No. 20-1569

In the
Supreme Court of the United States

DAWN DESROSIERS, ET AL.,

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

BRIEF OF ILYA FEOKTISTOV AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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June 11, 2021

QUESTION PRESENTED

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?

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INTERESTS OF *AMICUS CURIAE*

Ilya I. Feoktistov, Esq. is a Massachusetts civil rights attorney whose private practice is focused on defending the rights of individual citizens from modern collective usurpations.[1]

Amicus relies on the United States Constitution, on the Court's modern constitutional precedent, and on the civil rights legislation passed by representative governments of both the United States and Massachusetts to defend the civil rights of his clients. These safeguards were created with the wisdom to weather any crises, and apply to rulers and people, equally in war and in peace, and under all circumstances. Despite the greatness of the exigencies, the government may not breach these safeguards, outside of which the government has all the powers granted to it which are necessary to preserve its existence.

Amicus strongly believes that the opinion of the Supreme Judicial Court of Massachusetts in *Desrosiers v. Baker*, 486 Mass. 369 (2020) has eroded the very foundations of individual rights in Massachusetts by allowing the government to treat private homes like government property for the purposes of regulating the exercise of First Amendment rights. Allowing governments to

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *Amicus*, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to filing this brief, *Amicus* notified counsel for the parties of his intent to file. All parties have consented to the filing.

generally ban private assembly in response to public health crises opens a Pandora's Box of novel usurpations that have never before plagued the human race. To *Amicus*'s knowledge, until 21st century technology made doing so possible, no government had ever presumed to issue a general ban of indefinite duration on private face-to-face human social interaction outside of a prison or slave camp, and sparingly even there.

As a civil rights attorney, *Amicus* has a strong interest in Petitioners' argument that no such general assembly ban may be exempted from First Amendment scrutiny by the highest court of Massachusetts—a state where the first shot of the American Revolution was fired amid a smallpox pandemic far deadlier than COVID-19 by people far braver than us.

SUMMARY OF ARGUMENT

Respondent's COVID-19 orders imposed prior restraints on assembly in private homes, businesses, and non-profit entities "throughout the Commonwealth" of Massachusetts.

To the extent that Respondent's COVID-19 orders reached non-commercial assembly in private residences, the Supreme Judicial Court of Massachusetts ("SJC") was constitutionally required to review the orders under the strictest First Amendment scrutiny of the "clear and present danger" test. This test asks whether the orders were justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger, grave and immediate.

The SJC failed to apply the clear and present danger test. Instead, in broadly ruling that the COVID-19 orders did not violate the First Amendment, the SJC misapplied the much more lenient "reasonable time, place, and manner restrictions" test for restrictions on the exercise of First Amendment liberties within public fora on government property.

Under the public forum test, reasonable content-neutral restrictions on the time, place, and manner of First Amendment activity are permissible if the restrictions are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Even content-based exclusions are permissible if the regulation of content is necessary to serve a compelling state interest and if the regulation is narrowly drawn to achieve that end. Applying the public forum test, the SJC ruled that the COVID-19 orders were content-neutral, narrowly tailored, and left open ample alternative channels of communication.

The SJC should have applied an even more lenient, commercial assembly test to the business and non-profit entity Petitioners. In the commercial context, content-neutral restrictions on First Amendment liberties need only to directly advance a substantial governmental interest, and to not be more extensive than is necessary to serve that interest. Content-based commercial restrictions must, in addition, be drawn to achieve that interest.

The business and non-profit entity Petitioners show, in their Petition, that even under the

commercial assembly test, Respondent's COVID-19 orders are unconstitutional as applied to those Petitioners, since the orders are clearly content and event-based, and since the categories of social, commercial, political, and religious assembly they establish are unrelated to reducing the dangers of COVID-19.

By applying the public forum test, however, the SJC failed to distinguish between commercial and non-commercial assembly—a distinction that would be irrelevant in the public forum context. As a result, the SJC failed to consider whether the COVID-19 orders were unconstitutionally overbroad on their faces, and as applied to the individual Petitioners, regardless of how they applied to the business and non-profit entity Petitioners, since the orders restrict both commercial and non-commercial assembly.

Because COVID-19 represented a danger far short of an existential all-annihilating crisis that might have justified them, Respondent's COVID-19 orders banning non-commercial assembly on residential property fail to carry the burden of the "clear and present danger" test. The COVID-19 orders were thus facially unconstitutional, and unconstitutionally applied to the individual Respondents.

REASONS FOR GRANTING THE PETITION

I. RESPONDENT'S COVID-19 ORDERS IMPOSED PRIOR RESTRAINTS ON ASSEMBLY IN PRIVATE RESIDENCES OF U.S. CITIZENS

On March 23, 2020, Respondent issued COVID-19 Order No. 13, which banned "throughout the Commonwealth [of Massachusetts]", and "without limitation," assemblies of "more than 10 persons in any confined indoor or outdoor space." Pet.App.54a. Assembly activities involving "close, physical contact," irrespective of participant number, were also banned. *Id.*

On August 7, 2020, Respondent issued COVID-19 Order No. 46, explicitly applying Respondent's assembly restrictions to "private homes and backyards," but exempting assembly for religious and political purposes. Pet.App.162a. COVID-19 Order 46 clarified that Respondent's ban on "close, physical contact" will apply to any assembly "where, no matter the number of participants present, conditions or activities at the gathering are such that it is not reasonably possible for all participants to maintain [six feet] of separation. . . from participants who are not members of the same household." *Id.* Commercial entities were exempted from COVID-19 Order 46, except for Phase IV enterprises, consisting exclusively of social assembly spaces, such as sporting events and family entertainment centers, which had to remain closed. *See id.*

On November 2, 2020, as the SJC was deciding *Desrosiers v. Baker*, 486 Mass. 369 (Dec. 10, 2020),

Respondent issued COVID-19 Order 54, which imposed significantly stricter restrictions on assembly in "private residences" than on assembly in indoor spaces "falling within the definition of an event venue or public setting." Pet.App.198a. Assembly in private residences was limited to ten participants. *Id.* For public settings and event venues, the limit was set at twenty-five. *Id.* Assembly for political and religious purposes was exempted. Pet.App.197a. All assembly, except for political and religious purposes, "no matter the size or location," had to end, and its participants "disperse by 9:30 pm." Pet.App.199a. Some hosts could be required to provide the State with "lists of attendees at social gatherings and their contact information." *Id.* Phase IV enterprises were to remain closed, while other commercial entities were exempt from COVID-19 Order 54. Pet.App.197a.

COVID-19 Order 13 was enforceable by misdemeanor criminal penalties, civil penalties, and injunctive restraint. Pet.App.55a. COVID-19 Orders 46 & 54 were enforceable by civil penalties and injunctive restraint. Pet.App.163a-164a; Pet.App.199a.

II. PRIOR RESTRAINT OF LAWFUL ASSEMBLY IN PRIVATE RESIDENCES MUST BE REVIEWED UNDER THE "CLEAR AND PRESENT DANGER" TEST

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Prior restrictions on entirely lawful, private non-commercial speech, press, and assembly

have been reviewed under the strictest First Amendment standard, the "clear and present danger test":

> [A]ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . . "They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."
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> *Thomas v. Collins*, 323 U.S. 516, 527 n.12, 530 (1945) (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943)).[2]

Therefore, "consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime," *De Jonge*, 299 U.S. at 365. Lawful peaceable assembly also cannot be subject to prior restraint or burden, like a registration requirement or injunction. *Thomas v. Collins*, 323 U.S. 539-41. All lawful purposes for peaceful assembly are protected because First Amendment "liberties are not peculiar to religious activity and institutions alone. . . . Great secular causes, with small ones, are guarded . . . not solely religious or political ones." *Id.* at 531.

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[2] In *Thomas v. Collins*, 323 U.S. at 530, the assembly in question was in a public forum, the "time and place" standard, though cited, was not applied because the challenged restrictions focused on the speaker instead of the forum.

However, certain categorical abuses of First Amendment liberties are traditionally excluded from First Amendment protections:

> Among these categories are advocacy intended, and likely, to incite imminent lawless action, *see Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); obscenity, *see, e.g., Miller* v. *California*, 413 U.S. 15 (1973); defamation, *see*, *e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (providing substantial protection for speech about public figures); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (imposing some limits on liability for defaming a private figure); speech integral to criminal conduct, *see,* e.*g., Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949); so-called "fighting words," *see Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); child pornography, *see New York* v. *Ferber*, 458 U.S. 747 (1982); fraud, *see Virginia Bd. of Pharmacy* v.*Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); true threats, *see Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam); and speech presenting some grave and imminent threat the government has the power to prevent, *see Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), although a restriction under the last category is most difficult to sustain, *see New York Times Co.* v. *United*

States, 403 U.S. 713 (1971) (per curiam).

United States v. Alvarez, 567 U.S. 709, 717-18 (2012).

"Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins*, 323 U.S. at 530. "The people through their legislatures may protect themselves against th[ose] abuse[s]. But the legislative intervention can find constitutional justification only by dealing with the abuse." *De Jonge*, 299 U.S. at 364-65. The "rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds will not suffice [with First Amendment rights]. These rights rest on a firmer foundation." *Thomas v. Collins*, 323 U.S. at 530.

Indeed, insofar as they apply to speech and press rights, traditional restrictions on many of these categorical abuses of First Amendment rights have been cabined by this Court's modern precedent. *See, e.g.*, *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2027-28 (2015) (Thomas, J., dissenting) (arguing that majority opinion requiring a heightened mental state for true threats made "threats one of the most protected categories of unprotected speech"); *Alvarez*, 567 U.S. at 721 (distinguishing fraud from lies "simply intended to puff up oneself"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002) (distinguishing child pornography produced using real children from virtual ones); *Stanley v. Georgia*,

394 U.S. 557, 565 (1969) (holding that obscenity statutes do not "reach into the privacy of one's own home").

III. THE MASSACHUSETTS HIGH COURT IMPROPERLY REVIEWED RESPONDENT'S COVID-19 ORDERS UNDER THE PUBLIC FORUM "REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS" TEST

Instead of under the "clear and present danger" test, in *Desrosiers*, 486 Mass. at 390-92, the Massachusetts Supreme Judicial Court reviewed both COVID-19 Orders 13 & 46[3] under a blanket public forum "reasonable time, place, and manner restrictions" analysis, and found that they "do not unconstitutionally burden the plaintiffs' right to free assembly because reducing the dangers of COVID-19 is a significant government interest, and because the emergency orders are content neutral and narrowly tailored, and they leave open alternative means of communication . . . such as through virtual assembly."

The time, place, and manner doctrine grew out of a conflict between the protections of the First Amendment and the commonsense fact that the State often owns or has zoning power over the most desirable real estate locations for the exercise of those freedoms. *See, e.g., Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1986); *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939). Like any "private owner of property," the State "has power to preserve the property under its control for the use to which it is lawfully dedicated."

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[3] COVID-19 Order 54 was issued after oral argument.

Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (citing long line of cases). *See also Davis* v. *Massachusetts*, 167 U.S. 43, 48 (1897) ("[P]ower existed in the State or municipality to absolutely control the use of the [Boston C]ommon[.]").

Starting in 1939 with *Hague*, however, the Court began to balance the States' absolute property rights with the rights of United States citizens under the First and Fourteenth Amendments, rejecting arguments that a State or municipality's "ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof." *Hague*, 307 U.S. at 514.

Within such "quintessential" traditional public fora as streets and parks, and on State property designated for First Amendment-protected activity, the State "may not prohibit all communicative activity." *Perry*, 460 U.S. at 45. As the property owner of such fora, however, the State may impose reasonable content-neutral restrictions on the "time, place, and manner" of First Amendment activity if the restrictions "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* at 45. *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As the property owner, the State may even "enforce content-based exclusions," if it can show that "regulation [of content] is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry,* 460 U.S. at 45. *See also Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

IV. COMMERCIAL SPEECH, PRESS, AND ASSEMBLY ARE REVIEWED UNDER A SEPARATE INTERMEDIATE SCRUTINY TEST

In addition to restricting First Amendment liberties on its own property, a State may restrict First Amendment liberties under its police power to regulate commerce and other forms of conduct. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech[, press, and peaceable assembly]." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

The Court has recognized "'commonsense'" distinctions between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell, 5*64 U.S. at 567. "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson*, 447 U.S. at 563.

Lawful, non-misleading commercial speech, press, and assembly, are nevertheless protected by the First Amendment. "[A] great deal of vital expression . . . results from an economic motive," and the "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell*, 564

U.S. at 566 (quoting *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

Therefore, if commercial speech, press, and assembly "concern lawful activity and [are not] misleading," they are protected under an intermediate level of First Amendment scrutiny. *Central Hudson*, 447 U.S. at 566. *See also Cincinnati v. Discovery Network*, 507 U.S. 410, 417 n.13 (1993) ("While we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational-basis review.").

To sustain a content-*neutral* restriction on First Amendment liberties in the commercial context, the State must show that the restriction "directly advances a substantial governmental interest," *Sorrell,* 564 U.S. at 571, and that "it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

When a commercial speech restriction is "directed at certain content [or] is aimed at particular speakers," however, recent decisions by the Court have required that the restriction is "*drawn* to achieve that interest. *Sorrell*, 564 U.S. at 571-72. There must be a fit between the legislature's ends and the means chosen to accomplish those ends." *Id.*

When "the very basis" for a restriction of First Amendment liberties is "the distinction between commercial and noncommercial" literature, *Discovery Network*, 507 U.S. at 424, or between "political and non-political" assembly events, *Reed v. Town of Gilbert*, 576 U.S. 155, 170-71 (2015), then "by any commonsense understanding of the term," the

restriction is "content based." *Discovery Network*, 507 U.S. at 429. "[J]ust as with speaker-based laws, the fact that a distinction is event based does not render it content neutral." *Reed,* 576 U.S. at 170. *See also Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980) ("[I]t is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.") (internal quotation marks omitted).

At the same time, restrictions on First Amendment liberties that are permissible in the commercial context may still be unconstitutionally overbroad if they also reach to restrict non-commercial speech. "'To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.'" *Bd. of Trs. v. Fox*, 492 U.S. 469, 481 (1989) (quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

V. THE MASSACHUSETTS HIGH COURT ERRED BY FAILING TO DISTINGUISH AMONG THE PUBLIC, COMMERCIAL, AND NON-COMMERCIAL ASSEMBLY TESTS, APPLYING THE WRONG TEST, AND HOLDING THAT RESPONDENT'S COVID-19 ORDERS WERE CONSTITUTIONAL THEREUNDER

Petitioners have detailed the various ways in which Respondent's COVID-19 orders are content and

event-based. Pet.App.15-20. The orders classify different event topics for different treatment based on their religious, political, social, or commercial purposes, and based on the events' residential, commercial, or public settings. Petitioners have also described the complete lack of rational fit between Respondent's significant interest in "reducing the dangers of COVID-19" on the one hand, and the assembly purpose/setting distinctions in Respondent's COVID-19 orders on the other hand. Pet.App.20-22. Respondent's COVID-19 orders are, therefore, unconstitutional content and event-based restrictions on commercial assembly, as applied to the business and non-profit entity Petitioners. *See Reed*, 576 U.S. at 170-71; *Sorrell*, 564 U.S. at 571-72; *Discovery Network*, 507 U.S. at 424.

As *Amicus* seeks to bring to the attention of the Court, however, the SJC *did not* use the commercial speech, press, or assembly test to review those provisions of Respondent's COVID-19 orders that applied to the business and non-profit entity Petitioners. Instead, it erroneously employed the "time, place, and manner" public forum test to review all the provisions of Respondent's COVID-19 Orders 13 & 46 in a blanket fashion, without any distinction among Respondent's widely differing powers to regulate assembly within public, commercial, and entirely private residential fora, or his very limited powers to do so on the basis of social, commercial, political, and religious assembly classifications. *Desrosiers*, 486 Mass. at 390-92.

A. The Massachusetts High Court Misapplied the Public Forum "Reasonable Time, Place, Or Manner" Test to Commercial and Non-Commercial Assembly on Private Property

Respondent's COVID-19 orders restricted assembly in "any confined indoor or outdoor space" in Massachusetts—to include "private homes and backyards." Pet.App.162a. Yet, in reviewing these orders in *Desrosiers*, 486 Mass. at 390-92, the SJC relied on public forum precedent, limited strictly to speech and assembly on government property, or in the context of the government power to zone property use. *See McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (analyzing the Massachusetts Reproductive Health Care Facilities Act under the public forum test); *City of Bos. v. Back Bay Cultural Ass'n*, 418 Mass. 175, 178, (1994) ("The Supreme Court has recognized that 'in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech. . .'"); *Rock Against Racism*, 491 U.S. at 791 ("[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech. . ."); *Playtime Theatres*, 475 U.S. at 49 ("[A]t least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations.").

The SJC simply omitted the words "in a public forum" from its restatement of the Court's "time, place, and manner" public forum analysis. *See Desrosiers*, 486 Mass. at 390. The holding in *Desrosiers* is therefore not merely that the First Amendment allows Petitioner to regulate assembly within "private homes and backyards." The holding applied government property status to the private residences, businesses, and non-profit entities of U.S. citizens living in Massachusetts, everting this Court's statement in *Hague*, 307 U.S. at 514 ("the city's ownership of streets and parks is [not] as absolute as one's ownership of his home"), to rule that it is one's ownership of his home which is not absolute. Indeed, the SJC has held that Respondent has at least as much power to exclude citizens from the use of their own homes for lawful assembly as he does to impose a neutral "place" restriction on assemblies on government property. Such an absurd holding has serious implications for many "sacred precincts" of the Court's constitutional precedent, which are beyond the scope of this brief.

B. The Massachusetts High Court Did Not Recognize that Separate Categories of Commercial and Non-Commercial Assembly, Rather Than Public Assembly Were at Issue in the COVID-19 Orders

As applied to the business and non-profit entity Petitioners, the Court's precedent required the SJC to review Respondent's COVID-19 Orders 13 & 46 under the commercial speech, press, and assembly test, *see Central Hudson*, 447 U.S. at 563, instead of the public

forum analysis, which was used in error. The commercial test is, in fact, less strict than the public forum test, requiring only that Respondent's content-based restrictions be "drawn" to achieve a "substantial" government interest, instead of the "narrowly drawn" and "compelling" interest requirements for public fora. *Compare Sorrell*, 564 U.S. at 571-72, *with Perry*, 460 U.S. at 45.

However, had the SJC reviewed COVID-19 Orders 13 & 46 under the commercial speech, press, and assembly test, it would have been required to recognize that Respondent's COVID-19 Orders 13 & 46 are unconstitutionally overbroad on their faces, regardless of how they may apply to the business and non-profit entity petitioners. *See Bd. of Trs. v. Fox*, 492 U.S. at 481. The orders restrict both commercial and non-commercial assembly, indeed, exempting much of the former and imposing stricter restrictions on the latter. *See* Pet.App.162a; Pet.App.198a. Additionally, the SJC would have had to recognize that the orders are unconstitutional as applied to the individual Petitioners, and to their home-based non-commercial assembly activities. *See Bd. of Trs. v. Fox* at 481.

In public forum analysis, on the other hand, the commercial or non-commercial nature of the assembly is irrelevant for overbreadth purposes, since the regulatory nexus is in the government property on which such assembly occurs, regardless of purpose.[4] *See Perry*, 460 U.S. at 46.

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[4] Public forum regulations based solely on the difference between commercial and non-commercial speech would

As in *Bd. of Trs. v. Fox,* at 481, Petitioners' "principal attack upon the [assembly restraint] concerned its application to commercial [assembly; but] the alleged overbreadth (if the commercial . . . application is assumed to be valid) consists of its application to noncommercial speech, and that is what counts."

In the District Court proceedings prior to *Bd. of Trs. v. Fox*, "both commercial and (less prominently) noncommercial applications were attacked on their own merit – with no apparent realization . . . [by] the District Court, that separate categories of commercial speech and noncommercial speech, rather than simply various types of commercial speech, were at issue." *Id. at* 483-84. Similarly, the SJC did not recognize at all that commercial and non-commercial speech were involved, applying the entirely inapposite public forum test to both. *See Desrosiers*, 486 Mass. at 390-92.

Unlike in *Bd. Of Trs. v. Fox,* there is no question here that COVID-19 Orders 13, 46, & 54 apply to non-commercial speech. These, and dozens of other orders issued by Respondent banned Petitioners and all U.S. citizens residing in Massachusetts from gathering for both social and commercial purposes in their private homes, businesses, or non-profit entities, in greater numbers and past the hour allowed, except to discuss politics or religion, and by no means for any reason requiring close physical contact. *See* Pet.App.54a; Pet.App.162a;

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themselves be suspect content restrictions. *See Discovery Network, 507 U.S. at 424.*

Pet.App.197a-199a. Under any commonsense reading, these are content, speaker, and event-based restrictions that have less rational connection to reducing the dangers COVID-19 than they do to Respondent's disfavor for social assemblies held under non-political or non-religious auspices. The Petitioners have made this case, despite the confusion caused by the SJC's misapplication of the public forum test to their claims.

VI. UNDER THE "CLEAR AND PRESENT DANGER" TEST FOR NON-COMMERCIAL ASSEMBLY, RESPONDENT'S COVID-19 ORDERS ARE UNCONSTITUTIONAL PRIOR RESTRAINTS ON ASSEMBLY LIBERTIES

First Amendment liberties "rest on firmer foundations" than unenumerated due process rights and, to the extent that Respondent's COVID-19 orders restricted non-commercial assembly on private residential property, the "rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U.S. at 530. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (holding, in rejecting a challenge to compulsory vaccination on due process grounds, that "the right of every freeman to care for his own body and health in such way as to him seems best" is "not wholly free from restraint").

The prevention and mitigation of epidemics is a paramount public safety and welfare interest. *See, e.g., Zemel v. Rusk*, 381 U.S. 1, 15-16, (1965). Those provisions of the orders that restricted non-

commercial assembly on private residential property must therefore be reviewed under the "clear and present danger" test, applied to such assembly as "present[s] some grave and imminent threat the government has the power to prevent," with the understanding that "a restriction under [this test] is most difficult to sustain." *Alvarez*, 567 U.S. at 718 (citing *Times* v.*United States*, 403 U.S. at 714).

Even when it was alleged that the publication of state secrets would result in "grave and immediate danger to the security of the United States," resulting in "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, . . . [the] prolongation of the [Vietnam] war and of further delay in the freeing of United States prisoners"; the Court has ruled that such allegations could not carry the burden for imposing prior restraints on publishing the secrets. *Times* v.*United States*, 403 U.S. at 763 (Blackmun, J., dissenting).

Only when a "mistake in ruling against the United States [by refusing to enjoin the release of state secrets] could [have] pave[d] the way for thermonuclear annihilation for us all," did a federal court ever take the unprecedented step of enjoining the lawful exercise of First Amendment liberties. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979).

Assemblies for social, political, or religious reasons did not pose a clear and present danger during the COVID-19 pandemic. A future pandemic disease may represent such a danger, but it was clear early on that COVID-19 was far from it. Even the most alarmist early models predicted less than a 1%

death rate from the virus in the United States. *See, e.g.* Neil M. Ferguson, et al., *Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand*, IMPERIAL COLLEGE OF MEDICINE (Mar. 16, 2020). As of May 31, 2021, COVID-19 was the cause of 17,872 deaths among a population of 7,029,917 Massachusetts residents—a 0.254% death rate.[5] This is less than half the death rate experienced by active service members in Vietnam[6], and represents a danger that, while great, and should not be understated, is still clearly less than "annihilation for us all." *See id.*

As the Court had written shortly after the Civil War—America's deadliest and most existential crisis:

> [T]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the

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[5] *See COVID-19 Response Reporting*, MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH (accessed May 31, 2021), https://www.mass.gov/info-details/covid-19-response-reporting.

[6] *See Vietnam War U.S. Military Fatal Casualty Statistics*, THE NATIONAL ARCHIVES (accessed May 31, 2021), https://www.archives.gov/research/military/vietnam-war/casualty-statistics.

> theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.
>
> Ex parte *Milligan*, 71 U.S. 2, 120-21 (1866).

Respondent has not carried the heavy burden of showing justification for his bans on non-commercial assembly in the private residences of United States citizens, and the SJC therefore made its judgment in error. *See Times v. United States*, 403 U.S. at 714.

CONCLUSION

The Court should grant the Petition and reverse the judgment of the Supreme Judicial Court of Massachusetts. At a minimum, the Court should order the Respondent to file a Reply.

Respectfully submitted,

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Dated: June 11, 2021