state court decision. Although the West Virginia hemp sellers may proceed to trial, the Court found the plaintiffs unlikely to prevail Read the full Opinion here.

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.

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 [6 cases]

United States v. Daniels (U.S. Court of Appeals for the 5th Circuit, August 9, 2023) The Fifth Circuit Court of Appeals applied the U.S. Supreme Court decision in *New York State Rifle & Pistol Association v. Bruen* (2022) and struck down a federal law the prohibits unlawful users of controlled substances from possessing firearms. The Court used a two-step approach. First, they examined whether the individuals identified in the statute are covered by the Second Amendment such that they hold a presumptive right to firearm ownership. The Court answered yes, despite language in *Bruen* that Second Amendment rights are held only by law-abiding citizens. Second, the court examined whether the Founders regulated firearms in this manner or whether there is an historical analogue for such a law. The Court found no law existing at the founding and no relevant historical analogue.
As a result, the federal law banning gun ownership by unlawful users of controlled substances is unconstitutional. Read the full Opinion here.

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.

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 AND TREATING COMMUNICABLE CONDITIONS [3 cases]

We The Patriots USA v. Connecticut Office of Early Childhood Development (U.S. Court of Appeals for the 2nd Circuit, August 4, 2023) The Second Circuit Court of Appeals found that amendments to Connecticut's vaccination law removing the religious exemption were constitutional, but remanded the case to consider whether the amendments violate the Individuals with Disabilities in Education Act (IDEA). Connecticut's vaccination requirements for children enrolled in public and nonpublic schools or attending childcare centers and group childcare homes, and for students enrolled in public and private institutions of higher education, were changed such that religious exemptions to vaccination would no longer be permitted. Medical exemptions remain. Parents and an advocacy organization argued that the amendments violated the Free Exercise Clause, due process rights to privacy and medical freedom, equal protection, and liberty interests in childrearing. One parent alleged that the amendments violated the IDEA. The Court found that the amendments and related legislative history "contain no trace of hostility toward religion but rather reflect significant accommodations on the part of the legislature." The Court affirmed dismissal of the substantive due process claims because there is no fundamental right to an education or to avoid vaccination and the law does not compel vaccination. The Equal Protection claim of age-based classification was dismissed because the classification was rationally related to Connecticut's interest in protecting the health and safety of students. The IDEA claim may proceed. Read the full Opinion here.

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 [4 cases]

Logic Technology Development v. FDA (U.S. Court of Appeals for the 3rd Circuit, October 19, 2023): The Third Circuit Court of Appeals found that the Food and Drug Administration (FDA) did not violate the Administrative Procedures Act (APA) and did not act arbitrarily or capriciously in rejecting a vape manufacturer's Pre-Market Tobacco Product Application for a menthol-flavored vape product. Logic Technology alleged that the FDA violated the APA and acted arbitrarily and capriciously by applying the same standard to menthol products as applied to candy and fruit flavored products; establishing a rule against authorization of menthol vapes through informal decision rather than the formal rulemaking process; and not giving the manufacturer a post-denial transition period to wind down sales of the denied products. Rejecting each argument, the Court found that the FDA properly applied a regulatory decision-making framework that was consistent with the Family Smoking Prevention and Tobacco Control Act and provided a reasoned explanation for the denial. The Court explained that the FDA made scientific judgments in decision making and that the Court would not second guess those determinations. Read the full Opinion here.

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.

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.

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

Torres, et al. v. JAI Dining Services (Supreme Court of Arizona, October 16, 2023) The Supreme Court of Arizona found that the state constitution did not prohibit the Arizona State Legislature from passing a law imposing a higher burden of proof for dram shop liability than had been established in Arizona common law. After a night of heaving drinking at a JAI establishment, an intoxicated patron drove his car and caused a fatal crash. Family members of the crash victims sued JAI arguing that state common law created dram shop liability, meaning establishments that sell alcohol to intoxicated individuals may be liable for injuries caused due to the intoxication. Common law dram shop liability was established in Arizona via court decision in 1983. The state legislature sought to alter that common law, passing legislation that imposes a more rigorous standard for imposing liability on alcohol sellers. The plaintiffs alleged that the legislation violates the Arizona Constitution, which states that the "right of action to recover damages for injuries shall not be abrogated." The Court found that this constitutional provision did not apply to causes of action created by the 1983 dram shop common law case because that liability was created after Arizona achieved statehood. The more rigorous standard for imposing dram shop liability survived challenge. Read the full Opinion here.

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.

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 AND 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 AND THE BUILT ENVIRONMENT [3 case]

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 urported 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.

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 [3 cases]

Gonzalez v. Inslee, Governor of State of Washington (Supreme Court of Washington, September 28, 2023) The Supreme Court of Washington upheld Governor Jay Inslee's COVID-era ban on evictions in a case landlords brought challenging the Governor's action as outside the scope of his emergency powers as set forth in the Washington Constitution and Code. The landlords argued that the Governor may not waive or suspend application of statutes—here, provisions establishing landlords' eviction powers—but that emergency powers are limited to actions not addressed in existing law. The Court rejected that argument and found that the Governor acted within the scope of his emergency powers, particularly noting that the eviction ban did not eliminate tenants' obligations to pay rent or landlords' power to seek payment without eviction. Read the full Opinion here.

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 AND CARE ACCESS [8 cases]

Planned Parenthood South Atlantic v. South Carolina (Supreme Court of South Carolina, August 23, 2023) The Supreme Court of South Carolina upheld the 2023 version of a fetal heartbeat abortion ban, finding the ban does not violate the South Carolina Constitution. This is a substantive reversal of an earlier decision, *Planned Parenthood South Atlantic v. State*, 438 S.C. 188 (2023), finding a 2021 version of the fetal heartbeat bill to be in violation of the state Constitution. Planned Parenthood has since filed a new lawsuit seeking clarification of terms in the law that could result in the ban affecting pregnancies after nine weeks of gestation. The 2023 abortion restrictions are now in effect in South Carolina. Read the full Opinion here.

Alliance for Hippocratic Medicine v. FDA (U.S. Court of Appeals for the 5th Circuit, August 16, 2023) The Fifth Circuit Court of Appeals found that it was too late for the plaintiffs to challenge the Food and Drug Administration's (FDA) approval of the abortion drug Mifepristone in 2000 but found that the plaintiffs presented sufficient evidence that FDA's 2016 changes to the protocol for use of Mifepristone violated the Administrative Procedures Act. As a result, the Court ordered that the pre-2016 protocols should remain in place pending trial. This not only removed the 2016 protocols, but it also invalidated the 2023 changes to the protocols. The Court's decision makes access to Mifepristone more difficult as multiple in-person visits are required before the mandatory in-person administration of the medication. The Court's decision is not in effect, however, as the U.S. Supreme Court has stayed all action in the case pending consideration of a petition for certiorari filed by the FDA. Additionally, a federal district court in Washington State found that the FDA's 2023 protocols may be too stringent and issued an order prohibiting the FDA from altering the 2023 protocols to be more stringent while the case proceeds to trial. That decision covers 18 states that sued the FDA. The Alliance for Hippocratic Oath decision, though stayed, purports to apply nationally. Read the full Opinion here.

GenBioPro v. Sorsaia (U.S. District Court for the Southern District of W.V., August 24, 2023) A federal district court in West Virginia found that federal law approving the abortion drug Mifepristone for use in pregnant people up to 10 weeks gestation did not preempt the State's law that prohibits most abortion but that for abortions permitted under the State's law, federal law does preempt the requirement that Mifepristone only be provided at an in-person visit. West Virginia prohibits abortion at all stages of pregnancy, except in the case of a "nonmedically viable fetus", ectopic pregnancy, or medical emergency. Survivors of rape or incest may receive abortion care for up to 14 weeks gestation if they file a police report or get medical treatment for the rape or incest. Regardless of the reason for the abortion, West Virginia law prohibits access to Mifepristone by telehealth despite the FDA's protocols that permit prescribing Mifepristone via telehealth. The Court found that FDA approval of Mifepristone for up to 10 weeks gestation does not mean that a state cannot restrict abortion in any way during that 10-week period. But the Court did find West Virginia's prohibition on telehealth for lawful use of Mifepristone conflicts with FDA's protocols for the drug and frustrates Congress' objectives in giving FDA authority to address prescription drug risks. Therefore, the telehealth prohibition was struck down as preempted by federal law. Read the full Opinion here.

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.

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.

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