2020 WL 7318887
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Supreme Judicial Court of Massachusetts,
Worcester..

Dawn DESROSIERS [1] & others [2]
v.
The GOVERNOR.

SJC-12983
|
Argued September 11, 2020
|
Decided December 10, 2020

Synopsis

Background: Business owners brought action against Governor, seeking declaratory judgment and injunctive relief stemming from Governor's declaration of state of emergency and accompanying emergency orders closing certain businesses and imposing restrictions on gatherings, which were enacted in response to COVID-19 pandemic. Parties jointly petitioned for transfer of case, which was granted.

Holdings: The Supreme Judicial Court, Cypher, J., held that:

pandemic was an "other natural cause" that would support declaration of state of emergency, and issuance of emergency orders, pursuant to Civil Defense Act;

Public Health Act (PHA), providing for measures to protect state residents from dangerous diseases, did not preclude Governor from acting under the Civil Defense Act (CDA) to enact emergency orders in response to pandemic;

emergency orders did not violate separation of powers;

fact that some businesses and organizations were burdened more heavily than others by emergency orders did not render the orders a violation of owners' substantive due process rights; and

orders were content neutral, supporting finding that they did not unconstitutionally burden right to free assembly under First Amendment.

Ordered accordingly.

Procedural Posture(s): Petition for Discretionary Review; Motion for Declaratory Judgment; Motion for Preliminary Injunction.

Governor. Civil Defense. Public Health. Constitutional Law, Governor, Separation of powers, Right to assemble. Due Process of Law. Statute, Construction. Words, "Other natural causes."

CIVIL ACTION commenced in the Superior Court Department on June 1, 2020.

Following transfer to the Supreme Judicial Court for the county of Suffolk, pursuant to G. L. c. 211, § 4A, the case was reported by Lenk, J.

Attorneys and Law Firms

Michael P. DeGrandis, of the District of Columbia, for the plaintiffs.

Douglas S. Martland, Assistant Attorney General, for the Governor.

John A. Sten, Boston, for Representative Shawn C. Dooley, amicus curiae, submitted a brief.

Elissa Flynn-Poppey, Emily Kanstroom Musgrave, & Andrew Nathanson, Boston, for Massachusetts Health & Hospital Association & others, amici curiae, submitted a brief.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ. [3]

Opinion

CYPHER, J.

***1** On March 10, 2020, Governor Charles D. Baker, Jr., declared a state of emergency in the Commonwealth of Massachusetts in response to the pandemic arising from COVID-19, a respiratory illness caused by a novel coronavirus. See Governor's Declaration of Emergency, Executive Order No. 591. He did so under the Civil Defense Act (CDA), St. 1950, c. 639, and G. L. c. 17, § 2A. At the time of the emergency declaration, Massachusetts had about one hundred COVID-19 cases and was facing its first outbreak. Since the Governor declared the state of emergency, he has issued numerous COVID-19 emergency orders (emergency

orders). The emergency orders placed restrictions on daily activities, which, among other things, prohibited gatherings of more than ten people; suspended in-person instruction at schools; ordered restaurants and bars to suspend on-premises service; and required all businesses and other organizations not providing designated COVID-19 "essential services" [4] to close premises to workers, customers, and the public. As the public health data improved, the Governor announced a phased reopening plan, in which he classified business and organization types in different reopening phases. See Order Implementing a Phased Reopening of Workplaces and Imposing Workplace Safety Measures to Address COVID-19, COVID-19 Order No. 33 (May 18, 2020).

COVID-19 has taken a devastating toll on the Commonwealth, the United States, and the world. As of this writing, in Massachusetts alone, over 250,000 people have been infected and over 10,000 people have died. During the April 2020 surge in Massachusetts, the number of infections often exceeded 1,500 per day and there were more than one hundred deaths per day from COVID-19 for the majority of the month. In addition to the medical toll COVID-19 has inflicted, the personal toll resulting from the virus and containment measures has been immeasurable. Behind every infection and every death are those who could not visit loved ones in the hospital due to visitation restrictions, or who could not grieve the loss of loved ones with family and friends in the traditional manner. Family and friends had to isolate from one another, and visiting a loved one in another country became impossible, or nearly so. COVID-19 and the attendant containment measures have also resulted in high unemployment, economic hardship, and shuttered businesses.

In June 2020, the plaintiffs [5] filed a complaint in the Superior Court, seeking declaratory judgment and injunctive relief and challenging the Governor's declaration of a state of emergency and the emergency orders as unauthorized and unconstitutional. [6] The parties agreed to defer seeking preliminary injunctive relief from the Superior Court and jointly petitioned for transfer of the case from the Superior Court to a single justice of this court for reservation and report. The single justice granted the petition, and the case is now before us.

***2** We conclude that the CDA provides authority for the Governor's March 10, 2020, declaration of a state of emergency in response to the COVID-19 pandemic and for the issuance of the subsequent emergency orders; the emergency orders do not violate art. 30 of the Massachusetts Declaration of Rights; and the emergency orders do not violate the plaintiffs' Federal or State constitutional rights to procedural and substantive due process or free assembly. [7]

Background. 1. COVID-19. Patients with COVID-19 may be asymptomatic, may have a mild respiratory illness, or may develop severe complications leading to the need for hospitalization, and even death. The virus spreads primarily from person to person but can also spread through a person contacting a surface that has the virus on it and then touching his or her mouth, nose, or eyes. A person can be asymptomatic or presymptomatic and still spread the virus. Medical experts have identified ways in which the spread of the virus can be curtailed, which include wearing a cloth face mask, social distancing, [8] quarantining when infected or exposed to the virus, hand washing, and cleaning frequently touched surfaces. People with certain underlying medical conditions and older adults are at a higher risk of developing severe illness from COVID-19. At this time, there is no cure and effective vaccines have not yet been distributed.

COVID-19 emerged at around the start of 2020 in China, and within months it spread around the world. On January 11, 2020, the first known death caused by COVID-19 was reported in China. Later in January, a man in the State of Washington became the first confirmed case in the United States. On January 30, the World Health Organization (WHO) declared "a public health emergency of international concern," and in response to the growing outbreak, the President's administration implemented restrictions on travel from China. [9]

On February 29, 2020, the United States reported that an individual in Washington became the country's first death from COVID-19. [10] On March 11, WHO declared the coronavirus outbreak a pandemic, and on March 13, the President declared a national emergency.

2. The Governor's declaration of a state of emergency. On March 10, 2020, the Governor declared a state of emergency, "to protect the health and welfare of the people of the Commonwealth" and to "facilitate and expedite the use of Commonwealth resources and deployment of federal and interstate resources to protect persons from the impacts of the spread of COVID-19." See Executive Order No. 591. He declared the state of emergency pursuant to the powers provided in the CDA [11] and in G. L. c. 17, § 2A. [12] Id. The state of emergency was effective immediately and remained

in effect "until notice is given, pursuant to [the Governor's] judgment, that the state of emergency no longer exists." Id.

***3** 3. The emergency orders. From early March to May 2020, the number of COVID-19 infections and deaths from COVID-19 in the Commonwealth increased at a grim rate. The Commonwealth faced outbreaks at long-term care facilities, fear that a surge would overwhelm hospitals, and uncertainty about the future.[13] Against that backdrop, the Governor issued numerous emergency orders, aimed first at efforts to "flatten the curve," i.e., to reduce the number of cases at a given time. Through the emergency orders, the Governor, among other things, banned large gatherings;[14] suspended all in-person instruction at public and private elementary and secondary schools in the Commonwealth;[15] banned on-premises consumption of food or drink at restaurants and bars; suspended all child care operations but established emergency child care for certain children; designated specified service and production sectors as "COVID-19 Essential Services," which were "urged to continue operations during the state of emergency," and ordered businesses that did not provide essential services to close their physical workspaces and facilities;[16] mandated wearing a face covering when social distancing was not possible; and mandated a fourteen-day quarantine for travelers arriving in Massachusetts, unless traveling from a specified State, providing a negative COVID-19 test, or otherwise falling within one of the exceptions. Certain orders contained language about the penalties for violations. For example, violation of Order No. 13, which limited gatherings to no more than ten people and established COVID-19 essential services, would result in criminal penalty under § 8 of the CDA or a civil fine of up to $300 per violation. Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More Than 10 People, COVID-19 Order No. 13 (Mar. 23, 2020) (Order No. 13).

As the public health data improved, the Governor began transitioning the emergency orders to "reopening" the Commonwealth. On May 18, 2020, the Governor implemented a phased reopening plan. Order Implementing a Phased Reopening of Workplaces and Imposing Workplace Safety Measures to Address COVID-19, COVID-19 Order No. 33. The plan established phases in which categorized businesses and organizations could reopen, subject to workplace safety rules set forth in the plan. Id. Phase one included businesses that could open first, including construction, places of worship,[17] and firearms retailers and shooting ranges; and businesses that could open second, including hair salons and barber shops, general use offices, and pet groomers. On June 1, the Governor announced the businesses in phases two, three, and four, which could reopen when the Governor authorized it in subsequent orders. Order Clarifying the Progression of the Commonwealth's Phased Workplace Reopening Plan and Authorizing Certain Re-opening Preparations at Phase II Workplaces, COVID-19 Order. No. 35. Phase two included retail stores, restaurants, golf facilities, and day camps. Phase three businesses included casino gaming floors, fitness centers and health clubs, museums, and aquariums. Phase four included amusement parks, street festivals and parades, and large capacity venues used for entertainment, group or spectator sports, business, and cultural events.[18] On June 6, the Governor issued an order that phase two businesses could reopen in two steps, the first taking place immediately and including services such as outdoor table service at restaurants, and the second taking place subject to a subsequent order and including services such as indoor dining. See Order Authorizing the Reopening of Phase II Enterprises, COVID-19 Order No. 37. On July 2, the Governor issued an order that phase three businesses and organizations could reopen, again in a two-step process. See Order Authorizing the Re-opening of Phase III Enterprises, COVID-19 Order No. 43. Phase four businesses will not be allowed to open until a COVID-19 vaccine or treatments are developed.

***4** 4. Reservation and report. After the plaintiffs filed their amended complaint in the Superior Court, the parties jointly petitioned for transfer to a single justice of this court for reservation and report. The single justice ordered the case transferred and reserved and reported the matter to the full court. The reported questions are as follows:

> "(1) Whether the [CDA], St. 1950, c. 639, provides authority for Governor 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 [art.] 30 of the Massachusetts Declaration of Rights; and
>
> "(2) Whether the emergency orders issued by Governor Baker pursuant to his declaration of a state of emergency on March 10, 2020, violate plaintiffs' federal or state

constitutional rights to procedural and substantive due process or free assembly as alleged by plaintiffs."

Discussion. 1. The Governor's authority under the CDA. The plaintiffs argue that the Governor's emergency declaration and emergency orders under the CDA are unenforceable, ultra vires actions because the CDA vests the Governor with specified emergency powers only in the event of "immediate and specific cataclysmic events of limited duration," which they argue the COVID-19 pandemic is not. The plaintiffs further argue that the Legislature intended the Public Health Act (PHA), codified, as amended, in G. L. c. 111, and not the CDA, to be used to protect Massachusetts residents from "disease dangerous to the public health," such as COVID-19. The Governor counters that the plain language of the CDA gives him broad authority in the context of the COVID-19 pandemic, the PHA does not preclude the Governor from acting under the CDA, and the current Legislature repeatedly has ratified his reading of the CDA and his application of the CDA to the COVID-19 pandemic. We conclude that the CDA provides authority for the Governor's declaration of a state of emergency in response to the COVID-19 pandemic and the issuance of the emergency orders.

In interpreting a statute, we follow the plain language "when it is unambiguous and when its application 'would not lead to an "absurd result," or contravene the Legislature's clear intent.' " Commonwealth v. Kelly, 470 Mass. 682, 689, 25 N.E.3d 288 (2015), quoting Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 82, 706 N.E.2d 625 (1999). "The words of a statute are the main source from which we ascertain legislative purpose ...." Kelly, supra at 688, 25 N.E.3d 288, quoting Foss v. Commonwealth, 437 Mass. 584, 586, 773 N.E.2d 958 (2002). "More specifically, courts construe a statute in accord with the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated" (quotation and citation omitted). Kelly, supra at 688-689, 25 N.E.3d 288.

a. The CDA. The CDA, entitled "An Act to provide for the safety of the commonwealth during the existence of an emergency resulting from disaster or from hostile action," provides the Governor with expansive discretionary powers in the face of a declared state of emergency, namely, "all authority over persons and property, necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces thereof." St. 1950, c. 639, § 7. The Legislature enacted St. 1950, c. 639, as a temporary measure. See St. 1950, c. 639, § 22 (providing CDA would run only to July 1, 1952); Director of the Civ. Defense Agency & Office of Emergency Preparedness v. Civil Serv. Comm'n, 373 Mass. 401, 404, 367 N.E.2d 1168 (1977). The sunset clause was later extended and eventually removed. See St. 1952, c. 269; St. 1953, c. 491.

***5** Section 5 of the CDA, on which the plaintiffs focus their statutory interpretation argument, and under which the Governor, in part, declared the state of emergency, provides, in relevant part:

> "Because of the existing possibility of the occurrence of disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, in order to insure that the preparations of the commonwealth will be adequate to deal with such disasters, and generally to provide for the common defense and to protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth, if and when the congress of the United States shall declare war, or 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 upon the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action; or from riot or other civil disturbance; or from fire, flood, earthquake or other natural causes; or 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 whenever the accidental release of radiation from a nuclear power plant endangers the health, safety, or property of people of the commonwealth, the governor may issue a proclamation or proclamations setting forth a state of emergency."

St. 1950, c. 639, § 5, as amended through St. 1979, c. 796, § 26. The CDA further specifies that "[t]he governor ... shall be responsible for carrying out the provisions of this act," St. 1950, c. 639, § 4, and that the Governor may exercise any of the authority conferred on him by any provision of the CDA

in a declaration of emergency under § 5, including through executive orders issued thereafter, St. 1950, c. 639, § 8.

The plaintiffs contend that we must apply the statutory interpretation canon of ejusdem generis [19] because § 5 of the CDA contains general terms preceded by specific, limiting terms. However, where, as here, the language of a statute "is unambiguous and when its application 'would not lead to an "absurd result," or contravene the Legislature's clear intent,' " we follow the plain language. Kelly, 470 Mass. at 689, 25 N.E.3d 288, quoting Cargill, Inc., 429 Mass. at 82, 706 N.E.2d 625. See Gooch v. United States, 297 U.S. 124, 128, 56 S.Ct. 395, 80 L.Ed. 522 (1936) ("The rule of ejusdem generis ... is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.... [I]t may not be used to defeat the obvious purpose of legislation").

***6** Because the CDA does not specify that the Governor's power to declare a state of emergency extends to the COVID-19 pandemic specifically or to a health crisis generally, the Governor's power turns on whether the phrase "other natural causes" in § 5 encompasses a health crisis such as the COVID-19 pandemic. We note first that COVID-19 is naturally caused, as scientists believe it originated from an animal, likely a bat. When examining the phrase "other natural causes" in the context of § 5 and the statute as a whole, Kelly, 470 Mass. at 688-689, 25 N.E.3d 288, it is apparent that the phrase encompasses a pandemic on the scale of the COVID-19 pandemic. Section 5 states the general purposes of the CDA as, in part, "to protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth." St. 1950, c. 639, § 5. Given that COVID-19 is a pandemic that has killed over a million people worldwide, it spreads from person to person, effective vaccines have not yet been distributed, there is no known cure, and a rise in cases threatens to overrun the Commonwealth's hospital system, it is a natural cause for which action is needed to "protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth." Id. Therefore, we conclude that the CDA, through the phrase "other natural causes," encompasses a health crisis on the level of the COVID-19 pandemic.

b. The PHA. The PHA covers an array of public health related issues in the Commonwealth. See, e.g., G. L. c. 111, §§ 4G (care for epileptics), 8C (fluoridation of water supplies), 72D (telephone access at long-term care facilities), 127A (adoption and enforcement of State sanitary code). Specific to the COVID-19 pandemic, the plaintiffs argue that certain sections of the PHA pertain to the control of the pandemic and preclude the Governor from acting under the CDA. [20] See, e.g., G. L. c. 111, § 6 ("The [Department of Public Health] shall have the power to define ... what diseases shall be deemed to be dangerous to the public health, and shall make such rules and regulations consistent with law for the control and prevention of such diseases as it deems advisable for the protection of the public health"). However, although it is evident that the PHA was designed to protect Massachusetts residents from, among other things, dangerous diseases, there is nothing to prevent the CDA from supplementing the PHA during times of actual public health emergencies, such as the COVID-19 pandemic.

The PHA and the CDA differ significantly in the scope of the emergency they seek to address. It is clear from the language of both acts that the Legislature could not have intended the PHA, and therefore primarily local boards of health, to be exclusively responsible for addressing a public health crisis such as COVID-19, a pandemic that has killed over one million people globally and over 10,000 people in Massachusetts. The CDA is broader in scope for emergencies of a larger magnitude than is encompassed by the PHA, which focuses largely on the actions required of local boards. See G. L. c. 111, §§ 104 ("If a disease dangerous to the public health exists in a town, the selectmen and board of health shall use all possible care to prevent the spread of the infection ..."), 106 ("The board of health of a town near to or bordering upon an adjoining state may in writing appoint suitable persons ... who may examine such travelers as the board suspects of bringing any infection dangerous to the public health, and, if necessary, restrain them from traveling until licensed thereto by the board of health of the town to which they may come"). In contrast, the CDA contemplates the need to prepare for and respond to a serious disaster requiring swift, top-down, coordinated relief efforts. See, e.g., St. 1950, c. 639, §§ 1 (defining "[c]ivil defense"), 5 (a) (upon proclamation of state of emergency, Governor "may employ every agency and all members of every department and division of the government of the commonwealth to protect the lives and property of its citizens and to enforce the law"), 7 (Governor "shall have and may exercise any and all authority over persons and property, necessary or expedient for meeting said state of emergency"). It therefore appears that with the emphasis on empowering local boards of health, the Legislature contemplated the PHA to address public health issues confined to particular locales within the Commonwealth. On the other hand, it appears that with the latitude given to the Governor to respond to

"other natural causes," the Legislature created the CDA to deal with Statewide public health crises beyond the scope of local authorities. In essence, the existence of the CDA and the PHA demonstrates a legislative intent not to limit the Governor's ability to manage a public health crisis like the COVID-19 pandemic, but to empower him to do so.

***7** Moreover, the CDA directs the Governor and executive officers to utilize, to the maximum extent practicable, the existing State and local departments, agencies, officers, and personnel in carrying out the provisions of the CDA. St. 1950, c. 639, § 16. See St. 1950, c. 639, § 20 (all members of governmental bodies must "fully ... co-operate with the governor and the director of civil defense in all matters affecting civil defense"). See also St. 1950, c. 639, § 13 (political subdivisions empowered "to enter into contracts and incur obligations necessary to combat such disaster, protecting the health and safety of persons and property, and providing emergency assistance to the victims of such disaster"). Therefore, although under a different framework from the PHA, local organizations and agencies are part of the over-all CDA scheme.

Accordingly, because the CDA encompasses a larger scale emergency requiring executive action coordinating State resources, the PHA is focused on local health boards, and neither the PHA nor the CDA contains language precluding the Governor from acting under the CDA when faced with a public health emergency, the PHA does not preclude the Governor from acting under the CDA in relation to the COVID-19 pandemic. [21]

c. Looking forward. Despite our emphasis on the serious nature of the COVID-19 pandemic, we are cognizant of the limits of the Governor's power under the CDA.

As is the case here, when the Governor acts pursuant to an express authorization of the Legislature, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that [the Legislature] can delegate." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) ("If his act is held unconstitutional under these circumstances, it usually means that the [State] Government as an undivided whole lacks power"). In Youngstown Sheet & Tube Co., the President ordered the Secretary of Commerce to take possession of and operate most of the steel mills in the country, and because he did not act pursuant to an act of Congress, the issue was whether the Constitution provided the President with the authority to issue the order. Id. at 582-583, 585-587, 72 S.Ct. 863. The United States Supreme Court held that the "Constitution [did] not subject this lawmaking power of Congress to presidential ... supervision or control." Id. at 588-589, 72 S.Ct. 863 ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times").

In Justice Jackson's concurrence, he detailed three levels of executive action: (1) when the executive acts pursuant to an express or implied legislative authorization, (2) when the executive acts where the Legislature has neither granted nor denied his authority, and (3) when the executive's actions are incompatible with the express or implied will of the Legislature. Id. at 635-637, 72 S.Ct. 863 (Jackson, J., concurring). Actions taken under the first level receive the strongest presumption of validity, whereas when the executive acts under the third level, his or her "power is at its lowest ebb" and "[c]ourts can sustain exclusive [executive] control in such a case only by disabling the [Legislature] from acting upon the subject." Id. at 635-638, 72 S.Ct. 863.

***8** In the present case, it is the language of the CDA, and therefore an express authorization from the Legislature, that enables the Governor to act. However, although we determine that the Governor is acting pursuant to an express grant of authority from the Legislature, we emphasize that not all matters that have an impact on the public health will qualify as "other natural causes" under the CDA, even though they may be naturally caused. The distinguishing characteristic of the COVID-19 pandemic is that it has created a situation that cannot be addressed solely at the local level. Only those public health crises that exceed the resources and capacities of local governments and boards of health, and therefore require the coordination and resources available under the CDA, are contemplated for coverage under the CDA. Therefore, although we hold that the COVID-19 pandemic falls within the CDA, we do not hold that all public health emergencies necessarily will fall within the CDA, nor do we hold 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 CDA.

2. Separation of powers under art. 30. The plaintiffs next argue that the Governor's emergency orders violate art. 30. They contend that the Governor "does not have the authority to suspend, dispense, or make law backed with civil and criminal

penalties through his COVID-19 Orders." The Governor counters that the emergency orders fall within the limits on executive authority set by the Massachusetts Constitution because the Governor is discharging his constitutional duty to execute the laws and because the orders are grounded in statutory authority delegated to the Governor. We conclude that because the Governor's actions were carried out pursuant to the authority granted to the Governor in the CDA, the emergency orders do not violate art. 30.

Article 30 provides:

> "In the government of this commonwealth, 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: to the end it may be a government of laws and not of men."

The General Court is the Commonwealth's legislative department, and the Governor is its "supreme executive magistrate." See Part II, c. 1, § 1, Art. 1, and Part II, c. II, § 1, Art. 1, of the Constitution of the Commonwealth. "We have recognized that art. 30 does not rigidly demand a total separation between the three branches of government but rather that there is a 'need for some flexibility in the allocation of functions among the three departments.' " Boston Gas Co. v. Department of Pub. Utils., 387 Mass. 531, 541, 441 N.E.2d 746 (1982), quoting Opinion of the Justices, 375 Mass. 795, 813, 376 N.E.2d 810 (1978). "The critical inquiry is whether the actions of one branch interfere with the functions of another." Boston Gas Co., supra, citing Opinion of the Justices, supra.

We first note that the Governor asserts that the Legislature has expressed its approval of his actions through its enactment of a wide range of legislation to address the COVID-19 pandemic subsequent to the emergency declaration. Assuming for the purposes of this discussion that the Legislature has approved the Governor's actions by not moving to curtail them, this does not absolve us of our responsibility to determine whether the emergency orders are within the bounds of art. 30. We can look to the Legislature's lack of exercise of the option under § 22 of the CDA to make any part of the CDA inoperative as an indication that it approves of the Governor's actions, but that inaction is not determinative of our decision. See St. 1950, c. 639, § 22. The validity of the Governor's actions is for the courts -- not the Legislature -- to decide.

We conclude that the emergency orders do not interfere with the functions of the Legislature. See Boston Gas Co., 387 Mass. at 541, 441 N.E.2d 746, citing Opinion of the Justices, 375 Mass. at 813, 376 N.E.2d 810. As we have determined supra that the CDA provides authority for the Governor's declaration of the state of emergency and for his issuance of the emergency orders, by issuing the emergency orders, the Governor is executing the laws. See Opinion of the Justices, 375 Mass. 827, 833, 376 N.E.2d 1217 (1978) ("constitutional prerogative, as well as duty, of the Governor to execute the laws"). In addition to the Legislature providing the Governor with the authority to act under the CDA, the Governor states in each emergency order the sections that authorize him to act during the effective period of a declared emergency. See, e.g., Order Extending the Temporary Closure of All Public and Private Elementary and Secondary Schools, COVID-19 Order No. 16 (Mar. 25, 2020) (identifying St. 1950, c. 639, §§ 7, 8, and 8A, as "authoriz[ing] the Governor, during the effective period of a declared emergency, to exercise any and all authority over persons and property necessary or expedient for meeting a state of emergency, including but not limited to authority over public assemblages in order to protect the health and safety of persons"). Because the Governor was acting under an express authorization of the Legislature, namely, the CDA, his authority was, therefore, at its maximum. See Youngstown Sheet & Tube Co., 343 U.S. at 635-637, 72 S.Ct. 863 (Jackson, J., concurring).

***9** Moreover, the emergency orders do not, as the plaintiffs argue, "deprive the Legislature of its full authority to pass laws." See Opinion of the Justices, 430 Mass. 1201, 1203, 717 N.E.2d 655 (1999). Since the Governor declared the state of emergency, the Legislature has enacted many pieces of legislation to address COVID-19. See, e.g., St. 2020, c. 118 (expanding take-out and delivery options); St. 2020, c. 71 (virtual notarization); St. 2020, c. 65 (eviction and foreclosure moratorium); St. 2020, c. 45 (municipal election postponement and increased voting options). The CDA also provides that the Legislature can make any part of the CDA "inoperative by the adoption of a joint resolution to that effect by the house and senate acting concurrently." See St. 1950, c. 639, § 22. Therefore, not only have the emergency orders not precluded the Legislature from exercising its full authority to pass laws, but the Legislature also has at its disposal a way to curb the Governor's powers under the CDA, should it

desire to do so, and it has not done so.[22] See Boston Gas Co., 387 Mass. at 541, 441 N.E.2d 746, citing Opinion of the Justices, 375 Mass. at 813, 376 N.E.2d 810 ("critical inquiry is whether the actions of one branch interfere with the functions of another").[23] For the foregoing reasons, we conclude that the emergency orders do not violate art. 30.[24]

***10** 3. Constitutional rights. The plaintiffs also argue that the emergency orders violate their Federal and State constitutional rights to due process and assembly. The Governor counters that the emergency orders do not violate the plaintiffs' Federal and State due process and assembly rights and that broad deference should be afforded to the emergency orders. We conclude that the emergency orders do not violate the plaintiffs' Federal or State due process or assembly rights.

As an initial matter, the Governor argues that under Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), during times of public health crises State action should be upheld unless it lacks a "real or substantial relation to the protection of the public health" or represents "a plain, palpable invasion of rights secured by the fundamental law." Id. at 31, 25 S.Ct. 358. In South Bay United Pentecostal Church v. Newsom, —— U.S. ——, 140 S. Ct. 1613, 207 L.Ed.2d 154 (2020) (South Bay), in which the applicants sought to enjoin the enforcement of the California Governor's order limiting attendance at places of worship, Chief Justice Roberts's concurrence relied, in part, on Jacobson, stating that "[the United States] Constitution principally entrusts '[t]he safety and health of the people' to the politically accountable officials of the States 'to guard and protect.' " Id. at 1613 (Roberts, C.J., concurring), quoting Jacobson, supra at 38, 25 S.Ct. 358. Chief Justice Roberts further elaborated that "[w]hen those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' " South Bay, supra, quoting Marshall v. United States, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected [State] judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." South Bay, supra at 1613-1614, quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Therefore, as long as the "broad limits" are not surpassed, we will look to see whether the emergency orders bear a "real or substantial relation to the protection of the public health," Jacobson, supra at 31, 25 S.Ct. 358, and will not second guess the emergency orders.[25]

***11** a. Due process. The plaintiffs argue that the emergency orders violated their rights to procedural and substantive due process under art. 10 of the Massachusetts Declaration of Rights and under the due process clause of the Fourteenth Amendment to the United States Constitution.

i. Procedural due process. The plaintiffs contend that their procedural due process rights were violated because the Governor failed to provide adequate process before burdening or denying their liberty and property interests. The Governor argues that the plaintiffs were not entitled to individual hearings because the emergency orders were in response to a public health crisis and because the emergency orders were not adjudications, but instead were rules of general and prospective application. We disagree with the plaintiffs' assertion because the emergency orders were general rules, not individual adjudications. See American Grain Prods. Processing Inst. v. Department of Pub. Health, 392 Mass. 309, 323 n.20, 467 N.E.2d 455 (1984) ("It is well settled that, where a proceeding is legislative or political rather than adjudicatory, a hearing is not essential to due process ..."). Adjudications involve "specifically identified persons" who are affected, whereas general rules involve legislative or policy decisions that have a prospective and general application. See Cambridge Elec. Light Co. v. Department of Pub. Utils., 363 Mass. 474, 486-487, 295 N.E.2d 876 (1973). The emergency orders were general rules because they are policy decisions that apply prospectively to entire categories of organizations. See id.; Hayeck v. Metropolitan Dist. Comm'n, 335 Mass. 372, 374-375, 140 N.E.2d 210 (1957). Therefore, because general rules do not require an individualized, adjudicatory hearing, see American Grain Prods. Processing Inst., supra, the absence of the additional procedures here did not violate the plaintiffs' rights to procedural due process.[26]

ii. Substantive due process. The plaintiffs contend that the emergency orders violate their substantive due process rights because the emergency orders interfere with their enjoyment of their liberty and property interests and because the

Governor unlawfully dispensed with the law by deciding arbitrarily which businesses were "essential," and that only some businesses could reopen. The Governor argues that the emergency orders do not violate the plaintiffs' substantive due process rights because in crafting the emergency orders, he consulted recommendations from public health officials and acted in accordance with public health recommendations, and because the plaintiffs do not have a constitutional right to conduct their business, religious, or educational activities free from government regulation. We determine that the Governor did not act arbitrarily and that the emergency orders did not violate the plaintiffs' substantive due process rights.

***12** When analyzing due process challenges under art. 10, we "adhere[ ] to the same standards followed in Federal due process analysis." Gillespie v. Northampton, 460 Mass. 148, 153 n.12, 950 N.E.2d 377 (2011), quoting Goodridge v. Department of Pub. Health, 440 Mass. 309, 353, 798 N.E.2d 941 (2003) (Spina, J., dissenting). When a fundamental right is burdened, we apply strict scrutiny, which requires that governmental restraints be "narrowly tailored to further a legitimate and compelling governmental interest" (citation omitted). Gillespie, supra at 153, 950 N.E.2d 377. We apply rational basis review where the statute does not "collide with a fundamental right." Id. As a matter of due process, under the rational basis test, governmental action is "constitutionally sound if it is reasonably related to the furtherance of a valid State interest." Id.

To the extent the plaintiffs argue that operating a business, teaching one's child, and assembling for religious reasons are burdened by the emergency orders, these arguments do not subject the emergency orders to strict scrutiny. The right to work is not a fundamental right that receives strict scrutiny, Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542, 320 N.E.2d 911 (1974); the orders do not ban teaching children, but rather limit gatherings in schools; and limitations on religious gatherings to mitigate COVID-19 risks are valid as long as the limitations are no more stringent than those imposed on similarly situated secular institutions, which they are in this case,[27] see Roman Catholic Diocese vs. Cuomo, —— U.S. ——, 141 S.Ct. 63, —— L.Ed.2d —— (2020); South Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

We further disagree with the plaintiffs that the Governor unlawfully has dispensed with the law, thereby rendering the emergency orders arbitrary and a violation of the plaintiffs' substantive due process rights. The plaintiffs note that the CDA allows for the "suspension of the operation of [law]" in certain circumstances, St. 1950, c. 639, § 7 (k), and they cite Picquet, appellant, 5 Pick. 65, 69-70, 22 Mass. 65 (1827), for the proposition that a suspension of the law affects all people equally. They argue, however, that instead of suspending the law, the Governor has dispensed with the law by closing and then reopening some, but not all, businesses. Dispensing with the law occurs when the Legislature, or one acting with authority from the Legislature, "suspend[s] any of the general laws, limiting the suspension to an individual person, and leaving the law still in force in regard to every one else." Id. See Commissioner of Pub. Health v. Bessie M. Burke Memorial Hosp., 366 Mass. 734, 741, 323 N.E.2d 309 (1975). That is not what the emergency orders have done. Although the emergency orders do place different businesses in different categories, this does not equate to dispensing with the law, as the emergency orders do not limit the suspension of the law to an individual person, or group, but instead apply equally to similarly situated categories of businesses. The Governor is not, as the plaintiffs argue, "donn[ing] the mantle and crown" to pick winners and losers; he is making 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, and basing his emergency orders on those determinations. Because the CDA grants the Governor the authority to issue the emergency orders, and because the emergency orders applied to broad categories of similarly situated businesses and organizations, we conclude that the emergency orders did not dispense with the law, were not arbitrary, and therefore did not violate the plaintiffs' substantive due process rights.

***13** Because we determine that the emergency orders do not burden the plaintiffs' fundamental rights, and we reject the plaintiffs' arguments that the emergency orders' status as executive-made law renders them subject to strict scrutiny and that they dispense with the law, we conclude that the emergency orders are subject to rational basis review. The emergency orders as a whole were informed by public health recommendations and serve the State interest of slowing the spread of COVID-19, which is a legitimate State interest. See Jacobson, 197 U.S. at 31, 25 S.Ct. 358; Gillespie, 460 Mass. at 153, 950 N.E.2d 377. Although some businesses and organizations bear a larger burden than others under the

emergency orders, this alone does not render arbitrary the restrictions imposed by the emergency orders.[28] Therefore, the emergency orders do not violate the plaintiffs' substantive due process rights.

b. Free assembly. The plaintiffs argue that the emergency orders unconstitutionally burden their right to free assembly under art. 19 of the Massachusetts Declaration of Rights and the First Amendment to the United States Constitution. We agree with the Governor that the emergency orders are valid time, place, and manner restrictions.

States may impose reasonable restrictions on the time, place, or manner of protected speech and assembly "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " Boston v. Back Bay Cultural Ass'n, Inc., 418 Mass. 175, 178-179, 635 N.E.2d 1175 (1994), quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The same test applies to restrictions analyzed under art. 19. Opinion of the Justices, 430 Mass. 1205, 1208-1209 & n.3, 723 N.E.2d 1 (2000). We agree with the Governor that reducing the dangers of COVID-19 is a significant government interest, and we therefore look to whether the emergency orders are content neutral and narrowly tailored and leave open alternative channels of communication.

We first determine that the emergency orders are content neutral. The "principal inquiry in determining content neutrality ... in time, place, or manner cases ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Back Bay Cultural Ass'n, Inc., 418 Mass. at 179, 635 N.E.2d 1175, quoting Ward, 491 U.S. at 791, 109 S.Ct. 2746. An order may regulate the secondary effects of speech and assembly, such as public health, without being held to regulate the expressive content of the speech or assembly at issue. See Showtime Entertainment, LLC v. Town of Mendon, 472 Mass. 102, 107, 32 N.E.3d 1259 (2015), quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Here, the purpose of the emergency orders is unrelated to regulating the expressive content of the regulated activities. The emergency orders, and the regulations they impose, are based on the public health data regarding the risks of COVID-19 spreading in certain types of environments and on which businesses are essential in the circumstances presented by the pandemic.[29] See, e.g., Order No. 13 (list of essential businesses and other organizations "based on federal guidance and amended to reflect the needs of Massachusetts'[s] unique economy").

***14** We next determine that the emergency orders are narrowly tailored. A time, place, or manner restriction must be tailored narrowly to achieve a substantial government interest, but "it need not be the least restrictive or the least intrusive means of doing so." Opinion of the Justices, 430 Mass. at 1211, 723 N.E.2d 1, quoting Ward, 491 U.S. at 799, 109 S.Ct. 2746. We will uphold a restriction "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." Showtime Entertainment, LLC, 472 Mass. at 109, 32 N.E.3d 1259, quoting Ward, supra at 800, 109 S.Ct. 2746. The restrictions at issue readily meet this standard, as reducing the number of people who can gather together and taking other measures aimed at reducing the rate of COVID-19, which spreads from person-to-person contact, are not "substantially broader than necessary to achieve the government's interest" of reducing the spread of COVID-19. See Showtime Entertainment, LLC, supra, quoting Ward, supra.

We also determine that the emergency orders leave open alternative channels of communication. The orders limit the number of people allowed at most gatherings, but do not ban all in-person assembly, and the plaintiffs have alternative ways to assemble, such as through virtual assembly. See Renton, 475 U.S. at 53-54, 106 S.Ct. 925 (leaving more than five percent of town available for adult theaters provided sufficient alternative channels of communication); Opinion of the Justices, 430 Mass. at 1211-1212, 723 N.E.2d 1 (proposed buffer zone law left open alternative channels of communication because protests could still occur outside designated zones); Friends of Danny DeVito v. Wolf, ––– Pa. ––––, 227 A.3d 872, 903, cert. denied, ––– U.S. ––––, 141 S.Ct. 239, ––– L.Ed.2d ––– (2020) (restrictions did not ban all in-person gatherings, and online mediums of communication also sufficed).

Therefore, the emergency orders do not unconstitutionally burden the plaintiffs' right to free assembly because reducing

the dangers of COVID-19 is a significant government interest, and because the emergency orders are content neutral and narrowly tailored, and they leave open alternative channels of communication.

Conclusion. For the foregoing reasons, we conclude that the CDA provides the Governor with the authority for his March 10, 2020, declaration of a state of emergency in response to the COVID-19 pandemic and for his issuance of the emergency orders; the emergency orders do not violate art. 30; and they do not violate the plaintiffs' Federal or State constitutional rights to procedural and substantive due process or free assembly.

So ordered.

All Citations

--- N.E.3d ----, 2020 WL 7318887

Footnotes

1 Individually and doing business as Hair 4 You.

2 Susan Kupelian; Nazareth Kupelian; Naz Kupelian Salon; Carla Agrippino-Gomes; Terramia, Inc.; Antico Forno, Inc.; James P. Montoro; Pioneer Valley Baptist Church Incorporated; Kellie Fallon; Bare Bottom Tanning Salon; Thomas E. Fallon, individually and doing business as Union Street Boxing; Robert Walker; Apex Entertainment LLC; Devens Common Conference Center LLC; Luis Morales; Vida Real Evangelical Center; Ben Haskell; and Trinity Christian Academy of Cape Cod.

3 Justice Lenk participated in the deliberation on this case prior to her retirement.

4 “Essential services” are those identified by the government as “essential to promote the public health and welfare.” See Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More Than 10 People, COVID-19 Order No. 13 (Mar. 23, 2020) (Order No. 13).

5 The plaintiffs are two hair salons, a tanning salon, a boxing gym, and two restaurants, as well as the respective owners of those businesses; two houses of worship and their pastors; the head of a religious academy; a family entertainment center that offers various indoor attractions; and a conference center.

6 On June 1, 2020, the plaintiffs commenced their action, and on June 19, they filed an amended complaint.

7 We acknowledge the amicus briefs submitted by the Massachusetts Health & Hospital Association, Massachusetts Medical Society, and Organization of Nurse Leaders; and by Representative Shawn C. Dooley.

8 “Social distancing” refers to keeping at least six feet apart from people who are not from one's household, in both indoor and outdoor spaces.

9 Throughout the course of the COVID-19 pandemic, the United States and other countries implemented various travel restrictions. See Coronavirus Travel Restrictions, Across the Globe, N.Y. Times, July 16, 2020 (listing travel restrictions by country).

10 It later was discovered that other people in the United States had died earlier from COVID-19.

11 The Civil Defense Act (CDA), St. 1950, c. 639, provides that the Governor can declare a state of emergency in specified circumstances, St. 1950, c. 639, § 5, and provides the Governor with “all authority over persons and property, necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces thereof,” St. 1950, c. 639, § 7.

12 General Laws c. 17, § 2A, provides that upon the Governor's declaring “that an emergency exists which is detrimental to the public health,” the Commissioner of Public Health may “take such action and incur such liabilities as he [or she] may deem necessary to assure the maintenance of public health and prevention of disease” and “may establish procedures to be followed ... to insure the continuation of essential public health services and the enforcement of the same.”

13 The COVID-19 pandemic is far from the first public health crisis the Commonwealth has faced. In 1701, quarantine legislation aimed at preventing epidemics empowered the Governor or commander-in-chief, once he was made aware of the presence of the plague, smallpox, pestilential or malignant fever, or other contagious sickness, "with the advice and consent of the council, to take such further order therein as they shall think fit for preventing the spreading of the infection." St. 1701-1702, c. 9.

14 He first banned gatherings of more than 250 people, then reduced that to no more than twenty-five people, and finally to no more than ten people.

15 Residential and day schools for special needs students were excluded from this order.

16 The order contained an exception that places of worship could remain open subject to the emergency order's general limitation on the number of people who could gather.

17 Although places of worship were not subject to a complete closure in the initial shutdown order, see note 16, supra, "reopening" in phase one allowed them to operate at higher capacity.

18 The lists for phases three and four noted that they were subject to amendment, and one such amendment was that arcades were moved from phase three to phase four, but the Governor subsequently allowed arcades to open in September 2020.

19 Ejusdem generis "applies to lists '[w]here general words follow specific words in a statutory enumeration.' " See Carey v. Commissioner of Correction, 479 Mass. 367, 370 n.6, 95 N.E.3d 220 (2018), quoting Banushi v. Dorfman, 438 Mass. 242, 244, 780 N.E.2d 20 (2002). "It limits the 'general terms which follow specific ones to matters similar to those specified.' " Carey, supra, quoting Commonwealth v. Gallant, 453 Mass. 535, 542, 903 N.E.2d 1081 (2009).

20 The plaintiffs cite G. L. c. 111, §§ 1, 2, 6, 7, 92, 95, 96, 96A, 104, 106, 111, 111C, 112, 113.

21 The plaintiffs' argument that because the CDA is a special law, and therefore not codified in the General Laws, the Legislature did not intend for it to apply to diseases also is unavailing. From a legal perspective, a special act has the same force and effect as a General Law. See, e.g., Legislative Research Council, Report Relative to Civil Defense, 1971 House Doc. No. 5034, at 65, 66 ("it has been the accepted practice of the General Court not to incorporate either statutes with a specific expiration date or statutes applicable to a unique situation in the General Laws").

22 The plaintiffs' argument that the emergency orders amount to an improper exercise of police power also fails. The Legislature can delegate the police power, see Arno v. Alcoholic Beverages Control Comm'n, 377 Mass. 83, 88-89, 384 N.E.2d 1223 (1979); Milton v. Donnelly, 306 Mass. 451, 459, 28 N.E.2d 438 (1940), and the penalties that are provided for in some of the emergency orders, see, e.g., Order No. 13, are provided pursuant to the CDA. See St. 1950, c. 639, § 8 ("Whoever violates any provision of [an executive order or general regulation promulgated by the governor under the CDA] ... shall be punished by imprisonment for not more than one year, or by a fine of not more than [$500], or both").

23 The plaintiffs state that the Legislature cannot delegate its lawmaking prerogative to the Governor; however, they have not demonstrated how the Governor's actions serve to abrogate this power. The argument does not rise to the level required for appellate advocacy. See Mass. R. A. P. 16 (a)(9)(A), as appearing in 481 Mass. 1628 (2019). Moreover, nothing in the Governor's actions prevents the Legislature from exercising its lawmaking prerogative or police power.

24 The United States District Court for the Western District of Michigan certified questions to the Michigan Supreme Court relating to the Michigan Governor's authority to issue her COVID-19 emergency orders. In re Certified Questions from the U.S. Dist. Court, No. 161492, slip op. at 2, —— Mich. ——, ——, —— N.W.2d ——, 2020 WL 5877599 (Mich. Oct. 2, 2020) (In re Certified Questions). The Michigan Supreme Court held that (1) absent legislative authorization, the Michigan Governor did not possess the authority under the Emergency Management Act, Mich. Comp. Laws §§ 30.401 et seq., to redeclare a state of emergency or state of disaster based on the COVID-19 pandemic after the twenty-eight days provided for in the statute had run; and (2) because the Emergency Powers of the Governor Act of 1945, Mich. Comp. Laws §§ 10.31 et seq., was an unlawful delegation of legislative power to the executive branch, the Michigan Governor

did not possess the authority to exercise emergency powers under that act. Id. Although the Michigan Supreme Court addressed facially similar issues to the ones at hand in the present matter, a deeper look reveals two core differences. First, unlike the Michigan Emergency Management Act, the CDA does not contain a requirement that a set number of days after declaring a state of disaster or state of emergency "the governor shall issue an executive order or proclamation declaring the [state of disaster or state of emergency] terminated, unless a request by the governor for an extension of the [state of disaster or state of emergency] for a specific number of days is approved by resolution of both houses of the legislature." See Mich. Comp. Laws § 30.403(3), (4). Second, although the court determined that the Emergency Powers of the Governor Act was an unlawful delegation of power because of the broad scope and indefinite duration of the delegated powers, and the standards of being "reasonable" and "necessary" that governed the Michigan Governor's exercise of emergency powers were not sufficient to render the statute constitutional, In re Certified Questions, supra at 31-33, —— Mich. at —— – ——, —— N.W.2d ——, the differentiating factor is that the CDA provides substantially more detail and guidance to the Governor than the Emergency Powers of the Governor Act provided the Michigan Governor. Compare Mich. Comp. Laws §§ 10.31, 10.32, 10.33, with St. 1950, c. 639, §§ 1-22.

25 In County of Butler vs. Wolf, U.S. Dist. Ct., No. 2:20-cv-677, 2020 WL 5647480 (W.D. Pa. Sept. 14, 2020), the judge was presented with a constitutional challenge to the Pennsylvania Governor's orders related to the COVID-19 pandemic. In determining the constitutional standard to apply, the judge rejected the defendants' argument that the deferential standard of Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), should apply, instead applying "regular" constitutional scrutiny. County of Butler, supra at 17. The judge stated: "Although the Jacobson Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health, it did not hold that deference is limitless." Id. at 13. The judge quoted from Jacobson for the proposition that a public health measure may violate the Constitution:

> "Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe -- perhaps to repeat a thought already sufficiently expressed, namely -- that the police power of a [S]tate, whether exercised ... by the legislature, or by a local body acting under its authority, may be exerted in such circumstances ... or by regulations so arbitrary and oppressive in particular cases ... as to justify the interference of the courts to prevent wrong and oppression." (Alterations added to reflect original language in Jacobson.)

Id., quoting Jacobson, supra at 38, 25 S.Ct. 358. The judge went on to note that other courts and commentators question whether "[Jacobson] remains instructive in light of the [tiered levels of scrutiny developing after Jacobson]." County of Butler, supra at 13-14. And the core basis of the judge's reasoning was that "Jacobson should not be interpreted as permitting the 'suspension' of traditional levels of constitutional scrutiny in reviewing challenges to COVID-19 mitigation measures." Id. at 16, 17, citing Wiley & Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, 133 Harv. L. Rev. F. 179, 182 (2020) ("Two considerations inform this decision -- the ongoing and open-ended nature of the restrictions and the need for an independent judiciary to serve as a check on the exercise of emergency government power").

We agree that Jacobson does not lead us to disregard constitutional scrutiny and defer completely to the executive's orders. Instead, we determine the appropriate level of scrutiny and analyze the issues thereunder.

26 The emergency orders are not, as the plaintiffs argue, required to go through notice and comment rulemaking pursuant to G. L. c. 30A, § 2. General Laws c. 30A, § 2, in part, requires an agency to hold a public hearing before the adoption of a regulation if violation of the regulation is punishable by a fine or imprisonment. However, the Governor is exempt from the statute's definition of "agency," G. L. c. 30A, § 1(2), and G. L. c. 30A, §§ 1A-1D, which apply the hearing requirement to State bodies that are exempt from the definition of "agency," do not include the Governor.

27 The petitioners have not argued that the houses of worship are being treated differently from the secular businesses. Nevertheless, we have reviewed the orders relating to houses of worship in light of the order in Roman Catholic Diocese vs. Cuomo, —— U.S. ——, 141 S.Ct. 63, —— L.Ed.2d —— (2020), and we have concluded that the Governor's orders do not suffer from the same features criticized by the Court in that case.

28 The plaintiffs use the example of arcades and casinos being in different opening phases. Casinos were allowed to open in phase three, whereas arcades were moved from phase three to phase four, but were thereafter allowed to reopen in September 2020. See Order Authorizing the Re-opening of Phase III Enterprises, COVID-19 Order No. 43 (July 2, 2020); Order Making Certain Phase III Adjustments, COVID-19 Order No. 50 (Sept. 10, 2020). Although at first glance, casinos and arcades seem like they would pose the same level of risk for patrons, unlike arcades, casinos are highly regulated by the Gaming Commission, and Massachusetts has only three casinos. The high level of regulation that could lessen the risk of spread of COVID-19 suffices as a reason for the Governor to have placed the entities in different phases. See New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); Gillespie v. Northampton, 460 Mass. 148, 153, 950 N.E.2d 377 (2011).

29 Order No. 46 exempts political and religious gatherings from its reach, but this exemption does not render the order viewpoint based. See Third Revised Order Regulating Gatherings Throughout the Commonwealth, COVID-19 Order No. 46 (Aug. 7, 2020) (Order No. 46). If exemptions "represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people," exemptions can invalidate an otherwise content-neutral regulation. See McCullen v. Coakley, 573 U.S. 464, 483, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014), quoting Ladue v. Gilleo, 512 U.S. 43, 51, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). Here, the exemptions do not invalidate the restriction because the exemptions can be justified in light of the secondary effect on public health, see Showtime Entertainment, LLC v. Mendon, 472 Mass. 102, 107, 32 N.E.3d 1259 (2015), quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and also because religious gatherings are subject to the limitations set forth in the "Places of Worship" guidance and it was social gatherings that the order specifically identified as contributing to the rise in the infection rate. See Order No. 46 ("clusters of COVID-19 infections have been traced to house parties in the Commonwealth and in other States").

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