



Litigation ADVISORY ■

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Constitutional Challenges to Pandemic Restrictions: What's Happening Now

by [Christy Hull Eikhoff](#), [Jason Levine](#), [Stuart Plunkett](#), [Gillian Clow](#), [Ryan Martin-Patterson](#), and [Kaelyne Wietelman](#)

Nearly as soon as state and local governments began imposing restrictions on businesses and individuals to prevent the spread of the novel coronavirus, lawsuits challenging their constitutionality commenced. Whether – and to what extent – individual liberties can be infringed upon to cope with a global pandemic became the question of the day. Most courts have so far declined to invalidate state and local orders issued to combat COVID-19 beyond narrow rulings. The recent federal court decision in [County of Butler v. Wolf](#), however, departs from that trend, striking down as unconstitutional key aspects of Pennsylvania's COVID-19 emergency order: the limitation on the size of indoor gatherings and the “closure of all businesses that are not life sustaining,” as articulated in the title and body of the executive order. The immediate and lasting impacts of the decision are unclear, given that it has already been appealed. But the breadth of the court's order is striking, and the issue now is whether other courts, in future challenges, will follow suit.

The General Trend Upholding Challenged COVID-19 Restrictions

Federal courts have been resistant to rule that COVID-19 regulations are unconstitutional. Notably, the U.S. Court of Appeals for the Seventh Circuit recently [rejected](#) the Illinois Republican Party's challenge to the governor's executive order limiting physical gatherings for a social event or a political rally but providing an exemption for religious gatherings. The court upheld the governor's order on injunctive review, citing it as a permissible accommodation of the Free Exercise clause of the First Amendment. Relatedly, the U.S. Supreme Court recently declined, in a [5-4 decision](#), to enjoin California's restrictions on attendance at church and other religious services.

To the extent a limited number of cases have found COVID-19 regulations to be constitutionally defective, they have generally fallen into two camps: either the court finds the law is worded poorly and thus is impossible to comply with (*i.e.*, unconstitutionally vague), or the court rules that the application of the law is irrational (*i.e.*, violates due process and/or equal protection). These infirmities have usually been fixable once spelled out. For example, a Wisconsin circuit court judge ruled in July that the City of Racine's regulations were unconstitutionally overbroad and vague but

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assured that the city would “maintain[] its full power to issue a new order addressing COVID-19.” And a federal court in Michigan found unconstitutional a state law that restricted gyms from opening but did not ban swimming pools, restaurants, bars, and salons because there was no rational basis grounded in science for the gym closures. Thus, the constitutional problems could be remedied with more artful drafting by the ordering body.

***County of Butler v. Wolf* Decision**

The recent decision in [*County of Butler v. Wolf*](#) by the U.S. District Court for the Western District of Pennsylvania departed from the general trend in federal courts and found much broader constitutional violations that could not be readily remedied. The plaintiffs – including several counties, politicians, and private businesses – challenged Pennsylvania Governor Tom Wolf’s COVID-19-related “emergency” restrictions limiting the number of people permitted to attend gatherings and determining which businesses could remain open, based on whether they are “life-sustaining” in nature. District Court Judge William S. Stickman IV, who was appointed to the bench in July 2019, heard evidence and testimony on the plaintiffs’ allegations of violations of substantive due process under the Fourteenth Amendment, Equal Protection Clause of the Fourteenth Amendment, and First Amendment.

Applying varying levels of constitutional scrutiny, the court found three problems with the governor’s orders. First, the court held that the gathering limits – 25 persons for indoor gatherings and 250 for outdoor gatherings – violated the First Amendment right to assemble because the attendance caps for assemblies were more restrictive than the 25 percent or 50 percent occupancy restrictions on certain businesses. Thus, a department store was less restricted than a political rally. Further, the court found that the 25-person restriction, and the fact that the restrictions applied equally across all counties regardless of their COVID statistics, was not rationally supported by evidence.

Second, the court held that the lockdowns and temporary closure of certain “non-life-sustaining” businesses violated plaintiffs’ substantive due process rights under the Fourteenth Amendment because they were too broad, untailored, and draconian to pass constitutional muster. While the lockdowns were a violation of the right to travel, the restrictions on non-life-sustaining businesses were found to violate the right to choose one’s profession. Citing the controversial and dated U.S. Supreme Court decision in [*Lochner v. New York*](#), the court found that an open-ended order impacting large swaths of Pennsylvania’s businesses violated plaintiffs’ economic due process rights.

Finally, the court held that the closure of certain non-life-sustaining businesses also violated plaintiffs’ equal protection rights under the Fourteenth Amendment, finding no rational basis for the regulations because some businesses were treated differently than other, similar businesses. The court illustrated its reasoning with an example that imposing constraints on a “mom-and-pop” hardware store while allowing Walmart to sell the same products would not keep a consumer at home; it would simply send her to Walmart, doing nothing to protect her or others from COVID-19. As a result, the court found that the restrictions’ means did not rationally relate to their ends and therefore violated the Equal Protection Clause of the Fourteenth Amendment.

Impact of the *County of Butler v. Wolf* Decision

Governor Wolf has already sought a stay of the decision and filed an appeal to the U.S. Court of Appeals for the Third Circuit. But even without a stay, the immediate impact of the decision is questionable because the challenged restrictions – the gathering limitations and business closures – had, at the time of the court’s decision, already been eased by the governor as part of the Commonwealth’s phased reopening plan. This raised questions of mootness that the district court brushed aside but which are sure to be reviewed on appeal. Moreover, the ruling does not impact other restrictions that are still in place involving teleworking, a mandatory mask order, and worker and building safety orders.

If the holding is affirmed in the Third Circuit, however, it will become precedential and could impact restrictions in other jurisdictions within the circuit, including New Jersey, Delaware, and the Virgin Islands. At a minimum, until the Third Circuit decides the case, Judge Stickman's opinion will certainly be advanced as persuasive authority by other challengers in other courts. Its reasoning and outcome could thus have far-reaching impacts if adopted elsewhere in similar constitutional challenges.

What to Watch For

Constitutional challenges to pandemic restrictions are pending in other federal courts. The U.S. District Court for the District of Maine recently heard oral argument on challenges to Maine's emergency rules, including a claim that the governor's quarantine requirement is an unconstitutional restriction on people's right to travel freely from state to state. That court has not yet issued an opinion. Additional challenges to COVID-19 restrictions are pending in federal district courts across the country, including in Arizona, California, Massachusetts, and New York.

There are also hints that the U.S. Supreme Court may have interest in considering these types of constitutional challenges. In *County of Butler*, Judge Stickman cited Justice Alito's recent dissent in the Court's denial of injunctive relief in [Calvary Chapel Dayton Valley v. Sisolak](#). That case involved a challenge to certain COVID-19 restrictions in Nevada. Justice Alito's dissent advocated for a stricter constitutional review of emergency health measures, stating: "We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." Justice Alito also commented that "a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists." The dissent (which was joined by Justices Thomas and Kavanaugh) signals that at least some members of the Court are watchful of these constitutional challenges and may be ready to consider such a case when an appropriate petition for writ of certiorari is filed. *County of Butler* could provide that vehicle for Supreme Court review.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Christy Hull Eikhoff
404.550.4823
christy.eikhoff@alston.com

Jason Levine
202.239.3039
jason.levine@alston.com

Stuart Plunkett
415.243.1057
stuart.plunkett@alston.com

Gillian Clow
213.576.1054
gillian.clow@alston.com

Ryan Martin-Patterson
202.239.3038
ryan.martin-patterson@alston.com

Kaelyne Wietelman
202.239.3227
kaelyne.wietelman@alston.com

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WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghai Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, TX 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
FORT WORTH: 3700 Hulen Street ■ Building 3 ■ Suite 150 ■ Fort Worth, Texas, USA, 76107 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, CA 94304-1012 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333