

Massachusetts Supreme Judicial Court Upholds COVID-19 Executive Orders

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The Massachusetts Supreme Judicial Court on December 10, 2020 rejected a broad challenge to Governor Baker's authority to issue emergency orders intended to combat the ongoing COVID-19 pandemic. Rejecting both the plaintiffs' statutory and constitutional claims, the SJC's opinion in *Desrosiers v. The Governor* endorses the Governor's continued authority to act without additional legislative authorization.

The plaintiffs – a coalition of business owners operating hair and tanning salons, a gym, restaurants, two houses of worship, a religious academy, a family entertainment center, and a conference center – argued that the string of executive orders issued by Governor Baker since the March 10, 2020 declaration of emergency (1) overstepped the Governor's authority under the Civil Defense Act and Public Health Act; (2) represented a violation of the separation of executive and legislative powers; and (3) violated the plaintiffs' constitutional rights to due process and free assembly.

Though the SJC indicated that it might take a less deferential approach in the future should the public health emergency begin to abate, for the moment, it is clear that the SJC does not intend to interfere with the Governor's handling of the COVID-19 pandemic.

The Civil Defense Act and the Public Health Act

The SJC endorsed a broad view of the authority granted by the Civil Defense Act to combat emergencies of all types. Specifically, the Act permits the Governor to exercise executive authority to deal with emergencies caused by "natural causes," which would apply to a pandemic-scale viral infection that is ultimately of natural origin. The SJC further held that the Act "contemplates the need to prepare for and respond to a serious disaster requiring swift, top-down, coordinated relief efforts," consistent with the Governor's broad-based approach. The Court rejected the plaintiffs' claim that the Public Health Act, which vests authority primarily in local boards of health, was the sole legislative tool for combatting pandemics. Instead, the Court held that the two acts are complementary: the Civil Defense Act gives the Governor the authority to deal with major, statewide public health emergencies, while the Public Health Act gives boards of health the authority to assist those efforts on a local level.

The SJC did temper its analysis with what it called a "looking forward" discussion of the Governor's authority, noting that that its holding did not imply that "when the public health data regarding COVID-19 demonstrates stable improvement, the threshold will not be crossed where it no longer constitutes an emergency under the [Civil Defense Act]," nor that "all public health emergencies" in the future would necessarily fall within that authority. However, for present purposes, the SJC did not suggest any immediate limiting of the Governor's latitude to act, emphasizing that "[t]he distinguishing characteristic of the COVID-19 pandemic is that it has created a situation that cannot be addressed solely at the local level," and that combatting the virus "require[s] the coordination and resources available under the [Civil Defense Act]." Nonetheless, the Court's caveats may presage future challenges by business owners to the Governor's emergency orders when COVID-19 vaccines are more widely available and infection rates begin to demonstrate continued improvement.

Constitutional Separation of Powers

The SJC rejected the plaintiffs' argument that the Governor's actions violated the constitutional "separation of powers" between the executive and legislative branches. The SJC noted that the Civil Defense Act is itself a legislative action that delegates broad authority to the Governor, and that the Legislature has both passed legislation supporting various aspects of the Governor's COVID-19 response and declined to attempt to block the Governor's orders (as the Civil Defense Act permits the Legislature to do). Together, these facts led the SJC to conclude that the Governor's actions did not violate the Massachusetts Constitution.

With respect to whether the Governor's actions violated the plaintiffs' constitutional rights to due process and assembly, the SJC was guided by the concurrence of United States Supreme Court Chief Justice Roberts in the recent case [South Bay United Pentecostal Church v. Newsom](#), 140 S. Ct. 1613 (2020). In *South Bay*, several places of worship challenged a California emergency order limiting the size of public gatherings. Chief Justice Roberts emphasized that, when acting in the face of medical and scientific uncertainty to counteract a public health threat, courts should not second guess public health experts. The SJC likewise declined "to second guess the emergency orders" challenged by the plaintiffs here.

The SJC held that the emergency orders were broad rules of general applicability, and thus the plaintiffs were not constitutionally entitled to an individualized examination of how the rules impacted them in particular. The SJC further held that operating a business, having a child attend school, and assembling for religious reasons – though undoubtedly important to the plaintiffs – were not among the "fundamental rights" of persons to which "strict scrutiny" (an exacting and typically dispositive standard of constitutional review) should be applied. Rather, the SJC applied the lower "rational basis" standard and found that the emergency orders were permissible.

In rejecting the plaintiffs' arguments regarding unconstitutional impositions on their freedom of assembly, the SJC noted that states may impose reasonable restrictions on the time, place, and manner of assembly, provided they are narrowly tailored to serve a significant governmental interest, and that they preserve alternative means for open communications to take place. The SJC held that orders closing places of public gatherings "are based on the public health data regarding the risks of COVID-19 spreading in certain types of environments," and were not more strict than necessary to serve the need to combat the spread of the virus. Similarly, the SJC held that "alternative ways to assemble" were available, including "virtual assembly" through Zoom and similar services.

A Note on Religious Institutions

With respect to religious institutions in particular, the SJC acknowledged the United States Supreme Court's recent and contentious holding in [Roman Catholic Diocese v. Cuomo](#), Docket No. 20A87 (Nov. 25, 2020) that invalidated several New York emergency orders that affected churches and other places of worship. The SJC stated in a footnote that it had "reviewed [Governor Baker's] orders relating to houses of worship in light" of *Cuomo*, and "concluded that the Governor's orders do not suffer from the same features criticized by the Court in that case."

As many commentators on the Supreme Court's decision have noted, several justices – most notably Justice Neil Gorsuch – took the opportunity in *Cuomo* to write separately and criticize restrictions on gatherings in places of worship in sharp terms. Justice Gorsuch – though he particularly took issue with the fact that the New York restrictions did not take into account the size of the religious venue – also criticized Governor Cuomo for designating as essential "laundry and liquor, travel and tools" while not so designating churches and synagogues. Justice Gorsuch further took aim at restrictions in other states, in which he argued that governors, with a "flick of a pen" had systematically "privilege[d] restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples."

The SJC seemed to reject this line of thinking in holding that, in designating essential and non-essential businesses, the Governor was not "pick[ing] winners and losers". The SJC instead saw the Governor's designations as the result of "difficult decisions about which types of businesses are 'essential' to provide people with the services needed to live and which types of businesses are more conducive to spreading COVID-19." But the clear parting of ways between the SJC's view and that of Justice Gorsuch raises the question of whether the plaintiffs may head to the United States Supreme Court in search of a more sympathetic ear on this specific point.

Conclusion

The SJC's opinion is a strong endorsement of the Governor's authority to act. Though not surprising, given the severity of the pandemic in Massachusetts and general public support for continued restrictions to combat it, the opinion suggests that the SJC will continue to view the Governor's authority as broad until COVID-19 vaccines significantly curtail the threat of the virus.

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