COMMONWEALTH OF MASSACHUSETTS
SJC-12983

Supreme Judicial Court

DAWN DESROSIERS, and DAWN DESROSIERS D/B/A HAIR 4 YOU, and SUSAN KUPELIAN, and NAZARETH KUPELIAN, and NAZ KUPELIAN SALON, and CARLA AGRIPPINO-GOMES, and TERRAMIA, INC., and ANTICO FORNO, INC., and JAMES P. MONTORO, and PIONEER VALLEY BAPTIST CHURCH INCORPORATED, and KELLIE FALLON, and BARE BOTTOM TANNING SALON, and THOMAS E. FALLON, and THOMAS E. FALLON D/B/A UNION STREET BOXING, and ROBERT WALKER, and APEX ENTERTAINMENT LLC, and DEVENS COMMON CONFERENCE CENTER LLC, and LUIS MORALES, and VIDA REAL EVANGELICAL CENTER, and BEN HASKELL, and TRINITY CHRISTIAN ACADEMY OF CAPE COD, *Plaintiff-Petitioners*,

v.

CHARLES D. BAKER, JR., in his official capacity as the Governor of the Commonwealth of Massachusetts, *Defendant-Respondent*.

ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF PLAINTIFF-PETITIONERS

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Dated: August 4, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Plaintiff-Petitioners disclose as follows: Plaintiff-Petitioners do not have parent corporations, and no publicly held corporation owns 10% or more of any of Plaintiff-Petitioners' businesses, churches, or school.

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STATEMENT OF THE ISSUES

The parties have agreed to pose two principal questions to the Supreme Judicial Court for Suffolk County for reservation and report to the full Supreme Judicial Court. Joint Pet. to Transfer Case, at 6 (July 2, 2020).

1. Whether the Civil Defense Act, St. 1950, c. 639, provides authority for Governor Baker's declaration of a state of emergency on March 10, 2020, and issuance of the emergency orders pursuant to the emergency declaration and, if so, whether such orders, or any of them, violate the separation of powers doctrine reflected in article 30 of the Massachusetts Declaration of Rights.

2. Whether the emergency orders issued by Governor Baker pursuant to his declaration of a state of emergency on March 10, 2020, violate Plaintiff-Petitioners' federal or state constitutional rights to procedural and substantive due process or free assembly as alleged by Plaintiff-Petitioners.

STATEMENT OF THE CASE

On June 1, 2020, Plaintiff-Petitioners filed a Complaint in Worcester County Superior Court against Defendant-Respondent, Charles D. Baker, Jr., in his official capacity as Governor of Massachusetts. On June 18, 2020, Plaintiff-Petitioners filed an Amended Complaint providing updated facts as they evolved after the initial filing. Plaintiff-Petitioners subsequently requested and received leave of

court to file a Motion for Preliminary Injunction in excess of the page limits. The Superior Court has not made any rulings on the merits of this case.

The parties agreed that in lieu of proceeding with a Preliminary Injunction Motion in the Superior Court, "a ruling from this Court on [Governor Baker's] authority will provide clarity, reduce the likelihood of inconsistent lower-court decisions, and preserve judicial and executive branch resources during this emergency." Joint Pet. to Transfer Case, at 4. The parties filed a Joint Petition to Transfer the Case to the Single-Justice Session of this Court on July 2, 2020, and on July 10, 2020, Justice Barbara A. Lenk entered an order to "reserve and report the matter to the full [Supreme Judicial Court] for decision." Order of Reservation & Report (July 10, 2020).

STATEMENT OF FACTS

There are no facts in dispute in this case. On July 2, 2020, the parties filed a Joint Stipulation of Facts attached to their Joint Motion to Transfer Case to the Supreme Judicial Court for Suffolk County. The Joint Motion to Transfer and the Joint Stipulation are attached hereto as Addendum B. Governor Baker's Executive Order No. 591, declaring a state of emergency in the Commonwealth, is attached hereto as Addendum G (the "Civil Defense State of Emergency"). Governor Baker

has issued 45 COVID-19 orders to date (the "COVID-19 Orders").[1] The COVID-19 Orders cited in this Brief are attached hereto as Addendum H.

SUMMARY OF ARGUMENT

A health crisis does not empower the governor to make law or dispense with law as he sees fit. That COVID-19 is a contagious and sometimes deadly virus is beyond dispute. It is cause for public concern and warrants action to protect those at risk. Fear of that virus, however, cannot justify suspending the constitutional order of Massachusetts government. In fact, deviation from the Constitution's separation of powers has exacerbated what started as a health crisis into related health, social, political, economic, and spiritual crises.

On March 10, 2020, Governor Baker declared a state of emergency under the Civil Defense Act, to mitigate the spread of COVID-19. Argument § I. But his reliance upon a Cold War-era statute designed to defend Massachusetts from foreign invasions, armed insurrections, and similar catastrophic events, is misplaced. *Id.* The Civil Defense Act is a special law, with limited scope. *Id.* § I.A.1. Under the well-established canon of statutory interpretation, *ejusdem generis*, general terms at the end of a statutory list are limited by the specific words

[1] Plaintiff-Petitioners will coordinate with Defendant-Respondent to file a comprehensive Joint Appendix with all COVID-19 Orders. Plaintiff-Petitioners could not account for all COVID-19 Orders through on-line resources.

that precede them. *Id.* The Civil Defense Act identifies seven triggering events that permit gubernatorial civil defense emergency declarations. *Id.* Pandemics are not on the list, nor can they be read into it. *Id.*

For instance, the general phrase, "other natural causes," cannot be reasonably interpreted to include pandemics because pandemics are unlike the preceding list which is limited to "fire, flood, or earthquake." *Id.* § I.A.2. Fires, floods, and earthquakes may threaten health, but these crises are characterized by catastrophic destruction to infrastructure and property. *Id.* They put a specific population's access to water, food, and shelter at grave risk. *Id.* Pandemics, on the other hand, are crises that cause misery and sometimes death, but pandemics do not impact the Commonwealth's infrastructure, nor are they limited to times, places, or durations. *Id.* Indeed, this is the likely reason that the Civil Defense Act is a special law—not codified in the general laws—because it does not have widespread applicability. *Id.* § I.A.3.

Moreover, COVID-19 did not surprise the General Court—it planned for this contingency in the Public Health Act, at least as far back as 100 years ago. *Id.* § I.B.1. The Act's primary function is to protect Massachusetts from dangerous infectious diseases. *Id.* It delegates responsibilities for disease control to state and local healthcare authorities, not the governor. *Id.* Indeed, the COVID-19 Orders frustrate the legislature's intent to require coordination between localities and the

Department of Public Health (DPH). *Id.* Nothing in the Civil Defense Act suggests that it supersedes the Public Health Act. *Id.* § I.B.2.

Governor Baker's COVID-19 Orders, therefore, violate the separation of powers under the Massachusetts Declaration of Rights, Article XXX. *Id.* § I.C.1. Separation of powers is fundamental to constitutional governance, as it is essential for the preservation of liberty. *Id.* John Adams insisted upon Massachusetts's robust and unequivocal separation of powers to establish "a government of laws and not of men." *Id.* The Massachusetts Constitution grants the General Court the power to make laws, not the governor. *Id.* All Governor Baker's COVID-19 Orders carry the force of law (including criminal penalties) but they are issued by executive decree, not legislative process. *Id.* § I.C.2. Therefore, the COVID-19 Orders violate the separation of powers by usurping authority from the legislature. *Id.*

The COVID-19 Orders also violate Plaintiff-Petitioners' federal and state constitutional rights to due process and assembly. *Id.* § II. Plaintiff-Petitioners have substantial liberty interests in earning a lawful wage, running a lawful business, preaching, teaching, worshiping, and associating with others. *Id.* § II.A.1. The Due Process Clause protects these interests, as well as property interests in their licenses to operate their businesses, churches, and school. *Id.* The government may only burden due process pursuant to valid legislative authority

when burdening liberty or property interests, but that is not the case here, where Governor Baker issued laws by decree. *Id.* § II.A.2.

By issuing decrees that declared which businesses are "essential" (closing those deemed inessential), and that prohibited and regulated the size of some gatherings (including churches), for example, Governor Baker did not suspend the law, he unconstitutionally dispensed it. *Id.* By picking winners and losers, Governor Baker's actions are inherently arbitrary and violate Declaration of Rights, Article XX. *Id.*

Furthermore, liberty and property interests may not be burdened or dispossessed without constitutionally adequate procedure. *Id.* § II.A.3. None of the Plaintiff-Petitioners has had the opportunity to be heard in the form of an appeal or a petition for a waiver of Governor Baker's arbitrary classifications of their organizations. *Id.* The lack of recourse is antithetical to due process, thus violating Declaration of Rights, Article X and the Fourteenth Amendment. *Id.*

Plaintiff-Petitioners also have a right to assemble, which the COVID-19 Orders have denied to them. *Id.* § II.B.1. Assembly is a fundamental right that is not limited to political expression—it includes social, educational, religious, and economic gatherings. *Id.* But the COVID-19 Orders are not narrowly tailored—they are pervasive rules that fail to consider less restrictive means to suppress the

spread of disease, including physical distancing and facemasks. *Id.* Thus, the Orders violate Declaration of Rights, Article XIX and the First Amendment. *Id.*

Fear of a virus, even one that targets a vulnerable population (such as the elderly in this case), does not and cannot justify abandoning constitutional governance. Furthermore, if COVID-19 rebounds, or when the next pandemic arises, Governor Baker's executive overreach must not be repeated by him, nor by his successor. Constitutional order must be restored to ensure that this Commonwealth returns to the "government of laws and not of men" that Adams built.

ARGUMENT

Plaintiff-Petitioners respectfully request that this Court make declaratory determinations regarding the scope of executive authority under Massachusetts law, and to vindicate and protect their civil liberties as guaranteed by the Massachusetts and U.S. Constitutions.

I. THE GOVERNOR'S DECLARATION OF A CIVIL DEFENSE STATE OF EMERGENCY IS INVALID BECAUSE COVID-19 IS A PUBLIC HEALTH EMERGENCY, NOT AN EMERGENCY OF CIVIL DEFENSE

The stated purpose of Governor Baker's March 10, 2020 declaration of a Civil Defense State of Emergency was "to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of the people of the Commonwealth[.]" *See* Exec. Order No. 591. The COVID-19

public health crisis, however, does not implicate the Civil Defense Act of 1950, which is a special law designed to address immediate and specific cataclysmic events of limited duration. The General Court, in fact, enacted the Public Health Act specifically to prevent the spread of diseases dangerous to the public health. Thus, all orders issued pursuant to the Civil Defense State of Emergency are laws-by-decree, which violate Article XXX of the Massachusetts Declaration of Rights' separation of powers.

A. The Civil Defense Act Does Not Afford the Governor Sweeping Emergency Powers to Mitigate the Spread of Infectious Diseases

Canons of statutory interpretation establish that the Public Health Act, a general law expressly governing the response to diseases dangerous to public health, is the controlling authority directing the government's efforts to suppress and eradicate COVID-19. The Civil Defense Act, in contrast, is a special law designed to "protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth" from enemy invasions and natural cataclysms that have the destructive force of invasions. Spec. L. c. S31, § 5.

This Court has explained that "a state officer may be said to act *ultra vires* only when he acts 'without any authority whatever.'" *New Hampshire Ins. Guar. Ass'n v. Markem Corp.*, 424 Mass. 344, 353 (1997). Governor Baker's declaration of a Civil Defense State of Emergency is not only ill-conceived, it is *ultra vires*

because the Civil Defense Act does not confer upon him "any authority whatever" to suspend or dispense validly enacted laws in cases of pandemic.

1. The Well-Established Canon of Statutory Interpretation, Ejusdem Generis*, Limits the Civil Defense Act's Application to Civil Defense Emergencies*

Ejusdem generis is a canon of statutory interpretation used to interpret laws "where general words follow specific words" in a statutory list. *Carey v. Comm'r of Corr.*, 479 Mass. 367, 370 n.6 (2018) (quoting *Banushi v. Dorfman*, 438 Mass. 242, 244 (2002)). The canon's purpose is to ***limit*** the "general terms which follow specific ones to matters ***similar to*** those specified." *Id.* (quoting *Commonwealth v. Gallant*, 453 Mass. 535, 542 (2009)) (internal quotations omitted) (emphasis added).

The Civil Defense Act permits the governor to declare emergencies. Spec. L. c. S31, § 5. The legislature explained that this authority, and its sweeping attendant powers, is necessary

> [b]ecause of the existing possibility of the occurrence of disasters of unprecedented size and destructiveness ***resulting from*** [1] enemy attack, [2] sabotage or [3] other hostile action, in order to insure that the preparations of the commonwealth will be adequate to deal with ***such disasters***, and generally to provide for the common defense and to protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth[.]

Id. (emphasis added). The General Court's rationale for permitting a declaration of a Civil Defense Act emergency is thus limited to three types of occurrences: two

specific, and one general. As to the specific authority, Governor Baker may declare a Civil Defense Act state of emergency to address enemy attack or sabotage. *Id.* As to his general authority, Governor Baker may declare a state of emergency to address "other hostile action." *Id.*

To understand the general term's meaning, it must be interpreted as limited by the specific. *Banushi v. Dorfman*, 438 Mass. 242, 244 (2002). This Court has explained that if the general is not limited by the specific, such a "view would vitiate the statutory canon of *ejusdem generis*; the more ***general term would always strip the more specific terms of any meaning whatsoever***." *Commonwealth v. Escobar*, 479 Mass. 225, 229 (2018) (emphasis added). "Other hostile action," therefore, must be "of the same kind or of the same general description" as those of "enemy attack" or "sabotage." *See Crown Shade & Screen Co. v. Karlburg*, 332 Mass. 229, 231 (1955) (relating to a statutory lien). The Act describes the purpose of a state of emergency under § 5, which is to "protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth[.]" Spec. L. c. S31, § 5.

The Civil Defense Act also identifies the seven triggering events under which a governor may declare a state of emergency:

> [1] if and when the congress of the United States shall declare war, or [2] if and when the President of the United States shall by proclamation or otherwise inform the governor that the peace and security of the

> commonwealth are endangered by belligerent acts of any enemy of the United States or of the commonwealth or by the imminent threat thereof; or [3] upon the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action; or [4] from riot or other civil disturbance; or [5] from fire, flood, earthquake or other natural causes; or [6] whenever because of absence of rainfall or other cause a condition exists in all or any part of the commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food; or [7] whenever the accidental release of radiation from a nuclear power plant endangers the health, safety, or property of people of the commonwealth[.]

Id. The foregoing clause contains four general terms, all of which are preceded by specific, limiting terms. The third triggering event, "or other hostile action," must be similar to an attack or sabotage; the fourth triggering event, "or other civil disturbance," must be similar to riots; the fifth triggering event, "or other natural causes," must be similar to fire, flood, or earthquake; and the sixth triggering event, "or other cause" must be similar to an "absence of rainfall."

Underscoring the General Court's intention to limit "other natural causes" to those similar to "fire, flood, or earthquake," is the adjective, "other." "Other" further restricts the general term to limit the general term's breadth. *Mammoet USA, Inc. v. Entergy Nuclear Gen. Co.*, 64 Mass. App. Ct. 37, 42 (2005) ("[T]he qualifier "other," [] would appear to ***cabin the word even further*** and limit the breadth it might otherwise be deemed to have in the absence of that adjective.") (emphasis added).

> The primary meanings of "other" in its adjectival form focus on the relationship of the modified word to its antecedents: "1. a. Being the remaining one of two or more … b. Being the remaining one of several." American Heritage Dictionary of the English Language 1282 (3d ed. 1992).

Id. at 42 n.14 (ellipses in original). Notably, the nonpartisan Massachusetts Legislative Research Council conducted a study regarding executive orders. Contrasting gubernatorial orders that carried the force of law with those that are merely ceremonial, the Council noted that:

> [t]he statutes specifically authorizing the governor to issue proclamations and executive orders having the force of law ***permit him to do so only*** in relation to emergencies arising from (a) war, sabotage and other hostile activity, (b) civil disorders, (c) natural disasters, (d) water shortages, (e) nuclear accidents, and (f) fires. The principal source of the governor's authority aforesaid is the Civil Defense Act of 1950 (as amended).

Mass. Legis. Research Council, H. No. 6557, *Gubernatorial Exec. Orders* at 12-13 (Apr. 3, 1981) (emphasis added) ("Mass. LRC").

Applying the canons of statutory interpretation here, Governor Baker may not construe the Civil Defense Act to grant broad license to declare ***any*** threat to the health and safety of Massachusetts, a civil defense state of emergency. Such declarations are limited to the seven circumstances quoted above.

2. A Pandemic Does Not Result from Enemy Attack, Sabotage, or Other Hostile Action, nor Is It an "Other Natural Cause"

While politicians may characterize COVID-19 as a "battle" against an "invisible enemy," thank medical professionals on the "frontlines," and talk about

winning the virus "war," such rhetoric does not accurately describe this health crisis. A counterinsurgency cannot disable COVID-19's command-and-control capabilities or disrupt the virus's supply lines. COVID-19 does not take territory, nor does it destroy infrastructure. COVID-19 is, without a doubt, a tragedy. But the threat it poses does not result from enemy attack, sabotage, or other hostile action.

Governor Baker cannot defend his Civil Defense State of Emergency by asserting that "other natural causes"—or any other event that would trigger emergency authority under the Act—includes infectious diseases. Determining which other natural causes are similar to fire, flood, or earthquake is determined by the ordinary meanings of these words. This Court has recently explained that

> When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose. … We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions.

Commonwealth v. Heywood, 484 Mass. 43, 50 (2020) (internal citations omitted) (ellipses in original). *See also* G.L. pt. I, tit. I, c. 4, § 6 ("Words and phrases shall be construed according to the common and approved usage of the language[.]"). "Other natural causes" cannot be reasonably interpreted to include pandemics because pandemics are unlike the limiting specific words preceding the general phrase. A "pandemic" is an "outbreak of [] a disease," and a "disease" is a

"condition of the body, or of some part or organ of the body, in which its functions are disturbed or deranged[.]"[2] *Oxford English Dictionary (oed.com)*, Oxford Univ. Press (2020).

While not every fire, flood, or earthquake requires a civil defense state of emergency, those that require such sweeping action are sudden cataclysmic events of limited time, place, and duration. They are characterized by the potential for loss of life, destruction of essential infrastructure, and loss of access to clean water, unadulterated food, and safe shelter. Since the Civil Defense Act's 1950 enactment, Massachusetts's website enumerates eleven previously declared civil defense states of emergency, prior to COVID-19.[3] Hurricanes, tornadoes, and severe winter storms account for nine, and two (issued three weeks apart) related to the Merrimack Valley gas explosion.[4] In each instance, "fire, flood, earthquake or

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[2] On the other hand, a "fire" is an "[u]ncontrolled, destructive, and frequently extensive burning[;]" a "flood" is an "overflowing or irruption [sic] of a great body of water over land not usually submerged[;]" and an "earthquake" is a "shaking or movement of the ground; esp. a violent convulsion of the earth's surface, frequently causing great destruction[.]" *Oxford English Dictionary (oed.com)*.

[3] Mass. Emergency Mgmt. Agency, State of Emergency Info., *available at* https://www.mass.gov/service-details/state-of-emergency-information. There have been other civil defense states of emergency. The Civil Defense Act was invoked 53 times between 1950 and 1981, but only in response to war, organization of Massachusetts' civil defense agencies, or catastrophic fires, floods, hurricanes, tornadoes, and blizzards. *See generally*, Mass. LRC, H. No. 6557, *Gubernatorial Exec. Orders*, at 123-53 (Apr. 3, 1981).

[4] Mass. Emergency Mgmt. Agency, State of Emergency Info.

other natural causes" threatened "public peace, health, security and safety," empowering governors "to preserve the lives and property of the people of the commonwealth" by triggering a civil defense response. Each declared emergency threatened the integrity of infrastructure and property; first responders' access to victims; and the victimized population's access to safe water, food, and shelter. In other words, all prior crises that precipitated declarations of states of emergency manifested the types of harms specified in the statute. COVID-19 marks the first time in history that a Massachusetts governor has applied the Civil Defense Act to a health crisis.[5]

Infectious diseases like COVID-19 disturb proper bodily function, but they leave infrastructure, water, food, and shelter intact. As COVID-19 has all-too-clearly demonstrated, pandemics are not limited to times, places, or durations, unlike civil defense emergencies. While COVID-19 is naturally occurring and threatens public health, the virus threat originates from vastly different external sources than fires, floods, or earthquakes.

[5] Not that there has been want for infectious disease control since 1950. Massachusetts has survived without declaring a state of emergency during the 1950-1991 measles epidemic, the 1952 polio epidemic, the 1957 and 1977 H2N2 flu pandemics, the 1962-65 rubella pandemic, the 1968-69 H3N2 flu pandemic, the 1983-present HIV pandemic, the 1997 and 1999 H7N9/H5N1 flu pandemics, the 2009 H1N1 flu pandemic, and the 2010 and 2014 whooping cough epidemics. And this is to say nothing of seasonal influenza.

3. The Civil Defense Act Is a Special Law, Not Codified in the General Laws, Because It Applies Only to Specific Locations and Incidents

The Civil Defense Act is not codified because it is not a general law. "General laws" are "[l]egislative acts ***applying generally*** to the Commonwealth and its citizens." Gen. Court, *Legis. Research & Drafting Manual* (5th ed. 2010) (emphasis added). The Civil Defense Act is a "special law," making it a "[l]egislative act applying to a particular county, city, town or district, individual or group of individuals and ***not general in nature***." *Id.* (emphasis added). According to the Massachusetts State Library, special laws

> are acts that are more specific in nature. They apply to a limited number, such as one person, ***one event***, a specific city or town, etc. Like general acts, they are subject to amendments brought about by subsequent acts; however ***they are not codified*** into any body of law.

State Library of Mass., An Act By Any Other Name: General vs. Special Acts, *available at* http://mastatelibrary.blogspot.com/2013/11/an-act-by-any-other-name-general-vs.html (emphasis added). The Civil Defense Act is modeled after temporary war powers acts that were intended to expire with the emergencies they were enacted to address. *See* Mass. LRC, *Gubernatorial Exec. Orders* at 63-64. The specificity of special laws provides inherent limitations on their applicability, which in turn protects liberty interests. Otherwise, the Research Council explained, there would be virtually no protections for individual rights:

> Except as to … major emergency situations [including situations covered by the Civil Defense Act], the General Court has been reluctant

> to empower the governor to issue proclamations and executive orders regulating the persons, property and procedural rights of the general public or any segment thereof, outside the executive branch of the state government itself. Instead, the General Court has preferred to rely on delegations of regulatory authority to state administrative agencies and quasi-judicial agencies to implement policies and programs ordained by statute. That authority is wielded within the framework of procedural and other safeguards mandated by the State Administrative Procedure Act and other controlling laws.

Id. at 13.

Because diseases are commonplace, diverse in epidemiological character, and broadly affect the general population, they are impossible to delineate in a special law. The COVID-19 Orders are not limited to a specific person or group, a specific location, or a specific event—they apply to everyone within Massachusetts's borders. Genuine civil defense emergencies, on the other hand, are uncommon while also being specific in time, place, and persons affected. The distinction is important because a public health crisis that threatens the entire Commonwealth is precisely the subject matter the General Court has historically addressed through general legislation.

B. The Primary Function of the Public Health Act Is to Protect Massachusetts from Diseases Dangerous to Public Health, and to Delegate Power to State and Local Authorities

The General Court has afforded Massachusetts a means to protect residents from COVID-19—the Public Health Act. The Public Health Act tasks DPH, its Commissioner, its Council, local boards of public health, and local government,

with the responsibility of protecting the public from "disease dangerous to the public health." *See, e.g.*, G.L. c. 111, §§ 1, 6, 95 & 96. Governor Baker simply cannot substitute the inapposite Civil Defense Act to ignore or suspend the very statute the General Court wrote to protect Massachusetts from pandemics.

1. The General Court Enacted the Public Health Act Specifically to Suppress the Spread of Diseases Dangerous to Public Health

DPH has the statutory authority to define "what diseases shall be deemed to be dangerous to the public health[.]" G.L. c. 111, § 6. DPH—not the governor—"***shall make such rules and regulations consistent with law*** for the ***control and prevention of such diseases*** as it deems advisable[.]" *Id.* (emphasis added). The Commissioner of DPH "may direct any executive officer or employee of the department to assist in the study, ***suppression or prevention of disease*** in any part of the commonwealth." G.L. c. 111, § 2 (emphasis added). If DPH declares an infectious disease dangerous "or [that it] is likely to exist in any place within the commonwealth," DPH must investigate the means of preventing its spread and consult with local authorities. G.L. c. 111, § 7.

Local boards of health have significant authority under the Public Health Act. Although DPH may require towns to establish "hospitals for the reception of persons having … diseases dangerous to the public health[,]" these "isolation hospitals" are subject to orders and regulations of local boards. G.L. c. 111, § 92. In the event of an infectious disease outbreak, local boards "provide such hospital

or place of reception and such nurses and other assistance and necessaries ***as is judged best*** for his accommodation and ***for the safety of the inhabitants***[.]" G.L. c. 111, § 95 (emphasis added).

In some circumstances, a local board of health may seek a magistrate's warrant

> to remove any person infected with a disease dangerous to the public health or who is a carrier of the causative agent thereof, or to take control of convenient houses and lodgings, and to impress into service and use such convenient houses, lodgings, nurses, attendants and other necessaries.

G.L. c. 111, § 96. The Act prohibits transporting people infected with dangerous diseases to other towns without first obtaining assent from the receiving town's board of health, except for transportation to a hospital. G.L. c. 111, § 96A.

The Public Health Act addresses numerous other disease-mitigating functions, including physicians' notice of dangerous diseases to local boards of health (G.L. c. 111, § 111), board notification to DPH of the occurrence of dangerous diseases (G.L. c. 111, § 112), and reporting by first responders of their unprotected exposure to infectious disease (G.L. c. 111, § 111C). If DPH declares a disease dangerous to public health, local boards must give notice to DPH of the names and locations of people afflicted (G.L. c. 111, § 112) and keep records, accordingly (G.L. c. 111, § 113).

Local governments also have authority in the face of an infectious disease outbreak. "[S]electmen and board[s] of health shall use all possible care to prevent the spread of the infection[.]" G.L. c. 111, § 104. Local government "may give public notice of infected places by such means as in their judgment may be most effectual for the common safety." *Id.*. In other words, infectious disease suppression is a community effort requiring close coordination between state and local healthcare officials and governments, under the Public Health Act.

The regulations promulgated by DPH pursuant to the Act further confirm that it is the proper mechanism by which to protect Massachusetts from infectious disease:

> ***The purpose*** of 105 CMR 300.000 is to list diseases dangerous to the public health as designated by the Department of Public Health and ***to establish reporting, surveillance, isolation and quarantine requirements***. 105 CMR 300.000 is intended for application by local boards of health, hospitals, laboratories, physicians and other health care workers, veterinarians, education officials, recreational program health service providers, food industry officials, and the public.

Code of Mass. Regs., 105 CMR 300.001 (emphasis added). Remarkably, DPH regulations promulgated pursuant to the Act, at least 16 years prior to COVID-19, ***address mitigation of "novel coronavirus," by name***. *See, e.g.*, 105 CMR 300.100 (requiring reporting of "[r]espiratory infection thought to be due to any ***novel coronavirus***[.]") (emphasis added) *and* 105 CMR 300.170 (requiring reporting by

"all laboratories, including those outside of Massachusetts, … such evidence of infection [from] … ***[n]ovel coronaviruses***[.]") (emphasis added).

Disease-mitigating regulations permit both DPH and local boards of health "to conduct surveillance activities necessary for the investigation, monitoring, control and prevention" of dangerous diseases. 105 CMR 300.190. Indeed, authorized surveillance activities include "[i]dentification of cases and contacts," "[c]ounseling and interviewing individuals as appropriate to assist in positive identification of exposed individuals," "[m]onitoring the medical condition of individuals diagnosed with or exposed to" reportable diseases and "[e]nsuring that [reportable diseases] are subject to the requirements of 105 CM 300.200 and other proper control measures." 105 CMR § 300.190.

2. The General Court Did Not Design the Civil Defense Act to Supersede the Public Health Act for Infectious Disease Control

The General Court enacted the Public Health Act to delegate specific and limited authority to the executive branch for infectious disease control. It predates the Civil Defense Act, in one form or another, by almost 50 years. *See* Acts of 1907, c. 183, § 1 (requiring the state board of health to define which diseases are "dangerous to the public health"). Indeed, the Public Health Act's section entitled "Definitions" (G.L. c. 111, § 1) alone has been amended eleven times since first appearing in the Act in 1938—nine of those amendments coming after passage of the Civil Defense Act. *See generally* Acts of 1938, c. 265.

Massachusetts courts "presume that the Legislature acts with full knowledge of existing laws." *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 457 Mass. 663, 673 (2010). When the 156th General Court enacted the Civil Defense Act, it knew of the existence of the Public Health Act, which was enacted by the 128th General Court. Moreover, this Court has held that, "[w]hen construing two or more statutes together, '[w]e are loath to find that a prior statute has been superseded in whole or in part ***in the absence of express words*** to that effect ***or of clear implication***.'" *Id.* (internal quotations and citations omitted) (emphasis added). The Civil Defense Act does not contain "express words" or "clear implication" to suggest that it supersedes the Public Health Act. It does just the opposite. The Civil Defense Act addresses entirely different circumstances under which the governor can act to protect the "civil defense," none of which could be construed as a public health emergency, and none of which relates to infectious disease.

The Civil Defense Act also cannot be interpreted to render the Public Health Act superfluous. *See Wolfe v. Gormally*, 440 Mass. 699, 704 (2004) (citations omitted). Canons of statutory construction disfavor readings that render any ***portion*** of a statute superfluous. *See id. A fortiori*, a reading that renders an entire statute redundant is not reasonable. To hold that the Civil Defense Act supersedes,

amends, or makes superfluous the Public Health Act would inject uncertainty in the law and frustrate the will of the legislature.

The negative implications are apparent. Take, for instance, Order No. 45. On July 24, 2020, Governor Baker decreed that "all persons arriving in Massachusetts by any means or mode must quarantine for 14 days in accordance with standards issued by [DPH,]" subject to some exceptions. Order No. 45. This order unlawfully supersedes § 106 of the Public Health Act. Prior to Order No. 45, local boards of health could "examine" travelers entering Massachusetts from infected places outside the Commonwealth, "***as the board suspects*** of bringing any infection dangerous to the public health[.]" G.L. c. 111, § 106 (emphasis added). Additionally, "if necessary, [a local board may] ***restrain them from traveling until licensed*** thereto ***by the board of health of the town to which they may come***." *Id.* (emphasis added). Travelers continuing through Massachusetts without a local license may be fined. *Id.* The General Court delegated considerable power to ***local healthcare authorities***, not the governor. Governor Baker, however, has taken this power for himself and relegated localities to mere enforcement agents of his decrees. Order No. 45 is emblematic of the larger problem of Governor Baker's wholesale and suspending and dispensing of validly enacted laws.

Localized control of infectious diseases is an historical hallmark of the General Court's strategy for suppressing dangerous diseases. *See* G.L. c. 111,

§ 104. Massachusetts law recognizes that each community has its unique risks, concerns, and needs that must be addressed by local leaders and health professionals. The General Court understands these differences, and it delegated authority to the local communities to protect their residents. Governor Baker is countermanding the legislature's rightful policy choice.

C. The Governor's COVID-19 Orders Violate the Separation of Powers by Depriving the General Court of Its Constitutional Prerogative to Make Law

Neither the Massachusetts Constitution nor the Civil Defense Act grant Governor Baker the authority to issue orders during a public health emergency. Because compliance with Governor Baker's orders is mandatory—enforced with civil and criminal penalties—they ostensibly carry the force of law. Governor Baker's COVID-19 orders thus violate the separation of powers guaranteed under the Massachusetts Declaration of Rights, Article XXX .

1. The Separation of Powers Is a Fundamental Characteristic of Massachusetts Government and Essential for the Preservation of Liberty

The Massachusetts Declaration of Rights establishes a strict separation of governmental powers to protect civil liberties from the arbitrary and capricious decrees of individual executive officers:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial

> powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: ***to the end it may be a government of laws and not of men***.

Decl. of Rights art. XXX (emphasis added). The General Court is the legislative department of the Commonwealth, Mass. Const. 2d Pt., c. I, § I, art. I, and it has "full power and authority … to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without[,]" Mass. Const. 2d Pt., c. I, § I, art. IV.

The Governor of Massachusetts is the state's "supreme executive magistrate." Mass. Const. 2d Pt., c. II, § I, art. I. The governor's role in enacting legislation is constitutionally limited to approval of bills bicamerally presented to him or a qualified veto. Mass. Const. 2d Pt., c. I, § I, art. II. The governor may not suspend laws, nor may the governor execute laws without authority derived from the legislature:

> The power of suspending the laws, or the execution of the laws, ***ought never to be exercised but by the legislature***, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

Decl. of Rights art. XX (emphasis added).

John Adams, the principal architect of the Massachusetts Constitution of 1780, insisted upon this robust and unequivocal separation of powers. Good

lawmaking, Adams believed, requires a "representative assembly" that "should think, feel, reason, and act like [those it represents]." John Adams, *Thoughts on Government, in a Letter from a Gentleman to his Friend* (1776) (reprinted in John Adams's Thoughts on Government, 11 Const. Rev. 113 (1927)). Twelve years later, James Madison further clarified the necessity for keeping the branches of government "in their proper places." The Federalist No. 51 (J. Madison) (1788). He asserted that "usurpations [of authority] are guarded against by a division of the government into distinct and separate departments." *Id.* Madison explained that this is an important feature of constitutions because the separation of powers is "essential to the preservation of liberty[.]"[6] *Id.*

[6] Preservation of liberty is not the only reason the Massachusetts Constitution separates governmental powers. Article IV of the U.S. Constitution guarantees to the people of every state a "republican form of government." U.S. Const. art. IV, § 4. Although the federal judiciary has often regarded the clause as non-justiciable, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019), the Supreme Court has not entirely ruled out the possibility of adjudicating such claims, *see New York v. United States*, 505 U.S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions."). If Massachusetts' separation of powers can be so easily marginalized (or subverted) by an ambitious chief executive, it is open to question whether Massachusetts has a republican form of government at all. Rule by executive decree and the governor's absolute authority to suspend general laws and validly enacted regulations by fiat, pursuant to a perpetual state of emergency, is a blatant abdication of republican government. Such a circumstance could well revive the Supreme Court's willingness to police the boundaries of state governing structures where they cease to afford their citizens the system guaranteed to them by the U.S. Constitution.

The Massachusetts Constitution guarantees the separation of powers conceived by the Founders. The Commonwealth's chief executive simply cannot make or suspend law under the Massachusetts Constitution. Where a governor usurps the legislature's lawmaking prerogative, as Governor Baker has done repeatedly, the executive-made law violates the separation of powers and undermines an essential bulwark against deprivation of civil liberties.[7]

2. The Commonwealth's Police Power Is Inherent in the Legislative Branch and the Power to Legislate Cannot Be Delegated to Another Branch

This Court has explained that "[t]he core police power 'includes the right to ***legislate*** in the interest of the public health, the public safety and the public morals.'" *Abdow v. Attorney General*, 468 Mass. 478, 489 (2014) (quoting *Boston Elevated Ry. v. Commonwealth*, 310 Mass. 528, 552 (1942)) (emphasis added). "According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations ***established directly by legislative***

[7] As a matter of first principles, executives cannot suspend or dispense with legislative acts. *See* Philip Hamburger, Nat'l Rev., *Are Health-Care Waivers Unconstitutional?* (Feb. 8, 2011), *available at* https://www.nationalreview.com/2011/02/are-health-care-waivers-unconstitutional-philip-hamburger/. Where executives can dispense with laws by decree, there is no separation of powers, as the executive and legislative authorities merge: "The power to dispense with the laws had no place in a constitution that divided the active power of government into executive and legislative powers." *Id.* Historically, executive suspension of laws "was a power exercised not through and under the law, but above it." *Id.* Massachusetts's Founders categorically rejected executive lawmaking in Article XXX of the Declaration of Rights.

enactment as will protect the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (emphasis added). The General Court delegated responsibilities to protect public health from dangerous diseases in the Public Health Act, but it did not delegate the lawmaking prerogative nor the police power to the governor in either the Public Health Act or the Civil Defense Act.

Nor could it have done so. The Massachusetts Constitution "prohibits the executive department from exercising legislative power." *Opinion of the Justices*, 430 Mass. 1201, 1203-04 (1999) (citing Decl. of Rights art. XXX). Where executive action "deprive[s] the Legislature of its full authority to pass laws[,]" the executive action violates the separation of powers provision of the Massachusetts Constitution. *Id.* Governor Baker does not have the authority to suspend, dispense, or make law backed with civil and criminal penalties through his COVID-19 Orders, yet that is exactly what he has done.

II. THE GOVERNOR'S COVID-19 ORDERS HAVE VIOLATED PLAINTIFF-PETITIONERS' FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ASSEMBLY

Governor Baker's Civil Defense State of Emergency declaration also infringes the Plaintiff-Petitioners' liberty and property rights, as well as their right to peaceably assemble. The COVID-19 Orders fail because they do not afford Plaintiff-Petitioners constitutionally required due process to protect them from burdens on, and deprivations of, their civil liberties. Additionally, the Orders that

burden and deprive Plaintiff-Petitioners of their fundamental right to peaceably assemble fail because they are indiscriminately pervasive, not narrowly tailored to serve a compelling governmental interest.

A. The COVID-19 Orders Burden or Deprive Plaintiff-Petitioners of Their Liberty and Property Interests Without Due Process

The Massachusetts Declaration of Rights guarantees that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." Decl. of Rights art. X. Similarly, the Fourteenth Amendment to the U.S. Constitution guarantees that states cannot "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. While the Declaration of Rights "may afford greater protection" than the Fourteenth Amendment, the standard of review for a denial of due process under the Declaration of Rights and the U.S. Constitution are identical. *Gillespie v. City of Northampton*, 460 Mass. 148, 153 n.12 (2011).

When governmental action denies property interests without due process, this Court employs the *Mathews v. Eldridge* test, "which requires that 'the individual interest at stake must be balanced against the nature of the governmental interest and the risk of erroneous deprivation of liberty or property.'" *Commonwealth v. Brown*, 426 Mass. 475, 482 (1998) (quoting *Aime v. Commonwealth*, 414 Mass. 667, 674 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). While courts typically use the rational basis test where

individuals assert infringement upon their liberties, such a standard is too low a bar when an ***executive*** denies liberty, as Governor Baker has done here:

> In reviewing the constitutionality of ***statutes*** subject to a rational basis test, we adhere to principles of judicial restraint based upon our "recognition of the inability and undesirability of the judiciary substituting its notion of correct policy for that of a ***popularly elected Legislature***."

Zeller v. Cantu, 395 Mass. 76, 85 (1985) (quoting *Zayre Corp. v. Attorney Gen.*, 372 Mass. 423, 433 (1977)). Governor Baker's Orders have not been enacted by a popularly elected legislature. Moreover, and as explained above, he has not issued COVID-19 orders pursuant to a lawful delegation by the General Court. Rather, he is using the Civil Defense Act to dispense—not merely suspend—existing law. The COVID-19 Orders are thus not entitled to rational basis deference.

1. Plaintiff-Petitioners Enjoy Substantial Liberty and Property Interests Related to Their Businesses, Churches, and School

This Court has acknowledged that "no one questions the existence of the right of every person to follow any legitimate calling for the purpose of earning his own living, or for any other lawful purpose." *See Commonwealth v. Beaulieu*, 213 Mass. 138, 141 (1912). "It is a ***sacred right*** and is protected both by the Federal Constitution and that of this Commonwealth." *Id.* (citing U.S. Const. amend XIV and Decl. of Rights art. X) (emphasis added). Substantive due process rights are broad and not confined to mere economic benefits:

> Without doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The COVID-19 Orders have burdened or denied Plaintiff-Petitioners' liberty interests like these, whether in earning a lawful wage, running a lawful business, preaching, worshiping as a community, associating with one another, or teaching their children.[8] And the Orders are backed by criminal and civil penalties.[9]

Additionally, the Due Process Clause protects property interests that a person acquires in the form of specific benefits, defined by existing rules that stem from independent sources, such as state law. *LG Elecs. USA, Inc. v. Dep't of*

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[8] As stated above, Governor Baker does not have the authority under the Civil Defense Act to issue any of the COVID-19 Orders because the Civil Defense Act does not apply in cases of pandemic. Not every Order, however, violates Plaintiff-Petitioners' liberty and property interests. *See, e.g.*, Order March 15, 20 and No. 29 (motor vehicle licenses); March 15 (telehealth services); March 17 (access to physicians); *etc.*

[9] The Civil Defense State of Emergency declaration states that Governor Baker will "from time to time issue recommendations, directives, and orders as circumstances may require[,]" subject to the criminal penalties under the Act. Exec. Order No. 591. Each COVID-19 Order cites the criminal penalty provision under the Civil Defense Act. Governor Baker has also decreed civil penalties in some of his Orders. *See, e.g.*, Order No. 13. The governor does not have authority—under the municipal government statute, as he claims—to impose civil fines on behalf of a city or town pursuant to ordinance or bylaw. *Compare* Order No. 13 *with* G.L., pt. I, tit. VII, c. 40, § 21D.

Educ., 679 F. Supp. 2d 18, 33 (D.D.C. 2010). Therefore, "a license to operate a business is a protected property interest under the due process clause if it cannot be taken away from its holder before a time certain and in the absence of misconduct." *Yankee Atomic Electric Co. v. Sec. of Commonwealth*, 403 Mass. 203, 215 n.1 (1988) (Lynch, J., dissenting) (citing *Baer v. Wauwatosa*, 716 F.2d 1117, 1122 (7th Cir. 1983)). The Plaintiff-Petitioners hold state and local licenses to operate their businesses, churches, and school. They earned their licenses by meeting or exceeding statutory requirements set by the General Court and municipal governments. They have maintained, and continue to maintain, these licenses and they are entitled to enjoy the benefits of licensure. Where the COVID-19 Orders interfere with Plaintiff-Petitioners' enjoyment of their property interests, they violate due process.

2. The Governor's Arbitrary Orders Burden or Deprive Plaintiff-Petitioners of Their Liberty and Property Interests

Arbitrary acts, by definition, are antithetical to due process. As a preliminary matter, due process requires that burdens on liberty or property must be the product of ***valid*** exercises of authority. Article X's due process clause explains that "the people of this commonwealth ***are not controllable by any other laws than those to which their constitutional representative body have given*** their consent." Decl. of Rights art. X (emphasis added). The Declaration thus

recognizes that due process first must arise from validly enacted law by the legislature, not from executive fiat.

> It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages, which are denied to all others under like circumstances[.]

Comm'r of Pub. Health v. Burke Mem. Hosp., 366 Mass. 734, 742 (1975). Even if delegation under the Civil Defense Act were the equivalent of the people's representatives giving consent to the governor's suspension of general laws (which it is not), ***the legislature still could not*** lawfully benefit one person or group while harming another who is similarly situated. *See id.* at 742-43 (permitting special laws benefiting one, if it "does not … diminish or defeat an existing property interest of any other[.]").

At most the Civil Defense Act permits the governor to ***suspend*** the law in a true civil defense emergency, but he certainly may not ***dispense*** the law by applying it to some, and not to others. Such conduct has been forbidden for 240 years.

> [I]t ought not to be presumed that the legislature intended to do what by the constitution they have no authority to do, and we think it very clear that they have no authority by the constitution to suspend any of the general laws, limiting the suspension to an individual person, and leaving the law still in force in regard to every one else. ***This would not be suspending a law*** by virtue of their constitutional power so to do [in Article XX] ***in cases of emergency, but it would be to dispense with the law*** in favor of an individual, ***leaving all other subjects of the***

> ***government under obligation to obey it***; and ***we do not find any such dispensing power in the constitution***.

In re Picquet, 22 Mass. 65, 69-70 (1827) (emphasis added). "The soundness of this salutary principle has never been questioned by this court." *Paddock v. Brookline*, 347 Mass. 230, 234 (1964) (citing *Holden v. James*, 11 Mass. 396, 404-05 (1814)). If a law is suspended, it has no force or operation. *In re Picquet*, 22 Mass. at 69-70. Dispensation, however, does not apply equally to all—it favors some over others. It is "the epitome of the absolute and unconstitutional prerogative." Philip Hamburger, *Is Administrative Law Unlawful?*, The Univ. of Chicago Press, at 65 (2014).

Governor Baker has not suspended the law, he has unlawfully dispensed it.[10] Were Governor Baker acting pursuant to valid statutory authority (which he is not), he could still not pick winners and losers. One example of the due process problem that Governor Baker has created is the dichotomy between slot machines and video games, which directly implicates liberty and property interests of Plaintiff-Petitioners Mr. Walker and Apex Entertainment. Casinos opened in Phase 3. Order No. 43. The governor slated indoor arcades to reopen in Phase 3, Order No. 37, but decided to move all arcades to Phase 4, Order No. 43. This is

[10] *See, e.g.*, Order March 13, 2020, Nos. 13, 21, 30, 32, 38 and 44 (gatherings); March 15 (restaurants and bars); March 18, Nos. 15 and 36 (childcare); Nos. 13, 33, 35, 37, 40, and 43 (essential businesses and reopening phases); Nos. 22 and 34 (beaches); No. 45 (travel quarantine).

rank arbitrary dispensation, not countenanced in the Civil Defense Act, and it violates the Massachusetts Constitution.[11]

"The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be arbitrary or capricious." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 329 (2003) (citations omitted). Executive dispensing of law is inherently arbitrary. Governor Baker has arbitrarily decided that some businesses are essential and others are not; that some businesses may reopen while others may never operate again; and that spiritual and educational vocations must transform their ministries and teaching methods to conform to statewide mandates. Arbitrary classifications that favor certain individuals or groups over others violate due process.

> It is obvious that this article [XX of the Declaration] gives no authority to dispense with the obligations of any particular law, in favor of individual citizens or strangers, leaving the law still in force in regard to all other members of the community.

In re Picquet, 22 Mass. at 70.

Plaintiff-Petitioners do not object to reasonable limitations placed on the enjoyment of their rights for the greater good of protecting Massachusetts from COVID-19. But burdens on their rights may only flow from a valid legislative

[11] Of course this also represents a serious violation of Equal Protection of the laws under the Fourteenth Amendment, but that issue is not before the Court at this time.

authority—which Governor Baker lacks—and the law must be fairly applied to all. The law must not favor some citizens and disfavor others, as Governor Baker's dispensation Orders do. Thus, the COVID-19 Orders that dispense the law,[12] rather than suspend it, must fail as violative of due process.

3. The COVID-19 Orders, Issued by Executive Fiat, Deny Procedural Due Process to Affected Parties

The COVID-19 Orders also fail because they do not afford Plaintiff-Petitioners procedural due process prior to the deprivation of their liberty and property interests. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews*, 424 U.S. at 332. Additionally, with respect to property rights in licensure, "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Konstantopoulos v. Whately*, 384 Mass. 123, 132 (1981) (internal quotations and citation omitted).

Procedural due process requires "notice and the opportunity to be heard at a meaningful time and in a meaningful manner." *Gillespie*, 460 Mass. at 156 (citations omitted). "[D]ue process is flexible and calls for such procedural

[12] At a minimum, the Orders exhibiting this forbidden dispensing power include, *e.g.*, March 13, 2020, Nos. 13, 21, 30, 32, 38 and 44 (gatherings); March 15 (restaurants and bars); March 18, Nos. 15 and 36 (childcare); Nos. 13, 33, 35, 37, 40, and 43 (essential businesses and reopening phases).

protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews*, 424 U.S. at 333.

None of the Plaintiff-Petitioners has had the opportunity to be heard to assert that their businesses are "essential" or subject to a different reopening phase, or that their churches can safely minister to larger groups, or that their school can provide hands-on learning for children in a safe environment. None can seek appeal of their reopening phases or petition the government for a waiver or exception. Not only do they have no recourse, Governor Baker has reserved unto himself the authority to reclassify the Plaintiff-Petitioners into different reopening phases or to reverse course as he sees fit. This blatant violation of due process has significant ramifications for those subject to executive caprice.

Take, for instance, Plaintiff-Petitioners Ms. Fallon and Bare Bottom Tanning. Despite that the tanning industry has existed for decades, the governor did not include tanning in his reopening plan. Order No. 33. Ms. Fallon believed that a business that serves only one person per room, where the room is bathed in virus-killing UV radiation, and where regulations require her to clean with hospital-grade sanitizer after each customer, could reopen in Phase 1. But the governor decided that tanning was Phase 2, and two days before Phase 2

businesses opened, he split Phase 2 into two parts, placing tanning in the second part. Order No. 37. Ms. Fallon had nowhere to go to appeal her business's shifting categorization. She could not seek a waiver or exemption because there was no process for her to do so. Ms. Fallon's inability to earn a living put the essentials of life at risk: food, clothing, and shelter for herself and her family. Like the other Plaintiff-Petitioners, Ms. Fallon has suffered at the hands of arbitrary and capricious executive dispensation that favored some, while indiscriminately punishing her. The COVID-19 Orders that implicate the liberty and property interests of Plaintiff-Petitioners must fail because they were imposed without procedural due process necessary to protect those interests.

B. The COVID-19 Orders Violate Plaintiff-Petitioners' Right to Peaceably Assemble

1. Plaintiff-Petitioners and Their Patrons, Congregants, and Students Enjoy the Right to Peaceably Assemble

Declaration of Rights Article XIX guarantees that the "people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good[.]" Decl. of Rights art. XIX. Likewise, the First Amendment to the U.S. Constitution guarantees "the right of the people peaceably to assemble[.]" U.S. Const. amend. I. The right to assemble is fundamental under Massachusetts law. *See Bowe v. Secretary of Commonwealth*, 320 Mass. 230, 249-50 (1946). The U.S. Supreme Court has explained that the right to peaceably assemble protects public

and private points of view. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). People associate with others to advance beliefs and ideas, which are not necessarily political. *Id.*

> [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61.

Restrictions on Plaintiff-Petitioners' right to assemble is pervasive, touching upon every aspect of their lives.[13] Plaintiff-Petitioners have been denied their fundamental right to assemble in their stores, salons, and restaurants (economic assembly), in their churches (religious assembly), in their schools (educational assembly), at indoor and outdoor venues to recreate or to celebrate each other's triumphs and mourn each other's tragedies (cultural assembly). And now they may not travel as they please. These are no small matters, and curtailing fundamental freedoms requires that the governor prove that his restrictions are narrowly tailored to achieve a compelling government interest. *See Commonwealth v. Weston W.*, 455 Mass. 24, 26 (2009).

[13] *See, e.g.*, Order March 13, 2020, Nos. 13, 21, 30, 32, 38 and 44 (gatherings); March 15 (restaurants and bars); March 15, March 18, Nos. 15, 16 and 36 (education and childcare); Nos. 13, 33, 35, 37, 40, and 43 (essential businesses and reopening phases); Nos. 22 and No. 34 (beaches); No. 45 (travel quarantine).

2. The COVID-19 Orders Infringing Peaceable Assembly Are Not Narrowly Tailored to Achieve a Compelling Government Interest

The COVID-19 Orders are the opposite of narrowly tailored. They are blanket rules across a state with diverse social, political, religious, and economic dynamics and needs. Plaintiff-Petitioners understand the dangers inherent in the health crisis, and they can keep themselves and their patrons, congregants, students, families, friends, and neighbors safe without such draconian restrictions. Indeed, Governor Baker himself extolls the virtues of wearing masks to protect others as an alternative to physical isolation. *See* Order No. 31.

"[N]arrow tailoring requires 'serious, good faith consideration' of 'workable' nondiscriminatory alternatives that will achieve the Legislature's goals. *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 242 (2012) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)). Assembly's closely related fundamental right, freedom of speech, requires narrow tailoring to "leave[] open ample alternative channels of communication." *Opinion of the Justices to the Sen.*, 430 Mass. 1205, 1209 (2000). There are many other ways Massachusetts could have achieved its goal of suppressing the spread of COVID-19 without infringing on Plaintiff-Petitioners' right to assemble. The Orders do not take into account, for instance, whether the assemblage consists of people who do not have the virus, whether they are sufficiently distanced from each other, whether they are

masked or otherwise cordoned off from each other with barriers, or any of a host of other factors that could make the assemblage low-risk for spread of COVID-19.

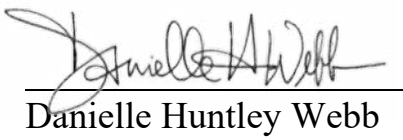
The governor's restrictions are also overly broad and arbitrary. The Supreme Court has held that a law cannot "make[] a crime out of what under the Constitution cannot be a crime." *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971). Constitutionally protected conduct cannot be punished. *See id.* at 614. Here, violations of COVID-19 Orders are criminal. *See* Exec. Order No. 591. They arbitrarily establish definitive numbers for gatherings for some events, but do not apply to certain protests. "[A]n obvious invitation to discriminatory enforcement[,]" is constitutionally problematic, but the governor has intentionally chosen to enforce his Orders against some, and not against others. Since blanket decrees such as these are not the least restrictive means to achieve the government's interest in public health, and since the Orders are arbitrarily enforced, the COVID-19 Orders violate Plaintiff-Petitioners' right to peaceably assemble.

CONCLUSION

For the foregoing reasons, Plaintiff-Petitioners respectfully request that the Supreme Judicial Court declare that Governor Baker's March 10, 2020 Civil Defense State of Emergency is without statutory authority, and is thus void; that all COVID-19 Orders issued pursuant to the Civil Defense State of Emergency violate

the separation of powers and are thus void; that the identified COVID-19 Orders violate Plaintiff-Petitioners' rights to due process and peaceable assembly; and for such other relief that the Court may deem just and proper.

Respectfully submitted,



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Dated: August 4, 2020

ADDENDUM

Ex.	Description
A	Order of Reservation & Report (July 10, 2020) (Lenk, J.)
B	Joint Pet. to Transfer | Joint Stipulation of Facts (July 2, 2020)
C	Massachusetts Constitutional Provisions
D	United States Constitutional Provisions
E	Statutes
F	Regulations
G	Decl. of State of Emergency, Exec. Order No. 591 (Mar. 10, 2020)
H	Cited COVID-19 Orders (organized by date)
I	Mass. Gen. Court, *Legis. Research & Drafting Manual* (5th Ed. 2010)
J	Legis. Rsch. Council, H. No. 6557, *Gubernatorial Exec. Orders* (1981)
K	Unpublished Sources

CERTIFICATE OF COMPLIANCE

This Brief of Plaintiff-Petitioners complies with the rules of the Supreme Judicial Court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction).

In compliance with the applicable length limit of Rule 20, Plaintiff-Petitioners used proportionally spaced Times New Roman font in 14-point, in Microsoft® Word for Microsoft 365 MSO (16.0.13001.20338) 64-bit counts the number of non-excluded words at 10,945.

Michael P. DeGrandis

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, the Brief of Plaintiff-Petitioners in the matter of *Desrosiers, et al. v. Baker*, SJC-12983, in the Supreme Judicial Court, was filed electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record in the above-captioned case. The foregoing Brief of Plaintiff-Petitioners is a re-filing of the same Brief on August 4, 2020 to reflect the proper case number and to address Addendum deficiencies associated with the electronic filing. It is hereby re-filed electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record. Courtesy copies will also be emailed to Defendant-Respondent.

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