

## JUDICIAL TRENDS IN PUBLIC HEALTH – MAY 14, 2024

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

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2. CONSTITUTIONAL RIGHTS & THE PUBLIC'S HEALTH ([2 Cases](#))
3. PREVENTING & TREATING COMMUNICABLE CONDITIONS ([1 Case](#))
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10. PUBLIC HEALTH EMERGENCY: LEGAL PREPAREDNESS & RESPONSE
11. REPRODUCTIVE LIBERTIES & CARE ACCESS ([1 Case](#))

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

### 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.](#)

### 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.](#)

### 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.](#)


## 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.](#)

## 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.](#)


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

## 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.](#)

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