

**Alert | Health Emergency Preparedness Task Force:
Business Continuity Amid COVID-19**



September 2020

Federal Judge Rules Pennsylvania Lockdown and Business Closure Orders Violate U.S. Constitution

On October 1, 2020, the United States Court of Appeals for the Third Circuit stayed Judge Stickman's decision pending the outcome of the appeal. The stay will allow Pennsylvania to enforce the gathering restriction (and hypothetically reinstate the lockdown and business closure orders) that Judge Stickman had ruled were unconstitutional.

On Sept. 14, in *Butler v. Wolf*, a federal district court in Western Pennsylvania held that certain Coronavirus Disease 2019 (COVID-19) mitigation measures ordered by the Commonwealth of Pennsylvania were unconstitutional. Conceding the efforts were a "well-intentioned effort to protect Pennsylvanians from the virus," Judge William S. Stickman, IV nevertheless held that the portion of orders issued by Gov. Tom Wolf and Secretary of Health Rachel Levine violated the First Amendment as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court found:

- Limits on gatherings of certain sizes – up to 25 people indoors and 250 outdoors – violated the First Amendment;
- Orders closing "non-life-sustaining" businesses – violated both the Due Process and Equal Protection Clauses as applied; and
- A stay-at-home order as implemented violated the Due Process Clause.

The Commonwealth has announced it will appeal the decision. If it stands, the ruling will require the Commonwealth to adopt more narrowly tailored, specific standards and then, once adopted, to apply those standards uniformly within similarly situated geographic areas.

Unlike the few earlier cases where judges limited gubernatorial power under state constitutions, Judge Stickman found that Pennsylvania's virus mitigation efforts violated the U.S. Constitution; thus, his opinion arguably raises issues that could impact COVID-19 mitigation orders nationwide.

Judge Stickman also notably refused to apply a standard of extraordinary deference to these public health measures, a standard which stems from a 1905 U.S. Supreme Court decision. Instead, he relied heavily on Justice Alito's dissent to the U.S. Supreme Court's denial of emergency injunctive relief in late July in a case known as *Calvary Chapel Dayton Valley v. Sisolak*. Judge Stickman ruled that because the broad disease mitigation efforts had become the "new normal" he applied normal deference, which differed from that implemented in a May 2020 decision from a different Pennsylvania federal court in *Benner v. Wolf*. Acknowledging the shifting standards, Judge Stickman explained the change was due to the extended duration of these orders and the development of a fuller record.

Background

In May 2020, four Western Pennsylvania counties, a congressman, three state representatives, and the owners of eight businesses, including a salon, a drive-in movie theater, and an appliance store, filed the action under 28 U.S.C. § 1983.

While the suit went through four months of discovery, hearings, and briefing, Gov. Wolf and Secretary Levine lifted most of the orders, but a limitation on gathering sizes remained in effect as of the date of the court's order. The Commonwealth was clear throughout that it believed it could reinstate similar or related orders if the COVID-19 situation in Pennsylvania deteriorated.

Gathering Limits

On July 25, 2020, the Commonwealth issued an order limiting indoor "events and gatherings" to 25 people and outdoor "events and gatherings" to 250 people, an increase from limits earlier in the pandemic. The restriction on events and gatherings applies to public and private property regardless of the gathering's purpose, except it does not apply to normal business operations or to bars or restaurants; however, smaller table limits apply to bars and restaurants, and separate social distancing and other mitigation measures apply to all businesses allowed to operate.

The court pointed to several instances where the Commonwealth's enforcement of the gathering restrictions appeared uneven. Although the orders do not except protests on their face, in deference to First Amendment rights, the Commonwealth has permitted protests. The Commonwealth also made a major exception for "Spring Carlisle," an auto show and flea market – allowing up to 250 people to gather inside and more than 20,000 outside – but only after the operators of the show sued the Commonwealth and the parties entered into a confidential settlement agreement.

The court found the gathering limits served a purpose unrelated to the content of the expression, and, as a result, held that if the rule was narrowly tailored to serve a significant government interest, leaving open ample alternative channels of communication, it would be legal under the First Amendment. Judge Stickman expressly agreed that the challenged orders served a significant government interest: curbing the COVID-19 pandemic.

But the court found that the orders, including the exceptions for commercial gatherings such as retail stores, were not narrowly tailored for several reasons. The court expressed concern that the Commonwealth's order treated activities "traditionally covered within the ambit of the [First] Amendment – political, social, cultural, educational and other expressive gatherings" – more harshly than routine commerce. The court also found the gathering limits were an unacceptable "one-size fits all approach" to Pennsylvania's many different environments, finding the "statewide approach is broadly, rather than narrowly, tailored."

Stay-at-Home Order

On March 23, 2020, Gov. Wolf ordered all individuals in the Commonwealth to stay home unless they were accessing, supporting, or providing a "life-sustaining" business, emergency, or government service. The plaintiffs challenged this order, contending it was not a traditional disease-control measure, such as quarantine or isolation. The court focused on how the lockdown orders differed dramatically from past measures, in part because Pennsylvania's quarantine statute limits itself to persons "exposed to a communicable disease" and a limited time period ("equal to the longest usual incubation period of the disease").

The court found that the lockdown order was not narrowly tailored to the appropriate governmental purpose, holding: "the stay-at-home order require[d] a *default* of confinement at home, unless the citizen is out for a purpose approved by Defendants' orders" and such a "broad restructuring of the default concept of liberty of movement in a free society eschews any claim to narrow tailoring." Because the order was not narrowly tailored, the court held it violated the constitutional right to free movement and travel, originating in the Due Process Clause.

Defining and Applying 'Life-Sustaining'

In the Commonwealth's early orders, and continuing for almost three months, Pennsylvania permitted "life-sustaining" businesses to operate while ordering "non-life-sustaining" businesses to close temporarily. Because the Commonwealth did not define the term "life-sustaining" in writing, but only in one-off, confidential waiver applications, these standards have been challenged almost from their initial announcement. Eventually, the Commonwealth distinguished between businesses based on the NAICS codes, but not before there was significant confusion and, allegedly, distinctly different treatment for businesses depending on which individual was reviewing the waiver application, which changed at least 10 times over the initial 60-day period. The court found the process by which the Commonwealth "designed, implemented and administered" the "life-sustaining" standard to various businesses to be so arbitrary that it violated Pennsylvania businesses' substantive due process right to engage in economic activity.

The court found that both: (1) the "life-sustaining" business structure created and implemented by Pennsylvania "was so arbitrary in its creation, scope and administration as to fail constitutional scrutiny;" and (2) the closing of the waiver process when it was overwhelmed by applications was unfair to business owners who were denied an opportunity to have their waiver request heard. The court also found that the orders had treated similarly situated businesses differently, intentionally, and without a rational basis, even within the same county, in a manner that violated the Equal Protection Clause.

The court's findings on life-sustaining businesses does not necessarily preclude a future order, but, if they survive appeal, may provide parameters within which governments would have to act, namely by providing a clear and written distinction between businesses that may operate and those that may not and even enforcement of same.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

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