UNORTHODOXAMBASSADOR *v.* _MYHOUSEISONFIRE_
IN RE: EXECUTIVE ORDER 44

No. 20-11 Filed July 10, 2020—Decided September 19, 2020

Petitioner UnorthodoxAmbassador is a citizen of the United States and argues that the Atlantic Commonwealth, by and through House O. Fire in his official capacity as Governor, acted beyond the scope of Executive Law §§ 18 *et seq*. in enacting Executive Order 44.

HurricaneofLies, C.J., delivered the opinion of a unanimous court. UnorthodoxAmbassador argued the case for petitioner. Zurikurta, Attorney General, argued the case for respondent. JacobinAustin participated in briefing as *amicus curiae* in support of neither party.

Held: The Governor's suspension of statutes is *ultra vires* the Executive Law and consequently void.

1. The political question doctrine is clearly inapposite because the review of the Governor's order has not "demonstrably and textually been committed to a coordinate, political branch of government." *Pub. Employees v. Cuomo*, 64 N.Y.2d 233, 240 (1984). [paras 7-10]
2. Mootness is also inapposite because the instant case is capable of repetition yet evading judicial review. [paras 11-17]
3. The determination of whether an emergency situation exists is a quintessential exercise of executive discretion. The Governor's reasoning may very well be erroneous, as Petitioner urges us to find, but it is reasonable. This satisfies rational-basis review. [paras 26-32]
4. Unlike a declaration of emergency, which is squarely committed to the Governor's discretion, the suspension of statutes is an extraordinary measure

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Paragraph: *UnorthodoxAmbassador v. _MyHouseIsOnFire_*, (2020) Atl. 11, [para].

which blurs the separation of powers between the executive and legislative branches of our government. Thus, rational-basis review is inapplicable and we must instead engage in a deeper investigation of the fit between the Governor's professed rationale and his tactics. [paras 34-37]

5. There is no intelligible fit between the Governor's rationale and the authorization of criminal background checks. [paras 38-45]
6. We find no reasonable fit between the suspension of the law and the Governor's rationale, and hold that the suspension of AB. 382 was unlawful. [paras 46-50]

HURRICANEOFLIES, C.J.:

[1] It is in times of emergency when the pressing need for action in the interest of public welfare often runs up against the ordinary limits of the laws. In these exigent moments, our constitutional structure entrusts the executive branch to exercise its sound judgment to protect the welfare and safety of the people.

[2] But though we must defer to the executive power in times of crisis, deference is not abdication. It is both the place and the responsibility of the judiciary to safeguard the rights and privileges of Atlanteans, especially when the basis for an emergency is not beyond reasonable dispute.

[3] In the instant case, we confront Governor House O. Fire's executive order proclaiming a statewide emergency in relation to the "mass migration of individuals into the Atlantic Commonwealth." Exec. Order 44, pmbl. The order further provides fiscal assistance to state police and suspends statutory prohibitions on criminal background checks (Renters' Bill of Rights § 6(a), AB.103 (2019)) and warrantless police use of unmanned aerial vehicles (Say No To Big Brother Act § II(b)(3), AB.382 (2020)).

[4] For the following reasons, we hold that, while the disaster declaration is a lawful exercise of executive discretion, the Order exceeds the confines of the underlying statute because it suspends statutes in a manner which is unjustified.

I

[5] Before we proceed to an evaluation of the merits, we first establish the jurisdiction of the Court to hear the underlying dispute.

[6] We do so in the instant case because *amicus* urges us to find that the Assembly's failure to oppose the executive order constitutes tacit approval of the Governor's decision and subsequently removes the matter from judicial review, or, in the alternative, that the dispute is moot. We disagree on both counts.

(A) Political question doctrine

[7] That the Assembly has very broad power to circumscribe the delegated executive authority of the Governor is a natural part of our system of government. Cf. *JacobinAustin v. _MyHouseIsOnFire*, (2020) Atl. 10, 39 ("executive authority, outside of those domains that are traditionally understood to be innate to the core of the branch's power, can only derive from an affirmative delegation by a coequal branch of government").

[8] In the Executive Law, the Assembly has chosen to exercise its power and establish a mechanism to quickly check abuses of delegated authority. This clause envisions the use of a concurrent resolution to terminate any executive order which purports to suspend a statute. Exec. Law § 29-A(4).

[9] However, we find no indication that the Assembly ever intended for its own oversight mechanism to be the exclusive method of review. Had the Assembly intended to become the sole judge of a disaster declaration's validity, it is difficult to imagine why it would have codified a large array of definitions that enumerate a clear and unambiguous standard of review: after all, the Assembly need hardly tell itself how to apply its own policies.

[10] Regardless, the political question doctrine is clearly inapposite because the review of the Governor's order has not "demonstrably and textually been committed to a coordinate, political branch of government," *Pub. Employees v. Cuomo*, 64 N.Y.2d 233, 240 (1984), since the law explicitly provides that the Governor's power must be exercised "[s]ubject to the state constitution, the federal constitution and federal statutes and regulations." Exec. Law § 29-A. One could hardly envision a clearer mandate for judicial review.

(B) Mootness

[11] Mootness is also inapposite because the instant case is capable of repetition yet evading judicial review.

[12] The short duration of a statutory suspension is a necessary feature of the Executive Law, but it also ensures a high probability that the declaration will expire before

litigation can be brought, heard and adjudicated by a court of law. Without an authoritative pronouncement by this Court, the Governor would be free to reissue similar orders in the future, while avoiding judicial scrutiny each time by running out the clock.

[13] Avoidance of such a vexatious prospect constitutes a well-established and quintessential exception to the doctrine of mootness. See generally *Roe v. Wade*, 410 U.S. 113, 125 (1973). Thus, we entirely reject that mootness requires the dismissal of the instant action.

[14] Of course, it also bears mention that the federal conception of mootness is fundamentally a product of the federal constitution's case or controversy requirement, U.S. Const., art. II, § 2, cl 1, "a requirement that has no analogue in the State Constitution." *Society of Plastics Industries v. Suffolk County*, 77 N.Y.2d 761, 772 (1991).

[15] Consequently, the jurisdiction of this Court is constrained by prudential, not constitutional, considerations. As we have previously noted, there are strong prudential reasons for courts to "deter future instances of executive overreach." *JacobinAustin*, *supra*, at 35.

[16] Moreover, we also note that there is a strong presumption in contemporary jurisprudence against deciding substantive matters by "legally-questionable procedural machinations" when it can be avoided,[1] *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2020) Atl. 4, 3-4, n. 4, and that there is a long pattern of American courts liberally construing standing and ripeness in favor of the plaintiff. See, e.g., *In re Executive Order 13*, 101 M.S.Ct. 114, at part III (2020); *In re Safer Western Act*, 1 West. 1, 2-3 (Sier. 2019); *In re Communist Control Act*, 101 M.S.Ct. 108 (2018).

[17] As neither the case law nor prudential considerations suggest mootness, the case is not moot.

II

[18] We begin our discussion of merits by briefly retracing the history of this case. On July 16, 2020, Petitioner filed an application for a preliminary injunction against the enforcement of the Order. We granted the application in part and denied in part.

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[1] The Supreme Court of Dixie disagrees.

[19] We now build upon the initial memorandum order and elaborate on the rationale underlying our earlier decision in this case.

[20] The three prongs of the preliminary injunction test require the moving party to demonstrate "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Though no single prong is determinative of the outcome, likelihood of success must be both real and significant for injunctive relief to follow on account of its drastic nature.

[21] With respect to the disaster declaration, we denied the application because, as a threshold matter, we found little possibility of success. Likelihood of success must be evident on the basis of the law and the facts as presented in the trial record, and Petitioner's case failed to overcome this barrier because it did not satisfactorily address the fact that both the statute and longstanding practice accord the Governor extensive discretion in proclaiming a state of emergency. Furthermore, enjoining the operation of a disaster declaration, except when it constitutes a flagrant abuse of discretion, is generally not in the public interest because it delays the Commonwealth's planned emergency response.

[22] However, we granted the application with regards to the statutory suspensions. As discussed below, we found a substantial likelihood of success in light of the specific, concrete situations where the Executive Law authorizes such suspension—the Governor's order appears to be a poor fit for those scenarios.

[23] Petitioner has also established irreparable injury because the suspension of the housing statute would have a direct and concrete impact on returning citizens across the Commonwealth, who would, without notice, once again be subject to insidious discriminatory treatment in violation of established law and, quite possibly, the Commonwealth Constitution.

[24] Likewise, irreparable injury was established with regards to the use of unmanned aerial vehicles because the deprivation of rights, whether created by the Constitution or by statute, for even brief moments of time, *per se* constitutes irreparable injury.[2] Here, the Governor subjects citizens of the Commonwealth to a

[2] This is the case with respect to statutorily-created rights because the Commonwealth Constitution, like the U.S. Constitution, was never intended to be an exhaustive repertoire of the people's fundamental rights. Cf. U.S. Const., amend. IX. The Legislature may, of course, expand

form of unlawful surveillance from which they are affirmatively protected by the codification of an expansive construction of the right against warrantless searches and seizures. Cf. U.S. Const., amend. IV; Atl. Const., art. I § G.

[25] Finally, the balance of equities tips in favor of Petitioner because the harms inflicted upon several groups in Atlantic are real, present and immediate. Though there is also harm in the frustration of the Governor's public policy decisions, the relatively equal balance of the competing equities on this prong of the test is not conclusive because both other prongs weigh heavily in Petitioner's favor. An entitlement to injunctive relief is thus clearly established.

III

[26] We now address the first fundamental question raised by Petitioner: whether the set of circumstances determined by the Governor constitutes a disaster within the meaning of the Executive Law at all.

[27] The determination of whether an emergency situation exists is a quintessential exercise of executive discretion. Though justiciable, it is a sensitive field in which a court must balance the need to uphold the law against the sound judgment of those authorities which bear primary responsibility for disaster response.

[28] Consequently, we adopt a deferential standard of review, intended to control only flagrant "executive usurpation[s] of the legislative branch's domain." *JacobinAustin*, *supra*, at 33. Thus, the disaster declaration will be upheld unless "no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious." *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974).

[29] We preface our analysis by observing that rational-basis review does not require the government's analysis to be true, so long as it could be "reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Whether one or one million immigrants appear in the end in Flushing is not determinative of the order's legality.

[30] In this case, we see a fairly lucid relationship between the Governor's professed rationale and the disaster declaration. It is hardly fanciful conjecture to conclude that the federal government's wholesale refusal to enforce immigration law *could* incentivize a significantly greater rate of immigration, and that this in-migration

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negative rights beyond their scope as interpreted by the judiciary, provided that such enactment does not impugn upon some other fundamental right of the people.

could pose great logistical pressures on the Commonwealth that could not be handled through ordinary processes.

[31] The Governor's reasoning may very well be erroneous, as Petitioner urges us to find, but it is reasonable. This satisfies rational-basis review.

[32] It is also neither arbitrary nor capricious because the Governor makes findings that "mass migration" poses an "economic burden [...] on communities" and that the President's executive order effectively permitted "open borders" by removing the threat of enforcement. Exec. Order 44, pmbl. In light of the Governor's findings, a disaster declaration is conceivably reasonable and grounded in reasonable findings and justifiable apprehension about federal policy, not in pure caprice.

IV

[33] However, our finding that the disaster declaration is valid hardly gives the Governor *carte blanche* to exercise all the emergency powers that he deems provident. We now turn to whether the statutory suspensions in section II of the Order are valid.

(A) Standard of review

[34] Unlike a declaration of emergency, which is squarely committed to the Governor's discretion, the suspension of statutes is an extraordinary measure which blurs the separation of powers between the executive and legislative branches of our government.

[35] We have previously observed that little deference will be accorded "when [the Governor] acts in a domain reserved in our constitutional structure for a coequal branch of government." *JacobinAustin*, *supra*, at 30. Thus, in such cases, the rational-basis test and arbitrary-or-capricious review are both inapplicable and we must instead engage in a deeper investigation of the fit between the Governor's professed rationale and his tactics.

[36] This approach finds substantial support in the text of the Executive Law, which provides that a suspension is void when it "is not in the interest of the health or welfare of the public" or "not reasonably necessary to aid the disaster effort." Executive Law § 29-a(2)(b). The language here clearly invites the reviewing court to inquire into the actual motivations and effects of the Governor's order.

[37] Our inquiry consequently consists of two parts:

1. Based on the totality of the circumstances, is the suspension in the interest of health or welfare?
2. Is there a reasonable fit between the emergency situation and the suspension?

We caution however that '*reasonable* fit' should not be conflated with '*perfect* fit.'[3] So long as the measure's sweep is reasonably commensurate to the disaster's scale, it satisfies our inquiry.

(B) Criminal background checks

[38] We first address the Governor's suspension of the state ban on criminal background checks in the rental housing market.

[39] The Governor explains in the order that "the influx of immigrants will likely cause unrest" because "housing is limited and it will take additional time for additional housing units to be constructed." Exec. Order 44 § II(A)(a). We thus understand that the Commonwealth's interest in the suspension rests on the necessity of rapidly increasing the housing stock.

[40] This seemingly satisfies the first prong of our test because the Commonwealth's interest in health and welfare self-evidently extends to the prevention of housing insecurity and homelessness. We accordingly conclude, as a general rule, that suspension of certain regulations around housing is likely to be properly motivated by health and welfare concerns.

[41] However, the suspension falls short on the second prong because there is no intelligible fit between the Governor's rationale and the authorization of criminal background checks.

[42] The prohibition on criminal background checks, enacted against the background of a nationwide campaign to 'ban the box,' was enacted by the General Assembly "to protect tenants from housing discrimination." Renters' Bill of Rights, long title. The suspended provision merely provides that "[n]o person shall, as a precondition of renting or continuing to rent a house, be required to undergo a criminal background check, provide a copy of his or her criminal record, or respond to any questions concerning their occupation, criminal record or use of substances." *Id.* at § 6(a).

[3] That is to say, this standard should not be conflated with strict, or even intermediate, scrutiny. It is not so exacting as to preclude or frustrate good-faith efforts to respond to an emergency situation on the part of the executive.

[43] The only relationship that this measure supposedly has with the housing supply, according to the Commonwealth, is that the ban on background checks "widen[ed] the pool of possible renters." Resp't's Br. at 5.

[44] Because we exercise heightened scrutiny, we do not have to accept the Commonwealth's rationale at face value. Here, we reject it because we find this reasoning to be pretextual and lacking in good sense. At the risk of stating the obvious, denying people housing does not increase the housing supply; nor will making one group homeless to prevent another group from becoming homeless address an allegedly looming homelessness crisis.

[45] In essence, were we to accept the Governor's reasoning, we would have to find that this cruel game of musical chairs among tenants does not advance a health or welfare interest. Conversely, were we to reject this reasoning, the Commonwealth's actions would be based on no reasoning at all and would necessarily fail 'reasonable fit' analysis. Either way, this suspension is unlawful.

(C) Drone surveillance

[46] We also struggle to find a reasonable fit between the 'economic burden' of 'mass migration' and the need to use unmanned aerial vehicles to engage in the warrantless mass surveillance of ordinary citizens on the streets.

[47] We emphasize here that the Governor's only stated rationale was economic. Though this measure could plausibly be justified under other rationales, the Governor has identified no such reasons for his order and we decline to do so in his place. The heightened scrutiny employed in our analysis means that the Court will not engage in a conjectural fishing expedition to justify the Governor's actions *post hoc* when he himself has not signalled any intention to do so.[4]

[48] In light of the Governor's stated reasoning, the suspension of the drone surveillance law strains the bounds of credulity. We cannot accept without clear evidence that there is any reasonable *economic* link between the suspension of the statute and the Governor's professed interest in alleviating the Commonwealth's burden.

[4] Accordingly, we reject the Commonwealth's assertion at trial that the purpose of the suspension was to address an "increase in crime" or "ensure the public peace at a riot." Resp't's Br. at 5. Neither of these rationales are present in the Governor's order, and our attentive scrutiny of statutory suspensions means that *post hoc* justifications are not permissible.

[49] Moreover, this rationale is fatally undermined because, under section 29-A of the Executive Law, the regulation in question may only be suspended for thirty days. We simply cannot believe that the cost of acquiring, deploying and operating a new fleet of drones that will only be in service for thirty days would pose less of an economic burden on the Commonwealth than the normal police hiring that would take place over a 30-day period. Indeed, common sense would suggest that the opposite is far more likely to be the case.

[50] As such, we find no reasonable fit between the suspension of the law and the Governor's rationale, and hold that the suspension of AB. 382 was unlawful. The corresponding provision of the Executive Order is consequently null and void.[5]

IV

[51] For the foregoing reasons, both statutory suspensions contained in Executive Order 44 are *ultra vires* the Executive Law and consequently void. The remainder of the Order shall continue in effect.

[52] The complaint is allowed in part and dismissed in part, with each party to bear its own costs.

It is so ordered.

[5] Because we hold today that the deployment of drones was unlawful *ab initio*, any evidence collected through the use of unmanned aerial vehicles in violation of AB. 382 is inadmissible.