



Constitutional Challenges to Government COVID-19 Measures Mount

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Legal challenges to “stay at home” and “essential business only” orders are beginning to mount as businesses and individuals attempt to cope with the economic fallout of the COVID-19 crisis. Among other arguments, business owners and special interest groups with constituents who have been impacted by states’ measures to combat the virus have begun arguing that orders which permit some businesses to stay open and mandate that others close are unconstitutional. They also argue the government mandates that certain businesses cease operations – and, consequently, cease collecting income – constitute a “taking” that entitles them to a payment from the government.

Among those arguing that the government-imposed lockdown constitutes an illegal taking are a group of business owners and employees in Pennsylvania who [filed a putative class-action lawsuit](#) against the state’s governor and secretary of health in the United States District Court for the Eastern District of Pennsylvania. Pennsylvania previously issued an order that all “non-life sustaining” business close on March 20, 2020. The Pennsylvania plaintiffs assert that, by issuing the order, “[t]he Governor and Secretary have seized without compensation the property of businesses and the livelihoods of individuals across [Pennsylvania], forcing indefinite closures and widespread layoffs.”

Notably, the “suit does not seek to contest whether” (emphasis original) the state’s decision to issue the closure orders were within the governor’s power; instead, the lawsuit solely contends that the adverse economic effect of the state’s order on local businesses, and the fact that the plaintiffs in some cases are no longer able to use their property, are equivalent to the government having “taken” the businesses without compensation, in violation of the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The so-called Takings Clause, found in the Fifth Amendment, limits the power of the government to exercise eminent domain by requiring that, when certain government actions have certain impacts on private property interests, the government must provide “just compensation” to affected property owners. The clause, which originally governed only federal takings, was made applicable to the states by the ratification of the Fourteenth Amendment. The Pennsylvania complaint also alleges violations of the Due Process Clause of the Constitution, a provision that is similarly found in the Fifth Amendment and made applicable to the states by the Fourteenth Amendment. This provision protects against government action that deprives a person of a protected liberty interest without adequate justification and/or administrative procedure.

The complaint demands that Pennsylvania pay business owners whose property has been reduced in value or closed entirely “just compensation” for the taking, and that the court prevent the state’s COVID-19 order from being enforced until the government can create administrative procedures and safeguards governing the implementation of the order, such as instituting an appeals process for businesses who disagree with the state’s determination of which businesses are “life-sustaining.”

This is not the first lawsuit filed in Pennsylvania regarding the government lockdown. Several law firms in the state have [petitioned the governor](#) to designate legal services as “life-sustaining” businesses, citing the critical role that law firms occupy in protecting civil and other rights. Previously, gun purchasers and gun store owners [filed a petition for relief](#) in Pennsylvania state court, arguing that the closure of gun shops in the state violated the Second Amendment, which some contend protects the right of private individuals to own firearms. The Pennsylvania Supreme Court [denied the petition](#) on March 23 without providing any reasoning, although a dissenting justice noted, “I am troubled by the uncertainty that has followed the Governor’s orders responding to the COVID-19 pandemic.”

Elsewhere, the National Rifle Association, a gun advocacy lobbying group, is [suing the state of New York](#) on similar grounds, arguing in

its April 2 complaint that New York's order shutting down all gun stores in the state violates the Second Amendment. Like the plaintiffs in the Pennsylvania class action described above, beachfront property owners in Florida – including former presidential candidate Mike Huckabee – have [filed a lawsuit](#) claiming that county ordinances closing beaches along the panhandle constitute an illegal taking without compensation.

In Puerto Rico, the ACLU [filed a lawsuit](#) alleging that some of the U.S. territory's COVID-19 measures, including a curfew and the requirement that all individuals entering a business wear a face mask, violate the population's fundamental civil rights. A Kentucky woman similarly [asserted in a lawsuit](#) that the state's COVID-19 measures, which include a mandatory 14-day self-quarantine for Kentuckians who return from outside the state and restrictions on other travel, constitute a violation of her due process rights and her right to interstate travel. A judge has already denied her petition for a temporary injunction regarding enforcement of the state's COVID-19 orders.

Whether any of these lawsuits and petitions will be successful is uncertain. Although the federal and state governments are taking unprecedented steps to combat the spread and impact of the virus, the virus itself presents an equally unprecedented threat that may well constitutionally justify the actions challenged in the above lawsuits. Businesses and individuals with concerns regarding the impact of stay-at-home orders and mandatory closures, and their rights under those measures, should contact an experienced attorney to discuss their options. For more information, contact [Joshua Lewis](#) of Frost Brown Todd's [Business & Commercial Litigation Practice](#).

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#), including a special team focusing on business funding options under the CARES Act. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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