

COMMONWEALTH OF MASSACHUSETTS
SJC-12983

Supreme Judicial Court

DAWN DESROSIERS, and DAWN DESROSIERS D/B/A HAIR 4 YOU,
and SUSAN KUPELIAN, and NAZARETH KUPELIAN, and
NAZ KUPELIAN SALON, and CARLA AGRIPPINO-GOMES, and
TERRAMIA, INC., and ANTICO FORNO, INC., and JAMES P. MONTORO,
and PIONEER VALLEY BAPTIST CHURCH INCORPORATED, and
KELLIE FALLON, and BARE BOTTOM TANNING SALON, and
THOMAS E. FALLON, and THOMAS E. FALLON D/B/A UNION STREET
BOXING, and ROBERT WALKER, and APEX ENTERTAINMENT LLC, and
DEVENS COMMON CONFERENCE CENTER LLC, and LUIS MORALES, and
VIDA REAL EVANGELICAL CENTER, and BEN HASKELL, and TRINITY
CHRISTIAN ACADEMY OF CAPE COD, *Plaintiff-Petitioners*,

v.

CHARLES D. BAKER, JR., in his official capacity as the Governor of the
Commonwealth of Massachusetts, *Defendant-Respondent*.

ON RESERVATION AND REPORT FROM THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

**BRIEF OF AMICUS CURIAE
MASSACHUSETTS STATE REPRESENTATIVE SHAWN C. DOOLEY
IN SUPPORT OF PLAINTIFF-PETITIONERS**

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Massachusetts State Representative Shawn C. Dooley respectfully submits this brief pursuant to the accompanying Motion for Leave to File an Amicus Brief under Massachusetts Rule of Appellate Procedure 17.

STATEMENT OF IDENTITY AND INTEREST

Massachusetts State Representative Shawn C. Dooley presently serves as a member of the Massachusetts House of Representatives representing the 9th Norfolk district, comprised of Medfield, Millis, Norfolk, Plainville, Walpole, and Wrentham, Massachusetts. Representative Dooley was first sworn into the Massachusetts House of Representatives by Governor Deval Patrick on January 29, 2014 after winning a Special Election. Representative Dooley has an interest in the present matter before the Court because the issues concern the boundaries of the separation of powers doctrine reflected in Article XXX of the Massachusetts Declaration of Rights and matters of federal or state constitutional law.

ISSUES PRESENTED FOR REVIEW

1. Whether the Massachusetts Civil Defense Act, St. 1950, c. 639, provides authority for Governor Charles Baker's declaration of a State of Emergency on March 10, 2020, and issuance of the emergency orders pursuant to the emergency declaration and, if so, whether such orders, or any of them, violate the separation of powers doctrine reflected in Article XXX of the Massachusetts Declaration of Rights.

2. Whether the emergency orders issued by Governor Charles Baker

pursuant to his declaration of a State of Emergency on March 10, 2020, violate Plaintiff-Petitioners' federal or state constitutional rights to procedural and substantive due process or free assembly as alleged by Plaintiff-Petitioners.

SUMMARY OF THE ARGUMENT

On March 10, 2020, Governor Charles Baker declared a state of emergency under the Massachusetts Civil Defense Act to mitigate the spread of the COVID-19 virus. The Massachusetts Civil Defense Act permits the Governor to issue civil defense emergency declarations in limited circumstances involving disasters caused by attacks, sabotage, riots, fires, floods, earthquakes or other natural causes, among other things. However, a health crisis, namely the prevention and suppression of an infectious disease, if and of itself, is not a disaster within the meaning of the Massachusetts Civil Defense Act. Therefore, Governor Baker lacks the authority to proclaim and maintain an ongoing emergency under the Massachusetts Civil Defense Act. Furthermore, because Governor Baker did not have the authority to issue his emergency orders, which were issued via an executive degree, as opposed to a legislative process, Governor Baker violated the separation of powers under the Massachusetts Declaration of Rights, Article XXX.

Additionally, the emergency COVID-19 orders issued by Governor Baker violate the constitutional rights of Massachusetts citizens like Plaintiff-Petitioners to due process and assembly. Governor Baker lacked legislative authority to so

burden due process interests in liberty and property and did not follow adequate constitutional procedure to give citizens such as Plaintiff-Petitioners the opportunity to be heard in the form of appeal or petition for waiver from Governor Baker's emergency COVID-19 orders.

ARGUMENT

Amicus Representative Dooley supports Plaintiff-Petitioners' request that for declaratory determinations regarding the scope of executive authority under Massachusetts law, and to promote the civil liberties granted by the Massachusetts and United States constitutions.

I. Governor Baker's Emergency Covid-19 Orders Are Not Supported By The Civil Defense Statute Or Separation Of Powers Doctrine.

On March 10, 2020, Governor Baker's March 10, 2020 issued a declaration of a Civil Defense State of Emergency "to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of the people of the Commonwealth[.]" *See* Exec. Order No. 591. The Massachusetts Civil Defense Act is designed for use in responding to emergencies in order to "protect the public peace, health, security and safety, and to preserve the lives and property of the people of the Commonwealth." Spec. L. c. S31, § 5 ("Massachusetts Civil Defense Act"). The Massachusetts Civil Defense Act identifies seven circumstances in which the Governor may declare a state of emergency: [1] if and when the Congress of the United States shall declare war, or

[2] if and when the President of the United States shall by proclamation or otherwise inform the Governor that the peace and security of the Commonwealth are endangered by belligerent acts of any enemy of the United States or of the Commonwealth or by the imminent threat thereof; or [3] upon the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action; or [4] from riot or other civil disturbance; or [5] from fire, flood, earthquake or other natural causes; or [6] whenever because of absence of rainfall or other cause a condition exists in all or any part of the Commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food; or [7] whenever the accidental release of radiation from a nuclear power plant endangers the health, safety, or property of people of the Commonwealth. Spec. L. c. S31, § 5.

The Massachusetts Civil Defense Act does not list the prevention or suppression of infectious disease among the various circumstances in which it applies.¹ The Governor may argue that the term “natural causes” encompasses a public health crisis such as that presented by COVID-19. That would be in error, as the legislature of the Commonwealth was clearly aware of the dangers on infectious disease and could have enumerated it as a basis had it so chose. Indeed,

¹ Although infectious diseases are not explicitly covered by the Massachusetts Civil Defense Act, it is not because risk of infectious disease was not understood or contemplated. Indeed, the General Court created the Public Health Act to protect the public from dangerous diseases. *See, e.g.*, G.L. c. 111, §§ 1, 6, 95 & 96.

the risk of infectious disease was fully understood in 1950 and years prior. But it is covered by the Public Health Act, which was enacted by the General Court nearly 50 years earlier to protect the public from dangerous diseases. *See, e.g.*, G.L. c. 111, §§ 1, 6, 95 & 96. The General Court did not enumerate infectious disease as a basis for a declaration of disaster, although it could have. Indeed, nowhere in its text or legislative history is it stated or implied that the Massachusetts Civil Defense Act, created nearly 50 years after the Public Health Act, was intended to supplement or supersede the Public Health Act in any way. Accordingly, the Massachusetts Civil Defense Act was not intended to cover declarations of emergency for the purposes of suppressing or preventing infectious disease—such actions are instead clearly covered under the Public Health Act. *See generally Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 457 Mass. 663, 673 (2010) (holding that prior statutes should not be found to be superseded “in the absence of express words to that effect or of clear implication”).

Thus, Governor Baker did not have the authority under the Civil Defense Act to proclaim a disaster or issue emergency COVID-19 orders thereunder.

Because Governor Baker did not have express authority under the Massachusetts Civil Defense Act to issue emergency COVID-19 orders, and such orders carry the force of law, in issuing the emergency COVID-19 orders, Governor Baker violated the separation of powers provided under the

Massachusetts Declaration of Rights, Article XXX. The Massachusetts Declaration of Rights establishes the separation of government powers. Decl. of Rights Art. XXX. It states that “the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them.” *Id.* The General Court is the legislative department of the Commonwealth. Mass. Const. 2d Pt., c. I, § I, Art. I. As such, the General Court has “full power and authority ... to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without.” Mass. Const. 2d Pt., c. I, § I, Art. IV. The Governor of Massachusetts is the state’s “supreme executive magistrate.” Mass. Const. 2d Pt., c. II, § I, Art. I. Thus, the Governor requires legislative authority in order to create or suspend laws. *See generally* Decl. of Rights Art. XXX. Because, as explained above, the Massachusetts Civil Defense Act does not include the suppression or prevention of infectious diseases as an enumerated “disaster,” Governor Baker lacked authority to declare a disaster under the Massachusetts Civil Defense Act and to issue the emergency COVID-19 orders. Thus, he violated the separation of powers described in the Massachusetts Declaration of Rights.

Further, even if he had adequate basis to declare the suppression or

prevention of an infectious disease a “disaster” under the Massachusetts Civil Defense Act, Governor Baker overstepped the bounds of the statute by prescribing criminal penalties for self-quarantine violations of his emergency orders. Sections 5 and 7 of the Massachusetts Civil Defense Act enumerate the powers of the Governor and does not include the right to impose selective quarantine upon citizens within the Commonwealth conferred upon the Governor.

II. Governor Baker’s Emergency Covid-19 Orders Are Not Supported By The Massachusetts Or United States Constitution.

The United States Constitution provides that states may not “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. Similarly, the Massachusetts Declaration of Rights provides that “[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.” Decl. of Rights Art. X. Governor Baker violated these rights in issuing the emergency COVID-19 orders without basis; as well as in an arbitrary and capricious manner.

Massachusetts citizens, like Plaintiff-Petitioners, have the “right of every person to follow any legitimate calling for the purpose of earning his own living, or for any other lawful purpose.” *See Commonwealth v. Beaulieu*, 213 Mass. 138, 141 (1912). They have “the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own

conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). They have the right to “a license to operate a business[, which] is a protected property interest under the due process clause if it cannot be taken away from its holder before a time certain and in the absence of misconduct.” *Yankee Atomic Electric Co. v. Sec. of Commonwealth*, 403 Mass. 203, 215 n.1 (1988) (Lynch, J., dissenting) (citation omitted). And they have “a right, in an orderly and peaceable manner, to assemble to consult upon the common good.” Decl. of Rights Art. XIX; *Bowe v. Secretary of Commonwealth*, 320 Mass. 230, 249-50 (1946). The haphazard and inconsistent emergency orders issued by the Governor infringe on these rights.

A denial of due process under the Massachusetts Declaration of Rights and the under U.S. Constitution is evaluated by the same standard of review. *Gillespie v. City of Northampton*, 460 Mass. 148, 153 n.12 (2011). This standard of review, commonly referred to as the “*Mathews v. Eldridge* test” requires that “the individual interest at stake must be balanced against the nature of the governmental interest and the risk of erroneous deprivation of liberty or property.” *Commonwealth v. Brown*, 426 Mass. 475, 482 (1998) (quoting *Aime v. Commonwealth*, 414 Mass. 667, 674 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))). Here, individual due process interests in earning a living,

maintaining liberty, and peaceably assembling outweigh the government’s interest in the emergency COVID-19 orders. Furthermore, the emergency COVID-19 orders issued by Governor Baker are not narrowly tailored because their objectives could have been reached by less restrictive means including, but not limited to, allowing uninfected or low-risk individuals to operate their businesses and peaceably assemble under the guidance of the applicable federal, state and local health authorities. *See generally Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 242 (2012) (“[N]arrow tailoring requires ‘serious, good faith consideration’ of ‘workable’ nondiscriminatory alternatives that will achieve the Legislature’s goals.” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003))).² The emergency COVID-19 orders were issued under the guise of an emergency, and thus not subject to legislative review or process. Yet they have the force of law—without a set duration or expiration. Indeed, the emergency COVID-19

² Although a “rational basis” test is typically applied in the evaluation of whether individual liberties have been infringed upon, such a test is insufficient in the present case because Governor Baker did not enact the emergency COVID-19 orders pursuant to lawful authority, as explained above. *See generally Zeller v. Cantu*, 395 Mass. 76, 85 (1985) (“In reviewing the constitutionality of statutes subject to a rational basis test, we adhere to principles of judicial restraint based upon our recognition of the inability and undesirability of the judiciary substituting its notion of correct policy for that of a popularly elected Legislature.” (internal quotation omitted)). Instead, strict scrutiny is appropriate here. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”).

orders issued by Governor Baker are subject to criminal penalties—which clearly gives them the force of law—all in the absence of legislative oversight or approval.

Finally, the “Massachusetts Constitution requires, at a minimum, that the exercise of the State’s regulatory authority not be arbitrary or capricious.” *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 329 (2003) (citations omitted). Here, Governor Baker’s emergency COVID-19 orders allow some businesses to be deemed “essential,” but disfavors the reopening of other types of businesses in an arbitrary and capricious manner. This violates due process. *In re Picquet*, 22 Mass. 65, 69-70 (1827) (holding that Article XX of the Massachusetts Declaration of Rights “gives no authority to dispense with the obligations of any particular law, in favor of individual citizens or strangers, leaving the law still in force in regard to all other members of the community”).

Finally, when the Governor’s emergency COVID-19 orders were issued, Massachusetts citizens, like Plaintiff-Petitioners, were not afforded procedural due process because they were not provided with the opportunity to petition for exception or waiver from the emergency orders based on individual circumstances—even though their organizations and enterprises are located all across the state—in far differing geographical and demographical situations. Although this approach was expedient, it does not comport with due process.

CONCLUSION

Based on the foregoing, Amicus Curiae Massachusetts State Representative Shawn C. Dooley respectfully supports Plaintiff-Petitioners' request for an Order declaring that the March 10, 2020 Civil Defense State of Emergency issued by Governor Charles Baker in response to the COVID-19 pandemic lacks statutory authority and is void, that all such emergency COVID-19 orders issued pursuant to the Civil Defense State of Emergency violate the separation of powers and are void; and that the emergency COVID-19 orders identified by Plaintiff-Petitioners violate Plaintiff-Petitioners' rights to due process and peaceable assembly.

Respectfully Submitted,
For *Amicus Curiae* Massachusetts State
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Dated: September 2, 2020

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DECLARATION PURSUANT TO MASS. R. APP. P. 17(C)(5)

I hereby declare that no party’s counsel authored the brief in whole or in part. No party or their counsel, and no person—other than amici curiae, their members, or their counsel—contributed money that was intended to fund the preparation or submission of the brief. No amici curiae or their counsel represents or has represented the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

/s/ John A. Sten

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CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with Massachusetts Rules of Appellate Procedure 17 and 20. I further hereby certify that, to the best of my knowledge, this brief complies with the length limit of Massachusetts Rules of Appellate Procedure 20(a)(3)(E) as follows:

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 2,764 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ John A. Sten

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court’s CM/ECF system upon all counsel of record in the above-captioned case.

/s/ John A. Sten

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