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New York Governor v. New York City Mayor: Who Has the Last Word on New York City's Business Shutdown?

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During the COVID-19 emergency, what are businesses operating in New York City to do if the Mayor issues an executive order that conflicts with one from the Governor of the State? Under applicable law and legal principles, the last word should rest with the Governor. To be sure, businesses must comply with the valid orders of local governments, but the Governor of New York may, by executive order, suspend otherwise-valid sources of law, including orders from mayors. This may be surprising to some, as New York's Constitution provides local governments with protections from State-level encroachments in the form of the home rule doctrine, but these protections do not likely limit the Governor's executive orders in response to the COVID-19 pandemic.

New York's Governor's Broad Emergency Authority.

Under New York Executive Law 29-a, a statute initially passed by the New York State Legislature in 1978, the Governor of the State of New York has immense power during certain states of emergency. The Legislature amended Section 29-a in early March to provide the Governor with even greater authority in light of the looming threat of COVID-19.[1] According to the legislative history, the amendment was intended to allow "the governor" to issue "any directive necessary to respond to a state disaster emergency."[2]

Section 29-a provides that

Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend *any* state, local law, ordinance, *or orders, rules or regulations, or parts thereof*, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster.[3]

The law further provides that the governor "may issue *any* directive during a state of disaster emergency declared in the following circumstances," which include an "epidemic" and, as added by the recent amendment, a "disease outbreak."[4] The amendment also added to the statute that "[a]ny such directive" issued by the Governor "must be necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive."[5] The Governor's power is not unlimited. In fact, if the New York State Legislature wishes to override the Governor's directive under Section 29-a, it "may terminate by concurrent resolution executive orders issued under [Section 29-a] at any time."[6]

Given the breadth of Section 29-a, an executive order from the Governor meant to manage the COVID-19 pandemic should fall within the scope of the Governor's statutory authority. After all, the statute was expressly amended for this purpose.[7] Case law also supports this result. Not surprisingly, to date there has been very little litigation over the

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Governor's Section 29-a powers, the only case to address the statute in meaningful detail, admittedly decided nearly 20 years ago, affirmed the Governor's exercise of emergency authority.[8] And, just this month, a court upheld one of Governor Cuomo's COVID-19 executive orders against a challenge that it denied criminal defendants their statutory right to a prompt preliminary hearing.[9]

Only on rare occasion have courts second-guessed governmental emergency orders. For example, last year, a court granted a preliminary injunction against an Emergency Declaration issued by the County Executive of Rockland County that shut down schools in the face of a measles outbreak.[10] That court reasoned that the outbreak was not an "epidemic" as used within the meaning of a different emergency statute from Section 29-a.[11] The recent amendments to Section 29-a should avoid this result, however, because they clarified that the Governor may issue orders in the face of both an "epidemic" *and* a "disease outbreak."[12] Moreover, the Rockland County court's reasoning does not account for the factual differences between a county-wide measles outbreak and the COVID-19 pandemic—among other things, there has been a measles vaccine available for decades.

In short, unless some other statute or constitutional provision served to limit his action, the Governor would be within his statutory authority to issue directives to New York businesses, or to suspend mass transit and public gatherings, including concerts, shows, games and other events.[13]

Local Government's Emergency Powers and Constitutional Home Rule.

While the Mayor of New York City has authority to issue emergency orders to manage the COVID-19 pandemic, his orders are likely ineffective if they conflict with an order from the Governor made pursuant to Executive Law Section 29-a. Still, the Mayor of New York City is empowered to issue local emergency orders to deal with an ongoing or imminent crisis.[14] This stems from New York State Executive Law Section 24, which provides that a governmental "chief executive may promulgate local emergency orders to protect life and property or to bring [an] emergency situation under control."[15] The New York City Charter itself incorporates Section 24.[16] But, as already mentioned, Section 29-a on the Governor's emergency powers allows the Governor to "suspend any statute, local law, ordinance, or orders,"[17] which on its face includes an order from a mayor. Thus, the Governor's emergency powers allow him to suspend a mayor's "order[]."

In the face of the Governor's overriding executive order, New York City's Mayor may argue that the State Constitution limits the State's ability to control local affairs. But while the State Constitution does provide protections through the provisions relating to home rule, those protections are limited, and indeed may be inapplicable altogether.

As the New York Court of Appeals has said,

Enacted to protect the autonomy of local governments, the Municipal Home Rule Clause allows the legislature to "act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership."[18]

For three reasons, constitutional home rule should not limit the Governor from issuing an order that conflicts with the New York City Mayor's management of the COVID-19 pandemic.

First, constitutional home rule challenges may not apply to executive orders at all. The relevant constitutional text constrains the "Legislature" and the "law[s]" it may pass, not the Governor or any action he may take via executive order.[19] As one case explained in rejecting a home rule challenge to a county executive's order, "an Executive Order" functions merely as an "implementing directive" made under an already-existing law.[20]

An executive order, then, is "not a law and, therefore, claims predicated on alleged violation of the State Constitution or statute that themselves pertain to laws, are not viable."[21] With that in mind, a mayor who wishes to challenge an executive order made pursuant to Executive Law Section 29-a would likely have to show that Section 29-a *itself* violates the Constitution's home rule provisions. Such a challenge would almost certainly fail, as Section 29-a is not aimed at "the property, affairs or government of any local government," which is the only limitation the home rule provision creates.[22]

Second, even if an executive order from the Governor were subject to a home rule inquiry, it would likely count as a permissible "general law." Under the State Constitution, home rule does not apply to any state "general law," meaning one "which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages."[23] Courts have thus far typically deferred to the Legislature when deciding whether a statute is properly classified as a general law,[24] which has led to an extraordinarily view of what falls into that general law category.[25]

Third, even if an executive order from the Governor were construed as a "special law" for home rule purposes, it may still be valid under the Substantial State Concern doctrine. That doctrine provides that if (1) the State has a "substantial interest" in the subject matter and (2) "the enactment . . . bear[s] a reasonable relationship to the legitimate, accompanying substantial State concern," the Legislature may act even if doing so interferes with issues of local concern.[26] For example, in *Greater New York Taxi Association v. State*, the Legislature substantially expanded the number of authorized taxi medallions and modified regulations governing both yellow cabs and livery cabs in New York City specifically, despite the fact that "regulation of" taxicabs "has always been a matter of local concern."[27] The Court of Appeals held that the law in question was valid as it meant to further "the public health, safety and welfare of residents of the state of New York *traveling to, from and within* the city of New York," which constituted "a matter of substantial state concern."[28]

* * *

In sum, the Governor would very likely be within his authority to issue a statewide order directed to businesses during the context of the COVID-19 pandemic, and a mayor of an affected municipality likely would have no recourse to challenge such an order. Executive Law Section 29-a expressly places extraordinary authority in the Governor to deal with an "epidemic" or "disease outbreak"—conditions no doubt satisfied by the current COVID-19 pandemic. Of course, any order under Section 29-a would have to be, as noted, consistent with the federal and state constitutions, which could provide a basis for challenge depending on the from that a particular order might take.

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[1] *See* Senate Bill S7919, NY State Senate, https://www.nysenate.gov/legislation/bills/2019/s7919.

[2] *Id.*

[3] N.Y. Exec. L. § 29-a(1) (emphasis added); Senate Bill S7919, *supra* note 1.

[4] N.Y. Exec. L. § 29-a(1) (emphasis added).

[5] *Id.*

[6] Exec. L. § 29-a(4).

[7] *See* Senate Bill S7919, *supra* note 1.

[8] *See* People v. Haneiph, 191 Misc.2d 738 (Sup. Ct. Kings Cty. 2002) (rejecting

criminal defendant's motion to dismiss for failing to satisfy the state Speedy Trial statute and holding that Governor Pataki's suspension of the Speedy Trial statute after 9/11 was not unconstitutional).

[9] *See* People v. Hood, 2020 WL 1672425, at *3 (N.Y. City Ct. Apr. 4, 2020) ("[T]he right to a prompt preliminary hearing is purely statutory. As such, it is within the Governor's power to suspend that statutory right during a state emergency disaster.")

[10] *See* W.D. *ex. rel.* A v. County of Rockland, 63 Misc. 3d 932 (Sup. Ct. Rockland Cty. 2019).

[11] *Id.* at 936.

[12] *See supra* note 1.

[13] *See* Selfridge v. Carey, 522 F. Supp. 693, 696 n.4 (N.D.N.Y. 1981) (noting in dicta that Section 29-a "would appear to accord the Governor authority to ban public activities in certain circumstances").

[14] *See generally* Exec. L. § 24.

[15] *Id.* § 24(1).

[16] *See* New York City Charter § 10-171.

[17] Exec. L. § 29-a(1).

[18] Greater N.Y. Taxi Ass'n v. State, 21 N.Y.3d 289, 301 (2013) (quoting N.Y. Const. art. IX, § 2(b)(2))

[19] *See* N.Y. Const., art. IX, § 2(b)(2).

[20] Godfrey v. Spano, 15 Misc. 3d 809, 817-18, 836 N.Y.S.2d 813, 819 (Sup. Ct. Westchester Cty.) (citing Clark v. Cuomo, 66 N.Y.2d 185 (1985)), *judgment aff'd*, 13 N.Y.3d 358 (2009).

[21] *Id.* *See also* People v. Haneiph, 191 Misc. 2d 738, 743 (Sup. Ct. Kings Cty. 2002) (affirming Governor's order under Section 29-a while noting that an executive act is valid so "long as 'the basic policy decisions underlying the regulations have been made and articulated by the Legislature.'" (quoting Matter of N.Y.S. Health Facilities Ass'n v. Axelrod, 77 N.Y.2d 340, 348 (1991)).

[22] *See* N.Y. Const., art. IX, § 2(b)(2) (emphasis added).

[23] Matter of City of Utica, 91 N.Y.2d 964, 965 (1998) (quoting N.Y. Const., art. IX, § 3(d)(1)).

[24] *See* Greater N.Y. Taxi Ass'n, 21 N.Y.3d at 302 ("Our review concerning what constitutes a substantial state interest is not dependent on what historically has been the domain of a given locality. Rather, our determination is dependent on the stated purpose and legislative history of the act in question." (internal quotation marks omitted)).

[25] In one case, while a law conferred benefits only on the Museum of Modern Art in New York City, the court found it was still a "general" law because "other institutions" might "in time, meet the[] [law's requirements] also." *See* Hotel Dorset Co. v. Tr. for Cultural Res. of City of New York, 46 N.Y.2d 358, 368-369 (1978). Accordingly, it is likely that any executive order from the Governor meant to manage the COVID-19 pandemic could be written in terms that are general enough to render it a "general law," even if the bulk of its effects are immediately felt in New York City. *Cf. id.*

[26] *See, e.g.*, City of New York v. Patrolmen's Benevolent Ass'n, 89 N.Y.2d 380, 391 (1996); *see also* Adler v. Deegan, 251 N.Y. 467, 491 (1929) (Cardozo, J., concurring) ("[I]f the subject be in a substantial degree a matter of state concern, the Legislature may act, though intermingled with it are concerns of the locality."); Matter of Kelley v. McGee, 57 N.Y.2d 522, 538 (1982) ("It is well established that the home rule provisions of article IX do not operate to restrict the Legislature in acting upon matters of State concern.").

[27] *See Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 296-300.

[28] *Id.* at 303 (emphasis in original).

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**, or the following authors:

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