ASTHO Report
In-depth coverage of leading state and territorial public health issues.
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Legal Challenges to State COVID-19 Orders

Scores of lawsuits have been filed across the country challenging the use of state executive authority in response to the COVID-19 pandemic.[i] The lawsuits are being brought in both state and federal courts and make claims based on both state and federal law. Two noteworthy categories of lawsuits have emerged. The first category is lawsuits based on state law claims alleging an overreach or misuse of state executive power. The second category is lawsuits accusing state executives of violating civil liberties and other rights protected by the United States Constitution and federal law.[ii]

Key Findings and Considerations

- The underlying legal authority of state executives to respond to public health crises is being challenged.
- Claims are being made that public health falls outside of the state executive's emergency powers.
- The judicial deference to state action in response to public health emergencies afforded by *Jacobson v. Massachusetts* is being weighed against more recent standards of judicial review.
- States should consider both *Jacobson's* deferential standard and the more recent standards of review when developing COVID-19 orders.

Lawsuits Based on State Law and Use of Executive Authority

Of primary concern are lawsuits being brought under state law claims and aiming to eliminate executive public health authority. These suits often allege an overreach or misuse of state executive power and include claims that the executive actions violate the non-delegation doctrine (i.e., legislative bodies cannot delegate their power to the executive), that the emergency response laws are a violation of the separation of powers between the legislative and executive branches, that the governor has exceeded the authority provided by emergency response laws (i.e., ultra vires claims), and the violation of state Religious Freedom Restoration Acts (RFRA).[iii]

Non-Delegation, Separation of Powers, and Exceeding Powers Claims

Midwest Institute of Health, PLLC v. Whitmer. A group of healthcare providers challenged the Michigan governor's order restricting nonessential medical and dental procedures in the United States District Court for the Western District of Michigan, claiming that she unlawfully exercised her authority under state law, violated the separation of powers and non-delegation doctrines, and violated plaintiffs' right to due process. The federal court asked the Michigan Supreme Court (1) whether the governor had

[i] As of Oct. 8, 2020, the website Ballotpedia lists 997 lawsuits. The list includes lawsuits from every state (except Wyoming), Washington, D.C., and Puerto Rico. Ballotpedia notes that this is a partial list since it relies on website users to report cases from the jurisdictions.
[ii] Please note, many of these cases are ongoing and subject to further decision and/or appeal.
[iii] RFRA statutes prohibit governmental agencies, departments, or officials from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability. The burden on a person's exercise of religion is permitted if the application of the burden to the person: (1) furthers a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. The federal government and several states have adopted RFRA statutes.

authority under the state's Emergency Powers of the Governor Act (EPGA) of 1945 and the Emergency Management Act (EMA) of 1976 to issue or renew her COVID-19-related orders after April 30, 2020, the last date the state legislature denied renewing her declarations, and (2) whether either of the laws violated the state Constitution.

The Michigan Supreme Court determined that the governor lacked authority under the EMA to declare a "state of emergency" or a "state of disaster" after April 30, 2020 (i.e., the date the legislature last denied renewing the declaration) since the law establishes a 28-day limitation on her authority to issue the declarations. The court reasoned that "[n]othing prohibits the Legislature from placing such a limitation on authority delegated to the Governor, and such a limitation does not render illusory in any way the delegation itself." As to the EPGA, the court declared the law unconstitutional in its entirety after finding that it unlawfully delegated legislative powers, including plenary police powers, to the executive branch and allowed the indefinite exercise of those powers.

Michigan House of Representatives and Michigan Senate v. Whitmer. On Oct. 12, 2020, the Michigan Supreme Court reversed the Michigan Court of Appeals' decision stating that "the Emergency Powers of the Governor Act is incompatible with the Constitution of our state, and therefore, executive orders issued under that act are of no continuing legal effect." Subsequent to the court's initial ruling, the Michigan Department of Health and Human Services issued an order related to face covering requirements and gathering limits effective through Oct. 30, 2020. In addition to the health agency order, several local health departments have issued their own orders (e.g., Washtenaw County, City of Detroit, Ingham County).

Free Minnesota Small Business Coalition v. Walz. Thirteen Republican lawmakers and a group of small businesses in Minnesota challenged the governor's COVID-19-related executive orders in the Ramsey County District Court. The plaintiffs alleged that the orders were violations of the state Constitution's nondelegation doctrine and claimed that public health is not a permissible rationale for invoking emergency powers under the Minnesota Emergency Management Act, meaning the governor exceeded his authority in issuing the orders. The court dismissed the lawsuit and found that the governor acted pursuant to the authority delegated to him by the legislature and that the "COVID-19 pandemic constitutes an act of nature that provides the Governor with the basis to declare a peacetime state of emergency in Minnesota." The court also asserted that requiring the governor's emergency order to go through "a notice and comment period, public hearings, and review by an administrative law judge" would be "cumbersome and unreasonable."

Desrosiers v. Baker. The Massachusetts Supreme Judicial Court heard oral arguments in a challenge to the governor's authority to issue COVID-19 emergency orders under current law. Plaintiffs allege that the Massachusetts Civil Defense Act does not provide the governor authority to address a health-related crisis. The court's decision is pending.

Wisconsin Legislature v. Palm. The Wisconsin Legislature filed suit in the Wisconsin Supreme Court claiming that the state health officer exceeded her authority by extending the state's stay-at-home order. The court ruled 4-3 in favor of the plaintiffs finding that under state law, the stay-at-home order is a rule that is required to go through the emergency rulemaking procedures as set out by statute. Since the order did not go through the rulemaking process, it is unenforceable. The court also

found that the state health officer exceeded the statute setting out the health department's powers and duties.

Neville v. Polis. The Colorado House Minority Leader filed suit in the Colorado Supreme Court against the Colorado governor, claiming that his COVID-19-related orders, including the statewide mask order, violated the separation of power doctrine. The court refused to hear the case and plaintiff may refile the case in a lower court.

State Religious Freedom Restoration Act Claims

Maryville Baptist Church, Inc. v. Beshear. The issue in this case was whether the Kentucky governor's order prohibiting faith-based mass gatherings violated the Free Exercise Clause and the state RFRA when a church sought to hold a drive-in service. The Sixth Circuit granted a preliminary injunction against the governor's order after finding that the plaintiffs were likely to be successful in their claim. The court found that the order likely violated the state RFRA by finding that the restriction significantly burdened the free exercise of religion; even though there was a compelling governmental interest for the order, it was not the least restrictive means for achieving the public health interests. Office environments' ability to continue operating with mitigation measures was cited by the court as evidence the prohibition of faith-based mass gatherings was not a least restrictive means. The court also found that the plaintiff would likely be successful on the Free Exercise Claims for reasons similar to those set out in its ***Roberts v. Neace*** decision summarized below.

United States Constitution and Federal Law Claims

The lawsuits brought under constitutional and federal law claims are often based on the rights contained in the Bill of Rights (e.g., freedom of speech, freedom of assembly, freedom of association, free exercise of religion, the right to just compensation for governmental takings), the Fourteenth Amendment (e.g., the rights to equal protection and due process), the Contracts Clause (i.e., prohibiting states from impairing contractual obligations), and the federal Religious Freedom Restoration Act. An additional question emerging among the courts is whether the deference to state restrictions during a public health emergency as afforded by ***Jacobson v. Massachusetts*** should be given to the state orders, or if the standards for reviewing constitutional claims developed since the ***Jacobson*** decision should be applied.

Application of *Jacobson* to the State Orders

In ***4 Aces Enterprises, LLC v. Edwards***, several bar owners challenged the Louisiana governor's order banning the on-site consumption of food or drink at bars while allowing restaurants with bars to remain open. The bar owners alleged that the order lacked a rational basis and was a violation of due process, equal protection, and freedom from unlawful takings. In denying a request for a preliminary injunction[iv]

[iv] Upon the filing of a lawsuit, plaintiffs often request a temporary injunction against the continued enforcement of the state mitigation orders. If granted, the temporary injunction may remain in place until final judgment of the case. In deciding a temporary injunction request, courts generally look at several factors including: (1) the plaintiff's likelihood of winning the case; (2) whether the plaintiff shows he or she will suffer irreparable harm without the injunction; (3) a balancing of hardships and equities (i.e., the threatened harm to the plaintiff outweighs any harm an injunction may cause the opposing party); and (4) whether the injunction would be in the public interest. The lawsuit usually does not end after a court grants or denies a temporary injunction and there may be further decisions made on the merits of the case and/or appeal of the temporary injunction decision.

the U.S. District Court for the Eastern District of Louisiana applied the standard of review established by ***Jacobson***. The bar owners were able to show that the state's order infringed upon their constitutional rights. However, based on the testimony of Alexander Billioux (SHO-LA), the court concluded that closure order "bears a 'real or substantial relation' to the goal of slowing the spread of COVID-19 and is not 'beyond all question' a violation of the bar owners' constitutional rights." An appeal of the court's decision is pending before the U.S. Court of Appeals for the Fifth Circuit.

While the court in ***4 Aces Enterprises*** noted that "[t]raditional doctrine does not control during a pandemic; [***Jacobson***] does" and the U.S. Fifth Circuit Court of Appeals in ***In re Abbott*** stated that ***Jacobson*** "governs a state's emergency restriction of *any* individual right [emphasis in original]," questions of whether ***Jacobson*** provides the standard for assessing all constitutional challenges or is limited to substantive due process claims are being raised. For example, dissenting opinions in the U.S. Supreme Court and the Ninth Circuit Court of Appeals have questioned the scope and application of the ***Jacobson*** standards to free exercise claims. See **South Bay Pentecostal** and **Calvary Chapel** cases below.

More recently, in ***Butler County v. Wolf***, the U.S. District Court for the Eastern District of Pennsylvania applied the levels of scrutiny for constitutional claims established since the ***Jacobson*** decision in its granting of a declaratory judgment striking down the public health orders issued by Pennsylvania's governor and health commissioner. As to the restrictions on public gatherings, the court found no evidence that the specific numeric limits were necessary to achieve the public health goals and concluded that the order's one-size-fits-all approach was overly broad and not narrowly tailored to meet the compelling governmental interest. The court also found the stay-at-home orders to not be narrowly tailored, stating that such actions have never been used before to combat a disease and that they were a "dramatic inversion of the concept of liberty in a free society." The business closure orders were found to lack a rational basis (i.e., that the governmental action bears a rational relationship to some legitimate end) under the plaintiff's First Amendment claim since the closure categories were not defined in statute or regulation and their design, implementation, and administration were arbitrary (e.g., some businesses selling the same products or services were categorized differently). Finally, the court held that the business closure orders violated the Equal Protection Clause since the state's asserted purpose for the order (i.e., limiting personal interactions) was not rationally related to the order's application (e.g., the order did not keep consumers home when looking to buy a product, as the consumer simply went to a business that was allowed to be open).

Public health law scholars are also questioning the application of ***Jacobson*** to all constitutional claims. The court in ***Butler County*** relied heavily on an article by Wiley and Vladeck that critiques the deference courts may give state emergency orders under a ***Jacobson*** review. An article by Jackson reviews the tiered levels of scrutiny for constitutional claims that were established in the years since ***Jacobson***; an article by Gatter argues that a "focused scrutiny" should be applied to the review of public health orders. As questions about the application and scope of ***Jacobson*** continue, governors and health officials would be well served to ensure that any public health order is drafted in a manner to meet the standards of both ***Jacobson*** and the post-***Jacobson*** levels of scrutiny.

Free Exercise Clause

South Bay United Pentecostal Church, et al. v. Newsom. Plaintiff challenged California's religious gathering restrictions claiming they violated the Free Exercise Clause. The U.S. District Court for the

Southern District of California denied plaintiff's temporary injunction request, finding that the restrictions were neutral and of general applicability as well as rationally based to protect safety by stopping the spread of COVID-19. The court found that religious services are within Stage 3 of the state's reopening plan not because of their religious nature but because they involve people sitting together in closed environments for long periods of time. The court noted that the same restrictions also applied to other similar entities and activities. The court also found that the restrictions passed strict scrutiny since they are based on a compelling state interest in public health and are narrowly tailored to advance that interest in that they allow remote gatherings, clergy can go to churches to set up remote services, and drive-in services with physical distancing are permitted.

The Ninth Circuit also denied plaintiff's temporary injunction request finding the restrictions to be neutral, generally applicable, and rationally based. In dissent, Circuit Judge Collins rejected the assertion that ***Jacobson*** requires deference to a state's restrictions on the right to free exercise during an emergency and asserted that the explicit assignment of "religious services" to Stage 3 of the reopening plan, within the same category as movie theaters and other personal and hospitality services, is evidence of the government's discrimination against religious conduct. Also, while noting the state has an undeniable compelling interest in public health, Judge Collins believed that the public health interest could be achieved with narrower, less burdensome restrictions. For example, plaintiff was willing to take physical distancing measures, require face masks, and prohibit singing, hugging, and handshaking. Judge Collins contended that the state could restrict these specific underlying risk-creating behaviors rather than banning a particular religious setting where they may occur. Upon the state's assertion that there is too much risk that church congregants will not follow the rules, the judge replied that the state wants to assume that the same people who cannot be trusted in a place of worship can be trusted in a place of business.

The plaintiff then petitioned the U.S. Supreme Court for injunctive relief and was again denied. Chief Justice Roberts, concurring with the 5-4 majority, declared that California's restrictions appear consistent with the Free Exercise Clause. Roberts noted that similar or more severe restrictions apply to comparable secular gatherings where large groups of people gather in close proximity for long periods of time (e.g., lectures, concerts, movie theaters, sports venues) and that restrictions are more lax only for dissimilar activities where people neither congregate in large groups nor remain in close proximity for long periods of time (e.g., grocery stores, banks, laundromats). He also asserted that the Constitution gives state officials broad latitude to guard and protect health and safety when there are medical and scientific uncertainties and "[w]here those broad limits are not exceeded, they should not be subject to second-guessing by [the courts] which lacks the background, competence, and expertise to assess public health and is not accountable to the people." In dissent, Justice Kavanaugh argued that California's restrictions "indisputably discriminates against religion" and that the state cannot show a compelling governmental interest for placing occupancy restrictions on religious worship services that are not placed on secular businesses.

Calvary Chapel Dayton Valley v. Sisolak. The U.S. District Court for the District to Nevada denied a temporary injunction request by a church claiming the state violated the Free Exercise Clause. The district court found that the Nevada governor's directive restricting communities of worship and faith-based organizations to in-person services of no more than 50 people with physical distancing requirements was neutral and generally applicable and didn't burden plaintiff's free exercise of religion.

The court reasoned that since church services are held to the same restrictions as similar secular entities and activities (e.g., lectures, museums, movie theaters, nightclubs, concerts that bring together large gatherings of people for extended periods of time) and because entities that are allowed to operate at 50% capacity are subject to more restrictive limitations and greater governmental oversight, the state's directive is not an attempt to specifically target places of worship. The court also noted that whether an entity should be subject to a 50-person cap or 50% capacity limit is the sort of decision making that is subject to disagreement and something the court should refrain from engaging in.

The Ninth Circuit and U.S. Supreme Court also denied, without comment, a temporary injunction request by the plaintiffs. In a dissent, Justice Alito asserted that the state's order discriminated against religion and the state does not "show that conducting services in accordance with [the church's mitigation] plan would pose any greater risk to public health than many other activities that the directive allows, such as going to the gym."

Legacy Church, Inc. v. Kunkel. Plaintiff challenged the state health secretary's orders restricting religious gatherings as a violation of the right to free exercise. In denying plaintiff's request for a temporary injunction, the U.S. District Court for the District of New Mexico found the orders to be both neutral and generally applicable, as well as rationally related to a compelling governmental interest. "The Court cannot say that Secretary Kunkel acted unreasonably in restricting all indoor mass gatherings, and this restriction is closely related to her compelling interest in guarding the public health."

Despite the above cases where temporary injunctions were denied for claimed violations of the Free Exercise Clause, several courts have granted temporary injunctions for Free Exercise claims. In ***Roberts v. Neace***, church members claimed that the Kentucky governor's prohibition of faith-based mass gatherings violated the Free Exercise Clause. In issuing a preliminary injunction on behalf of the plaintiffs, the Sixth Circuit found that the restriction was not neutral and generally applicable since several other entities (e.g., law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, landscaping businesses) were allowed to continue to operate as long as they followed mitigation measures and no evidence was offered for why church members would be less trusted in adhering to public health guidelines as compared to other groups. There was no question of a compelling governmental interest in stopping the spread of COVID-19. However, the court found that the order was not the least restrictive way of dealing with the problem.

Temporary injunctions were also granted by the Sixth Circuit in ***Maryville Baptist Church, Inc. v. Beshear*** (the order was not narrowly tailored since it permitted people to gather in some places (e.g., retail stores, airports) so long as they physically distanced themselves but did not permit people to gather for religious services), the United States District Court for the Eastern District of Kentucky in ***Tabernacle Baptist Church, Inc. v. Beshear*** (issuing a temporary injunction for "religious services which observe the social distancing guidelines promulgated by the Centers for Disease Control, as Tabernacle has promised to do, does not harm" the government's interest), the U.S. District Court for the Northern District of New York in ***Soos v. Cuomo*** ("All of this is to demonstrate that these secular businesses/activities threaten defendants' interest in slowing the spread of COVID-19 to a similar or greater degree than those of plaintiffs', and demonstrate that the 25% indoor capacity limitation on houses of worship is underinclusive and triggers strict scrutiny review."), and the U.S. District Court for the Eastern District of North Carolina in ***Berean Baptist Church v. Cooper*** ("The Governor has failed to cite any peer-reviewed

study showing that religious interactions in those 15 states [that allow such gatherings] have accelerated the spread of COVID-19 in any manner distinguishable from non-religious interactions.”).

Mass Gatherings: Free Speech and Assembly

As noted above, the court in ***Butler County v. Wolf*** struck down Pennsylvania’s restrictions on mass gatherings for violating the First Amendment’s free speech and assembly protections by finding that the restrictions were not narrowly tailored for their purpose.

Ramsek v. Beshear. The Sixth Circuit reversed the district court’s denial of a temporary injunction requested by the plaintiff who claimed the state’s mass gatherings order violated the First Amendment. The court found that the order was not narrowly tailored since “it fails to define the size of the mass gathering that is permitted or allowed” and that it discriminates against political speech because it permits people to gather in other places (e.g., retail stores, airports, parking lots, churches) but doesn’t permit them to gather for a protest. The court’s injunction order permitted protesters to gather, provided they practice physical distancing and comply with other requirements for lawful gatherings

Legacy Church, Inc. v. Kunkel. Plaintiffs also asserted that the state’s mass gathering restrictions violated the right of assembly. However, the court found the order consistent with the First Amendment since it “permits Legacy Church to conduct its services for broadcast. It permits Legacy Church to hold outdoor services. To the extent that the [order] limited Legacy Church’s ability to conduct its group ministries, it does so in the context of an across-the-board restriction on analogous conduct, while preserving Legacy Church’s right to conduct those ministries by audiovisual means.”

Federal Religious Freedom Restoration Act

Capitol Hill Baptist Church v. Bowser. Plaintiff claimed Washington, D.C.’s limitation of religious services to 100 people violated the federal RFRA. The U.S. District Court for the District of Columbia granted a temporary injunction after finding a likelihood of plaintiff’s success on the merits. According to the court, D.C. “cannot rely on its generalized interests in protecting public health or combating the COVID-19 pandemic, critical though they may be.” The Court also determined that Washington, D.C. “presented little to no evidence that it has a compelling interest in applying its restrictions to ban the type of services that the Church wishes to hold. And some of the scant evidence that does appear in the record cuts against the District’s arguments. Consider the District’s response to mass protests over the past year, which included thousands of citizens marching through the streets of the city, including along streets that the District closed specifically for that purpose.”

Case to Watch

An additional case to keep an eye on right now includes a challenge to CDC’s eviction moratorium. In ***Brown v. Azar***, a landlord filed suit in the U.S. District Court for the Northern District of Georgia against CDC’s nationwide eviction moratorium, which temporarily halts residential evictions for most renters in order "to prevent the further spread of COVID-19." The plaintiff alleges that the moratorium restricts his right to access the courts, violates the Supremacy Clause, violates the non-delegation doctrine, and is counter to the anti-commandeering doctrine (i.e., the federal government cannot require states or state officials to adopt or enforce federal law).