SUPREME COURT OF NEW JERSEY

DOCKET NO. 086160

CHARLES KRAVITZ, DAWN JOHANSON-KRAVITZ, and LITTLE HARRY'S LLC; MARGARITA JOHNSON, JOHN JOHNSON, and TWO BEARS PROPERTY MANAGEMENT, *Appellants-Petitioners*, v. PHILIP D. MURPHY, in his official capacity as Governor of New Jersey; ANDREW J. BRUCK, in his official capacity as Acting New Jersey Attorney General; and JUDITH M. PERSICHILLI, in her official capacity as Commissioner of the New Jersey Department of Health, *Respondents.*	A Petition for Certification from the July 20, 2021, Judgment of the SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-1584-20 Sat Below: Hon. Carmen Messano, P.J.A.D. Hon. Richard S. Hoffman, J.A.D. Hon. Morris G. Smith, J.S.C.

REPLY IN SUPPORT OF PETITION FOR CERTIFICATION OF APPELLANTS-PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THIS PETITION IS NOT MOOT 1

II. THIS PETITION IS OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S ATTENTION 3

III. THE COURT SHOULD GRANT CERTIFICATION BECAUSE THE APPELLATE DIVISION ERRED WHEN IT UPHELD EO 128 6

A. EO 128 Is Not a Valid Exercise of the Governor's Emergency Powers Under the DCA 6

B. Separation of Powers and the Nondelegation Doctrine Apply Even in Times of "Widespread Economic Emergency" 7

C. EO 128 Substantially Impaired Home Providers' Contractual Rights in Violation of the Contracts Clause 9

CONCLUSION 10

CERTIFICATION 11

TABLE OF AUTHORITIES

Cases

Chase Manhattan Bank v. Josephson, 135 N.J. 209 (1994)..... 4
Cnty. of Gloucester v. State, 132 N.J. 141 (1993)..... 5
Commc'ns Workers of Am. v. Christie, 413 N.J. Super. 229 (App. Div. 2010) 8
Matter of J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101 (1988) 3
Melendez v. City of New York, No. 20-4238-cv, 2021 U.S. App. LEXIS 32327 (2d Cir. Oct. 28, 2021) 9, 10
Worthington v. Fauver, 88 N.J. 183 (1982)..... 1, 7

Regulations

N.J. Exec. Order 128 (Apr. 24, 2020)..... 1
N.J. Exec. Order 244 (June 4, 2021)..... 5

INTRODUCTION

The petition asks this Court to define the boundaries of the Governor's powers under the Disaster Control Act ("DCA") which, contrary to the Appellate Division's analysis, "are not without limit." Worthington v. Fauver, 88 N.J. 183, 201 (1982). This case is about important fundamental limitations placed on executive power by and through the New Jersey Constitution. These limitations exist by operation of the separation of powers as delineated by the Constitution, the nondelegation principle, and the Contracts Clause. The Governor's attempt to characterize the petition as "unimportant" signals his contempt for any limits on his powers under the Constitution or the DCA.

I. THIS PETITION IS NOT MOOT

This case is not moot. First, by its terms, Executive Order 128 permanently nullified the express terms of countless residential leases in New Jersey. See N.J. Exec. Order 128 (Apr. 24, 2020); (Aa7-20). The Kravitzes' Glassboro Lease, for instance, explicitly prohibited the Rowan Tenants from using their security deposit for payment of rent and permitted the Kravitzes to deduct for damage to the property. (Aa11). But EO 128 nullified those provisions and allowed the Rowan Tenants to demand that the Kravitzes apply the security deposit toward unpaid rent. (Aa50-52). Shortly thereafter, Mr. Kravitz discovered that they had caused $1,854.94 in damage, which would have been covered by the

$2,000 security deposit for which they contracted. To date, the Kravitzes still have not been able to track down their former tenants to recover funds used to repair their damaged property.[1]

Second, the terms of EO 128 keep the order's effects in place for at least six months after EO 128 expired on July 4. In addition to permanently altering the terms of any current lease, EO 128 continues to apply even if the contracting parties renew the lease—this harm does not end until at least December 4, 2021. The Respondents readily admit that some housing providers are still affected after that date. See Resp. Br. at 9.

Third, EO 128 has permanently diminished the value of Petitioners' leases. (Ab47-48; Ar15). According to the Appellate Division, because the Security Deposit Act ("SDA") exists and regulates some aspect of the landlord-tenant relationship, Petitioners should have reasonably expected that the State's response to a once-in-a-century pandemic would be to nullify their contractual right to a security deposit. The Court did not even consider that the value of the leases was diminished, because it wrongly determined that the fact that they were regulated in some

[1] Respondents' attempt to frame Petitioners as unwilling "to go through litigation" ignores the fact that the tenants cannot be found, and the money will likely never be recovered. See Resp. Br. at 18. Respondents also ignore the fact that it is EO 128 that emboldened the tenants to convert their security deposit to rent, despite their contractual agreement to the contrary.

way was enough to establish that the encroachment did not violate the Contracts Clause.

Requiring a security deposit——typically an amount worth 12.5% of a year-long lease's value——allows housing providers to mitigate the risk of leasing their private property to a stranger. Without the ability to rely on a security deposit, housing providers will have to mitigate that risk in other ways, including by raising their monthly rent or exiting the housing market entirely. Or housing providers may decide that leasing residential property in New Jersey is no longer worth the risk and choose to invest elsewhere, it will limit the housing supply. Both these alternatives will continue to harm housing providers and tenants alike. This perpetual harm of EO 128, and the Governor's claimed authority to issue that order, will remain unless this Court grants the petition and declares that his actions were unlawful.

II. THIS PETITION IS OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S ATTENTION

Even if this Court could reasonably determine that this case is moot—which it should not—this Court should still grant review. This Court "will rule on such [moot] matters where they are of substantial importance and are capable of repetition yet evade review." Matter of J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101, 104-05 (1988). This Court has regularly granted review when the questions presented are of "public importance." Chase Manhattan

Bank v. Josephson, 135 N.J. 209, 214 (1994) (granting review even though "the parties have resolved the underlying dispute"). This petition clearly falls within that exact category.

Identifying the limits of the Governor's emergency powers under the DCA (and the Constitution) and determining whether the Contracts Clause protects residential leases—are of substantial importance and affect the public beyond just the Petitioners. Indeed, few issues are more important than the fundamental and structural constitutional issues in this case.

The Appellate Division failed to consider that EO 128 repeals or amends the SDA—–a fact the Respondents readily admit. Resp. Br. at 5. Whatever powers the DCA vests in the Governor, it fails to grant the Governor the ability to contradict already established, duly enacted laws. For example, the SDA provisions that EO 128 repealed or amended are its criminal penalty provisions. See Pet. at 16-17. By grafting the DCA's criminal provisions onto the SDA, EO 128 strips the SDA of its scienter requirement and substantially increases the financial and incarceration penalties over five times what the Legislature contemplated when it enacted the SDA. Id. The Governor, however, is without any authority to criminalize otherwise lawful behavior. Respondents' argument that if EO 128 were invalidated because it imposes criminal penalties pursuant to the DCA "then no gubernatorial order could be enacted under the DCA," Resp. Br. at 15, misses Petitioners' point. The Governor has

never had the power to single-handedly criminalize otherwise lawful behavior (nor should he); that power is instead strictly held by the Legislature and cannot be delegated.

The issues presented in this case are also capable of repetition but may yet evade review. Governors have regularly invoked the DCA to assert emergency powers. See, e.g., Cnty. of Gloucester v. State, 132 N.J. 141, 149 (1993) (Govs. Byrne, Kean, and Florio collectively issued sixteen consecutive Executive Orders declaring a continuing "state of emergency" under the DCA). That governors will do so in the future is nearly guaranteed. The emergency powers under the DCA are, by design, temporary in nature, and thus it is likely that abuses of that power could end before judicial review is completed.

The Governor tries to downplay the likelihood of repetition by arguing that "there is no reason to think that EO 128 will be reinstated." Resp. Br. at 10. But the repetition consideration does not require the reinstatement of EO 128, only that a similar issue could arise in the future. Respondents ignore the fact that EO 244, issued after the Legislature wrested some of its power back from the Governor, continued the state of emergency under the DCA because "the economic and social impacts of the virus will require ongoing management and oversight." See N.J. Exec. Order 244 at 7 (June 4, 2021). It is the state of emergency under the DCA that provided the purported authority for EO 128. See Pet. at

4-5 n.2. Thus, contrary to their assertion there is no reason to think that EO 128 will not be reinstated, at least so long as the state of emergency continues. This concern is compounded by the Appellate Division's limitless view of the Governor's powers under the DCA and its boundless delegation of legislative power. See id. at 11-17. Indeed, the Appellate Division's opinion practically invites future encroachments on private contracts because, in the court's view, participation in a regulated industry necessarily permits nullification of contractual rights in times of "widespread economic emergency." (PCa35-44).

In sum, Petitioners are asking this Court to clarify the limits of the Governor's emergency powers, and to overturn the Appellate Division's erroneous view that the Contracts Clause is functionally dead and the Governor's power is essentially boundless during times of economic turmoil. (PCa35, 35-44). These issues are of substantial importance, and the decision below will enable repeated abuses of gubernatorial power unless this Court reinforces the limits set in the Constitution.

III. THE COURT SHOULD GRANT CERTIFICATION BECAUSE THE APPELLATE DIVISION ERRED WHEN IT UPHELD EO 128

A. EO 128 Is Not a Valid Exercise of the Governor's Emergency Powers Under the DCA

Respondents rely on mere speculation and conjecture to argue that EO 128 was rationally related and tailored to the emergency. See Resp. Br. at 12-13. They have provided no evidence that "[t]he

order helped tenants pay rent" and rely on the possibility that "freeing up money" could potentially have been used on pandemic-related needs. Id. at 12. Their argument against certification is also internally inconsistent. The Governor seems to accept that the DCA does not authorize him to address future harms and tries unconvincingly to avoid this limitation by framing future harms as present harms, i.e., the impact that potential negative marks may have on tenants in the future. See id.

Respondents' two other arguments against Petitioners' first comment fair no better. Compare Resp. Br. at 13-14 with Pet. at 11-13. This Court should grant review and reinforce that the Governor's powers under the DCA "are not without limit," See Worthington, 88 N.J. at 201, by recognizing the clear boundaries set by the statutory language.

B. Separation of Powers and the Nondelegation Doctrine Apply Even in Times of "Widespread Economic Emergency"

Respondents do not seem to grasp the harm caused by violations of constitutional structure and the nondelegation doctrine. Their argument against granting this petition rests on the view that emergencies warrant use of executive power, including the ability to amend statutes. But the Constitution forbids doing so.

The Appellate Division's opinion is an unprecedented grant of executive power in violation of the separation of powers and nondelegation doctrine. Structurally, the division of power

amongst the government's three branches "prevent[s] the concentration of unchecked power in one branch of the government." Commc'ns Workers of Am. v. Christie, 413 N.J. Super. 229, 257 (App. Div. 2010). An executive order may be a valid delegation of power if it "flows out of the Governor's legislatively-delegated emergency powers to act on behalf of the safety and welfare of" New Jerseyans. Id. at 259. But the delegation is not boundless. Id. The DCA cannot be read to implicitly grant the Governor the power to repeal or amend statutes. Pet. at 15.

Respondents do not dispute that EO 128 amended the SDA while it was in effect. See Resp. Br. at 5. But "an Executive Order cannot amend or repeal a statute." Commc'ns Workers, 413 N.J. Super. At 260. Respondents' argument that executive orders may "suspend[]" the SDA's provisions, Resp. Br. at 14, is unavailing because as they admit, id. at 5, EO 128 did not just suspend the SDA——it amended the statute, including its criminal provisions as noted *supra*. Respondents also ignore the weight of caselaw in support of Petitioners' arguments and instead rely on a single, inapposite line in Worthington. Compare Pet. at 15-17 with Resp. Br. at 14. The Appellate Division failed to even acknowledge that EO 128 repeals and amends the SDA. Review should be granted to correct this departure from settled New Jersey law.

C. EO 128 Substantially Impaired Home Providers' Contractual Rights in Violation of the Contracts Clause

Respondents' primary argument that the decision below requires no further review is "that every single court to face an analogous challenge has rejected it." Resp. Br. at 15. But they are wrong. In fact, the week before Respondents filed their brief in opposition, the U.S. Court of Appeals for the Second Circuit reversed the dismissal of a Contracts Clause challenge to a New York City ordinance that "render[ed] permanently unenforceable personal liability guaranties on certain commercial leases for any rent obligations arising during a specified pandemic period." Melendez v. City of New York, No. 20-4238-cv, 2021 U.S. App. LEXIS 32327 (2d Cir. Oct. 28, 2021).[2]

Melendez refutes most of the Governor's arguments. The court held that the Contracts Clause requires more than rational-basis scrutiny. Id. at *117-18. Melendez concluded that New York's law substantially impaired contracts, rejecting as "speculative at best" that tenants might repay debts despite the law, and it credited plaintiffs' assertion that they would not have leased their property "without the security of a personal guarantee." Id. at *79-80. Importantly, no "contrary conclusion" was "compelled"

[2] The Melendez plaintiffs challenged the Guaranty Law under the U.S. Constitution's Contracts Clause. That analysis, however, is still instructive here as "[t]he New Jersey contracts clause is interpreted similarly to its federal counterpart." (PCa35).

by New York's pre-pandemic regulation of commercial real estate. Id. at *82-83.

As the Melendez court noted, "[t]he Clause's textual prohibition is now understood to demand some flexibility to allow states to protect the public welfare … Nevertheless, the Clause's limits are not illusory or non-existent." Id. at *76-77. The Appellate Division's uncritical analysis of EO 128 rendered the Contracts Clause superfluous and its limits non-existent. See Pet. at 17-20. Review is warranted to ensure the Contracts Clause is not made illusory now or in the future.

CONCLUSION

For the reasons set forth, Petitioners ask this Court to grant the petition and reverse the Appellate Division's judgment.

Respectfully submitted,

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CERTIFICATION

The undersigned counsel certifies that this Petition presents a substantial question and is filed in good faith and not for the purposes of delay.

Respectfully submitted,

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Dated: November 15, 2021