

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
DOCKET NO. _____

COMMCAN, INC.; THE GREEN LADY)
DISPENSARY, INC.; ASCEND MASS LLC;)
MASSGROW, LLC; SLANG, INC.; and)
STEPHEN MANDILE,)
Plaintiffs,)
v.)
CHARLIE BAKER, in his Official Capacity)
as Governor of the Commonwealth of)
Massachusetts,)
Defendant.)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

The plaintiffs, CommCan, Inc. (“CommCan”), The Green Lady Dispensary, Inc. (“The Green Lady”), Ascend Mass, LLC (“Ascend”), MassGrow, LLC (“MassGrow”), Slang, Inc., d/b/a Bloom Brothers (“Bloom Brothers”), and Stephen Mandile (“Mr. Mandile”), submit this memorandum in support of their accompanying emergency motion seeking a preliminary injunction against the Executive Orders of the defendant, Governor Charlie Baker (“Governor”), that closed adult-use marijuana establishments until at least May 4, 2020 because of the COVID-19 outbreak. As grounds for their motion, the plaintiffs state the following.

I. Introduction & Summary of Argument

Because of the COVID-19 outbreak, the Governor issued Executive Orders that served to close the physical “brick-and-mortar” facilities of purportedly “non-essential” businesses until at least May 4, 2020. Among these businesses are 43 adult-use retail marijuana establishments (and many more adult-use cultivation and manufacturing marijuana establishments) employing

approximately 8,000 people. If it continues, this mandatory closure will cause profound and irreparable damage to the nascent adult-use marijuana industry; will deprive Massachusetts residents of safe access to regulated marijuana; and, will make it very difficult or impossible (e.g., in Nantucket) for certain medical-marijuana users to obtain marijuana legally.

While the Governor's efforts to combat the COVID-19 outbreak generally have been laudable, this particular decision was too extreme and does not pass constitutional muster. There was no legitimate reason for the Governor to shutter the entire adult-use cannabis industry and deny access to its customers, while permitting medical marijuana dispensaries and even liquor stores to remain open. Indeed, the Governor's sole reason for doing this—to deter nonresident marijuana users from entering Massachusetts—could and should have been accomplished by restricting marijuana sales to Massachusetts residents alone.

The plaintiffs have a strong likelihood of success on the merits of this action. Moreover, the ongoing harm caused by the Executive Orders is obvious and irreparable, not only to the cannabis industry, which cannot avail itself of any federal or state COVID-19 stimulus programs, but also to Massachusetts residents, who no longer have access to lawful recreational marijuana. Meanwhile, the public would not be harmed by allowing adult-use marijuana establishments to remain open to Massachusetts residents; and indeed, keeping these establishments open is safer than potentially sending their customers toward the illegal and unregulated marijuana market, where social-distancing and other COVID-19 protective measures cannot be enforced. Accordingly, the court should enter a preliminary injunction, and permit this activity, pending final disposition of this action.

II. Facts & Background

The Plaintiffs

The following plaintiffs now or in the future will operate the following state-licensed licensed marijuana facilities:

- CommCan operates a state-licensed “co-located” retail adult-use marijuana establishment and retail medical marijuana treatment center (“MMTC”) in the Town of Millis; and, a state-licensed MMTC in the Town of Southborough.
- The Green Lady operates a state-licensed retail adult-use marijuana establishment in the Town of Nantucket.
- Ascend has a provisional state license to operate a retail adult-use marijuana establishment in the City of Boston and a pending application for a retail adult-use marijuana establishment in the City of Newton.
- MassGrow operates a Tier-11 adult-use cultivation marijuana establishment in Athol and has a provisional state license to operate an adult-use manufacturing marijuana establishment in Athol.
- Bloom Brothers operates a retail adult-use marijuana establishment in the City of Pittsfield.

(Hereinafter, CommCan, The Green Lady, Ascend, MassGrow, and Bloom Brothers are referred to collectively as the “Marijuana Establishment Plaintiffs.”) Mr. Mandile is a Massachusetts resident and veteran who uses marijuana for medical purposes. Complaint for Declaratory and Injunctive Relief, at §§ 1-6.

The Executive Orders

On March 10, 2020, pursuant to Chapter 639 of the Acts of 1950, and G.L. c. 17, sec. 2A, Governor Baker declared a state of emergency in the Commonwealth of Massachusetts due to the outbreak of COVID-19. On March 11, 2020, the World Health Organization declared that the outbreak of COVID-19 constituted a global pandemic. On March 19, 2020, the Federal Cybersecurity and Infrastructure Security Agency identified 14 infrastructures the agency

considered to provide functions essential to combating the COVID-19 pandemic (“Federal Guidelines”). Id. at §§ 9-11. (The Federal Guidelines are attached to the Complaint at Tab 1.)

On March 23, 2020, pursuant to Sections 7, 8, and 8A of Chapter 639 of the Acts of 1950 (“Civil Defense Act”), Governor Baker issued “COVID-19 Order No. 13” (“First Executive Order”), referring to the Federal Guidelines and declaring that he had “identified additional services and functions that likewise are essential to promote the public health and welfare of the Commonwealth, and therefore it is imperative to ensure that workers providing critical services and functions in these State and Federally designated sectors may continue to work to ensure community resilience and continuity of response efforts[.]” Id. at § 12. (The First Executive Order is attached to the Complaint at Tab 2.)

The First Executive Order provided that:

- The production and services sectors identified in Exhibit A [accompanying the Order] are hereby designated as ‘COVID-19 Essential Services.’ (Emphasis in original.)
- The workforces engaged and working in these production and service sectors are hereby designated as ‘COVID-19 Essential Workforces.’
- Businesses and other organizations that provide the services and functions identified as COVID-19 Essential Services in Exhibit A are urged to continue operations during the state of emergency, but to do so with allowance for social distancing protocols consistent with guidance provided by the Department of Public Health. (Emphasis in original.)
- All businesses and other organizations that do not provide COVID-19 Essential Services shall close their physical workplaces and facilities (‘brick-and-mortar premises’) to workers, customers, and the public as of 12:00 noon on March 24, 2020 and shall not re-open to workers, customers, or the public before noon on April 7, 2020. (Emphasis added.)
- Businesses and other organizations that do not provide COVID-19 Essential Services are encouraged to continue operations where they are able to operate through remote means that do not require workers, customers, or the public to enter or appear at the brick-and-mortar premises closed by this Order.” (Emphasis added.)

Id. at § 13.

Exhibit A to the First Executive Order contained a list, “based on [the Federal Guidelines] and amended to reflect the needs of Massachusetts’ unique economy[,]” with 14 categories of COVID-19 Essential Services, corresponding with the same 14 industry categories listed in the Federal Guidelines. (Emphasis added.) The category “Food and Agriculture” was included in the Federal Guidelines and Exhibit A. But while the Federal Guidelines’ first Food and Agriculture subcategory stated “[w]orkers supporting pharmacies, groceries and other retail that sells food and beverage products[.]” Exhibit A’s first Food and Agriculture subcategory stated “[w]orkers supporting groceries, pharmacies and other retail, including farmers markets and farm stands, that sells food and beverage products, including liquor stores.” Id. at §§ 14-16. (Emphasis added.)

Adult-use marijuana establishments did not make Exhibit A’s list of COVID-19 Essential Services. Medical Marijuana Treatment Centers (“MMTCs”) did make the list of COVID-19 Essential Services: Together with many other “medical facilities,” they are found in the “Health Care/Public Health/Human Services” category. By law, MMTCs can only sell marijuana products to qualified registered patients. Id. at §§ 17-19.

Exhibit A provided a mechanism permitting any business not on the list of COVID-19 Essential Services to make a request to the Governor’s office that the business be added to the list and allowed to keep its brick-and-mortar operations open. The Marijuana Establishment Plaintiffs made requests to the Governor’s office that adult-use marijuana establishments be added to the list, but the Governor’s office has not responded.¹ Id. at §§ 20-24.

¹ On March 23, 2020, subsequent to (and referring to) the First Executive Order, the Cannabis Control Commission (“CCC”) issued a “Cease and Desist Order” declaring that all adult-use retail marijuana establishments in the Commonwealth would have to close between 12:00 p.m. on Tuesday, March 24, 2020 and 12:00 p.m. on Tuesday, April 7, 2020. While the Cease and Desist Order purported to offer a hearing within 21 days to any aggrieved establishments, the First Executive Order prevented the CCC from granting any relief to such establishments because it did not invite the CCC to issue any subsequent orders, directives, or guidelines of any kind. Id.

In his public statements, the only rationale the Governor has offered for differentiating between liquor stores and MMTCs (on the one hand) and adult-use marijuana establishments (on the other hand) is to deter residents from neighboring states without lawful recreational marijuana from patronizing Massachusetts' adult-use marijuana establishments:

“If we make recreational marijuana available, we are going to have to deal with the fact that people are going to come here from all over the place, across the northeast and create issues for us with respect to the fundamental issue we are trying to solve for here — which is to stop the spread,” [Governor] Baker said at a press conference Tuesday. “And for that reason and that reason alone, I think this is just a non-starter with us.” (Emphasis added.)

Id. at § 25. The plaintiffs are not aware of any reasons offered by the Governor for not simply requiring adult-use marijuana establishments to limit their sales to Massachusetts residents alone, other than concerns that this might be unlawful. Id. at § 26.

Meanwhile, on March 31, 2020, the Governor issued “COVID-19 Order No. 21” (“Second Executive Order”), extending the First Executive Order through and including May 4, 2020. The Second Executive Order was accompanied by a list of COVID-19 Essential Services that, once again, provided that liquor stores and MMTCs were allowed to keep their brick-and-mortar facilities open, while adult-use marijuana establishments again were not allowed to keep their facilities open. Id. at §§ 27-28. (The Second Executive Order and the Governor’s current list of COVID-19 Essential Services are attached to the Complaint at Tabs 4 and 5.)²

Other States’ Treatment of Adult-Use Marijuana Establishments During the COVID-19 Outbreak

Among the many states with regulated adult-use and medical marijuana markets that have responded to the COVID-19 outbreak, Massachusetts seems to be the only state that has deemed

² Yesterday, April 7, 2020, the CCC updated its Cease and Desist Order to account for the Second Executive Order, and in doing so, the CCC (among other things) confirmed that the adult-use marijuana industry has been deemed non-essential and must remain closed until May 4, 2020. Id.

medical marijuana essential but adult-use/recreational marijuana non-essential. The states of California (the most populous state in the country), Colorado, Illinois, Nevada, and Washington have deemed both medical and recreational marijuana establishments to be “essential,” while Michigan and Oregon have provided legal guidance effectively allowing the continued operation of all cannabis businesses. More specifically:

- In California, on March 19, 2020, Governor Newsom issued an Executive Order that directed all residents to comply with the State Department of Public Health Officer’s COVID-19 directives, while the Health Officer’s March 19 and 22, 2020 directives have referred to the Federal Guidelines, and have included all cannabis retailers as a part of the State’s “Essential Workforce” in the same “Healthcare/Public Health” category.
- In Colorado, a Public Health Order (issued pursuant to an Executive Order of Governor Polis) includes marijuana dispensaries as “Critical Businesses,” with the caveats that adult-use sales occur only via curbside delivery, and that any such businesses follow social-distancing guidelines. (Previously, Governor Polis suspended the State’s prohibition of online marijuana sales, consistent with social-distancing guidelines promulgated by the Colorado Department of Public Health and Environment, which relied upon the federal CDC’s “Interim Guidance for Coronavirus Disease (COVID-19)” (dated March 15, 2020).
- In Illinois, on March 20, 2020, Governor Pritzker issued an Executive Order determining—in pertinent part—that adult-use cannabis dispensaries are essential businesses. (Governor Pritzker relied on the CDC’s social-distancing guidelines and, by reference and in substance, the Federal Guidelines.)
- In Michigan, the determination that marijuana businesses are “essential” was not as explicit; nevertheless, an Executive Order of Governor Whitmer determined that “no person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.” (Furthermore, the Michigan Marijuana Regulatory Agency’s Advisory Bulletin (dated March 23, 2020) granted licensed marijuana businesses the ability to engage in regulated activities as authorized by their licenses, although provisioning centers and retailers are limited to curbside service or delivery, and marijuana businesses must abide by the CDC’s social-distancing guidelines.)

- In Nevada, Governor Sisolak issued an “Emergency Directive” (on March 20, 2020) allowing retail cannabis dispensaries to continue operations by delivery only, while closing Non-Essential Businesses entirely. In issuing this Directive, Governor Sisolak specifically relied upon the CDC guidelines.
- In Oregon, Governor Brown issued an Executive Order (dated March 23, 2020), ordering, inter alia, the immediate closure of certain businesses. Retail marijuana dispensaries were not required to close, as long as they designated a representative to enforce the social-distancing policies directed by the Oregon Health Authority. In his Executive Order, Governor Brown acknowledged the CDC’s mitigation strategies against COVID-19.
- In Washington, a Proclamation of Governor Inslee required the statewide shutdown of certain businesses and establishments (and limited the size of gatherings to no more than 50 people). Cannabis retailers were not among the businesses required to close. Any retail establishments not ordered to close—including cannabis retailers—again were required to designate a representative to enforce the social-distancing and sanitation measures established by the CDC or Washington State Department of Health.

Id. at §§ 29-30.

The Marijuana/Cannabis Industry in Massachusetts and its Nexus to Liquor Stores

In 2016, The Regulation and Taxation of Marijuana Act (“Act”), legalized adult-use marijuana in the Commonwealth and had a stated purpose “to control the production and distribution of marijuana under a system that licenses, regulates and taxes the businesses involved in a manner similar to alcohol[.]” (Emphasis added.) The Act included at least two direct correlations between adult-use retail marijuana establishments and liquor stores, one of which (a) limit[ed] the ability of municipalities to prohibit the number of adult-use retail marijuana establishments to “fewer than 20 percent of the number of licenses issued within the city or town for the retail sale of alcoholic beverages not to be drunk on the premises where sold[.]” and the other of which (b) established the CCC and tasked it with creating “qualifications for licensure and standards for employment ... similar to qualifications for licensure and employment standards in connection with alcoholic beverages[.]”Id. at §§ 31-32 (Emphases added.)

With slight modifications, these provisions of the Act are now codified by Sections 3 and 4, respectively, of Chapter 94G of the Massachusetts General Laws (“94G”). While 94G allows for home-delivery from adult-use marijuana establishments, the CCC has not yet accepted applications for licenses permitting home-delivery. Meanwhile, adult-use marijuana can only be sold at the physical-storefront locations of licensed adult-use marijuana establishments (i.e., the type of “brick-and-mortar” operations proscribed by the Executive Order). *Id.* at §§ 33-35.

Since the first adult-use marijuana establishments began operating in Massachusetts, they collectively have generated gross sales of approximately \$549,000,000.00, and millions of dollars of corresponding tax revenue for the Commonwealth and its citizens. Currently, adult-use retail marijuana establishments generate approximately \$13,000,000.00 in gross weekly sales throughout the Commonwealth. *Id.* at §§ 36-37.

As of March 26, 2020, there were 399 adult-use marijuana establishment license applications pending before the CCC, and 43 adult-use marijuana establishments had received permission from the CCC to commence operations. There are currently no adult-use/ recreational dispensaries open in any of the states bordering Massachusetts, although Vermont and Maine have legalized (though not yet formally permitted) marijuana sales. *Id.* at §§ 38-39.

Plaintiff The Green Lady

The Green Lady operates the only adult-use marijuana establishment in the Town of Nantucket, and there are no MMTCs in Nantucket. Therefore, medical marijuana patients who live on Nantucket rely exclusively upon The Green Lady to obtain regulated marijuana. On March 22, 2020, the Nantucket Health Department issued an emergency order to shelter-in-place as of 5:00 p.m. on March 23, 2020 (“Nantucket Order”). With limited exceptions, the Nantucket Order required all individuals living on the island to stay home, except to “[p]rovide or receive certain essential activities or engage in certain essential activities and work for essential businesses...” The

Nantucket Order permitted individuals to “leave their residence to work for or obtain services at any ‘Healthcare Operations,’ including but not limited to..., marijuana dispensary (sic) or any related and/or ancillary healthcare services.” The First and Second Executive Orders effectively nullified the Nantucket Order’s determination that The Green Lady was an essential “Healthcare Operation.” As a result of the Executive Orders, The Green Lady has closed its retail marijuana establishment and is not able to provide marijuana for medical purposes to any individuals who rely exclusively upon The Green Lady for marijuana. Complaint, at §§ 40-46; Affidavit of Nicole Campbell, Tab A, at paras. 1-6.

Plaintiff Stephen Mandile

Mr. Mandile served in Iraq, where he suffered a number of injuries, including five ruptured discs, spinal stenosis, damage to the sciatic nerve, radiculopathy in both legs, and a traumatic brain injury. Upon returning from Iraq, he was diagnosed with chronic pain and PTSD by Department of Veterans Affairs physicians who prescribed him over 50 different prescription drugs, including Methadone, Morphine, Oxycodone, Oxycontin, Percocet, Fentanyl, and Benzodiazepine.

As a result of taking these medications, Mr. Mandile experienced negative side effects, including depression and suicidal thoughts. He then began using marijuana as an alternative medical treatment and, within five months, he was able to cease using all but one of the prescriptions drugs, and marijuana has since become an essential part of his medical treatment. Mr. Mandile relies on adult-use marijuana establishments to obtain marijuana to treat his medical conditions, because he would have to travel over one hour to visit a MMTC, making the adult-use establishments significantly more accessible to him.

Mr. Mandile is the founder of a nonprofit organization, Alternative Treatment for Veterans (“ATV”), whose mission is to raise awareness about veterans and marijuana use, support research, and advocate for veteran access to marijuana. Through his work with ATV, Mr. Mandile has

gained first-hand knowledge of veterans who rely exclusively upon adult-use marijuana establishments to obtain marijuana for medical purposes because they are reluctant to enter into the Commonwealth's medical marijuana program, fearing this might deprive them of federal benefits. (Under federal law, marijuana sales are not authorized, and marijuana is considered to have no accepted medical use.) Additionally, through his work at ATV, Mr. Mandile has personal knowledge of veterans who have been deprived of access to marijuana for medical purposes because of the Executive Orders' closure of all adult-use marijuana establishments. Complaint, at §§ 47-53; Affidavit of Stephen Mandile, Tab B, at paras. 1-7.

Harm to Plaintiffs

As a result of the Executive Orders, the Marijuana Establishment Plaintiffs have ceased their adult-use operations and begun to suffer irreparable financial harm. Overall, the Executive Orders effectively have closed 43 licensed adult-use establishments (and many more cultivation and manufacturing marijuana establishments, including MassGrow's and The Green Lady's cultivation establishments in Athol and Nantucket, respectively) employing approximately 8,000 people); and, at least 21 other provisionally-licensed adult-use retail marijuana establishments, including Ascend's approved Boston facility, will be unable to open while the Second Executive Order remains in effect. Complaint, at §§ 54-55.

For as long as the Executive Orders remain in effect and adult-use marijuana establishments are deemed non-essential:

- The Marijuana Establishment Plaintiffs (and all operational adult-use marijuana establishments) will be deprived of all revenue, and the Commonwealth and its citizens will be deprived of all corresponding tax revenue.
- The Marijuana Establishment Plaintiffs will continue to suffer ever-more-substantial irreparable financial harm on a daily basis.

- The citizens of the Commonwealth desirous of patronizing adult-use marijuana establishments for medical purposes will be unable to do so, including any such individuals on Nantucket, where The Green Lady is the only legal source of marijuana.
- Certain other medical users of marijuana, including but not limited to persons reluctant to access the Commonwealth’s medical marijuana program because they fear it might deprive them of federal benefits, will not be able to legally purchase marijuana for medical purposes.
- Mr. Mandile and other similarly situated veterans will be unable to patronize adult-use retail marijuana establishments to purchase the marijuana products essential to the treatment of their medical conditions.
- The unavailability of adult-use marijuana products may lead certain marijuana users to resort to illegal and unregulated sources of marijuana, where social-distancing and other protective measures against COVID-19 cannot be enforced.

See Complaint, at § 56; see generally Affidavit of Nicole Campbell, Tab A; Affidavit of Stephen Mandile, Tab B.

III. Applicable Law

A. Preliminary Injunction Standard

“To succeed in an action for a preliminary injunction, a plaintiff must show (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff’s likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.” Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001) (citing Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 617 (1980)).

“By definition, a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law. On the basis of this record, the moving party must show that, without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits.” Packaging Indus. Grp., 380 Mass. at 616. “The Court may

accept as true ‘well-pleaded allegations [in the complaint] and uncontroverted affidavits.’ The Court may also rely on otherwise inadmissible evidence, including hearsay.” Louhghalam v. Trump, 230 F.Supp.3d 26, 32 (D.Mass. 2017) (citations omitted).

“When, as here, a party seeks to enjoin governmental action, the court also considers whether the relief sought will adversely affect the public.” Tri-Nel Mgmt., Inc., 433 Mass. at 219 (citing Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984)). “[A] court reviewing [the governmental action in question] is not concerned with whether there was substantial evidence in a record before the agency, but rather ... whether, based solely on the record made in court, the [governmental action] was illegal, arbitrary, or capricious.” Tri-Nel Mgmt., at 433 (emphasis in original) (quoting Massachusetts State Pharmaceutical Ass'n v. Rate Setting Comm'n, 387 Mass. 122, 126 (1982)).

B. The Civil Defense Act of 1950

The Executive Orders cited, as their enabling legislation, Sections 7, 8, and 8A of the Civil Defense Act, Chapter 639 of the Acts of 1950. Section 1 of the Civil Defense Act defines “civil defense” as follows:

the preparation for and carrying out of all emergency functions, other than functions for which military forces other than national guard are primarily responsible, for the purpose of minimizing and repairing injury and damage resulting from disasters caused by attack, sabotage or other hostile action; or by riot or other civil disturbance; or by fire, flood, earthquake or other natural causes. Said functions shall include specifically, but without limiting the generality of the foregoing, firefighting and police services other than the actual control or suppression of riot or other civil disturbance, medical and health services, rescue, engineering and air-raid warning services, evacuation of persons from stricken areas, emergency welfare services, communications, radiological, chemical and other special weapons of defense, emergency transportation, existing or properly assigned functions of plant protection, temporary restoration of public utility services and other functions. (Emphases added.)

Section 7 provides as follows:

During the effective period of so much of this act as is contingent upon the declaration of a state of emergency as hereinbefore set forth, the governor, in addition to any other authority vested in him by law, shall have and may exercise any and all authority over persons and property necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces thereof, and specifically, but without limiting the generality of the foregoing, the governor shall have and may exercise such authority relative to any or all of the following:--- (Emphasis added.)

Section 7(a)-(q) then provides a list of 17 activities and subjects the Governor may regulate during a state of emergency, including:

- Labor, business or work on Sundays or legal holidays. Sub. (f).
- Assemblages, parades or pedestrian travel, in order to protect the physical safety of persons or property. Sub. (g).
- Regulation of the business of insurance and protection of the interests of the holders of insurance policies and contracts and of beneficiaries thereunder and of the interest of the public in connection therewith. Sub. (i).
- Regulation of the manner and method of purchasing or contracting for supplies, equipment or other property or personal or other services, and of contracting for or carrying out public works, for the commonwealth or any of its agencies or political subdivisions, including therein housing authorities. Sub. (l).
- Variance of the terms and conditions of licenses, permits or certificates of registration issued by the commonwealth or any of its agencies or political subdivisions. Sub. (o).
- Regulating the sale of articles of food and household articles. Sub. (p).

(The Executive Orders do not explain which of these subsections may have authorized the Governor's closure of adult-use marijuana establishments.) Section 8 of the Act then allows the Governor to issue Executive Orders to carry-out his powers under the Act, while Section 8A gives such Orders precedence over any conflicting legal mandates during the state of emergency.

C. Equal Protection and Rational Basis

“Absolute equality before the law is a fundamental principle of our own Constitution.” Opinion of the Justices, 211 Mass. 618, 619, 98 N.E. 337 (1912); Goodridge v. Dept. of Public Health, 440 Mass. 309, 329 (2003). “The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be “arbitrary or capricious.” Goodridge, at 329 (quoting Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974)). “Under both the equality and liberty guarantees, regulatory authority must, at very least, serve ‘a legitimate purpose in a rational way’; a statute must ‘bear a reasonable relation to a permissible legislative objective.’” Goodridge, at 329-330 (quoting Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 270, 596 N.E.2d 340 (1992), and in the equal protection context, citing Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778, 767 N.E.2d 549 (2002)). In fact, “[a]ny law failing to satisfy the basic standards of rationality is void.” Goodridge, at 330.

More specifically, “the equal protection principles of the Massachusetts Constitution prohibit lawmakers from treating similarly-situated citizens differently without adequate justification.” Doe v. Secretary of Education, 479 Mass. 375, 387 (2018) (citing Goodridge, at 330, and Massachusetts Fed'n of Teachers, AFT, AFL–CIO v. Board of Educ., 436 Mass. 763, 778–779 (2002)). “For equal protection challenges, the rational basis test requires that ‘an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.’” Goodridge, at 330 (emphasis added) (quoting English v. New England Med. Ctr., 405 Mass. 423, 429 (1980) (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring))).

To be sure, rational basis review is “not a license for courts to judge the wisdom, fairness, or logic of legislative [or executive] choices.” Louhghalam v. Trump, 230 F.Supp.3d 26, 33–34 (D. Mass. 2017) (internal quotations and citations omitted). “[I]t is not the court's function to

launch an inquiry to resolve a debate which has already been settled in the [lawmaking] forum. ‘(I)t (is) the judge's duty ... to give effect to the will of the people as expressed in the statute by their representative body. It is in this way ... that the doctrine of separation of powers is given meaning.’ Shell Oil Co. v. City of Revere, 383 Mass. 682, 687 (1981) (quoting Commonwealth v. Leis, 355 Mass. 189, 202 (1969) (Kirk, J., concurring)).

However, it is notable that “[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.” Goodridge, at 328. Also, in terms of effectuating the will of the people of Massachusetts, it is notable that Massachusetts feels strongly enough about the legal-recreational use of marijuana that it was one of the first states to legalize it and, again, there are no states bordering Massachusetts with operational adult-use marijuana establishments; and as noted above, the adult-use marijuana and liquor industries are joined at the statutory hip.³

IV. Argument

Because the Executive Orders sweep far too broadly against adult-use marijuana establishments and their customers, many of whom rely on adult-use marijuana establishments to purchase marijuana for medical purposes, the Executive Orders do not pass constitutional muster, and the plaintiffs have a strong likelihood of success on the merits of this action. Also, whereas the harm caused by the Executive Orders is obvious and irreparable, the public would not be harmed by permitting Massachusetts’ residents to purchase adult-use marijuana (subject to the same social-distancing and other restrictions imposed on other businesses in order to combat the

³ Moreover, the CCC, which regulates adult-use marijuana, is not part of the executive branch or otherwise under the Governor’s specific control.

COVID-19 outbreak). As a result, the court should enter a preliminary injunction granting such relief pending final disposition of this action.

A. The Plaintiffs are Likely to Succeed on the Merits Because Closing Adult-Use Marijuana Establishments, While Keeping MMTCs and Liquor Stores Open, is Not a Proper Use of the Governor’s Powers Under the Civil Defense Act

1. *Gubernatorial States of Emergency*

The Executive Orders arose from the State of Emergency issued by Governor Baker on March 10, 2020, pursuant to the Civil Defense Act, and pursuant to G.L. c. 17, sec. 2A (“Powers of commissioner upon declaration of emergency”), which provides as follows:

Upon declaration by the governor that an emergency exists which is detrimental to the public health, the [public health] commissioner may, with the approval of the governor and the public health council, during such period of emergency, take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease.

The commissioner, with the approval of the public health council, may establish procedures to be followed during such emergency to insure the continuation of essential public health services and the enforcement of the same.

Upon declaration by the governor that such emergency has terminated, all powers granted to and exercised by the commissioner under this section shall terminate.

The case of Vapor Technology Association v. Baker, 36 Mass. L. Rptr. 93, 2019 WL 6050041 (Mass. Super., October 21, 2019) (Wilkins, J.), concerned a state of emergency issued by Governor Baker with respect to certain adverse health impacts that he identified with respect to so-called “vaping” products. Pursuant to that state of emergency, the Commissioner of Public Health imposed a ban on all lawful and unlawful vaping products: “Without a public hearing, notice and comment, or any explicit statement of fiscal or small business impacts under G.L. c. 30A, the executive branch ha[d] prohibited the sale or display of all vaping products to consumers until January 25, 2020.” Id. at *6. The court said “[i]t may be an open question whether this statute

authorizes broad relief in the nature of a regulation affecting (and, indeed, stopping) an entire industry.” Id. at *7 (emphasis added). In allowing the plaintiffs’ motion for preliminary injunction, the court found that the plaintiffs had a likelihood of success on the merits because [inter alia] the defendants [including the Governor and Commissioner] had dispensed with certain statutory safeguards necessary for the court to “tolerate[] the executive exercise of authority that would otherwise be exclusively legislative.” Id. at *12-13.

“Moreover,” the court proceeded, “under the arbitrary and capricious test ‘[t]he process by which the information is gathered, identified, and applied to the statutory standards under [governing law] must be logical, and not arbitrary or capricious.’” Id. at *13 (quoting Allen v. Boston Housing Authority, 450 Mass. 242, 254 (2009)). Because of this, the court found that:

the process by which the information was ‘gathered, identified, and applied to the statutory standards’ was arbitrary and capricious because it ignored statutory criteria (e.g., fiscal and small business impact), included a declaration of emergency based in part on a non-emergency (ongoing youth vaping epidemic) and failed to provide numerous mandatory safeguards. See G.L. c. 30A, § 2. The Order was made without consideration and in disregard of facts and circumstances from the public and affected persons and entities that the Commissioner should have entertained in a public hearing (or even a notice and comment process).

Id. at * 13 (citation in original).

Balancing the plaintiffs’ potential injuries against those of the general public with respect to lawful vaping products, this court found the plaintiffs’ injuries more compelling: “Their injury, though economic, amount[ed] to irreparable harm because this ‘loss threaten[ed] the very existence of the movant’s business.’” See Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co., 399 Mass. 640, 643 (1987). “[S]hutting down small businesses for four months [was] indeed likely to threaten the existence of the plaintiffs’ businesses and those of members of the [retail vaping] Association.” Id. at *14 (citation in original).

While the present situation involving the COVID-19 outbreak is very different, and much more immediate, than the vaping issue that Governor Baker previously sought to address, the Vapor Technology decision is instructive nonetheless. That decision, which similarly involved a gubernatorial state of emergency, shows that the courts will not hesitate to ensure that the correct procedures are followed, and rational measures are implemented, even in a state of emergency.

2. *The Civil Defense Act*

Judging from the paucity of case law, and thankfully, there have been few instances in which the Commonwealth's governors have had to invoke their emergency powers under the Civil Defense Act and similar statutes in which emergency powers were delegated to them by the Legislature. But it is axiomatic that a governor may only take emergency actions that have (at least tacitly) been delegated to him. In Opinion of the Justices, 315 Mass. 761 (1944), for instance, the Supreme Judicial Court said the governor could not alter military voting rights under his war-emergency powers, for the simple reason that no such right was granted by the enabling legislation at issue. Shortly thereafter, in Opinion of the Justices, 321 Mass. 772 (1947), the SJC rejected a purportedly emergency effort by the governor to alter court procedures because, again, nothing about the legislation on which he relied permitted that effort.

The plaintiffs assume for purposes of this motion that the COVID-19 outbreak warranted the State of Emergency declared by the Governor and constitutes a "natural cause" under the Civil Defense Act. However, any measures taken pursuant to the Civil Defense Act still must be authorized by that Act, and must be "necessary or expedient for meeting said state of emergency." Other than generally citing the lengthy Sections 7, 8, and 8A of the Act, the Executive Orders do not cite any specific provisions of the Act, or explain why it was "necessary or expedient" to close the entire adult-use marijuana industry, while allowing other very similarly-situated industries to remain open. In any event, as discussed below, this distinction was arbitrary and capricious.

3. *Equal Protection*

As noted in Goodridge, arbitrary-and-capricious (i.e., “rational basis”) review is not “toothless,” 440 Mass. at 330 n. 20, and calls for an examination of whether the challenged governmental action bears “a real and substantial relation to the public ... safety[.]” Id. at 330. Moreover, as evidenced by Goodridge (and the bar-examination cases Barnard and Jadd discussed infra), the court cannot accept any facially-valid justification that may be offered for the governmental action in question. (Otherwise, the government would be able to do virtually anything without challenge.) To the contrary, as in these cases (and Vapor Technology), all of which negated various governmental actions, the present court must determine whether the stated reason behind the Executive Orders survives basic scrutiny and was reasonably tailored to address the problem at hand.

In Goodridge, the defendant was required to come forward and explain the purported rationality behind its differentiation between opposite-sex and same-sex marriage. But in approximately 10 pages of analysis, the SJC scrutinized the various rationales proffered by the defendant (and others), and rejected each and every one of them. Goodridge, 440 Mass. at 334.

Similarly, in Centro Presente v. United States Dep't of Homeland Sec., 332 F. Supp. 3d 393, 416 (D. Mass. 2018), which involved an immigration matter, where the federal executive authority could hardly be broader, the court insisted that the executive branch come forward with a legitimate explanation for the immigration regulation at issue. It could not do so, at least at the Rule 12(b)(6) stage, so the government’s motion to dismiss was denied: “The complaint does not allege, and Defendants do not present, any rationale for such a focus or any explanation of the process by which the decision to shift focus in that manner was made. Thus, even under rational basis review, Plaintiffs have plausibly stated constitutional claims.” Id. at 416.

In the present case, the Governor has not provided, and cannot show, any rational basis for his differentiation between adult-use marijuana establishments and both liquor stores and MMTCs. As discussed below, the Governor’s only stated reason—that this differentiation will prevent nonresidents from patronizing the adult-use marijuana establishments and thereby reduce the spread of COVID-19—does not hold up under basic scrutiny.

4. *Constitutionality of Differential Treatment of Non-Residents*

Cases such as Barnard v. Thorstenn, 489 U.S. 546 (1989), and In the Matter of Robert I. Jadd, 391 Mass. 227 (1984), address the federal Constitution’s interstate privileges-and-immunities clause and make clear that the Governor could have simply restricted marijuana sales to Massachusetts residents. “When a challenged restriction deprives nonresidents of a privilege or immunity protected by [the federal Constitution], it is invalid unless ‘(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.’” Barnard, at 552 (emphases added) (quoting Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985)). “If the State interest is substantial and some measure of discrimination is permissible [because no fundamental right is involved], there must be a reasonable relationship between the danger represented by non-citizens, as a class, and the ... discrimination practiced upon them.” Jadd, at 229 (emphases added) (quoting Hicklin v. Orbeck, 437 U.S. 518, 526 (1978)).

Both of these cases struck down bar-admission residency requirements as not substantially related to legitimate state objectives. In taking such action, both courts delved well past the involved states’ purported reasons for the residency requirements, vigorously examining whether those reasons held up under analytical scrutiny. As in Goodridge, they did not. But the present situation, involving COVID-19 and its social-distancing requirements, involves a very different set of considerations.

5. *Conclusion – No Rational Basis Exists*

Clearly, the Governor’s interest in deterring nonresidents from entering Massachusetts during the COVID-19 outbreak is legitimate and indeed compelling, and preventing nonresidents from patronizing adult-use retail marijuana establishments would substantially advance this interest. This is especially true insofar as the states from which the nonresidents would be traveling very likely do not permit—and federal law does not permit—recreational marijuana sales.

But it was entirely unnecessary and unjustifiable for Governor Baker to entirely shutter the entire adult-use marijuana industry, and to prevent Massachusetts’ own residents from patronizing this industry, while allowing MMTCs to stay open and, more curiously, allowing liquor stores to stay open and serve nonresidents. All of these businesses are equally capable of enacting social-distancing and other protections encouraged or mandated by the Executive Orders, the CDC, or the Massachusetts DPH, and again, the Governor certainly has the authority to limit nonresidents’ use of Massachusetts businesses under the present circumstances.

Furthermore, the Executive Orders seriously impinge upon the rights of Mr. Mandile and other Massachusetts veterans and residents who frequent adult-use marijuana establishments for medical reasons, either for convenience, or because they fear that registering as medical-marijuana users would deprive them of federal benefits. This harm is particularly acute in Nantucket, where the only licensed marijuana facility is an adult-use marijuana establishment. This is a very compelling factor: As the Executive Orders acknowledge, the provision of medical marijuana is an essential service.

Adding to the irrational and arbitrary nature of the Executive Orders (as they relate the adult-use cannabis industry and its Massachusetts customers) is that the manufacturing chains of the adult-use and medical marijuana industries are inextricably entwined with each other. One such example is CommCan’s state-licensed co-located adult-use marijuana establishment and

MMTC in the Town of Millis. In addition, the products sold at adult-use marijuana establishments are known to have medicinal qualities. (In fact, in many cases, they offer the same products as medical dispensaries.) This is not typically said about the products sold at liquor stores.

Moreover, unlike all of the states that border it, the Commonwealth has legalized recreational marijuana. (As noted, Vermont and the non-bordering but nearby Maine have legalized but not yet licensed any marijuana establishments.) This suggests that adult-use marijuana establishments are certainly important (and at least as important as liquor stores) to “the needs of Massachusetts’ unique economy” to which the First Executive Order purportedly was tailored.

As noted, among the many states with regulated adult-use and medical marijuana markets that have responded to the COVID-19 outbreak by issuing orders differentiating between essential and non-essential business, Massachusetts apparently is the only state that has deemed medical marijuana essential but adult-use/recreational marijuana non-essential. The states of California, Colorado, Illinois, Nevada, and Washington, and California all have deemed both medical and recreational marijuana establishments to be essential. Michigan and Oregon have provided guidance for the continued operation of all cannabis businesses regardless of type.

The fact that Governor Baker took such different action than the Governors or other agencies of these similarly-situated states, and has said that the possibility of amending his essential-services list to include adult-use marijuana establishments is a “non-starter,” is all the more reason to conclude that he acted arbitrarily and capriciously in excluding the adult-use cannabis industry from the list of COVID-19 Essential Services. Indeed, it suggests that he simply did not want the adult-use establishments to remain open during the COVID-19 outbreak, despite the legality, value, and wide public approval of such establishments, as well as their clear similarity to many establishments that were allowed to remain open. Of course, this is not a valid reason.

B. Balance of Harms

The easiest consideration for the court is the balancing of harms. If the nascent adult-use cannabis industry (which is not eligible for any COVID-19 stimulus programs) remains shuttered until at least May 4, 2020, the Marijuana Establishment Plaintiffs and dozens of other businesses in this industry will be severely and irreparably harmed financially, and some may go out of business altogether; and, Mr. Mandile and the other Massachusetts residents who desire recreational marijuana or (more importantly) medical marijuana, will have great difficulty obtaining (or may not be able to obtain) marijuana. Indeed, medical-marijuana users in Nantucket will have no legal recourse whatsoever. Moreover, all Massachusetts residents will be deprived of all tax revenues derived from the adult-use marijuana industry during this ongoing and upcoming period of great financial difficulty.

This is all for no good reason. For one, and again, the desire to deter nonresidents from using these facilities can be accomplished by—quite simply—prohibiting this. Moreover, adult-use marijuana establishments are perfectly capable of implementing the social-distancing and other business measures necessary to combat the COVID-19 outbreak.

V. Conclusion

To reiterate, the Governor's efforts to combat the COVID-19 outbreak generally have been laudable. However, as against the adult-use cannabis industry and its Massachusetts customers, his Executive Orders went too far. There was no lawful reason for the Governor to shutter this entire industry, while allowing the medical-marijuana and liquor store industries to remain open. The past and future harm caused by this overreach will be extraordinary. Therefore, the court should put and immediate hold on it, by allowing the plaintiffs' motion for preliminary injunction, pending final disposition of this action.

The Plaintiffs,

COMMCAN, INC.; THE GREEN LADY
DISPENSARY, INC.; ASCEND MASS LLC;
MASSGROW, LLC; SLANG, INC.; and
STEPHEN MANDILE.

By their attorneys,

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/s/ Michael P. Ross

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Dated: April 8, 2020

-4/8/20

TAB A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
DOCKET NO. _____

COMMCAN, INC.; THE GREEN LADY
DISPENSARY, INC.; ASCEND MASS LLC;
MASSGROW, LLC; SLANG, INC.; and
STEPHEN MANDILE,
Plaintiffs,

v.

CHARLIE BAKER, in his Official Capacity
as Governor of the Commonwealth of
Massachusetts,
Defendant.

AFFIDAVIT OF NICOLE CAMPBELL

I, Nicole Campbell, having personal knowledge, do hereby depose as follows under the pains and penalties of perjury:

1. I am the co-founder of The Green Lady Dispensary, Inc. ("The Green Lady"), a Massachusetts corporation that operates a state-licensed retail, cultivation, and product manufacturing marijuana establishment in the Town of Nantucket, Massachusetts ("Nantucket").
2. The Green Lady Dispensary operates the only state-licensed retail marijuana establishment in Nantucket and, as a result of Governor Baker's March 23 and 31, 2020 and Executive Orders regarding COVID-19 ("Executive Orders"), we have been forced to cease all of our business operations, including retail, cultivation, and product manufacturing.
3. Through my work at The Green Lady, I have personal knowledge of individuals who exclusively rely on The Green Lady for marijuana for medical purposes because it is the only state-licensed retail marijuana establishment in Nantucket.

4. Through my work at The Green Lady, I have personal knowledge of individuals who have been deprived access to marijuana for medical purposes as a result of the Executive Orders, which did not list adult-use marijuana-establishments as COVID-19 Essential Services and therefore resulted in the closure of The Green Lady.
5. The Executive Orders have caused and, as long as they remain in place, will continue to cause irreparable financial harm to The Green Lady.
6. As a marijuana establishment, The Green Lady, and all other marijuana establishments, are not entitled to any federal stimulus relief in connection with COVID-19.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 7th

DAY OF APRIL 2020.



Nicole Campbell

TAB B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
DOCKET NO. _____

COMMCAN, INC.; THE GREEN LADY
DISPENSARY, INC.; ASCEND MASS LLC;
MASSGROW, LLC; SLANG, INC.; and
STEPHEN MANDILE,
Plaintiffs,

v.

CHARLIE BAKER, in his Official Capacity
as Governor of the Commonwealth of
Massachusetts,
Defendant.

AFFIDAVIT OF STEPHEN MANDILE

I, Stephen Mandile, having personal knowledge, do hereby depose as follows under the pains and penalties of perjury:

1. I am a veteran and Massachusetts resident, and I have been diagnosed with chronic pain and PTSD by physicians at the Department of Veterans Affairs, who once prescribed me over 50 different prescription drugs, including Methadone, Morphine, Oxycodone, Oxycontin, Percocet, Fentanyl, and Benzodiazepine for treatment and relief.
2. As a result of taking these medications, I experienced negative side effects including depression and suicidal thoughts.
3. I began using marijuana as an alternative medical treatment and, within five months, I was able to cease using all but one of the aforementioned prescription drugs, and marijuana has since become an essential part of my medical treatment.

4. I rely on adult-use marijuana establishments to obtain marijuana to treat my medical conditions, because I would have to travel over an hour to visit a retail medical marijuana treatment center and adult-use marijuana establishments make marijuana significantly more accessible to me.
5. I am the founder of Alternative Treatment for Veterans ("ATV"), a non-profit organization whose mission is to raise awareness about veterans and marijuana use, support research, and advocate for veteran access to marijuana.
6. Through my work at ATV, I have personal knowledge of veterans who rely exclusively on adult-use marijuana establishments to obtain marijuana for medical purposes, because they are reluctant to enter into the Commonwealth of Massachusetts' medical marijuana program, due to fears that doing so may deprive them of federal benefits.
7. Through my work at ATV, I have personal knowledge of veterans who have been deprived access to marijuana for medical purposes as a result of Governor Baker's recent Executive Orders of March 23 and 31, 2020, which have not listed adult-use marijuana establishments as COVID-19 Essential Services, and which therefore have resulted in the closure of all adult-use retail marijuana establishments in the Commonwealth.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 7

DAY OF APRIL 2020.


Stephen Mandile