SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CHARLES KRAVITZ, DAWN JOHANSON-KRAVITZ, and LITTLE HARRY'S LLC; MARGARITA JOHNSON, JOHN JOHNSON, and TWO BEARS PROPERTY MANAGEMENT; and ANDREW VAN HOOK and UNION LAKE ENTERPRISES, LLC, *Appellants*,	)	Docket No. 001584-20T4 CIVIL ACTION
v.	)	On Petition to Review
PHILIP D. MURPHY, in his official capacity as Governor of New Jersey; GURBIR S. GREWAL, in his official capacity as New Jersey Attorney General; and JUDITH M. PERSICHILLI, in her official capacity as Commissioner of the New Jersey Department of Health, *Respondents.*	)	Executive Order 128

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Beneath the shroud of reasonableness in which Respondents dress their response is little more than a bald power grab. Respondents' arguments boil down to the proposition that, during an emergency (and even after, so long as the effects of that emergency may linger), the Governor is virtually unconstrained by the Constitution, statutes, or judicial scrutiny, whenever he unilaterally decides that his actions are related to the emergency and in the public interest.

Specifically, Respondents claim that the Disaster Control Act (the "Act") authorizes the Governor to respond to an emergency by adopting any measures that he believes will promote the general welfare——regardless of whether such measures contravene other state laws——and courts must defer to that judgment. Respondents' interpretation of the Act includes no limiting principles. That over-broad reading finds no support in the either the statutory text or case law and poses a dangerous threat to civil liberties.

The same is true for Respondents' Contracts Clause arguments. According to Respondents, once the State regulates an industry, the Contracts Clause ceases to prevent the State from impairing contracts within that industry——especially during an emergency. Creating an exception that swallows the rule, Respondents' theory of the Governor's authority to disregard the Contracts Clause likewise lacks any limiting principle. And once again, the Governor

demands judicial deference to his untailored executive action despite the lack of any legislative process or findings to which this Court could defer.

Respondents have spent little to no time engaging with the text of the operable statutes and constitutional provisions, while assiduously avoiding the substance of Appellants' legal arguments. Unfortunately, this comes as no surprise given that Governor Murphy has announced that the Constitution is "above his pay grade."[1] The rule of law, however, is the foundation of our Government, and the Governor is bound by law and by oath. This Court must enforce that law and restore constitutional order to New Jersey.

I. Governor Murphy Exceeded His Statutory Powers

Respondents concede that EO-128 directly conflicts with the Rent Security Deposit Act ("RSDA"), N.J.S.A. 46:8-19, et seq., which grants home providers the right to require deposits of up to 1-1/2 times the monthly rent and to bar tenants from applying the security deposit toward the payment of rent. This should end the Court's inquiry. Respondents nonetheless argue that the Disaster Control Act, N.J.S.A. App.A:9-30, et seq., authorizes him to countermand the terms of the RSDA during a declared emergency and

[1] 'Above my pay grade': New Jersey governor claims Bill of Rights did not factor into his coronavirus executive orders, Washington Examiner (Apr. 15, 2020), available at https://washex.am/3tKRlTS.

to provide economic benefit to tenants at the expense of home providers.[2]

Respondents' argument is unpersuasive. New Jersey law is clear that the Disaster Control Act authorizes the Governor's emergency actions only if they are both: (1) "rationally related to the legislative purpose of protecting the public" during the emergency; and (2) "closely tailored to the magnitude of the emergency." Cty. of Gloucester v. State, 132 N.J. 141, 147 (1993). Even if EO-128 were rationally related to the goal of protecting the public (and Respondents have failed to make even that showing), Respondents have not met the second requirement. Respondents' brief fails to establish how EO-128, by abrogating the RSDA, is a response to the pandemic that is "closely tailored" to the goal of protecting the public from the effects of COVID-19.

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[2] Respondents have forfeited their claim that a second statute, the Emergency Health Powers Act ("EHPA"), N.J.S.A. 26-13-1 et seq., also authorizes EO-128——by failing to develop that argument in a meaningful way in their brief. Appellants explained at length (Ab19-21) that EHPA authorizes only actions closely related to the application of health care. Respondents' sole response is a short footnote (Rb14 n.4) that states in conclusory fashion (without further explanation) that the authority granted by EHPA "easily encompasses the order challenged here." By failing to respond to any of Petitioners' arguments regarding EHPA's inapplicability, Respondents have forefeited any reliance on EPHA. See Jefferson Loan Co., Inc. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008) (arguments not briefed are deemed forfeited).

Similarly, Respondents have made no attempt to defend EO-128's assertion that the order is authorized by the Governor's inherent constitutional powers or N.J.S.A. 38A:2-4 and 38A:3-6.1 (Ab7-10, 33-34 & n.3). They have likewise forfeited these claims.

A. EO-128 Is Not a "Closely Tailored" Response to Threats to the General Public Arising from an Emergency

Respondents concede that the Act limits the Governor to steps that are both: (1) rationally related to the legislative purpose of protecting the public during an emergency; and (2) "closely tailored" to the magnitude of the emergency. (Rb17-24). Appellants explained at length in their opening brief (Ab21-24) why Respondents have not even satisfied the "rationally related" requirement and will not repeat that explanation here. Respondents have made no attempt to engage with the substance of Appellants' arguments, nor do they explain why, as a statutory matter, the canons of ejusdem generis and noscitur scoiis do not compel a more limited reading of the Act. As mentioned, Respondents' reading of the Act would grant the Governor limitless authority so long as he merely claims that his order promotes the general welfare (a determination he believes that courts cannot second guess).

Instead, we focus on Respondents' claim that EO-128 is a "closely tailored" response to the COVID-19 pandemic. Respondents offer three reasons why EO-128 should be considered a closely tailored response to the pandemic: (1) it is "a modest measure that directly targets tenants' inability to pay rent without significant collateral consequences"; (2) it is a "temporary" measure that expires soon after the emergency declaration is lifted; and (3) EO-128 "is just one part of the State's broader

effort to help homeowners, landlords, and tenants alike." (Rb21-24). None of those three rationales is persuasive.

Starting with the third rationale, Respondents cite no rule of law that permits the Governor to exceed his statutory authority under the Act by imposing financial and criminal penalties on home providers simply because he has taken other actions that may benefit some home providers. Respondents, in other words, have provided no support for their request that this Court apply some type of "holistic" approach to Governor Murphy's entire emergency response, rather than engage with the legal failings of this particular order. That's because there is no basis to do so. Other unrelated orders (or legislative acts) that may have benefited home providers cannot make up for EO-128's lack of tailoring.

And even still, Respondents have misrepresented the assistance available to home providers like Appellants. *First*, they cite a "mortgage relief program" designed to delay foreclosures (for 60 days) and waive late fees (for 90 days) for homeowners who miss mortgage payments. (Rb23). But they fail to mention that: (1) the program is one voluntarily offered by some (but not all) New Jersey lenders; and (2) the offer applies only to owner-occupied housing, not rental housing. See N.J. Dep't of Banking & Ins., COVID-19 & Residential Mortgage Relief at 3, available at https://bit.ly/2RKsBOp.

Second, Respondents rely on the State's "Small Landlord Emergency Grant Program," which "provided financial support for small property owners who are struggling due to the COVID-19 emergency." (Rb23-24). But again, they fail to mention that Appellants and many other property owners are too small to qualify: the program is limited to applicants whose "property contains at least three and no more than 30 total housing units." See N.J. Housing & Mortgage Finance Agency, Small Landlord Emergency Grant Program, available at https://bit.ly/3w8np5X. The program is also limited to properties "with low-to-moderate rent levels." Id. In other words, those small landlords (like Appellants) who are hit hardest by EO-128 receive no relief from the wholly separate grant program. Perhaps if the substance of EO-128 were enacted through legislation rather than executive fiat——as the New Jersey Constitution requires——the two provisions would be tailored to function harmoniously. But Governor Murphy's usurpation of legislative authority left Appellants, and the many home providers like them, to face the burdens of EO-128 without any benefit of corresponding financial relief from the State.

Respondents also argue that EO-128 qualifies as "closely tailored" because it is a "temporary" program, claiming that "it permits special use of the security deposit only during the emergency and for two months after." (Rb22). False. The order provides that if the tenant opts to apply the security deposit to

current rent, "[t]he tenant shall otherwise be without obligation to make any further security deposit relating to the current contract, lease, or license agreement"——without regard to the cessation of the state of emergency and even if there are many years remaining on the lease. (Aa57) (emphasis added). And even if a tenant enters a new lease, he or she is under no obligation to replenish the security deposit until the date of renewal or "on the date six months following" the lifting of the Declaration of Emergency, "whichever is later." (Aa57). Respondents inaccurately state that EO-128 applies for only two additional months and ignore that the "temporary" measure has already been in place for longer than most residential leases.

Most importantly, there is no evidentiary support for Respondents' first rationale: that EO-128 qualifies as "closely tailored" because of its "modest scope." The terms of EO-128 apply to all tenants, without regard to whether they are in any financial distress due to COVID-19. So while Respondents justify EO-128 as a measure designed to ease health and housing concerns for those unable to keep up with their rent payments, they have made no effort to tailor the measure to those express goals or to those particular individuals.

EO-128 conflicts sharply in this respect from the security-deposit measure adopted by New York and touted by Respondents. (Rb22) (citing Elmsford Apt. Assocs., LLC v. Cuomo, 469 F. Supp.

3d 148 (S.D.N.Y. 2020)). The New York measure limited relief to tenants that are "eligible for unemployment insurance or benefits under state or federal law or are otherwise facing financial hardship due to the COVID-19 pandemic." 469 F. Supp. 3d at 158.[3]

The other tenant-relief case relied on by Respondents (Rb22-23), HAPCO v. City of Philadelphia, 482 F. Supp. 3d 337 (E.D. Pa. 2020), is wholly inapposite. The measure at issue there was adopted by a legislative body (the Philadelphia City Council), and thus the case raised none of the statutory-authority questions at issue here. Moreover, the Philadelphia ordinance had nothing to do with security deposits.

Respondents' "modest scope" claim is also belied by the fact that tenants are already protected against eviction for the duration of the pandemic and for two months thereafter. See EO-106 (Da1). In other words, EO-128 is totally unnecessary to prevent the spread of a pandemic-level disease among the homeless, because tenants face no possibility of eviction until months after Governor Murphy finally declares an end to the emergency.[4]

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[3] Elmsford addressed claims that an order issued by New York Governor Cuomo violated provisions of the U.S. Constitution. The federal district court explicitly declined to address claims analogous to those raised here (that Governor Cuomo exceeded his statutory powers), finding that review of those claims by a federal court was barred by "constitutional principles of federalism and state sovereign immunity." Id. at 156 n.3.

[4] For the first time on appeal, Respondents claim that EO-128 will also limit evictions because tenants are more likely to vacate voluntarily "before eviction procedures are consummated"——despite

Respondents also contend that EO-128 has a modest impact because home providers are "legally entitled to precisely the same money from the tenant as before." (Rb11). The plain text of the executive order disproves that argument. Before EO-128 was issued, Appellants had available a statutorily and contractualy devised pot of money from which to pay for property damage. That pot of money disappeared after EO-128 went into effect, denying Appellants the benefits of their bargain.

EO-128's lack of tailoring is dispositive.

B. Respondents' Interpretation of the Disaster Control Act Is Implausible Because It Imposes No Limits on the Governor's Authority During an Emergency

The Disaster Control Act grants the Governor authority to adopt measures designed "to provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and the destruction of property during an emergency." N.J.S.A. App.A:9-33. But while the authority granted to the Governor under the Act is broad, our Supreme Court has

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the fact that evictions cannot take place——if they can apply their security deposit toward rent. (Rb21). In addition to being unsupported and conclusory, this post hoc rationalization cannot support EO-128. See In re Elizabethtown Water Co., 107 N.J. 440, 460 (1987) (citing SEC v. Chenery Co., 318 U.S. 80, 87 (1943) ("'[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based' [], not an after-the-fact affidavit purporting to explain the administrative agency's decision.")). "An appellate brief is no place for an agency to try and rehabilitate its actions." In re N.J.A.C 7:1B-1.1, 431 N.J. Super. 100, 139 (App. Div. 2013).

repeatedly noted that the Act imposes enforceable limits on that authority. See, e.g., Cty. of Gloucester, 132 N.J. at 247; Worthington v. Fauver, 88 N.J. 183, 203-04 (1982).[5]

In asking the Court to uphold EO-128, Respondents are effectively asking the Court to eliminate all constraints on the Governor's authority during declared emergencies. They assert that the Act "provides the Governor with whatever tools are rational to mitigate any emergency New Jersey confronts." (Rb17). They assert that the pandemic has imposed economic hardship on many tenants and that it is rational to attempt to alleviate that hardship by allowing them to allocate security deposits to rental payments. But as Appellants pointed out in their opening brief (Ab25), if the Governor can take actions that alleviate tenants' economic hardship (even if it interferes with others' constitutional, statutory, contractual, and property rights), then it would be equally rational for the Governor to order a rent holiday——not just until the virus is under control but until every subset of the economy has fully recovered. Respondents have not responded to

[5] Respondents quote Worthington for the proposition that "when the Governor acts consistently with express or implied authority from the Legislature, those executive actions should be 'supported by the strongest of presumptions and the widest latitude of judicial interpretation.'" (Rb15-16) (quoting Worthington, 88 N.J. at 208). But Respondents' assertion assumes the answer to the central question posed by this case: is the Governor acting "consistently with express or implied authority from the Legislature?"

our observations regarding the implications of this anything-that-helps-the-tenant-is-authorized approach to statutory interpretation. That silence speaks volumes——particularly given Governor Murphy's public statements that he lacked such authority. (Ab25 n.5).

Respondents assert that it is improper for courts to assess whether EO-128 is "factually sound or good policy." (Rb16). But we do not challenge the Governor's factual findings or seek a policy judgment. Appellants merely assert that EO-128 is not authorized by the Act and directly conflicts with the RSDA. Rather than engaging with that statutory text, Respondents seek to cast the Governor's entire pandemic response as a policy choice necessitated by emergency that this Court is without power to second-guess. That dangerous proposition is contrary to law.

Respondents cite N.J. Republican State Comm. v. Murphy, 243 N.J. 574 (2020) ["NJRSC"], for the proposition that the COVID-19 pandemic is an economic emergency as well as a health emergency and that the State has acted properly in taking steps to mitigate the pandemic's economic impact. (Rb18-19). But NJRSC says nothing about the scope of the Governor's authority under the Act. Rather, the case addressed the legislature's decision to issue bonds (in response to financial needs created by the pandemic) pursuant to an explicit grant of emergency authority in the New Jersey Constitution. Indeed, to the extent that NJRSC is relevant here,

it supports Appellants' position. The Court said, "Reasonable people may differ about how to meet the challenges society now faces [in responding to the pandemic]. Those questions are for the Legislature and the people to decide." 243 N.J. at 610. In this case, the Legislature decided the policy at issue (whether home providers may require security deposits) when it adopted the RSDA; nothing in the Disaster Control Act authorizes the Governor to reverse or nullify that policy.

C. The Disaster Control Act Would Violate the Nondelegation Doctrine If It Were Interpreted to Authorize EO-128

As explained in our opening brief, reading the Disaster Control Act broadly enough to authorize EO-128 would render the Act constitutionally invalid under the nondelegation doctrine. (Ab 31-33). The Court can avoid any need to address that constitutional issue by construing the Act as written, which does not grant the Governor the wholesale authority to rewrite landlord-tenant law during a public emergency.

Respondents' brief discusses the nondelegation doctrine in passing (Rb26-27), but the response misunderstands Appellants' claim. Appellants explained that Respondents' construction of the Act is invalid because that construction provides no limitations on actions the Governor may take during an emergency. See, e.g., Roe v. Kervick, 42 N.J. 191, 232 (1964); Worthington, 88 N.J. at 209. If Respondents disagree and believe that the Act does, in

fact, impose some limitations on the Governor's actions, one would expect their brief to identify those limitations; that is, Respondents would have identified at least one action that the Governor cannot take in the name of providing for the general welfare.

Yet again, however, Respondents' brief is silent on that score. They assert instead that the Act does not present a nondelegation problem because the legislature has, by adopting the Act, quite clearly delegated broad (nearly unlimited) authority to the Governor. (Rb26). Respondents asserts that the Act grants the Governor "authority to protect public-health, safety, and welfare," (Rb26), but they fail to explain how such all-encompassing criteria provide any meaningful standards for determining whether the Governor is acting within the confines of his delegated authority.[6]

[6] Respondents cite Brown v. Heymann, 62 N.J. 1 (1972), in support of their position that the Act does not present a nondelegation-doctrine problem. (Rb24). Brown is inapposite. It addressed whether the Governor had authority to reorganize the government; the plaintiffs argued (unsuccessfully) that such authority belongs to the legislature and is "nondelegable." The issue here (whether the Disaster Control Act as construed by Respondents provides standards to guide the Governor in administering the Act) did not arise in Brown; the plaintiffs there conceded that legislation delegating reorganization authority to the Governor contained adequate standards for the exercise of the delegated authority. 62 N.J. at 5-6.

Moreover, they say that the Act permits the Governor to suspend statutes in case of emergency. (Rb25). But, as explained in the opening brief (Ab34), that is not a delegable legislative power. The legislature's power to suspend law is limited to the temporary suspension of habeas corpus. Construing the Act to permit the Governor to suspend other laws would violate the nondelegation doctrine and the separation of powers. All other laws must be amended or repealed through bicameralism and presentment.

II. The Contracts Clause Imposes a Meaningful Limit on the State's Impairing of Contracts

Respondents' arguments would render the Contracts Clause a dead letter. In their unsupported view, any time the State regulates an industry, the state vests itself with carte blanche authority to retroactively impair any contract in that sector, as if the mere existence of some regulation defeats any legitimate expectation that the government won't interfere with private contracts. Respondents are wrong. "[T]he Contract[s] Clause remains part of the Constitution. It is not a dead letter." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978).[7]

[7] Like Respondents' arguments, the trial court in Johnson v. Murphy, 2021 WL 1085744 (D.N.J. Mar. 22, 2021), appeal pending (3d Cir. No. 21-1795), treated the Contracts Clause as if it were a dead letter. Notably, Appellants' claims in that case were limited by the district court's erroneous decision that the Eleventh Amendment prevented the court from considering Appellants' arguments that Respondents violated the "federal Contracts Clause … by Governor Murphy's alleged *ultra vires* action." Id. at *8.

A. EO-128 Substantially Impaired Appellants' Contracts

As Appellants explained in their opening brief, a law likely impairs a contract when it contravenes "an express convenant" in the contract rather than an available remedy and when the law "lessen[s] the value of the contract." (Ab42-43) (quoting U.S. Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977); Edwards v. Kearzey, 96 U.S. 595, 607 (1877); Bronson v. Kinzie, 42 U.S. 311, 320-21 (1843)).

Respondents make no attempt to rebut these points, nor do they assert that a court in equity could have granted the relief provided in EO-128, as the Contracts Clause requires. (Ab46-47) (quoting Sveen v. Melin, 138 S. Ct. 1815, 1822 (2018)); see also W.B. Worthen Co. ex rel. Bd. of Comm'rs of Sch. Imp. Dist. No. 513 of Little Rock, Ark. v. Kavanaugh, 295 U.S. 56, 63 (1935) (distinguishing Blaisdell because "[t]here has been not even an attempt to assimilate what was done by this decree to the discretionary action of a chancellor in subjecting an equitable remedy to an equitable condition"). No court in equity could waive the provisions of RSDA and the provisions of Appellants' contracts ——especially without even the slightest showing of individualized necessity.

Because this Court is free to consider the lack of lawful process and lack of studied legislative judgment in promulgating EO-128, this Court can easily reach a different decision under the New Jersey Constitution's Contracts Clause.

Respondents instead focus almost exclusively on the fact that the RSDA regulates security deposits, as if that alone diminishes any legitimate expectation against all government interference. (Rb31-32). But again, they do not engage with Appellants' arguments that seven modest and technical statutory amendments to the RSDA in the last 50 years could not have put Appellants on notice that the Governor might retroactively criminalize the continued use of security deposits entirely——a right on which home providers like Appellants have depended for over 100 years. (Ab43-44).

Respondents also grossly misrepresent the effect of Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1936). That case is limited in two important ways. *First*, the case dealt only with the control a "state retains over remedial processes[.]" Id. at 434 (emphasis added). Blaisdell did not, therefore, sub silentio overrule 150 years of precedent prohibiting states from retroactively impairing contractual rights or obligations, see, e.g., McCracken v. Hayward, 43 U.S. 608, 612 (1844), while leaving states "free to regulate the procedure in its courts even with reference to contracts already made[.]" Kavanaugh, 295 U.S. at 60. To the contrary, the U.S. Supreme Court recently noted that the statute at issue in Sveen "stack[ed] up well against laws that th[e] Court upheld against Contracts Clause challenges as far back as the early 1800s." 138 S. Ct. at 1822.

Second, Blaisdell limited its holding to laws that meet three conditions: (1) the law provides only "temporary and conditional" relief; (2) that is "sustained because of an emergency"; and (3) the law reasonably compensates the creditor while it impairs his or her contractual rights. 290 U.S. at 441-42 ("[P]rovision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession."). EO-128 did not condition relief based on need (or any other criteria for that matter) and failed to compensate the home providers whose rights it impaired. Moreover, given Respondents' assertion that the Governor's authority extends after the health emergency subsides (Rb41), the order is not sufficiently temporary.

B. EO-128 Was Not Tailored to a Significant Public Purpose

Rather than attempting to meet its burden of proving that EO-128 is tailored to a "significant and legitimate public purpose," Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842, 859 (8th Cir. 2002) (setting a state's burden of proof); Energy Reserves Grp. V. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983)(discussing the state's need to justify the purpose of its regulation), Respondents attempt to shift the burden to Appellants to "identify specific alternatives New Jersey should have adopted that would have achieved its goals as efficiently." (Rb41-42). This attempted buden-shifting further exposes the fact that Respondents did not properly tailor EO-128.

Although the burden of proof clearly falls on Respondents, Appellants have, in fact, shown that there were tailored alternatives available, by establishing that the order could have been means tested, at the very least. See supra 7; (Ab25-26, 55 & n.8). Limiting EO-128 to only those tenants suffering economic hardship due to the pandemic would not require the state "to first erect an administrative enforcement scheme," as Respondents baselessly suggest. (Rb42). The Elmsford case on which Respondents rely limited relief to tenants that are "eligible for unemployment insurance or benefits under state or federal law or are otherwise facing financial hardship due to the COVID-19 pandemic." 469 F. Supp. 3d at 158. And despite its other flaws, the eviction order issued by the federal government at least included a type of means test by sworn declaration. Eviction Protection Declaration, U.S. Centers for Disease Control, available at https://bit.ly/3ocas8c. Tenants must swear under penalty of perjury that, among other things, they meet certain income requirements, have done their best to make timely partial payments, and will become homeless or be forced to live in close quarters if evicted. Id.

Notwithstanding Respondents' contrary assertion (Rb33), EO-128 destroys home providers' right to a security deposit and deprives them of the financial protection for which they contracted—for at least six months after Governor Murphy declares the emergency is over. Respondents have not carried their burden.

C. There Is No Studied Legislative Judgment to Justify Deference

Once again, Respondents failed to engage with the substance of Appellants' arguments. This time, in arguing that this Court must defer to Governor Murphy in its Contracts Clause analysis, Respondents assert incorrectly that Appellants relied on only one case to the contrary. (Rb37); but see (Ab50-52) (discussing several cases). They make no attempt to show that Governor Murphy's order meets the standard for deference set out in East New York Savings Bank v. Hahn, 326 U.S. 230, 234 (1945); see also Baptiste v. Kennealy, 490 F. Supp. 3d 353, 374 (D. Mass. 2020) (adopting the Hahn standard without regard to the specific facts of that case). And how could they? There was no studied legislative judgment to support EO-128. Governor Murphy's uniteral action, by its very nature, lacked the benefit of the legislature's "pooled general knowledge." Hahn, 326 U.S. at 234. As this Court has made clear, the Governor's "unilateral attempt to exercise the Legislature's power" does not warrant the deference this Court might afford to a legislative act resulting from studied legislative judgment. Cf. Commc'ns Workers of Am., ALF-CIO v. Christie, 413 N.J. Super. 229 (App. Div. 2010).

Without the "considerable" deference on which Respondents' arguments depend (Rb40), EO-128 cannot withstand judicial scrutiny.

CONCLUSION

No one can deny that COVID-19 hit New Jersey hard. And there is no denying that the Legislature vested the Governor with certain specific enumerated powers to respond swiftly to an emergency like COVID-19. But those powers were limited by their statutory terms. One does not have to doubt Governor Murphy's performance in the face of an unprecedented emergency to recognize that EO-128 lacked a statutory and constitutional basis.

Respondents are asking this Court to focus on the Governor's pandemic response in its entirety because they know that EO-128 cannot stand on its own terms. They hope to frame this case as one of reasonable and modest executive action in response to a "once-in-a-century" pandemic. But for the next hundred years following this pandemic, New Jerseyans will continue to depend on the rule of law. The excess executive power that the Governor is attempting to accumulate will distort the separation of powers well after the pandemic has passed unless this Court enforces the law as written. EO-128 is unlawful and must fail.

May 13, 2021

Respectfully submitted,

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