COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

WORCESTER, SS. NO. SJC-12983

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,
Petitioners,

v.

CHARLES D. BAKER, JR. IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF MASSACHUSETTS,
Respondent.

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

BRIEF OF THE RESPONDENT

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INTRODUCTION

In response to a novel and highly contagious respiratory virus that has infected millions of people, overwhelmed public health systems, and killed over 180,000 people in the United States, the Governor of Massachusetts, exercising his authority under the Civil Defense Act, St. 1950, c. 639 ("CDA" or the "Act"), declared a state of emergency and implemented a series of emergency measures to protect the Commonwealth and its residents. These measures focused first on slowing the virus' spread in the Commonwealth and coordinating the Commonwealth's medical resources to ensure that its hospital system was not overwhelmed with an influx of cases. Once that initial surge passed, the measures transitioned to ensuring an orderly re-opening of the Commonwealth, while endeavoring to keep the virus in check. Based on recommendations of state, local, and federal officials, scientific and medical experts, and business leaders, the measures have balanced a host of competing interests and represented the Governor's best judgment for how to protect the health, safety, and welfare of the Commonwealth's residents during this time of unprecedented crisis.

Petitioners urge this Court to invalidate all the Governor's emergency measures issued under the CDA because, in their view, the Governor is powerless under the Act to address this crisis. They claim that until the Legislature gives the

Governor express statutory authority to act, the response to the pandemic in Massachusetts must proceed on a municipality-by-municipality basis under G.L. c. 111, with local boards of health determining what is best for their individual communities. That contention is profoundly misguided. The CDA's express purpose is to authorize the Governor to coordinate the Commonwealth's response to disasters and catastrophes, marshalling the state's public and private resources to "protect the public peace, health, security and safety, and to preserve the lives and property of the people of the [C]ommonwealth[.]" This pandemic, which has killed 822,000 globally, including more than 8,700 Massachusetts residents statewide, is precisely the kind of civil defense emergency that warrants a coordinated state-level response by the Governor under the Act.

The emergency measures taken by the Governor are not ultra vires, they do not violate separation-of-powers principles, and they do not violate petitioners' constitutional rights. Under our state and federal constitutions, elected officials like the Governor have broad latitude to protect the public health, safety, and welfare in times of crisis. The Governor has faithfully executed his duties under the CDA, implementing measures to safeguard the Commonwealth's residents and curb the spread of disease, and those measures do not infringe due process, freedom of assembly, or any other constitutional protections.

STATEMENT OF THE ISSUES

The parties requested that the Single Justice reserve and report two issues to this Court:

(1) Whether the [CDA] 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; and

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

STATEMENT OF THE CASE

The Emergency Declaration

On March 10, 2020, Governor Baker declared a State of Emergency because of the "extreme risk" posed by COVID-19 to Massachusetts residents and the need for the Commonwealth "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." Joint Appendix ("JA") 60-61 ¶¶ 10-13. The emergency declaration, the Governor explained, would "facilitate and expedite" the use of "Commonwealth resources and deployment of federal and interstate resources to protect persons from the impacts of the spread of COVID-19." JA 61 ¶ 12.

The emergency declaration was an essential part of the Commonwealth's coordinated response to the pandemic, signifying the seriousness of the COVID-19 outbreak. In issuing the declaration, the Governor invoked the authority conferred by the Legislature in both the CDA and G.L. c. 17, § 2A. The declaration thus authorized the Governor, in accordance with the CDA, to direct the Commonwealth's mitigation efforts and protect the health and welfare of the Commonwealth's residents. It also authorized the Commissioner of Public Health to "take such action and incur such liabilities…necessary to assure the maintenance of public health and the prevention of disease." G.L. c. 17, § 2A.

Characteristics of COVID-19

The coronavirus that causes COVID-19 spreads mainly among people who are in close proximity for prolonged periods of time. *See* Addendum ("Add.") 88. Respiratory droplets, "produced when an infected person coughs, sneezes, or talks," cause person-to-person spread, as "[t]hese droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs." *Id.* Many with COVID-19 are asymptomatic or pre-symptomatic but still spread the virus. *See* Add. 93. Experts have identified certain interventions—prime among them, social distancing and the use of face coverings—that are effective at slowing transmission of the virus. *See* Add. 90-91, 102-06.

The Initial Surge

On March 14, days after the World Health Organization declared COVID-19 a pandemic and President Trump declared a national emergency, *see* JA 161 ¶ 2, Add. 218-20, the Governor established the COVID Command Center as the single point of strategic decision-making for the Executive Branch's comprehensive response to the pandemic. The Command Center was tasked with coordinating between executive agencies, the Legislature, municipalities, private healthcare providers, and the federal government. *See* Add. 208-12. Its initial objectives included expanding testing capacity, planning quarantine operations, coordinating state government operations, responding to the needs of local boards of health, monitoring supply chains, and identifying surge capacity in the Commonwealth's health network. *Id*. On March 12, the Legislature appropriated $15 million in supplemental funds for the Commonwealth's COVID-19 response. *Id*.; *see* St. 2020, c. 39, § 2A.[1]

When the Governor declared an emergency on March 10, there were about 100 confirmed COVID-19 cases in Massachusetts. That number grew rapidly,

[1] In St. 2020, c. 124, § 2A, the Legislature later appropriated an additional $1.1 billion to supplement the Commonwealth's COVID-19 response efforts.

reaching almost 10,000 by March 31; 35,000 by mid-April; and more than 70,000 by May 5. *See* Add. 118. So too did the death toll. *See* Add. 123.

Recognizing the threat to the public, the Governor issued Orders during March and April to improve the Commonwealth's virus-related healthcare capacity and to implement community mitigation strategies (including social distancing measures) to slow the virus' spread. *See e.g.*, JA 62-155. The Commissioner of Public Health, acting under G.L. c. 17, § 2A, likewise issued dozens of Emergency Orders[2] and multiple guidance documents, including a stay-at-home advisory. *See* Add. 169-70.

On March 23, the Governor issued COVID-19 Order No. 13 ("Order 13"),[3] which authorized continued operation of "essential services"—*i.e.*, businesses involved in distribution of food and beverages, provision of health care, law enforcement, telecommunications, energy, and transportation—but temporarily closed the "physical workplaces and facilities" of "all businesses and other

[2] Those Orders ranged from curtailing visitation at certain high-risk facilities, Add. 202 (long-term care facilities); 203 (hospitals); 204 (assisted-living), to COVID-19 data reporting, Add. 206-07, to expanding medical capacity by changing licensing and ratio requirements, Add. 205.

[3] COVID-19 Orders issued by the Governor in response to the pandemic will be cited in this brief by number (*e.g.*, "Order 31").

organizations that do not provide COVID-19 Essential Services." *See* JA 90-94.[4] The Order also limited in-person gatherings to 10 people. *Id*. As the virus continued to surge in the Commonwealth, the Governor extended Order 13's limitations, to May 4 and then May 18. *See* JA 137-139, 158-160.

On May 1, the Governor issued Order 31, which required persons over age two, unless medically exempted, to wear a face covering in indoor or outdoor public places when unable to maintain a distance of six feet from others. *See* JA 161-163. Order 31 was based on the Center for Disease Control and Prevention's ("CDC") recommendation that all persons wear a face covering when outside the home. The Order specified that, in grocery stores, pharmacies, retail stores, and transit services, the face covering requirement always applied. *Id*.

Phased Reopening

Like other States that endured a springtime surge of COVID-19 infections, Massachusetts experienced its peak of new confirmed cases in late April and early May. *See* Add. 110-12. As the growth rate slowed and other key metrics improved, the Governor began planning for a phased reopening, forming the Reopening Advisory Board in late April. The Board, which comprised representatives from

[4] The Order accommodated religious institutions, permitting them to keep their physical premises open subject to the Order's generally applicable 10-person limitation on gatherings.

the business community, public health officials, and municipal leaders, developed a reopening advisory based on input and testimony from thousands of individuals.

The advisory, issued on May 18, emphasized that reopening should be driven by public health data. Add. 177, 179. Maintaining and improving these key indicators, the advisory emphasized, required statewide cooperation. Add. 176. Individuals would need to practice good hygiene, stay home if sick, minimize non-essential outings, continue social distancing, and wear face coverings if unable to socially distance. Add. 180-81. Businesses and other entities would need to follow mandatory workplace standards and sector-specific protocols to reduce the risk of COVID-19 transmission. Add. 180, 182-83. The advisory also recommended a four-phased reopening plan that would carefully allow businesses, services, and activities to resume, while avoiding a COVID-19 resurgence. Add. 184-91.

Based on the Advisory Board's recommendations, the Governor issued Order 33, announcing that "improving public health data permits a carefully phased relaxation of certain restrictions" in Order 13. *See* JA 166-174. Order 33 provided that, beginning on May 18, "Phase I" entities could operate their brick-and-mortar premises subject to Order 33's generally-applicable "COVID-19 workplace safety rules," as well as "sector-specific rules" established by the

Director of Labor Standards ("DLS"), addressing specific sectors' "particular circumstances and operational needs." *Id.*

As public health data continued to improve, on June 1, Governor Baker issued Order 35, which identified those entities that could reopen their physical premises in the remaining phases. *See* JA 179-186. Based on further improvements, Phase II began on June 8, while Phase III is proceeding in two steps, with Step 1 beginning on July 6. *See* JA 200-203, 218-226. As in Phase I, Phase II and III entities reopened subject to generally applicable "COVID-19 workplace safety rules" and DLS' "sector-specific rules." *See* JA 179-186, 200-203, 218-226.

The Governor continues to adjust these requirements as warranted by evolving public health data.

SUMMARY OF THE ARGUMENT

The CDA gives the Governor extensive authority to protect the Commonwealth during a civil defense emergency. (Pp. 24-38) . The Act defines "civil defense" broadly, and responding to the current pandemic falls within its scope because COVID-19 is a "natural cause" that threatens the public health and welfare of the Commonwealth's residents. The Orders are within the Governor's authority to execute the laws, and they respect the separation-of-powers principles

in Article 30 of the Massachusetts Declaration of Rights. (Pp. 38-44). They do not deprive the Legislature of its power to make laws, and the Legislature's actions following the emergency declaration confirm as much.

The Governor's Orders also do not violate petitioners' federal and state rights to due process and assembly. Emergency measures like these, aimed at containing public health crises, are typically afforded broad deference. (Pp. 46-47) But even without deference, the measures readily survive scrutiny under traditional constitutional analysis. (Pp. 48-62).[5]

ARGUMENT

I. The Civil Defense Act Gives the Governor Broad Authority to Protect the Commonwealth from the COVID-19 Global Pandemic.

The emergency declaration and emergency orders ("COVID-19 Orders") fall within the Legislature's broad grant of authority in the CDA and have been repeatedly ratified by the Legislature. Petitioners are therefore wrong to argue that the Governor exceeded his authority.

[5] This Court reviews questions of statutory interpretation *de novo*, giving substantial deference to a reasonable interpretation of a statute by the agency charged with its enforcement. *Commerce Ins. Co. v. Comm'r of Ins.*, 447 Mass. 478, 481 (2006). Review of petitioners' individual rights claims is under the deferential standard in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), or, in the alternative, the traditional constitutional analysis governing such claims. (Pp. 45-62).

A. The CDA Authorizes the Governor to Respond to the Pandemic Because COVID-19 Is an "Other Natural Cause" Under the Act.

The CDA provides that "upon the occurrence of any disaster or catastrophe" from enemy attack, civil disturbance, or "fire, flood, earthquake or other natural causes," the Governor may declare a civil defense emergency and act to "protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth." St. 1950, c. 639, § 5. The Act's definition of "civil defense" encompasses "preparation for and carrying out all [non-military] emergency functions…for the purpose of minimizing and repairing injury and damage result resulting from" enemy act, civil disturbance, or "fire, flood, earthquake or other natural causes." *Id*. § 1. The Governor has broad discretion under the Act to determine whether a disaster arises from an "other natural cause." *See* Op. of the Atty. Gen., Aug. 18, 1943, pp. 68-70 (Add. 215-17) (Governor has "discretion" to determine whether a particular matter falls with the War Powers Act, a CDA-precursor, "so long as that discretion is an exercise of judgment and not a display of arbitrary power"); *CommCan, Inc. v. Baker,* No. 2084CV00808-BLS2, 2020 WL 1903822, at * 7 (Mass. Super. Ct. April 16, 2020) (Salinger, J.); *cf*. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 457 Mass. 663, 681 (2010) (according "substantial discretion to an agency to interpret

statute it is charged with enforcing, especially where…the Legislature has authorized the agency to promulgate regulations").[6]

The Governor's emergency declaration readily falls within the Act's broad definition of a civil defense emergency. *See* St. 1950 c. 639, §§ 1, 5. Like fires, floods, and earthquakes, COVID-19 is a natural phenomenon that threatens "the public peace, health, security and safety…of the people of the Commonwealth." St. 1950, c. 639, § 5. It is a disease caused by a novel, naturally occurring coronavirus that has infected millions of people, overwhelmed public health systems, and killed over 180,000 people in the United States, including more than 8,700 in Massachusetts.[7] The virus is highly contagious, has a lengthy incubation period, and can be spread by symptomatic and asymptomatic individuals. There is no known cure, and no vaccine has been approved for public use. *See CPCS v. Chief Justice of the Trial Court*, 484 Mass. 431, 433 (2020). As this Court has recognized, these are "extraordinary circumstances," with conditions in

[6] The CDA authorizes the Governor to "exercise any power, authority or discretion conferred upon him by any provision of the act" by "executive orders or general regulations." St. 1950, c. 639, § 8.

[7] *See* Add. 107 (CDC: "[w]e do not know the exact source of the current outbreak…, but we know that it originally came from an animal, likely a bat").

Massachusetts "dramatically…chang[ing]" since the Governor first declared the emergency. *Goldstein v. Sec. of the Com.*, 484 Mass. 516, 518, 525 (2020). The COVID-19 pandemic plainly falls within the Legislature's definition of a civil defense emergency from an "other natural cause."

Interpreting similar statutory language that also did not expressly list pandemics, the Pennsylvania Supreme Court applied nearly identical reasoning, holding that under the Pennsylvania Emergency Code the "COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions." *Friends of Danny DeVito v. Wolf*, 227 A.3d. 872, 889 (Pa. 2020). It explained that the only unifying factor among the "disparate types of disaster" listed in Pennsylvania's definition of "natural disaster" is that hurricanes, tornados, floods, tidal waves, fires, and earthquakes all involve "substantial damage to property, hardship, suffering or possible loss of life." *Id*.[8] That reasoning is equally applicable here: the only "commonality" among the disasters listed in sections 1

[8] Interpreting the phrase "natural emergency" in Florida's Emergency Management Act, the Florida Supreme Court similarly held that "a pandemic is a 'natural emergency' within the meaning of [the Florida act]." *See Abramson v. DeSantis*, 2020 WL 3464376 (Fla. June 25, 2020); *see also* Fla. St. § 252.34(8) ("'natural emergency' means an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake").

and 5 of the Act is that, like this pandemic, they are phenomena threatening "the public peace, health, security and safety…of the people of the Commonwealth."

Language elsewhere in the Act confirms the Legislature's intent to confer emergency powers on the Governor that are sufficiently broad to encompass public health emergencies. Indeed, the Act's very statement authorizing the Governor to act expressly references protecting public health. *See* St. 1950, c. 639, § 5 ("protect[ing] the public peace, health, security and safety," and to "preserve the lives and property of the people of the commonwealth"). Similarly, the Act's emergency preamble declares the Act "an emergency law, necessary for the immediate preservation of the public health, safety and convenience." St. 1950, c. 639.

B. Once an Emergency Is Declared, the Act Gives the Governor Extensive Authority to Protect the Public Peace, Health, Security, and Safety.

Upon declaration of the emergency, the Act gives the Governor, as head of the executive branch, "very extensive and highly flexible" powers to prepare for and meet the emergency. *Dir. of Civil Def. Agency & Office of Emerg. Prep. v. Civil Serv. Comm'n*, 373 Mass. 401, 404 (1977). The Act grants the Governor "any and all authority over persons and property necessary or expedient for meeting" the emergency that the Legislature may constitutionally "confer upon him as supreme

executive magistrate of the commonwealth and commander-in-chief of the military forces thereof." St. 1950, c. 639, § 7. It spells out some of this authority over "persons and property" expressly, *see id*., §§ 7(a)-(q);[9] provides that the enumerated subsections are merely examples—not an exhaustive list—of the Governor's powers, *see id*. § 7 (listing the specific powers "without limiting the generality of the foregoing" grant); and provides that so much of "any general or special law" or "any rule, regulation, ordinance or by-law" that is "inconsistent" with any "order or regulation issued or promulgated" under the Act "shall be inoperative" during the emergency, *see id*. § 8A.

The Governor has faithfully executed that broad authority here. It is well established that "one can carry and spread the COVID-19 virus without any apparent symptoms," with "every encounter with another person…pos[ing] a risk of infection." *Goldstein*, 484 Mass. at 526. Thus, COVID-19 prevention is "highly dependent on physical social distancing (*i.e.*, remaining at least six feet apart from other people)," "frequent hand-washing and sanitizing,", and mask-wearing in

[9] The 17 enumerated powers granted to the Governor in Sections 7(a)-(q) include the authority to "polic[e], protect[], or preserv[e]" all property, *see id*. § 7(c), and to regulate "transportation and travel," *id*. § 7(e), certain hours of labor and business, *id*. § 7(f), "assemblages, parades, or pedestrian travel" to "protect the physical safety of persons," *id*. § 7(g), and the sale of food and household articles, *id*. § 7(p).

public spaces. *Christie v. Commonwealth*, 484 Mass. 397, 399 (2020). The Orders advance these disease-prevention objectives, are consistent with public health measures adopted across the country, and fall within the powers enumerated in the CDA. *See* St. 1950, c. 639, §§ 7, 8A.

C. The Legislature Has Repeatedly Ratified the Governor's Determination that COVID-19 Is an "Other Natural Cause" Requiring Action Under the Act.

The Legislature's actions following the declaration of emergency confirm that the Governor acted within his statutorily authorized powers. *Dir. of Civil Def.*, 373 Mass. at 409-10 (Legislature's "affirmative conduct…can well be taken as a practical confirmation or ratification of the executive orders"). The Legislature, which has previously deferred to the Governor's designation of an event as a "natural disaster," in the context of professionals providing natural disaster and catastrophe services, *see* G.L. c. 112, § 60Q,[10] has repeatedly ratified the Governor's COVID-19 emergency declaration. *See Student No. 9 v. Board of Educ.*, 440 Mass. 752, 766-67 (2004).

[10] Section 60Q defines "natural disaster or catastrophe" as "an event, whether man-made or natural, that is declared an emergency by the President of the United States or by the governor, or which results in the deployment of emergency response personnel or the displacement of persons from the area of the event."

Since the Governor's emergency declaration, the Legislature has enacted a host of laws that approvingly acknowledge the state of emergency and are even contingent on the existence of a declared state of emergency. *See, e.g.*, St. 2020, c. 45, § 1(d) (municipal elections); St. 2020, c. 53, § 7 (municipal budgets); St. 2020, c. 65, §§ 1-2, 6-7 (tying expiration of portions of eviction and foreclosure moratorium to state of emergency); St. 2020, c. 71, §§ 7, 8 (remote notarization); St. 2020, c. 81, §§ 3-4, 6 (expansion of unemployment insurance); St. 2020, c. 92, §§ 7(a), 8(a), 9, 10(a), 11, 12(a)(1), 13(a)(1), 14(b)-(c), 16, 17 (municipal governance); St. 2020, c. 93, § 1(c) (COVID-19 data collection). The Legislature also enacted statutes—operative only during the state of emergency declared by the Governor—providing liability protection for healthcare workers and authorizing sales of alcoholic beverages for off-premises consumption. St. 2020, c. 64, §§ 1, 2(a), 4; St. 2020, c. 118, § 2(b). Finally, since the Governor declared an emergency, the Legislature has appropriated billions of dollars for COVID-19 mitigation. St. 2020, c. 39, § 2A ($15 million); St. 2020, c. 124, § 2A (additional $1.1 billion to supplement 2020 and 2021 COVID-19 response). *See Dir. of Civil Def.*, 373 Mass. at 409-10 (appropriations constitute practical form of ratification). These statutes can "be taken as a practical…ratification" of the COVID-19 Orders and the clearest sign that the Governor is using the Act just as the Legislature

intended—to protect the public health and safety during a disaster from "other natural causes." *Id.* at 410 ("Such confirmation or ratification can be raised from a course of legislative behavior and need not be set out in a statute in haec verba").

D. Petitioners' Narrow Definition of "Other Natural Causes" Is Inconsistent with the Phrase's Plain Meaning, the Governor's Broad Authority Under the Act, and the Legislature's Repeated Ratification of the Emergency.

Against all this, petitioners fall back on a canon of statutory interpretation, extrinsic interpretative aids, and an in-their-view competing statute to advocate for a cramped construction of the phrase "other natural causes."

Petitioners first argue that the canon of statutory interpretation *ejusdem generis* and a 1981 Report from the Massachusetts Legislative Research Council preclude reading the phrase "other natural causes" to cover a pandemic arising from natural causes. Petrs.' Br. 16-19. But resort to a canon of statutory interpretation is appropriate only when the statutory language is unclear, *see Commonwealth v. Escobar*, 479 Mass. 225, 228 (2018), which is not the case here. *See supra*, pp. 25-30; *see also DeVito*, 227 A.3d at 888-89 (canon of *ejusdem generis* inapplicable to the interpretation of the term "natural disaster").[11]

[11] Even if the canon applied, the only "commonality" among the various disasters listed in sections 1 and 5 is that they are natural phenomena that threaten "the public peace, health, security and safety…of the people of the

(footnote continued)

Likewise, a narrower reading of the Act advanced in the 1981 report of the now-defunct Legislative Research Council carries little weight, *see New England Survey Sys. v. Dep't of Indus. Accidents*, 89 Mass. App. Ct. 631, 638 (2016) ("when the words used by the Legislature have a plain meaning and achieve a logical and workable result, we do not turn to extrinsic interpretative aids"), and, in any event, is fatally undermined by the current Legislature's repeated ratification of the Governor's emergency declaration in statutes conditioned on existence of the emergency. *See supra*, pp. 30-32.

Petitioners next suggest that because the CDA "is not codified as a general law," the Legislature did not intend it to apply to a crisis affecting all Massachusetts residents. Petrs.' Br. 23-24. In fact, special laws typically address "discrete, specific circumstances," and a novel pandemic, even one that affects all Massachusetts residents, is precisely the type of discrete, specific circumstance that would be governed by a special law. *Lavecchia v. Massachusetts Bay Transp. Auth.*, 441 Mass. 240, 243 (2004). Moreover, many generally applicable laws are never codified as general laws. These include laws with ongoing effect that

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Commonwealth," just like COVID-19. *See supra*, pp. 25-28. The canon therefore supports interpreting the Act to uphold the Governor's authority to respond to a naturally caused, public-health pandemic.

organize state government, *e.g.*, St. 1956, c. 465 (creating MassPort) and St. 1997, c. 48 (abolishing counties);[12] establish rules and policies, *e.g.*, St. 1995, c. 5 (welfare reform), St. 2020, c. 1 (simulcasting authorization), St. 2008, c. 169 (long-term contracts with renewable emergency generators), and St. 1969, c. 546 (hotel-motel tax surtax); and authorize supplemental spending, *e.g.*, St. 2020, c. 124. The Act is of a piece with these enactments, and this Court has already recognized the Act's scope and the "very extensive and highly flexible" powers it confers on the Governor in a declared emergency. *Dir. of Civil Def.*, 373 Mass. at 404. *See supra*, pp. 24-30. That the Act is a special law therefore does not detract from the plain meaning of "other natural causes."

Third, and relatedly, petitioners argue that the CDA may cover only events of "limited duration." Petrs.' Br. 15. But the COVID-19 Orders are of limited duration and will last only so long as the COVID state of emergency remains in effect. And in any event, by (1) including such emergencies as "wars," which are not inherently limited to a particular duration,[13] and (2) repeatedly amending, then

[12] This was later codified in G.L. c. 34B.

[13] During World War II, for instance, the state of emergency under CDA precursors ran from Governor Saltonstall's December 29, 1941, declaration until Governor Bradford's June 27, 1947, Executive Order, *see* Exec. Order 99 (1st series) (June 27, 1947), with Executive Orders issued under that declaration and

(footnote continued)

removing, the sunset clause in Section 22,[14] the Legislature plainly intended that an emergency's hypothetical duration should not operate to curtail the Governor's present authority to protect the civil defense under the Act. Further, in *Dir. of Civil Def.*, this Court was untroubled that the Executive Order concerning a comparatively less urgent civil defense matter—the civil service status of Civil Defense Agency employees—had been in effect for 15 years at the time the decision issued. 373 Mass. at 407 (describing the order, which had "not been rescinded," as "without limit of time").

Fourth, petitioners contend that G.L. c. 111 is the Commonwealth's primary mechanism for suppressing dangerous infectious diseases and that the Legislature did not intend to give the Governor separate authority under the CDA to mitigate pandemics caused by infectious diseases. Petrs.' Br. 24-31. Therefore, they

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CDA-precursors running throughout that period. (One example: blackout orders remained in effect in some form from January 1942 until December 1945. *See* Exec. Order Nos. 3 (Jan. 8, 1942), 10 (March 31, 1942), 31 (July 17, 1942), 40 (Nov. 27, 1942), 52 (Feb. 12, 1943), 55 (June 7, 1943), 86 (Dec. 26, 1945) (all first series).)

[14] When enacted in 1950, the Legislature provided for the Act to become inoperative upon joint resolution and, in any event, no later than July 1, 1952. St. 1950, c. 639, § 22. It 1952, it extended the latter date to July 1, 1953. St. 1952, c. 269. Finally, in 1953, it removed the latter date-certain language altogether. St. 1953, c. 491. *See also Dir. of Civil Def.*, 373 Mass. at 404 (1953 "indefinite extension" broadened scope of Act's original conception).

contend, this Court should interpret the phrase "other natural causes" to prohibit the Governor from acting under the CDA to respond to a pandemic that otherwise threatens to overwhelm the State's ability to address the staggering toll on its residents. *Id*. Petitioners' mode of statutory interpretation runs afoul of this Court's instruction to "construe statutes to harmonize and not to undercut each other." *Sch. Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, SEIU*, 438 Mass. 739, 751 (2003). They point to no "explicit legislative commands" in G.L. c. 111 that preclude the Governor from acting under the CDA to supplement actions taken by the Department of Public Health and local health boards pursuant to c. 111. Nor do they identify actions the Governor has taken that interfere with local boards' responsibilities under G.L. c. 111.[15] *Id*. *See, e.g.*, G.L. c. 111, §§ 95-96A, 104, 111, 112, 113. And even if there were a conflict, the CDA is clear that the Governor's actions control. *See* St. 1950, c. 639, §§ 7 & 8A; *supra*, pp. 28-30.

Last, petitioners claim this Court should interpret the Act narrowly because otherwise the Governor's authority under the Act is unbounded. Not so. First, the

[15] Petitioners do contend that Order 45 usurps local boards' authority under Section 106 to examine travelers entering their communities. Even if the petitioners had standing to raise that challenge, there is no conflict. The CDA gives the Governor express authority over "travel." *See* St. 1950, c. 639, §§ 7(e) & 7(g). Further, under Order 45, local boards remain free to act, subject to the state-wide floor established by the Governor.

circumstances set forth in the declaration must fall within the Act's broad definition of "civil defense" emergency, and any associated orders must relate to the emergency. *See supra*, pp. 24-30.[16] Second, Section 22 of the Act reserves to the Legislature the power to render any part of the CDA inoperative by joint resolution. St. 1950, c. 639, § 22. Third, the Legislature separately retains the ability to not fund the Governor's actions and, if necessary, undo the Governor's actions by subsequent legislation. And finally, there is no dispute that the Governor's emergency declaration and related orders are subject to judicial review, whether under G.L. c. 214, § 1, or under the state constitution directly.[17] Given all these checks, there is no warrant for interpreting "other natural causes" narrowly

[16] Any review of the factual predicate for an emergency declaration and subsequent orders is under an "arbitrary and capricious" standard. *See* Op. of the Atty. Gen., Aug. 18, 1943, pp. 68-70.

[17] This Court has only disturbed the Governor's declaration of a civil defense emergency when the basis for the declaration has no logical connection to the statutory grant. *Compare Dir. of Civil Def.*, 373 Mass. at 408-09 (executive order giving Civil Defense Agency employees civil service status within Governor's authority under the Act), *with Mass. Bay Trans. Auth. Advisory Bd. v. Mass. Bay Trans. Auth.*, 382 Mass. 569, 578 (1981) (budget shortfall, which would have resulted in the shutdown of the MBTA, is not the type of "other cause" that the Legislature intended when it inserted the phrase "absence of rainfall or other cause" into Section 5 in a 1958 amendment); *see also* St. 1950, c. 639, § 5 (authorizing Governor to declare emergency "whenever because of absence of rainfall or other cause a condition exists in all or in 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").

and constraining the Governor from using his authority under the Act to respond to a pandemic-caused emergency.

II. The COVID-19 Orders Respect the Separation-of-Powers Principles Embodied in Article 30.

The COVID-19 Orders also fall well within the limits on executive authority set by the Massachusetts Constitution. In issuing the Orders, the Governor is discharging his constitutional duty to execute the laws. Each Order is grounded in statutory authority delegated to the Governor, and the Legislature has repeatedly expressed its approval of the Governor's actions through subsequent legislation. The Orders, issued as part of the executive and legislative branches' collaborative response to a pandemic of unprecedented scale, accord with both the spirit and the letter of Article 30 of the Declaration of Rights.

A. The COVID-19 Orders Are Within the Governor's Authority to Execute the Laws, a Power That Is at Its Height in Times of Emergency.

Article 30 ensures that the legislative, executive, and judicial branches refrain "from 'exercis[ing] the…powers' of the other branches." *Commonwealth v. Cole*, 468 Mass. 294, 301 (2014) (quoting Article 30). The "critical inquiry" in any Article 30 challenge is whether one branch's actions "interfere with the functions of [another] branch of government." *Opinion of the Justices to the Senate*, 375 Mass. 795, 813 (1978). This Court has long explained that while "the lawmaking

power…is within the prerogative of the Legislature," it "is the constitutional prerogative, as well as duty, of the Governor to execute the laws." *Opinion of the Justices to the Senate*, 375 Mass. 827, 833 (1978). When executing laws in accordance with statutory authorization by the Legislature, "the Governor ha[s] authority to use discretion in applying the energies of the executive branch and the resources of the Commonwealth…to achieve the purposes or objectives of the laws." *Id.* Thus, the "power to execute the laws, constituting the essence of the Governor's constitutional office, must be accorded the same deference as the several specific executive powers enumerated in the Constitution." *Id.*

In issuing the COVID-19 Orders, Governor Baker is discharging his constitutional prerogative, as well as his constitutional duty, to execute the Act. As described, the CDA is the source of statutory authority for each of the Orders. *See supra*, pp. 24-30. Each Order, accordingly, identifies the provision or provisions of the CDA through which the Legislature delegated the Governor authority to act. *See, e.g.*, JA 91, 167, 232. While petitioners object that the Orders amount to an exercise of the police power, executive branch officials can of course exercise the police power of the Commonwealth when acting pursuant to a delegation of authority from the Legislature. *See Arno v. Alcoholic Beverages Control Comm'n*, 377 Mass. 83, 85-89 (1979) (statute delegating authority regarding liquor licenses

was a valid delegation of police power); *DeVito*, 227 A.3d at 886 (upholding COVID-19 order because "[t]he broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth's police power").[18] And while petitioners specifically object to the inclusion of civil and criminal penalties in the Orders as an exercise of the police power, those penalties were authorized by the Legislature in the CDA itself. *See* St. 1950, c. 639, § 8 (establishing penalties for violations of "any "executive order…issued or promulgated by the governor" under the CDA). Thus, this is not a case of the executive branch exercising a power that is committed exclusively to the Legislature by the Massachusetts Constitution, but rather involves the Governor's power to execute laws and his exercise of delegated authority. *Compare Opinion of the Justices to the Senate*, 430 Mass. 1201, 1203-04 (1999) (proposed bill giving Governor authority to prevent appropriation of money infringed on Legislature's

[18] Petitioners do not make a non-delegation argument—*i.e.*, that the Legislature has impermissibly "delegated the general power to make laws" to the executive branch. *Opinion of the Justices to the House of Representatives*, 393 Mass. 1209, 1219 (1984). Indeed, they expressly disclaim any such argument, writing that the Legislature "did *not* delegate the lawmaking prerogative…to the governor in either [G.L. c. 111] or the [CDA]." Petrs.' Br. 35 (emphasis added). Petitioners therefore have waived any non-delegation argument. *See* Mass. R. App. P. 16(a)(9)(A); *Assessors of Boston v. Ogden Suffolk Downs, Inc.*, 398 Mass. 604, 608 n.3 (1986) ("issue raised for the first time in an appellant's reply brief comes too late, and we do not consider it.").

prerogative to appropriate money, a power committed "exclusively [to] the legislative branch" by the Constitution).[19]

When, as here, the Governor acts pursuant to an express authorization of the Legislature, his authority to act is at its apex. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring in the judgment). This principle applies with particular force in emergency contexts, where the executive branch can act most expeditiously to stem a crisis. *See* THE FEDERALIST NO. 70 (1788) (A. Hamilton) (the unitary executive can best respond to "the most critical emergencies of the state," whereas "[i]n the legislature, promptitude of decision is oftener an evil than a benefit"); *South Commons Condominium Ass'n v. Charlie Arment Trucking, Inc.*, 775 F.3d 82, 86 (1st Cir. 2014) ("By their nature, emergency situations require an immediate response."). When assessing Article 30 claims contesting executive action in emergency contexts, this Court has thus honored "the Legislature's recognition that the executive branch has the detailed and contemporaneous knowledge" to enable action "on an expedited basis." *New England Div. of Am. Cancer Society v. Comm'r of Admin.*, 437 Mass. 172, 184 (2002) (quotation marks omitted) (upholding statute empowering Governor "to

[19] Petitioners also contend that Governor Baker has somehow suspended laws, *see* Petrs.' Br. 32, 34, but conspicuously fail to identify any laws that have purportedly been suspended.

reduce public expenditures in a time of true financial emergency" as consistent with Article 30). The COVID-19 Orders, issued under the CDA during the largest disaster faced by the Commonwealth in a century, fit comfortably within the powers committed to the executive branch by Article 30. *See DeVito*, 227 A.3d at 892-93 (COVID-19 order closing non-life-sustaining businesses comports with separation-of-powers doctrine because Pennsylvania's Emergency Code "specifically and expressly authorizes the Governor to declare a disaster emergency" and issue related orders).

B. The COVID-19 Orders Do Not Deprive the Legislature of Its Power to Make Laws.

Rather than contest any particular COVID-19 Order as violative of Article 30, petitioners assert that the COVID-19 Orders, writ large, "depriv[e] the Legislature of its full authority to pass laws." Petrs.' Br. 35 (quoting *Opinion of the Justices to the Senate*, 430 Mass. at 1203-04). Put otherwise, they contend that, in acting under the CDA, the Governor is preventing the Legislature from exercising its constitutional prerogative to make laws to address COVID-19. *See id.* This far-fetched assertion is belied by the Legislature's conduct during the period of emergency.

Nothing about the Orders prevents the Legislature from enacting statutes to address COVID-19 or any other matter of concern. The Legislature retains all of its

authority to make laws. Indeed, the Legislature has enacted a wide range of legislation over the past six months to address the COVID-19 outbreak. *See, e.g.*, St. 2020, c. 45; St. 2020, c. 53; St. 2020, c. 56; St. 2020, c. 64; St. 2020, c. 65; St. 2020, c. 71; St. 2020, c. 92; St. 2020, c. 93; St. 2020, c. 115; St. 2020, c. 118; St. 2020, c. 124. Given the breadth and number of laws enacted since the Governor's emergency declaration, it blinks reality to suggest that the Legislature has been deprived of its authority to enact COVID-19-related laws. And should the Legislature disagree with any action taken by the Governor under the CDA—including any COVID-19 Order—it has multiple remedies, including one reserved within the CDA itself: the power to make any part of the CDA "inoperative by the adoption of a joint resolution to that effect by the house and senate acting concurrently." St. 1950, c. 639, § 22. *Cf. DeVito*, 227 A.3d at 886 (similar provision in Pennsylvania's Emergency Code).

While the Governor's emergency declaration has been in effect, the Legislature has not disapproved of the declaration or any of the COVID-19 Orders. Rather, it has repeatedly endorsed the Governor's actions by tying the operation of statutes to the existence of the emergency or incorporating the state of emergency as a condition of effectiveness. *See supra*, pp. 30-32. The Legislature's choice to repeatedly acknowledge the emergency declaration, and to make statutes

conditional on that declaration, is powerful evidence of its approval of the Governor's actions. *See Student No. 9*, 440 Mass. at 766-67 (Legislature "expressed its acceptance of" and "approval of" implementation of Education Reform Act of 1993 by repeatedly funding through budgetary line items programs to aid students in passing MCAS exam); *Dir. of Civil Def.*, 373 Mass. at 409-10 ("The affirmative conduct of the Legislature in passing [a] statute, and in repeatedly making appropriations that attracted Federal contributions dependent upon" the effectiveness of certain executive orders, "can well be taken as a practical confirmation or ratification of the executive orders.").

The mutually reinforcing actions by the Legislature and Governor demonstrate why this Court has affirmed, time and again, that "a rigid separation" between branches of government "'is neither possible nor always desirable.'" *Cole*, 468 Mass. at 301 (quoting *Opinion of the Justices to the House of Representatives*, 365 Mass. 639, 641 (1974)). It is "*interference* by one department with the function of another" that is the "essence of what cannot be tolerated under art. 30." *Gray v. Comm'r of Revenue*, 422 Mass. 666, 671 (1996) (emphasis added) (internal quotation marks omitted). But Massachusetts' experience shows that, far from interfering with one another, the legislative and executive branches have worked in tandem to address the pandemic. The COVID-19 Orders, part of the

record of complementary legislative and executive action during the period of emergency, accord fully with Article 30.

III. The COVID-19 Orders Do Not Violate Petitioners' Federal and State Rights to Due Process and Assembly.

Petitioners next claim that the COVID-19 Orders violate their rights to substantive and procedural due process under the Fourteenth Amendment to the U.S. Constitution and Article 10 of the Massachusetts Declaration of Rights and their rights to peaceably assemble under the federal and state Constitutions. Their alleged injuries, however, are abstract and generic, premised on conclusory allegations of constitutional injury that do not identify how the supposed denials occurred or how petitioners have been personally affected. *See infra*, note 25.[20] In any event, none of the Orders violates the state or federal Constitutions. Emergency measures to forestall epidemics are typically afforded broad deference, but even without the application of deference, the measures readily survive scrutiny under ordinary constitutional analysis.

[20] The sole exception is a paragraph questioning Bare Bottom Tanning's placement in Phase Two instead of Phase One of the reopening. Petrs.' Br. 44-45. Although petitioners assert in their complaint that they all "have experienced, and will continue to experience, concrete and particularized harm as a direct consequence of" the Governor's Orders, *see* JA 37, the allegations that follow that heading are not concrete and particularized in any way, *see* JA 37-39 ¶¶ 111-16.

A. The Governor Is Entitled to Broad Deference and Wide Latitude in Coordinating the Commonwealth's Public Health Response to the Global Health Pandemic.

The Supreme Court has long recognized that a "community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (internal quotation marks omitted). The "liberty secured by the Constitution…does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint," particularly during a pandemic when cooperative action is necessary for the common good. *Id.* at 26; *see also id*. at 29. State action, *Jacobson* instructs, should thus be upheld unless it lacks a "real or substantial relation to the protection of the public health" or represents "a plain, palpable invasion of rights secured by the fundamental law." *Id*. at 31; *see also Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (no "liberty to expose the community…to communicable disease").

Courts reviewing emergency challenges to COVID-19-related orders have consistently applied *Jacobson*. Most significantly, the Supreme Court upheld the denial of a request to enjoin California's capacity limitations on places of worship, with Chief Justice Roberts explaining that, under *Jacobson*, government officials' latitude "must be especially broad" to safeguard the "safety and health of the

people" from COVID-19. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (May 29, 2020) (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38, and *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Other courts have echoed this deferential standard. *See, e.g.*, *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 2020 WL 3468281, at *2 (6th Cir. 2020) (unpublished) (collecting cases); *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913, at *7 (D. Me. 2020).

Jacobson's deferential standard is easily met here. Simply put, there is a "real [and] substantial relation" between Governor Baker's COVID-19 Orders and the "protection of the public health." 197 U.S. at 31. COVID-19 is a global pandemic and national public health emergency that has affected every Massachusetts resident. As of August 24, 2020, Massachusetts had over 116,000 confirmed cases and over 8,700 deaths attributable to the disease. Add. 146. Moreover, the coronavirus is highly contagious, has no known cure or vaccine, and spreads from person to person via respiratory droplets. *See CPCS*, 484 Mass. at 433; *see also South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Under *Jacobson* alone, the Orders therefore can and should be upheld against petitioners' constitutional challenges.

B. Under a Traditional Analysis, the COVID-19 Orders Do Not Violate Petitioners' Federal and State Rights to Due Process and Assembly.

Even if this Court departs from *Jacobson*'s deferential standard, the COVID-19 Orders do not violate petitioners' individual rights.

1. Petitioners' Substantive Due Process Claims Are Meritless.

The COVID-19 Orders are wholly compatible with the substantive due process protections of the federal and state Constitutions. As an initial matter, petitioners neither specify which Orders they believe violate their substantive due process rights nor identify which of their assorted businesses and religious institutions is affected by any particular Order. Petrs.' Br. 35-43.[21] And they invoke in only an abstract fashion the concepts of "liberty" and "property," offering no facts to support their broad-brush assertion that the Orders "have burdened or denied" their interests in "earning a lawful wage, running a lawful business, preaching, worshiping as a community, associating with one another, or teaching their children." *Id.* at 38. For example, petitioners do not contend that the Orders temporarily closing the physical premises of non-essential services precluded remote operation of their business, religious, or educational activities,

[21] Petitioners acknowledge that some Orders do *not* violate their substantive due process rights. Petrs.' Br. 38 n.8.

nor do they represent that any of their business licenses have been suspended. Indeed, most of petitioners' businesses or places of worship—having been designated as Phase I, II, or III enterprises—have been able to reopen their physical premises.

More to the point, as they relate to petitioners' activities, the COVID-19 Orders are eminently reasonable and far from arbitrary. In deciding initially which businesses were "essential services," and later which businesses were included in each reopening phase, Governor Baker consulted recommendations from public health officials concerning "critical infrastructure sectors," JA 90, 137, 166, and obtained input from the Reopening Advisory Board. Thus, in initially limiting the operations of petitioners' restaurants (where diners sit in close proximity), while allowing grocery stores (where customers ordinarily do not linger) to remain open, the Governor acted in accordance with public health recommendations. Similarly, he reasonably designated gyms (where people share equipment, breathe heavily, and come into close contact) and hair and tanning salons (which also entail close contact) as "non-essential" services. And given the heightened risk of virus transmission associated with large indoor gatherings—like religious services where people congregate for sustained periods of time—he did not act arbitrarily in subjecting religious organizations to generally applicable occupancy limits. *See*

CommCan, 2020 WL 1903822, at * 6-8, 12 (plaintiffs unlikely to succeed on equal protection challenge to essential services order, since "[e]conomic rules do not have to be perfectly tailored, even in non-emergency situations," and, in economic sphere, regulation is constitutional as long as it is not arbitrary); *Talleywhacker v. Cooper*, 2020 WL 3051207, at *10-12 (E.D.N.C. 2020) (similar).[22]

Petitioners, in any event, cannot prevail on their substantive due process claims because they have no constitutional right to conduct their business, religious, or educational activities free from government regulation, particularly during this pandemic. "[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (internal citation omitted); *see also United States v. Salerno*, 481 U.S. 739, 746 (1987) (similar); *In Re Dutil*, 437 Mass. 9, 10 n.2 (2002) (substantive due process standard generally the same under federal and state Constitutions).[23] Petitioners' claims fail under these standards because their

[22] Petitioners suggest that their challenge to the inclusion of arcades in Phase IV could also be considered under an Equal Protection analysis but acknowledge not having asserted this claim. Petrs.' Br. 42 n.11.

[23] Although Article 10 "may afford greater protection of rights than the due process clause of the Fourteenth Amendment," this Court's "treatment of due

(footnote continued)

interests in operating their businesses are not "fundamental." While this Court has recognized that individuals have a right "to follow any legitimate calling," *Commonwealth v. Beaulieu*, 213 Mass. 138, 141 (1912), the right to work or to choose a profession is not "fundamental." *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 542 (1974) ("neither the United States Supreme Court nor this court has ever held that the right to work or to pursue one's business is a fundamental right infringement of which deserves strict judicial scrutiny"); *see SH3 Health Consulting, LLC v Page*, 2020 WL 2308444, at *1, 10 (E.D. Mo. 2020) (businesses "shut down by government [COVID-19] 'stay at home' orders" did not establish substantive due process violation because asserted right "to conduct their business and to earn a living" is not "fundamental"). And petitioners' claim as it relates to the operation of their places of worship and their church-

process challenges adheres to the same standards followed in Federal due process analysis." *Gillespie v. City of Northampton*, 460 Mass. 148, 153 n.12 (2011) (internal quotation marks and citation omitted); Petrs.' Br. 36. Article 10 may confer greater protection than its federal counterparts in the realm of "fundamental" rights. *See, e.g.*, *Foster v. Comm'r of Corr.*, 484 Mass. 698, 728 (2020); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 313 (2003). But under both state and federal constitutional law, the right to operate a business is not "fundamental." To the extent that the First Amendment provides enhanced protection to petitioners' operation of their churches or church-affiliated school, the COVID-19 Orders are not in conflict with those protections. *See, e.g.*, *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring); *Doe v. Sup't of Schs. of Worcester*, 421 Mass. 117, 129-130 (1995) (education not a fundamental right).

affiliated school—which reads like a Free Exercise Clause claim—likewise would fail even if evaluated under that framework. *See South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (California rules temporarily limiting attendance at places of worship "appear consistent with the Free Exercise Clause" because "[s]imilar or more severe restrictions apply to comparable secular gatherings").[24]

As discussed, the Essential Services and Phased Reopening Orders are consistent with public health recommendations and serve the Commonwealth's compelling interest in slowing COVID-19's spread. The Orders cannot credibly be characterized as "conscience-shocking." *See*, *e.g.*, *Henry v. DeSantis*, 2020 WL 2479447, at *8 (S.D. Fla. 2020) (Governor's temporary business closure orders "are reasonable and measured, based on data and science, and rationally related to a legitimate end"). Petitioners argue that it was arbitrary for the Governor initially to designate certain businesses as "essential," while omitting others from that designation, Petrs.' Br. 41-42, but the fact that the Orders necessarily entail some

[24] Protected substantive due process rights reflect basic values "implicit in the concept of ordered liberty" and those characterized as "fundamental." *Gillespie v. City of Northampton*, 460 Mass. at 153 (fundamental rights are those "deeply rooted in this Nation's history and tradition…and implicit in the concept of ordered liberty") (citing Supreme Court cases) (internal citations and quotations omitted).

line-drawing does not violate substantive due process rights.[25] *See 4 Aces Enters., LLC v. Edwards*, 2020 WL 4747660, at *14 (E.D. La. 2020), *appeal pending* (5th Cir. 20-30526).[26] Petitioners cite *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 329 (2003), but that case, in contrast, involved a "fundamental" right, *see id.* at 325-26, and its broader principle—that governmental authority may not be exercised arbitrarily—was not violated here. It was entirely rational for the Governor to maintain restrictions on some entities during the reopening phases, particularly since all open entities remain subject to social distancing measures.

[25] Insofar as Order 13's designation of certain businesses as "essential" has been superseded by the phased reopening orders, *see supra*, pp. 21-23, petitioners' challenge to Order 13 (and for that matter any other superseded order) may be moot. Petitioners, most of whom may now re-open their physical premises, fail to establish that they have suffered redressable harm that could save the case from mootness and, for that reason, may lack standing as well. In any event, for the same reason that the Governor could reasonably initially designate certain entities as "essential," he likewise could differentiate between entities in the phased reopening.

[26] The only specific example petitioners cite is Orders 37 and 43, under which casinos were designated as Phase III enterprises, while arcades were designated Phase IV enterprises. Petrs.' Br. 41-43. Without any further elaboration, petitioners also state in a one-sentence footnote that the COVID-19 Orders governing gatherings, restaurants and bars, childcare, and essential businesses and the phased reopening (Orders dated March 13 and March 18, 2020, as well as Orders 13, 21, 30, 32, 33, 35, 37, 38, 40 43, and 44) are further examples of orders that "favor some citizens and disfavor others." Petrs.' Br. 43 & n.12. Where, as here, no fundamental right is at stake, the Governor may permissibly make such line-drawing judgments.

See South Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring) ("[W]hen restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement" and "should not be subject to second-guessing" by courts).[27]

2. Petitioners' Procedural Due Process Claims Are Meritless.

Petitioners' procedural due process claims—premised on the contention that petitioners were deprived of notice of and an opportunity to be heard on the COVID-19 Orders, *see* Petrs.' Br. 43—are likewise meritless, for at least two reasons.

First, the Due Process Clause does not entitle individuals to notice and an opportunity to be heard before the government acts to stem a large-scale public health crisis. This rule, adopted by the Supreme Court over a century ago, emerged from circumstances like those faced by the Commonwealth today. *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana* involved a health board's order quarantining a ship whose passengers had sailed from a country that was previously a source of yellow fever outbreaks in

[27] Petitioners' passing assertion that the emergency declaration itself violates their substantive due process rights, *see* Petrs.' Br. 35, also lacks merit. In response to a global pandemic involving a deadly disease, the Governor's emergency declaration is not "conscience-shocking."

Louisiana. 186 U.S. 380, 381-83 (1902). The Court rejected the ship's owner's contention that the quarantine deprived it of "property without due process of law," *id.* at 387, explaining that, if accepted, the theory would "strip the government… [of its] power to enact regulations protecting the health and safety of the people, or, what is equivalent thereto, necessarily amounts to saying that such laws when lawfully enacted cannot be enforced against person or property without violating the Constitution." *Id.* at 393. In the Court's view, "the contention demonstrate[d] its own unsoundness"; no individualized process was required before the board could lawfully quarantine the ship. *Id.* The rule is sensible: if, for example, every licensed professional in Massachusetts were entitled to notice and an opportunity to be heard before the Governor could temporarily order non-essential businesses closed in Massachusetts to prevent the spread of a highly infectious virus, his powers under the CDA—and the government's ability to respond to the pandemic—would be severely constrained. The Constitution does not require government officials to take such time-consuming steps before taking emergency action to stem a life-and-death public health crisis.

Petitioners' claim also fails for a second reason: because the COVID-19 Orders are prospective rules of general application, they are not subject to the Due Process Clause's notice and hearing requirements. This Court and the Supreme

Court have long distinguished between "proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases, on the other." *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973); *see Hayeck v. Metropolitan Dist. Comm'n*, 335 Mass. 372, 374-75 (1957) (where a decision made "by the Legislature or by public officers to whom the Legislature has delegated the power" is not "judicial or quasi judicial," "a hearing is not essential to due process under the [federal or state constitutions]"). Dating to *Bi-Metallic Investment Co. v. State Board of Equalization*, the Supreme Court has held that "[w]here a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption." 239 U.S. 441, 445 (1915); *accord Morrissey v. State Ballot Law Comm'n*, 312 Mass. 121, 133-34 (1942). In such contexts, individual process rights—including notice and a right to be heard—do not attach. *See Bi-Metallic*, 239 U.S. at 445-46. Instead, individual rights affected by rules of general applicability "are protected in the only way that they can be in a complex society, by [the affected individual's] power, immediate or remote, over those who make the rule." *Id*. at 445.

Under this precedent, the COVID-19 Orders were not subject to the Due Process Clause's notice and hearing requirements. The Orders—which, among

other things, required the temporary closure of non-essential organizations statewide and governed the phased reopening of Massachusetts—have adopted "policy-type rules or standards"; they have not been "designed to adjudicate disputed facts in particular cases." *Fla. E. Coast*, 410 U.S. at 245. Moreover, they have "affec[ted] a large number of people, as opposed to targeting a small number of individuals based on individual factual determinations." *Gallo v. U.S. Dist. Ct. for the Dist. of Arizona*, 349 F.3d 1168, 1182 (9th Cir. 2003) (court rules changing attorney licensing standards not subject to notice and hearing requirement). And they apply "prospectively, and d[o] not seek to impose any retroactive penalty." *Interport Pilots Agency Inc. v. Sammis*, 14 F.3d 133, 143 (2d Cir. 1994) (generally applicable government action that "look[s] to the future…is not subject to the notice and hearing requirements of the due process clause"). Based on these "considerations of functional suitability," the Orders are not adjudicative in nature and, therefore, petitioners' procedural due process claims fail as a matter of law. *Cambridge Elec. Light Co. v. Dep't of Pub. Utils.*, 363 Mass. 474, 488 (1973); *see also Best Supplement Guide, LLC v. Newsom*, 2020 WL 2615022, at *5-6 (E.D. Cal. 2020) (challenge to COVID-19 orders unlikely to succeed because "'governmental decisions which affect la[rge] areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process

requirements of individual notice and hearing; general notice as provided by law is sufficient'") (quoting *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1260 (9th Cir. 1994)); *Hartman v. Acton*, 2020 WL 1932896, at *8-10 (S.D. Ohio 2020) (same).

3. Petitioners' Right to Assembly Claims Are Meritless.

Finally, petitioners' assembly claims under the First Amendment and Article 19 must be rejected. The right to assemble is not absolute. States may place content-neutral time, place, and manner regulations on speech and assembly "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Sullivan v. City of Augusta*, 511 F.3d 16, 32-33 (1st Cir. 2007) (content-neutral regulation of public assemblies satisfies First Amendment if designed to serve legitimate, content-neutral governmental interest and leaves open alternative communication channels). This standard for content-neutral regulations of assemblies applies to state and federal claims alike. *In re Opinion of the Justices to the Senate*, 430 Mass. 1205, 1208-09 & n.3 (2000).

Here, the Governor's Orders pass constitutional muster because they are content-neutral, narrowly tailored to serve a substantial governmental interest, and allow for other opportunities for expression. As discussed, the containment and

suppression of COVID-19 and related public health impacts are substantial governmental interests. *See supra*, pp. 48-54. Indeed, petitioners do not dispute that these goals are "compelling." *See* Petrs.' Br. 46-48.

The Governor's Orders are content-neutral because they do not involve any effort to regulate speech and do not discriminate based on any particular speaker's message. *See Ward*, 491 U.S. at 791 ("The principal inquiry in determining content neutrality…is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). Rather, they apply generally to entities regardless of any message that those organizations or their members may impart. Likewise, the limitations on gatherings are entirely neutral. Order 46 distinguishes between indoor and outdoor gatherings, and between "large, unenclosed public spaces such as beaches, parks, and recreation areas" generally and specific programs or events that occur within such public spaces; and it excludes "outdoor gatherings for the purpose of political expression" and "gatherings for religious activities." JA 236-240. None of those distinctions or exclusions is dependent on anyone's political, religious, or ideological beliefs or messages.[28]

[28] For these reasons, petitioners' suggestion that the Governor engaged in discrimination by establishing "definitive numbers for gatherings for some events," but not for "certain protests," Petrs.' Br. 48, is unfounded.

Last, the Orders are narrowly tailored and do not unreasonably limit alternative avenues of communication. Because COVID-19 is spread mainly by person-to-person contact, and because large in-person gatherings can significantly contribute to community spread, the Orders limit people's ability to assemble in person. Certain gatherings may still occur, however, including gatherings of up to 25 persons indoors and 50 persons outdoors, depending on accessible floor space. Further, the Orders leave open ample alternative channels of expression by, for example, imposing no limits on people's ability to assemble or otherwise exercise their First Amendment rights in settings not involving physically close, sustained interaction, such as by telephone or video-conferencing or communications through the Internet. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) (cyberspace and social media offer "relatively unlimited, low-cost capacity for communication of all kinds") (internal citation and quotation omitted).

Petitioners' arguments for narrow tailoring rest on the erroneous premise that strict scrutiny applies. *See* Petrs.' Br. 47-48. But there is no basis for the claim that strict scrutiny applies to these claims, under either state or federal law; again, this Court has ruled to the contrary. *See Opinion of the Justices*, 430 Mass. at

1208-09 n.3.[29] And as the Supreme Court has explained, "the same degree of tailoring" is not required of content-neutral time, place, or manner regulations, "and least-restrictive-alternative analysis is wholly out of place." *Ward*, 491 U.S. at 798 n.6.

In any event, petitioners' tailoring objections fail under any standard. For example, they contend that the Orders are not narrowly tailored because they do not consider "factors that could make the assemblage low-risk for spread of COVID-19," such as "whether the assemblage consists of people who do not have the virus." Petrs.' Br. 47-48. Because many people who spread the coronavirus are asymptomatic and do not know that they are infected, it would be impossible to tailor any gatherings limitation in this manner. Petitioners also suggest that the limitations should be tailored based on whether people are "masked," Petrs.' Br. 47-48, but, consistent with established public health research, the Governor's Orders require *all* persons over the age of two to wear face coverings for all indoor or outdoor gatherings of more than 10 people. The Orders therefore reflect the

[29] Citing *Bowe v. Secretary of Commonwealth*, 320 Mass. 230, 249-50 (1946), petitioners argue that the "right to assemble is fundamental under Massachusetts law," Petrs.' Br. 45, and the Governor must therefore "prove that his restrictions are narrowly tailored to achieve a compelling government interest," *id.* at 46. *Bowe* does not say that. Rather, *Bowe* only observes that Article 19 protects the right of the people "in an orderly and peaceable manner, to assemble to consult upon the common good." 320 Mass. at 249.

Governor's judgment that *both* wearing masks *and* limiting the size of gatherings are necessary to stop the spread of this deadly disease. Because the COVID-19 Orders clearly promote "a substantial government interest that would be achieved less effectively absent the regulation," *Ward*, 491 U.S. at 799 (internal citation and quotation omitted), the narrow tailoring requirement is satisfied.

CONCLUSION

For the foregoing reasons, this Court should conclude that the Civil Defense Act provides authority for Governor Baker's March 10, 2020, emergency declaration as well as the issuance of the COVID-19 Orders; that the emergency declaration, and the COVID-19 Orders, are consistent with the Article 30 of the Massachusetts Declaration of Rights; and that the COVID-19 Orders do not violate petitioners' federal or state constitutional rights to procedural and substantive due process or free assembly.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,937 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, I filed with the Supreme Judicial Court and served the attached Brief of the Respondent in *Desrosiers et al. v. Baker*, No. SJC-12983, by electronic filing:

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