

Rights restrictions under national emergency will lead to litigation, experts predict

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Harmeet Dhillon of Dhillon Law Group

As state-imposed restrictions persist or potentially intensify in the coming weeks -- barring access to businesses, places of worship and firearms -- a massive wave of litigation will likely follow, legal experts say. They disagree on which side will prevail.

As the nation attempts to slow the spread of the coronavirus, individual states have instituted stay-at-home orders with varying degrees of restrictions. The U.S. Constitution does not give Congress authority to regulate local matters concerning the health, safety and morality of state residents. Known as police powers, this authority is given to the states under the 10th Amendment, experts noted.

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assemble or engage in commerce.

While California has yet to see many significant legal challenges to these orders, some including California Republican Party official Harmeet Dhillon, a San Francisco-based First Amendment lawyer, say a wave of Constitution-based claims are on the horizon.

"The [state] government is saying for your own good, for everyone's good, 'I'm going to shut down your law firm, shut down your restaurant, your gun shop,'" Dhillon said in a phone interview Wednesday. "They have taken my property and prevented me from entering it ... and using it to serve the public; there should be compensation for that theoretically," she said.

However, constitutional law scholar and UCLA School of Law professor Eugene Volokh said he is doubtful many constitutional or takings claims arising from any perceived government overreach will go far.

"There is long-standing case law that the government can even outright destroy property in an emergency if it is necessary in order to prevent serious harm or a life-threatening situation," Volokh said. "The classic example is destroying property when there is a fire. ... And in those situations the government does not have a constitutional obligation to make compensation. However, it may sometimes still makes compensation without obligation."

Dhillon said the growing mistrust of state leadership -- which has closed places of worship and attempted to close gun shops but not marijuana dispensaries -- would soon turn into litigation if closures persist past the allotted time President Donald Trump has advised.

"If these shutdowns go on much longer than the 15 days the president suggested, you absolutely will see legal action," she continued. "If the governor forces myself and others to stay out of our property for six to eight weeks, there will be massive litigation coming out of that."

Those barred from their places of business may eventually file property-takings claims; worshipers and gun owners may file constitutional claims, and others doubting the decision making process at the state level may file all kinds of due process claims, Dhillon said.



Eugene Volokh of UCLA School of Law

Volokh's view is that the general ban on gatherings of more than 10 people, which has effectively precluded houses of worship from opening, does not violate the free exercise of religion clause of the Constitution because it does not impinge the right of American citizens to accept any religious belief and engage in religious rituals.

"Some state constitutions provide for religious exemptions regimes, beyond just being non-discriminational of the free exercise clause. Likewise some states have the religious freedom aspiration act. California does not have such a statute and the state Constitution has not been interpreted to provide for such protections," Volokh said. "One could imagine a

religious exemption claim being brought, but I think the response is that there is a compelling interest in preventing large numbers of deaths by communicable diseases."

"The marijuana dispensaries, whatever one might say about whether they should or shouldn't be open, my sense is that people don't really congregate in large numbers inside them." Volokh added.

Gun stores were almost closed this week in Los Angeles County while jail inmates were being released. However, after receiving guidance from County Counsel Mary Wickham that gun stores could be classified as essential businesses under the governor's statewide order, Sheriff Alex Villanueva suspended efforts to close shops, according to news reports Wednesday.

"Now when it comes to gun stores, I do think there's a plausible argument that closing gun stores is a categorical ban on the exercise of a constitutional right, especially in states where one can't just engage in private transfers," Volokh said. "I think it would be going too far because it would completely preclude the exercise of a constitutional right; at least precluded for those people who do not already have a gun."

Jon Coupal, president and director of legal affairs at the Howard Jarvis Taxpayers Association in Sacramento, said while he has yet to file a suit on behalf of his organization's members, he expects the categories of litigation to be "endless."

"We are doing two things," Coupal said. "The first thing we are not doing is looking for litigation for the sake of litigation. But secondly we are cautiously and carefully watching government behavior in areas that directly affect our members, and we have the capacity to litigate. But again, we are affording the government some degree of flexibility up to a point."

While Coupal expects much of the future litigation to be employment-related, he said regardless of the type of claim, courts will likely be lenient on declarations of emergency, he said.

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