

## JUDICIAL TRENDS IN PUBLIC HEALTH – NOVEMBER 20, 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, 4<sup>TH</sup> ED. (2021)), including hyperlinks to the full decisions (where available). Contact the [Network](#) for more information, questions, or comments.

### JTPH TOPIC DIGEST

1. SOURCE & SCOPE OF PUBLIC HEALTH LEGAL POWERS (2 Cases)
2. CONSTITUTIONAL RIGHTS & THE PUBLIC'S HEALTH (1 Case)
3. PREVENTING & TREATING COMMUNICABLE CONDITIONS (1 Case)
4. SOCIAL DISTANCING MEASURES
5. ADDRESSING CHRONIC CONDITIONS (1 Case)
6. MITIGATING THE INCIDENCE & SEVERITY OF INJURIES & OTHER HARMS (1 Case)
7. PUBLIC HEALTH INFORMATION MANAGEMENT, PRIVACY & SECURITY
8. REGULATING COMMUNICATIONS
9. MONITORING PROPERTY & THE BUILT ENVIRONMENT
10. PUBLIC HEALTH EMERGENCY: LEGAL PREPAREDNESS & RESPONSE (1 Case)
11. REPRODUCTIVE LIBERTIES & CARE ACCESS (3 Cases)

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

*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](#).

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

***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 that 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](#).

## 3. PREVENTING AND TREATING COMMUNICABLE CONDITIONS

***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.](#)

#### 4. SOCIAL DISTANCING MEASURES

#### 5. ADDRESSING CHRONIC CONDITIONS

*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.](#)

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


*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.](#)

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

#### 8. REGULATING COMMUNICATIONS

#### 9. MONITORING PROPERTY AND THE BUILT ENVIRONMENT

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




***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.](#)

## 11. REPRODUCTIVE LIBERTIES AND CARE ACCESS

***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.](#)

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