

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, SS

NO. SJ-2020-\_\_\_\_\_

DAWN DESROSIERS, and DAWN DESROSIERS  
d/b/a HAIR 4 YOU, and SUSAN KUPELIAN, and  
NAZARETH KUPELIAN, and NAZ KUPELIAN  
SALON, and CARLA AGRIPPINO-GOMES, and  
TERRAMIA, INC., and ANTICO FORNO, INC., and  
JAMES P. MONTORO, and PIONEER VALLEY  
BAPTIST CHURCH INCORPORATED, and KELLI  
FALLON, and BARE BOTTOM TANNING SALON,  
and THOMAS E. FALLON, and THOMAS E.  
FALLON d/b/a UNION STREET BOXING, and  
ROBERT WALKER, and APEX ENTERTAINMENT  
LLC, and DEVENS COMMON CONFERENCE  
CENTER LLC, and LUIS MORALES, and VIDA  
REAL EVANGELICAL CENTER, and BEN  
HASKELL, and TRINITY CHRISTIAN ACADEMY  
OF CAPE COD,

Plaintiffs-Petitioners,

v.

CHARLES D. BAKER, JR., in his official capacity as  
Governor of Massachusetts,

Defendant-Respondent.

**JOINT PETITION TO TRANSFER CASE TO SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY AND TO RESERVE AND REPORT TWO LEGAL  
ISSUES TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH**

Pursuant to G.L. c. 211, § 4A, the parties jointly petition for transfer of this case from Worcester Superior Court to the Supreme Judicial Court for Suffolk County (“Single Justice”), and for reservation and report by the Single Justice to the Supreme Judicial Court for the Commonwealth of the legal issues raised in the Amended Complaint. As discussed in greater

detail below, the plaintiffs claim that (1) under the Civil Defense Act, St. 1950, c. 639, Governor Baker is not authorized to declare a state of emergency and issue emergency orders in the circumstances presented by the current coronavirus pandemic, and (2) the emergency orders violate the plaintiffs' constitutional rights to procedural and substantive due process and free assembly. While the Governor believes those claims are invalid and subject to dismissal, the parties agree that the Amended Complaint presents questions of law that can be efficiently decided by the Supreme Judicial Court and that the full Court's resolution of those questions will provide clarity regarding the Governor's authority to act in response to the COVID-19 pandemic. The motion includes a proposed briefing schedule and is accompanied by the parties' Statement of Agreed Facts.

### **PROCEDURAL AND LEGAL BACKGROUND**

Plaintiffs – two hair salons, a tanning salon and boxing gym, and two restaurants, as well as the respective owners of those businesses; two houses of worship and their pastors; the headmaster of a religious academy; and an entertainment center and conference center – brought this action broadly challenging Governor Baker's declaration of a state of emergency based on COVID-19, the disease caused by the coronavirus, and issuance of emergency orders following the emergency declaration. Plaintiffs allege that “the Civil Defense Act does not confer any authority upon Governor Baker during a pandemic or other health emergency,” at least where, as they contend is the case here, the health emergency at issue “is not incident to any of the catastrophes congruous with the Civil Defense Act.” Amend. Compl., Prayer for Relief ¶ A. The Governor's position is that the Civil Defense Act, which empowers him “to protect the public peace, health, security and safety” of Massachusetts residents upon the occurrence of a “disaster or catastrophe resulting from . . . fire, flood, earthquake or other natural causes,”

provides authority for his declaration of a state of emergency and subsequent emergency orders. St. 1950, c. 639, § 5; *see also id.* §§ 4, 7-8.

Plaintiffs filed their action in Worcester Superior Court on June 1, 2020, and they filed an Amended Complaint on June 19, 2020. The Amended Complaint asserts two categories of legal claims. First, plaintiffs allege that the Governor’s declaration of a state of emergency, and the emergency orders issued following the declaration, are *ultra vires* and, relatedly, that the orders violate the principle of separation of powers embodied in article 30 of the Massachusetts Declaration of Rights. Amend. Compl. Counts I-II. *See, e.g.,* Amend. Compl. ¶ 119 (“[T]he Civil Defense Act is inapplicable to the COVID-19 health crisis because COVID-19 does not present a civil defense crisis, within the meaning of the Civil Defense Act.”). Second, plaintiffs claim that the emergency orders violate their federal and state constitutional rights to procedural and substantive due process and free assembly. *Id.* Counts III-X.

Plaintiffs originally intended to seek preliminary injunctive relief from the Superior Court, *see* Docket No. 5 in *Desrosiers et al. v. Baker*, Worcester Superior Court No. 2085CV00570, but they have agreed to defer that request in the interest of obtaining a definitive ruling from this Court. Because challenges to the Governor’s authority and actions under the Civil Defense Act are pending in at least two other state-court actions<sup>1</sup> and at least three federal-

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<sup>1</sup> *See* Defendants’ Opposition to Temporary Restraining Order in *Town of Oxford v. Blondin* (Worcester Superior Court No. 20-00557) (opposing town’s motion for TRO on grounds that in circumstances of current pandemic, Governor Baker was not authorized to issue emergency orders under Civil Defense Act); Complaint Count III in *Impact Fitness v. Baker et al.* (Worcester Superior Court No. 20-00601) (alleging that Governor Baker’s orders exceed his authority under the Civil Defense Act).

In the *Town of Oxford* case, the Superior Court (Sullivan, J.) issued a Memorandum and Order on June 5, 2020, granting the Town’s motion to enjoin a gym’s continued operation in violation of Governor Baker’s Order No. 33; and the court issued a further Memorandum and Order, on June 16, granting the town’s contempt motion, after the gym continued to operate. *See* Docket Nos. 15-16 in Worcester Superior Court No. 20-00557. In a third order, dated June 18, the court

court actions,<sup>2</sup> the Governor similarly believes that a ruling from this Court on his authority will provide clarity, reduce the likelihood of inconsistent lower-court decisions, and preserve judicial and executive branch resources during this emergency.<sup>3</sup> The parties will file a Joint Motion to Stay the Superior Court action.

### **REASONS FOR REQUEST FOR TRANSFER AND RESERVATION AND REPORT**

Pursuant to the last paragraph of G.L. c. 211, § 4A, “[t]he supreme judicial court may . . . direct any cause or matter to be transferred from a lower court to it in whole or in part for further action or directions, and in case of partial transfer may issue such orders or directions in regards to the part of such cause or matter not so transferred as justice may require.” A Single Justice of the Court may exercise the foregoing authority to transfer a case to the County Court, and the determination to do so is a discretionary one. *Beres v. Board of Registration of Chiropractors*,

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directed the town to place locks on the doors of the gym, which had continued to flout the court’s earlier orders. *See id.*, Docket No. 18. The gym has filed a notice of appeal from the Superior Court’s preliminary injunction order; as of July 1, 2020, the appeal had not yet been docketed in the Appeals Court.

In the *Impact Fitness* case, the Superior Court (Ritter, J.) issued a Memorandum and Order on June 19, 2020, denying the gym’s motion to enjoin enforcement of Order No. 33, pursuant to which fitness centers, which are included in Phase 3 of the Governor’s reopening process, are not yet permitted to open their physical premises. *See* Docket No. 10 in Worcester Superior Court No. 20-00601. As of July 1, 2020, the Superior Court’s online docket does not reflect the filing of a notice of appeal.

<sup>2</sup> *See Delaney v. Baker*, D. Mass. No. 20-11154-WGY (ECF No. 1) (Compl. Count III, alleging that COVID-19 does not fall within meaning of Civil Defense Act and that Governor’s emergency orders violate article 30); *Bechade v. Baker*, D. Mass. No. 20-11122-MPK (ECF No. 1) (Compl. Count I, challenging face mask requirement in Order No. 31, and alleging that COVID-19 does not fall within Civil Defense Act); *World Gym, Inc. et al. v. Baker*, D. Mass. No. 20-11162-DJC (ECF No. 1) (Comp., Fourth Cause of Action, alleging that Governor Baker’s orders exceed his authority under the Civil Defense Act).

<sup>3</sup> In each of the above state and federal-court cases, plaintiffs also contend that the Governors’ orders violate plaintiffs’ individual constitutional rights, variously asserting claims under the due process, free exercise, free speech and assembly, equal protection, and takings clauses of the federal Constitution and parallel provisions in the Massachusetts Constitution.

459 Mass. 1012, 1013 (2011) (“G.L. c. 211, § 4A, permits a single justice of this court, in the sound exercise of his or her discretion, to transfer a case timely filed in another court to this court”).

The parties respectfully submit that this case presents an appropriate exercise of this Court’s discretion to order the transfer of a case. Given the pendency of at least six cases in state and federal court challenging the Governor’s authority to issue the emergency orders under the Civil Defense Act, a ruling by the Supreme Judicial Court will provide clarity and certainty on the validity of Governor Baker’s emergency orders. A definitive ruling by the full Court on the Governor’s authority and related legal issues will eliminate the possibility that judges in the other pending cases – or any additional cases yet to be filed – might issue conflicting decisions, with the confusion and disruption that would inevitably ensue. Given the unprecedented nature of the current pandemic, a decision by this Court will also serve the public interest in clarity and consistency regarding the validity of the public health measures implemented through the Governor’s emergency orders. *Cf.* Order on Transfer and Reservation and Report, dated Feb. 26, 2020, in *Massachusetts Coalition for the Homeless v. City of Fall River*, No. SJ-0259 (Cypher, J.) (ordering transfer of case from Bristol Superior Court and reserving and reporting issue to full Court based on determination that “the case raises important issues with statewide significance”).

In order to facilitate a decision by the full Court on the legal issues presented, the parties submit, together with this motion, a Statement of Agreed Facts.

**PROPOSED BRIEFING SCHEDULE AND  
REQUEST FOR SEPTEMBER ARGUMENT DATE**

The parties propose that, if this Court grants the parties’ request to reserve and report the legal issues identified here to the Supreme Judicial Court for the Commonwealth, the parties will submit briefs in the full Court in accordance with the following schedule:

- Plaintiffs-Petitioners will file their brief on or before July 28, 2020;
- Defendant-Respondent will file his brief on or before August 21, 2020; and
- Plaintiffs-Petitioners will file a reply brief, if any, on or before August 31, 2020.

The parties respectfully request a September argument date in the full Court.

### **CONCLUSION**

For the foregoing reasons, the parties respectfully request that the Single Justice transfer this case from Worcester Superior Court to the Supreme Judicial Court for Suffolk County and reserve and report, for decision by the full Supreme Judicial Court, the following legal issues:

- (1) Whether the Civil Defense Act, St. 1950, c. 639, provides authority for Governor Baker's declaration of a state of emergency on March 10, 2020, and issuance of the emergency orders pursuant to the emergency declaration and, if so, whether such orders, or any of them, violate the separation of powers doctrine reflected in article 30 of the Massachusetts Declaration of Rights; and
- (2) Whether the emergency orders issued by Governor Baker pursuant to his declaration of a state of emergency on March 10, 2020, violate plaintiffs' federal or state constitutional rights to procedural and substantive due process or free assembly as alleged by plaintiffs.

Respectfully submitted,

/s/ Danielle Webb

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Dated: July 2, 2020

**CERTIFICATE OF SERVICE**

I certify that this document, filed through the Court's electronic filing system, will be sent via e-mail to the above counsel for plaintiffs on July 2, 2020.

/s/ Amy Spector

Amy Spector  
Assistant Attorney General

## **JOINT STIPULATION OF FACTS**

1. There are 21 named plaintiffs in the Amended Complaint, a true and accurate copy of which will be included in the Joint Appendix to the Briefs. The plaintiffs are as follows:
  - a. Plaintiff Dawn Desrosiers resides in Rutland, Massachusetts. Ms. Desrosiers is the owner and employee of Plaintiff Dawn Desrosiers d/b/a Hair 4 You, a hair salon with a principal place of business in Hubbardston, Massachusetts. Hair 4 You has two employees.
  - b. Plaintiffs Susan and Nazareth Kupelian reside in Medford, Massachusetts. Ms. and Mr. Kupelian are owners and employees of Plaintiff Naz Kupelian Salon, a hair salon with a principal place of business in Lexington, Massachusetts. Naz Kupelian Salon has 11 employees, four of whom are family members.
  - c. Plaintiff Carla Agrippino-Gomes resides in Canton, Massachusetts. Ms. Gomes is the owner and employee of Plaintiff Terramia, Inc. (Terramia Ristorante) and Plaintiff Antico Forno, Inc. (Antico Forno Cucina a Legna), restaurants with principal places of business in Boston, Massachusetts. Terramia Ristorante has nine employees and Antico Forno employs 24.
  - d. Plaintiff James P. Montoro resides in Westfield, Massachusetts. Mr. Montoro is the pastor of Plaintiff Pioneer Valley Baptist Church Incorporated, a church located in, and principally serving and ministering to, the community of Westfield, Massachusetts. Pioneer Valley Baptist Church has about 150 members and provides faith-based addiction recovery counseling to the Westfield community.
  - e. Plaintiffs Kellie Fallon and Thomas E. Fallon reside in Burlington, Massachusetts. Ms. Fallon is the owner and employee of Plaintiff Bare Bottom Tanning Salon, a tanning salon with a principal place of business in Burlington, Massachusetts. Mr. Fallon is the owner and employee of Plaintiff Thomas E. Fallon d/b/a Union Street Boxing, a gym with a principal place of business in Billerica, Massachusetts. Bare Bottom Tanning Salon has two employees and Union Street Boxing has one employee.
  - f. Plaintiff Robert Walker resides in Westford, Massachusetts. Mr. Walker is the owner of Plaintiff Apex Entertainment LLC, a family entertainment center with a principal place of business in Marlborough, Massachusetts, and Plaintiff Devens Common Conference Center LLC, a convention facility with a principal place of business in Devens, Massachusetts. Apex Entertainment has 175 full and part-time employees, and Devens Common Conference Center employs three full-time and 20 part-time employees.
  - g. Plaintiff Luis Morales resides in Somerville, Massachusetts. Mr. Morales is the pastor of Plaintiff Vida Real Evangelical Center, a church located in, and principally serving and ministering to, the community of Somerville, Massachusetts. Vida Real Evangelical Center has about 1,100 congregants.
  - h. Plaintiff Ben Haskell resides in Centerville, Massachusetts. Mr. Haskell is the Headmaster of Plaintiff Trinity Christian Academy of Cape Cod, a school providing private education to children from kindergarten through 12<sup>th</sup> grade, with roughly 160 students enrolled, with a principal place of learning in Barnstable, Massachusetts.



2. There is one defendant in this case—Charles D. Baker, Jr. He is sued in his official capacity as the Governor of the Commonwealth of Massachusetts.
3. On March 10, 2020, Governor Baker issued Executive Order No. 591, declaring a state of emergency in the Commonwealth of Massachusetts. A true and accurate copy of Executive Order No. 591 will be included in the Joint Appendix to the Briefs.
4. Since issuing the Executive Order on No. 591, Governor Baker has issued 41 COVID-19 Emergency Orders. True and accurate copies of these orders will be included in the Joint Appendix to the Briefs.