

New Civil Liberties Alliance Senior Litigation Counsel Michael P. DeGrandis, presented oral arguments before the Massachusetts Supreme Judicial Court on September 11, 2020 via webcast from NCLA Headquarters in Washington, DC in the case of *Dawn Desrosiers, et al. v. Governor Charles D. Baker*.

TC-00:06

**Hon. Frank Gaziano:** Mr. DeGrandis?

TC-00:09-1:11

**Michael P. DeGrandis:** Yes, thank you your honor. May it please the court, I'm Michael DeGrandis with the New Civil Liberties Alliance, appearing on behalf of the petitioners in this case.

Your honors, the questions presented here can be succinctly restated as a simple proposition. May Governor Baker ignore a health statute that expressly provides for the containment of a pandemic, of epidemics, of infectious disease, and instead exercise the police power as he sees fit pursuant to a civil defense statute. The answer to that question has to be no. It has to be no, if Article, 30 Separation of Powers means anything at all, and if the Massachusetts government is the Republican form of government guaranteed to its citizens by the United States Constitution.

The Civil Defense Act makes no mention of disease and no disease, no pandemic, has ever triggered a Civil Defense Act state of emergency. All prior states of emergency have been related to military preparedness, weather related crises, and one instance of a natural gas explosion that set fire to at least three towns.

The Public Health Act...

TC 1:11-1:14

**Hon David Lowy:** If I could interrupt you for a moment.

TC: 1:15

**Michael P. DeGrandis:** Sure.

TC: 1:16-2:04

**Hon David Lowy:** I understand your statutory construction argument and argument about the general being limited by the specific, being in the Civil Defense Act legislation, it specifically references protecting the public health. And

when we look at other natural causes as a listed concern, and we see that one of the purposes of the Civil Defense Act is protecting the public health, why wouldn't that leave us with a reasonable statutory construction that the governor's acts are within the statute?

TC: 2:07 – 2:46

**Michael P. DeGrandis:** There are at least, I would say, three reasons why that wouldn't be a reasonable interpretation. First and foremost, we have the canon of *Ejusdem Generis* which requires that general phrase, “other natural causes,” to be limited to the preceding specific phrases, “fires, floods, and earthquakes.” There also would be no limiting principle whatsoever if every natural occurrence, because everyone agrees here that all manmade calamities war, sabotage, terrorism, all of those fall under the Civil Defense Act. But if other natural causes means every natural occurrence of any sort, then there's absolutely no limiting principle. When can't a governor declare a civil defense state of emergency?

TC: 2:47 – 3:13

**Hon. David Lowy:** Well, this is this is not every situation. This is a, obviously, a pandemic where the spread could be from asymptomatic people. And I guess the issue is how much weight can the other natural causes hold? I understand your *Ejusdem Generis* argument but that's an aid to statutory construction that's not dispositive.

TC: 3:14 – 4:02

**Michael P. DeGrandis:** Well, it I think it brings us, your question, brings us to the third point, which is, if you read the Civil Defense Act other natural causes to also mean disease and pandemic, though those aren't named in the act you're going to make the Public Health Act superfluous. The Public Health Act is directly on point with this. The Public Health Act, we say in our briefing, predates the Civil Defense Act by at least 50 years. But, in fact, elements of the Public Health Act have been in place for hundreds of years.

This is the one place to go to know what the legislature intended. And what it intended to do was localize disease control mitigation. And also keep in mind too, this doesn't, in invalidating the Civil Defense Act state of emergency.

TC: 4:02 – 4:30

**Hon. David Lowy:** The local boards under the Public Health Act, local boards are going to be able to deal with this issue? The legislatures, they're there every day. They've been enacting legislation under the understanding that the Civil Defense Act is the means through which this is going to be addressed. And now we're going to look to the Public Health Act and have local boards being able to deal with the pandemic?

TC: 4:31 – 5:40

**Michael P. DeGrandis:** Well, the legislature may be making a mistake and taking the governor's lead in mistakenly believing that the Civil Defense Act applies. The legislature can easily correct

its course if it disagrees with the legislature in the early 1900s that put forth the Public Health Act.

So local boards of health, if they're actually enabled to do their jobs, they're the ones on the ground. They've been relegated to mere health police by the governor's orders. If they're allowed to actually interact the way the Public Health Act intended them to, that is in close concert with each other because they do form their own their own coalitions or own groups in neighboring towns, and getting advice and information and guidance from the Commonwealth's Department of Public Health this, this is the path set forth by the general. If the general court wants to adapt that, if there are unique dynamics to this particular disease, then the general court can make those changes. There's nothing about invalidating the Civil Defense State of Emergency that would put the, the general court on its heels, it's already spoken. And if it wants to adapt it can readily adapt.

TC: 5:41 – 5:57

**Hon. Elspeth Cypher:** Counsel when, you say they can adapt, they can adapt, certainly they could if they thought the governor was misinterpreting the Civil Defense Act. Could not they uh act now and take care of that?

TC: 5:58 – 6:00

**Michael P. DeGrandis:** They certainly could. They just haven't done it.

TC: 6:01 – 6:02

**Hon. Elspeth Cypher:** And you think that's because they're mistaken?

TC: 6:03 – 6:10

**Michael P. DeGrandis:** That's right, they are mistaken and there's no reason why the petitioners should have to wait around for the legislature...

TC: 06:11- 6:59

**Hon. Elspeth Cypher:** All right, well, let's talk about that for a minute. One thing is let me ask you when you say the petitioner's waiting around. I understand that this pandemic and the restrictions that have been placed have taken an extreme toll on the people of Massachusetts. Some of them have worn the burden disproportionately in the form of either death or long-term illness, job loss, business loss. Some of the people you're representing would fall into that category. And some have borne a greater burden as essential workers or as black and brown people who often have the double burden of being the essential workers. Families have been separated. I understand all that. But bearing in mind, bearing in mind all of that, don't you have to admit that Governor Baker's done a pretty darn good job here? Especially when you compare him to the other states?

TC: 7:00- 7:14

**Michael P. DeGrandis:** Whether he's done a good or bad job, whether his policies are right or wrong, isn't relevant. The ultimate question as to whether a disease is a Civil Defense State of Emergency or to the question as to whether he can exercise the general courts police power by issuing his orders.

TC: 7:15 – 7:29

**Hon. Elspeth Cypher:** Related to that, if the legislature did not think he was, they could amend that, but you say he's mistaken. Would you be happier if, say they amended the statute to include the word pandemic? Would that be okay?

TC: 7:30 – 7:44

**Michael P. DeGrandis:** If the legislature amended the statute to include pandemic, uh, that would probably be a signal that the legislature meant for the Civil Defense Act to supersede the Public Health Act in these circumstances. So, yes, but it doesn't provide for that now.

TC: 7:45 – 8:16

**Hon. Elspeth Cypher:** Okay, and one other question on that front, one of your other arguments is about duration. That floods, fires, even the gas explosion was of a limited duration and that this could go on and on and on and on. What if some of those natural disasters did take say nine months maybe we have a nine-month forest fire or we have a chemical explosion that leaves damage. Would they be out? Would we be out of luck, too? Would we have to wait for the legislature to take control of the situation?

TC: 8:17 – 8:22

**Michael P. DeGrandis:** Well, I think the issue there, well, certainly those examples would definitely fit within the Civil Defense Act.

TC: 8:23- 8:26

**Hon. Elspeth Cypher:** But they'd still be of a long duration and you say things of a long duration are not contemplated.

TC: 8:27 – 8:47

**Michael P. DeGrandis:** Things of a long duration, that is, let me try to rephrase it a little bit. It's about the impossibility or the substantial impracticality of the legislature being able to meet. This is supposed to be a bridge. Emergency powers are a bridge from one end to the other to get Massachusetts through crises such as the one that that you're raising here hypothetically.

TC: 8:48 – 8:55

**Hon. Elspeth Cypher:** And so how long is a reasonable amount of time for an emergency?

TC: 8:56- 8:59

**Michael P. DeGrandis:** Certainly, by a case-by-case basis. I don't think you can put a definitive time on it.

TC: 09:00 – 09:15

**Hon. Elspeth Cypher:** All right, now, one other thing and then I'll turn this over to my colleagues. Well, two things. I think Justice Lowy asked you this, do you really think that numerous local health boards can control a pandemic that spreads like this?

TC: 09:16 – 09:23

**Michael P. DeGrandis:** That's not for me to decide. The general court believes that. And the general believed that including smallpox and all other diseases...

TC: 09:24 – 09:27

**Hon. Elspeth Cypher:** So, you're not going to register on that because that's not within your territory, is that correct?

TC: 09:28 – 09:29

**Michael P. DeGrandis:** I'm sorry?

TC: 09:30 – 09:37

**Hon. Elspeth Cypher:** You're not going to tell, you won't say whether you think they could do it because that's not within your authority to make that judgment.

TC: 09:38 – 09:44

**Michael P. DeGrandis:** It's not also not within my competence. I'm not a health care professional like the local boards of health are consistent of healthcare providers.

TC: 09:45 – 10:22

**Hon. Elspeth Cypher:** And then I have one more question and I'll be finished. And that is that, you know we're Commonwealth and when that's defined, it means public welfare, general advantage. And that dates way back to the 15th century. There's all kinds of restrictions we endure, gladly, for the common good. Traffic laws, you have to wear clothes, regulations on certain kinds of business. We don't have total freedom so that we can be protected from one another. Doesn't this pandemic provide a really good example of why that is? That some people have to put up with some restrictions for the greater good.

TC: 10:23 – 10:39

**Michael P. DeGrandis:** Oh, absolutely. And let me make it perfectly clear if I haven't made it clear yet, 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 that they are in fact lawful orders.

TC: 10:40- 10:42

**Hon. Elspeth Cypher:** They just want it to come from the legislature?

TC: 10:43 – 10:53

**Michael P. DeGrandis:** This is an issue of process and what is the character, what is the character of Massachusetts government? Is it a government of laws or a government of men? That's the key question here.

TC: 10:54 – 10:58

**Hon. Frank Gaziano:** We have a question from Justice Kafker and then I believe Justice Lenk after Justice Kafker.

TC: 10:59- 11:23

**Hon. Scott Kafker:** So, I'm trying, I've read both statutes carefully at this point so I'm trying to understand. If we disagree with you that the pandemic is a natural cause, um, were all the governor's actions then justified? Again, I understand you disagree with that point, but if we felt that the pandemic is a natural cause, did he exercise his powers properly?

TC: 11:24 – 11:54

**Michael P. DeGrandis:** Well, so, in that circumstance, I think there's still problems with a number of the orders. It wouldn't be all of the orders. So, if this is not a Civil Defense Emergency, all of the orders fail. If it is a Civil Defense Emergency many of the orders fail. And we have a chart, a graph, attached to our reply brief to identify those where the governor has unlawfully dispensed with the law and violated due process and where he has violated right to assembly.

TC: 11:55- 12:04

**Hon. Scott Kafker:** Give me one example I'm just trying to understand. Again, I understand, if it is a natural cause give me one example where he's exceeded his power.

TC: 12:05 – 12:49

**Michael P. DeGrandis:** I think one example that we used, I was just looking for one here on my screen. I don't see it. But one we used in the briefing was, I believe it's Order 45, the travel ban.

The Public Health Act clearly states that border towns, local boards of health can prevent travelers coming from out-of-state infected areas from traveling through Massachusetts. They can even get a warrant to forcibly quarantine or remove that person from Massachusetts. And so when Governor Baker says, no, no, no, no, now the Civil Defense Act, I've got the power he is obviously supplanting the legislative will that it would be the local boards of health that would control that, and again they are working with the state on this thing it's not that they're completely independent.

TC: 12:50 – 13:16

**Hon. Scott Kafker:** I'd like to switch to the other statute for a second. So, again, the powers here, there are 294 towns and 57 cities in Massachusetts. So your view is that we've got all these different actors dealing with a public health crisis, and that's what is meant to be occurring here? Is that...

TC: 13: 17 – 13:27

**Michael P. DeGrandis:** With coordination, I think the Public Health Act is clear that all this must be coordinated through the Commissioner of Public Health. Indeed, Commissioner Burrell has been doing that. The problem...

TC: 13:28 – 13:35

**Hon. Scott Kafker:** So, if the commissioner were doing what the governor is doing here under the Public Health Act could the commissioner do all of that?

TC: 13:36 – 13:38

**Michael P. DeGrandis:** The commissioner couldn't do all of that. The commissioner could do much of it.

TC: 13:39 – 13:48

**Hon. Scott Kafker:** What could the governor do that the commissioner cannot do under your view?

TC: 13:49 – 14:20

**Michael P. Grandis:** The commissioner couldn't suspend the law. So, the Civil Defense Act allows for suspension, which is different from dispensation with the law, but suspension of the law if this is a legitimate Civil Defense Emergency. The governor, take something different like a hurricane comes through. The governor can suspend the law and say okay all businesses, so everyone's treated equally, all businesses, all churches, all schools everything is closed until this emergency is over. That's not a power that Commissioner Burrell would have with Governor Baker's Public Health Emergency. That's different.

TC: 14:21- 14:26

**Hon. Scott Kafker:** Could the commissioner shut non-essential businesses under your view under the Public Health Act?

TC: 14:27 – 15:01

**Michael P. DeGrandis:** No, I don't believe the commissioner could shut down non-essential businesses because the commissioner wouldn't have the authority to identify what businesses are essential or not. I think the commissioner could perhaps provide guidance to local boards of health for occupancy standards, keep six feet away, in stores people should be wearing masks, and those sorts of things. Commissioner Burrell has also allowed for compounding of hand sanitizer in pharmacies. This is the ordinary course of things when using the Public Health Act to protect people from the infectious disease.

TC: 15:02 – 15:32

**Hon. Scott Kafker:** My last question is trying to distinguish between these two acts. It seems to me that the Civil Defense Act is meant for basically when all hell's breaking loose out there. And the Public Health Act is dealing with, again, we have health problems constantly, we have disease outbreaks constantly, but it's a level of magnitude where these two statutes differ. Is that not correct?

TC: 15:33 – 16:16

**Michael P. DeGrandis:** I think it's correct that there is an element of magnitude to these since the Civil Defense Act is all-encompassing. Governor makes it clear in his briefing, and in that sense, he's correct that he has a tremendous amount of power, not the power to do anything, not the power to dispense with the law, not the power to, obviously, violate constitutional rights, but he does have a lot of power. And that's because the, the statute itself contemplates a very real cataclysm. And that's entirely different from the Public Health Act. Where the Public Health Act contemplates that, yes, there will be epidemics, there are ways to control these and still look out for people's civil liberties. There is a way to do this and, and to do it simultaneously.

TC: 16:17 – 16:18

**Hon. Frank Gaziano:** Justice Lenk, I believe, has a question.

TC: 16:19 – 16:41

**Hon. Barbara Lenk:** I do, I wanted to ask you about legislative history. As to each of these statutes. Do you have anything that you can offer in terms of our statutes? And also in terms of the statutes for the states and the decisions in this regard? I'm sure this is not the only challenge that your organization has brought. Or organizations like yours have brought. So, could you tell me what's going on in other states and what the results have been there?

TC: 16:42 – 19:17

**Michael P. DeGrandis:** Sure. There are very few states that have the same dynamic of a Civil Defense Act and a Public Health Act that are competing. As a matter of fact, just the other day, there was an argument before the Michigan Supreme Court, in which the argument really centered around two separate emergency Acts, and then the interplay with a Public Health Act. The difference was one of those emergency acts allowed the governor to act in the event of infectious disease. So, the dynamic was a bit different because there was true overlap between those statutes. We've seen in, I think it's, it's important to bring up the McCarthy case.

McCarthy against Baker, where, I believe it was district court Judge Woodlock had ruled that Governor Baker's orders closing a gun shops was unconstitutional because it wasn't related to the larger needs of protecting a pandemic. There are a number of other states that have basically given away the farm. Rhode Island is a good example. Rhode Island has a Military Defense Act that allows a governor to, similar to Governor Baker, establish a Civil Defense State of Emergency. But in that Act, the legislature had included the word disease, had



included pandemic, or I should say epidemics, but, of course, that includes pandemics in it as well. And so, it's a bit of a hodgepodge across the country. And so, it varies depending on where you go.

As far as your question regarding statutory history certainly the Civil Defense Act having been enacted in 1950 was really the product of prior war acts and military, uh, military reparation during war. And in fact, there is the one case that we cite, I can't remember the name of it off the top of my head, where, oh, actually it wasn't a case it was an attorney general's opinion that explained that the governor under the prior war act may have the authority to build a bridge to help the war effort in World War II, but the governor wasn't allowed to determine what the scope of that was what was an emergency. He knew that the emergency was World War II.

Um, as far as the Public Health Act is concerned as I mentioned a few moments ago this dates back at least 50 years in the form at which we see it today but it goes back hundreds of years. I mean Massachusetts has dealt with smallpox, it's dealt with a number of diseases.

TC: 19:18 – 19:25

**Hon. Barbara Lenk:** Nine percent of that statue you're saying that's percentage dealt with, but it hasn't been pursuant to statute the statute was an accurate only 50 years ago you said right?

TC: 19:26 – 19:27

**Michael P. DeGrandis:** I am afraid I don't understand.

TC: 19:28 – 19:30

**Hon. Barbara Lenk:** The Civil Defense Act. When was the Civil Defense Act enacted?

TC: 19:31 – 19:32

**Michael P. DeGrandis:** 1950. That's 1950.

TC: 19:33 – 19:35

**Hon. Barbara Lenk:** When was the other one enacted?

TC: 19:36 – 19:41

**Michael P. DeGrandis:** Well about, it depends on how you measure it, but about 1903 to 1909. And it really dates back to the 1800s.

TC: 19:42 – 19:43

**Hon. Barbara Lenk:** You have a statute that dates back to the 1800s?

TC: 19:44 – 20:00

**Michael P. DeGrandis:** There are provisions that have been adapted and modified back to the 1800s to bring it up to, that's why I choose to say it was about 1909, because that's the modern approach that we see and how it was codified in Massachusetts general laws.

TC: 20:01 – 20:07

**Hon. Barbara Lenk:** You see these statutes as being in conflict with each other or one being narrower or broader than the other, or what?

TC: 20:08 – 20:49

**Michael P. DeGrandis:** Only the governor's interpretation here brings them into disharmony, otherwise they're perfectly harmonized. The Civil Defense Act, there are only seven triggering events, seven triggering cataclysms. Whereas the Public Health Act is a general law meant to protect Massachusetts health and safety at all times, which is why we have people, health care professionals on the ground, in their communities who understand their communities needs best of all, and who can react to changing environments in real time. Instead of having to wait the delay of, a certainly a single person, the governor trying to adapt as a dynamic disease progresses through society.

TC: 20:51 – 20:52

**Hon. Frank Gaziano:** Justice Cypher?

TC: 20:53 – 21:11

**Hon. Elspeth Cypher:** Yeah, um, I just have a few more follow-up questions after listening to some of your answers. You spoke, I think it was an answer to Justice Kafker's question or maybe it was Justice Lenk about Rhode Island and you were comparing their statute. And it sounds like their statute is broader than ours is that right?

TC: 21:12 – 21:18

**Michael P. DeGrandis:** That's right, they had amended it. I forget exactly when, a handful of years ago, I think within the last five years or so.

TC: 21:19 – 21:20

**Hon. Elspeth Cypher:** And it includes disease?

TC: 21:21 – 21:22

**Michael P. DeGrandis:** Include disease, right. It did not...

TC: 21:22 – 21:27

**Hon. Elspeth Cypher:** In response to that you referred to that as giving away the farm, what that means?

TC: 21:28 – 21:47

**Michael P. DeGrandis:** In other words, I would question whether any legislature in any republican form of government with any semblance of separation of powers can divest itself of its core legislative responsibility to legislate the police power. The health, safety welfare...

TC: 21:48 – 21:58

**Hon. Elspeth Cypher:** So, actually the problem then is not that the statute that we have doesn't say disease it's that it's a delegation of police power that's too much in your mind.

TC: 21:59 – 22:04

**Michael P. DeGrandis:** It's both this statute doesn't say disease. And even if it did...

TC: 22:05 – 22:17

**Hon. Elspeth Cypher:** Even if it did it'd be too much. All right, suppose we agree with you, suppose we say, you know what you're right. This is the legislature's prerogative. And then they don't do anything what happens then?

TC: 22:18 – 22:32

**Michael P. DeGrandis:** Well, then it seems that the legislature would be communicating that, hey, we like what the, I think a hundred and I forget which legislature, 128th or whatever it was, we like what the legislatures had done. And by the way, consistently amend the Public Health Act throughout time.

TC: 22:33 – 22:49

**Hon. Elspeth Cypher:** Going back to that then, the Attorney General, General Healey's office, has argued the legislature has demonstrated its approval of the governor's interpretation of the CDA by funding the initiatives and by not curtailing the power. Isn't that the same thing, point you just made?

TC: 22:50 – 23:09

**Michael P. DeGrandis:** I think that's related to the ratification argument and it's not, well, maybe I misunderstand the question. So, if the argument is the legislature has indicated its approval, and that's not the role of the legislature, the legislature, and by the way

TC: 23:10 – 23:16

**Hon. Elspeth Cypher:** It's their role to delegate and they can decide what they mean by a statute, right?

TC: 23:17 – 23:25

**Michael P. DeGrandis:** They certainly can and this court's been clear that the delegation must be limited to filling in details. It can't be the establishing of policy.

TC: 23:26 – 23:32

**Hon. Elspeth Cypher:** All right, so, if the legislature thought that the governor wasn't filling in the details right, wouldn't they do something?

TC: 23:33 – 24:02

**Michael P. DeGrandis:** Well, I would like to think they would do something, but they might not do anything. The governor has taken control and he's turned the government upside down. At this point, the legislature is left to approve or disapprove of the governor's policy choices.

That's not how it's supposed to work. The governor is merely supposed to execute the policy choices of the legislature. And for the legislature to make a change, the legislature would also have to have a veto proof majority in order to do so. That is standing the government on its head. That's not a republican form of government.

TC: 24:03 – 24:05

**Hon. Elspeth Cypher:** I think I understand your argument.

TC: 24:05 – 24:08

**Hon. Frank Gaziano:** I think we have a question from Justice Lowy, then Justice Kafker.

TC: 24:09 – 25:37

**Hon. David Lowy:** Thank you Justice Gaziano. I just want to turn to the constitutional issues for a moment and obviously we're looking at Jacobson versus Massachusetts and we're where, uh, in that situation one of the points that you make is that the smallpox vaccine back in 1905 was pursuant to legislation and here the governor is acting, uh, you say without legislative authority and so that's a distinction from Jacobson, but in South Bay Pentecostal Church with justice for Chief Justice Roberts's concurrence when he was looking at the constitutional issue involving a limitation on how many people could worship at the church he was addressing an executive order. So, if we're going to look at legislation executive order here, we have a situation where at best you're, you're saying that the governor is acting beyond the delegation of the, uh, of the, uh, Civil Defense Act. So that's a long way of saying, how can you put so much weight on your constitutional analysis in Jacobson and reconcile with Chief Justice Roberts's concurrence?

TC: 25:38 – 26:39

**Michael P. DeGrandis:** Well because it's still the, the governor's argument that, uh, there are some lesser rights available to people during time pandemic is simply wrong. And so, I think the way we reconcile Jacobson with Chief Justice Robert's opinion on the matter is that Jacobson still, still require the government to meet some sort of level of constitutional protections.

There's, there's got to be some indicia of, of a defense of civil liberties available and so it doesn't necessarily mean that in, in having due process there must be a hearing where someone

may be vocally heard but there's got to be some sort of process here. I don't think, unless I, I don't remember, uh, the, uh, Chief Justice Roberts opinion correctly there wasn't an issue where the governor was simply had his own counsel and the executive then issued an order and that there was no process whatsoever to, to seek reclassification...

TC: 26:40 – 27:32

**Hon. David Lowy:** I'm not sure I agree with you but I understand your procedural due process argument in that regard I, I understand and maybe we'll have time to get to it but, but I'm not talking about the procedure due process analysis. I'm talking about the substantive due process analysis and looking at whether it's strict scrutiny or whether it's rational basis. We see that Jacobson, uh, was in perhaps similar circumstances okay and you've got your, your argument to differentiate Jacobson involving well that's the governor acting as opposed to a legislative mandate and what I'm saying is in *Pentecostal Church*, Chief Justice Robertson's concurrence, uh, is an executive order so I'm not asking at all in this question about procedural due process.

TC: 27:33 – 28:37

**Michael P. DeGrandis:** Okay I'm, I'm sorry I misunderstood so Chief Justice Roberts wasn't examining article 10 of the Declaration of Rights that requires a standing law. It says that only standing law can regulate and burden due process rights and so Governor Baker's orders can't be considered standing law. Even Governor Baker wouldn't argue that they are standing law they are executive orders and because they're executive orders, and again they don't have any of the features of due process that you'd expect with a standing law, we don't have the confidence unlike a standing law where I or any one of the petitioners can reach out to a legislator to, to try to influence law. Whether that works or not at least we understand where that law comes from and so perhaps in those circumstances substantive due process deserves lesser scrutiny, perhaps in those circumstances but there's been absolutely no process here whatsoever similar to that to, similar to the creation of a standing law and that's ultimately the problem and ultimately why I think Governor Baker has to be held to it to a strict scrutiny standard.

TC: 28:38 – 28:39

**Hon. Frank Gaziano:** Justice Kafker.

TC: 28:40 – 29:37

**Hon. Scott Kafker:** Again, it all assumes that the legislature doesn't think the pandemic is a natural cause right, because the legislature if it does think the pandemic is a natural cause, has expressly authorized the governor to act. Also, it reserves in Section 22 the ability to withdraw the power and it's not done that. It's also has its continuous ability to pass laws which it's done for the elections and other things during the crisis so again, doesn't this all hinge on the fact that you don't think a pandemic is a natural cause under the statute? Otherwise the governor's actions are clearly provided with legislative authorization and also as Justice Cypher says confirmed by the legislative inaction or its responses so far.

TC: 29:38 – 29:54

**Michael P. DeGrandis:** Well certainly the first step in the constitutional analysis of our separation of powers argument is yes statutory interpretation. The disease can't be another natural cause because then there's no limitation then every natural cause presents a Civil Defense State of Emergency potential...

TC: 29:55 – 30:11

**Hon. Scott Kafker:** Every natural cause, every natural cause that's a natural disaster basically. Um, it's not every time someone gets sick in Massachusetts it's, it's a pandemic that threatens, threatens our entire way of life.

TC: 30:12 – 30:28

**Michael P. DeGrandis:** And, and the Public Health Act is there to prevent that and again to, to I must stress this that it's not the job of the legislature to approve or disapprove of what the governor's policy the governor's policy making is and the governor's choice to use the legislation.

TC: 30:29 – 30:36

**Hon. Elspeth Cypher:** Well counsel you call it policy making, but I think Justice Kafker might call it interpretation or application. It's a, it's a little bit different isn't it?

TC: 30:37 – 31:25

**Michael P. DeGrandis:** I, I don't, I don't see the difference since I mean just the, the, looking at essential and non-essential businesses making that judgment these are, these were lawful businesses before mar, well March 10th was a declaration and then a couple weeks later was, uh, order number 13 but you know that is the responsibility of the legislature to take that up.

The legislature can make those choices the governor may not. That is a clear policy choice deciding who is or is not essential and in the meantime not taking into consideration any, any possible exceptions, any way for any of the petitioners to ask to be re-categorized, ask for appeals, to ask for waivers, or anything of the sort if the legislature was involved they would be able to influence their legislators.

TC: 31:26 – 31:36

**Hon. Elspeth Cypher:** I thought he had a lot of boards from representatives of all the industries and the interests and the hospitals and the schools and the in the businesses advising him?

TC: 31:37 – 31:43

**Michael P. DeGrandis:** These are not elected representatives of the people I'm sure that those, that those to their elected organizations...

TC: 31:44 – 31:47

**Hon. Elspeth Cypher:** People could still go to their elected representative, though can't they?

TC: 31:48 – 31:49

**Michael P. DeGrandis:** They certainly can and they have been.

TC: 31:50 – 31:59

**Hon. Frank Gaziano:** Mr. DeGrandis I, I take your point that it's actually our job to determine whether or not the governor's orders exceed lawful authority correct?

TC: 32:00 – 32:01

**Michael P. DeGrandis:** Correct.

TC: 32:02 – 32:33

**Hon. Frank Gaziano:** All right, um, but as Justice Kafka indicates and I'd like to hear your answer to this, uh, maybe again as he indicates if we determine using tools of statutory interpretation that the Civil Defense Act natural causes includes the pandemic the fact that there's another statute doesn't bother interpretation in essence if there were two statutes the governor could have used and he picked one that's not unlawful, correct?

TC: 32:34 – 32:42

**Michael P. DeGrandis:** Uh, well that would, that would be correct although it should inform your decision as to whether he made the right decision in the first place.

TC: 32:43 – 33:14

**Hon. Frank Gaziano:** That's policy. The statutory intent legislative intent policy that you posit is that the, the Public Health Act is, is properly the vehicle to address a pandemic right if we don't agree with you and we think that the natural causes language in the in the prior act controls it's up to the governor if both are applicable he can pick either correct.

TC: 33:14 – 33:28

**Michael P. DeGrandis:** I, I don't think so, I think to the extent that so let's, let's take that hypothetical whether, not exactly let's assume for the sake of argument, uh, that you decide that he that either one could work well to the extent that then...

TC: 33:29 – 33:33

**Hon. Frank Gaziano:** Well either one is, either one is lawful right under either one, correct?

TC: 33:34 – 34:16

**Michael P. DeGrandis:** Right so let's say lawful under either one the, the civil defense component of the Civil Defense Act is the only portion that he could use with respect to civil defense issues. He would still need to, to effectuate the legislature's will with respect to the Public Health Act in getting Massachusetts healthy again in monitoring and controlling the spread of the disease.

I, I don't know where that dividing line would come in since it strikes me that these are two profoundly different acts, but there would definitely be a dividing line there because there

could, there could be a blended circumstance not in the, not in this particular case but in another type of disaster perhaps.

TC: 34:16 – 34:24

**Hon. Frank Gaziano:** Thank you so let me just make sure Justice Kafker is done with his question and I know Justice Lenk hasn't had a question. Are you all set Justice Kafker? Justice Lenk?

TC: 34:25 – 34:26

**Hon. Barbara Lenk:** I'm all set thank you okay.

TC: 34:27 – 34:28

**Hon. Frank Gaziano:** Any further questions for Mr. DeGrandis?

TC: 34:29 – 34:29

**Hon Barbara Lenk:** No. Thank you.

TC: 34:30 – 34:31

**Hon. Frank Gaziano:** Thank you council.

TC: 34:31 – 34:32

**Michael P. DeGrandis:** Thank you.

TC: 34:33 – 34:34

**Hon. Frank Gaziano:** Mr. Martland.

TC: 34:34 – 35:34

**Doug Martland:** Good morning may it please the Court Douglas Martland assistant attorney general for the governor, uh, if I may make one brief response before addressing your questions. Uh, in relation to Mr. DeGrandis' argument, uh, here the governor is at appropriately acting within the bounds of his authority delegated to him.

In the act there are three limiting principles the first is judicial review all actions remain subject to judicial review for under an arbitrary and capricious standard. The second is the act itself the declaration of emergency must fit within the statutory definition of broad definition and each order must reasonably relate to the emergency and we can talk about in a few minutes why that's the case here. Third we look to the legislature whether there's been approval or disapproval by the legislature and again we can talk about, uh, whether there has been here but I think the, the facts are clear that there has been a repeated confirmation ratification and appropriation by the legislature of the governor's actions here...



TC: 35:35 – 36:51

**Hon. David Lowy:** But, but number one on your list, number one your list always exists in every legislation, so that doesn't answer the question and, uh, and as Justice Gaziano just pointed out number three on your list doesn't help because it's not for the legislature to affirm the constitutionality of the statute or the interpretation of the statute.

So it really, it's really about legislative intent from the Civil Defense Act and I guess the question is if, if there's going to be this delegation of, of this type of enormous power, um, shouldn't the, uh, authorization, uh, in the statutory language, language be clearer than this as opposed to, uh, in section five in subsection five we've got floods we've got earthquakes and, um, all of a sudden fires and then we have uh other natural causes. Isn't other natural causes in any way limited by the other three circumstances? Again, I'll repeat, especially when we're dealing with an enormous, enormous delegation of power.

TC: 36:52 – 37:18

**Doug Martland:** I understand that your Honor and the, the only commonality between the various disasters and catastrophes that are listed in that phrase is that they are disasters of massive proportion that dramatically affect the people of the commonwealth, and the pandemic clearly falls within that. It arises from a natural cause, in fact, that's undisputed in this case and it is causing a disaster of massive proportions within the commonwealth and across the country.

TC: 37:19 – 37:20

**Hon. Frank Gaziano:** Justice Lenk.

TC: 37:21 – 37:45

**Barbara Lenk:** What about the what about the, uh, flu pandemic in 1918? Was that not a massive, um, public disaster? Was that not dealt with under the civil that was not dealt with under the civil side of it of course that didn't exist at the time but, uh, but the question is then what part of the civil defense act would it, uh, come under the other causes natural causes?

TC: 37:46 – 37:56

**Doug Martland:** Yes, your Honor we, we certainly agree that, uh, the 1918 flu epidemic or pandemic if the Civil Defense Act had existed at that time would clearly fall under the other natural causes' language.

TC: 37:57 – 38:01

**Hon. Barbara Lenk:** How about how about the polio, how about polio epidemic.

TC: 38:02 – 38:19

**Doug Martland:** Uh, I think there are several factors here that are highly relevant to distinguishing the two your Honor. Uh, the first is that, uh, both, in both the 1918 epidemic and

again today, uh, we're dealing with a novel, uh, virus to which no playbook, uh, exists for how to combat it. And secondly...

TC: 38:20 – 38:23

**Barbara Lenk:** Well with polio, that was true with polio as well wasn't it?

TC: 38:24 – 38:44

**Doug Martland:** To a degree your Honor yes, but it was not nearly as highly contagious it was not overwhelming public health systems it was not causing the scale of deaths and destruction that it is, uh, in this instance and it was certainly reasonable uh for the governor to make a decision that it falls within the other natural causes uh language. Right...

TC: 38:45 – 38:49

**Barbara Lenk:** In polio he did not, did he?

TC: 38:50 – 39:02

**Doug Martland:** I do not believe so, but prior governor's decisions, uh, whether or not to act under the Civil Defense Act certainly shouldn't determine whether this particular circumstance falls within the civil defense act.

TC: 39:03 – 39:07

**Hon. Frank Gaziano:** Well let me just make let me just make sure Justice Lowy finished his question.

TC: 39:08 – 39:14

**Hon. David Lowy:** Um, well I, I have some constitutional questions to ask but I'm going to wait until the stats turn the interpretation is done.

TC: 39:15 – 39:19

**Hon. Frank Gaziano:** Okay so we have Justice Cypher then Justice Kafker in order.

TC: 39:20 – 39:56

**Hon. Elspeth Cypher:** Okay with regard to, thank you, with regard to, um, the statutory interpretation and, uh, the examples justice Lenk raise of the flu pandemic and the polio pandemic. Those, um, one, one occurred definitely before they were before the Civil Defense Act was passed but now considering where we are today with regard to international air travel the speed of automobiles how fast everybody's moving around do you think that the statute needs to be amended to take it into account modern, the modern situation?

TC: 39:57- 40:17

**Doug Martland:** Your, your Honor the statute does not need to be amended for the governor to have authority, uh, in this instance, uh, again this is a disease that a virus that arises from a

natural cause that is causing, uh, destruction and damage on the scale of the other disasters listed, uh, in the phrase fires, floods, and earthquakes.

TC: 40:18 – 40:36

**Hon. Elspeth Cypher:** May I ask one, one follow-up on the statutory Interpretation. Your brother had argued that there should be a limited duration involved, um, in this what would, where would you, what do you say to that and what do you think is a reasonable amount of, of time for handling an emergency?

TC: 40:37 – 41:30

**Doug Martland:** I think your Honor that it depends on the circumstances. Uh, here we have, if you look at the broader statute as a whole we have the occlusion of the term war in the statute which is inherently, uh, a long lasting conflict and certainly we can draw the conclusion from that that the legislature did not intend duration, in the potential duration of a pandemic or of a event to determine whether or not there should be a Civil Defense Emergency.

And again, I will come back to the limiting principles here that during the course of any Civil Defense Emergency it of course remains subject to arbitrary and capricious review of whether the emergency remains ongoing but what we shouldn't be doing is using that duration to cut off an emergency that we're clearly in the middle of right now.

TC: 41:30 – 41:32

**Hon. Frank Gaziano:** Okay Justice Kafker.

TC: 41:33 – 42:35

**Hon. Scott Kafker:** And my questions are the same, how we do the legal analysis under the stack, they follow up on Justice Cypher's last questions, how we evaluate the governor's powers over time. Um, I mean we're, we started in March it's October, you know we're working towards October. The legislature hasn't changed its response but does the governor's power remain sort of it though at that level of deference as we move you know later into the process a year or two? If we don't get a vaccine for two years do, we how do we analyze that legally I, I understand we there's it's factually dependent but does, because the statute clearly has an emergency time component to it. How does are there cases guiding us on how to deal with the passage of time?

TC: 42:36 – 43:29

**Doug Martland:** Uh, certainly there are your Honor, I point you to two things one in the statute itself and then a specific case from this court. In the statute itself you can look at Section 22 the sunset clause, when that was originally enacted by the legislature there was a two-year limitation on the operation of the Civil Defense Act. Over the next several years the legislature removed that, again indicating that it did not intend duration to be the limiting factor of the emergency.

I'd also point this court to the director of civil defense case from 1977 in there the court was evaluating a 19, set or excuse me a 1962 executive order so at the time of the decision it was 15 years old, and the court didn't blink at the age of the executive order and it's continuing operation and two reasons for that and this circles back to...

TC: 43:30 – 43:39

**Hon. Scott Kafker:** What did that executive order empower the governor to do? Is it, I take it it's nothing like this level of authorization, is it?

TC: 43:40 – 44:44

**Doug Martland:** Certainly, in a, in a comparison to scale that is correct your Honor. Um, but in that, in that instance, uh, the Court was untroubled by the duration and looked specifically to the legislature's actions that it had taken in relation to that order and there the legislature had practically ratified the governor's actions in two separate ways. First it had confirmed it by continuing to provide the funding for the various employees and second it had appropriated money to do that. And again, that's exactly what we have here, we have the legislature confirming and ratifying the governor's decision in a host of legislation that's cited in our brief that includes the declaration of emergency being a contingency for the operation of the statute. We also have the legislature appropriating over a billion dollars in funds to the commonwealth's COVID relief response and if the legislature had any indication of disapproving certainly this Court could conclude that they would have done something more than that.

TC: 44:45- 44:56

**Hon. Frank Gaziano:** Delegation is a legislative intent issue but ultimately as, as, as I said previously it's our call as to whether or not this is lawful, correct?

TC: 44:57 – 44:59

**Doug Martland:** We certainly agree that this question is subject to judicial review you're Honor.

TC: 45:00 – 45:18

**Hon. Frank Gaziano:** Okay let me ask you a different question. Can you address the whole concept of constitutional winners and losers, um, and more specifically the impact of just the Judge Woodward's Second Amendment decision in the federal court?

TC: 45:19 – 46:15

**Doug Martland:** Uh, I, I think this court should look closely your Honor at both Jacobson and the recent federal decisions that interpret, uh, Jacobson, uh, as applied to mod, the, this current pandemic and governor's orders in those cases. Uh, those, those cases make quite clear that the court's role here is to approach any order with broad deference. As to, uh, the governor's interpretation, and the reason we do that, in this Court, uh, specifically talked about that in slightly different context in the American cancer case is because the governor is in the best

position with the most contemporaneous knowledge to deal with this emergency and the governor has all the information, information that the legislature just doesn't have at its fingertips, and that, uh, Chief Justice Roberts said that in his concurrence in *South Bay* and it's been a theme that's been repeated throughout all of these recent federal court's decisions.

TC: 46:16 – 46:17

**Hon. Frank Gaziano:** Uh, Justice Lowy.

TC: 46:18 – 47:36

**Hon. David Lowy:** Um, yes along those uh along those lines I, I want to ask you about order number 46, which as you know deals with the exemption for outdoor religious gatherings and for protests and the petitioners are making the point here that that classification that exemption seems to be arbitrary. And also, that, um, there seems to be a distinction that may raise issues about whether or not there's an expressive content concern with that exemption for, uh, protest and, and religious worship and, uh, and even putting aside, uh, whether we're dealing with, uh, with strict scrutiny or, or a rational basis we're dealing with a right to assemble, um, and we're dealing with an issue where we have concerns about broad or even under inclusive. Is there a problem in time place and manner with, um, order 46 that might be different than some of the other orders here?

TC: 47:37 – 48:18

**Doug Martland:** There is no problem with order 46 your Honor, uh, just like all of the other, uh, orders its a, it's a content neutral generally applicable order that applies to everybody. Uh, what, what the governor has clearly done here, uh, is try to identify specific circumstances and then address the public health, uh, implications of those circumstances and the orders leave ample opportunities for alternative avenues of communication, and they have also attempted to accommodate as best that can be done during this pandemic, uh, the, the core First Amendment rights of all of the people of the commonwealth.

TC: 48:19 – 48:20

**Hon. Frank Gaziano:** Justice Lenk.

TC: 48:20 – 48:21

**Hon. Barbara Lenk:** I didn't have anything, thank you.

TC: 48:21- 48:28

**Hon. Frank Gaziano:** Oh, I'm sorry, I thought you raised your hand, I'm sorry. Any further questions, Justice Lowey.

TC: 48:29 – 49:21

**Hon. David Lowey:** Uh, yes could you, could you just address, uh, uh, the issue you, you say that all of the harms that the petitioners raise they're too general they're not specific enough. Um I, I don't mean to point out the one that is the most specific in response to that argument but the owner of the tanning salon lays out, uh, with some precision what, what, what the harm is that we need a narrow tailoring and a gov, and a, um, an appropriate government interest. We obviously have the appropriate government, government interest I didn't think that's contested but as far as, um, narrow tailoring and, and harm at least addressed that one, uh, plaintiff.

TC: 49:22 – 50:21

**Doug Martland:** Uh, certainly your Honor. Uh, two responses the first I, I believe that we acknowledge in a footnote in our brief that a, a plaintiff like that who has alleged specific harm, uh, certainly has standing, uh, the first part of your question. Answering the second part of your question, uh, both Jacobson and Chief Justice Roberts' decision in South Bay, uh, make clear that these difficult and challenging line drawing decisions are best committed to the executive official who's publicly accountable to the people. As opposed to courts that should be giving broad deference to these decisions, um, and within that framework it was perfectly permissible here for the governor to make a difficult line drawing decision as what entities should be open during what phase and certainly the, uh, the, the plaintiffs or the petitioners here, uh, can challenge any of these individual determinations for an, on an arbitrary and capricious standard, uh, you know subject to judicial review.

TC: 50:22 – 50:23

**Hon. Frank Gaziano:** Justice Cypher.

TC: 50:24 – 50:25

**Hon. Elspeth Cypher:** Yeah oh okay, I'm sorry me?

TC: 50:26 – 50:27

**Hon. Frank Gaziano:** Justice Cypher and then Justice Lenk.

TC: 50:28 – 50:58

**Hon. Elspeth Cypher:** Okay thank you, um, I'd like to just have you address, uh, Attorney Martland, uh, your brother's argument that actually the, the local communities are better placed to regulate their local businesses through their boards of health because they know their communities. For example, if somebody lives in a very rural area the needs might be different than somebody who lives in a more urban area and that it's actually the local boards of health and the local leaders of the community who are better in touch with that.

TC: 50:59 – 51:37

**Doug Martland:** Uh, certainly your honor and the, the answer to that question is that in this instance the commonwealth needed every tool that it had available to it to deal with this pandemic. Certainly, the local boards of health represent one level, but they cannot provide the coordinated state level response that is necessary to combat the pandemic in Massachusetts.

Um, their authority does not extend, uh, too many of the factors including expanding healthcare capacity, uh, regulating certain licenses and things like that that are absolutely essential for the commonwealth's response.

TC: 51:38 – 51:39

**Hon. Frank Gaziano:** Justice Lenk.

TC: 51:40 – 51:50

**Hon. Barbara Lenk:** Okay I just wanted to make sure that I understood the governor's position here, which is that I gather that he felt that he could have used either of these statutes in order to uh to uh act?

TC: 51:50 – 51:50

**Doug Martland:** Uh, the governor's position is that executing us under his authority under both statutes was necessary because of the, uh, the pandemic itself in all of them...

TC: 52:00 – 52:03

**Hon. Barbara Lenk:** So, he has it, he has exercised and also under the other statute?

TC: 52:04 – 52:29

**Doug Martland:** Yes, yes if you look at the declaration of emergency from March 10<sup>th</sup>, uh, he makes a declaration, the declaration under both the Civil Defense Act and general laws chapter 17 section 2a, uh, in the governor's position is that all of that authority was essential because the commissioner of public health authority does not extend, uh, to far enough to respond to the pandemic.

TC: 52:30 – 52:33

**Hon. Frank Gaziano:**

Okay any further questions for Mr. uh, Justice Lowey.

TC: 52:34 – 53:28

**Hon. David Lowey:** Just one last question. I, I think, uh, the, the petitioner's main point is that they believe that they, uh, the governor is picking winners and, and losers here. And that putting aside whether or not the legislative mandate's available and one of the examples has to do with, for instance, well how do you distinguish between the risk of, of the pandemic in an arcade as opposed to a casino and what's, what's the rationale for something like that that um allows one person to, to pick winners and losers? What's the response to a constitutional argument that is just it's just arbitrary and it's just drawing lines with no, uh, rational basis?

TC: 53:29 – 54:32

**Doug Martland:** Uh well, well certainly and there's, there's two answers to this question in your Honor, uh, the, the first answer is that the line drawing here was not arbitrary. Casinos are highly regulated with well, uh, by the state commission, uh, they're, they're well-resourced and they're

in a position both with cameras and security to, to attempt to ensure the public health of their patron. There are also, uh, only three casinos across the commonwealth and they're in relatively new buildings by comparisons there are a host of arcades across the commonwealth they are generally in poorly ventilated buildings and there is no state oversight commission for arcades to impose any type of workplace sector regulations, which we've seen the governor here established by regular or the state established by regulation.

The second answer your Honor is that in order 50 which was issued yesterday afternoon, uh, the governor moved up arcades, uh, into phase three and they're going to be able to open I believe on September 17<sup>th</sup>, uh, once the workplace or the sector specific standards are in place for our kid.

TC: 54:33 – 54:34

**Hon. Frank Gaziano:** Justice Kafker.

TC: 54:35 – 55:07

**Hon. Scott Kafker:** There's a no damages provision right under the Civil Defense Act right? So, the governor has these terrible choices he has to make, um, here, uh, but there's no way to compete and, and we owe him I, I take it as you say deference on that decision making but some of the decisions are gonna not be a hundred percent correct right but there's no way to compensate anyone for that right?

TC: 55:08 – 55:09

**Doug Martland:** That's unfortunately correct your Honor, yes.

TC: 55:09 – 55:26

**Hon. Scott Kafker:** That's the really difficult part of this, that you know as Justice Cypher began there are a lot, we're all in this together but some people are suffering much more than others and there's no way to correct that right?

TC: 55:27 – 55:50

**Doug Martland:** Well I, I think that's a situation your Honor where you have to look to the commonwealth's broader response to the pandemic. One, one of the, uh, statutes that the legislature passed during this was the expansion of unemployment insurance and certainly, uh, that is you know account for in part the effects of what what's happening, uh, in relation to the pandemic.

TC: 55:51 – 55:56

**Hon. Frank Gaziano:** Thank you. Any further questions, any further questions? Thank you, Mr. Martland.

TC: 55:56 – 55:57

**Doug Martland:** Thank you.