
Gov. Charlie Baker at a State House press conference. (Pool photo by Nicholas Czarnecki)

OPINION

# SJC decision on Baker's powers is poorly reasoned

## Justices show irresistible urge to support the governor

DAVID R GEIGER Dec 11, 2020

**THE MASSACHUSETTS** Supreme Judicial Court (SJC) ruled on Thursday that Gov. Charlie Baker's various COVID-19 orders were authorized by the Massachusetts Civil Defense Act of 1950, and did not violate the plaintiffs' due process rights or right to assemble under either the state or federal constitutions. The court's opinion is superficial and poorly reasoned at best, and intellectually dishonest at worst, and is hardly the end of the matter.

The outcome of the opinion could readily be predicted from its first words, which identified the justice who authored it. Stunningly, that justice during the argument of the case had asked the plaintiffs' counsel whether he didn't agree that the governor was doing a good job with his COVID-19 measures. Any first-year law student, and indeed most sentient citizens, would know that the job of a justice ruling on a legal or constitutional challenge to a government measure is not to agree or disagree with any policy underlying the measure, or the results achieved by it, but rather to rule on whether it is indeed legally or constitutionally valid.

For starters, in finding the governor's orders authorized by the Civil Defense Act, the court said it was "apparent" from section 5 of the statute, its emergency declaration provision, as well as "the statute as a whole," that "a pandemic on the scale of the COVID-19 pandemic" came within the section's phrase "other natural causes." The court rejected a statutory interpretation principle requiring that the general phrase "other natural causes" be limited to events similar to the immediately preceding more specific events of "fire, flood [or] earthquake," as that principle is not appropriate where the statutory language is "unambiguous."

The superficiality or intellectual dishonesty of these assertions is evident on multiple grounds. The question was not the meaning of "other natural causes" in isolation, but rather the full phrase involving the actual "occurrence" (not mere risk) of a "disaster or catastrophe resulting from fire, flood, earthquake or other natural causes." The court conveniently omitted from its opinion the fact that the governor's declaration was premised on the occurrence of only 91 "presumed" COVID cases spread among the Commonwealth's 6.9 million people, and did not pause to examine how that constituted an actual disaster or catastrophe. Instead, in a sleight-of-hand, the court looked to the *present* state of COVID affairs rather than the state at the time of the emergency declaration, and equally improperly to the state of affairs in the *world* rather than Massachusetts, referring to "a pandemic that has killed over a million people worldwide."

In addition, the extent of the court's analysis of "the statute as a whole" was to look only at one additional phrase in section 5 referring to the Legislature's desire "to protect the public peace, health, security and safety, and to preserve the lives and property of the people of the

Commonwealth."

Of course, those are the purposes of virtually every legislative enactment. The court conveniently ignored (1) the statute's title identifying its subject as "Civil Defense," (2) the statute's definition of civil defense as involving "emergency functions" such as the National Guard, firefighting and police, engineering, evacuation, restoration of utility services, and the like, (3) the statute's creation of the Massachusetts Emergency Management Agency, hardly a bulwark of epidemic response, and (4) its provisions for the government to commandeer real property and vehicles to aid in emergency response. With the benefit of the court's blinkered eyes, the meaning of "other natural causes" was thus easily "apparent" and "unambiguous."

Relatedly, in supposedly considering "the statute as a whole," the court completely ignored section 7 of the statute, which enumerates various emergency powers of the governor, none of which have anything to do with pandemic-fighting. The court also did not attempt to analyze whether, even assuming a valid emergency declaration, the 49 orders challenged by plaintiffs were indeed authorized by section 7, perhaps because the plaintiffs did not raise this issue.

The section authorizes the regulation of "[l]abor, business or work on Sundays or legal holidays," *not* the everyday closures and other regulation that the orders entail. The section authorizes the regulation of schools "supported in whole or in part by public funds" in order "to extend the benefits or availability thereof," *not* the regulation of schools both public and private and drastic curtailment of their services.

Regarding the constitutional issues, the court, as also noted in a previous column, did not have any actual factual record, including scientific literature and expert testimony, on which to base its decision. It did not examine the actual text of *any* of the 49 orders in question, but rather simply ruled that "[t]he 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," and hence satisfied due process under a "rational basis" standard.

And the court concluded that any restriction on citizens' right to assemble was valid because it was not based on the citizens' viewpoints, left open alternative channels of communication, and was not "'substantially broader than necessary to achieve the government's interest' of reducing the spread of COVID-19."

As a starting point, the court's unsupported assertion that preventing the spread of disease per se is a significant government interest justifying liberty restrictions is completely unfounded. On that basis, *all* of our interpersonal actions—at home, at work, and in society—could be restricted in ways similar to the COVID orders due to the risk that simple colds, influenza, measles, or other communicable diseases could spread through normal living. To the contrary, the government's only legitimate interest lies in protecting those who *cannot protect themselves*, such as frail nursing home residents, not those who are fully capable through their own voluntary choices of deciding how much personal risk they want to tolerate by their life activities.

That aside, the court's sweeping conclusion that all 49 orders were valid, without analyzing any of their texts and without the benefit of any actual evidence, can only mean, at best, that the court views the orders as not constitutionally invalid on their face under due process and the right to assemble.

As one final example of the justices' apparently irresistible urge to approve the actions of the governor who appointed all of them, the court even noted helpfully in a footnote that although "[t]he petitioners have not argued that the houses of worship are being treated differently from the secular businesses," the court had "reviewed the orders" in light of the United States Supreme Court's November 25 decision in *Roman Catholic Diocese v. Cuomo* and concluded they "do not suffer from the same features criticized by the Court in that case."

The court's volunteered and wholly peremptory conclusion is somewhat interesting in that the governor's orders challenged in *Desrosiers* initially imposed an absolute numerical limit of 10 persons at any religious service, rather than a limit based on percentage of building capacity, and without taking into account any other prophylactic measures—such as mask-wearing and distancing—that the place of worship was employing.

In fact, those were *precisely* the features of New York Gov. Andrew Governor Cuomo's orders that led the Supreme Court to conclude his orders likely violated the First Amendment right to the free exercise of religion. As the court noted, "even in a pandemic, the Constitution cannot be put away and forgotten," and courts "have a duty to conduct a serious examination of the need for such a drastic measure." Would that the SJC had conducted such a "serious examination of the need," or had a factual record on which to do so.

The court's decision is far from the end of the matter. The ruling is at best binding only on the plaintiffs in the case, and at most only resolves as to them the section 5 issues that the court actually addressed and the limited facial constitutional issues it appears to have attempted to address, to the extent one can discern that from the court's limited discussion. In addition, the court's views on the federal constitutional issues are not at all binding on federal courts, including of course the Supreme Court, which has the final say on such matters. Those courts also appear to be far more solicitous of fundamental human liberties, and less prone to judicial abdication, than the SJC.

Future individual, business, religious, and educational plaintiffs, therefore, remain free to argue that the SJC should revisit its interpretation of section 5 in light of the many statutory points the court did not consider. Plaintiffs may also argue that even if the emergency declaration itself was valid, individual COVID orders that affect the plaintiffs are not authorized by section 7 of the statute.

Such plaintiffs are free to argue that the SJC should revisit even the facial validity of individual orders based on an actual factual record from a preliminary injunction hearing or trial, and that regardless of facial validity individual orders as applied to the particular plaintiffs are unconstitutional under the state and federal constitutions. And all the federal constitutional issues remain fully open in federal courts.

Tagged in: Charlie Baker/ Massachusetts Supreme Judicial Court