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Five Key Takeaways from the Pennsylvania Decision Throwing Out the Governor's Lockdown Orders

If you wonder how a governor's executive orders banning persons from leaving their homes, assembling in public, and operating their businesses can possibly be constitutional, a recent federal court decision may give you some hope.

Earlier this week the United States District Court for the Western District of Pennsylvania invalidated the Pennsylvania governor's lockdown and business shutdown orders on the grounds that the orders violate the First Amendment's rights of free speech and assembly and the Fourteenth Amendment's rights of due process and equal protection. The Pennsylvania governor's orders are similar in many respects to those issued by California Governor Newsom and the governors of other states. Here are five key takeaways from the court's decision.

1. "Although this nation has faced many epidemics and pandemics and state and local governments have employed a variety of interventions in response, there have never previously been lockdowns of entire populations—much less for lengthy and indefinite periods of time." [Slip Op. at 40.] "The fact is that the lockdowns imposed across the United States in early 2020 in response to the COVID-19 pandemic are unprecedented in the history of our Commonwealth and our Country. . . . They were unheard of by the people of this nation until just this year. It appears as though the imposition of lockdowns in Wuhan and other areas of China—a nation unconstrained by concern for civil liberties and constitutional norms—started a domino effect where one country, and state, after another imposed draconian and hitherto untried measures on their citizens." [Slip Op. at 44.]
2. "What were initially billed as temporary measures necessary to 'flatten the curve' and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end—stopping the spread of an infectious disease and preventing new cases from arising—which requires ongoing and open-ended efforts." [Slip Op. at 17.] Thus, "the ongoing and



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indefinite nature of [the government's] actions weigh strongly against application of a more deferential level of [judicial] review." [*Ibid.*]

3. **The orders limiting public gatherings violate the right of assembly under First Amendment to the United States Constitution.** "The right of assembly is a fundamental right enshrined in the First Amendment: 'Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.'" [Slip Op. at 25.] The Pennsylvania Governor's order placed "substantially more burdens on gatherings than needed to achieve their own stated purpose." [Slip Op. at 30.] "[I]f social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection." [Slip Op. at 32, quoting *Tabernacle Baptist Church, Inc. v. Beshear*, ___ F.Supp.3d ___, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020).

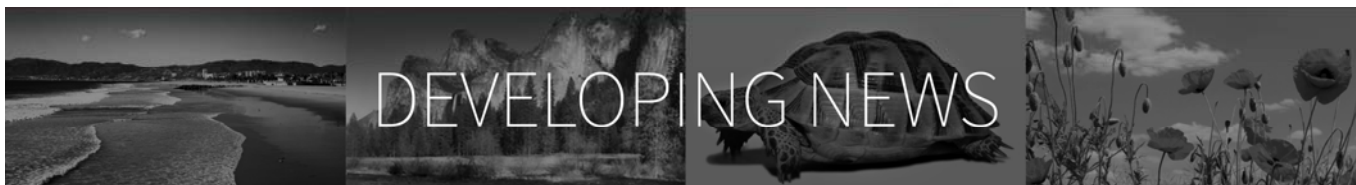
4. **The stay-at-home orders violate the right to substantive due process under the Fourteenth Amendment to the United States Constitution.** "[T]he right to move freely about one's neighborhood or town, even by automobile, is indeed, 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'" [Slip Op. at 45, citing *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990).] "Our Courts have long recognized that beyond the right of travel, there is a fundamental right to simply be out and about in public." [Slip Op. at 46, citing *City of Chicago v. Morale*, 527 U.S. 41, 53-54 (1999); *Bykofsky v. Borough of Middletown*, 429 U.S. 964 (1976) (Marshall, J. dissenting) ("The freedom to leave one's house and move about at will is of the very essence of a scheme of ordered liberty, . . . and hence is protected against state intrusions by the Due Process Clause of the Fourteenth Amendment.")]. "The intrusions into the fundamental liberties of the people of this Commonwealth effectuated by these orders are of an order of magnitude greater than any of the ordinances examined in right to travel cases, loitering and vagrancy cases or even curfew cases. [The Governor's] stay-at-home and business closure orders subjected



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every Pennsylvanian to a lockdown where he or she was involuntarily committed to stay-at-home unless he or she was going about an activity approved as an exception by the orders. This is, quite simply, unprecedented in the American constitutional experience.” [Slip Op. at 47.]

- 5. The business shutdown orders violate the right to substantive due process and the right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.** “[T]he right of citizens to support themselves by engaging in a chosen occupation is deeply rooted in our nation’s legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment. Over a century ago, the Supreme Court recognized that “[i]t requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it as the purpose of the [Fourteenth] Amendment to secure.” [Slip Op. at 52, citing *Truax v. Raich*, 239 U.S. 33, 41 (1915).] “[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the ‘liberty’ and the ‘property’ concepts of the Fifth and Fourteenth Amendments.” [Slip Op. at 52, citing *Piecknick v. Comm. of Pa.*, 36 F.3d 1250, 1259 (3d Cir. 1994).] “The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property.” [Slip Op. at 61, quoting *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954) (Justice William O. Douglas, dissenting)]. The Pennsylvania Governor’s orders shut down small, family-owned businesses selling, for example, furniture and beauty products, but allowed their big box competitors to remain open. “It is paradoxical that in an effort to keep people apart, [the Governor’s] business closure orders permitted to remain in business the largest retailers with the highest occupancy limits.” [Slip Op. at 60-61.] “Closing [a furniture store] did not keep at home a consumer looking to buy a new chair or lamp, it just sent him to Walmart.” [Slip Op. at 65.]



This is not to say that the court did not appreciate the seriousness of the COVID-19 pandemic, or that the Governor’s orders were intended to protect public health. “[T]he greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions—while expedient in the face of an emergency situation—may persist long after immediate danger has passed. [Slip Op. at 2.]

September 17, 2020