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RECENT CONSTITUTIONAL LITIGATION CHALLENGING GOVERNMENTAL RESPONSES TO THE COVID-19 PANDEMIC

To Our Clients and Friends:

I. Overview

In previous alerts, we discussed the constitutional limitations on governmental responses to COVID-19 under the Takings, Contracts, Due Process, and Equal Protection Clauses of the U.S. Constitution, and have also considered how the constitutional right to travel and the Dormant Commerce Clause limits governmental actors.^[1]

A number of businesses and others subject to COVID-19 regulations have now filed suit challenging governmental actions as unconstitutional, including under some of the same theories we identified in these prior alerts. Some plaintiffs have alleged that state and local responses to the COVID-19 pandemic, particularly shut-down orders, have effected unconstitutional takings without just compensation, are arbitrary and irrational and deprive them of fair notice and equal protection, and violate their right to travel. Other plaintiffs have brought Freedom of Assembly, Association, and Petition claims under the First Amendment, while others have raised Dormant Commerce Clause objections or challenges under the Republican Guarantee Clause.

So far, while all courts have recognized that constitutional restrictions bind governmental actors even during emergencies, plaintiffs' challenges have had mixed success. Some courts have struck down governmental orders, finding that the particular action constituted governmental overreach. And in other instances, governments have elected to resolve litigation by rescinding the challenged action before any final ruling. Other courts have deferred to governmental actions taken in the midst of a pandemic, declining to enjoin the action or strike it down. This is a fast-moving environment, and many of the cases discussed below were decided on preliminary motions, so we should continue to see a development in the jurisprudence as the cases progress. And because the majority of the constitutional challenges are still pending, there remains much opportunity for the development of additional caselaw in these complex areas of constitutional law.

Below is a description of some of the recent cases challenging COVID-19-related governmental actions on constitutional grounds.^[2]

II. Recent Constitutional Challenges To COVID-19-Related Governmental Acts

1. Some plaintiffs have met with success in challenging COVID-19-related orders. On May 6, 2020, a Massachusetts federal court entered a temporary restraining order enjoining the Massachusetts Attorney General from enforcing a COVID-19-related regulation that had banned debt collectors from telephonic

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communications and from initiating enforcement actions. *ACA Int'l v. Healey*, No. CV 20-10767-RGS, 2020 WL 2198366 (D. Mass. May 6, 2020). The court held that the regulation “impose[d] a flat ban on a particular medium of speech (telephone communications) involving a particular subject matter (the solicitation of payment of a debt) by a particular subset of those persons (debt collectors) who engage in that type of speech,” and that the regulation did not add anything to existing consumer protections “other than an unconstitutional ban on one form of communication.” *Id.* at *5, *8. In addition, the regulation’s prohibition against initiating lawsuits violated the constitutional guarantee of access to the courts embedded in the First Amendment’s right to petition the government for redress of grievances. *Id.* *8–*9.

Another case preliminarily enjoined a stay-at-home order because it violated the right to travel. By executive order in March 2020, the Governor of Kentucky had banned Kentucky residents from traveling out of state with only a few exceptions. *Roberts v. Neace*, No. 2:20-CV-054 (WOB-CJS), 2020 WL 2115358, at *1 (E.D. Ky. May 4, 2020). The district court held that “[t]he restrictions infringe on the basic right of citizens to engage in interstate travel.” *Id.* at *4. The court noted that the constitutional right to travel from one state to another “is ‘virtually unconditional.’” *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)). And the order’s restrictions, the court concluded, were not narrowly tailored, given that the order restricted even minimal travel to a neighbouring state, while allowing otherwise identical travel within the state. *Id.* Moreover, individuals who lived close to the border would be prohibited from their normal travel across state lines. *Id.* Finally, the court noted that check-points would have to be set up at all entrances to the state, with quarantine facilities to accommodate the thousands of individuals crossing the border. *Id.* In response to the ruling, the Governor rescinded the Executive Order and issued a new one that “replaced the mandatory language related to travel and self-quarantining with more permissive language.” *W.O. v. Beshear*, No. 3:20-CV-00023-GFVT, 2020 WL 2314880, at *1 (E.D. Ky. May 9, 2020).

Other courts have struck down COVID-19 regulations based on claims of executive overreach rooted in state constitutional law and related principles. For example, on May 13, 2020, the Wisconsin Supreme Court struck down an order issued by the Secretary of the Wisconsin Department of Health Services requiring all people to remain in their homes, prohibiting all non-essential travel, and closing all non-essential businesses. The court ruled that the order was unenforceable because the Secretary did not follow the statutory rulemaking procedures, and exceeded her statutory authority. *Wis. Legislature v. Palm*, No. 2020-AP-765-OA, 2020 WL 2465677 (Wis. May 13, 2020). Several Justices also noted that allowing the Secretary to make rules and enforce them without going through the rulemaking process would violate the Wisconsin Constitution’s separation of powers. *See id.* at *14 (R.G. Bradley, J., concurring); *id.* at *31 (Kelly, J., concurring).

In other cases, the governmental entity has chosen to avoid litigation by rescinding its restriction after plaintiffs brought their challenge and prior to a final ruling from the court. For example, after the Michigan Governor’s office prohibited the use of motorized boating, a conservation group brought suit, arguing that the ban violated the Equal Protection Clause by irrationally singling out motorized boating, that it arbitrarily infringed on the right to travel, and that it ran afoul of the Dormant Commerce Clause by burdening interstate commerce and the navigation of interstate waterways. After the lawsuit was

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filed, the Governor rescinded the motorboat ban, and the plaintiff voluntarily dismissed its suit. *See Mich. United Conservation Clubs v. Whitmer*, No. 1:20-cv-00335 (W.D. Mich.).

Similarly, an association of landscapers and garden-supply retailers filed suit to enjoin the Michigan Governor's Order prohibiting the operation of businesses that require workers to leave their homes or places of residence. The association argued that the order unduly burdened interstate commerce in violation of the Dormant Commerce Clause, violated the right to travel, and amounted to an uncompensated taking. Although the court declined to issue a temporary restraining order, it set the case for full briefing, noting that it "has concerns about the application of the Executive Order to landscaping services," and acknowledging that "Plaintiffs have a point that lawn care can largely be performed alone or while maintaining an appropriate social distance." Order, *Mich. Nursery & Landscape Ass'n v. Whitmer*, No. 1:20-cv-331, ECF No. 19 (W.D. Mich., Apr. 22, 2020). Two days later, the Governor modified her order and allowed gardeners and landscapers to resume their work.

In one recently filed high-profile challenge, Tesla sued Alameda County, arguing that the County's local orders halting all business activities conflict with state orders allowing all businesses involving federal critical infrastructure—including Tesla—to continue operating. The local order, Tesla argued, deprives regulated parties of fair notice in violation of due process, given its conflict with state orders; violates equal protection by subjecting Tesla's Alameda factory to different standards than the Tesla factories in neighbouring counties; and is pre-empted by the state-wide order. *Tesla, Inc. v. Alameda Cty.*, 4:20-cv-03186 (N.D. Cal.). Only a few days later, Alameda County allowed Tesla's assembly plant to reopen with enhanced safety precautions. *See Chase DiFelicianantonio, Alameda County Agrees to Let Tesla Reopen If Certain Conditions Are Met*, S.F. Chron. (May 12, 2020), available at <https://www.sfchronicle.com/business/article/Alameda-County-orders-Tesla-s-Fremont-plant-to-15264761.php>.

These cases confirm that, as we noted in our prior alerts, courts will continue to scrutinize governmental actions in light of constitutional limits even during a pandemic. When those regulations violate constitutional requirements, restrict activity in an irrational manner, or go well beyond restrictions necessary to address the problem at hand, courts will step in. And at a certain point courts may start to feel COVID-19 "fatigue," in which they look on further or continued governmental restrictions with increasing skepticism. Additionally, the very act of initiating a lawsuit can have the beneficial effect of forcing the governmental actor to reconsider the challenged regulation, and either narrow its scope or even rescind it altogether.

2. Other plaintiffs have been less successful. For example, in *Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100 (Pa. Apr. 13, 2020), several businesses challenged the Pennsylvania Governor's Order closing the physical operations of all non-life-sustaining businesses. The Plaintiffs argued that the Order constituted a taking without just compensation, and that it violated the Constitution's guarantee of procedural due process and the freedom of assembly. The court rejected these arguments, reasoning that the Order results in only a temporary loss of the use of the plaintiff's business premises, that petitioners were entitled only to the post-deprivation process that they received, and that the order does not restrict plaintiffs' ability to assemble telephonically or online. The Plaintiffs

applied for a stay with the United States Supreme Court, which was denied; their petition for a writ of certiorari remains pending. *See Friends of Devito v. Wolf*, No. 19-1265 (U.S.).

In *Hartman v. Acton*, a federal court in Columbus, Ohio declined a bridal shop owner's request for a temporary restraining order against the Ohio Department of Health's stay-at-home order. No. 2:20-CV-1952, 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020). The court first held that the order did not violate procedural due process because "[a] person adversely affected by a law of general applicability has no due process right to a hearing since the law's generality provides a safeguard that is a substitute for procedural protections." *Id.* at *8 (internal quotation marks omitted). The court distinguished those recent cases that had issued temporary restraining orders against governmental actions closing abortion clinics (*see, e.g., Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 1:19-CV-00360, 2020 WL 1932851 (S.D. Ohio Mar. 30, 2020)) or church services (*see, e.g., On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)) because those orders "implicat[ed] a fundamental right," and also were not generally applicable, *Hartman*, 2020 WL 1932896, at *9.

Another recent case outlined the basis for deferring to governmental action during a pandemic. In *SH3 Health Consulting, LLC v. Page*, an antique store and a gym sought to enjoin COVID-19 stay-at-home orders issued by city and county officials that required "all businesses, other than essential businesses, to cease virtually all activities," arguing that those orders violated their right to assemble and associate, and their due process rights. No. 4:20-cv-00605-SRC, 2020 WL 2308444, at *2–*3 (E.D. Mo., May 8, 2020). The court first noted the Supreme Court's ruling in the context of the smallpox epidemic at the beginning of the twentieth century that, "in a public health crisis, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Id.* at *6 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 38 (1905)) (some internal quotation marks omitted). Applying this standard, the court held that there was no violation of the right to assemble, because the orders did not prevent plaintiffs from assembling "through a video call or group chat over the internet." *Id.* at *8. Similarly, Plaintiffs may still associate with their customers "[t]hrough social media, email, blogs, and telephones," and "Plaintiffs can discuss whatever they would like with whomever they would like." *Id.* As for Plaintiffs' Due Process argument, the court held that, "within the broad limits of the *Jacobson* test," the state may "order businesses to curtail activities to protect the public health and welfare." *Id.* at *10.

3. Still other challenges are waiting on a ruling. For example, a New York law firm has sued the Governor and Attorney General of New York, alleging that, although it was designated as an "essential business," state officials had been investigating it and issuing cease-and-desist letters, calling for the firm to stop employees from coming to the office. The firm has brought a wide range of claims, alleging that the actions of state officials have violated the Dormant Commerce Clause by burdening the law firm's ability to engage in interstate commerce, the Contracts Clause by impeding the law firm's ability to carry out its contracts, and the Due Process, Equal Protection, and Takings Clauses. *See Hoganwillig, PLLC v. James*, No. 20-cv-00577 (W.D.N.Y.).

Businesses in Pennsylvania have brought a class action challenging the Governor's closure orders as violative of the Takings Clause, as well as their substantive due process—because the order arbitrarily

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deprives plaintiffs of their property rights—and procedural due process rights. *Schulmerich Bells, LLC v. Wolf*, 2:20-cv-01637 (E.D. Penn.). And one recently filed case brought as a class action by a stone-working business that was deemed nonessential challenges the Governor of New York’s shutdown orders as violating the Contracts Clause because they impair the classes’ ability to fulfill obligations under contracts entered into prior to the order. *Omnistone Corp. v. Cuomo*, 2:20-cv-02153 (E.D.N.Y.). The court denied plaintiffs’ request for a temporary restraining order, and set their preliminary-injunction motion for briefing. Order, *Omnistone Corp. v. Cuomo*, 2:20-cv-02153-GRB-SIL, ECF No. 18 (E.D.N.Y. May 15, 2020).

In Maryland, in another pending case, a collection of businesses and individuals have challenged the Governor’s COVID-19 orders that individuals stay at home and not enter any businesses other than those deemed “essential,” arguing that the order infringes on their First Amendment rights to free speech and peaceable assembly, violates equal protection by arbitrarily treating them differently from others who are similarly situated, takes their property without just compensation by shuttering their businesses, and unlawfully interferes with interstate commerce in violation of the Dormant Commerce Clause. Additionally, plaintiffs argue that the order violates the Republican Guarantee Clause because the executive is adopting and enforcing regulations that were not enacted by democratically elected legislators. *Antietam Battlefield KOA, v. Hogan*, 1:20-cv-01130 (D. Md.).

These are just some of the many recently filed cases challenging business-shutdown and stay-at-home orders. Others include pending lawsuits brought by beauty salons, *Professional Beauty Federation of California v. Newsom*, 2:20-cv-04275 (C.D. Cal., filed May 12, 2020), landlords, *Behar v. Murphy*, 3:20-cv-05206-FLW-DEA (D.N.J., filed Apr. 28, 2020), lounge restaurants, *Amato v. Elicker*, 3:20-cv-00464 (D. Conn., filed Apr. 3, 2020), and other businesses, *see, e.g., Gondola Adventures, Inc. v. Newsom*, 2:20-cv-03789 (C.D. Cal., filed Apr. 24, 2020).

III. Conclusion

The broad range of outcomes in the constitutional challenges to COVID-19-related governmental actions that have already been resolved reinforces that the relevant constitutional analysis is highly fact-specific. But the successful lawsuits listed above demonstrate that even during a pandemic, governmental action is not immune from constitutional scrutiny. As governmental actors at the local, state, and federal levels continue to take actions in response to COVID-19, private parties, businesses and others subject to COVID-19 regulations should be aware of the possible relief that constitutional litigation may offer.

[1] See Gibson Dunn’s May 1, 2020 Client Alert, *The Constitutional Consequences of Governmental Responses to COVID-19: The Right to Travel and the Dormant Commerce Clause*, <https://www.gibsondunn.com/the-constitutional-consequences-of-governmental-responses-to-covid-19-the-right-to-travel-and-the-dormant-commerce-clause>; Gibson Dunn’s April 15, 2020 Client Alert, *Constitutional Implications of Rent- and Mortgage-Relief Legislation Enacted in Response to the COVID-19 Pandemic*, <https://www.gibsondunn.com/constitutional-implications-of-rent-and-mortgage->

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relief-legislation-enacted-in-response-to-the-covid-19-pandemic; Gibson Dunn's March 27, 2020 Client Alert, *Constitutional Implications of Government Regulations and Actions in Response to the COVID-19 Pandemic*, <https://www.gibsondunn.com/constitutional-implications-of-government-regulations-and-actions-in-response-to-the-covid-19-pandemic>.

[2] This Alert focuses on constitutional litigation brought by businesses and therefore does not discuss the COVID-19-related cases involving issues such as prison conditions, voting rights, abortion access, and church attendance.



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