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**Fate of Gov. Baker’s COVID-19 Orders Could Be Influenced by Michigan, Pennsylvania Court Decisions**

*NCLA files Supplemental Notice of Pertinent and Significant Authorities in Desrosiers v. Baker*

**Washington, DC (October 7, 2020)** – A recent Michigan Supreme Court decision striking down months of COVID-19 executive orders by Governor Gretchen Whitmer has prompted the New Civil Liberties Alliance to file a [Supplemental Notice of Pertinent and Significant Authorities](#) in the Massachusetts Supreme Judicial Court in the matter of *Desrosiers v. Baker*.

Massachusetts’s highest court heard oral arguments on September 11, 2020, at which time the Justices inquired regarding other governors’ declarations of states of emergency and judicial interpretations of their COVID-19 orders. The Notice alerts the Justices to two similar cases in other states where governors’ pandemic orders were challenged—and nullified by the courts. NCLA, a nonpartisan, nonprofit civil rights group, believes that these judicial decisions could persuade the Massachusetts SJC in deciding the *Desrosiers v. Baker* matter.

*Midwest Institute of Health, PLLC v. Whitmer* was pending in the Michigan Supreme Court and *County of Butler v. Wolf* was pending in the Western District of Pennsylvania at the time of oral argument, but they have now been decided against both governors.

In *Midwest Institute of Health*, the Michigan Supreme Court held that Governor Whitmer’s COVID-19 orders violated the separation of powers and nondelegation clauses of the Michigan Constitution. The Supreme Court cited a Massachusetts Supreme Judicial Court decision as standing for the proposition that an emergency does “not abrogate the Constitution.” Declaring Governor Whitmer’s orders unconstitutional, the Justices concluded that a governor may not “possess[] free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time.”

In *County of Butler v. Wolf*, the district court held that Pennsylvania Governor Wolf’s COVID-19 orders violated First Amendment rights to assembly and speech and Fourteenth Amendment rights to substantive due process and equal protection. The district court believed Governor Wolf’s orders were well-intentioned, but good intentions are not a constitutional standard. “Indeed, the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency.” Declaring Governor Wolf’s orders unconstitutional, the district court concluded that “[t]he Constitution cannot accept the concept of a ‘new normal’ where the basic liberties of the people can be subordinated to open-ended emergency mitigation measures.”

The petitioners in *Desrosiers v. Baker*, which include business owners, church pastors, and the headmaster of a private school, are asking the Massachusetts SJC to consider: (1) whether the 1950’s-era 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' rights to due process and free assembly. These issues are akin to the ones Governors Whitmer and Wolf lost recently.

**NCLA released the following statement:**

“With no end in sight to the Civil Defense State of Emergency nor indication that Governor Baker will be loosening his grip on the legislature’s police power, I hope the Supreme Judicial Court will take notice of an emerging trend across the country. More and more courts are defending state and federal constitutions and restoring civil liberties lost under the guise of ‘temporary’ emergency gubernatorial action. This is a heartening trend that the SJC could—and should—further in Massachusetts.”

– **Michael P. DeGrandis, NCLA Senior Litigation Counsel**

**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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