

MEMORANDUM

To: Governors' Offices
From: National Governors Association
Re: Regulatory Takings Claims in the Context of COVID-19
Date: May 4, 2020

Background

As states continue to implement COVID-19 response efforts, some jurisdictions are beginning to face legal challenges to public health measures (e.g., temporary physical closure of nonessential businesses) put into place to mitigate the spread of the disease. Additionally, as states implement reopening plans, litigation could arise around which businesses will be allowed to reopen and when they may do so. Plaintiffs may look to challenge the extent to which these measures deprive them of their economic and property rights protected by the Takings Clause of the Fifth Amendment, among other Constitutional claims, asserting that mandatory business closures constitute a regulatory taking by the government requiring compensation. So far, courts have largely upheld governors' broad authority to implement such measures during the COVID-19 pandemic. However, as governors continue to take action to amend business designations, lift restrictions around business closures, and prepare to reopen, they may want to consider potential issues that could arise.

This memorandum provides an overview of regulatory takings in light of states' COVID-19 response efforts as well as related legal issues. Specifically, it: (1) provides an overview of regulatory takings jurisprudence and how it might be applied in the context of COVID-19; (2) highlights state action regarding business closure orders, moratoriums on evictions and foreclosures, and current regulatory takings litigation challenging state orders; and (3) reviews potential regulatory takings issues.

This memorandum is for the sole and exclusive use of legal counsel for members of the National Governors Association. It is intended to provide references to state and federal statutes, regulations, executive orders, and other resources that are currently in the public domain. NGA conducted independent research and consulted with leading legal experts on the issues raised in this memorandum.¹ However, this research memorandum is not legal advice. Definitions of legal terms and terminology vary from state to state. States should consult their legal counsel and Attorney General's office and reference relevant statutes and case law for state-specific procedures and guidance.

Overview of Regulatory Takings

The Takings Clause of the Fifth Amendment states that "private property shall not be taken for public use without just compensation."² Incorporated to the states through the Fourteenth Amendment, this clause provides protection for individuals against government seizure of private property. While it is lawful for government to take private property for public use, the Fifth Amendment establishes the requirement for just compensation.³ Extending beyond physical

¹ NGA would like to acknowledge and thank the following individuals for their conversations and highlighting relevant resources towards the development of this memorandum: Professor Kevin Lynch of the University of Denver School of Law and Professor Bernadette Meyler of Stanford Law School.

² U.S. Const. Amend. V.

³ Please note this memorandum does not discuss physical takings of private property, including commandeering and inventorying. Please see NGA's memorandum *Overview of State Actions to Commandeer and Inventory Private Property* (April 20, 2020) for more information on physical property.

takings, the Supreme Court has established a protection for property owners in cases where government regulation becomes so burdensome in its interference of the use of private property that it constitutes a taking, known as regulatory takings.

The Court has identified guidelines for determining when government regulation is so onerous that it constitutes a taking, holding that a regulation that “denies all economically beneficial or productive use of land” would require just compensation.⁴ The Court has also held that a partial taking may still require just compensation. In *Penn Central Transportation Company v. New York City*, the Court held that when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a three factor test.⁵ These factors include: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment backed expectations; and 3) the character of the government action.⁶

The Court has articulated that the “Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁷ In assessing whether a taking has occurred and just compensation is warranted, courts are likely to conduct a fact-specific inquiry and apply the *Penn Central* balancing test. The Court’s determination of a regulatory taking has been characterized by “essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all the relevant circumstances.”⁸

In the context of COVID-19, states are beginning to see challenges to governors’ orders to temporarily close some physical businesses, asserting these actions constitute a regulatory taking by the government requiring compensation. So far, courts have generally upheld governors’ authority to implement such measures during an emergency. Key observations for how courts have generally viewed COVID-19 restrictions include their temporal nature and the public health necessity for implementing such actions.

The temporal aspect is one key element among several that courts use to determine potential takings. For example, the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, held that while a lengthy delay in approving a development permit is a burden on the use of private property, the length of the delay is only one factor to weigh in considering whether a taking has occurred.⁹ A temporary restriction could constitute a taking, with the length of the delay as one factor to consider; however, courts are likely to weigh all relevant circumstances including the character of the government restriction and the public interest.

In addition, some have drawn an analogy to COVID-19 and war efforts. In the context of regulatory takings, the Supreme Court has recognized that exigent circumstances, such as war, can require “strict regulation of nearly all resources” to prevent imminent loss to life or property.¹⁰ In other words, property ownership does not necessarily include a right to be free from certain losses caused

⁴ *Palazzolo v. Rhode Island*, 533 U. S. 606, 617 (2001).

⁵ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

⁶ *Id.*

⁷ *Armstrong v. United States*, 364 U.S. 40 (1960).

⁸ *Palazzolo v. Rhode Island*, 533 U. S. 606, 617 (2001).

⁹ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Please note that future Chief Justice John Roberts represented the Tahoe Regional Planning Agency.

¹⁰ Sean M. Stiff, [COVID-19 Response: Constitutional Protections for Private Property](#), Congressional Research Service (Mar. 27, 2020).

by actions necessary to prevent imminent loss of life or property in emergency situations.¹¹ Ultimately, courts that review regulatory takings claims against governors' COVID-19 orders may take a fact-specific inquiry and weigh the harms of restriction on the use of private property against the government necessity to protect public health and safety.

Scope of Relevant State Action

Courts have generally found that governors possess significant powers relating to the implementation of business closures orders and other executive actions impacting private property interests, such as placing moratoriums on evictions and foreclosures, during emergency periods.¹² The purpose of these measures is to protect individuals from public health threats while ensuring continuity of essential functions and critical workforces. Recently, certain litigation around these measures has alleged deprivation of economic and property rights as protected by the Fifth Amendment, among other constitutional claims. Here, petitioners allege that mandatory business closures, or regulations on other property rights, constitute a taking by the government. As such, understanding how regulatory takings may apply in certain executive actions may be helpful as states either continue to implement such measures and/or move forward with re-opening some but not all “non-essential” businesses. The below section summarizes legal precedent around business closure orders, state actions pertaining to moratoriums on evictions and foreclosures, and current COVID-19 litigation related to regulatory takings.

Legal Precedent for Business Closure Orders

In response to COVID-19, every state has implemented either formal action or informal guidance around temporary physical business closures or other restrictions, including designations of essential and nonessential businesses. Businesses may seek to challenge their closure status, but limited case law through the COVID-19 quarantine would suggest that, depending on the entity, claims may be rejected by courts upholding justifiable community public health restrictions.¹³ Recent case law seems to suggest that potential shorter-term rights violations resulting from business closures would not likely outweigh government interests in health and safety through closures.^{14, 15} Likewise, prior to the COVID-19 pandemic, there was also an absence of legal precedent around business designations of “essential” versus “nonessential,” thereby requiring analysis of other case law addressing these designations. The closest analogy that can be made is a case upholding closures based on distinctions between essential and nonessential functions.¹⁶

Moratoriums on Evictions and Foreclosures

In addition to the temporary closure of physical businesses, moratoriums on evictions and foreclosures are another example of executive action that affects property. Nearly all states have

¹¹ *Id.*

¹² Additional use of executive action around private property includes commandeering and inventorying. Please see NGA's memorandum *Overview of State Actions to Commandeer and Inventory Private Property* (Apr. 20, 2020) for more information.

¹³ NGA memorandum on *Overview of State Actions on Business Closure and Personal Movement Restrictions in Response to COVID-19* (Mar. 23, 2020).

¹⁴ *Id.*

¹⁵ Lawrence O. Gostin et al., *Pandemic Influenza: Ethics, Law, and the Public's Health*, 59 ADMIN. L. REV. 121, 164 (2007).

¹⁶ In *Anglers of the Au Sable v. U.S. Forest Service*, 565 F.Supp.2d 812, 837 (E.D. Michigan 2008), a federal court in Michigan permitted government closures of “nonessential” roads in national forests to reduce environmental erosion and preserve wildlife habitats. The court emphasized that smaller, primitive road closures maintained management access to forested areas and therefore furthered an important public interest. By extension, one could envision a court upholding a classification of either essential or nonessential provided it furthered an important public interest.

taken action to restrict evictions during the COVID-19 emergency, with some states taking action to prevent foreclosures, as well.¹⁷ Governors have issued executive orders placing moratoriums on eviction enforcement and many courts have issued their own orders to halt eviction filings. Many of these orders are tied to previous executive orders, such as stay-at-home or shelter-in-place orders. Key elements of eviction and foreclosure moratoriums include restrictions on serving public notices of eviction orders and suspending law enforcement action to effectuate an eviction solely for default payment of rent. The orders are temporary in nature and do not absolve tenants of their contractual obligations to pay rent. While these orders have not been formally challenged in court, some groups have raised that these orders place a heavy burden on property interests and restrict the economic use of private property.¹⁸ As states continue to look for strategies to support renters and ensure either compliance with stay-at-home orders or within a reopening period, one observation is that third parties may bring challenges against these temporary emergency orders around regulatory takings claims.

Current COVID-19 Litigation Related to Regulatory Takings

As governors continue to implement COVID-19 response efforts, some jurisdictions are beginning to face litigation around public health measures (e.g., temporary physical closure of nonessential businesses) initially put into place to mitigate the spread of the disease. As previously noted, governors possess significant powers and authority relating to the implementation of business closures, the designations of businesses, and personal movement restrictions (e.g., stay-at-home/shelter-in-place orders) during emergency periods. Still, legal challenges to business closures may still arise, including designations and/or enforcement of essential versus nonessential businesses within a stay-at-home or reopening period and, by extension, impacts to economic viability.

In recent weeks, litigation alleging deprivation of economic and property rights as a consequence of gubernatorial executive action has arisen in a number of state and local jurisdictions. Generally, these suits involve petitioners suing the state on constitutional grounds, including regulatory takings claims, for deeming their businesses as nonessential in accordance with the governor's executive orders. Petitioners argue that by destroying their economic viability, state governments have violated the takings clause, which requires just compensation when private property is taken for public use. Most of these cases are still pending, but some courts have rejected such challenges and upheld governors' orders.^{19,20}

¹⁷ See NGA's [State Efforts to Address Evictions and Foreclosures During COVID-19](#) (Apr. 14, 2020).

¹⁸ Bernadette Meyler, [Shelter-in-Place Orders Are Perfectly Legal: Supreme Court Precedent Comes Down on the Side of State and Local Governments](#), NY TIMES (April 29, 2020).

¹⁹ In Pennsylvania, a group of businesses filed suit to temporarily block the enforcement of Governor Wolf's temporary business closure order alleging that the order is doing "substantial, unprecedented damage to the economy" and that it violates their constitutional right not to have their property taken. On April 13, 2020, the [Pennsylvania Supreme Court](#) rejected the suit and issued an order refusing to overturn Governor Wolf's order, concluding that the businesses "have not established any basis for relief based upon their constitutional challenge." The court also noted the distinction between temporary and permanent governmental action. Petitioners then filed a writ of certiorari to the Pennsylvania Supreme Court. The challengers' request went to Justice Samuel Alito, who handles emergency appeals from the geographic area that includes Pennsylvania. Justice Alito has called for the state to respond by May 4, 2020. Alito can rule on the request on his own or refer it to the full court. A suit has been filed in the [U.S. District Court for the Central District of California](#) by several small businesses against the state alleging impermissible partial or complete takings in violation of the Takings Clause, amongst other constitutional claims.

²⁰ Relatedly the [U.S. District Court for the Southern District of Ohio Eastern Division](#) denied a motion for a temporary restraining order with regard to the enforcement of Ohio's stay-at-home order on April 20. Here,

Additional Observations

Courts have generally found that governors have broad authority during emergencies to place restrictions on private property for the protection of public health. Notwithstanding this authority, such restrictions may raise constitutional concerns and claims of onerous government burden on private property interests. Property owners could bring regulatory takings claims against states for business closures and other restrictions implemented during the COVID-19 response. While challenges on these grounds have not yet been successful for claimants, the claims may still raise issues for states to consider.

- **Degree of Economic Harm.** Whether the government action causes a total destruction of all economic value of the property or whether the property maintains economic value following the government action is a factor to consider in any takings claim. The degree of economic harm to the property owner will be weighed against the government interest in restricting the use of the property. With regards to COVID-19 orders, some businesses may argue that the restrictions caused a complete destruction of all economic value of their property. However, courts may consider that even in cases where owners may go out of business, the property likely retains some economic value in physical assets.²¹ Businesses may also have adjusted operations to comply with orders (e.g., carry out for restaurants, online retail presence). Still, some courts have found that property does not need to lose all economic value in order to be considered a taking. As such, courts may consider the degree of harm along with other relevant circumstances.
- **Duration.** The duration of the government regulation is likely significant for a court in any potential takings claim. In the past, some courts have held that a long delay, even years, does not necessarily constitute a taking. As such, the temporary nature of the current emergency and executive orders may weigh in favor of states. While private businesses and property owners are being deprived of economic value, the deprivation is not permanent. Certain states are implementing restrictions on private property for a period of time that they have determined to be necessary to protect the public health and safety. However, courts may find that restrictions that extend beyond the period required for public health protection could strengthen claims of regulatory takings.
- **Offsetting Benefits.** In regulatory takings cases, a court might consider whether any offsetting benefits were provided to the claimant by the government.²² In the context of COVID-19, this might include expanded financial benefits, such as unemployment or

a bridal shop filed suit against the state alleging the governor's stay-at-home order and designations of nonessential businesses as unconstitutional. The ruling noted that although plaintiffs may have suffered losses, it did not amount to the level of irreparable and constitutional harm. The court also held that all nonessential businesses have suffered harm and plaintiffs are not unique. Further, no evidence or reason was proffered to show that the executive order, which would expire in less than two weeks, would permanently damage the business in the next two weeks. The court also noted that the business is at least partially open, as it has internet sales. Additional litigation examples around business closures/restrictions, not necessarily alleging violations of the Takings Clause, have been seen in [Suffolk Superior Court](#) (upholding Governor Baker's order), the [U.S. District Court for the Eastern District of Pennsylvania](#) (pending), the [U.S. District Court of Massachusetts](#) (pending), the Commonwealth Court of Pennsylvania (pending), the [U.S. District Court for the Northern District of New York](#) (pending), and in the [U.S. District Court of Connecticut](#) (pending). Local litigation has been seen in [Waco, Texas](#) and [Long Beach, CA](#). Please note this list was last updated on May 1, 2020 and is not exhaustive.

²¹ Ilya Somin, "Does the Takings Clause Require Compensation for Coronavirus Shutdowns?" REASON.COM (March 20, 2020), available at <https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/>.

²² Bell and Parchomovsky, "Partial Takings," COLUMBIA LAW REVIEW (VOL. 117 NO. 8), available at <https://columbialawreview.org/content/partial-takings/>. ("In the language of the law, compensation for the taking is "offset" by the value of the benefit realized by the owner").

receipt of stimulus funds, or general public health benefits to the community. It might also be argued that the temporary closure of business and other public health measures allows operations to resume in a swifter and safer manner than had these actions not been taken (thus allowing the disease to spread faster). If deemed a regulatory taking, a court may find that these benefits may offset, reduce, or eliminate the taking amount owed to the claimant.

- **Rationale for Regulation.** While legal precedent does not address this issue specifically, states, at their discretion, may want to consider potential implications related to the phased approach of reopening strategies. As certain businesses are authorized to resume operations while others must remain closed, litigation around alleged takings may continue to arise throughout reopening periods. While any challengers are likely to raise equal protection arguments, it is possible that some businesses may claim that the government's need to restrict their business is weaker once other businesses begin opening. Weighing the harms to private property interests against the government's need to protect the health and safety of citizens, courts may be faced with fact-specific inquiries around whether the regulation on the use of private property is more onerous within a reopening period.

Conclusion

As governors continue to implement measures to protect public health and safety during the COVID-19 emergency and reopening period, private entities may continue bringing challenges against certain orders. While challenges on regulatory takings claims have largely not been successful, how courts may view the balance between public health and safety and takings issues could shift. NGA will continue to track this issue and ongoing litigation.