



Apr 15, 2020

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Life and Liberty: Lessons from Early Decisions Addressing Federal Constitutional Challenges to State Orders Addressing the Coronavirus Pandemic

As states and localities have taken action to stem the spread of the coronavirus, courts are increasingly being called upon to decide whether, and to what extent, authorities may restrain freedoms and rights protected by the U.S. Constitution in the name of fighting the COVID-19 pandemic. At this stage, there are still relatively few reported court decisions that have decided such questions. Our understanding of the appropriate legal framework for addressing these issues will undoubtedly evolve as the facts develop and more decisions are issued. However, some lessons can be gleaned from the few decisions that have been issued so far.

Several court decisions have recognized that the COVID-19 pandemic changes the framework for evaluating state action infringing on people's and businesses' constitutional rights. In particular, courts have focused on a 115-year-old U.S. Supreme Court decision upholding state mandatory vaccination laws during a smallpox epidemic, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), to guide that analysis.

For example, the Fifth Circuit recently declared that while "individual rights secured by the Constitution do not disappear during a public health crisis," it construed the Supreme Court's decision in *Jacobson* to provide that, "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to that public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" ^[1] Thus, the Fifth Circuit vacated a district court's temporary restraining order enjoining the Texas governor's order suspending abortions along with other elective surgeries,

holding “the district court abused its discretion by failing to apply (or even acknowledge) the framework” established in *Jacobson*. *Id.* at *5. The Fifth Circuit made clear, moreover, that this framework was not limited to cases involving abortion rights: “*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.”^[2]

The *Jacobson* framework was also applied in another case addressing Oklahoma’s suspension of abortions along with other elective surgeries.^[3] Likewise, a recent federal district court opinion addressing First Amendment challenges to the application of mass-gathering bans to drive-in religious services recognized that such challenges should be viewed through the lens of the *Jacobson* case.^[4]

However, the decisions to date have varied somewhat in their application of the *Jacobson* framework, including their identification of the facts and factors most relevant under this framework.

For example, the majority in the Fifth Circuit’s *In re Abbott* decision construed *Jacobson* as broadly prohibiting courts from “second-guess[ing] the wisdom or efficacy” of state executive public health orders, although it noted courts could inquire whether such orders contained “basic exceptions for ‘extreme cases’” or whether the orders used the health crisis as a mere pretext to target constitutionally protected conduct.^[5] The majority held the governor’s order satisfied these standards, emphasizing that the suspension was temporary, it treated abortions the same as other elective surgeries, and it contained exceptions, which all suggested it was “reasonably tailored to the present crisis.”^[6]

The dissenting opinion in *In re Abbott* also purported to apply the *Jacobson* framework, but concluded the governor’s order was invalid under that standard as a “plain and palpable” violation of rights. The dissent emphasized that postponing abortions would, in many cases, effectively deny them entirely.^[7] The dissent also found an absence of a real or substantial relation to the health crisis under *Jacobson*, because abortions used minimal PPE and hospital resources, and because the order could encourage patients to travel out of state to seek abortions, which could spread the virus.^[8]

Following the Fifth Circuit's decision, the Texas district court issued a second, narrower temporary restraining order (TRO), which only enjoined enforcement of the order against non-surgical medical abortions, and patients whose pregnancies had progressed to the point that the suspension could deny them any access to abortion. The Fifth Circuit has not yet fully reviewed the merits of this order, but unlike the first TRO, on April 13, 2020, the Fifth Circuit declined to stay the second TRO. The Fifth Circuit still expressed "serious concerns" about whether the second TRO sufficiently addressed the *Jacobson* framework, but also expressed "doubts" about the state's factual basis for applying the suspension to non-surgical medical abortions, and thus found a stay was not warranted.^[9]

Contemporaneously with the Fifth Circuit's consideration of *Abbott*, an Oklahoma district court applied the *Jacobson* standard to the Oklahoma governor's order suspending abortions, and like the dissent in *Abbott*, found such a suspension failed the *Jacobson* test and issued a temporary restraining order.^[10] On April 13, 2020, the Tenth Circuit dismissed an appeal from the TRO on jurisdictional grounds, finding that the state had not shown it would be irreparably harmed if the TRO remained in place until a full hearing on a preliminary injunction was completed.^[11]

In the First Amendment context, a recent Kentucky district court recognized the applicability of *Jacobson*, but nonetheless issued an *ex parte* temporary restraining order prohibiting restrictions on drive-in church services.^[12] Applying traditional First Amendment principles, the court held the ban, as construed by the plaintiffs, it was not neutral toward religion because the state allowed other drive-in and drive-through business activity, including sales of alcohol. The court held that Louisville would be unlikely to satisfy the requirement under strict scrutiny, and that its actions were narrowly tailored to a compelling state interest, because the court believed the city's interest could be sufficiently served by allowing services to be held subject to requirements that cars be adequately spaced and attendees remain in their vehicles. The court acknowledged that under *Jacobson*, "the rules of the road in constitutional law [do not] remain rigidly fixed in the time of national emergency," Slip Op. at 15, but found that the city's restrictions, as described in plaintiffs' TRO application, "violate the Free Exercise

Clause ‘beyond all question’ [under *Jacobson*] because they are not even close to being narrowly tailored to advance” the state’s compelling interest in combatting the pandemic.^[13]

The variations in these courts’ approach to the *Jacobson* framework is not surprising. *Jacobson* was decided long before the development of more modern analytic frameworks for evaluating constitutional rights, like strict scrutiny, intermediate scrutiny, and rational basis analysis. Indeed, *Jacobson* largely preceded the Supreme Court’s incorporation of the Bill of Rights onto the states. Thus, the *Jacobson* decision’s pronouncements are not made in the language of the more mechanical tests that modern courts use to evaluate constitutional challenges to state action. *Jacobson* has been cited occasionally, in a variety of contexts, in the century-plus since it was decided. But prior to the current crisis, there was little if any case-law elaborating on *Jacobson* as setting forth the definitive constitutional framework for evaluating constitutional rights in times of public health crisis. Thus, we can expect the contours of this framework to evolve and take further shape as more and more courts apply it to different factual circumstances in the context of the current pandemic.

For more information, please contact [Jason Renzelmann](#) or any attorney in Frost Brown Todd’s [Business & Commercial Litigation](#) or [Government Services](#) Practice Groups.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). 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.

^[1] *In re Abbott*, 2020 WL 1685929, at *6 (5th Cir. April 7, 2020) (quoting *Jacobson*, 197 U.S. at 31).

^[2] *Id.* at *8 (italics in original).

^[3] *South Wind Women’s Center LLC*, 2020 WL 1677094, at *1 (W.D. Okla. April 6, 2020)

^[4] *On Fire Christian Center, Inc. v. Fischer*, Civ. Action No. 3:20-CV-264 (E.D. Ky., April 11, 2020, Temporary Restraining Order).

[\[5\]](#) *In re Abbott*, 2020 WL 1685929, at *7.

[\[6\]](#) *Id.* at *10.

[\[7\]](#) *Id.* at *20.

[\[8\]](#) *Id.* at *22.

[\[9\]](#) Slip Op., *In re Abbott*, No. 20-50296, at 3,4 (April 13, 2020).

[\[10\]](#) *South Wind Women's Center*, 2020 WL 1677094.

[\[11\]](#) *South Wind Women's Center v. Stitt*, 2020 WL 1860683 (10th Cir. April 13, 2020).

[\[12\]](#) Slip Opinion, *On Fire Christian Center, Inc. v. Fischer*, Civ. Action No. 3:20-CV-264 (E.D. Ky., April 11, 2020 Temporary Restraining Order).

[\[13\]](#) *Id.* at 12.

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