

December 2020

**Client Advisory**

**Businesses Have a Chance to Voice their Views on PA Lockdown Measures**

Businesses have an opportunity to weigh in on the ongoing dispute about what restrictions a government may place on its citizens and businesses in light of a declared pandemic, in this case, the COVID-19 pandemic. Governor Wolf of Pennsylvania and the Secretary of the Pennsylvania Department of Health (“Appellants”) have appealed a federal District Court decision handed down by the Western District of Pennsylvania—a decision which has declared that various “mitigation efforts” in Pennsylvania violated the U.S. Constitution. Interested parties are generally permitted to file briefs, known as *amicus curiae* or “friend of the Court” briefs, to weigh in on the legal issues on appeal with the Court of Appeals. As such, *amicus* briefs may be filed in support of the original plaintiffs in the case, which are certain Pennsylvania counties and businesses (now the “Appellees”). **Such *amicus* briefs may be filed any time between now and 7 days after the Appellees file their brief in opposition, which is currently due by December 24, 2020.**

By way of background, on May 7, 2020, the plaintiff Pennsylvania counties and businesses filed a Complaint challenging the following restrictions imposed by orders of Governor Wolf and the PA Department of Health: (1) limitations on the number of people at indoor or outdoor gatherings, (2) orders closing “non-life-sustaining” businesses, and (3) stay-at-home orders. In its September 14, 2020 decision, the District Court first found that the numerical restrictions on non-commercial indoor and outside gatherings violated the First Amendment because such restrictions targeted non-commercial gatherings on the one hand, while permitting gatherings in commercial establishments in much greater numbers. Furthermore, the Court found insufficient evidence that the numeric limits on the gatherings were necessary to prevent alleged “mega-spreading events.” Finally, the state-wide gathering limits did not account for differences in population density and infection rates across the Commonwealth.

Next, for the restrictions shutting down “non-life-sustaining” businesses, while allowing “essential” businesses to continue operations, the District Court held that the divergent treatments of businesses under such restrictions failed to satisfy the requirements of substantive due process and the equal protection rights under the Fourteenth Amendment, and were thus unconstitutional. The Court found that the different treatments afforded a “life-sustaining” versus a “non-life-sustaining” business were arbitrary in that they led to larger stores with a diverse array of products remaining open even though specialty stores selling the same products as the larger stores had to close.

Finally, as to the stay-at-home order, the District Court found that the restriction violated substantive due process because, in response to every prior pandemic or epidemic, state and local governments have found less restrictive means to combat the disease, and therefore the restriction “burdens more conduct than is reasonably necessary.”

The Commonwealth of Pennsylvania’s appeal of this District Court decision is currently pending before the Third Circuit Court of Appeals. The Commonwealth has argued: (1) the District Court should have applied a much more lenient standard to the restrictions in view of emergency nature of the pandemic; (2) the District Court’s analysis of the business-closure orders improperly looked to “economic liberties” rather than whether the restrictions impinged upon fundamental rights, and (3) the court committed various errors in its analysis with regard to the right to move about freely.

**If you have questions about the potential ramifications of the Third Circuit’s decision, or have an interest in joining the dispute as an amicus**, please contact your Archer attorney, or [John Connell](mailto:jconnell@archerlaw.com) at [jconnell@archerlaw.com](mailto:jconnell@archerlaw.com), or [Richard Gilly](mailto:rgilly@archerlaw.com) at [rgilly@archerlaw.com](mailto:rgilly@archerlaw.com), or any member of Archer’s [COVID-19 Task Force](#).

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