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

Snell v. Walz (Supreme Court of Minnesota, May 10, 2024) The Supreme Court of Minnesota affirmed dismissal of a challenge to the Governor of Minnesota's power to declare a peacetime emergency due to the COVID-19 pandemic under the State's Emergency Management Act. The case had been presented to the State's highest court previously, after most of the claims had been dismissed as moot because the period of peacetime emergency had ended. At that time, the Court remanded the case for substantive determination because the issue presented was "functionally justiciable" and "of statewide importance." On remand, the lower courts held that the Act authorized the Governor's emergency declaration. The Supreme Court of Minnesota affirmed, finding that the Act generally authorizes the Governor to declare a peacetime emergency in response to "a public health crisis such as a pandemic." The Court considered the plaintiff's argument that the Act was prohibited by the nondelegation doctrine but rejected this argument because Minnesota's statutes are "presumed constitutional," and because the Act contains limitations and "non-illusory checks" on its powers and strikes a balance between "government overreach and emergent threats." In a concurrence, Justice Anderson addressed "serious concerns" related to "executive branch emergency orders issued over extended periods of time," but concluded that it is the Legislature's

role to assign powers and to design oversight systems to keep those powers in check. Read the full Opinion here.

Garland v. Cargill (U.S. Supreme Court, June 14, 2024) By a 6-3 vote, the Supreme Court invalidated the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) rule that classified bump stocks as "machine guns" for purposes of the National Firearms Act, which would have essentially prohibited ownership of the devices. The Court held that "a bump stock—an accessory for a semi-automatic rifle that allows the shooter to rapidly reengage the trigger (and therefore achieve a high rate of fire)" — does not turn the rifle into a machine gun as defined by federal law. The decision was not based on the Second Amendment and did not apply the *Bruen* test; rather, the opinion is solely based on the Court's interpretation of the National Firearms Act's definition of machine gun. The Court drew the distinction between the definition of machine gun, automatically firing more than one shot by a single function of the trigger, and how a bump stocks work on semi-automatic rifles, using the gun's recoil to help rapidly and repeatedly pull the gun trigger. Because ATF based its rule on the Agency's statutory authority to regulate machine guns, the Court concluded ATF exceeded its statutory authority and invalidated the rule. Read the full Opinion here.

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

A.M.C. v. Smith, (U.S. District Court for the Middle District of Tennessee, August 26, 2024): In a class action case brought on behalf of thousands of plaintiffs, the U.S. District Court for the Middle District of Tennessee found that TennCare, Tennessee's Medicaid program, violated federal statutes and the Constitution in terminating or wrongly denying coverage to Medicaid beneficiaries and applicants. The Court ruled in favor of the class on myriad issues, including that TennCare 1) failed to determine applicants' eligibility for different categories in Medicaid before terminating them; 2) did

not provide applicants with required notice about their eligibility results or provided misleading notice; 3) denied applicants the opportunity to contest eligibility determinations; and 4) discriminated on the basis of disability. The first three findings are based on federal law and the Due Process Clause of the Constitution, and the fourth finding is based on the Americans with Disabilities Act. With these legal findings, the Court will now shift to determining the remedy for the statutory and constitutional violations that harmed thousands of Tennesseans for many years. Read the full opinion here.

The Catholic Benefits Association, et al. v. Equal Employment Opportunities Commission, (U.S. District Court for the District of North Dakota, September 23, 2024): The U.S. District Court for the District of North Dakota issued a preliminary injunction prohibiting the Equal Employment Opportunity Commission (EEOC) from enforcing certain provisions of the federal Pregnant Workers Fairness Act (PWFA) against certain Catholic employers across the country. The PWFA protects employees from discrimination based on pregnancy, childbirth, or related medical conditions. The EEOC interprets the PWFA as including protections for employees seeking abortion care or fertility treatments, like IVF. Employers are not required to provide medical care coverage for abortion care or fertility treatments but may not discriminate against an employee with regard to using medical or other leave for those purposes. The Catholic employers deem abortion and fertility treatment immoral and argued that applying the law to them would violate the Religious Freedom Restoration Act (RFRA) designed to protect religious liberty. The Court was persuaded by the argument and found that the PWFA likely violates RFRA. Read the full opinion here.

U.S. v. Connelly, (U.S. Court of Appeals for the 5th Circuit, August 28, 2024): The U.S. Court of Appeals for the Fifth Circuit found unconstitutional a federal law that prohibits an unlawful user of controlled substances from possessing a firearm. Police responded to a call about gunshots being fired at a home where Paola Connelly lived. When police arrived, Connelly acknowledged to police that she possessed a firearm and that she occasionally used marijuana. Although Connelly had not engaged in violent behavior and was not intoxicated at the time, police charged her with violating 18 U.S.C. §922(g)(3), which prohibits possession of a firearm by one who unlawfully uses controlled substances. Applying the Bruen test, the Fifth Circuit found that “our history and tradition may support some limits on a presently intoxicated person's right to carry a weapon… but they do not support disarming a sober person based solely on past substance usage.” As a result, the federal prohibition was found unconstitutional. Read the full opinion here.

U.S. v. Scheidt (U.S. Court of Appeals for the 7th Circuit, June 7, 2024) The Seventh Circuit Court of Appeals held that the Bruen Supreme Court ruling does not compel the Court to undergo a Second Amendment review of historical gun registration requirements because requirements for transaction records are not unconstitutional. The case concerned criminal charges based on a federal criminal statute, 18 U.S.C. § 922(a)(6), which prohibits any person from knowingly making a false oral or written statement on a fact material to a gun purchase transaction. The defendant was indicted and pled guilty to making false written statements likely to deceive a firearms dealer, and admitted to selling firearms to a man she believed was affiliated with a Mexican drug cartel. On appeal, the defendant argued that the prohibition on falsifying information on a Firearms Transaction Record was a violation of the Second Amendment. The Court affirmed the conviction without performing an historical analysis of gun registration forms because the Second Amendment does not cover Scheidt’s conduct. The Court held that the criminal statute “restricts fraudulent statements, not firearm purchases.” Instead of performing a Second Amendment analysis, the Court concluded that

"[o]rdinary information-providing requirements … do 'not infringe' the right to keep and bear arms," making the Bruen historical analysis framework inapplicable. Read the full opinion here.

Vaughn v. Bassett, et al. (U.S. Court of Appeals for the 5th Circuit, June 10, 2024) The Fifth Circuit Court of Appeals reversed a lower court's dismissal of inmate Vaughn's Bivens claim that the warden and others violated the Eighth Amendment by denying him access to necessary medical care. Vaughn, representing himself pro se and in forma pauperis, was injured when he collided with another inmate during a softball game, leaving his nose bleeding and his face "visibly caved in." Although Vaughn promptly requested medical attention, defendant Basset ordered him back to his room and did not arrange transportation to a hospital. Vaughn was evaluated at a hospital the following day, but defendants Crnkovich and Pence prevented him from following up appropriately, including by neglecting to provide Vaughn's facial surgeon with his CT images. Despite Vaughn's repeated requests and urgent need for surgery, defendants Crnkovich and Pence failed to provide him with pain medication and delayed his medical follow up for six weeks, until after his bones had healed, resulting in permanent disfiguration of Vaughn's face. Without commenting on the merits of his claims, the Court held that Vaughn had properly pled an Eighth Amendment claim for deliberate indifference—a very difficult standard for inmates to meet--because he properly alleged that he sustained a serious injury, that the defendants were aware of his injury, and that had subsequently received delayed and inadequate treatment. Read the full opinion here.

Kindschy v. Aish (Supreme Court of Wisconsin, June 27, 2024): The Supreme Court of Wisconsin struck down a civil harassment injunction against an anti-abortion protester because it violated the First Amendment. The Court explained that in a criminal prosecution for harassment premised on true threats, the government must prove at a minimum that the defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." Citing the recent U.S. Supreme Court decision in Counterman v. Colorado, the Court found that the defendant's repeated comments to Kindschy, an abortion clinic worker, did not constitute "true threats," and therefore were protected by the First Amendment. Kindschy had obtained a civil harassment injunction after the defendant repeatedly made intimidating comments urging her to repent, including statements that she would be "lucky" if she made it safely to her home that night, and that "bad things are going to start happening to you and your family." The Court held that these statements "cannot be interpreted as true threats" because the defendant did not threaten violence or allude to any "recent, or well-known, real-world acts of violence," and because they came from "a place of love or nonaggression." Because the respondent's statements were considered protected speech, the Court applied strict scrutiny and overturned the harassment injunction. The Court held that the injunction did not pass the "high bar" required by strict scrutiny because it "burdens significantly more speech than is necessary," including by effectively preventing the defendant from speaking with other workers at the clinic. Read the full opinion here.

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

MacDonald v. Oregon Health & Science University (U.S. District Court for Oregon, July 5, 2024) The U.S. District Court for Oregon granted summary judgment to Oregon Health & Science University (OHSU), rejecting MacDonald's prima facie Title VII claim because her religious accommodation request to remain unvaccinated would have caused undue hardship to OHSU. OHSU is the largest public hospital system in Oregon, and MacDonald worked as a registered nurse in their Children's Hospital's Mother and Baby unit. MacDonald was denied a religious accommodation to remain unvaccinated against COVID-19, and she was subsequently fired after she continued to decline vaccination. OHSU's lawyers conceded that MacDonald had established a prima facie case of Title VII discrimination, but the Court granted summary judgment because OHSU demonstrated that the requested accommodation would have caused undue hardship to the hospital. OHSU established this affirmative defense with declarations from hospital administrators to describe the anticipated impact of the accommodation, and an expert report that documented the known threat of COVID-19 and the unique efficacy of vaccines. By contrast, MacDonald's case was weakened by "redundant or inappropriate" arguments," and by the exclusion of much of her evidence as hearsay, or due to errors in submission. In granting summary judgment, the Court notes that the Defendant's undue hardship defense would not depend on the efficacy of the required vaccine, but on the Defendant's "assessment of undue hardship at the time it denied Plaintiff's exemption." Despite conceding a prima facie Title VII violation, OHSU convinced the Court that accommodating MacDonald would have "undermined Defendant's legitimate mission, creating a substantial increased cost and, hence, an undue hardship," so the Court granted the OHSU's motion for summary judgment. Read the full opinion here.

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

Food and Water Watch, et al. v. U.S. Environmental Protection Agency, (U.S. District Court for the Northern District of California, September 24, 2024): The U.S. District Court for the Northern District of California found that the current "optimal" level of fluoride in drinking water set by the Environmental Protection Agency (EPA) presents an unreasonable risk of lowering children's IQ. For generations, the majority of local jurisdictions across the country have added fluoride to drinking water supplies, most commonly at the level recommended as optimal by the EPA, though no federal law requires water fluoridation by these local governments. Groups challenging the EPA's establishment of an optimal level asked the Court to order the EPA to reverse course, retracting the recommendation and prohibiting the use of fluoride in drinking water pursuant to the Toxic Substances Control Act (TSCA). While the Court found that the EPA failed to consider evidence of harm from water fluoridation and directed the Agency to take action under TSCA, the decision does not indicate what specific action the Agency must take. Read the full decision here.

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

In re Fosamax (alendronate sodium) Products Liability Litigation, (U.S. Court of Appeals for the 3rd Circuit, September 20, 2024): The U.S. Court of Appeals for the Third Circuit found that the federal Food, Drug, and Cosmetic Act (FDCA) that gives the Food and Drug Administration (FDA) power to regulate the labeling of drugs does not preempt failure-to-warn claims made under state law. Nationally more than 3,000 cases have been filed against Merck, the manufacturer of Fosamax, an

osteoporosis drug. Plaintiffs allege that Merck was aware that the drug created a risk of thigh bone fractures but failed to warn about that risk. Merck claimed that the warnings on the drug were approved by the FDA, that the company sought but was denied approval for relevant changes to the FDA-approved warnings, and that this federal process preempts any failure-to-warn claims based on state law. The parties have litigated this issue for more than 10 years, with several court decisions and reversals over that time. Although Fosamax now carries the thigh bone fracture warning,as a result of the Court's decision, those injured prior to the warnings are able to proceed to trial on their state law claims. Read the full Opinion here.

Does v. Broadbent, et al., (Supreme Court of Utah, August 8, 2024): The Supreme Court of Utah held that the state's Health Care Malpractice Act did not apply to plaintiffs' claims of sexual battery, sexual assault, and intentional infliction of emotional distress against their former health care provider, obstetrician-gynecologist Dr. Broadbent. The Malpractice Act applies to claims alleging "personal injuries relating to or arising out of health care rendered." The plaintiffs allege that Dr. Broadbent engaged in inappropriate conduct during medical appointments under the guise of providing medical care. The trial court had dismissed the plaintiffs' claims, concluding that the Malpractice Act applied and that the plaintiffs failed to take required pre-litigation steps prior to filing suit. The Supreme Court reversed, holding that the Malpractice Act did not apply because the alleged acts served no medical purpose and could not be considered medical treatment, even though they occurred during medical appointments. As a result, the plaintiffs were not required to meet the requirements of the Malpractice Act. Read the full Opinion here.

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 with 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

Vita v. New England Baptist Hospital, (Supreme Judicial Court of Massachusetts, October 24, 2024): The Supreme Judicial Court of Massachusetts held that two hospitals did not violate Massachusetts' wiretap law when they captured Vita's personal information as she browsed the hospitals' websites searching for health care providers to treat certain medical conditions. Although the hospitals did not collect personal medical information protected by federal and state privacy laws, they did collect information about the types of medical professionals Vita researched and they sold that information to third parties. The case turned on whether web browsing activity constitutes "communication" under the wiretap law. The Court found the statute ambiguous on that question and examined legislative history, which revealed that the law is intended to apply to covert interception of private, person-to-person conversations. Applying the "rule of lenity" that a criminal statute should be narrowly construed in favor of the accused, the Court dismissed Vita's claims, holding that the wiretap law does not apply to intercepting web-browsing activity. Read the full Opinion here.

8. REGULATING COMMUNICATIONS

Bates v. Oregon Health Authority, (Court of Appeals of Oregon, October 16, 2024): The Court of Appeals of Oregon found that a state law prohibiting packaging of tobacco and cannabis vape products that is attractive to minors violates vape manufacturers' free speech rights under the Oregon Constitution. Regulations adopted under the law prohibited vape product packaging using cartoons, celebrity endorsements, and fruit flavors and descriptors for other flavors likely to appeal to minors. The Court found these restrictions not focused on the sale of vape products to underage consumers but rather restraints on speech. Given the broad protection of speech in the Oregon Constitution, the statute and regulations were struck down as unconstitutional. Read the full Opinion here.

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

King County v. Friends of Sammamish Valley, (Supreme Court of Washington, September 19, 2024): The Supreme Court of Washington found that King County failed to properly consider the environmental impacts of changes made to zoning laws designed to support certain types of businesses–wineries, breweries, and distilleries in rural areas. Washington's State Environmental Protection Act (SEPA) requires significant analysis of the environmental impacts of development projects. King County passed zoning changes that would allow for expanded operations at certain alcohol businesses, including permitting remote tasting rooms, large events, and paved parking areas to accommodate the changes. These changes would apply in rural and agricultural communities. The County argued that it was not required to conduct the full SEPA analysis of environmental impacts. The Court rejected that argument, finding SEPA applicable and the County's environmental assessment inadequate. Read the full Opinion here.

Hobby Distillers Ass'n v. Alcohol and Tobacco Tax & Trade Bureau (U.S. District Court for the Northern District of Texas, July 10, 2024) The U.S. District Court for the Northern District of Texas granted summary judgment to overturn two regulations restricting the possession and placement of distilled spirits grains and distilling equipment, holding that the restrictions were a Congressional overstep not authorized by the Tax or Commerce powers. Although the government described the overturned regulations as taxes, the Court held that they were not authorized by the Tax Power because they did not generate revenue and they lacked the essential features of a tax. The Court also evaluated whether the Commerce Clause might justify the regulations but held that the federal regulation of alcohol was insufficiently comprehensive to extend to the regulation of personal production. Comprehensive regulatory schemes, like those for marijuana (Gonzales v. Raich) or wheat (Wickard v. Filburn), "justif[y] Congressional regulation of local behavior." By contrast, federal alcohol regulations only address interstate activity, leaving substantial control over production, distribution, and consumption to the states. The Court also held that the overturned regulations were not "necessary and proper" because the regulations lacked a "sufficiently clear corollary" connecting them to either the Tax or Commerce Powers. The Court struck down both contested regulations as unconstitutional overreaches of Congress's enumerated powers. Read the full opinion here.

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

Redd v. Amazon.com, Inc., et al. (U.S. District Court for Northern Illinois, June 4, 2024) The U.S. District Court for Northern Illinois granted summary judgment to defendant Amazon for alleged violations of the Biometric Information Protection Act (BIPA) because the contested actions are covered countermeasures protected by the Public Readiness and Emergency Response Act (PREP). Following the federal declaration of a public health emergency due to COVID-19, Amazon used thermal cameras in high-traffic warehouses to screen the temperatures of employees for the purpose of reducing the spread of COVID-19. Amazon employee Redd alleged that Amazon used the thermal sensors to check her temperature without her knowledge or consent. Redd also alleged that Amazon collected additional biometric data, such as facial geometry scans, and shared this data with device and software vendors and other third parties. Although there was no dispute that Amazon's temperature monitoring was a covered countermeasure under PREP, Redd argued that Amazon's failure to obtain consent had separately violated BIPA. The Court limited its analysis to the plain

language of the PREP Act, which provides immunity for all federal and state claims against losses caused by or arising from the use of countermeasures covered by the PREP Act. The Court determined that Redd's claims had arisen from the protected use and administration of thermal cameras and granted Amazon summary judgment. Read the full opinion here.

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

Oklahoma v. Department of Health and Human Services, (U.S. Supreme Court September 3, 2024): The Supreme Court of the United States refused to consider a case in which the U.S. Circuit Court of Appeals for the 10th Circuit allowed the U.S. Department of Health and Human Services to withhold approximately $4 million in Title X funding from the state of Oklahoma. Title X rules require that recipient states counsel pregnant people who use federally funded family planning centers about all options, including abortion care. Oklahoma refused to do so arguing that state law bans abortion in almost all circumstances. The trial court found for Oklahoma and the appellate court reversed; the Supreme Court allowed that decision to stand. Under the first Trump Administration, Title X rules did not require this counseling; the Biden Administration changed the rule to require counseling on all options. For more on the history of this issue, read our Law and Policy Insight here. Read the full Opinion of the 10th Circuit here and the notice of the Supreme Court's refusal to hear the case here.

Roman Catholic Diocese of Albany v. Vullo (New York Court of Appeals, May 21, 2024): The New York Court of Appeals upheld a mandate for insurance coverage of medically necessary abortions, holding that the mandate does not violate the Free Exercise Clause because its "religious employer" exemption was generally applicable. Plaintiffs had challenged the religious employer exemption as too narrow, violating the First Amendment rights of some religious employers who did not meet exemption criteria. This case was initially dismissed because it was substantially similar to Catholic Charities of Dioces of Albany v. Serio, which held that a requirement for insurance to cover contraception did not violate the Free Exercise Clause because it was "neutral and generally applicable." The Court vacated its dismissal after the U.S. Supreme Court decied Fulton v. Philadelphia, which focused solely on "general applicability," to evaluate whether Fulton had changed the controlling precedent for Free Exercise claims. The Vullo Court held that the insurance mandate is still "generally applicable" under Fulton because its determination of "religious employer" status relies on enumerated factors and objective criteria, rather than individual discretion. In addition, the Court held that the insurance mandate did not treat secular conduct more favorably than religious conduct. After establishing that the insurance mandate qualified as "generally applicable," the Court declined to apply strict scrutiny and affirmed the Appellate Division's dismissal of the case. Read the full opinion here.

Planned Parenthood of the Heartlands, et al. v. Reynolds, et al. (Supreme Court of Iowa, July 28, 2024) The Supreme Court of Iowa reversed the district court and overturned a temporary injunction against a fetal heartbeat law, declaring that abortion is not a fundamental right in Iowa and that abortion restrictions need only be rationally related to legitimate state interests. The district court had upheld the injunction, applying the "undue burden" test, but its analysis reflected the "unsettled terrain regarding the level of scrutiny to apply in this case." The district court relied heavily on precedent from before Dobbs, especially an Iowa Supreme Court case that had established that abortion was not a fundamental right in Iowa but had failed to form a majority regarding how abortion regulations should be scrutinized. Reevaluating this question after Dobbs, the Supreme Court of Iowa decided 4-3 that abortion regulations in Iowa should instead be evaluated under the rational basis test, a low burden for restrictions to meet. Applying this reduced scrutiny, the Court held that the fetal heartbeat law is rationally related to the legitimate state interest of protecting unborn life and reversed the temporary injunction to enable the fetal heartbeat law to take effect. Read the full Opinion here.

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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