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CORONAVIRUS UPDATE #90

MASS. SJC HEARS ARGUMENTS ON LEGAL CHALLENGE TO GOV. BAKER'S SHUTDOWN ORDERS

FEDERAL JUDGE RULES PENNSYLVANIA'S SHUTDOWN ORDERS UNCONSTITUTIONAL

U.S. HOUSE MEMBERS REMAIN HOPEFUL ON PASSING FIFTH STIMULUS BILL

UPCOMING NADA WEBINARS

Mass. Supreme Judicial Court Hears Oral Arguments on Gov. Baker's Shutdown Orders

[Courtesy of State House News Service]

Previously in earlier bulletins, we informed you of the legal challenge business owners filed against Governor Charlie Baker's economic shutdown orders issued during the Coronavirus crisis.

On Friday, September 11, six months into the COVID-19 pandemic, the state's highest court is poised to decide whether Gov. Baker's string of executive orders were a legally appropriate response to contain the highly infectious virus or if he overstepped the authority outlined in law.

An attorney representing business owners and religious leaders who sued the Baker administration argued in court Friday that Baker has "turned the government upside down" by taking significant individual action, rather than executing laws passed by the Legislature, during the public health crisis.

"At this point, the Legislature is left to approve or disapprove of the governor's policy choices," Michael DeGrandis, a lawyer with the New Civil Liberties Alliance, told justices. "That's not how it's supposed to work. The governor is merely supposed to execute the policy choices of the Legislature. For the Legislature to make a change, the Legislature would also have to have a veto-proof majority to do so. That is standing the government on its head. That's not a republican form of government."

Baker declared a state of emergency on March 10 and has issued numerous executive orders charting a course for Massachusetts through the pandemic. His orders ranged from ordering businesses deemed non-essential to shutter physical operations to closing K-12 schools to limiting how many people can gather in one place.

The alliance, a national non-profit that describes itself as fighting the "unconstitutional administrative state," [filed a lawsuit](#) against Massachusetts on June 1 on behalf of several plaintiffs who own businesses or represent religious institutions impacted by forced shutdowns and mandatory operational changes during the pandemic.

At the core of the plaintiffs' case is the Civil Defense Act, a 1950 law covering emergency preparedness on which the administration based its response. The statute outlines allowable causes for emergency declarations, including acts of war, natural disasters and "other natural causes," but does not explicitly name a pandemic.

DeGrandis argued that, because pandemics are not listed, Baker overstepped his legal authority. The Public Health Act, which directs the main responsibility for disease control to local boards of health, should instead govern the state's COVID-19 response, he said.

"The petitioners have been doing their part. They will always do their part. They have abided by the governor's orders as best as they could understand the governor's orders and will continue to do so as long as this court decides these are lawful orders," DeGrandis said. "This is an issue of process and what is the character of Massachusetts government. Is it a government of laws or a government of men?"

State officials [have contended](#) that Baker was well within his authority to lean on the Civil Defense Act. While it may not use the word "pandemic," they argue it grants broad authority for response to crises stemming from natural causes.

"The pandemic clearly falls within that: it arises from a natural cause, a fact that's undisputed in this case, and it is causing a disaster of massive proportion within the commonwealth and across the country," Assistant Attorney General Doug Martland told justices.

The Legislature spent the first several months of the crisis on uncertain ground, meeting only in lightly attended informal sessions where a single lawmaker's dissent could stall any bill. During that period, the governor took numerous executive actions enacting binding rules to govern life in Massachusetts.

Both branches now have processes in place to hold formal sessions with remote voting, and they have generally worked with the administration on a range of COVID-era responses, such as a more than \$1 billion supplemental budget, a temporary ban on evictions and foreclosures, and an expansion of mail-in voting.

Martland said Friday that the Legislature could have amended the Civil Defense Act any time since March to make it clear that it does not apply to pandemics, but lawmakers have not done so.

"We have the Legislature confirming and ratifying the governor's decisions in a host of legislation," Martland said. "That includes the declaration of emergency being a contingency for the operation of the statute. We also have the Legislature appropriating over \$1 billion in funds to the commonwealth's COVID relief response, and if the Legislature had any indication of disapproving, certainly this court can conclude they would have done something more than that."

The Massachusetts Fiscal Alliance, which has been critical of Baker's pandemic response, has vocally supported the lawsuit, though it is not a plaintiff in the case.

"Massachusetts residents and businesses that have fallen victim to the Governor's orders, either by closing their small business for good or having their freedoms and liberties limited, should feel a sense of relief that their side of the argument was finally heard by the public and the state's highest court," Fiscal Alliance spokesman Paul Craney said Friday. "We hope the justices will rule in favor of those in Massachusetts who are suffering and do not have a voice due to these orders."

Judges asked several questions from attorneys on both sides, but did not offer an indication of which way they lean on the case nor when they plan to issue a ruling.

Judges probed the plaintiffs' attorney on why a pandemic did not fall into the "natural causes" definition and how the Legislature could respond if they found Baker's actions excessive, and asked the state's attorney how long an emergency authorization should last. Martland said "it depends on the circumstances."

Asked by Justice Elspeth Cypher whether local public health boards have the capacity to manage a global pandemic, DeGrandis replied that it was not for him to decide but that lawmakers effectively ruled that by placing authority with cities and towns in the Public Health Act.

At the start of the hearing, Justice Frank Gaziano said that Chief Justice Ralph Gants, who underwent surgery following a heart attack one week ago, would follow the proceedings and planned to participate in the final decision. (Note: Yesterday court officials announced Chief Justice Gants' death.)

The tape of the hearing can be accessed at this link: [Online Archives: SJC Hearings](#)

Federal Judge Rules Pennsylvania's Coronavirus Orders are Unconstitutional

[Courtesy of *The Hill*]

A federal judge ruled yesterday that Pennsylvania Gov. [Tom Wolf](#)'s (D) coronavirus orders, which shut down the state, closed businesses, and limited gatherings, were unconstitutional.

U.S. District Judge William Stickman IV, a Trump appointee, said [in his opinion](#) that COVID-19 orders from Wolf and Pennsylvania Secretary of Health Rachel Levine violated and continue to violate the First Amendment right to freedom of assembly and the due process and equal protection clauses of the 14th Amendment.

The efforts to stop the spread of the coronavirus "were undertaken with the good intention of addressing a public health emergency," Stickman wrote.

"But even in an emergency, the authority of government is not unfettered," he added. "There is no question that this Country has faced, and will face, emergencies of every sort," he wrote. "But the solution to a national crisis can never be permitted to supersede the commitment to individual liberty that stands as the foundation of the American

experiment.”

Four Pennsylvania counties — Butler, Fayette, Greene, and Washington — along with Rep. [Mike Kelly](#) (R-Pa.), three state representatives, and seven businesses and their owners challenged the state government’s coronavirus orders. Their lawsuit was filed in May, when these counties were in the “red” phase that required residents to stay at home. (Note: Congressman Kelly is a franchised auto dealer in western Pennsylvania.)

Lyndsay Kensinger, a spokesperson for the governor's office, said the administration was "disappointed" by the ruling and will file an appeal.

"The actions taken by the administration were mirrored by governors across the country and saved, and continue to save lives in the absence of federal action," she said in a statement. "This decision is especially worrying as Pennsylvania and the rest of the country are likely to face a challenging time with the possible resurgence of COVID-19 and the flu in the fall and winter."

Kensinger clarified that the ruling related to the business closure order, the stay at home orders, and indoor and outdoor gathering limitations, not the other orders such as the mandatory mask order.

Previous rulings have rejected several challenges to Wolf’s coronavirus orders. In July, the Pennsylvania Supreme Court [ruled the state legislature](#) could not end the coronavirus shutdown.

Other governors across the country took similar steps early in the coronavirus pandemic, with most states implementing stay-at-home orders and shutting down businesses.

Pennsylvania has since lifted most of the coronavirus restrictions but still limits indoor gatherings to 25 people, outdoor gatherings to 250 people, and indoor dining to 25 percent occupancy. The indoor dining capacity is expected to rise to 50 percent on September 21, according to [CBS Pittsburgh](#).

Pennsylvania has documented 140,842 confirmed COVID-19 cases and 7,869 deaths since the beginning of the pandemic. [The New York Times](#) categorizes Pennsylvania as a state where cases are “lower and staying low,” with a seven-day average of 676 new cases per day.

House Centrists Add \$1.5 Billion Plan as Latest Stimulus Option

[Courtesy of *State House News Service*]

Gov. Charlie Baker and legislative leaders are waiting for a sign from Washington about what kind of budget relief, if any, states like Massachusetts can expect this year, and House Democrats in Congress said today they were prepared to remain in the capital as long as it takes to reach a "meaningful" compromise with Senate Republicans.

U.S. Rep. Hakeem Jeffries and U.S. Rep. Katherine Clark, the chair and vice-chair of the Democratic Caucus, said today after a conference call with House Democrats that the speaker was prepared to extend the session as long as it takes to get another coronavirus relief package passed.

"We cannot let Mitch McConnell try to run a Congressional calendar out on the suffering," Clark said. "And so we are going to stand strong, and we are going to bring the voices of our constituents and families across this country here to Congress and say, 'We see you. And we're going to fight for you.' And we will do that until we have relief for them."

The House passed the \$3.4 trillion Heroes Act, but Speaker Nancy Pelosi and Senate Minority Leader Charles Schumer have said they'd be willing to come down to \$2.4 trillion to get a deal done. Senate Majority Leader Mitch McConnell, meanwhile, initially proposed a \$1 trillion relief package, and then last week reduced that to about \$650 billion in a "skinny" bill that failed to pass the Senate.

"This is a very simple question that we all here at the Capitol have to ask and answer. Is this an extraordinary event that has afflicted the American people or not? If it's an extraordinary event then Congressional COVID-19 pandemic response should be extraordinary as well," Jeffries said.

The press conference with Democratic leadership came after a House Democratic caucus meeting that lasted about hour and 45 minutes, Jeffries said, and before the Problems Solvers Caucus - a group of about 50 centrist House lawmakers from both parties - were prepared to roll out a \$1.5 trillion coronavirus relief package. Clark said she was "grateful that we have colleagues on both sides of the aisle who are trying to work towards a solution." "I hope that the Republicans on the Problem Solvers will be an inspiration to the Senate and come and join us back at the negotiating table," Clark said.

Upcoming NADA Webinars – Register Today

Descriptions of upcoming NADA webinars and registration links are below. All webinars will include time for Q&A. They will be recorded and made available on demand for NADA and ATD Members who can't attend live. Reserve your seat today!

- **Wednesday, September 16, 1pm-2pm ET: [Virtual Retailing: How to Improve CX & Drive Sales](#)**. Join automotiveMastermind Director of Business Development Steve DeWitt as he shares lessons learned from dealers during COVID-19 closures and challenges – including what went well and where they missed the mark – and how dealers can improve digital retailing to enhance customer experience and drive sales. [REGISTER](#).
- **Thursday, September 17, 1pm-2pm ET: [DMS Data: Removing Barriers to Access and Innovation](#)**. Join Mike Trasatti, CEO of DealerBuilt, and Cliff Banks, President of Banks Media Enterprises, as they discuss the evolving and strategic role of data within the retail automotive space and how various industry stakeholders are seeking to harness this valuable asset. The discussion will focus on the role of the DMS (dealer management system), as it sits at the intersection of data flowing between dealers, their other dealer tech providers, OEMs, and end consumers. [REGISTER](#).
- **Wednesday, September 23, 1pm-2pm ET: [3 Proven Ways to Boost Pre-Owned Profitability](#)**. During this webinar, Pete Margaros and Andrew Menditch from automotiveMastermind will discuss the inventory management tactics, targeted audience development strategies, and disciplined dealership processes needed to drive pre-owned profitability in 2020 and beyond. [REGISTER](#).

Daily Massachusetts COVID-19 Tracker

The state's COVID-19 Dashboard with up-to-the-date data can be found [here](#).

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If you have any questions regarding this bulletin, please contact Robert O'Koniewski, Esq., MSADA Executive Vice President, by e-mail at rokoniewski@msada.org, or Peter Brennan, Esq., MSADA staff attorney, by e-mail at pbrennan@msada.org, or either by phone at (617) 451-1051.