No. _____

In The

Supreme Court of the United States

EMERALD HOME CARE, INC.,

Petitioner,

v.

DEPARTMENT OF UNEMPLOYMENT ASSISTANCE,

Respondent.

On Petition For A Writ Of Certiorari To The Appeals Court Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns, as far as Petitioner can determine, the first law in American history that restricts taxpayers' speech about a tax. It also concerns a taxing procedure that withholds adequate notice of the tax pending the execution of an attestation about the confidentiality of certain tax information and a promise to restrict one's speech concerning that information. The questions presented are:

1. Whether assessing a tax but withholding notice of information fundamental and necessary for understanding the tax unless the taxpayer first executes a certification attesting that the information is confidential and promising not to disclose it, except under very limited circumstances, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. Whether assessing a tax but withholding notice of information fundamental and necessary for understanding the tax unless the taxpayer first executes a certification attesting that the information is confidential and promising not to disclose it, except under very limited circumstances, violates the First Amendment of the United States Constitution, made applicable to the States via the Fourteenth Amendment.

3. Whether a state law that puts federal constitutional and statutory rights into conflict violates the Supremacy Clause of the United States Constitution.

RULE 14.1(b) STATEMENT

The caption of the case contains the names of all the parties.

RULE 29.6 STATEMENT

Petitioner Emerald Home Care, Inc. has no parent corporation, and no publicly held corporation owns more than 10% of its shares.

RELATED CASES

Emerald Home Care, Inc. v. Department of Unemployment Assistance, No. FAR-28109, Supreme Judicial Court for the Commonwealth of Massachusetts. Judgment entered April 15, 2021.

Emerald Home Care, Inc. v. Department of Unemployment Assistance, No. 20-P-188, Appeals Court for the Commonwealth of Massachusetts. Judgment entered February 2, 2021.

Emerald Home Care, Inc. v. Department of Unemployment Assistance, No. DAR-27362, Supreme Judicial Court for the Commonwealth of Massachusetts. Judgment entered May 15, 2020.

Emerald Home Care, Inc. v. Department of Unemployment Assistance, No. 18-1670, Massachusetts Superior Court. Judgment entered August 29, 2019.

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The decision of the Supreme Judicial Court of Massachusetts denying further appellate review (App. 1) is reported at 487 Mass. 1104, 167 NE.3d 1188 (April 15, 2021) (Table). The opinion of the Appeals Court of Massachusetts (App. 2-16) is reported at 99 Mass.App.Ct. 151, 164 N.E.3d 916 (February 2, 2021). The May 15, 2020 decision of the Supreme Judicial Court of Massachusetts denying direct appellate review (App. 18) is unreported. The August 29, 2019 opinion of the Massachusetts Superior Court (App. 19-37) is unreported.

JURISDICTION

Pursuant to an Order of this Court dated July 19, 2021, "in any case in which the relevant . . . order denying discretionary review . . . was issued prior to July 19, 2021, the deadline to file for a writ of certiorari remains extended to 150 days from the date of that judgment or order." The decision of the Supreme Judicial Court of Massachusetts denying further appellate review (App. 1) was on April 15, 2021. This Petition for a Writ of Certiorari is thus timely and to the Appeals Court of Massachusetts. *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) (appeal was properly from Court of Civil Appeals as the highest court of Texas in which a decision could be had where the Supreme Court of Texas declined to hear case). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of (1) the First Amendment to the Constitution, (2) the Due Process Clause of the Fourteenth Amendment to the Constitution, (3) the Supremacy Clause of Article VI of the Constitution, (4) certain confidentiality requirements of Medicaid, 42 U.S.C. § 1396a, and related regulations, 42 C.F.R. § 431.300 *et seq.*, (5) M.G.L. c. 118E, § 49, and (6) An Act Further Regulating Employer Contributions to Health Care, St. 2017, c. 63 (containing M.G.L. c. 149, § 189A (repealed)),[1] and related regulations, 430 CMR 21.10, are reproduced at App. 58-81.

STATEMENT

This case concerns, as far as Petitioner can determine, the first law restricting speech on a tax in American history. It is also the first case where such a law has been upheld by a court. As far as Petitioner can determine, the case also concerns the first law in American history that provides for the withholding of the constitutional due process right to adequate notice and a meaningful hearing pending the execution of an attestation and a promise to restrict one's speech.

In short, the taxing scheme at issue extracts from each assessed taxpayer (1) a written promise not to

[1] An Act Further Regulating Employer Contributions to Health Care enacted a two-year tax (M.G.L. c. 149, § 189A) by providing for the repeal of the tax after two years pursuant to Sections 9, 10 and 16 therein. *See* App. 69-72, 74.

speak in an identifying way about the subject of the assessment and (2) an attestation that the identity of the subject of the assessment is confidential information. *See* App. 82-84. It does so by withholding notice of the identity of the subject of the assessment unless the taxpayer executes such a written promise and attestation. *See* 430 CMR 21.10(2)(c). Without the identity of the subject of the assessment, the taxpayer cannot determine the accuracy of the assessment and consequently cannot meaningfully understand or challenge the assessment. The taxpayer is thus in the following situation: either (1) remain uninformed of the identity of the subject of the assessment, have no meaningful way to challenge the assessment, and pay the tax without knowing whether it is accurate, or (2) agree to limit your speech about the identity of the subject of the tax and make an attestation that such information is confidential.

A. Legislative and Regulatory Background

An Act Further Regulating Employer Contributions to Health Care was passed by the Massachusetts legislature and signed into law in August 2017 (the "Act"). *See* App. 67-74; M.G.L. c. 149, § 189A (repealed). Among other things, the Act created a two-year special tax on taxpayers employing more than five employees in Massachusetts and, with limited exceptions, whose non-disabled employees obtained health insurance either from the Massachusetts Medicaid program, known as MassHealth, or subsidized coverage through the Massachusetts ConnectorCare program. *See* M.G.L.

c. 149, § 189A(a) (repealed).[2] This two-year tax, which was assessed during calendar years 2018 and 2019, is known as the Employer Medical Assistance Contribution Supplement (the "EMAC Supplement").

The EMAC Supplement was equal to 5% of annual wages for each qualifying employee, up to the annual wage cap of $15,000, for a maximum of $750 per affected employee per year. *See* M.G.L. c. 149, § 189A(a); c. 151A, § 14(a)(4).

The Massachusetts Department of Unemployment Assistance (the "DUA"), in consultation with the division of medical assistance and the commonwealth health insurance connector, was tasked by the Act to promulgate regulations implementing the EMAC Supplement. *See* M.G.L. c. 149, § 189A(a) (repealed). The problem that the DUA and the other state agencies faced was implementing the EMAC Supplement without violating certain Medicaid-related confidentiality requirements of 42 U.S.C. § 1396a and the federal regulations related thereto (collectively, the "Federal Medicaid Confidentiality Requirements"). Among other things, that federal statute requires that "[a] State plan for medical assistance must . . . provide . . . safeguards which restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with . . . the administration of the plan[.]" 42 U.S.C. § 1396a(a)(7)(A)(i). Federal regulations provide more specific requirements. *See*, *e.g.*, 42 C.F.R. § 431.301 ("A State plan must provide,

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[2] As discussed in footnote 1 above, the Act itself provided for the repeal of the tax after two years.

under a State statute that imposes legal sanctions, safeguards meeting the requirements of this subpart that restrict the use or disclosure of information concerning applicants and beneficiaries to purposes directly connected with the administration of the plan."); 42 C.F.R. § 431.305 ("The [state] agency must have criteria that govern the types of information about applicants and beneficiaries that are safeguarded" and "[t]his information must include at least . . . [n]ames and addresses.")[3]

Attempting to comply with the Federal Medicaid Confidentiality Requirements, the DUA promulgated 430 CMR 21.10 (the "EMAC Regulation"). Of note is 430 CMR 21.10(2)(b) and (c), which provide:

> (2) *Confidentiality*.
>
> . . . .
>
> (b) DUA may provide an employer, that it determines is liable for the EMAC Supplement under M.G.L. c. 149, § 189A, with access to Member Information for

[3] *See also* 42 C.F.R. § 431.304(a) and (b); 42 C.F.R. § 431.306(a), (b), (c) and (e). There is also Massachusetts state law restricting the disclosure of information about Medicaid applicants and beneficiaries. *See*, *e.g.*, M.G.L. c. 118E § 49 ("The use or disclosure of information concerning applicants and recipients shall be limited to purposes directly connected with the administration of the medical assistance programs established under this chapter and the names of applicants and recipients shall not be published.") This law, however, presumably could be amended to facilitate, or could be deemed amended by, the Act *but for* the federal commands contained in the Federal Medicaid Confidentiality Requirements. Accordingly, it is the Federal Medicaid Confidentiality Requirements that posed a fundamental problem for Massachusetts lawmakers and regulators.

> purposes of reviewing and/or appealing such liability. Access shall be provided in accordance with procedures established by DUA. Any employer that receives Member Information shall be required to maintain the confidentiality of such Information in accordance with M.G.L. c. 118E, § 49, and any other legal obligation to which the employer is subject, and shall limit its use and disclosure of such information as necessary to review and/or appeal the amount of the employer's liability.
>
> (c) Without limiting the generality of the foregoing, no employer shall use or disclose Member Information to disparage or retaliate against any employee or other individual to whom it pertains. Prior to the receipt of Member Information, employers shall be required to sign a written acknowledgment of their obligations to maintain the confidentiality of such Information, in such form and pursuant to such procedures established by DUA.

In addition to promulgating regulations, the DUA was also charged by the Act with, among other things, assessing the EMAC Supplements. *See* c. 149, § 189A(a) (repealed); *see also* 430 CMR 21.06. Via a document dated April 11, 2018 and entitled "Employer Medical Assistance Contribution (EMAC) Supplement Determination," made available online under Petitioner's account with the DUA, the DUA informed Petitioner that the DUA "has determined that for quarter 1 and year 2018 you are liable under M.G.L. c. 149,

§ 189A for the EMAC Supplement in the amount of $6,117.13 for 28 employees." App. 41. The DUA also informed Petitioner that "[t]his determination will become final unless you request a hearing within ten days from the date on which you received the determination." App. 44. Similar notifications of EMAC Supplement determinations were made quarterly by the DUA to Petitioner.

The DUA did not provide any information identifying the 28 employees or the wages attributable to each of them, thereby making it impossible for Petitioner to determine how the EMAC Supplement was calculated and whether that calculation was accurate. Based upon the information supplied by the DUA, Petitioner could not even confirm if any of the alleged 28 employees were in fact employees of Petitioner. In short, Petitioner was not given enough information to confirm that any tax was owed, much less the specific amount assessed by the DUA.

Consistent with the EMAC Regulation, *see* 430 CMR 21.10(2)(c), the DUA refused to provide information identifying the 28 employees to Petitioner unless Petitioner executed the following certification (the "Certification") through the DUA's online system:

> *The undersigned hereby certifies to being (1) an authorized representative of the Employer; and (2) duly authorized to execute this EMAC Supplement Certification on behalf of the Employer. On behalf of the Employer, the undersigned further agrees:*

1. The Employer has requested information regarding its Qualifying Employees from DUA ("Qualifying Employee Information") to review and/or appeal its assessed EMAC Supplement liability.

2. Qualifying Employee Information is confidential and, consistent with M.G.L. 118E § 49 and [430 CMR 21.10], the Employer and its authorized representative is required to maintain the confidentiality of any Qualifying Employee Information received from DUA (including any copies, derivatives or extracts of such Information), in accordance with MGL 118E § 49 and any other legal obligation to which the Employer is subject, and shall not use or disclose such Information except as necessary to review and/or appeal the amount of the Employer's EMAC Supplement liability. These confidentiality obligations also bind any representative of the Employer.

3. Neither the Employer nor its authorized representative shall use or disclose Qualifying Employee Information to disparage or retaliate against any employee or other individual to whom it pertains.

4. The Employer and any authorized representative shall limit access

> *to Qualifying Employee Information to those employees, contractors and agents who reasonably need such Information to review or appeal the Employer's assessed EMAC Supplement liability.*
>
> *5. The Employer and any authorized representative shall require any contractor or agent receiving Qualifying Employee Information to agree in writing to the same or more stringent limitations on the use and disclosure of Qualifying Employee Information.*

App. 82-83.

Petitioner refused to sign the Certification and thus was not provided and still has not been provided necessary information concerning how its EMAC Supplement was calculated. Petitioner has had to blindly pay the EMAC Supplement without being provided the means to know whether the EMAC Supplement was properly assessed.

B. Federal Questions Raised

Although this case proceeded in the Massachusetts state court system, from the outset it focused on the questions of federal law set forth in the Questions Presented in this Petition.

On April 20, 2018, consistent with the notice provided to Petitioner by the DUA informing Petitioner of its 10-day appeal rights, *see* App. 44, Petitioner filed an

administrative appeal of its EMAC Supplement through the DUA's online system. *See* App. 46-48. In the very limited space provided by the online system for setting forth the nature of the appeal, Petitioner wrote as follows:

> The EMAC Supplement is unconstitutional. The State cannot impose a tax without giving sufficient notice of the basis of the tax, including how the tax was calculated. Here the State refuses to reveal the details of how the tax was assessed without the employer first agreeing to the EMAC Supplement Employer Certification. The obligations imposed on the employer referenced in such certification unconstitutionally impose burdens and penalties on an employer who wants to know the basis for a tax determination, something that constitutionally should be provided as a matter of course. In addition, the obligations referenced in the EMAC Supplement Employer Certification infringe, among other things, upon the employer's constitutional rights, including the employer's free speech rights, by imposing confidentiality obligations on the employer.

App. 46-47. Via a document dated May 9, 2018 and entitled "Notice of Dismissal for Failure to Cite Cognizable Ground for a Hearing," the DUA dismissed Petitioner's appeal without a hearing. *See* App. 39-40.

On June 8, 2018, Petitioner filed a complaint with the Massachusetts Superior Court commencing an action for judicial review. *See* App. 49-57. In that

complaint, Petitioner plead violations of the United States Constitution, including with respect to due process, free speech and preemption principles. *See* App. 54-55. The opinions rendered by the Massachusetts state courts in this case, as described immediately below, addressed those federal questions. *See* App. 2-16, 19-37.

C. The Superior Court's Opinion

The Superior Court denied Petitioner's motion for judgment on the pleadings and allowed the DUA's motion for judgment on the pleadings.

In its due process analysis, the Superior Court began by distinguishing this case from this Court's decision in *Speiser v. Randall*, 357 U.S. 513 (1958), which struck down as a violation of due process a California procedure where veterans had the burden of proving (in part through a loyalty oath) that they did not advocate for the overthrow of the government as a condition precedent to obtaining a tax exemption. *See* App. 31. The Superior Court viewed *Speiser* as standing for the proposition that the government cannot penalize someone for engaging in certain speech, but it concluded that the procedure at issue in this case did not penalize Petitioner for its speech. *See* App. 31. The Superior Court did not explain why it thought the government refusing to provide a tax exemption for engaging in certain speech was a penalty (*e.g.*, *Speiser*) but the government refusing to provide adequate notice of a tax for not agreeing to refrain from certain speech was not a penalty (*e.g.*, this case).

In concluding that due process was not violated, the Superior Court also relied upon case law that permits fact-specific flexibility in *procedures* to uphold the extraction of a *substantive* promise to limit speech on a tax in exchange for receiving necessary and fundamental information about that tax. *See* App. 31-32 (*citing Commonwealth v. Torres* 441 Mass. 499, 502 (2004) for proposition that "[d]ue process is a fact-specific and flexible concept that 'calls for such procedural protections as the particular situation demands.' ") The Superior Court did not address how substantive constitutional rights can be protected if, on its view, procedures can be used to extract their surrender.

In its free speech analysis, the Superior Court held "reasonable limits on First Amendment rights are proper generally, and are so here." App. 34. The Superior Court did not cite any direct support for its assertion that First Amendment rights are *generally* subject to reasonable limits. The Superior Court appears to have derived this standard of reasonableness after reviewing two lines of case law.

The first line of cases is that concerning time, place and manner restrictions. *See* App. 32, 34 (*citing Commonwealth v. Bohmer*, 374 Mass. 368, 374 (1978) for the proposition that First Amendment rights are subject to reasonable time, place and manner restrictions). The Superior Court did not make clear how this line of case law was applicable to this case. That case law addresses " 'such matters as *when, where, and how loud.*' " *Griffin v. Bryant*, 30 F.Supp.3d 1139, 1166 (D.N.M. 2014) (*quoting Smolla and Nimmer on*

Freedom of Speech § 8:36 (2014)). And even the restrictions addressing those practical matters must be content neutral and narrowly tailored to serve a significant government interest, *see id.* at 1165, not simply be "reasonable" – the only standard applied by the Superior Court.

The second line of case law cited by the Superior Court is that which addresses the situation where someone, usually the press, is seeking access to information in the government's possession or to inspect a government facility or function. *See* App. 34 (*citing Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) for the proposition that "the government has the authority and the obligation to impose reasonable conditions on access and use of private information it possesses.") The Superior Court did not address why it was appropriate to apply this "right-of-access" line of cases in this case in lieu of the procedural due process principles of adequate notice and a meaningful hearing.

In analyzing the preemption issue, the Superior Court initially concluded, *citing Armstrong v. Exceptional Child Care Ctr., Inc.*, 135 S.Ct. 1378, 1383 (2015), that Petitioner did not have standing to raise a cause of action under the Supremacy Clause. The Superior Court nevertheless went on to conclude that disclosing the identities of Medicaid beneficiaries to their employers after the employers executed the Certification did not violate the Federal Medicaid Confidentiality Requirements that such disclosures only be made for purposes directly connected with administering the

Medicaid program. *See* App. 36; *see also* 42 U.S.C. § 1396a(a)(7)(A)(i).

D. The Massachusetts Appeals Court's Opinion

The Massachusetts Appeals Court affirmed. Like the Superior Court, the Appeals Court in its due process analysis distinguished this case from this Court's decision in *Speiser*. According to the Appeals Court's opinion, this case is unlike *Speiser* because "[t]he EMAC Supplement does not place any burden on [Petitioner], or other Massachusetts employers, to show that they will suppress their speech as a requirement to receiving notice of its EMAC Supplement liability or a hearing to challenge that liability." App. 10 at n.5. The Appeals Court did not explain why having to sign the Certification, which contains an agreement to suppress one's speech, as a condition precedent to receiving fundamental and necessary information concerning the EMAC Supplement is not a burden like that prohibited by *Speiser*.

Also like the Superior Court, the Appeals Court relied upon case law that permits fact-specific flexibility in *procedures* to uphold the extraction of a *substantive* promise to limit speech on a tax in exchange for receiving necessary and fundamental information about that tax. *See* App. 9 (*quoting Torres*, 441 Mass. at 502, that "due process is 'not a technical conception with a fixed content[.]' ") The Appeals Court also did not address how substantive constitutional rights can be protected if, on its view, procedures can be used to extract their surrender.

The Appeals Court, like the Superior Court, cited to the right-of-access line of cases for the proposition that the government need not disclose nonpublic information in its possession. *See* App. 11-12. Also like the Superior Court, the Appeals Court did not address why it was relying on that line of cases instead of procedural due process case law which does require the government to provide adequate notice of information in its possession to allow for a meaningful hearing.

In analyzing the free speech question, the Appeals Court declined to apply strict scrutiny and instead applied the free speech standard of review applicable in protective order cases. "[W]e apply the same standard used in [*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)], and ask 'whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of that particular government interest involved."'" App. 13. In applying that standard, the Appeals Court viewed the important or substantial government interest involved as "maintaining the confidentiality of private health care information[.]" App. 14. The Appeals Court did not explain why the government interest involved was not raising revenue, which is generally the purpose of taxes such as the EMAC Supplement. Applying the protective order standard in this manner, the Appeals Court concluded that the taxing procedure involved in this case did not violate the First Amendment. *See* App. 14.

In its preemption analysis, unlike the Superior Court, the Appeals Court did not view this Court's decision in *Armstrong* as barring a preemption claim because M.G.L c. 30A, § 14(7) provides a basis for the claim. *See* App. 15 at n.9. It did however agree with the Superior Court that the disclosure of the names of Medicaid recipients to their employers did not violate the Federal Medicaid Confidentiality Requirements, and thus there was no violation of the Supremacy Clause.

E. The Supreme Judicial Court of Massachusetts

Petitioner appealed to the Supreme Judicial Court twice during this case. On February 28, 2020, following the Superior Court's decision, Petitioner filed an Application for Direct Appellate Review (DAR-27362), which was denied on May 15, 2020. *See* App. 18. On February 23, 2021, following the Appeals Court's decision, Petitioner filed an Application for Further Appellate Review (FAR-28109), which was denied on April 15, 2021. The Supreme Judicial Court has not addressed and, as far as Petitioner is aware, is not scheduled to address any of the Questions Presented in this Petition in another case. The Appeals Court's published opinion in this case, *see* App. 2-16, is thus binding authority throughout the Massachusetts state court system and likely will remain so.

REASONS FOR GRANTING THE PETITION

This case involves a state court deciding novel and important questions of federal law that should be settled by this Court. Moreover, those questions were decided by the state court in a manner that conflicts with decisions of this Court explicating fundamental constitutional principles.

As far as Petitioner can determine, never has there been a case decided where the information necessary to understand and thus effectively appeal a tax determination was withheld pending the signing of an agreement to limit speech concerning the subject of the tax. Moreover, as far as Petitioner can determine, there has never before been a case where speech concerning a tax was substantively restricted in any way.

I. Conditioning Adequate Notice of a Tax Upon the Execution of a Substantive Attestation and Promise to Restrict Speech Raises Important and Novel Questions of Due Process that Should be Settled by this Court, and the Appeals Court's Opinion Upholding that Novel Procedure Conflicts with Fundamental Due Process Principles Explicated in Decisions of this Court

To understand whether an EMAC Supplement was accurately assessed, a taxpayer needs to know two, *and only two*, pieces of information: (1) the assessed amount; and (2) the name of the employee who is the basis for the assessment. Pursuant to the EMAC Regulation, the DUA withholds the second piece of

information until and unless a Certification is executed by the taxpayer. Specifically, the EMAC Regulation requires that taxpayers sign the Certification before the DUA will provide the taxpayer with "Member Information,"[4] most importantly the names of the individuals who are the subject of the tax. *See* 430 CMR 21.10(2)(b) and (c). The Certification sets forth the taxpayer's attestation that those names are confidential and the taxpayer's agreement to keep those names confidential. *See* App. 83. It is impossible for a taxpayer to meaningfully understand any assessment of an EMAC Supplement without those names. That is because the amount of the EMAC Supplement due on account of each "employee" is a function of the amount of wages each "employee" earned from the taxpayer. *See* M.G.L. c. 149, § 189A(a). Without knowing the names of the "employees" with respect to whom the DUA is basing its calculation, the taxpayer cannot identify and verify the wages upon which the DUA's calculation is based. Thus the EMAC Regulation sets up a procedure whereby the only way that taxpayers can receive the relevant names and preserve their right to a meaningful hearing is to sign the Certification, thereby attesting to something that they may not believe and agreeing to limit their speech concerning the subject of the tax.

The Appeals Court held that because "due process is 'not a technical conception with a fixed content[,]'" due process therefore permits the withholding of

[4] "Member Information" is defined to include information pertaining to MassHealth (*i.e.* Medicaid) and ConnectorCare beneficiaries. 430 CMR 21.10(1).

information needed by a taxpayer to determine the accuracy of an assessment. App. 9-10 (*quoting Torres*, 441 Mass. at 502). The Appeals Court highlighted all the information related to the tax that was provided to Petitioner and minimized the fact that a critical piece of information necessary for understanding whether the tax was accurately assessed was withheld. *See* App. 7-8. But providing a lot of "window dressing" instead of information fundamental and necessary to understanding the tax denies the taxpayer adequate notice and a meaningful opportunity to be heard, and therefore violates due process. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a *meaningful* manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added)). "It is likewise fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it. Otherwise the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided." Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1280-1281 (1975). In other words, a hearing is not "meaningful" as required by due process if a party has not been given sufficient information to understand the claims against it to benefit from any hearing thereon.[5] Thus interpreting due process, as the

[5] *See American-Arab Anti-Defamation Committee v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) ("Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, [*Mathews v. Eldridge*] suggests

Appeals Court does, to include the withholding of required information eliminates the core requirement of due process: that there actually be a meaningful opportunity to be heard. Without being told what (in this case who) you are being taxed on, there is no coherent way to be heard. Put simply, imposing a tax based upon specific information but not informing the taxpayer of that specific information, denies the taxpayer due process.

The Appeals Court viewed the conditional nature of the withholding of the relevant tax information as somehow making it permissible. *See* App. 9 ("due process does not mandate DUA to unconditionally turn over any and all information that would be helpful to [Petitioner] at a hearing"). But minimum due process is not optional or conditional. If it were, it would not be a right. The receipt of adequate notice that permits an

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that use of undisclosed information in adjudications should be presumptively unconstitutional."); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("The notice must be of such nature as reasonably to convey the required information"); *Fares v. Smith*, 901 F.3d 315, 324 (D.C. Cir. 2018) ("Excluding parties from directly accessing the evidence against them is strongly disfavored," so reliance on undisclosed classified information is only permissible in the most extraordinary circumstances, such as protecting vital national security interests); *Taylor v. Rodriguez*, 238 F.3d 188, 193 (2d Cir. 2001) (*referencing Mathews v. Eldridge*, 424 U.S. at 333, and holding "[a] hearing is not 'meaningful' if a prisoner is given inadequate information about the basis of the charges against him. A prisoner should not, as Taylor was, have to guess what conduct forms the basis for the charges against him."); *Swank v. Smart*, 898 F.2d 1247, 1256 (7th Cir. 1990) ("a fair hearing includes the right to be shown the evidence on which the tribunal has relied").

opportunity to be heard in a meaningful manner is not within the power of the Commonwealth of Massachusetts to *substantively* condition, which is what the Commonwealth is doing when it will provide adequate notice sufficient to permit a meaningful hearing *only if* the taxpayer makes a substantive declaration and a substantive promise. The power to condition implies the power to deny. Because the Commonwealth does not have the power to deny adequate notice sufficient to permit a meaningful hearing, it does not have the power to *substantively* condition it either.

In *Speiser*, 357 U.S. 513, this Court struck down as a violation of due process a California procedure where veterans had the burden of proving (in part through a loyalty oath) that they did not advocate for the overthrow of the government as a condition precedent to obtaining a tax-exemption. Here we are dealing with something worse than the conditioning of the *privilege* of tax-emption upon proving that one does advocate certain views. Here we are dealing with the direct conditioning of a right already owed – the right to meaningful notice and a meaningful hearing – upon an agreement to restrict one's speech. One right is being improperly withheld to extort the surrender of another right.

The Appeals Court unconvincingly attempted to distinguish *Speiser*. According to the Appeals Court's opinion, this case is unlike *Speiser* because "[t]he EMAC Supplement does not place any burden on [Petitioner], or other Massachusetts employers, to show that they will suppress their speech as a requirement to

receiving notice of its EMAC Supplement liability or a hearing to challenge that liability." App. 10 at n.5. But that is exactly what the EMAC Supplement does. A taxpayer is required sign the Certification, thereby agreeing to suppress their speech as a condition precedent to "receiving [adequate] notice of its EMAC Supplement liability or a [meaningful] hearing to challenge that liability."

As discussed above, the conditioning of notice of information fundamental in understanding a tax upon execution of an attestation and a promise to restrict speech on the tax is a novel procedure that raises important due process issues that should be settled by this Court. Moreover and as also set forth above, the Appeals Court's opinion upholding that novel procedure conflicts with fundamental due process principles explicated in decisions of this Court, making review by this Court appropriate.

II. Restricting Speech on a Tax Raises Important and Novel Questions Under the First Amendment that Should be Settled by this Court, and the Appeals Court's Opinion Upholding that Novel Restriction Conflicts with Fundamental Free Speech Principles Explicated in Decisions of this Court

The Appeals Court's decision, like the Superior Court's decision, confuses form over substance, and therefore misses the fundamentals of free speech jurisprudence. It would be unconstitutional if Massachusetts passed a tax where it fully disclosed the subject

of the tax but also straightforwardly prohibited taxpayers from speaking about the subject in an identifying way. *See*, *e.g.*, *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2020) (applying strict scrutiny – restriction must be "narrowly tailored to a state interest of the highest order" – and holding unconstitutional a Virginia law that prohibited the publication of names and social security numbers that were disclosed by the government). The fact that the procedure at issue here coerces a promise to restrict speech, rather than straightforwardly restricting speech itself, is a difference in form, but not an improvement in substance. In fact, as a matter of substance, it is worse because, as discussed above, it creates a due process violation, and it also creates an *additional* free speech violation – namely compelling speech (*i.e.* an affirmation and a promise) under threat of penalty.

The Appeals Court failed to view the requirement that a taxpayer execute the Certification as a condition precedent to receiving information necessary to understand a tax as itself being a First Amendment violation. *See* App. 10 at n.5. ("DUA *merely* requires [Petitioner] to agree. . . ." (emphasis added)). But the government may not compel speech or agreement. *See West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) and its progeny. The Certification contains an attestation that "Qualifying Employee Information" is confidential, a declaration with which a taxpayer may not agree and cannot be compelled to make. App. 83. The Certification also contains a promise to restrict one's speech, which a taxpayer cannot be compelled to

make. *See* App. 83. But the EMAC Regulation attempts to do exactly that by withholding the required "Member Information" (or "Qualifying Employee Information" as it is named in the Certification) as punishment for not making such an attestation and such a promise to restrict speech. *See* 430 CMR 21.10(2)(c). And even if the withholding the "Member Information" was not a due process violation, which it is, it would still be a penalty for not executing the Certification. Those that execute the Certification (and thereby say what the government wants them to say) receive the benefit of the information, and those that do not execute the Certification (and thus do not say what the government wants them to say) are penalized by having that information withheld, placing them at a disadvantage in understanding and challenging their tax assessment.

Furthermore, in analyzing whether the speech restriction on the tax in this case is constitutional, the Appeals Court applied the wrong standard. *See* App. 13 ("we apply the same standard used in *Seattle Times Co.*, and ask 'whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of that particular government interest involved."'"). The *Seattle Times Co.* standard only applies to protective orders issued in a discovery context. *See id.* at 32. This is not a protective order situation, so that standard should not have been applied. Strict scrutiny is the default standard for reviewing laws and

regulations that restrict speech. *See* 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 4:1 (2016). And that is what should have been applied by the Appeals Court. *See*, *e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *AIDS Action Committee of Mass., Inc. v. Mass. Bay Transportation Authority*, 42 F.3d 1, 8 (1st Cir. 1994) ("a regulation which permits an idea to be expressed but disallows the use of certain words in expressing that idea is content-based"); *Ostergren*, 615 F.3d 263 (applying strict scrutiny – restriction must be "narrowly tailored to a state interest of the highest order" – and holding unconstitutional a Virginia law that prohibited the publication of names and social security numbers that were disclosed by the government). Under the Appeals Court's reasoning, every restriction on free speech could be recast as a universal protective order. But protective orders are issued by judges, not through legislation or regulations. They have their place in the specific circumstances of a specific litigation where they can be customized for that situation. They are not tools of general applicability.

Moreover, even if the *Seattle Times Co.* standard was the correct standard to apply, which it is not, the Appeals Court misapplied it. The Appeals Court fails to address how the limiting of speech in this case is "no greater than is necessary or essential to the protection of that particular government interest involved" –

namely raising revenue through taxation. Instead, the Appeals Court improperly viewed protecting private health information as the governmental interest involved, which does not make sense. It was the EMAC Supplement itself that created the concern over private health information by making that information relevant in the assessment of a tax. Prior to the EMAC Supplement, there was no such concern, so that could not possibly be the government interest with which the EMAC Supplement is concerned. Indeed, the purpose of the EMAC Supplement, like other taxes, was to raise revenue.[6] And the limiting of speech was "greater than is necessary or essential" to raise revenue. There are numerous ways for the Commonwealth to raise revenue without infringing upon free speech rights.

As discussed above, restricting speech on a tax raises important and novel questions under the First Amendment that should be settled by this Court. Moreover and as also set forth above, the Appeals Court's opinion conflicts with fundamental free speech principles explicated in decisions of this Court, making review by this Court appropriate.

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[6] To see what the true motivation was in passing the Act, one only needs to ask what would have happened if the Act never existed? The concerns regarding the disclosure by employers of Medicaid beneficiaries' private information would never have existed. Employers would have remained in the position of not knowing which of their employees have Medicaid and having no need to know. What would have happened if the Act never existed is that the Commonwealth would not have received the revenue that it obtained pursuant to the Act. And that was the purpose of the EMAC Supplement – to raise revenue.

III. This Case Raises an Important Question Under the Supremacy Clause that Should be Settled by this Court, and the Appeals Court's Opinion Conflicts with the Doctrine of Preemption Explicated in Decisions of this Court

The Appeals Court misconceived this matter as presenting a contest between the privacy rights of Medicaid beneficiaries and Petitioner's asserted free speech rights. *See* App. 10-14. In fact, it is not. The Commonwealth has no power to put those rights into conflict, since each of those rights arise from law that preempts state law, specifically federal law in the case of Medicaid beneficiaries' privacy rights and constitutional law in the case of Petitioner's free speech rights. A state law cannot put superior rights/laws into conflict and then decide, in balancing the competing interests of that conflict, how those superior rights/laws must be modified. If it could, it would undermine the preemption doctrine and hierarchy of law in our republic.

The EMAC Supplement puts a Medicaid beneficiary's privacy rights based in federal statute into conflict with a taxpayer's first amendment/due process rights based in the Constitution. It does this by making the Medicaid beneficiary the basis of the tax, thereby triggering the taxpayer's first amendment/due process rights at the expense of the Medicaid beneficiary's privacy rights.[7] Then Massachusetts, which had no right

[7] In addition to infringing taxpayers' due process and free speech rights, the EMAC Regulation infringed Medicaid beneficiaries' privacy rights. Under federal law, the disclosure of the

to create a conflict of rights derived from law superior to state law, mediated that conflict through the EMAC Regulation, where the competing interests were purportedly balanced. *See* App. 14. But neither the taxpayer nor the Medicaid beneficiary is obliged to give up any rights because of a conflict created by a state law of inferior rank. It is the state law that must be invalidated under basic preemption principles. *See Murphy v. National Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1479 (2018) (The doctrine of preemption is based on

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identities of Medicaid beneficiaries must be for purposes directly connected with *administering* the Medicaid program. *See* 42 U.S.C. § 1396a(a)(7)(A)(i); *see also* 42 C.F.R. § 431.301. The EMAC Regulation provides for the disclosure of those identities to the *employers* of those very people. And the EMAC Supplement is not related to the administration of the Medicaid program. The Appeals Court held otherwise, concluding that because revenue raised from the EMAC Supplement is used *to fund* the Medicaid program, the disclosure is made for purposes directly connected with *administering* the Medicaid program. But that is a stretch. Funding is not administering. Although Petitioner *funds* NASA in part through the taxes that it pays, that does not mean that Petitioner *administers* NASA. Or if Petitioner *raises revenue for* or otherwise *funds* a charity, that does not mean Petitioner *administers* the charity. Similarly, just because the EMAC Supplement helped to fund the Medicaid program, that does not mean it was "directly connected with the administration of the [Medicaid program]." 42 U.S.C. § 1396a(a)(7)(A)(i). Massachusetts Medicaid beneficiaries had their privacy rights violated when the Commonwealth disclosed their identities to their employers in contravention of federal law. The fact that Massachusetts required employers to sign the Certification does not change this. Massachusetts was obligated to keep that information confidential. It is no excuse to disclosing information that you were supposed to keep confidential to say that the person to whom you gave the information promised to keep it confidential.

the Supremacy Clause, "which specifies that federal law is supreme in case of a conflict with state law.")

As discussed above, a Massachusetts tax law that places into conflict rights derived from federal statutory and constitutional law presents an important question under the Supremacy Clause that should be settled by this Court. Moreover and as also set forth above, the Appeals Court's opinion conflicts with fundamental preemption principles explicated in decisions of this Court, making review by this Court appropriate.

IV. The Law at Issue and the Opinions Below Set a Dangerous New Precedent

As far as Petitioner can determine, the opinions of the Appeals Court and the Superior Court are the first in American history to uphold a substantive limitation on speech concerning a tax. The American Revolution was precipitated in large part by complaints about taxes, with Massachusetts playing a central role. From that time and all time since, Americans have always been free to complain without substantive restrictions about their taxes. That should remain the case. Americans should not have to be reduced to using "pseudonyms" – as suggested by the Appeals Court – when discussing a tax with their own elected representatives or anyone else. App. 14. Taxation is one of the most coercive functions of government. *See M'Culloch v. Maryland*, 17 U.S. 316 (1819) (the power to tax is the power to destroy). And free speech is most critical and

needs the most protection from the courts when the government is at its most coercive. There simply is no good reason, never mind a compelling reason, to limit speech on a tax. There are numerous other ways to raise revenue that do not infringe upon the most fundamental right in a free society.

The tax regulation at issue in this case applied to all Massachusetts taxpayers with more than 5 employees, *see* M.G.L. c. 149, § 189A(a), which encompasses a very large number of business owners. Those that were assessed and executed Certifications were coerced into making an attestation and a promise to restrict their speech, are having their speech chilled on an ongoing basis, and that will continue to be the case absent review by this Court. Those that signed the Certification cannot have a conversation with their own elected representatives about the tax without having to censor themselves. And those taxpayers that did not sign the Certification, like Petitioner, never found out whether they were properly taxed, had their right to adequate notice and a meaningful hearing taken away, and were forced to blindly pay the tax.

Because of the fundamental issues involved in this case, the large number of people impacted, and the disturbing precedent set by the tax law at issue in this case and the opinions upholding the same, review by this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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