The Network for Public Health Law

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JUDICIAL TRENDS IN PUBLIC HEALTH – CASE ABSTRACTS, 2024

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 2024 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:

JTPH TOPIC DIGEST

1. SOURCE AND SCOPE OF PUBLIC HEALTH LEGAL POWERS

Red River Valley Sugarbeet Growers Association v. Regan (U.S. Court of Appeals for the 8th Circuit, November 2, 2023) The Eight Circuit Court of Appeals found that the Environmental Protection Agency (EPA) exceeded its authority, acting arbitrarily and capriciously in completely eliminating the use of chlorpyrifos on food crops. For more than a decade, EPA had allowed the pesticide to be used in some measure on some crops, called tolerances. After losing a case challenging those tolerances, the EPA passed a regulation allowing no use of the product, even though the Agency had considered revoking most of the tolerances but allowing some high-benefit agricultural uses to continue. The Court disagreed with EPA that the Agency's findings supported only a full ban, finding that the Agency lacked evidence to support the full ban and had less restrictive means available given the potential safe use of the pesticide on some crops. This case is consistent with a trend of courts disagreeing with administrative agency decisions and substituting the court's judgment for that of the agency. Read the full Opinion here.

Free Oregon, Inc. v. Oregon Health Authority (Oregon Court of Appeals, December 13, 2023) The Oregon Court of Appeals upheld the Oregon Health Authority's since-repealed rules requiring that health care facility and public school staff be vaccinated against COVID-19. The State had sought to

have the case dismissed as moot, but the Court found that the issue remained salient for some plaintiffs who were challenging their school employer's decision to place them on unpaid leave while the rules were in effect. The Court found that the Oregon Health Authority had the power to issue the vaccine mandate rules, the rules did not conflict with a state law prohibiting public health officials from interfering with individual's medical decisions; and the Food, Drug, and Cosmetic Act (FDCA) did not preempt the mandate. Read the full Opinion here.

2. CONSTITUTIONAL RIGHTS AND THE PUBLIC'S HEALTH

Ocean State Tactical, LLC, et al. v. State of Rhode Island (U.S. Court of Appeals for the 1st Circuit, March 7, 2024): The First Circuit Court of Appeals rejected a Second Amendment challenge to a Rhode Island law banning the sale of large-capacity magazines (LCM). The Court first assumed without deciding that LCMs are "arms" covered by the Second Amendment. The Court then applied the Bruen test of whether the LCM ban is "consistent with this Nation's historical tradition of firearm regulation." Finding that there could not be a historical tradition of regulating LCMs because they are relatively modern, the Court looked for an historical analogue, a relevantly similar historical regulation to the LCM ban. The court found the history of regulating arms that are not commonly used in self-defense and present a threat to public safety, like sawed-off shotguns, is an analogue for the LCM ban because LCMs are similarly rarely used in self-defense and present a risk to public safety. With the ban passing the historical analogue test, the Court examined the impact of the ban, concluding that the LCM ban does not impose a significant burden on the right to armed self-defense because it does not prevent gun owners from owning other forms of weaponry or ammunition for self-defense. As a result, the ban was upheld. Read the full decision here.

Kadel, et al. v. Folwell, et al. (U.S. Court of Appeals for the 4th Circuit, April 29, 2024): The Fourth Circuit Court of Appeals found that state Medicaid programs that deny coverage for certain gender-affirming care are violating the Equal Protection Clause of the U.S. Constitution and federal statutes. Medicaid programs in North Carolina and West Virginia refuse to cover gender-affirming care, including mastectomy and hormone therapy, despite covering that same care for other purposes, such as breast cancer or menopause management. The Fourth Circuit held that these programs discriminate on the basis of gender identity and sex in violation of the Equal Protection Clause. The programs also violate the anti-discrimination provisions of the Affordable Care Act as well as certain provisions of the Medicaid Act. As a result, the North Carolina and West Virginia programs must cover gender-affirming care consistent with coverage of that care for other purposes. Read the full decision here.

Poe v. Labrador (U.S. District Court for Idaho, December 26, 2023) The U.S. District Court for Idaho issued a preliminary injunction prohibiting enforcement of an Idaho law that prohibits health care professionals from providing certain medical treatment to children with gender dysphoria while allowing the same treatment for children with other medical conditions. The Court considered whether the statute violates the 14 Amendment's Equal Protection Clause by treating transgender children differently than other children and whether the statute violates the 14th Amendment's Due Process Clause by interfering with the right of parents of transgender children to make medical decisions for their children. In issuing the injunction, the Court found that the statute failed on both issues. First, the statute discriminates on the basis of sex and transgender status, requiring a strict scrutiny analysis. Second, parents' right to seek appropriate medical care for their children is protected by the

Constitution, thereby requiring a strict scrutiny analysis of an interference with that right. The strict scrutiny test requires that there be a compelling government interest and that the state action be narrowly tailored to satisfy that interest. Based significantly on its finding that the prohibited care is medically accepted as safe, effective, and appropriate for children with gender dysphoria, the Court found the statute violates the rights of transgender children and their parents. The statute may not be enforced while the case proceeds to trial. Read the full Opinion here. On January 30, 2024, the Ninth Circuit Court of Appeals issued an order upholding the district court so that the stay will remain in place. Read the Order here.

Antonyuk, et al. v. Chiumento, et al. (U.S. Court of Appeals for the 2nd Circuit, December 8, 2023) The Second Circuit Court of Appeals is allowing many provisions in New York's Concealed Carry Improvement Act (CCIA) to remain in effect and paused others while the lower court hears a full challenge to the law. The CCIA was passed in response to the U.S. Supreme Court's decision in *Bruen* striking down New York's stringent concealed carry law and was immediately challenged. The trial court issued an injunction preventing enforcement of some CCIA provisions and allowed others to go into effect. The State's highest court weighed in, finding that three provisions would be stayed pending trial: 1) requiring applicants for a concealed carry permit to list their social media identities; 2) prohibiting firearms at religious institutions; and 3) imposing a default that firearms are prohibited on private property open to the public. The court allowed continued enforcement of: 1) the requirement that an applicant demonstrate good moral character and disclose household and family members on a permit application; 2) the ban on concealed carry in sensitive places, including behavior health centers, public parks, zoos, theaters, conference centers, and places licensed for on-premise alcohol consumption; and 3) requirements for an in-person interview, character references, and 16 hours of training. Read the full opinion here.

3. PREVENTING AND TREATING COMMUNICABLE CONDITIONS

In Re: Gardasil Products Liability Litigation (U.S. District Court for the Western District of N.C., March 20, 2024): More than 140 cases against Merck, the maker of the HPV vaccine Gardasil, have been consolidated in the federal district court for the Western District of North Carolina as multi-district litigation (MDL). In two test cases in the MDL, Merck filed a motion to dismiss almost all claims, arguing that they are barred by the National Childhood Vaccine Injury Act, which protects manufacturers from product liability claims as an incentive to produce vaccines. The Court granted the motion in large part--dismissing claims of manufacturing and design defect, failure to warn patients and the public, and negligence--and allowing only claims of failure to warn medical providers and fraudulent concealment vis-à-vis medical providers to proceed. These legal findings impact all plaintiffs in the MDL and severely reduce the pending claims against Merck. Read the full order here.

Stand up Montana v. Missoula County Public Schools (Supreme Court of Montana, December 12, 2023) The Supreme Court of Montana upheld the Missoula Public School's COVID-19 mask mandate over challenges raised by parents that the mandate violated the parents' state constitutional right to make medical decisions for their children and violated the students' state constitutional rights of privacy and individual dignity. The Court found that masks are not medical treatment or devices such that there was no medical care being provided without the parent's consent and that the case raised no fundamental constitutional rights of students. Applying the rational basis test, the Court found the County had a legitimate interest in preventing the spread of COVID-19 among students and

staff and that mandating masks was a reasonable approach to protect that interest. Read the full Opinion here.

4. SOCIAL DISTANCING MEASURES

5. ADDRESSING CHRONIC CONDITIONS

Six Brothers, Inc., et al. v. Town of Brookline (Massachusetts Supreme Judicial Court, March 8, 2024): The highest court in Massachusetts upheld a local law that prohibits the sale of tobacco products to anyone not yet age 21 as of the effective date of the law, a so-called Tobacco-Free Generation law. Retailers challenged the local law arguing that the state law establishing 21 as the age of access to tobacco products preempts local laws regulating tobacco sales by age. The Court rejected that argument, finding no conflict between the local and state laws. Retailers also argued that the local law violates the Equal Protection Clause of the Massachusetts Declaration of Rights. The Court rejected this argument because the prohibition on tobacco sales to a new generation is rationally related to the Town's legitimate interest in public health. The Court noted that the Tobacco-Free Generation provision falls short of a complete ban on the sale of tobacco products. Now at least four Massachusetts towns have passed Tobacco-Free Generation laws, and more are pending. Read the full decision here.

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

Jenny L. Flores, et al. v. Merrick Garland, et al. (U.S. District Court, Central District of California, April 3, 2024): This decision comes through the 1997 Flores Settlement, which established national minimum standards for the treatment, placement, and release of detained immigrant children. The federal district court maintains ongoing supervision of the federal government's compliance with the settlement. In this litigation, plaintiffs challenged as a violation of the settlement the federal government's practice of detaining immigrant minors in open-air settings. The Court ruled that all minors detained by the Department of Human Services (DHS) in open air detention sites are in US custody and therefore entitled to rights and protections guaranteed by the settlement. The Court found that DHS is violating the settlement by placing children in open air detention and ordered DHS to provide those children safe and sanitary conditions, including indoor facilities. Read the full order here.

M.N., et al. v. MultiCare Health System (Supreme Court of Washington, January 18, 2024) The Supreme Court of Washington overturned a trial court decision to dismiss claims brought by patients who may have been exposed to Hepatitis C at the defendant's hospital. MultiCare Health employed a nurse who diverted drugs and engaged in conduct that put patients who were treated with narcotics at risk of contracting Hepatitis C. The trial court allowed patients who were treated by the nurse to continue to trial but dismissed claims of patients who were treated with narcotics while the nurse was on duty but who were not treated by the nurse. The hospital informed those patients of the potential exposure and suggested they be tested for Hepatitis B and C and HIV. The Court found that, for medical malpractice claims, plaintiffs seeking emotional damages that involve fear of disease transmission may have a viable cause of action if they can prove they experienced reasonable fear of having contracted a disease by a medically recognized means of transmission. Plaintiffs may recover damages only for the period of time that they experienced the anxiety related to the potential exposure. Because the patients had been made aware of the potential exposure and had to wait for

test results, they may be able to prove all elements of the claim; thus, their case was revived. Read the full Opinion here.

7. PUBLIC HEALTH INFORMATION MANAGEMENT, PRIVACY & SECURITY

8. REGULATING COMMUNICATIONS

RJ Reynolds Tobacco Company, et al. v. FDA, et al. (U.S. Court of Appeals for the 5th Circuit, March 21, 2024): The Court of Appeals for the Fifth Circuit rejected a First Amendment challenge to the Food and Drug Administration's (FDA) new graphic warning label requirement for cigarette packages and advertisements. Cigarette manufacturers had successfully challenged the FDA's initial set of graphic warnings in 2011; the Agency proposed new warnings in 2021. Cigarette manufacturers again challenged the regulations on First Amendment grounds. The Court found that the new warnings are factual and non-controversial and justified by the government's interest in promoting greater public understanding of the negative health consequences of smoking. The Court also found that the regulation is not unduly burdensome as cigarette manufacturers have myriad ways to advertise their products beyond the portion of the packaging and ads containing the graphic warnings. However, the case was remanded to the district court for consideration of the claim that the FDA violated the Administrative Procedure Act, a claim the district court had not decided. Read the full decision here

Maryland Shall Issue, et al. v. Anne Arundel County, Maryland (U.S. Court of Appeals for the 4th Circuit, January 23, 2024) The Fourth Circuit Court of Appeals upheld a local ordinance passed in Anne Arundel County, Maryland, that requires firearm sellers to make visibly available in their shops and distribute to all customers who purchase a firearm or ammunition a County-provided pamphlet related to gun safety and suicide prevention. Firearms sellers challenged the law arguing that the ordinance required them to engage in compelled speech in violation of their First Amendment right because the information in the pamphlet is not factual or uncontroversial. The Court disagreed, finding that pamphlet factually informs purchasers of the nature, causes, and risks of suicides and the role that guns play in them and encourages purchasers to store their guns safely to help reduce suicides. The pamphlet neither discourages gun purchases nor indicates that guns cause suicide. Reviewing statistics about gun-related suicide, the Court found that the ordinance is reasonably related to the County's interests in suicide prevention and not unjustified or unduly burdensome. As a result, the Court upheld the ordinance. Read the full opinion here.

National Association of Wheat Growers, et al. v. Bonta (U.S. Court of Appeals for the 9th Circuit, November 7, 2023) The Ninth Circuit Court of Appeals struck down a California law requiring a warning label on products containing glyphosate as a violation of companies' First Amendment rights. Glyphosate is commonly used in pesticides and has been found to be "probably carcinogenic" in humans by the International Agency for Research on Cancer. Under California law, a product containing glyphosate must bear a warning about potential cancer risk. The Court found the required warning labels to be compelled speech that violates the First Amendment because there is significant dispute in the scientific community about whether the chemical causes cancer. Without a deeper factual link, the State may not force manufacturers to include a cancer warning on their products. Read the full Opinion here.

9. MONITORING PROPERTY AND THE BUILT ENVIRONMENT

Westminster Management, LLC, et al. v. Tenae Smith, et al. (Supreme Court of Maryland, March 25, 2024): The Supreme Court of Maryland found that a rental property management company violated state law by charging excessive fees for late payment of rent and other charges and using those late fees and charges as a basis for filing eviction proceedings. The tenant-plaintiffs alleged that the management company illegally defined the excessive late fees as rent in their leases so that when a tenant paid their rent, the management company would first deduct late fees, making the tenant's rent payment insufficient, triggering more late fees and often eviction filings. The Court found that this scheme violates state law in two ways. First, the practice of charging collection fees beyond a 5% late fee violates Maryland's statutory limit on late fees. Second, the Court held that rent "means the fixed, periodic payments that a tenant makes for the use or occupancy of the premises" and that the management company's attempt to add additional charges to the definition of rent in lease agreements is illegal. As a result, the management company must apply rent payments only to rent due and may not initiate eviction proceedings based on non-payment of other fees. The case was remanded to the lower court to reconsider allowing the plaintiffs to proceed under class certification, allowing all tenants of the management company to seek relief based on these legal findings. Read the full decision here.

Held, et al. v. Montana (Supreme Court of Montana, January 16, 2024) The Supreme Court of Montana upheld a trial court decision denying the State's request to stay the trial court's decision that found unconstitutional the Montana Environmental Policy Act. Youth advocating for the environment challenged the Act because it prohibits Montana from considering the climate impacts of energy projects. In a landmark decision, the trial court found that the Montana Constitution provides the right to a "clean and healthful" environment and the prohibition against considering climate impacts interferes with that right. The State sought a stay of the decision, allowing energy projects to proceed without consideration of climate impacts, while the case proceeds on appeal. Finding the State unlikely to prevail on the merits of the case, the lower court refused to issue the stay. The Supreme Court of Montana agreed, allowing the lower court decision to remain in effect while the case proceeds to a full appeal. Montana may not proceed with energy projects without taking climate impacts into consideration. Read the full Opinion here.

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

Ohio, et al. v. Becerra (Supreme Court of Florida April 1, 2024): The Supreme Court of Florida ruled that a state statute banning abortion after 15 weeks of gestation did not violate the Florida Constitution's Privacy Clause that provides "the right to be let alone and free from governmental intrusion into . . . private life." Long-standing decisions by the Court finding abortion protections in the Privacy Clause were based on the same analysis that had been used in Roe v. Wade, overturned by the Supreme Court of the United States in Dobbs. The Florida Court overturned its precedent, abiding to the same analysis used in Dobbs to overturn Roe and finding that the previous decisions failed to give proper deference to the state legislature. Having established no constitutional right to abortion, the Court upheld the 15-week ban largely on the grounds that state legislation is entitled to the presumption of constitutionality. Although the case concerned the 15-week ban, the decision eliminating the state constitutional right to abortion triggered a new law imposing a 6-week ban. On the same day the Court upheld the abortion ban, the Court approved placing a question on the November 2024 ballot called the "Amendment to Limit Government Interference with Abortion," that would limit the power of the legislature to restrict abortion access. Florida requires a 60% favorable vote to amend the Constitution. Read the full Planned Parenthood Opinion here. Read the ballot question Advisory Opinion here.

Planned Parenthood Arizona, et al. v. Kristin Mayes, et al. (Arizona Supreme Court, April 9, 2024): The Arizona Supreme Court found that a law passed in 1864 that prohibits abortion except to save the life of the pregnant person was returned to effect because of the Supreme Court of the United States decision in Dobbs overturning Roe v. Wade. The court explained that the 15-week abortion ban passed in 2022 and other post-Roe abortion laws passed by the state legislature failed to completely repeal the 160-year-old total abortion ban that had only been unenforceable because of Roe. The later enactments did not create an explicit right to abortion. As a result, abortion is prohibited except to save the life of the pregnant person per the 1864 law. Unlike the 15-week ban, the 1864 law lacks any definitions or explanations that medical professionals can rely upon to determine when a pregnant person's life is in sufficient jeopardy to permit abortion. The Attorney General of Arizona sought reconsideration of the decision; that was denied April 30, 2024. On May 1, 2024, the Arizona State Legislature passed a bill repealing the 1864 prohibition and the Governor will sign the bill. As a result, the 1864 ban revived in the Mayes case will have no effect and the 15-week ban passed in 2022 will be effective. Read the full decision here.

Bryant v. Stein, et al. (U.S. District Court for the Middle District of North Carolina, April 30, 2024): The District Court for the Middle District of North Carolina found that some aspects of a North Carolina law regulating the provision of medication abortion are preempted by federal law. Medication abortion drugs are approved by the Food and Drug Administration (FDA) and may be prescribed and used as established by the FDA. Provisions in the North Carolina law that prohibit non-physician medical professionals from prescribing medication abortion drugs; require in-person prescribing, dispensing, and administering; and compel prescribers to schedule an in-person follow-up appointment are preempted by the FDA's approval and rules for use of the drugs. State law requirements for in-person counseling, ultrasound and blood testing, and adverse event reporting to the State are not inconsistent with federal law and may remain in effect. Read the full opinion here.

Ohio, et al. v. Becerra (U.S. Court of Appeals for the 6th Circuit, November 30, 2023) The Sixth Circuit Court of Appeals struck down aspects of the Biden Administration's regulations related to Title X funding for family planning clinics. Per Congress, Title X funding may not be used for abortion care. The decision, applicable only in Ohio, revives the Trump Administration's policy requiring clinics to maintain "strict physical and financial separation" if they offer contraception and other services

through Title X and also offer abortion care with other funding. That rule requires that the differently funded services be provided in different buildings, by separate staff, and using distinct billing systems. The Court did not strike down the Biden Administration rule that Title X funded clinics refer patients to abortion providers if the patient requests abortion care. Read the full Opinion here.

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