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## FORCED BUSINESS CLOSURES: Executive Orders by the Governor Closing Private Businesses

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## FORCED BUSINESS CLOSURES

### *Executive Orders by the Governor Closing Private Businesses*

CODE SECTIONS:	O.C.G.A. §§ 38-3-3, -51
EXECUTIVE ORDERS:	Ga. Exec. Order Nos. 03.14.20.01; 03.16.20.01; 03.23.20.01; 03.26.20.02; 04.01.20.01; 04.02.20.01; 04.08.20.04; 04.23.20.02; 04.27.20.01; 05.12.20.02; 05.21.20.01; 05.28.20.02; 06.11.20.01
EFFECTIVE DATES:	March 14, 2020; March 16, 2020; March 23, 2020; March 26, 2020; April 1, 2020; April 2, 2020; April 3, 2020; April 8, 2020; April 23, 2020; April 27, 2020; April 30, 2020; May 15, 2020; May 21, 2020; May 28, 2020; June 11, 2020
SUMMARY:	Governor Brian Kemp (R) issued Executive Orders in response to the COVID-19 pandemic that required businesses to close in an effort to limit the spread of the virus. Business owners often challenged those forced business closures as unconstitutional or as exceeding the State's police power, and those challenges were met with varying degrees of success.

### *Introduction*

In December of 2019, Wuhan, China, reported a “cluster of novel human pneumonia cases,” in which patients experienced fever, dry cough, and shortness of breath.<sup>1</sup> The press initially termed the phenomenon “Wuhan pneumonia” due to the area of origin and the

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1. Yen-Chin Liu et al., *COVID-19: The First Documented Coronavirus Pandemic in History*, 43 *BIOMED. J.* 328, 328 (2020).

symptomology of the disease, but whole-genome sequencing revealed the “causative agent” behind these symptoms was actually a novel coronavirus.<sup>2</sup> Sometimes able to jump from animals to humans, coronaviruses include “a large family of viruses that usually cause mild to moderate upper-respiratory tract illnesses, like the common cold.”<sup>3</sup> Officially designated COVID-19 by the World Health Organization (WHO) in February 2020, the virus swept through Asian and European countries—quickly spreading worldwide and ultimately reaching the United States in January 2020.<sup>4</sup> On March 11, 2020, the WHO declared COVID-19 a “pandemic”—the first one ever to be caused by a coronavirus.<sup>5</sup>

### *Background*

#### *First Wave of Closures*

After COVID-19 cases were reported in Georgia in early March, Governor Brian Kemp (R) declared a Public Health State of Emergency on March 14, 2020.<sup>6</sup> This declaration made various

2. *Id.* (“[T]his virus is the seventh member of the coronavirus family to infect humans.”).

3. Overview of *Coronaviruses*, NAT’L INST. ALLERGY & INFECTIOUS DISEASES, <https://www.niaid.nih.gov/diseases-conditions/coronaviruses> [https://perma.cc/AZS5-GF8X] (May 19, 2020) (“There are hundreds of coronaviruses, most of which circulate among such animals as pigs, camels, bats[,] and cats. Sometimes those viruses jump to humans—called a spillover event—and can cause disease.”).

4. Liu et al., *supra* note 1 (“Since COVID-19 initially emerged in China, the virus has evolved for four months and rapidly spread to other countries worldwide as a global threat.”); *see also* Derrick Bryson Taylor, *How the Coronavirus Pandemic Unfolded: A Timeline*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html> [https://perma.cc/7J2E-DMCG] (“The first confirmed case in the United States came [on January 21, 2020] in Washington State, where a man in his [thirties] developed symptoms after returning from a trip to Wuhan.”).

5. WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19, WORLD HEALTH ORGANIZATION [WHO] (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [https://perma.cc/TNW6-P5SB].

6. Ga. Exec. Order No. 03.14.20.01 (Mar. 14, 2020) (on file with the Georgia State University Law Review). Subsection (6) of Code section 38-3-3 defines “Public Health Emergency” as:

[T]he occurrence or imminent threat of an illness or health condition that is reasonably believed to be caused by bioterrorism or the appearance of a novel or previously controlled or eradicated infectious agent . . . and poses a high probability of . . . a large number of deaths in the affected population . . . or . . . substantial future harm to a large number of people in the affected population.

O.C.G.A. § 38-3-3(6) (2012 & Supp. 2019); *see also* Memorandum from Georgia Gov.’s Office on Pub.

“legal and operational resources available to respond to an emergency” and gave the governor a wide range of powers.<sup>7</sup> Under Code section 38-3-51, these powers include the ability “[t]o seize, take for temporary use, or condemn property for the protection of the public” and “[t]o perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.”<sup>8</sup> Pursuant to these powers, Governor Kemp issued the first wave of Executive Orders closing schools and businesses in mid-to-late March.

Executive Order 03.16.20.01 shuttered all public elementary, secondary, and post-secondary schools from March 18, 2020, until March 31, 2020.<sup>9</sup> Justified as a “necessary and appropriate action to protect the health, safety, and welfare of Georgia’s residents and visitors to help control the spread of COVID-19 throughout [the] state,” issuance of this Order drew on powers given to the Governor by subsection (d)(1) of Code section 38-3-51.<sup>10</sup>

Issued on March 23, 2020, Executive Order 03.23.20.01 closed all bars and nightclubs for fourteen days pursuant to the Governor’s power “to perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.”<sup>11</sup> The Order also mandated that businesses and other establishments could not allow more than ten people in a single location unless people could remain six feet

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Health State of Emergency to Members of the Georgia Gen. Assemb. (Mar. 15, 2020) (on file with the Georgia State University Law Review) [hereinafter Public Health Memorandum].

7. Emergency Declarations and Authorities Fact Sheet of *Emergency Authority and Immunity Toolkit*, ASS’N ST. & TERRITORIAL HEALTH OFFS. (June 23, 2020), <https://astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Emergency-Declarations-and-Authorities-Fact-Sheet/> [https://perma.cc/F4CE-GGCC].

8. O.C.G.A. § 38-3-51 (2012 & Supp. 2020); *see also* Public Health Memorandum, *supra* note 6.

9. Ga. Exec. Order No. 03.16.20.01, at 2 (Mar. 16, 2020) (on file with the Georgia State University Law Review).

10. *Id.* at 1; § 38-3-51(d)(1). Subsection (d)(1) of Code section 38-3-51 vests the Governor with the emergency power to “[s]uspend any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency,” provided that “strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster.” § 38-3-51(d)(1); *see also* Ga. Exec. Order No. 03.16.20.01, *supra* note 9, at 1.

11. Ga. Exec. Order No. 03.23.20.01, at 1–3 (Mar. 23, 2020) (on file with the Georgia State University Law Review).

apart at all times.<sup>12</sup> Lastly, this Order vested the power to close non-compliant businesses and other establishments in the Georgia Department of Public Health (DPH) and also provided that the Commissioner of the Department of Public Safety would allocate additional resources to aid in the enforcement of the Order.<sup>13</sup>

On March 26, 2020, Governor Kemp issued Executive Order 03.26.20.02, which extended Executive Order 03.16.20.01 and closed all public elementary, secondary, and post-secondary schools until April 24, 2020, to stop the spread of COVID-19.<sup>14</sup>

### *Second Wave of Closures*

As more information became available about the severity of the virus, April saw a trend of stricter, more aggressive executive orders coming from the Governor's Office. Issued on April 1, 2020, Executive Order 04.01.20.01 extended all school closures mandated by Executive Order 03.26.20.02 through the end of the 2019–20 academic year.<sup>15</sup>

One day later, the Governor's Office issued Executive Order 04.02.20.01, the most comprehensive Order, instructing “residents to shelter in place unless they [were] conducting ‘essential services,’ either traveling to and from jobs[,] or taking part in other exceptions.”<sup>16</sup> As defined by the Order, “essential services” included obtaining necessary supplies and services (such as food, medication, or equipment to work from home), seeking medical care or emergency services, and engaging in outdoor exercise activities so long as participants maintained at least six feet of distance between each person.<sup>17</sup>

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12. *Id.*

13. *Id.* at 2–3.

14. Ga. Exec. Order No. 03.26.20.02, at 2 (Mar. 26, 2020) (on file with the Georgia State University Law Review).

15. Ga. Exec. Order No. 04.01.20.01, at 2 (Apr. 1, 2020) (on file with the Georgia State University Law Review).

16. Ga. Exec. Order No. 04.02.20.01, at 2–3 (Apr. 2, 2020) (on file with the Georgia State University Law Review); *see also* Greg Bluestein, *Kemp Details Georgia's Statewide Shelter in Place Order*, ATLANTA J.-CONST. (Apr. 2, 2020), <https://www.ajc.com/blog/politics/kemp-details-georgia-shelter-place-order/hc3ETUjzBedtWW1LoJHTIP/> [<https://perma.cc/YM8P-RVVU>].

17. Ga. Exec. Order No. 04.02.20.01, *supra* note 16, at 3.

Certain businesses were treated differently than others under the Order. For example, the Order mandated that all gyms, fitness centers, bowling alleys, theaters, live performance venues, amusement parks, tattoo parlors, hair salons, massage parlors, bars, and nightclubs “cease in-person operations” entirely and remain “close[d] to the public” throughout the duration of the Order.<sup>18</sup> Restaurants and private social clubs could remain open, but they were forced to cease dine-in services in lieu of takeout, curbside pick-up, or delivery services.<sup>19</sup>

Businesses and other similar establishments engaging in “minimum basic operations” could continue to operate but were limited to a capacity of ten people unless all employees could maintain a distance of six feet.<sup>20</sup> Further, these businesses had to comply with a set of prescribed guidelines, such as providing disinfectants for workers, screening workers for COVID-19 symptoms, and providing personal protective equipment as available and appropriate.<sup>21</sup>

The Order contained an exception for businesses or entities defined as “critical infrastructure” by the U.S. Department of Homeland Security.<sup>22</sup> Businesses deemed “critical” could continue in-person operations, as long as they implemented measures to “mitigate the exposure and spread of COVID-19” among the workforce.<sup>23</sup> Unlike the specific set of provisions mandated for businesses engaging in minimum basic operations, critical businesses were encouraged—but not forced—to implement the safety measures described in the Order.<sup>24</sup> Shortly after Executive Order 04.02.20.01

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18. *Id.* at 6–7.

19. *Id.* at 6.

20. *Id.* at 4–5. Under the Order, minimum basic operations were limited to the “minimum necessary activities to maintain the value of a business, establishment, corporation, non-profit corporation, or organization, provide services, manage inventory, ensure security, process payroll and employee benefits, or for related functions.” *Id.* at 3.

21. *Id.* at 4–5; *see also* Bluestein, *supra* note 16.

22. Ga. Exec. Order No. 04.02.20.01, *supra* note 16, at 5.

23. *Id.*

24. *Id.* Such safety measures *could* include screening workers for symptoms of COVID-19, requiring workers with COVID-19 symptoms to stay at home, providing sanitation, requiring hand washing, providing personal protective equipment, and implementing staggered shifts for all possible workers—just to name a few. *Id.* at 5–6.

was issued, the Governor issued Executive Order 04.08.20.04, which suspended all short-term vacation rentals until May 1, 2020.<sup>25</sup>

### *Reopening Phase*

On April 23, 2020, Governor Kemp attracted national attention when he issued Executive Order 04.23.20.02, which reopened some businesses and ended the strict shelter in place.<sup>26</sup> The Order first urged citizens to vigilantly observe public health precautions, directing all people to wear face coverings and engage in social distancing.<sup>27</sup> It also ordered elderly and immunocompromised people to continue sheltering in place within their homes.<sup>28</sup> The Order prohibited businesses from allowing more than ten people at a single location if, to be present, people were required to stand or be seated within six feet of any other person.<sup>29</sup>

The Order allowed dine-in restaurants to reopen in a very limited capacity, restricting them to no more than ten patrons within 500 square feet of public space.<sup>30</sup> Additionally, dine-in restaurants were required to follow a list of thirty-nine precautions listed in the Order.<sup>31</sup> The Order also allowed non-essential businesses, gyms and fitness centers, salon and body art studios, indoor movie theaters, and bowling alleys to reopen as long as they followed a list of specified precautions.<sup>32</sup> Not all businesses were permitted to reopen, however;

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25. Ga. Exec. Order No. 04.08.20.04, at 1 (Apr. 8, 2020) (on file with the Georgia State University Law Review).

26. Ga. Exec. Order No. 04.23.20.02, at 2 (Apr. 23, 2020) (on file with the Georgia State University Law Review); Amanda Mall, *Georgia's Experiment in Human Sacrifice*, THE ATLANTIC (Apr. 29, 2020), <https://www.theatlantic.com/health/archive/2020/04/why-georgia-reopening-coronavirus-pandemic/610882/> [<https://perma.cc/GC2P-UD9U>]. This Executive Order provided clear definitions of many COVID-19 terms, including gathering, social distancing, and essential services. Ga. Exec. Order No. 04.23.20.02, *supra*, at 3–4.

27. Ga. Exec. Order No. 04.23.20.02, *supra* note 26.

28. *Id.* at 4–5.

29. *Id.* at 11.

30. *Id.* at 7–8. “Public space” included waiting and bar areas, but does not include hallways, restrooms, and spaces closed to patrons. *Id.* at 7.

31. *Id.* at 7–9.

32. *Id.* at 11, 14–15.

the Order mandated public swimming pools and amusement parks remain closed until May 13, 2020.<sup>33</sup>

Over the next few weeks, Governor Kemp released several Executive Orders to provide additional guidance to businesses that were reopening.<sup>34</sup> On June 1, 2020, bars and nightclubs were permitted to reopen if they implemented thirty-nine mandatory measures.<sup>35</sup> Even with the wave of business openings, live performance venues remained closed based on the reasoning that it was in the best interest of public health.<sup>36</sup> As COVID-19 restrictions eased, restaurant owners remained uncertain whether customers would feel comfortable sitting two feet from the table next to them or whether they would want to remain six feet apart.<sup>37</sup>

### *Analysis*

#### *Are These Forced Business Closures Constitutional?*

Other state governors who issued similar Executive Orders shuttering businesses in response to COVID-19 experienced legal backlash from business owners.<sup>38</sup> Specifically, three common constitutional challenges to similar state Executive Orders emerged from business owners. First, business owners argued that forced business closures exceeded the state's police power.<sup>39</sup> Second,

33. Ga. Exec. Order No. 04.23.20.02, *supra* note 26, at 12.

34. Ga. Exec. Order No. 04.27.20.01 (Apr. 27, 2020) (on file with the Georgia State University Law Review); Ga. Exec. Order No. 05.12.20.02 (May 12, 2020) (on file with the Georgia State University Law Review); Ga. Exec. Order No. 05.21.20.01 (May 21, 2020) (on file with the Georgia State University Law Review); Ga. Exec. Order No. 05.28.20.02 (May 28, 2020) (on file with the Georgia State University Law Review); Ga. Exec. Order No. 06.11.20.01 (June 11, 2020) (on file with the Georgia State University Law Review).

35. Ga. Exec. Order No. 05.28.20.02, *supra* note 34, at 7–10.

36. *Georgia Gov. Kemp Renews State of Emergency; Rolls out Opening Dates for More Businesses*, FOX 5 ATLANTA (May 28, 2020), <https://www.fox5atlanta.com/news/georgia-gov-kemp-renews-state-of-emergency-rolls-out-opening-dates-for-more-businesses> [<https://perma.cc/VYP3-35Z8>]. Governor Kemp reasoned, "I know these closures are tough on business owners and their employees, but we will continue to watch the data to ensure the health and safety of our citizens." *Id.*

37. Telephone Interview with Jarrett Stieber, Owner, Little Bear Food & Merch. (June 20, 2020) (on file with the Georgia State University Law Review).

38. *See, e.g.,* Complaint, *Tesla, Inc. v. Alameda Cnty.*, 20-cv-3186, 2020 WL 2356208 (N.D. Cal. May 9, 2020); *Friends of DeVito v. Wolf*, 227 A.3d 872, 873 (Pa. 2020).

39. Elizabeth Joh, *Yes, States and Local Governments Can Close Private Businesses and Restrict*

business owners argued that these Executive Orders violated their substantive and procedural due process rights under Fourteenth Amendment.<sup>40</sup> Lastly, some business owners argued that shuttering businesses constituted an impermissible “taking” under the Takings Clause of the Fifth Amendment, incorporated against the states through the Fourteenth Amendment.<sup>41</sup> The following Sections analyze these various claims in the COVID-19 context.

### *The Police Power*

States have broad authority to mandate business closures during a pandemic through their police power.<sup>42</sup> The police power is incredibly broad and sweeping, and it is an inherent attribute of state sovereignty.<sup>43</sup> The Tenth Amendment to the U.S. Constitution affirms states’ police power “as a reminder that the national government is one of limited authority and that those powers that the people did not give to the federal government remain with the states and the people.”<sup>44</sup> The term “police power” first appeared in *Brown v. Maryland*, a case addressing the constitutionality of a Maryland

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*Your Movement*, POLITICO (Mar. 18, 2020, 6:16 PM), <https://www.politico.com/news/magazine/2020/03/18/states-police-power-coronavirus-135826> [<https://perma.cc/8LEH-GLX3>].

40. Joshua T. Lewis, *Constitutional Challenges to Government COVID-19 Measures Mount*, FROST BROWN TODD (Apr. 10, 2020), <https://frostbrowntodd.com/constitutional-challenges-to-government-covid-19-measures-mount/> [<https://perma.cc/478P-ZCPE>]; Mark D. Taticchi et al., *Pennsylvania Supreme Court Upholds Business-Closure Order, Rules that COVID-19 Is a ‘Natural Disaster,’* FAEGRE DRINKER (Apr. 16, 2020), <https://www.faegredrinker.com/en/insights/publications/2020/4/pennsylvania-supreme-court-upholds-business-closure-order> [<https://perma.cc/2FF4-6LLP>].

41. David Jacobs, *Federal Judge Upholds Louisiana Bar Restrictions*, WASH. EXAM’R. (Aug. 18, 2020, 3:00 PM), <https://washingtonexaminer.com/politics/federal-judge-upholds-louisiana-bar-restrictions> [<https://perma.cc/55C8-YES5>].

42. U.S. CONST. amend. X; *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824).

43. U.S. CONST. amend. X; *Gibbons*, 22 U.S. at 78; see also Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. LAW. 625, 626 (2015); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 781–96 (2017) (“Nowadays, insofar as the expression is used in American constitutional law, the phrase ‘police power’ normally refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare.”).

44. U.S. CONST. amend. X; Ohm, *supra* note 43. The Tenth Amendment simply states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

regulation that required importers of foreign goods to obtain a license to do so.<sup>45</sup> In *Brown*, Chief Justice John Marshall first referenced the police power when he stated, “[t]he power to direct removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.”<sup>46</sup> In *Gibbons v. Ogden*, Chief Justice John Marshall further detailed the leviathan nature of police power:

They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c.[.] are component parts of this mass.<sup>47</sup>

Nearly a century later, in *Jacobson v. Massachusetts*, the Supreme Court held states may use the police power to enact quarantine laws and “health laws of every description,” so long as the laws are reasonable and protect public health and public safety.<sup>48</sup> In other words, states may restrict civil liberties to limit the spread of a communicable disease as long as the state actions have a reasonable relationship to public health.<sup>49</sup> Courts adopt a very deferential

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45. *Brown v. Maryland*, 25 U.S. 419, 443 (1827), *abrogated by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 474 (2004).

46. *Brown*, 25 U.S. at 443; Barros, *supra* note 45.

47. *Gibbons*, 22 U.S. at 78. In *Gibbons*, the Court found New York ultimately lacked the power to restrict navigation under the Commerce Clause, though it was within its police power. *Id.*; *see also, e.g.*, *State v. McKay*, 193 S.W. 99, 100 (Tenn. 1917) (holding Tennessee law requiring labeling of seed packets was “an attempted exercise by the state of the police power, which was one of the powers reserved to the states in the national Constitution”); Legarre, *supra* note 43, at 792–93 (“[W]hen the courts today . . . make reference to the acknowledged ends of the police power (‘public health, safety, morals, welfare’) they do so . . . to provide non-exhaustive examples of the goods that the police power may promote.”). Theoretically, a state could limit its police power by proscribing such legislation in its own constitution. *See* U.S. CONST. amend. X.

48. *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905).

49. *Id.*; Erwin Chemerinsky, *Op-Ed: Yes, Businesses Have Been Hurt by Coronavirus Closures, but They Won’t Get Relief from the Courts*, L.A. TIMES (Apr. 29, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-04-29/op-ed-yes-businesses-have-been-hurt-by->

standard of review regarding state actions taken during a public health emergency and will likely find state actions bear a reasonable relationship to public health as long as they are not completely arbitrary.<sup>50</sup> At first glance, *Jacobson* may not seem relevant to forced business closures in the wake of the COVID-19 pandemic—it was an early twentieth-century case that analyzed whether the Massachusetts state government could mandate smallpox vaccinations.<sup>51</sup> Because it is one of the few cases analyzing the police power as applied to communicable disease, however, it has become a seminal case to analyze forced business closures in the wake of COVID-19.<sup>52</sup>

States' use of the police power to close certain businesses during public health emergencies may be limited by the First and Second Amendments.<sup>53</sup> In a 6–3 decision, the Supreme Court denied a church's request for injunctive relief pending appeal in *Calvary Chapel Dayton Valley v. Sisolak* after the State of Nevada ordered houses of worship to limit services to no more than fifty persons to combat the spread of COVID-19.<sup>54</sup> At the same time, Nevada allowed secular gatherings, such as casinos, to operate at 50% capacity, which in many cases exceeded the fifty-person limit imposed on houses of worship.<sup>55</sup> Justice Alito dissented from the Court's denial of injunctive relief, concluding that Nevada's actions constituted discrimination under the First Amendment; Justice Alito also discouraged lower courts from blindly applying *Jacobson* precedent during the COVID-19 pandemic: "It is a considerable stretch to read [*Jacobson*] as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case."<sup>56</sup>

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coronavirus-closures-but-they-wont-get-relief-from-the-courts [https://perma.cc/UZ9Y-G3CV].

50. Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20, 21 (2005).

51. *Jacobson*, 197 U.S. at 24–25.

52. *Id.*; Chemerinsky, *supra* note 49 ("The Supreme Court has held [in *Jacobson*] that restrictions of civil liberties are allowed to limit the spread of a communicable disease, so long as there is a real and substantial relationship to public health. This is why quarantine orders are constitutional, even though they greatly restrict freedom.").

53. Telephone Interview with Eric Segall, Ashe Family Chair Professor of L., Ga. State Univ. Coll. of L. (June 19, 2020) (on file with the Georgia State University Law Review).

54. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603 (2020).

55. *Id.* at 2603–06 (Alito, J., dissenting).

56. *Id.* at 2603, 2606.

Further, it is possible that the Second Amendment precludes states from using the police power to close firearm retailers and shooting ranges during the COVID-19 pandemic. In *Altman v. County of Santa Clara*, however, the Northern District of California held that a county Order mandating closures of all businesses, including firearm retailers and shooting ranges, was constitutional because it was facially neutral and treated all businesses alike.<sup>57</sup> However, it is possible that a court could find closures of firearm retailers and shooting ranges unconstitutional if those businesses were treated differently from other businesses, as Justice Alito noted in his dissent in *Calvary Chapel*, stating that Nevada’s restrictions discriminated against houses of worship.<sup>58</sup>

Here, Georgia officials acted within the state’s police power to force businesses to close during the COVID-19 pandemic because its actions were in the interest of public health.<sup>59</sup> In *Gibbons*, the Supreme Court explicitly stated that quarantine laws and health laws are permissible uses of a state’s police power.<sup>60</sup> Georgia’s forced business closures were rooted in serious public health concerns, as evinced by Governor Brian Kemp’s (R) Executive Orders, which not only closed businesses but also ordered elderly and immunocompromised people to shelter in place within their homes.<sup>61</sup> In fact, the sole purpose of the forced business closures was to prevent the spread of COVID-19 and to protect the “health, safety, and welfare of Georgia’s residents and visitors.”<sup>62</sup> Even though

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57. U.S. CONST. amend. II; *Altman v. Cnty. of Santa Clara*, No. 20-cv-2180, 2020 WL 2850291, at \*1, \*12 (N.D. Cal. June 2, 2020).

58. Compare *Altman*, 2020 WL 2850291, at \*1, \*12, with *Calvary Chapel*, 140 S. Ct. at 2603–06 (Alito, J., dissenting).

59. See *Jacobson v. Massachusetts*, 197 U.S. 11, 12–13 (1905); Ga. Exec. Order No. 03.16.20.01, *supra* note 9, at 1 (“Further action is necessary to protect the health and safety of the population of Georgia, slow the spread of COVID-19, reduce the number of people who will become infected, and avoid unnecessary strain on Georgia’s healthcare system . . .”); see also David French, *The Police Power of the States to Control a Pandemic, Explained*, THE DISPATCH (Mar. 17, 2020), <https://thedispatch.com/p/the-police-power-of-the-states-to> [<https://perma.cc/9JSK-J7J4>]; Damon Root, *Police Powers During a Pandemic: Constitutional, but Not Unlimited*, REASON (Mar. 18, 2020, 12:00 PM), <https://reason.com/2020/03/18/police-powers-during-a-pandemic-constitutional-but-not-unlimited/> [<https://perma.cc/E2AH-M8CM>] (proposing a framework to analyze whether public health laws are within a state’s police power).

60. *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824).

61. See, e.g., Ga. Exec. Order No. 04.02.20.01, *supra* note 16, at 2, 6–7.

62. *Id.* at 2.

Georgia's forced business closures did not directly govern health issues like the Massachusetts law requiring smallpox vaccinations in *Jacobson*, they were nonetheless related to public health because they were enacted for the purpose of stemming the unchecked spread of COVID-19.<sup>63</sup>

Further, Georgia's forced business closures were a constitutional exercise of the state police power because they did not violate individual liberties protected by the First and Second Amendments. Georgia's Executive Orders mandating business closures did not implicate First Amendment issues because they did not treat houses of worship differently from secular businesses.<sup>64</sup> Unlike Nevada's Executive Order detailed in *Calvary Chapel*, which limited houses of worship to fifty attendees but allowed hundreds of patrons to enter casinos at the same time, Georgia's Executive Orders imposed no restrictions on houses of worship that were not also imposed on secular businesses.<sup>65</sup> Georgia's forced business closures did not violate the Second Amendment because the Executive Orders explicitly did not apply to the operation of stores selling firearms and ammunition.<sup>66</sup> Georgia's forced business closures were more deferential to citizens' Second Amendment rights than the business closures at issue in *Altman* because Georgia allowed firearms and ammunition retailers and transporters to remain open during the COVID-19 pandemic.<sup>67</sup> Finally, Georgia's use of the police power to close businesses in the context of a pandemic was not prohibited by the Georgia Constitution or laws enacted by the state legislature.<sup>68</sup>

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63. *Id.*; *Jacobson*, 197 U.S. at 12–13.

64. Ga. Exec. Order No. 04.02.20.01, *supra* note 16.

65. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603 (2020); Ga. Exec. Order No. 04.02.20.01, *supra* note 16; *see also* Ga. Exec. Order No. 03.16.20.01, *supra* note 9.

66. Ga. Exec. Order No. 04.02.20.01, *supra* note 16, at 9.

67. *Id.*; *Altman v. Cnty. of Santa Clara*, No. 20-cv-2180, 2020 WL 2850291, at \*1, \*12 (N.D. Cal. June 2, 2020).

68. *See* O.C.G.A. § 38-3-51(d)(1) (2012 & Supp. 2020); GA. CONST. art. I, § III, para. 1(a).

*Fourteenth Amendment Challenges to Forced Business Closures*

The Fourteenth Amendment provided two main avenues for business owners to challenge forced business closures.<sup>69</sup> First, business owners argued that the forced business closures violated their substantive and procedural due process rights under the Fourteenth Amendment. Second, business owners argued that the forced business closures constituted a “taking” requiring payment of just compensation under the Takings Clause of the Fifth Amendment, which was incorporated against the states through the Fourteenth Amendment. However, both claims face significant uphill battles—for “[e]ven in usual times, judicial deference to the government’s ability to regulate the economy is enormous, and it will be even greater in the context of a pandemic.”<sup>70</sup>

*Forced Business Closures as Violations of Due Process Rights*

Both the Fifth and the Fourteenth Amendments to the Constitution of the United States contain a Due Process Clause.<sup>71</sup> The Fifth Amendment prohibits the federal government from depriving people “of life, liberty, or property, without due process of law.”<sup>72</sup> Likewise, the Fourteenth Amendment repeats this language—extending its applicability to states and thus barring them from these same categories of deprivations.<sup>73</sup> Despite the vague language, these constitutional provisions carry special importance: they “impose constraints on governmental actions or decisions which deprive persons of interests.”<sup>74</sup> In defining the scope of these constraints, the Supreme Court has established that neither the federal nor state governments may interfere with life, liberty, or property by taking legislative actions that are considered “arbitrary or without

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69. *Friends of DeVito v. Wolf*, 227 A.3d 872, 873 (Pa. 2020).

70. Chemerinsky, *supra* note 49.

71. U.S. CONST. amends. V, XIV, § I.

72. U.S. CONST. amend. V.

73. U.S. CONST. amend. XIV, § I (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .”).

74. 16 C.J.S. *Constitutional Law* § 1883 (2020).

reasonable relation to some purpose within the competency of the state to effect.”<sup>75</sup>

State constitutions often contain similar limitations on governmental powers, and Georgia’s Constitution is no exception.<sup>76</sup> Specifically, Article I, Section I of the Georgia Constitution provides: “No person shall be deprived of life, liberty or property except by due process of law.”<sup>77</sup> Similarly, the “individual interests” protected by the Due Process Clause are life, liberty, and property.<sup>78</sup> Substantive due process protects certain categories of liberty interests from government infringement “no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>79</sup> On the other hand, procedural due process scrutinizes the constitutionality of procedures used to deny a person’s life, liberty, or property.<sup>80</sup>

If a fundamental right or a protected class is not involved in the litigation, courts apply a rational basis test to determine whether a governmental action violated a plaintiff’s substantive due process rights.<sup>81</sup> Under this standard, courts do not require that the government’s action be “the best, or even *the least intrusive*, means available to achieve its objective.”<sup>82</sup> In fact, the means adopted by the action do not violate due process so long as they bear a “rational relationship to a legitimate [objective] of the government.”<sup>83</sup> Therefore, only arbitrary or irrelevant actions offend notions of due process under the rational basis test.<sup>84</sup>

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75. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

76. GA. CONST. art. I, § 1, para. 1; *Policy Guide on the Takings, Substantive Due Process, and Regulatory Takings Doctrines*, AM. PLAN. ASS’N: MICHIGAN CHAPTER, <https://www.planningmi.org/assets/docs/Policies/MAP%20Takings%20Substantive%20Due%20Process%20and%20Regulatory%20Takings%20Background.pdf> [<https://perma.cc/NW8U-THUJ>].

77. GA. CONST. art. I, § 1, para. 1.

78. U.S. CONST. amend. V; 16 C.J.S., *supra* note 74.

79. Reno v. Flores, 507 U.S. 292, 302 (1993).

80. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

81. Old S. Duck Tours v. Mayor & Alderman of Savannah, 272 Ga. 869, 872, 535 S.E.2d 751, 754 (2000).

82. City of Lilburn v. Sanchez, 268 Ga. 520, 522, 491 S.E.2d 353, 355 (1997).

83. Georgia Dep’t of Hum. Res. v. Sweat, 276 Ga. 627, 630, 580 S.E.2d 206, 211 (2003).

84. See Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down an amendment to the Colorado Constitution that prohibited gay, lesbian, and bisexual individuals from bringing claims of discrimination based on their sexual orientation as violating the Fourteenth Amendment Equal Protection Clause under rational basis review, reasoning that laws premised on animus toward

Amid the pandemic, business owners brought lawsuits challenging the constitutional validity of forced business closures, arguing that the mandatory closure of all non-essential business violated their right to “engage in the common occupations of life” and the right to pursue their “chosen profession free from unreasonable governmental interference.”<sup>85</sup> Because forced business closures have not been held to implicate a fundamental right, courts have employed rational basis review to evaluate the constitutionality of the business closures.<sup>86</sup> Although government actions subject to rational basis review generally survive constitutional scrutiny, one district court in Pennsylvania recently struck down the State’s forced business closures as “so arbitrary in its creation, scope, and administration as to fail constitutional scrutiny.”<sup>87</sup> The court in *County of Butler v. Wolf* conducted a fact-specific inquiry into the extent to which the Governor of Pennsylvania crafted an Executive Order that closed businesses arbitrarily.<sup>88</sup> In finding that the Governor of Pennsylvania acted arbitrarily, the court considered, among other factors, the lack of a formal definition of what constituted “non-life-sustaining” businesses, the overlap of products and services sold between “life-sustaining” and “non-life-sustaining” businesses, and the State’s eventual closure of the waiver application process due to a wavier requests backlog.<sup>89</sup>

Whether Governor Kemp’s forced business closures violated the due process rights of business owners would likely be subject to the same fact-intensive judicial scrutiny employed in *Wolf*.<sup>90</sup> In support of the State’s position that Governor Kemp’s Executive Order closing nonessential businesses bears a “rational relationship” to the

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historically-oppressed classes may indicate a lack of rational relationship); *see also Old S. Duck Tours*, 272 Ga. at 872, 535 S.E.2d at 754–55 (providing legal standard for rational basis review in Georgia).

85. *Cnty. of Butler v. Wolf*, No. 20-CV-677, 2020 WL 5510690, at \*25 (W.D. Pa. Sept. 14, 2020).

86. *Id.* (evaluating the constitutionality of Pennsylvania’s forced business closures during the COVID-19 pandemic and striking down the Executive Orders as violating Fourteenth Amendment Due Process and Equal Protection Clauses).

87. *Id.* at \*26 (“Even with this forgiving standard as its guide, the Court nevertheless holds that the March 19, 2020 Order closing all ‘non-life-sustaining’ businesses was so arbitrary in its creation, scope[,] and administration as to fail constitutional scrutiny.”).

88. *Id.* at \*26–27.

89. *Id.* at \*27–29.

90. *Id.*; *Old S. Duck Tours v. Mayor & Alderman of Savannah*, 272 Ga. 869, 872, 535 S.E.2d 751, 754 (2000).

state's objective of limiting and controlling the spread of COVID-19, Governor Kemp would justify the closures as "necessary and appropriate action[s] to protect the health, safety, and welfare of Georgia's residents and visitors to help control the spread of COVID-19 throughout [the] state."<sup>91</sup> Further supporting the Governor's position would be that the actions taken fell "within the scope of the police power."<sup>92</sup> However, the court's decision in *Wolf* introduces uncertainty into how a federal court in Georgia might resolve the same constitutional questions posed by business owners challenging the closure of their businesses. Though courts tend to be "very deferential" to the state when confronted with violations of due process claims, whether forced Georgia business closures would pass constitutional muster under the Due Process Clause remains uncertain.<sup>93</sup>

#### *Takings Claims Under the Fourteenth Amendment*

Another frequent constitutional challenge against forced business closures in other states was that these state-mandated closures violated business owners' rights under the Takings Clause of the Fifth Amendment, which was incorporated against the states through the Fourteenth Amendment.<sup>94</sup> In addition to protecting people from infringement of due process rights, the Fifth Amendment prohibits the federal government from taking private property for public use "without just compensation."<sup>95</sup> Similarly, the Georgia Constitution also provides that the State of Georgia cannot take or damage private property for public use without adequate and just compensation.<sup>96</sup> In assessing a takings claim, Georgia courts balance the State's interest in regulation against a property owner's interest in unfettered use of

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91. Ga. Exec. Order No. 04.02.20.01, *supra* note 16; *see also* Ga. Exec. Order No. 03.16.20.01, *supra* note 9, at 1.

92. *Standard Oil Co. v. City of Marysville*, 279 U.S. 582, 584 (1929).

93. Chemerinsky, *supra* note 49.

94. U.S. CONST. amend. V, XIV; *see also* Richard Frank, *Do Epidemic-Based Business Closures by Government Trigger an Unconstitutional "Taking"?*, LEGAL PLANET (May 7, 2020), <https://legal-planet.org/2020/05/07/do-epidemic-based-business-closures-by-government-trigger-an-unconstitutional-taking/> [<https://perma.cc/4UA2-DALM>].

95. U.S. CONST. amend. V.

96. GA. CONST. art. I, § III, para. 1(a).

property to determine the propriety of using police power to regulate.<sup>97</sup>

In *Lucas v. South Carolina Coastal Council*, the Court held that a government action depriving a landowner of “all economically beneficial or productive use of the land” was a public taking requiring just compensation.<sup>98</sup> In *Lucas*, a man bought beachfront properties with the intent to develop them, but before he could, the state legislature enacted a statute barring him from erecting any permanent habitable structures on the land.<sup>99</sup> The Court explained that two types of takings can occur: one that encompasses “regulations that compel the property owner to suffer a physical ‘invasion’ of his property” and a second situation “where regulation denies all economically beneficial or productive use of the land.”<sup>100</sup>

In regards to permanent physical invasions, the Court has explained that “no matter how minute the intrusion, and no matter how weighty the public purpose behind it,” governmental intrusion upon another’s land requires just compensation.<sup>101</sup> For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court held that a cable installation on a building constituted a “taking” because it involved a permanent “physical attachment of plates, boxes, wires, bolts, and screws to the building.”<sup>102</sup> Importantly, however, this type of taking must constitute “an actual physical invasion” of the property.<sup>103</sup> The Court has also acknowledged a second type of taking in which a government regulation imposes restrictions that deprive property owners of the beneficial use of their property.<sup>104</sup> Such “confiscatory regulations” include government mandates that prevent property owners from using their land in an economically beneficial manner.<sup>105</sup> Because the forced business

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97. *Pope v. City of Atlanta*, 242 Ga. 331, 333–35, 249 S.E.2d 16, 18–20 (1978).

98. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–19 (1992).

99. *Id.* at 1006–07.

100. *Id.* at 1015.

101. *Id.*

102. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982).

103. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

104. *Lucas*, 505 U.S. at 1015 (“[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922))).

105. *Id.* at 1029 (defining confiscatory regulations as “regulations that prohibit all economically

closures arose from the regulations imposed by Governor Kemp rather than from any forced physical appropriation of actual property, the Executive Orders are best analyzed under the regulatory takings framework.<sup>106</sup>

Unlike physical takings, the concept of regulatory takings is not explicitly defined within the four corners of the Constitution.<sup>107</sup> Rather, courts have recognized that regulatory takings jurisprudence has traditionally been “characterized by ‘essentially ad hoc, factual inquiries,’ designed to allow ‘careful examination and weighing of all the relevant circumstances.’”<sup>108</sup> Courts have grappled with whether all regulations that effectively deny property owners of economically beneficial uses of their land should constitute a compensable taking, recognizing that some government intrusions into property rights may be necessary to “adjust[] the benefits and burdens of economic life to promote the common good.”<sup>109</sup> As such, courts have declined to adopt a categorical rule requiring governmental agencies to compensate landowners for deprivations of economic use of land resulting from government regulations.<sup>110</sup> Thus, challengers “face an uphill battle” when contesting government regulations that affect the use of their property.<sup>111</sup>

Despite the lack of a categorical rule, courts have recognized that property owners are still entitled to compensation when a regulation

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beneficial use of land”).

106. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 322 n.17 (2002) (observing that a regulatory takings challenge “contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation”); Elizabeth Wolstein, *Do State Shut-Down Orders Effect a Taking for Which the State Must Pay Just Compensation?*, N.Y. L. J. (Apr. 22, 2020, 10:00 AM), <https://www.law.com/newyorklawjournal/2020/04/22/do-state-shut-down-orders-effect-a-taking-for-which-the-state-must-pay-just-compensation/> [https://perma.cc/69XC-PJKY].

107. *Tahoe-Sierra*, 535 U.S. at 321.

108. *Id.* at 332 (first quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); then quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001)).

109. *Id.* at 324–25 (quoting *Penn Cent.*, 438 U.S. at 124). Courts have accepted extensive policy arguments against finding that all regulatory prohibitions on land use constitute a compensable taking, primarily acknowledging the effect such a rule would have on the efficiency and effectiveness of the operation of local governments. *Id.* at 335 (“A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision[-]making.”).

110. *Id.* at 342.

111. *Id.* at 320 (quoting *Keystone Bituminous Coal Ass’n. v. DeBenedictis*, 480 U.S. 470, 495 (1987)).

results in a “total taking” of the property.<sup>112</sup> In *Lucas*, the Court established that a total taking occurs when a regulation imposes a permanent prohibition of the intended use of a property, thus depriving the owner of “all economically beneficial” value of the property.<sup>113</sup> Subsequent cases have clarified, however, that *Lucas* stands to apply only in the “‘extraordinary’ case in which a regulation *permanently* deprives property of *all* value.”<sup>114</sup> The Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* declined to extend *Lucas* to cover temporary prohibitions on particular uses of land.<sup>115</sup> In *Tahoe-Sierra*, members of a nonprofit development group and individual owners of vacant lots located in the Lake Tahoe basin challenged a thirty-two-month moratorium and an eight-month moratorium on development of property located within a portion of the basin.<sup>116</sup> The Court distinguished *Lucas* because the moratoria only temporarily deprived the property owners of the originally intended economic use of the land, rather than permanently prohibiting development in the area.<sup>117</sup> As a result, the Court held that when a regulation falls short of the extraordinary line drawn in *Lucas*—when the regulation causes only a temporary deprivation of the economically beneficial use of the property—the Court must embark on a more fact-specific inquiry to determine whether a compensable taking has occurred.<sup>118</sup>

Under this more fact-intensive inquiry, courts typically consider factors such as the cumulative economic impact of the regulation and “the extent to which the regulation has interfered with distinct investment-backed expectations.”<sup>119</sup> Because the analysis requires a “careful examination and weighing of all the relevant circumstances,” however, courts must also consider how the

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112. *Id.* at 331.

113. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

114. *Tahoe-Sierra*, 535 U.S. at 322 (emphasis added).

115. *Id.* at 342.

116. *Id.* at 306–12. The record established that the individual lot owners purchased the land prior to the imposition of the moratoria and did so with the intent to construct residences on the property. *Id.* at 312–13.

117. *Id.* at 330–31.

118. *Id.* at 335.

119. *Id.* at 321–22; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

challenged regulations promote fairness and justice.<sup>120</sup> Additionally, courts provide substantial deference to states imposing confiscatory restrictions when such regulations serve a substantial public service, such as the promotion of the health, safety, and general welfare of the community.<sup>121</sup> For example, courts typically afford states leeway in regulating land use under its “complementary power to abate nuisances that affect the public generally, or otherwise.”<sup>122</sup> This vague “otherwise” includes “litigation absolving the State (or private parties) of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.”<sup>123</sup> As an illustration, the Court in *Miller v. Schoene* held that the State of Virginia was not required to compensate tree owners when the State destroyed privately-owned red cedar trees to stop the spread of a cedar rust infection to apple orchards because the Virginia legislature provided statutory authority for the State to do so.<sup>124</sup> The Court reasoned that “where the public interest is involved[,] preferment of that interest over the property interest of the individual—to the extent even of its destruction—is one of the distinguishing characteristics of every exercise of the police power which affects property.”<sup>125</sup> Specifically, the Court determined that the “only practicable method of controlling the disease and protecting apple trees from its ravages” was the destruction of the red cedar trees.<sup>126</sup>

Because Governor Kemp’s Executive Orders forced only temporary business closures, the Orders did not leave the property owners with a “total loss” of the economically beneficial use of the

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120. *Tahoe-Sierra*, 535 U.S. at 342 (quoting *Palazzolo v. Rhode Island*, 33 U.S. 606, 636 (2001) (O’Connor, J., concurring)) (“We conclude . . . that the interest in ‘fairness and justice’ will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.”). Such policy concerns include whether the regulations affect the government’s ability to operate efficiently, whether the regulations promote effective planning to protect the interests of the affected parties, and whether the regulations result in individualized harm. *Id.* at 337–42; *Penn Cent.*, 438 U.S. at 125 (citing *Miller v. Schoene*, 276 U.S. 272, 279 (1928)).

121. *Penn Cent.*, 438 U.S. at 125, 127.

122. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

123. *Id.* at 1029, n.16 (quoting *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880)).

124. *Miller*, 276 U.S. at 277 (“The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust.”).

125. *Id.* at 280.

126. *Id.* at 279.

property and are therefore likely constitutional.<sup>127</sup> Unlike the permanent physical installation on the building in *Loretto* or the complete disallowance of all future land development in *Lucas*, COVID-19-forced business closures were intended to be temporary—only lasting long enough to curb the spread of COVID-19.<sup>128</sup> The temporary nature of the business closures was akin to the moratoria imposed in *Tahoe-Sierra*, though lasting for only a fraction of the time.<sup>129</sup> The Executive Orders only forced Georgia businesses to close their doors for six weeks before reopening again, as opposed to the thirty-two-month moratoria imposed in *Tahoe-Sierra* that still fell short of constituting a compensable permanent deprivation of all economic benefit.<sup>130</sup> Though the temporary closures undoubtedly deprived the business owners of their intended use for the property, the deprivation of economic benefit for six weeks fell far short of constituting a threat of “permanent ‘obliteration’ of the value” of the property at issue.<sup>131</sup>

Additionally, Governor Kemp’s Orders fell within the State’s power to protect the public. Like in *Miller*, Governor Kemp was faced with a decision to either sit idly as COVID-19 continued to spread rapidly throughout the state or impose certain executive restrictions favoring the public interest over competing private business interests, like interests of the cedar tree owners in *Miller*.<sup>132</sup> Just as the spread of a cedar rust infection amongst cedar and apple trees justified a government’s order to destroy privately-owned trees,

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127. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 330, 332 (2002).

128. Ga. Exec. Order No. 04.02.20.01, *supra* note 16, at 2–3; see also *Lucas*, 505 U.S. at 1006–07; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982). The statutory prohibition on development in *Lucas* was ultimately amended during the litigation to authorize certain exceptions to the development restrictions. *Lucas*, 505 U.S. at 1012. However, the Court declined to consider the State’s argument that the deprivation deserved to be analyzed as only a temporary taking because the statute, at the time of the challenge, was “unconditional and permanent.” *Id.*

129. *Tahoe-Sierra*, 535 U.S. at 332; Ga. Exec. Order No. 04.02.20.01, *supra* note 16; see also Ga. Exec. Order No. 03.16.20.01, *supra* note 9; Ga. Exec. Order No. 04.23.20.02, *supra* note 26.

130. *Tahoe-Sierra*, 535 U.S. at 332; Ga. Exec. Order No. 03.16.20.01, *supra* note 9; Ga. Exec. Order No. 03.23.20.01, *supra* note 11; Ga. Exec. Order No. 04.02.20.01, *supra* note 16; Ga. Exec. Order No. 04.23.20.02, *supra* note 26; see also *Mall*, *supra* note 26.

131. *Tahoe-Sierra*, 535 U.S. at 330 (citing *Lucas*, 505 U.S. at 1019–20); see also Ga. Exec. Order No. 03.16.20.01, *supra* note 9; Ga. Exec. Order No. 03.23.20.01, *supra* note 11; Ga. Exec. Order No. 04.02.20.01, *supra* note 16; Ga. Exec. Order No. 04.23.20.02, *supra* note 26.

132. *Miller v. Schoene*, 276 U.S. 272, 279 (1928).

the spread of a deadly pandemic justified Governor Kemp's ordered business closures.<sup>133</sup> As courts have recognized, prohibitions of particular uses of land may be justified where the government reasonably concludes that such prohibitions or restrictions promote the health, safety, or general welfare of the community.<sup>134</sup> Here, the Executive Orders even explicitly state that such business closures were imposed to mitigate the spread of COVID-19.<sup>135</sup> Moreover, the Orders reflect an attempt of the Georgia government to impose swift, uniform regulations that avoided the risk of individualized harm, analogous to the risk to the individual that the Court weighed in favor of the state regulation in *Tahoe-Sierra*.<sup>136</sup> Because the COVID-19 pandemic presented health concerns across the entire State of Georgia, it was necessary for Governor Kemp to mandate uniform, temporary restrictions to help quell the spread of the deadly virus.<sup>137</sup> Therefore, courts would likely show deference to the temporary forced business closures under Takings Clause jurisprudence because the closures were ordered to combat the spread of COVID-19.<sup>138</sup>

Due to the fact-specific nature of the inquiry into whether a temporary land-use regulation constitutes a compensable taking, some courts could find specific circumstances more persuasive than

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133. *Id.*; see also Ilya Somin, *Does The Takings Clause Require Compensation for Coronavirus Shutdowns?*, REASON: VOLOKH CONSPIRACY (Mar. 20, 2020, 10:20 PM), <https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/> [<https://perma.cc/WSW2-NL4P>]. Professor Ilya Somin referenced *Miller* when he stated why he thought forced business closure lawsuits would not succeed: "Protecting large numbers of people from the spread of a disease is, of course, a much stronger police power imperative than protecting apple trees." *Id.*

134. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 103, 125 (1978).

135. See, e.g., Ga. Exec. Order No. 04.02.20.01, *supra* note 16, at 1.

136. *Tahoe-Sierra*, 535 U.S. at 341 ("Moreover, with a temporary ban on development[,] there is a lesser risk that individual landowners will be 'singled out' to bear a special burden that should be shared by the public as a whole.").

137. *Id.* at 340 ("Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel."). Courts have recognized that, in the situation where large areas are faced with similar threats, temporary land-use restrictions deserve a degree of deference because they allow the government time to perform added due diligence to ensure appropriate long-term measures are taken rather than rushing to make an uninformed decision. *Id.* at 340–41 (recognizing that forcing decisionmakers to make hasty decisions absent deliberations with interested parties "would only serve to [further] disadvantage those landowners and interest groups" challenging the temporary restrictions).

138. Chemerinsky, *supra* note 49.

other courts.<sup>139</sup> While business owners continued to challenge similar regulations across the country, scholars remained pessimistic of the ultimate likelihood of success of such challenges.<sup>140</sup> Because of the latitude afforded to state officials in times of emergency, courts were most likely to find that such temporary restrictions did not constitute a total deprivation of all economically beneficial use of property and that such mandates were, moreover, necessary to promote the health and safety of the community.<sup>141</sup>

### *Conclusion*

Due to the state of uncertainty surrounding COVID-19 and the large scope of power afforded to federal, state, and local governments during a public health emergency, challenges to the constitutionality of Governor Brian Kemp's (R) Executive Orders were likely to fail. Legal challenges to the forced business closures could include that the forced closures exceeded the scope of the State's police power, violated business owners' due process rights, or constituted impermissible takings requiring the payment of just compensation. Even though these forced business closures caused devastating effects for business owners across the state of Georgia, preventing the spread of COVID-19 likely qualified as a reasonable—and constitutional—justification for this economic harm.

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139. *Tahoe-Sierra*, 535 U.S. at 335.

140. *See, e.g., Frank, supra* note 94.

141. *See Tahoe-Sierra*, 535 U.S. at 342; *Miller v. Schoene*, 276 U.S. 272, 279 (1928).

