Court Confirms Governor's Powers to Determine What Businesses Are Essential

On April 16, 2020, the Suffolk Superior Court denied a bid by the recreational cannabis industry to stay open as "essential services" during the Coronavirus State of Emergency. The decision underscores the Governor's broad powers during the State of Emergency and rejects the industry's constitutional challenges to the Governor's emergency orders barring sales of non-medical cannabis while allowing sales of alcohol and medical marijuana during the public health emergency.

Background

Three recreational cannabis companies and one medical patient based their Equal Protection argument on the claim that the Governor acted arbitrarily when he deemed medical marijuana treatment centers (MTCs) and liquor stores "essential businesses," but did not offer the same exemption to recreational facilities. The plaintiffs specifically argued that all three businesses – recreational, MTCs, and liquor stores – are similarly situated and, as such, the Governor's exclusion of recreational marijuana was an arbitrary or irrational classification that cannot pass rational basis review.

Decision

The Court sided with the Governor, finding that although all three businesses are similarly situated, "equal protection does not demand that a State employ a less burdensome alternative" than others potentially available.[1] The Court based its decision on the Governor's broad police power to stem an epidemic and on the principle that, under the rational basis test, courts may not question the "wisdom or desirability" of economic regulations.[2]

Analysis

Citing a line of cases arising from the early 20th century smallpox outbreak, the Court reasoned that, "faced with a serious threat of disease, the Commonwealth has broad power to restrain personal liberty and the use of private property" to protect public health.[3] The relative dearth of recreational cannabis facilities in Massachusetts, coupled with an overwhelming demand for their products, makes recreational cannabis facilities especially susceptible to large crowds, the precise threat to public health that the Governor's order was intended to curb.

The Court recognized that the "Plaintiffs make a convincing showing that there may be other ways to address these concerns that would allow adult-use marijuana establishments to restart their businesses without harming public health or safety—for example by temporarily limiting non-medical marijuana sales to Massachusetts residents who have ordered in advance and arrive during an assigned time-slot, authorizing adult-use retail stores to make curbside deliveries of their products just like medical marijuana treatment centers, and requiring other measures to ensure that customers and workers keep a safe physical distance apart."[4] However, "the classifications established by the Governor will pass constitutional muster if they have a rational basis, but will be unconstitutional if they are arbitrary and capricious."[5]

Here the Governor's exercise of his police power to stem the epidemic was a valid use of the Governor's legislatively authorized power to "exercise any and all authority over persons and property" necessary to meet a state of emergency. [6] The Legislature specified that the Governor may, among other things, restrict or regulate gatherings of people to protect public safety, regulate the sale of food and household articles, and vary the terms or conditions of licenses issued by state or local agencies.[7]

In ruling that the Governor did not violate the Equal Protection Clause by classifying recreational marijuana facilities as non-essential, the Court reaffirmed the power of the executive to take decisive, drastic action in the face of a public health emergency, even if such action has negative economic consequences.

Postscript

Procedurally, the Court denied the Plaintiffs' emergency motion for a preliminary injunction to allow the marijuana businesses to reopen. The Court's order is subject to the possibility of an immediate, interlocutory appeal by the aggrieved plaintiffs to the Appeals Court or the Supreme Judicial Court.[8] Because the decision implicates federal constitutional rights, the plaintiffs may also seek to pursue the case to the US Supreme Court.

[1] *CommCan, Inc., and Others* v. *Charlie Baker, in His Official Capacity as Governor of the Commonwealth of Massachusetts*, Suffolk County Superior Court (April 16, 2020), 2084CV00808-BLS2, MEMORANDUM AND ORDER DENYING PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION ("MEMORANDUM") at 17.

[2] *Id.* at 9 (citing *New Orleans v. Dukes*, 427 U.S. 297, 303–304 (1976); accord *Steinbergh* v. *Rent Control Bd. of Cambridge*, 410 Mass. 160, 164 (1991))

[3] MEMORANDUM at 7 (citing *Commonwealth* v. *Pear*, 183 Mass. 242, 244–245 (1903), aff'd sub nom. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

[4] MEMORANDUM at 2.

[5] *Id.* at 9 (citing *Doe v. Secretary of Education*, 479 Mass. 375, 393–395 (2018); *Murphy v. Department of Correction*, 429 Mass. 736, 742 (1999)).

[6] MEMORANDUM at 10 (citing St. 1950, c. 639, § 7)

[7] *Id.* (Citing c. 639, § 7 ¶¶ (g), (o), and (p)).

[8] M.G.L. c. 231, § 118.