

SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12935

---

STEPHEN FOSTER, MICHAEL GOMES, PETER KYRIAKIDES,  
RICHARD O'ROURKE, STEVEN PALLADINO, MARK SANTOS, DAVID  
SIBINICH, MICHELLE TOURIGNY, MICHAEL WHITE, FREDERICK  
YEOMANS, & HENDRICK DAVIS,

*Plaintiffs,*

**v.**

CAROL MICI, Commissioner of the Massachusetts Department of  
Correction, GLORIANN MORONEY, Chair, Massachusetts Parole Board,  
THOMAS TURCO, Secretary of the Executive Office of Public Safety and  
Security, & CHARLES BAKER, Governor of the Commonwealth of  
Massachusetts,

*Defendants.*

---

On Reservation & Report from the  
Supreme Judicial Court for Suffolk County, SJ-2020-0212

---

**MOTION TO DISMISS OF  
DEFENDANT GOVERNOR CHARLES D. BAKER**

---

Michael P. Moore Jr., BBO No. 670323  
Special Assistant Attorney General  
Ryan P. McManus, BBO No. 673219  
Special Assistant Attorney General (appt. pending)  
HEMENWAY & BARNES LLP  
75 State Street  
Boston, MA 02109  
(617) 227-7940  
pmoore@hembar.com  
rmcmanus@hembar.com

Governor Charles D. Baker moves to dismiss plaintiffs' claims asserted against him in this action. The declaratory and injunctive relief sought by plaintiffs is not available against the Governor under this Court's settled precedent and article 30 of the Massachusetts Declaration of Rights. In addition, even assuming the truth of plaintiffs' allegations, they fail to state an actionable claim against the Governor. The Governor therefore moves to dismiss all claims against him pursuant to Mass. R. Civ. P. 12(b)(1) and Mass. R. Civ. P. 12(b)(6) (insofar as they apply to proceedings before the Single Justice under Mass. R. Civ. P. 1) and under Mass. R. App. P. 15 (insofar as it applies to proceedings before the full Court).

First, plaintiffs' claims for declaratory relief under the Declaratory Judgment Act, G.L. c. 231A, et seq., fail as a matter of law. By the plain terms of that Act, declaratory relief may not be sought against the Governor. G.L. c. 231A, § 2 ("this section shall not apply to the governor"); McCarthy v. Governor, 471 Mass. 1008, 1010-11 (2015); Alliance, AFSCME/SEIU, AFL-CIO v. Sec'y of Admin. & Fin., 413 Mass. 377, 377 n.1 ("[D]eclaratory relief is not available against the Governor").

Second, the injunctive relief sought against the Governor is beyond the authority of this Court to award. Plaintiffs' Complaint does not seek to enjoin any affirmative act of the Governor but instead seeks to compel him to engage in affirmative conduct. See Dep't of Pub. Utils. v. Trustees of N.Y., N.H., & H.R. Co., 304 Mass. 664, 671 (1939) ("Relief by restraining affirmative action ordinarily is given in equity by preventive injunction. But relief against inaction by compelling performance of a public or quasi public duty . . . ordinarily is given at law by writ of mandamus."). This Court has long held that such mandamus relief is unavailable against the Governor, even where only ministerial acts are at issue. Rice v. Draper, 207 Mass. 577, 579 (1911). That precedent

has even more force where gubernatorial discretion is at issue. See Town of Milton v. Commonwealth, 416 Mass. 471, 475-76 (1993). Indeed, this Court has recognized consistently that ordering the Governor to affirmatively undertake executive action would raise core art. 30 concerns. Id. (“Judicial unwillingness to order the Governor or the Legislature to act is founded on separation of powers principles expressed in art. 30 of the Massachusetts Declaration of Rights.”).

Third, even if the Court had authority to award the relief demanded against the Governor, the Governor is not a proper party to a civil rights claim where the actions of other Executive Branch officials are at issue. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (“Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”); Hannon v. Beard, 979 F. Supp. 2d 136, 141-42 (D. Mass. 2013) (dismissing Governor from challenge to conditions of confinement brought pursuant to 42 U.S.C. § 1983). A review of the Complaint illustrates this point, as only two of its 100-plus paragraphs even mention the Governor at all. Any relief, if warranted, is available from subordinate executive officers who have been named defendants in this action. And should relief be entered as to those officials, the “presumption exists that the Commonwealth will honor it[.]” Bromfield v. Treasurer and Receiver Gen., 390 Mass. 665, 669 (1983).

With petitioners’ assent, the Governor requests leave to file a memorandum supporting this motion at or before 4:00 PM on Wednesday, April 29, 2020. As a basis for that request, the Governor submits that the Court and the parties will benefit from a full briefing of the remedial, jurisdictional, and constitutional issues implicated by including the Governor as a party to this action.

Respectfully submitted,

GOVERNOR CHARLES D. BAKER

By his attorneys,

/s/ Ryan P. McManus

Michael P. Moore Jr., BBO No. 670323

Special Assistant Attorney General

Ryan P. McManus, BBO No. 673219

Special Assistant Attorney General

(appt. pending)

HEMENWAY & BARNES LLP

75 State Street

Boston, MA 02109

(617) 227-7940

pmoore@hembar.com

rmcmanus@hembar.com

### **CERTIFICATE OF SERVICE**

I, Ryan P. McManus, hereby certify, under the penalties of perjury, that on April 24, 2020, I caused a true and accurate copy of the foregoing to be filed and served via electronic filing, and served copies upon all counsel of record by email.

/s/ Ryan P. McManus

Ryan P. McManus, BBO No. 673219

Special Assistant Attorney General

(appt. pending)