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NCLA Brief Tells Mass. Supreme Judicial Court that Gov. Baker's Covid-19 Orders Violate Constitution

Dawn Desrosiers, et al. v. Governor Charles D. Baker

Washington, DC (August 3, 2020) – The uncertainty of indefinite shutdowns and shifting reopening phases are causing hardship to people across Massachusetts. Today the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an opening [brief](#) on behalf of plaintiff-petitioners in *Dawn Desrosiers, et al. v. Governor Charles D. Baker*. The plaintiff-petitioners which include business owners, church pastors, and the headmaster of a private school, have bypassed state trial court to ask the state’s highest court to decide directly whether the governor’s March 10, 2020 Civil Defense State of Emergency declaration and the ensuing emergency orders responding to the coronavirus pandemic are lawful exercises of gubernatorial authority.

On July 10, 2020, Justice Barbara A. Lenk of the Supreme Judicial Court entered an order to “reserve and report the matter to the full court for decision.” Justice Lenk agreed with the parties that promptly obtaining a decision by Massachusetts’s highest court is in the public interest. Such an approach will provide clarity regarding the validity of Governor Baker’s decisions more quickly. A major issue is his reliance on the Civil Defense Act, rather than the Public Health Act, to impose his unilateral orders to close and restrict access to businesses, churches, schools, and limit private and some public gatherings.

The Supreme Judicial Court will consider two questions: (1) whether the Civil Defense Act provides authority for Governor Baker to declare a state of emergency and if his issuance of the emergency orders violates the separation of powers; and (2) whether the emergency orders violate the plaintiffs’ constitutional rights to due process and free assembly.

NCLA argues that Governor Baker has arbitrarily declared which businesses, organizations, and activities are “essential,” and banned others by categorizing them into his unilaterally defined reopening phases. The governor has also indefinitely closed some businesses, making their operations contingent upon a treatment or vaccine for the coronavirus—events over which those affected have no control. Even while he has allowed certain businesses to reopen, he continues to exercise the authority he usurped from the legislature to pursue his own policies on conditions and restrictions to business operations.

The plaintiffs have argued that the governor’s orders are invalid because the COVID-19 pandemic is not a “civil defense emergency” and does not afford the governor sweeping emergency powers to mitigate the spread of infectious diseases. The Civil Defense Act is a 1950’s-era statute designed to protect the Commonwealth from foreign invasions, armed insurrections, and civil unrest and destruction associated with natural disasters such as fire and earthquakes.

The Massachusetts legislature, adopted the Public Health Act to empower health authorities to control and prevent transmission of infectious diseases dangerous to public health. It never intended for the Civil Defense

Act to supersede it. Under the Public Health Act, principal responsibility for disease control lies with local boards of health and healthcare officials. The governor does not have the lawmaking prerogative to legislate the police power in either the Public Health Act or the Civil Defense Act.

Furthermore, even if the CDA allows Gov. Baker to *suspend* some laws, the Massachusetts Declaration of Rights does not allow him to *dispense* any laws, which is what happens when he suspends the application of laws to some citizens but not others or comes up with new rules that only apply to certain groups that he has identified. Nor does the constitution permit him to deny people's civil liberties without a hearing and adequate due process.

NCLA released the following statements:

"The plaintiffs are conscientious citizens and good neighbors. They have been doing their part to stop the spread of COVID-19, and they will continue to do so. But they refuse to sit idly by and watch a health crisis worsen into a socio-economic crisis caused by Governor Baker's unconstitutional law-by-decree regime. A return to constitutional order will restore health to our communities—physical, social, and economic—and ensure that the concerns for the welfare of all will be addressed by the legislature, as the Constitution intended."

— Michael P. DeGrandis, Senior Litigation Counsel, NCLA

"No governor is above the law. They are instead required to faithfully carry out the law as written and stay within the confines of their constitutional authority. The coronavirus simply cannot become a vehicle by which to weaken and undermine our Republican form of government. Protecting our civil liberties and freedoms is critical to the long-term health of our country."

— Harriet Hageman, Senior Litigation Counsel, NCLA

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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