

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2009-4078

MASSACHUSETTS REPUBLICAN PARTY

v.

DEVAL PATRICK

**MEMORANDUM AND ORDER ON PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff, the Massachusetts Republican Party ("Party"), has filed a motion for a preliminary injunction requesting this court enjoin the defendant, Deval Patrick, Governor of the Commonwealth of Massachusetts ("Governor"), from appointing an interim Senator to the Congress of the United States to fill a vacant seat.

[W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits.

Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). The issuance or denial of a preliminary injunction rests within the discretion of the judge. Id. at 615.

This court finds that the Party has not shown that it has a chance to succeed on the merits and therefore, any risk of harm to the Party will not outweigh the risk of harm to the Governor and the Commonwealth. The Referendum, II, of the Constitution states:

A law declared to be an emergency law shall contain a preamble setting forth the facts constituting the emergency, and shall contain the statement that such law is necessary for the immediate preservation of the public peace, health, safety or convenience. A separate

vote, which shall be recorded, shall be taken on the preamble, and unless the preamble is adopted by two-thirds of the members of each House voting thereon, the law shall not be an emergency law. Upon the request of two members of the Senate or of five members of the House of Representatives, the vote on the preamble in such branch shall be taken by call of the yeas and nays. But if the governor, at any time before the election at which it is to be submitted to the people on referendum, files with the secretary of the commonwealth a statement declaring that in his opinion the immediate preservation of the public peace, health, safety or convenience requires that such law should take effect forthwith and that it is an emergency law and setting forth the facts constituting the emergency, then such law, if not previously suspended as hereinafter provided, shall take effect without suspension, or if such law has been so suspended such suspension shall thereupon terminate and such law shall thereupon take effect: but no grant of any franchise or amendment thereof, or renewal or extension thereof for more than one year shall be declared to be an emergency law.

The Party argues that the Governor's letter to the Secretary declaring an emergency law can only be used when a law is subject to a referendum,¹ and further, only when the law could be subject to suspension of its operation under The Referendum, III, Section 3. In addition, the Party contends that the law at issue here, Chapter 92, cannot be subject to a referendum or a request for suspension. This court disagrees.

The Referendum, III, Section 1 states: "A referendum petition may ask for a referendum to the people upon any law enacted by the general court which is not herein expressly excluded." There is no argument that Chapter 92 fits into "the expressly excluded" category. See The Referendum, III, Section 2. The Party does not cite to any case law in support of its argument that Chapter 92 is not subject to a referendum petition or request for suspension.²

In addition, the Governor can make a declaration before any referendum petition is filed.

¹ Presumably relying on this language: "at any time before the election at which it is to be submitted to the people on referendum."

² The August 5, 2009 deadline cited by the Party does not apply here as Chapter 92 is not a constitutional amendment.

In Opinion of the Justices, 368 Mass. 889, 893-894 (1975), the Supreme Judicial Court (“SJC”), citing Prescott v. Secretary of the Commonwealth, 299 Mass. 191, 197 (1938), stated:

According to The Referendum, II, a declaration may be made ‘at any time’ (before the putative date of holding the referendum, which is to say before the last date on which the declaration could have any efficacy); and, significantly, our decision in Prescott v. Secretary of the Commonwealth, supra, shows that a declaration may validly be made before any referendum petition is filed.

In Prescott, the SJC, although addressing a situation where a referendum petition had already been filed, stated:

The provisions of The Referendum, II, that the Governor may file a statement ‘at any time before the election at which . . . [the law] is to be submitted to the people on referendum’ and that upon the filing of such a statement ‘then such law, if not previously suspended as hereinafter provided, shall take effect without suspension,’ import that the Governor need not wait before filing a statement until the operation of the law has been suspended under the provisions of The Referendum, III, § 3, as the result of the completion of a petition for a referendum and for such suspension — **or even until the original filing of such a petition.**

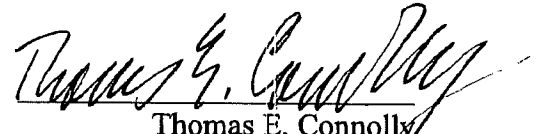
299 Mass. at 197 (emphasis added). Thus, the Party’s argument that the Governor’s authority to declare an emergency law can only be used when a law is subject to a referendum fails.

Further, this court finds that this action cannot be maintained against the Governor himself. See Prescott, 299 Mass. at 196-197 (principle that courts should determine “whether a public officer is overstepping constitutional bounds and whether statutes duly enacted conform to the fundamental law as expressed in the Constitution” applies to official acts of the Governor, “even though proceedings drawing them in question cannot be brought directly against him”).

Although there are other potential reasons for denying the request for a preliminary injunction, this court finds the two discussed above sufficient for the denial.

ORDER

For the above mentioned reasons, it is hereby **ORDERED** that Plaintiff's Motion for a Preliminary Injunction be **DENIED** and Defendant's Motion to Dismiss the Complaint be **ALLOWED**.


Thomas E. Connolly
Justice of the Superior Court

Date: September 25, 2009

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