No. _____

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

On Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Massachusetts reacted to the COVID-19 pandemic by adopting severe restrictions on the First Amendment right of peaceable assembly. Governor Baker exempted political gatherings from the restrictions. The Massachusetts Supreme Judicial Court ("SJC") concluded that the remaining restrictions were reasonable in time, place, and manner, and qualified as content-neutral, because they were based on secondary effects (*i.e.*, the health concerns) of the assemblies at issue. The first question presented is:

> Can broad-based restrictions on peaceable assemblies held on private property be upheld as valid time, place, and manner regulations based on a State's interest in slowing the spread of disease, even though, based on speech content, the State exempts political gatherings that trigger health concerns at least as severe as the restricted gatherings?

Under the Fourteenth Amendment's Due Process Clause, the Court has required more searching review of government regulation that impinges on basic values that underlie our society, including the right to engage in the common occupations of life. Although the Massachusetts COVID-19 restrictions required many individuals to wholly shutter their businesses for an extended period, the SJC analyzed Petitioners' due process claims under the lenient standards normally applied to routine business regulations of lesser scope. The second question presented is:

Did the SJC apply the wrong standard of review when it evaluated Petitioners' objections to severe restrictions on their personal liberty under a lenient, rational-basis standard of review?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The Plaintiffs-Petitioners before the Massachusetts Supreme Judicial Court were Dawn Desrosiers and her business, Hair 4 You; Susan Kupelian and Nazareth Kupelian and their business, Naz Kupelian Salon; Carla Agrippino-Gomes and her businesses, Terramia, Inc. and Antico Forno, Inc.; James P. Montoro and his church, Pioneer Valley Baptist Church Incorporated; Kellie Fallon and her business, Bare Bottom Tanning Salon; Thomas E. Fallon and his business, Union Street Boxing; Robert Walker and his businesses, Apex Entertainment LLC and Devens Common Conference Center LLC; Luis Morales and his church, Vide Real Evangelical Center; and Ben Haskell and his school, Trinity Christian Academy of Cape Cod.

The Defendant-Respondent in the Massachusetts Supreme Judicial Court was Charles D. Baker, Jr., in his official capacity as Governor of the Commonwealth of Massachusetts.

None of the corporations petitioning this Court has a parent corporation, and none has 10% or more of its stock held by a publicly held company.

Related Proceedings

Two state proceedings relate to this Petition. First, on the Joint Petition to a Massachusetts Justice sitting in Single Session in *Desrosiers v. Baker*, No. SJ-2020-0505, the court entered an Order of Reservation and Report referring the matter for consideration by the full Supreme Judicial Court, on July 10, 2020. Second, the full Supreme Judicial Court issued its opinion in *Desrosiers v. Baker*, 486 Mass. 369, on December 10, 2020 and entered judgment on January 13, 2021.

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In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

Dawn Desrosiers, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court in this case.

INTRODUCTION

No one doubts that the COVID-19 pandemic poses a serious public-health threat, nor that decisive government responses to that threat are warranted. But a public-health emergency does not grant Governors a license to ignore rights protected by the Constitution.

Massachusetts Governor Charles Baker has issued several dozen executive orders that have severely impinged on the liberty of every Commonwealth resident for the past 14 months. Many businesses have been forced to cease operations altogether or to operate with restrictions that ensure ruinous financial losses. Individuals and families have been barred from coming together, even on private premises, except in very small groups. Petitioners claim Governor Baker has imposed these restrictions in an arbitrary and discriminatory basis, in violation of their First Amendment assembly rights and their Fourteenth Amendment due process rights.

Rather than closely scrutinizing Petitioners' claims, the Massachusetts Supreme Judicial Court (SJC) largely deferred to Governor Baker's decision to impose these severe restrictions, month after month. The SJC held that the First Amendment freedom of assembly claims should be scrutinized under the relaxed standard applicable to time, place, and manner restrictions—even though it conceded that the restrictions did not apply to all types of assembly. It also held that the restrictions could pass muster under the Due Process Clause, as they were reasonably related to a valid state interest. And it applied that highly relaxed standard without regard

to the severity of the personal-liberty restrictions or the uneven nature of their imposition.

The SJC's choices to apply such deferential standards of constitutional review conflict with this Court's case law. In that way, the SJC's decision mirrors the deference that many other federal and state courts have displayed when upholding similarly severe restrictions imposed by other States. Although the number of COVID-19 cases and deaths has decreased in recent months, the severe restrictions on civil liberties persist in Massachusetts and elsewhere. Review is warranted to provide the SJC and other lower courts with much needed direction regarding the proper standards for reviewing constitutional challenges to those restrictions.

OPINIONS BELOW

The Massachusetts Supreme Judicial Court opinion is reported in 158 N.E. 3d 827 (Mass. 2020), and reproduced at Pet.App.1a-37a. The Reservation and Report is reproduced at Pet.App.38a-40a.

JURISDICTION

This Court has jurisdiction to grant a writ in this case under 28 U.S.C. § 1257(a). The Supreme Judicial Court rendered its decision on December 10, 2020 and entered judgment on January 13, 2021. This Petition is filed within 150 days of the decision.

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. The COVID-19 Pandemic

Between March and April 2020, 43 governors issued stay-at-home orders and closed businesses they deemed "nonessential" to "flatten the curve." *See* Ballotpedia, *States that issued lockdown and stay-at-home orders* (2020).[1] The stated purpose of these unprecedented measures was to slow the virus's spread and thus to avoid overwhelming the healthcare system. *See* Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. Times (Mar. 27, 2020).[2] However, even after the threat of swamping hospitals had subsided, the unprecedented measures were left

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[1] Ballotpedia, *States that issued lockdown and stay-at-home orders in response to the coronavirus (COVID-19) pandemic, 2020, available* at https://tinyurl.com/ncyxy6nn (last visited May 10, 2021).

[2] https://tinyurl.com/2zd2w2yp (last visited May 10, 2021).

in place on the new rationale that they would save lives.

A Brookings Institution study concluded that the virus, *together with the mitigation measures taken by governors*, have produced "a joint economic and public health crisis of a scale and at a speed unprecedented in the history of the United States." *See* Lauren Bauer, *et al.*, *Ten Facts about COVID-19 and the U.S. Economy*, Brookings Inst., at 4 (Sept. 2020).[3]

B. Massachusetts's COVID-19 Pandemic Response

On March 10, 2020, Governor Baker issued Executive Order No. 591 declaring a state of emergency under the Massachusetts Civil Defense Act ("CDA") (Mass. St. 1950, c. 639), and a health emergency under the Public Health Act (Mass. G.L. pt. I, tit. XVI, c. 111) ("Emergency Declaration"). Pet.App.43a-44a. The Emergency Declaration's stated purpose is "to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of the people of the Commonwealth[.]" *Id.*

To accomplish this purpose, the Emergency Declaration gives Governor Baker the power to issue executive orders and enforce those orders "by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both." CDA § 8. Fourteen months later, the state of emergency is still in effect, and it will continue "until notice is given, pursuant to [Governor Baker's] judgment, that

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[3] https://tinyurl.com/3dkyvrwc (last visited May 10, 2021).

the STATE OF EMERGENCY no longer exists." Pet.App.43a-44a. (emphasis in original).

Massachusetts's efforts to prevent virus deaths by restricting liberty severely have not worked well. Among the several States, Massachusetts ranks the *third highest* in total COVID-19 deaths per capita. *COVID Data Tracker*, CDC.[4]

C. Governor Baker's Emergency Orders

Governor Baker seized unprecedented executive and legislative authority when he issued his Emergency Declaration. Throughout the pandemic, Governor Baker has exercised:

> all authority over persons and property, necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces thereof[.]

CDA § 7. The "General Court" is Massachusetts's legislature.

Among other things, the Governor thus has the power to "suspend the operation of any statute, rule or regulation which affects the employment of persons … which are necessary because of the existence of a state of emergency[,]" and he exercises authority over "[a]ssemblages, parades or pedestrian travel, in order

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[4] https:// covid.cdc.gov/covid-data-tracker/#cases_deathsper100k (last visited May 10, 2021).

to protect the physical safety of persons or property." CDA § 7(k) & (g).

Furthermore, he will retain this power until he decides to surrender it, Pet.App.43a-44a, or until the Commonwealth's legislature amasses a veto-proof supermajority. CDA § 22. In addition to the criminal penalties for noncompliance set forth in the CDA, some Orders impose a civil fine and authorize courts to issue injunctions to prohibit continuing violations. *See, e.g.*, Pet.App.103a-104a (imposing $300 civil fine for noncompliance with reopening Order).

D. Petitioners' Liberty and Property Interests

Fourteen months into the State of Emergency, Governor Baker has issued 67 executive orders ("Orders"). At least 34 such Orders implicate Petitioners' substantive due process rights. For example, in closing their organizations and limiting their capacity upon reopening, Governor Baker has deprived Petitioners of their liberty and property interests to earn a living and to enjoy the benefits of state and local business licensure. *See, e.g.*, Pet.App.52a-65a. Governor Baker has also deprived Petitioners of their liberty interest to engage in the vocations of their choice at their churches, schools, and businesses. *See, e.g.*, Pet.App.98a-105a. And at least 41 Orders implicate the right of Petitioners to peaceably assemble in public and private settings by banning or limiting assemblages without regard to their location, the mitigation measures they employ, or the health of their attendees. For example, Governor Baker has constricted Petitioners' right to

assemble at their homes, businesses, churches, and schools. *See, e.g.*, Pet.App.160a-164a.

Moreover, Governor Baker did not impose these burdens equally across the Commonwealth. Pet.App.57a-65a. He devised a schedule of "COVID-19 Essential Services" that benefitted some interests and disfavored others. *See id.* For instance, Governor Baker closed Petitioner Desrosiers's hair salon on March 24, 2020. Pet.App.52a-65a. But Governor Baker allowed all other businesses in Petitioner's small town of Hubbardston, Massachusetts to remain open. *See id.* Governor Baker did not give Petitioner Desrosiers a hearing, neither allowing her to petition the government for a waiver of Order No. 13, nor to demonstrate her ability to operate her business as safely, if not more so, than nearby businesses deemed "essential."

Another example of the Governor's COVID-related uneven redistribution of liberty and property rights in Massachusetts may be found in the reopening of indoor video game venues and outdoor sports venues. The video poker machines at the casino Encore Boston Harbor were made available for general public use during the Governor's Phase III reopenings in July 2020, but Governor Baker kept Petitioner Walker's comparable family entertainment business video arcade—located within easy driving distance from Encore—closed until Phase IV, which was given no timeframe for when it could reopen. *See* Pet.App.142a-150a.

As of the date of this filing, Phase IV, Step 2 organizations that must remain closed include: amusement parks; bars, dance clubs, nightclubs,

breweries, and wineries that do not prepare food on-site for seated service; outdoor festivals and parades; and outdoor road races and large outdoor organized amateur and professional group athletic events—not including venues for spectator sports like Gillette Stadium (where the New England Patriots NFL team plays), and Fenway Park (where the Boston Red Sox MLB team plays). Pet.App.244a-251a.

E. Procedural Posture

Petitioners initiated this case in the Superior Court for Worcester County, Massachusetts on June 1, 2020. Reflecting the acknowledged need for a speedy resolution of this and the importance of the challenges at issue, the Superior Court did not make any rulings on the merits of this case. On July 10, 2020, Justice Barbara A. Lenk, sitting in single justice session for the Supreme Judicial Court for Suffolk County, instead transferred the case from the Superior Court to the single justice session, where she then issued an Order of Reservation and Report. That Order transferred the case to the full Massachusetts Supreme Judicial Court. Justice Lenk found that:

> [d]ue to the nature of the questions raised, and the multiple pending cases in State and Federal courts related to these issues of State-wide significance, the parties' motion to transfer is the most expeditious way to resolve the questions presented in the petitioner's complaint.

Pet.App.39a. Hence, this case was selected over and above dozens of other cases pending in superior courts

around the Commonwealth of Massachusetts to resolve the issues presented here.

Next, the matter was scheduled for expedited briefing and argument to consider two questions. The first of these involved interpretation of the CDA and the Commonwealth's constitution. The second asked whether the emergency orders issued by Governor Baker pursuant to his declaration of a state of emergency on March 10, 2020, violate Petitioners' federal or state constitutional rights to free assembly or to substantive and procedural due process.

The Supreme Judicial Court heard arguments on September 11, 2020. On December 10, 2020, the SJC thereupon held that the Emergency Declaration and the Orders did not violate Massachusetts law or violate the state or federal Constitutions. The Clerk of the Court entered the judgment on January 13, 2021.

F. The Supreme Judicial Court Decision

The *Desrosiers* court held that the Orders do not violate the Petitioners' right to peaceably assemble. Pet.App.34a. The court held that "reducing the dangers of COVID-19 is a significant government interest" and that the Orders are content-neutral because they are valid time, place, and manner restrictions, justifiable as avoiding secondary adverse effects on the public health. *Id.* The court also held that the Orders are narrowly tailored because they are "not substantially broader than necessary[.]" Pet.App.36a. The court noted that not all in-person assembly has been banned. *Id.*

The SJC also held that the Orders do not violate Petitioners' right to procedural due process under the Fourteenth Amendment because the Orders establish "general rules [that] do not require an individualized, adjudicatory hearing[.]" Pet.App.29a. Turning to substantive due process under the Fourteenth Amendment, the court held that that the Orders are not arbitrary. Pet.App.30a. The court reasoned that restrictions on personal liberty are valid if they are "reasonably related to the furtherance of a valid State interest" where the liberty is not a "fundamental right." Pet.App.31a. The court thus implicitly concluded that the rights of pastors to open their churches, of schools to open their doors to students, and bans on pursuing one's chosen vocation for long periods of time are not fundamental rights.

The court drew this conclusion by analyzing the Orders under the highly deferential rational-basis test. *Id.* But the *Desrosiers* court arrived at the rational-basis test, at least in part, because it believed this Court's *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) ("*South Bay I*"), decision directed it to do so. The court believed that if the Governor did not surpass undefined "broad limits," his Orders only needed to "bear a 'real or substantial relation to the protection of the public health[.]'" Pet.App.37a (quoting *South Bay I*, 140 S. Ct. at 1613-14 and *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)). *South Bay I*, though, is a decision from May 2020 that was both effectively modified by *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) ("*South Bay II*"), as well as overtaken by this Court's November 2020 decision in *Roman*

Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).[5]

Diocese of Brooklyn made clear that while the Court members did not see themselves as public health experts, where the First Amendment is involved, they still "have a duty to conduct a serious examination" of drastic measures that burden liberty. *Diocese of Brooklyn*, 141 S. Ct. at 68. Nevertheless, the *Desrosiers* court held that because Governor Baker "is making difficult decisions about which types of businesses are 'essential' to provide people with the services needed to live and which types of businesses are more conducive to spreading COVID-19," and because he is acting pursuant to state statute in the court's view, the Orders' business classifications are not an unconstitutional dispensing with the law. Pet.App.32a.

REASONS FOR ISSUING THE WRIT

"Even in a pandemic, the Constitution cannot be put away and forgotten." *Diocese of Brooklyn*, 141 S. Ct. at 68. This Court should grant review because this case presents two unique opportunities for this Court to disabuse state and federal courts of the unfortunate notion that the Constitution lacks vitality in times of crisis. This petition also presents an opportunity, in the alternative, to order the SJC to reconsider its decision because it failed to give proper respect to this Court's recent *per curiam* decisions regarding COVID-19 restrictions.

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[5] The *Desrosiers* court was well aware of *Diocese of Brooklyn* and its effect on this Court's evolving approach to the COVID-19 emergency. Petitioners informed the court of the case in the state court equivalent of a Federal Rule of Appellate Procedure 28(j) letter.

First, the Massachusetts Supreme Judicial Court held that Governor Baker's COVID-19 Orders do not unconstitutionally burden the Petitioners' First Amendment right to peaceably assemble because the Orders contain "valid time, place, and manner restrictions" to address a substantial governmental interest. Pet.App.34a. But this Court does not permit such a lax standard of review where assembly restrictions—on their face—are not content-neutral. For example, political and religious gatherings are treated more favorably than others, hair salons are treated more favorably than tanning salons, and video poker is treated more favorably than non-gambling video games. A neutral governmental purpose—public health—is not the same as a content-neutral restriction on First Amendment rights. This Court should clarify that the fundamental right to peaceable assembly cannot be so easily shunted aside by a court's substituting neutral purpose for neutral content.

Second, the *Desrosiers* court also reviewed Petitioners' due process claims under an impermissibly lenient standard. *See* Pet.App.35a. The SJC's exceedingly narrow view of the liberty interests protected by the Due Process Clause is not consistent with this Court's well-established precedent. While Massachusetts has a governmental interest in protecting its residents from the spread of disease, severe restrictions on liberty do not automatically survive due process scrutiny simply because a court determines that the restrictions are "reasonably related" to protecting public health. *See* Pet.App.31a. The *Desrosiers* court was wrong to use the rational-basis test because this Court has made clear that substantive due process analysis cannot be conducted by drawing arbitrary lines distinguishing

rights categorized as "fundamental" from rights not so characterized. *See Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

Alternatively, the SJC's failure to apply *Diocese of Brooklyn* reveals that it sought to find the easiest path to defer to Governor Baker. The SJC's error is particularly grave since the court premised its denial of Petitioners' federal constitutional claims on an early ruling premised on an elapsed rationale already altered by subsequent rulings handed down by this Court.

Accordingly, the Court should grant the petition, vacate the judgment as to the federal constitutional claims, and remand the case for further consideration in light of *Diocese of Brooklyn*'s binding precedent.

I. THE COURT'S INTERVENTION IS REQUIRED TO CORRECT ABUSES OF THE TIME, PLACE, AND MANNER DOCTRINE AND TO SETTLE THE PROPER PARAMETERS OF THE RIGHT TO ASSEMBLE

Here, the SJC readily "agree[d] with the Governor that the emergency orders are valid, time, place, and manner restrictions." Pet.App.34a. As explained below, however, this holding conflicts with numerous decisions of this Court, *see* S. Ct. R. 10(c), and founders most fundamentally on the obvious shoal that the emergency orders are not content-neutral. Indeed, each of the separate contraventions of the Court's precedents addressed in subsections A. through C. below provides an independent ground to grant the petition.

Additionally, the hastily ordered shutdowns reflexively instituted in many areas of the country

have placed and continue to exert unprecedented strains on the right to peaceably assemble—an area of constitutional law that has garnered too little judicial and academic attention. *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565, 610 (2010).

This Court's intervention is thus necessary not only to correct the SJC's errors as to core First Amendment doctrine in its present form, but also to provide critical direction to the lower courts at this important juncture in the history of public health law and policy. For it cannot be disputed that "[g]overnment is not free to disregard the First Amendment in times of crisis." *Diocese of Brooklyn*, 141 S. Ct. at 63 (Gorsuch, J., concurring).

In a world witnessing ever-expanding cross-border contacts and migrations, other disease-related crises will no doubt arise. New guideposts should be set down by this solemn body that do not freeze in place as the last word the aged *Jacobson* decision going all the way back to the turn of the last century—being supplemented only by brief interlocutory interludes in the *South Bay* litigation arising during COVID-19's earliest months. *See id.* at 71 (noting that *Jacobson* was the only pandemic-related case cited in *South Bay I*).

A. The Gubernatorial Orders Are Not Content-Neutral and Thus Are Not Valid Time, Place, and Manner Restrictions

"For while [state or local government] may constitutionally impose reasonable time, place, and manner regulations … for First Amendment purposes … what [it] may not do under the First and

Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression ...." *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). Massachusetts and its SJC sought refuge in this time, place, and manner line of authority. But their reasoning runs aground.

Consider just two examples of how the orders operate in a non-neutral and discriminatory fashion. *First*, the SJC's decision concedes that "Order No. 46 exempts political and religious gatherings from its reach ...." Pet.App.35a n.29. This would permit a Black Lives Matter gathering in Boston's Back Bay, a Brockton MAGA rally, an Antifa March in Lowell, or a collective pilgrimage by a congregation of New England residents to Attleboro to visit the Our Lady of La Salette Catholic Shrine, despite the fact that such potentially large gatherings would pose greater risks of COVID-19's spread—and even super-spread—than that posed by Petitioner Kellie Fallon's modest, one-employee Bare Bottom Tanning Salon, which isolates customers in their own individual booths, bathes them in virus-killing UV light, and disinfects the booths with hospital-grade sanitizer after each tanning session.

Second, Petitioner Robert Walker owns the family entertainment center, Apex Entertainment LLC, which has an indoor arcade for patrons. The orders clearly treat arcades more harshly than casinos, as the SJC also acknowledged. Pet.App.33a n.28. Compared to spins of the roulette wheel or figuring the cumulative odds as more and more cards are dealt out of the blackjack card shoe, playing Pac-Man, air hockey, or competing at skeeball for prizes down at

the local arcade may seem more pedestrian. But Massachusetts's Governor is not allowed to favor larger or more stylish businesses over smaller, more humdrum ones.

The SJC's flawed conclusion that the orders are content-neutral begins with a methodological error that violates this Court's precedent. Quoting *Ward v. Rock Against Racism*, the SJC noted that the "principal inquiry in determining content neutrality … in time, place, or manner cases … is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 494 U.S. 781, 791 (1989). And for this reason, the SJC went on to hold:

> Here, the purpose of the emergency orders is unrelated to regulating the expressive content of the regulated activities. The emergency orders, and the regulations they impose, are based on the public health data regarding the risks of COVID-19 spreading in certain types of environments and on which businesses are essential in the circumstances presented by the pandemic.

Pet.App.35a (footnote omitted).

Ward's reference to "purpose" is not the entirety of this Court's applicable precedent, however. To begin with, a government's *ipse dixit* that it is motivated by a neutral purpose cannot and does not call a halt to constitutional scrutiny, which is what the SJC, in essence, did. For "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Simon & Schuster, Inc. v. Members of State Crime*

Victims Bd., 502 U.S. 105, 117 (1991), *quoting Minneapolis Star & Tribune v. Minn. Comm'r of Rev.*, 460 U.S. 575, 592 (1983). At all times, the inquiry requires analyzing the text of what the government has enacted or ordered *on its face*. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 642-43 (1994); *see also Arkansas v. Writers Project*, 481 U.S. 221, 232-32 (1987). "That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015) (emphasis added). The SJC fatally inverted that proper sequence.

None of the cases in the preceding paragraph were cited or analyzed by the SJC. Instead, that court simply reified its view that Governor Baker's assertion of purpose was entitled to be taken at face value and credited, with the facial import of his relevant orders mattering not a whit. By contrast, under the law, even "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.*

Relatedly, the Court asserted that the secondary effects doctrine famously applied in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986), justified the gubernatorial orders. Pet.App.34a-35a. But the same reasons that expose the orders as being anything but content-neutral expose the orders as going beyond the public-health rationale that the SJC alighted on in the Governor's pronouncements. Outdoor political or religious gatherings, including

large-scale ones, are exempt from lockdowns in Massachusetts, even though (as a public-health matter) gatherings of that sort should be of much *greater* concern than whether a small arcade, nail salon, or restaurant operates to serve a small, socially-distanced group of customers wearing masks.

The SJC argues in response that "social gatherings [were] specifically identified as contributing to the rise of the infection rate." Pet.App.35a n.29. But clearly, political gatherings such as MAGA rallies or BLM protests *are* just a different species of social gathering bringing the like-minded together—and a different species of gathering of no moment to protecting the public health. The SJC's attempt to suggest that COVID-19 transmission via "house parties" raises special concern but these kinds of political events do not makes no sense. *See id*. It is thus not hard to imagine that such gatherings were exempted solely to duck current hot-button political controversy, not for the paramount reason of safeguarding the health of Massachusetts citizens.

The SJC's attempted rebuttal of Petitioners' arguments below that arcades and casinos were being treated non-neutrally is just as weak: "[U]nlike arcades, casinos are highly regulated by the Gaming Commission, and Massachusetts has only three casinos. The high level of regulation that could lessen the risk of spread of COVID-19 suffices as a reason for the Governor to have placed the entities in different phases." Pet.App.33a n.28.

Clearly, the SJC was just musing. Sure, casinos are more tightly regulated than video game arcades.

But it is equally easy to muse in the other direction—*i.e.*, in a direction that would see arcades as *less* of a risk than casinos: Massachusetts's three casinos are very large and thus pose the prospect of more customers exposing each other to disease as they mill about than at a neighborhood arcade. The casinos also happen to be large, multi-million dollar enterprises, attended by well-connected Boston lobbyists, raising the prospect that the Governor's motivation in ordering the Commonwealth's casinos to open faster than family arcades has more to do with raising tax revenue than reducing disease transmission.[6]

Granting this petition will send a clarion alert to the lower courts that the First Amendment's time, place, manner doctrine cannot be stretched to offer *carte blanche* for the States to regulate however they would like simply because they can *claim* they are trying to stop COVID-19.

B. The Gubernatorial Orders Are Not Narrowly Tailored

According to Massachusetts's highest court, the "restrictions at issue readily meet [the] standard [of narrow tailoring], as reducing the number of people who can gather together and taking other measures

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[6] *See* AP, *Massachusetts' 3 Casinos Have Encouraging Month in March* (Apr. 16, 2021) ("Encore Boston Harbor, MGM Springfield, and Plainridge Park Casino brought in a total of $84 million in gross gambling revenue last month, more than any month since February 2020 [around the start of the pandemic], according to the Massachusetts Gaming Commission. That resulted in almost $24 million in tax revenue for the state."), *available at* https://tinyurl.com/vz3vvazz (last visited May 10, 2021).

aimed at reducing the rate of COVID-19, which spreads from person-to-person contact, are not 'substantially broader than necessary to achieve the government's interest' of reducing the spread of COVID-19." Pet.App.36a.

But *all* political and religious gatherings held outdoors were simply exempted by the Governor from the restrictions other individuals and entities must labor under. *See* Pet.App.162a, ¶ 2. Hence, outdoor political and religious gatherings currently benefit in Massachusetts from a blanket exemption that none of the businesses Petitioners run can claim. Any assertion by the Commonwealth that the orders are narrowly tailored in light of this content-based restriction is fanciful.

This follows from basic logic (and this Court's case law). If large outdoor political gatherings are exempt from restrictions (ostensibly based on time, place, and manner oversight) because they do not pose enough risk to the public health to warrant regulation, then the application of significant restrictions to shutter small boxing gyms, nail, and tanning salons is fatally overinclusive. The comparative public-health gains from regulating the latter types of small-scale mom-and-pop shops but not large outdoor gatherings likely do not exist and even if they did, they would have to be *de minimis*. Distinctions between activities must be anchored in the risks they pose, "not the reasons why people gather." *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (*per curiam*).

In the past, this Court has made similar points, finding that state regulation flunked the requirement of narrow tailoring:

> [I]n *Carey v. Brown*, 447 U.S. 455, 467–469 (1980), we recognized the State's interest in preserving privacy by prohibiting residential picketing, but refused to permit the State to ban only nonlabor picketing. This was because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy."

Simon & Schuster, 502 U.S. at 120 (citation omitted). Similarly here, nothing in the distinction between content-based political/religious activities versus other types of non-expressive business activities has anything to do with protecting or improving public health. And for that reason alone, the restrictions are not narrowly tailored.

C. The SJC Also Erred in Holding That the Restrictions Leave Open Relevant Alternative Channels

For purposes of this case, the right that Petitioners asserted was the First Amendment right to freely assemble. Yet, the SJC misanalyzed the challenge presented as if Petitioners were arguing that their ability to speak was what was being infringed:

> We also determine that the emergency orders leave open alternative channels of communication. The orders limit the number of people allowed at most gatherings, but do not ban all in-person

> assembly, and the plaintiffs have alternative ways to assemble, *such as through virtual assembly*. See *Renton*, 475 U.S. at 53-54 (leaving more than five percent of town available for adult theaters provided sufficient alternative channels of communication)[.]

Pet.App.36a (emphasis added).

The fact that Massachusetts's highest court did not adjust its analysis to better attune itself to the asserted right of peaceable assembly is one reason why this Court should grant review in this case and clarify for the country's benefit how the right of assembly should work. *See also* subsection D., *infra*.

But even under existing case law, the Massachusetts high court's analysis is defective. It is one thing to find, as in *Renton*, that banning some locations for adult theaters is permissible, if other locations remain available. Those seeking to patronize such establishments can still go to the same movies elsewhere. Here, however, Governor Baker's restrictions have effectively shut down entire categories of businesses in the Commonwealth.

Most importantly, the ability of Massachusetts citizens to assemble for purposes of *talking about* manicures and pedicures, *watching* boxing footage, or *playing video games online* instead of coming together for fellowship in a brick-and-mortar building is not the same. Speaking via alternative, virtual channels is not at all a real substitute for assembly or association—for fellowship. *Cf. Diocese of Brooklyn*, 141 S. Ct. at 68 ("And while those who are shut out

may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance."). The court's "virtual assemblies"—Zoom and FaceTime calls—serve as alternative means of speech and adjudicating the contests of advocates, but not of assembly.

D. Assembly Rights in the COVID-19 Era Cry Out for Clarification from the Court

Cases like this one are unprecedented. The COVID-19 pandemic has produced, for the first time, widespread state regulation of *non*public assemblies. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting). Lower courts are starved for direction from this Court as to how to handle such intrusions on liberty, which have been all too frequent and pervasive beginning in 2020. This is precisely why Justice Lenk, acting as a single Justice, moved this case from Superior Court to the SJC and why the full court expedited this case.

The First Amendment right to peaceably assemble is cognate to the other First Amendment rights regarding religion, speech, press, and petition, but assembly is a distinct and equally fundamental right incorporated against the States through the Fourteenth Amendment. *See DeJong v. Oregon*, 299 U.S. 353, 364 (1936). Fundamental rights like assembly "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). "For the right is one that cannot be denied without violating those fundamental principles of liberty and

justice which lie at the base of all civil and political institutions[.]" *DeJong*, 299 U.S. at 364.

Under existing precedent, assembly is a broad right to gather in the physical presence of others for social, political, intellectual, religious, *or economic* reasons. *See Thomas v. Collins*, 323 U.S. 519, 530-31 (1945). The right of assembly is "not confined to any field of human interest." *Id.* at 531. Governor Baker's Executive Order Nos. 2-3, 5, 10, 13, 15-16, 21-22, 27-28, 30, 32-38, 40-41, 43-46, 48, 50-56-60, 62-63, and 65-66 would benefit from additional scrutiny once assembly jurisprudence is clarified.

One of this Court's canonical civil rights cases, *NAACP v. Alabama*, correctly held that the people have a right to associate and to keep their associations private. 357 U.S. 449, 461 (1958). In noting the "close nexus" between free speech and free assembly, however, the *NAACP* Court explained that free association is "an inseparable aspect of the 'liberty' assured by the Due Process Clause." *Id.* at 460. Via the analytical move of asserting that the two different rights had a nexus to one another, the *NAACP* Court effectively subsumed (and so marginalized) assembly claims because the right to associate is broader in scope. *See* Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. at 609.

NAACP's line of analysis particularly confounded the lower courts after the creation of the public forum doctrine. *See id.* at 610. Further, while *NAACP*'s association-progeny cases address speech, assembly, and association in *public* forums, they offer no analytical guidance as to how to evaluate restrictions

on *private* assemblies, which implicate property rights in addition to First Amendment rights.

This analytical lacuna has unsurprisingly led several federal courts to indulge in a light-touch approach to judicial review of COVID-19-related restrictions imposed on private gatherings. *See, e.g.*, *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 234-35 (D. Md. 2020); *Ramsek v. Beshear*, 468 F. Supp. 904, 917-18 (E.D. Ky. 2020). These courts have failed to appreciate that where governments restrict free assembly on *private* property, this Court's free assembly jurisprudence related to *public* forums is not entirely on point.

This case thus affords the Court a unique opportunity to clarify the legal parameters governing peaceable assembly challenges, to delineate any doctrinal differences between the freedoms of assembly and association, and to vindicate the people's right to assemble for nonpublic purposes on private property.

II. BY REVIEWING PETITIONERS' DUE PROCESS CLAIMS UNDER A LENIENT "RATIONAL BASIS" STANDARD, THE SJC UNDERVALUED IMPORTANT LIBERTY INTERESTS

Health concerns arising from the COVID-19 pandemic have necessitated major disruptions in the lives of all Americans. As this Court has recognized, "States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty." *Calvary Chapel*, 140 S. Ct. at 2604 (Alito, J., dissenting from denial of injunctive relief). But "a public health emergency does not give

Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists." *Id.* at 2605.

Petitioners claim that the severe restrictions imposed on their personal liberty and property rights by the Governor of Massachusetts violate their Fourteenth Amendment due process rights. The court below rejected those claims after concluding that it should evaluate them under a lenient, rational-basis standard of review. Pet.App.33a. The court's decision to brush aside Petitioners' due process claims so cavalierly conflicts with this Court's precedents. Review is warranted, both to address those conflicts, *see* S. Ct. R. 10(c), and to provide much-needed direction to the many state governments that continue to impose (and the courts of all stripes that continue to tolerate) severe restrictions on personal liberty in the name of public health.

The Massachusetts court adopted a very narrow view of the liberty interests protected by the Due Process Clause. It sanctioned any restrictions on personal liberty that could be deemed "reasonably related to the furtherance of a valid State interest," unless the restrictions infringe on a very narrow category of "fundamental rights." Pet.App.31a. In particular, it excluded restrictions on "the right to work" from any but the narrowest of constitutional protections. *Ibid.*

Massachusetts unquestionably has a valid interest in preventing the spread of COVID-19, but the court's "reasonably related" standard is inconsistent with this Court's due process jurisprudence. The Court has held that the "liberty" guaranteed by the Due Process Clause:

> Without doubt … 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) (emphasis added).

Petitioners do not claim a due process right to conduct their business and personal affairs free from government regulation. In most instances, courts properly defer to the judgments of Congress and state legislatures regarding appropriate measures for regulating commerce, so long as the legislative judgments are "at least debatable." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). But as *Meyer* and subsequent Court decisions make clear, "[d]eference, though broad, has its limits." *South Bay II*, 141 S. Ct. at 717 (Roberts, C.J., concurring in the partial grant of application for injunctive relief).

In contrast to the court below, this Court has not confined a more searching due process inquiry to cases in which the right at stake falls within a pre-defined list of "fundamental" rights. It has eschewed any effort to define a limited category of rights entitled to special solicitude: "Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful 'respect for the teachings of history (and), solid recognition of the

basic values that underlie our society.'" *Moore*, 431 U.S. at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)). History teaches that a "basic value" of American society, is the right of all citizens "to engage in … the common occupations of life." *Meyer*, 262 U.S. at 399. When, as here, government regulation does not merely establish the rules of commerce but actually prohibits many businesses from continuing to operate at all, much closer due process scrutiny is warranted.

Closer scrutiny is particularly warranted when, as here, the restrictions on personal liberty have been imposed by order of a single executive-branch official rather than a legislature. American society has traditionally looked to legislative bodies to determine important government policies. *See* U.S. Const., Art. I, § 1 (stating that "All legislative Powers" granted by the U.S. Constitution "shall be vested in a Congress of the United States."). When the Governor of Massachusetts issues executive orders that impose unprecedented restrictions on personal liberty and keeps them in place for an extended period, the rationales for judicial deference—that the restrictions represent the considered views of the people's representatives and that a generalist judge lacks sufficient expertise to second-guess their decisions—are largely inapplicable. Some deference to unilateral executive action may be warranted "at the outset of an emergency" when quick decisions are necessary; but "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting).

It simply cannot be true, as the SJC held, that even the most severe, long-term restrictions on personal liberty (such as ordering all citizens to remain at home for the duration of a pandemic or ordering some businesses to be closed for that same length of time) are immune from due process challenge so long as they are "reasonably related" to a State's interest in maintaining public health. Pet.App.31a. States no doubt can establish a mere "reasonable" relationship between a stay-at-home order or a ban on holiday gatherings and maintaining public health, but the Court has never previously offered a "free pass" of that nature when the restrictions on personal liberty are so extensive.[7]

Under any more exacting standard of review—whether "strict scrutiny" or some intermediate standard of review—the executive orders challenged by Petitioners cannot withstand due process scrutiny. In particular, those executive orders did not adequately ensure that similar entities were treated in a similar manner.

The Massachusetts court cited one example of dissimilar treatment in its opinion. The executive orders contemplated that shuttered businesses would

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[7] Though occurring after this case was brought, Governor Baker's limitations on holiday gatherings in private homes particularly underscore the need for judicial oversight of executive decrees, even if the decrees have an attenuated connection to public health. Between December 13, 2020 and January 25, 2021, the Orders prohibited Massachusetts residents from hosting more than ten people in their homes, and all guests were required to leave by 9:30 p.m. Pet.App.208a-213a. This Court has not seen such a brazen invasion of the sanctity of private homes and interference with personal relationships since *Griswold*. *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

be allowed to re-open in five distinct "phases." "Casinos" were assigned to Phase 3 while "arcades" were assigned to Phase 4—meaning that arcades were assigned later re-opening dates and are subject to more crowd-size restrictions following re-opening. Pet.App.33a n.28. As noted above, Petitioner Robert Walker owns an arcade. The shuttering of his business has caused him severe economic distress. But Massachusetts has provided no clear explanation for the dissimilar treatment. The crowds that gather in casinos and arcades would seem to pose similar public-health risks, yet Massachusetts significantly restricted the personal liberty of Mr. Walker, other arcade owners, and their customers, without imposing similar restrictions on other businesses whose operations pose equivalent (or perhaps greater) health risks. Even if such disparities in treatment might be constitutionally tolerable in the short term, severe and long-lasting disparities that Massachusetts has not adequately explained cannot pass constitutional muster under a heightened due process review standard.

By arbitrarily picking winners and losers among members of the Massachusetts business community, Governor Baker can appropriately be deemed to have "dispensed" with the law, a practice universally recognized as a violation of due process rights. *See* Philip Hamburger, *Is Administrative Law Unlawful?*, Univ. of Chicago Press, at 65 (2014) (the right of early English kings to grant dispensations from the law "came to be viewed as the epitome of the absolute and unconstitutional prerogative"). Although conceding that Governor Baker's "emergency orders do place different businesses in different categories," the Massachusetts court held that this differential

treatment "does not equate to dispensing with the law, as the emergency orders do not limit the suspension of the law to an individual person, or group, but instead apply equally to similarly situated categories of businesses." Pet.App.32a. But as the example of arcades and casinos illustrates, the executive orders do not grant similar treatment to all similarly situated businesses—a fact that would have become apparent to the Massachusetts court had it applied a more stringent standard of due process review.[8]

The Massachusetts court erroneously minimizes or misperceives the nature of the prohibition against dispensing with the law. While the legislature may suspend a law—that is, entirely turn it off—as to *all* citizens equally, *see* Mass. Const. Decl. of Rights, art. XX (expressly prohibiting all branches but the Legislature from suspending the laws), even the

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[8] The arbitrary manner in which Governor Baker imposed severe liberty restrictions through executive decrees, as acquiesced in by both the Legislature and the SJC, raises serious issues under the Guarantee Clause, U.S. Const., art. IV, § 4. Petitioners highlighted the Guarantee Clause problems with a potential ruling that the Governor could run the Commonwealth on an emergency footing for an unlimited time period. Nevertheless, the Massachusetts court was silent on this issue. The Clause guarantees to the people of every State a "Republican Form of Government." A state government cannot be classified as "republican" in form if the Governor suspends the liberty of many of the State's residents without seeking approval for his actions from the Legislature. Nor is a state "republican" in form where the Governor may unilaterally dispense with the law. The Guarantee Clause has too long suffered under the misimpression that it is nonjusticiable. *New York v. United States*, 505 U.S. 144, 184 (1992) (not all claims under the Guarantee Clause raise political questions and that the Court has decided the merits of Guarantee Clause challenges on at least four occasions).

legislature cannot authorize the executive to dictate that a law applies to certain groups at different times and in different ways than it applies to other groups. That would be a *dispensation*, which neither the Massachusetts Constitution nor the Fourteenth Amendment permits.

By conceding that the Governor of Massachusetts has "place[d] different businesses in different categories" for purposes of reopening and other restrictions, the court below acknowledges that Governor Baker dispensed with legal prohibitions—that is, he did not suspend them but offered relief differentially. This he may not do. It does not matter for these purposes whether he treats similarly situated businesses alike. He simply does not have the power to dispense with the law, that is, to do away with a law for some businesses but not for others. Doing so violates due process.

Review is warranted to resolve the conflict between the SJC and this Court's case law regarding the standard of review applied to substantive due process claims. This case provides an excellent vehicle for examining that legal issue because the facts are largely undisputed. Massachusetts does not contest Petitioners' claims that Governor Baker issued a lengthy series of executive orders that significantly restricted Petitioners' liberty and property interests. All that is disputed is the legal significance of those restrictions. Moreover, because many other States have imposed restrictions similar to those adopted by Massachusetts, a decision by the Court in this case will provide badly needed direction to courts hearing challenges to those other restrictions.

If, after granting review, the Court determines that the court below evaluated Petitioners' substantive due process claims under an improper standard, the Court should at the very least reverse the decision below and remand for reconsideration of Petitioners' due process claims under an appropriate heightened standard of review.

III. THE COURT SHOULD ISSUE THE WRIT AND VACATE AND REMAND THE DECISION BELOW FOR RECONSIDERATION OF THE CONSTITUTIONAL CLAIMS

Early in the COVID-19 crisis, the Supreme Court confronted the free exercise challenge presented in *South Bay I*, 140 S. Ct. 1613. Facing an unparalleled challenge to the public health in the twenty-first century accompanied by a climate of fear without equal since the Spanish Flu, the Court opted at that time to take a cautious approach, declining to issue injunctive relief against certain restrictions imposed on churches in California.

The lower courts are often very attentive to every pronouncement that is handed down by this Court in novel and high-profile matters, sometimes overreading each new ruling as signals they are bound to follow, even if those signals could be interpreted as standing in some tension with the ordinary, preexisting rules of constitutional law all judges take an oath to obey. *See* U.S. Const. art. VI, cl. 3.

Petitioners respectfully submit that the lower courts have reacted to *South Bay I* in such an inappropriate fashion that the time has now come, more than one year into the pandemic, for this Court

to take a COVID-19 case on the merits, so that it can provide the guidance necessary to restore the full force of the Constitution to supervise lower court judicial review of COVID-19 disputes.

Justice Gorsuch was one of the first members of this Court to recognize that the lower courts are confused and wrongly think they have been told to proceed with extra measures of caution and deference to state and local government officials fighting the pandemic:

> [*Jacobson*] was the first case *South Bay* cited on the substantive legal question before the Court[;] it was the only case cited involving a pandemic, and many lower courts quite understandably read its invocation as inviting them to *slacken their enforcement of constitutional liberties* while COVID lingers. See, *e.g., Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (CA7 2020); *Legacy Church, Inc. v. Kunkel*, --- F. Supp. 3d ---, ---, 2020 WL 3963764 (NM 2020).

Diocese of Brooklyn, 141 S. Ct. at 71 (Gorsuch, J., concurring) (emphasis added). Chief Justice Roberts has similarly expressed the need for the Court to adjust its rulings to emerging realities. *See South Bay II*, 141 S. Ct. at 717 (Roberts, C.J., concurring in the partial grant of application for injunctive relief) (cutting back on a broader, initial stance on deference in light of new developments). Since it is clear that the Constitution is not suspended whenever a new dread disease appears, it is fair to debate whether it really was understandable (as Justice Gorsuch kindly suggested) that the lower courts rushed to defer to the

political branches. But what is clear is that a pro-deference mindset has been the prevailing reaction by the inferior courts, and it should be course-corrected now, not tolerated or allowed to persist.

The Court owes it to the citizenry (and to the lower courts as well) to take corrective action. This case would be a useful vehicle to do so because it is evident here that the SJC overemphasized the *South Bay I* decision and the deference it afforded to the political branches a short time after the pandemic got underway. This Court has explained that it will grant, vacate, and remand cases where unapplied Supreme Court precedent was being given short shrift. *Henry v. Rock Hill*, 376 U.S. 776, 776-77 (1964). "Deference, though broad, has its limits." *South Bay II*, 141 S. Ct. at 717. But the Court must take a case and issue a merits decision to establish *those limits* on COVID-19 restrictions.

In a similar vein, a grant, vacatur, and remand here sending this case back to Massachusetts's highest court, instructing it to look again at the points made in the *Diocese of Brooklyn* majority decision and its concurrences (as well as *South Bay II*) would go a long way to ensuring that traditional constitutional liberties are not cast aside.

Specifically, the SJC asserted below that the first *South Bay* decision was the basis for its understanding that *Jacobson* stands for the proposition that the Constitution leaves "[t]he safety and health of the people to the politically accountable officials of the States to guard and protect." Pet.App.26a-27a (quoting *South Bay I*, 140 S. Ct. at 1613 (Roberts, C.J., concurring)) (internal quotations and citations omitted). Thus, the SJC concluded that

it "must" give "especially broad" latitude to the political branches in "areas fraught with medical and scientific uncertainties," when considering the Petitioners' federal constitutional challenges. Pet.App.27a. It denied Petitioners' constitutional claims because the SJC believed *Jacobson* and *South Bay I* required that it not "second guess the emergency orders" because the Orders did not surpass the "broad limits" afforded executive discretion in pandemics. *See id.*

Had the SJC looked more carefully to *Diocese of Brooklyn* as the more recent authority, it might have seen its error. Regarding Petitioners' assembly challenge, assembly is a fundamental right coequal with *Diocese of Brooklyn*'s free exercise right, so it is entitled to the same scrutiny. Moreover, the Governor was certainly not entitled to unquestioning deference to his shutdown determinations *nine months* into the pandemic.

In this case, even if Petitioners' due process and First Amendment claims were to receive rational-basis review, the Orders' imposition on their rights to be heard before suffering deprivations of their liberty or property interests (such as Petitioners' ability to earn a living, to pursue a vocation, to preach, and to teach) are so significant that the Orders do not even satisfy rational basis, as interpreted by *Diocese of Brooklyn*.

Vacatur and remand to the SJC for further consideration of Petitioners' federal constitutional claims is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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