**COMMONWEALTH OF MASSACHUSETTS**

**SUPREME JUDICIAL COURT**

No. SJC-12983

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

Petitioners,

v.

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

Respondent.

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On Reservation and Report from the
Supreme Judicial Court for Suffolk County

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# BRIEF OF MASSACHUSETTS HEALTH & HOSPITAL ASSOCIATION, MASSACHUSETTS MEDICAL SOCIETY, AND ORGANIZATION OF NURSE LEADERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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*Attorneys for Amici Curiae*
Elissa Flynn-Poppey, BBO No. 647189
Emily Kanstroom Musgrave, BBO No. 678979
Andrew Nathanson, BBO No. 548684
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
One Financial Center, Boston, Massachusetts 02111
(617) 542-6000 • EFlynn-Poppey@mintz.com

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 1:21, *amici curiae* Massachusetts Health & Hospital Association, Massachusetts Medical Society and the Organization of Nurse Leaders (collectively the "*amici*") make the following disclosure: They are nonprofit corporations with no parent corporations, with no stock, and therefore no publicly held company owning 10% or more of their stock.

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## STATEMENTS OF INTEREST OF THE AMICI CURIAE

Massachusetts Health & Hospital Association (MHA) is a voluntary, non-profit organization that serves as the voice for Massachusetts hospitals, healthcare systems, and other care providers. MHA's membership consists of over 70 Massachusetts hospitals and health systems, including acute facilities (such as community and teaching institutions) and non-acute care facilities (such as chronic, rehabilitation, and psychiatric institutions).

MHA is the leader in public advocacy, education, and information in support of its members' efforts to provide high-quality, cost-effective, and accessible care in Massachusetts. MHA seeks to promote responsible public policy, encourage public accountability, and foster an appropriate balance between those who provide and those who pay for healthcare services. In particular, MHA serves as the primary representative of the Commonwealth's hospital and health care system community, and serves as a central repository for strategic information on the healthcare environment in the Commonwealth.

The Massachusetts Medical Society (MMS), with some 25,000 physicians and student members, is dedicated to educating and advocating for the patients and physicians of Massachusetts. MMS

publishes the New England Journal of Medicine, a leading global medical journal and web site, and Journal Watch alerts and newsletters covering 13 specialties. Founded in 1781, the Society is the oldest continuously operating medical society in the country.

The Organization of Nurse Leaders (ONL) is a not-for-profit, professional membership organization for current and aspiring nurse leaders. Its members are more than 1,100 nurses from across five New England states. ONL's members lead more than 275,000 licensed nurses who care for 1.3 million patients per year in hospitals alone, and for tens of thousands of patients in other care settings. ONL's mission is to advance a culture of health through excellence in nursing and the organization works in full collaboration with local and national professional healthcare organizations to promote excellence in nursing leadership, and by extension, high-quality and high-value patient care.

The COVID-19 public health crisis and state of emergency the Governor declared directly impact MHA, MMS, ONL, and their members, as they work to care for affected patients, their families, and their communities. MHA, MMS, and ONL are therefore well positioned to provide this Court with insight into the effects this public

health crisis and the actions of the Office of the Governor have on citizens of the Commonwealth.

## RULE 17 DECLARATION

Pursuant to M.R.A.P. 17(c)(5), the *amici* declare that: (A) no party or party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; (C) no person or entity—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief; and (D) counsel for *amici* previously was a Deputy Legal Counsel to Governor Mitt Romney and represented the Office of the Governor in proceedings involving similar issues. Counsel for *amici* has also previously represented Governor Baker on other matters.

## SUMMARY OF THE ARGUMENT

*Amici* agree that Governor Baker has exercised his gubernatorial authority properly under the Civil Defense Act ("CDA"). The purpose of this brief is to give the Court some insight into the necessity for and efficacy of the Governor's actions, from the perspective of three organizations whose members have now spent six months in front lines of the ongoing fight against COVID-19.

To put it simply, that battle cannot be won (and could yet be lost) if the Governor's Office[1/] is prevented from using the authority granted to it by the CDA. The levels of sickness and death caused by the virus, and the accompanying strains placed on our health care infrastructure and workforce, have been unprecedented in modern Massachusetts history. It is self-evident that the pandemic has been a "disaster" and a "catastrophe" resulting from natural causes, as the Act requires for the Governor to invoke it. (Pages 11-24)

Despite the obstacles and initial setbacks, and without minimizing the awful toll already taken, the Commonwealth has achieved a significant measure of success in responding to the

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[1/] References to "the Governor" or the "Governor's Office" are used to describe the Office of the Governor of the Commonwealth of Massachusetts.

pandemic. It could not have done so if the Governor had been prevented from (1) implementing the kind of collective action that was needed to "flatten the curve," and (2) facilitating the acquisition and replenishment of needed supplies and infrastructure, and the development of therapeutic capacity. The Governor acted swiftly and effectively, but the administration was also transparent in its actions, which were consistent with the best information available at that time. No other governmental or private actor, or combination of actors, could have replicated this contribution. (Pages 25-40)

The crisis is hardly over. Although the curve has flattened, normal life has not yet resumed, and the unhappy recent experiences of other states and countries should remind us that resurgences are not just possible but likely. The Governor's emergency powers have helped to keep Massachusetts on a healthy path, and if the Court abrogates that authority—as the Petitioners ask—we fear the consequences will be severe. (Pages 40-47)

## ARGUMENT

### I. THE COVID-19 PANDEMIC IS A "DISASTER OR CATASTROPHE RESULTING FROM … NATURAL CAUSES."

The purpose of the Massachusetts Civil Defense Act is to "minimiz[e] and repair[] injury and damage" associated with "disasters" resulting from—among other things—"natural causes." Acts 1950, Ch. 639 §1. The statute authorizes the Governor to proclaim a "state of emergency," and to do what is "necessary or expedient for meeting said state of emergency," *id.* at §7, "upon the occurrence of any disaster or catastrophe resulting from … natural causes" *Id.* at §5. If the emergency is "detrimental to public health," the Commissioner of Public Health also has authority to "take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease." G.L. c. 17, §2A. The Governor invoked these statutes when he proclaimed a state of emergency in the Commonwealth on March 10.[2/]

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[2/] Governor Charles D. Baker's Declaration of Emergency to Support Commonwealth's Response to Coronavirus, March 10, 2020, https://www.mass.gov/news/governor-baker-declares-state-of-emergency-to-support-commonwealths-response-to-coronavirus

### A. A State of Emergency Existed On March 10.

The Governor's proclamation was appropriate because he had reason to anticipate a disaster or catastrophe resulting from natural causes. *See* Civil Defense Act, §8 (governor can exercise his powers "in reasonable anticipation" of an emergency).[3/] To be sure, because SARS-CoV-2 is a "novel" virus, and because the scientific community was only beginning to gain an understanding of its transmissibility and virulence, uncertainty remained about exactly when and how the pandemic would affect Massachusetts. However, by the second week of March, COVID-19 was already a worldwide disaster or catastrophe resulting from natural causes: major outbreaks were in progress on two continents; the crisis as it then existed portended an imminent calamity of unprecedented dimensions; and its effects were already being felt in

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[3/] The petitioners maintain that the causes of the pandemic were not "natural causes" within the meaning of the Civil Defense Act. We agree with the Governor that this is an illogical and unworkable reading of the statute and we do not believe there is room for reasonable dispute that COVID-19 results from "natural causes." It is quite clear that the illness is caused by the novel coronavirus known as SARS-CoV-2, and the consensus in the scientific community is that this is a naturally-occurring virus. *See* Kristian Andersen, *The proximal origin of SARS-CoV-2*, Nat Med, 17 March 2020, https://www.nature.com/articles/s41591-020-0820-9.pdf.

the United States generally and in the Commonwealth in particular.[4/] The World Health Organization (WHO) had declared a public health emergency of international concern on January 30, and would officially designate the outbreak as a "pandemic" on March 11.[5/] By the time Massachusetts declared a state of emergency, at least a dozen other states had done so (and the rest would shortly follow suit); the U.S. Secretary of Health and Human Services had already declared a public health emergency; and the President was only three days away from declaring a nationwide state of emergency.[6/] As of March 10, more than

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4/ World Health Organization (WHO) Coronavirus Disease 2019 Situation Report – 50 (March 10, 2010) (reporting 80,924 confirmed cases in China, 9,172 confirmed cases in Italy, and 472 cases in the United States); Massachusetts Department of Public Health, COVID-19 Cases in Massachusetts (March 10, 2010) (reporting 92 confirmed and presumptive cases).

5/ Timeline: WHO's COVID-19 Response, who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline.

6/ Lucia Bragg, *President Trump Declares State of Emergency for Covid-19*, March 25, 2020, https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx#:~:text=On%20March%2013%2C%20the%20president,ongoing%20COVID%2D19%20response%20efforts. 12 US states declare state of emergency over COVID-19, aa.com/tr/en/Americas/12-us-states-declare-state-of-emergency-over-covid-19/1761562 (March 11, 2020); NBC News, U.S. declares public health emergency over coronavirus (Jan. 31, 2020); Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease Outbreak (March 13, 2020).

90 cases of COVID-19 had already been reported in the Commonwealth, and the first local "superspreader" event had already been identified.[7/]

### B. The COVID-19 Pandemic Has Caused A Disaster Or Catastrophe In Massachusetts.

What followed was indisputably a public-health "disaster or catastrophe," and it quickly became apparent that the calamity was already taking place on March 10. Indeed, it has become increasingly clear that the number of confirmed cases at that time was in fact only a fraction of the actual extent of infection: a recent study concluded that on January 22, when 422 cases had been identified in the Chinese city of Wuhan, there actually could have been more than 12,000 undetected-but-symptomatic cases of COVID-19.[8/] Given the limited availability

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[7/] Massachusetts Department of Public Health, COVID-19 Cases in Massachusetts (March 10, 2010); Marc Aresenault, *How the Biogen leadership conference in Boston spread the coronavirus*, Boston Globe, (March 10, 2020).

[8/] Du, et al., Using the Covid-19 to influenza ratio to estimate early pandemic spread in Wuhan, China and Seattle, US (EClinicalMedicine, August 12, 2020), https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30223-6/fulltext. It has become apparent, moreover, that SARS-CoV-2 produces a significant number of asymptomatic infections, and that asymptomatic victims can transmit the virus to others.

of testing at the time, it is certain that there were many more active cases of COVID-19 in Massachusetts on March 10.

COVID-19's stealth and novelty gave it a considerable head start, and it continued to disseminate widely and rapidly for some time. We now know that SARS-CoV-2 has a high transmission rate, due at least in part to the prevalence of asymptomatic cases and its capacity for transmission by both asymptomatic and pre-symptomatic carriers. In addition, because SARS-CoV-2 is a novel virus, there were no "magic bullets" on hand: no innate immunity anywhere in the human population, no proven therapies, and no existing vaccine. Until effective remedies could be brought on line, or a safe and effective vaccine could be developed, the only way to limit the spread of the disease was through exactly the sort of collective action that Massachusetts has so far been able to take through the Office of the Governor: social distancing, the use of face coverings, limits on the size of gatherings, and limits on unnecessary movements and interpersonal encounters.[9/]

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[9/] Useful collective action, moreover, could only be taken on a statewide basis. The petitioners argue that "local boards of health" could have filled the gap. Petitioners' Br. at 25-28. This is nonsensical. There are 351 cities and towns in Massachusetts, each with its own autonomous public health structure many staffed by volunteers who

The pandemic's exponential trajectory in Massachusetts has been well-documented, and only someone with a gift for understatement could describe it as anything less than a "disaster" or a "catastrophe." At the peak of the surge, in the second half of April, Massachusetts reported a seven-day moving average of almost 2,500 new cases of COVID-19 per day[10/]—seven times the average as of September 1.[11/]

At around the same time, in late April, the Commonwealth experienced a one-day peak of 252 deaths and a seven-day moving average of more than 170 daily deaths.[12/] To give a sense of the

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meet infrequently. *See* mass.gov/service-details/overview-of-local-public-health-in-massachusetts. From a public-health perspective, moreover, the borders between these municipalities are entirely notional: patients, shoppers, commuters, and even pedestrians cross them without any concept that they are entering a different legal jurisdiction. Without a statewide baseline, the crazy quilt of municipal responses would be ineffective at best, and likely counter-productive.

[10/] Massachusetts Coronavirus Map and Case Count, nytimes.com/interactive/2020/us/Massachusetts-coronavirus-cases.html.

[11/] Massachusetts Coronavirus Map and Case Count, nytimes.com/interactive/2020/us/Massachusetts-coronavirus-cases.html.

[12/] *Id.* Moving averages give a more realistic picture of the shape of the curve than one-day totals, which may be affected by delays in reporting and other administrative factors. The highest one-day total of reported cases was 3,079 on April 23. (More cases were reported on April 24, but the higher total was caused by a reporting anomaly.)

magnitude of those numbers, the daily average number of deaths in Massachusetts from *all* causes in 2017 was about 161.[13/] The first COVID-19 related death in Massachusetts had been recorded on March 20.[14/] By April 30, more than 3,500 Massachusetts residents had died, and that number rose to more than 6,800 by the end of May.[15/] As of September 2, just five months after the first death, the death toll stands at 9,060.[16/] By way of comparison, approximately 10,300 service members from Massachusetts lost their lives over nearly four years in World War II.[17/]

Although virtually no Massachusetts communities have been spared, some were hit particularly hard, and the impacts have been especially severe in places populated by the Commonwealth's most vulnerable citizens. The most heart-breaking example, of course,

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13/ Massachusetts Department of Public Health, Massachusetts Deaths 2017 (October 2019), mass.gov/doc/2017-death-report/download.

14/ https://www.mass.gov/news/massachusetts-public-health-department-reports-states-first-death-from-covid-19

15/ Massachusetts Department of Public Health, COVID-19 Dashboard, April 30, 2020 and May 31, 2020.

16/ Massachusetts Department of Public Health, COVID-19 Dashboard, September 2, 2020.

17/ Congressional Research Service, American War and Military Operations Casualties: Lists and Statistics (updated July 29, 2020), p. 32, 35, fas.org/sgp/crs/natsc/RL32492.pdf.

occurred in long-term care facilities. Elderly people and people with pre-existing medical conditions are particularly vulnerable to COVID-19, and from the outset the disease has ravaged the assisted-living residences and skilled-nursing homes where many of them live. There are about 47,000 long-term care beds in Massachusetts[18/]; thus, when every bed is filled, the residents of these facilities make up only about .7% of the state's population. To date, however, the residents and staff of long-term care facilities make up about 20% of confirmed and probable COVID-19 cases in Massachusetts, and more than 64% of the deaths (5,815 out of 9,060).[19/]

Black and brown people, and the residents of poorer communities, have also been disproportionately affected. About 80% of Massachusetts residents are white, but Black people, indigenous people, and people of color account for almost 40% of COVID-related hospitalizations.[20/] The city of Chelsea, one of the poorest

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18/ Long-Term Care in Massachusetts: Facts at a Glance, https://bluecrossmafoundation.org/sites/default/files/Long%20Term%20Care%20in%20MA%20Facts%20At%20a%20Glance.pdf

19/ Massachusetts Department of Public Health, Dashboard of Public Health Indicators (Aug. 22, 2020).

20/ United States Census Bureau, census.gov/quickfacts/MA (as of July 19, 2020); Massachusetts Department of Public Health, Dashboard of Public Health Indicators (Aug. 22, 2020).

municipalities in the Commonwealth, was and remains a hotspot; in the early going, its infection rate was almost four times that of the state as a whole,[21/] and researchers who conducted a serology study in April found that nearly one-third of the Chelsea residents they tested were positive for antibodies to the virus.[22/] As of August 24, Chelsea—with fewer than 40,000 residents, or about 0.5 percent of the Commonwealth's population—had 3,379 confirmed cases of COVID-19 (almost 3% of the statewide total),[23/] and the city had suffered 152 COVID-related deaths—almost 2.9 percent of the statewide death toll.[24/]

As measured by these fundamental metrics, the pandemic has undoubtedly been the direst catastrophe to strike Massachusetts in recent history. The pandemic's toll to date has been greater, by several orders of magnitude, than the human cost of other noteworthy local disasters for which states of emergency were declared without

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[21/] Allen, Hohler, and Swidey, The Virus's Tale (Boston Globe, May 30, 2020).

[22/] Saltzman, Nearly A Third Of 200 Blood Samples Taken In Chelsea Show Exposure To Coronavirus (Boston Globe, April 17, 2020).

[23/] https://www.chelseama.gov/coronavirusupdates.

[24/] City of Chelsea, COVID-19 Case Status as of August 24, 2020, chelseama.gov/coronavirusupdates.

controversy: the Merrimack Valley gas explosions in 2018 killed one person, and the Blizzard of 1978 killed approximately 100 people and injured about 4,500 across the entire Northeast.[25/]

COVID-19's impact on *amici* and their constituents—hospitals and other health-care facilities, and the people who work in them—has been especially severe. Massachusetts is deservedly recognized for the quality of its health care, and the medical and public-health communities went on high alert at an early stage; by the time the Governor declared a state of emergency on March 10, several Boston-area hospitals had activated their own emergency operation plans (at least one as early as January 27) and were ramping up for an influx of COVID-19 patients.[26/]

Nevertheless, despite its first-class health care infrastructure, and despite the best efforts of its medical and public health communities to gear up in advance of the approaching wave, Massachusetts was still

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[25/] Massachusetts Executive Order No. 142 (Feb. 8, 1978); https://www.weather.gov/media/publications/assessments/Northeast%20Blizzard%20of%201978.pdf.

[26/] Allen, Hohler, and Swidey, The Virus's Tale (Boston Globe, May 30, 2020); McCluskey, Hospitals Readying for a Surge in Sickness (Boston Globe, Feb. 27, 2020); Thielking, "We Need Everyone for This": U.S. Hospitals Harnessing Resources to Brace for Any Spike in Coronavirus Cases (Stat News, Feb. 7, 2020).

vulnerable to the coronavirus in several critical ways. First and foremost was the lack of adequate testing.[27/ /] Local officials and private providers in the Commonwealth, like their counterparts in every other state, could use only those tests authorized by the CDC, and then use them only according to protocols established by the CDC. The test the federal agency initially rolled out, however, was defective, and even when the flaws were corrected the CDC initially restricted testing to patients who both displayed certain symptoms and had a recent history of travel to certain places.[28/] As we now know, however, even during that early period Massachusetts was already experiencing widespread community transmission, much of it through asymptomatic carriers. The limited testing we were allowed and able to perform was therefore an ineffective tool, leaving doctors and epidemiologists on the ground blind to the extent of the pandemic.

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[27/] Dialynn Dwyer, *Massachusetts is still behind on the level of coronavirus testing needed to safely reopen*, Harvard report says, May 12, 2020, https://www.boston.com/news/coronavirus/2020/05/12/harvard-global-health-institute-state-testing-targets-massachusetts

[28/] Shawn Boburg, *Inside the coronavirus testing failure: Alarm and dismay among the scientists who sought to help*, April 3, 2020, https://www.washingtonpost.com/investigations/2020/04/03/coronavirus-cdc-test-kits-public-health-labs/?arc404=true

As the number of patients mounted, hospitals and health care workers were undermined by persistent shortages, of both the equipment needed to care for the sick, and of the personal protective equipment (PPE) needed to safeguard those caring for them. Hospitals and other facilities found themselves desperately short of masks and face shields, gowns, gloves, and even the swabs used for COVID-19 testing, and the federal government donated only a small fraction of the PPE requested by the Commonwealth: "[i]n May, Massachusetts received the lowest amount of personal protective equipment from the federal government in the U.S. relative to its count of positive cases."[29/] Bidding wars for PPE broke out between hospitals and among states, and the competition for equipment even pitted states and municipalities against the Federal Emergency Management Agency, which disrupted the supply chain by confiscating materials that had been earmarked for local recipients.[30/] Hospitals and public health officials turned to

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[29/] Christine Willmsen, As Coronavirus Cases Surged Here, FEMA Gave Mass. Least PPE Per Case of Any State (July 23, 2020) , July 23, 2020, https://www.wbur.org/news/2020/07/23/fema-masks-ppe-massachusetts-coronavirus.

[30/] Joel Rose, A 'War' For Medical Supplies: States Say FEMA Wins By Poaching Orders, Apr. 15, 2020, https://www.npr.org/2020/04/15/835308133/governors-say-fema-is-outbidding-redirecting-or-poaching-their-medical-supply-or#:~:text=Live%20Sessions-

unusual and unprecedented sources to fill the critical gaps. Improvised technology was pressed into service to clean and disinfect face masks so that they could be reused, and private benefactors evaded obstacles thrown up by the federal government to bring in necessary equipment from foreign sources.[31/]

Confronted with a daily tide of patients, many of whom required long stays and exhaustive care, hospitals would have faced critical shortages of beds in general, and of ICU beds and ventilators in particular. By April 21, COVID-19 patients occupied about 4,000 of the Commonwealth's hospital beds, and on April 26, ICU occupancy by COVID patients peaked at 1,089 patients (and total ICU occupancy reached 1,564). [32/] In normal times, Massachusetts has 1,112 staffed

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,A%20'War'%20For%20Medical%20Supplies%3A%20States%20Say%20FEMA%20Wins,of%20poaching%20supplies%20they%20ordered.; Evan; White, Milford says FEMA took personal protective equipment meant for town, feds respond, Apr. 11, 2020, https://www.boston25news.com/news/milford-says-fema-took-personal-protective-equipment-meant-town-feds-respond/5F44IHCIMVB7XIW6PCLBX4WWRI/.

[31/] WBUR, Somerville Site Up And Running To Decontaminate N95 Masks At No Cost To Mass. Health Providers (April 11, 2020); CNN, New England Patriots team plane with 1.2 million N95 masks arrives from China to help ease shortages (April 3, 2020).

[32/] Nik DeCosta-Klipa, *New charts show Massachusetts hospital capacity ahead of coronavirus surge*, April 11, 2020, https://www.boston.com/news/local-news/2020/04/11/massachusetts-coronavirus-hospital-bed-capacity

adult ICU, coronary care unit, and surgical ICU beds.[33/] Even with a rapid expansion in "surge" capacity, which increased the number of available intensive care beds and medical-surgical beds and avoided a system-wide overload, the hospital system was pushed to the brink, and two of the five emergency field hospitals set up to accept overflow were pressed into service.[34/]

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33/ *Id*.

34/ The strain the virus put on our health care system affected more than just the afflicted patients and the resources devoted to helping them. The "second toll" of the pandemic was its impact on people with other medical needs—both urgent and routine—who were deterred from seeking care at offices and hospitals seemingly overrun with COVID patients. Carey Goldberg, Mass. Governor, Hospital Leaders Urge Patients Not to Fear Seeking Urgent Care, Apr. 25, 2020, https://www.wbur.org/commonhealth/2020/04/23/mass-governor-hospitals-fear-urgent-care. In addition, there was what has been called the "parallel pandemic" of professional burnout among health care providers, who were forced not only to "cope with the societal shifts and emotional stressors faced by all people," but with a "greater risk of exposure, extreme workloads, moral dilemmas, and a rapidly evolving practice environment that differ greatly from what they are familiar with." Dzau, V., Kirch, D., & Nasca, T., New England Journal of Medicine, *Preventing a Parallel Pandemic—A National Strategy to Protect Clinicans' Well-Being*, Aug. 6, 2020; Shanafelt, T., Ripp, J., and Trockel, M., JAMA, *Understanding and Addressing Sources of Anxiety Among Health Care Professionals During the COVID-19 Pandemic*, Apr. 7, 2020.

## II. THE GOVERNOR HAS USED HIS EMERGENCY POWERS TO LEAD AND FACILITATE A SWIFT, INFORMED, AND EFFECTIVE RESPONSE.

After an initial surge that was nearly as bad as anything experienced in the United States, Massachusetts has emerged, six months later, in a far better position from a public health standpoint than most other states. There can be no doubt that the Governor's informed response was essential to this outcome. He did two critical things: (1) he listened to the data and the science; and (2) he moved quickly, in ways that no other actor or combination of actors could have done.

### A. The Governor's response was swift.

COVID-19 spreads exponentially, not in linear fashion: one person infects three, three infect nine, nine infect twenty-seven, and so on. Within a few "generations" the disease is rampant, and each generation is measured in days. Mitigation measures, like face coverings and social distancing, effectively slow the rate of infection,[35/] but time is of the essence when it comes to implementing them. "The explosion in cases without social distancing measures happens later,

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[35/] The term "mitigation measures" broadly encompasses non-pharmaceutical interventions designed to combat the spread of COVID-19.

and by the time it is happening, the lagged effects of these measures mean that it is too late to stop it."[36/] Every doubling period we miss means "relentless," exponential infection.[37/] Thus, when it comes to fighting the coronavirus, a delay of "10 days can be a lifetime."[38/]

To see this principle in effect, we need look no further than the impact of a well-reported corporate meeting in Boston in late February. That single conference, at a single venue, which spawned 99 cases of COVID-19 among its participants, ultimately caused roughly 20,000 cases of COVID-19, occurring across four Massachusetts counties, by early May.[39/]

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[36/] Garuccio, et al., *Strong Social Distancing Measures in the United States Reduced the COVID-19 Growth Rate*, May 14, 2020, Health Affairs. doi: 10.1377/hlthaff.2020.00608.

[37/] Ethan Siegel, Mar. 17, 2020, Why 'Exponential Growth' Is So Scary For The COVID-19 Coronavirus, Mar. 17, 2020, https://www.forbes.com/sites/startswithabang/2020/03/17/why-exponential-growth-is-so-scary-for-the-covid-19-coronavirus/#632b3fba4e9b

[38/] Jason Horowitz , *Italy, Pandemic's New Epicenter, Has Lessons for the World*, March 21, 2020, https://www.nytimes.com/2020/03/21/world/europe/italy-coronavirus-center-lessons.html

[39/] Jonathan Saltzman, *Biogen conference likely led to 20,000 COVID-19 cases in Boston area, researchers say*, Aug. 25, 2020, https://www.bostonglobe.com/2020/08/25/business/biogen-conference-likely-led-20000-covid-19-cases-boston-area-researchers-say/

The Governor's response was swift and thorough—and incomparably more rapid and encompassing in its execution than anything that could have been accomplished without the exercise of his authority under the Civil Defense Act. Upon declaring a state of emergency, he issued guidance for the public and for Executive Branch employees about large events and travel (March 10); issued an order prohibited gatherings of over 250 people (March 13), and, two days later, prohibited gatherings of 25 or more.

Three additional emergency orders ensured patients would have "unimpeded" access to health care services.[40/] First, realizing the importance of allowing patients to access virtual medical services, on March 15, the Governor required various health insurers to "allow in-network providers to deliver clinically appropriate, medically necessary covered services to members via telehealth."[41/] Second, two days later, understanding that a shortage of physicians could be devastating, the Governor issued emergency orders expediting the onboarding process of more licensed health care professionals, including physicians who

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40/ *See* COVID-19 Order No. 25 (Order Expanding Access to Inpatient Services).

41/ Charles D. Baker, Order Expanding Access to Telehealth Services and to Protect Health Care Providers (Mar. 15, 2020).

had retired within the last year, and providers in good standing licensed in other states, who could now obtain emergency licenses to practice in person or through telemedicine.[42/] Finally, the Governor issued an emergency order focused on expanding access to inpatient services by, for example, limiting cost sharing by the insured for services related to COVID-19 – a measure the Civil Defense Act explicitly contemplates.[43/]

Though quick and comprehensive in relation to the nature of the emergency, the Governor's actions also were measured, drawing from the deep reservoir of medical and scientific expertise at his disposal. Four days after declaring a state of emergency, the Governor launched the COVID-19 Response Command Center: a team of subject matter experts and decision-makers from across state government including Massachusetts Emergency Management Agency and Massachusetts

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42/ *Baker-Polito Administration Announces Changes to Expedite Health Care Licensing, Increase Support for Local Boards of Health and Small Businesses*, March 17, 2020, https://www.mass.gov/news/baker-polito-administration-announces-changes-to-expedite-health-care-licensing-increase

43/ COVID-19 Order No. 25 (Order Expanding Access to Inpatient Services); Civil Defense Act § 7(i) (allowing "[r]egulation of the business of insurance and protection of the interests of the holders of insurance policies and contracts and of beneficiaries thereunder and of the interest of the public in connection therewith.").

Executive Office of Public Safety and Security, and led by Massachusetts Health and Human Services Secretary Marylou Sudders. By March 25, the Governor announced a COVID-19 Advisory Board of medical experts to advise the state's COVID-19 Response Command Center in its pandemic response.[44/] The COVID-19 Advisory Board includes Department of Public Health Commissioner Dr. Monica Bharel, and specialists in fields including infectious disease and emergency preparedness, from institutions like MGH and the Broad Institute.

### B. The Governor's response was data- and science-driven.

In April 2020, the scope and nature of the pandemic were rapidly emerging both abroad and at home. Governments and health care systems everywhere were playing catch-up, but in Massachusetts the process was well under way. By the first week of April, the Command Center had outlined projections and described its response to an anticipated surge of COVID-19 cases in the Commonwealth, which

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[44/] *Baker-Polito Administration Announces COVID-19 Response Command Center Advisory Board of Medical Experts, Infectious Disease Specialists*, March 25, 2020, https://www.mass.gov/news/baker-polito-administration-announces-covid-19-response-command-center-advisory-board-of

included a significant increase in hospital capacity, staffing and equipment.[45/] The Governor, the Command Center, and the Advisory Board explored and implemented mitigation measures designed to minimize disease spread, both by flattening the curve, and by supporting the health care system in ways both known and innovative.

First, the Governor and his advisors put in place measures to flatten the curve. In addition to the limitations on large gatherings discussed above, early findings in the medical and scientific community suggested that "multifaceted public health measures," including social distancing measures, would be effective.[46/] Indeed, a modelling study published on March 25 concluded interventions based on physical distancing "have a strong potential to reduce the magnitude of the epidemic peak of COVID-19 and lead to a smaller number of overall cases."[47/] One day earlier, a Massachusetts DPH Public Health Advisory had already instructed people in the Commonwealth to keep a distance of 6 feet between themselves and other people, and to stay at

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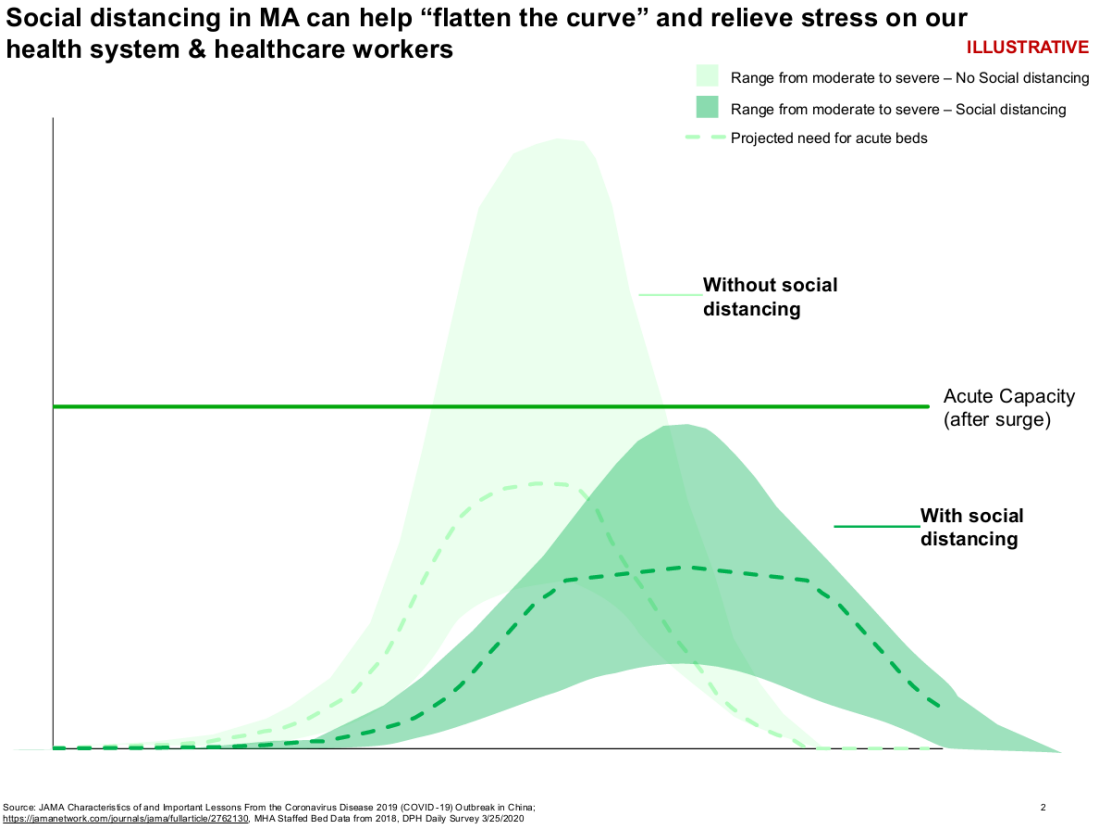
45/ *Id*.

46/ JAMA, Association of Public Health Interventions with Epidemiology of the COVID-19 Outbreak in Wuhan, China, April 10, 2020.

47/ The effect of control strategies to reduce social mixing on outcomes of the COVID-19 epidemic in Wuhan, China: a modelling study, at 269.

home. Relatedly, non-essential movements and interactions were limited as of March 24, 2020.[48/]

Command Center modeling, as early as March, clearly showed the impact that mitigation measures like social distancing could have on the anticipated flood of COVID-19 infections:




Social distancing was a start, but it would not be enough. On April 3, 2020, the White House Coronavirus Task force and the CDC

48/ COVID-19 Order No. 13.

recommended that members of the public wear masks, even if made of nothing more than cotton.[49/] On April 10, the Governor issued an advisory regarding face masks, and, on May 1, 2020, an order regarding the use of a mask or face covering in public if social distancing was not possible. [50/]

Not only, however, did the Commonwealth need targeted, tailored strategies for flattening the curve, but, mounting evidence across an ocean and as close as New York City showed what could happen if the health care system was overwhelmed. Shoring up the health care system in Massachusetts included basic necessities like PPE, but also innovation drawn from the deep, scientific and medical community we have here. The Governor's Office also achieved remarkable, statewide action that accomplished for both the state as a whole and for individual communities within it, what no municipality could have accomplished on its own.

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[49/] Fisher, et al., *Factors Associated with Cloth Face Covering Use Among Adults During the COVID-19 Pandemic — United States, April and May 2020*, July 17, 2020, https://www.cdc.gov/mmwr/volumes/69/wr/mm6928e3.htm

[50/] *Id*.

Public health advocates called for nationwide, "widespread 'contact tracing,' to help track and halt the spread" of COVID-19.[51/] A paper published last month in the Lancet added to the body of research showing that contact tracing can be an effective mitigation strategy "if tracing coverage is high and if the process is fast."[52/] Massachusetts was the first state in the country to do this. In fact, researchers at Johns Hopkins held up Massachusetts as a model for how contact tracing would need to be done, with a lead researcher noting "I hope that the rest of the country can and will follow the MA lead!"[53/]

That lead involved a "landmark" initiative through a collaboration with the global health nonprofit Partners in Health.[54/] The goal is to track down people who have tested positive, identify their

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51/ Johns Hopkins Bloomberg School of Public Health, *A National Plan to Enable Comprehensive COVID-19 Case Finding and Contact Tracing in the US*, April 10, 2020, at 3-4, & n.19.

52/ Kretzschmar, et al., *Impact of delays on effectiveness of contact tracing strategies for COVID-19: a modelling study*, at e458, July 16, 2020, https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930157-2.

53/ Joe Dwinell, *Boston Herald, Massachusetts hailed as coronavirus contact tracing model to opening up economy*, Apr. 14, 2020, https://www.bostonherald.com/2020/04/13/massachusetts-hailed-as-covid-19-contact-tracing-model-to-opening-up-economy/.

54/ Partners in Health Helping State Trace Contacts of COVID-19 Patients in Landmark Agreement with MA Gov's Office, https://www.pih.org/ma-response.

close contacts, and ask all of those people "to isolate until they are no longer contagious."[55/] By the end of the first week, contact tracers had reached 765 Massachusetts residents who had tested positive; those people identified more than a thousand close contacts, and the tracers had reached 626 of those close contacts.[56/] Contact tracing allowed Massachusetts to "go[] on the offensive" against COVID-19, instead of sitting back and waiting "to get creamed," in the words of PIH's chief medical officer.[57/] Nor was contact tracing the only such extraordinary initiative the Governor was able to launch. When the PPE supply chain failed and no federal "cavalry… appear[ed] to be coming,"[58/] the Governor's Office announced over $10 million in funding to help local

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55/ Martha Bebinger, C*OVID-19 Contact Tracing Has Launched in Mass. Here's How The Effort Is Going So Far*, April 18, 2020, https://www.wbur.org/commonhealth/2020/04/18/contact-tracing-massachusetts-covid19-coronavirus.

56/ *Id.*

57/ Martha Bebinger, *Why Charlie Baker Thinks 'Contact Tracing' Cases May Help Mass. Slow—Or Stop—COVID-19*, April 3, 2020, https://www.wbur.org/commonhealth/2020/04/03/contact-tracing-coronavirus-massachusetts-baker

58/ Andrew Artenstein, M.D., *In Pursuit of PPE*, N Engl J Med 2020; 382:e46, April 17, 2020, https://www.nejm.org/doi/full/10.1056/NEJMc2010025.

companies make PPE and other critical items, like ventilators, sanitizers, and thermometers.[59/]

And the Governor continued to work with health care experts to shore up hospitals bracing for a flood of patients. Recognizing a critical shortage of intensive care unit beds, the Governor said the state needed more ICU beds, emergency field hospitals and ventilators, to reduce the strain on hospitals.[60/] In April, Massachusetts put up five emergency field hospitals with roughly 1,500 acute care beds.[61/] Command Center modeling shows how critical the additional beds would be if the surge proceeded as anticipated:

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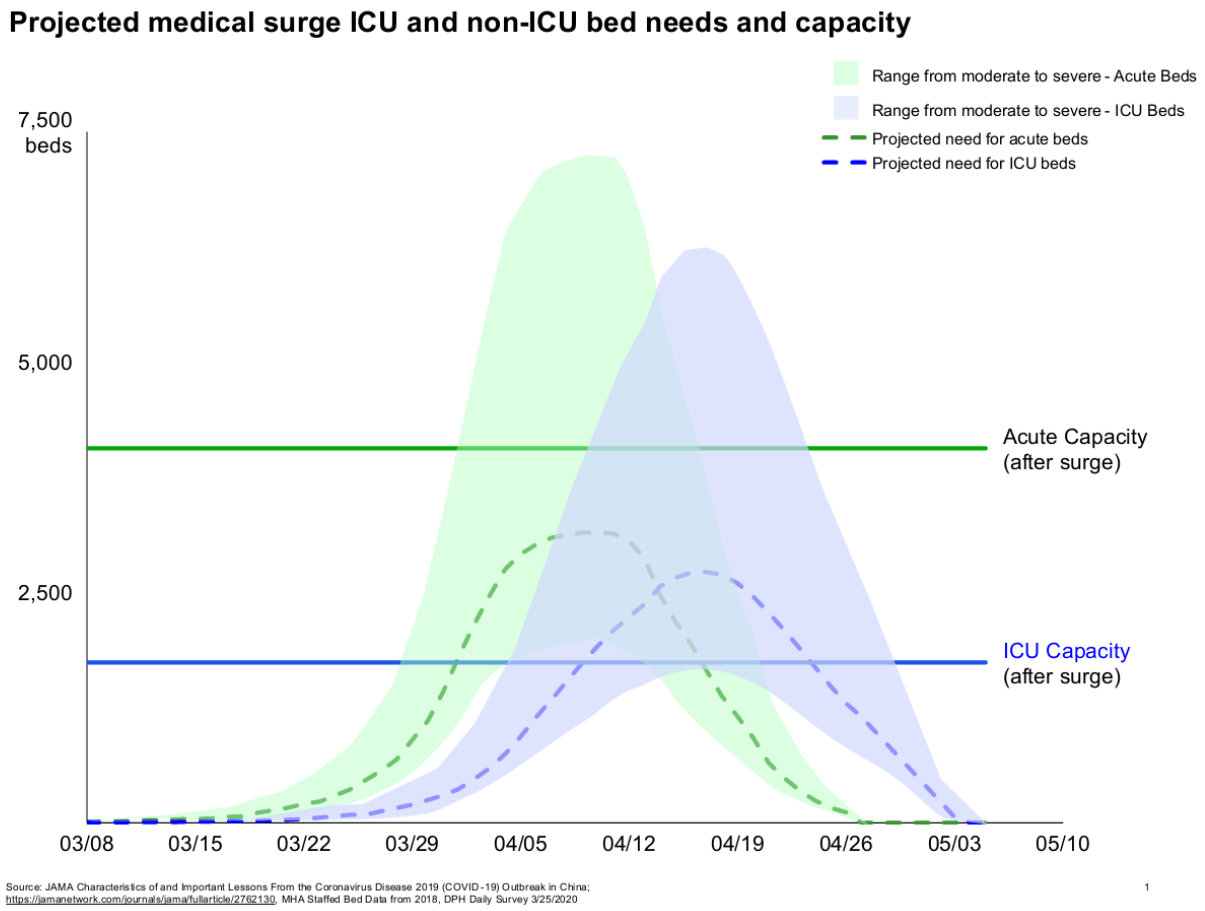
[59/] Baker-Polito Administration Launches Manufacturing Emergency Response Team to Support Supply Production, Apr. 13, 2020, https://www.mass.gov/news/baker-polito-administration-launches-manufacturing-emergency-response-team-to-support-supply.

[60/] Laney Ruckstuhl, *Baker Upping Health Care Resources as COVID-19 Models Predict Up to 172,000 Total Mass. Cases*, April 2, 2020, https://www.wbur.org/commonhealth/2020/04/02/governor-massachusetts-curve-model-coronavirus.

[61/] Angus Chen, *Most of the Space in Massachusetts Field Hospitals Went Unused. Now, Some Are Looking to Shut Down*, May 18, 2020, https://www.wbur.org/commonhealth/2020/05/18/massachusetts-field-hospitals-coronavirus-closing




Most recently, the Governor worked to nimbly respond to threats to the Commonwealth's current, relative stability in terms of disease spread. This summer, "case counts, positive test rates, hospitalizations, and deaths from COVID-19 are significantly higher in many other States," which "may present a new source of transmission within the Commonwealth" because of travelers arriving here "from States and

countries where infection rates for COVID-19 are high."[62/] As a result, the Governor ordered, with circumstance-specific exceptions, a mandatory 14-day quarantine for travelers entering Massachusetts.[63/]

To be sure, not every one of the actions the Governor's Office took, as described above, was taken pursuant to the Civil Defense Act. Actions like finding innovative ways to obtain critical PPE, though, demonstrate the way the Governor's Office was able to use its bargaining power and its market resources to confront the various faces of the pandemic. Indeed, the constellation of the Governor's actions, including under the Civil Defense Act, shows how he is using the calibrated, targeted tools available to him to address the breadth and depth of this catastrophe.

And these uses of the Governor's emergency powers worked.

### C. The Governor's response was effective.

By June 2020, Massachusetts had reported the lowest COVID-19 transmission rate in the country, and was continuing to see a decline

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62/ Charles D. Baker, Order Instituting a Mandatory 14-Day Quarantine Requirement for Travelers Arriving in Massachusetts, Covid-19 Order No. 45, July 24, 2020.

63/ *Id.*

in COVID-19 diagnoses and hospitalizations.[64/] By July, it was becoming even clearer why: researchers reported preliminary conclusions that social distancing policies, including "closures of restaurants, bars, and entertainment-related businesses substantially slowed the spread of COVID-19."[65/] Researchers have now concluded, for example, that allowing one, additional NBA or NHL game to proceed, with fans, "increased the cumulative number of COVID-19 deaths in affected US counties by 9 percent."[66/]

Conversely, when mitigation measures like stay-at-home orders are implemented, transmission of the virus slows dramatically. According to one study, stay-at-home restriction caused the

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64/ Jackson Cote, *Poll: As Mass. reports lowest rate of coronavirus transmission in the US, majority of residents still wary of plan travel, using public transportation and eating out*, June 24, 2020, https://www.masslive.com/coronavirus/2020/06/poll-as-mass-reports-lowest-rate-of-coronavirus-transmission-in-the-us-majority-of-residents-still-wary-of-plane-travel-using-public-transportation-and-eating-out.html

65/ Garuccio, et al., *Strong Social Distancing Measures in the United States Reduced the COVID-19 Growth Rate*, May 14, 2020, Health Affairs. doi: 10.1377/hlthaff.2020.00608

66/ Ahammer, et al., *Mass gatherings contributed to early COVID-19 spread: Evidence from US sports*, August 6, 2020, https://voxeu.org/article/mass-gatherings-contributed-early-covid-19-mortality#:~:text=Our%20estimates%20suggest%20that%20one,of%20COVID%2D19%20deaths%20per

"doubling" time for COVID-19 infection to increase by 459.70 percent.[67/]

In April, Massachusetts ranked third in the country for the highest number of COVID-19 infection. On June 25, 2020, Massachusetts was one of only four states "on track to contain" the COVID-19 outbreak.[68/] Incredibly, the beds of the emergency field hospitals were never completely filled. By May 26, 2020, the largest emergency field hospital announced it would no longer take new patients.[69/] Universal masking in the healthcare system, moreover, was associated with flattening the COVID-19 curve among healthcare

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67/ Lurie, et al., *COVID-19 epidemic doubling time in the United States before and during stay-at-home restrictions*, The Journal of Infectious Diseases, https://doi.org/10.1093/infdis/jiaa491

68/ Frank O'Laughlin, *Massachusetts is 'on track to contain' COVID-19 outbreak, model shows*, June 25, 2020, https://whdh.com/news/massachusetts-is-on-track-to-contain-covid-19-outbreak-model-shows/.

69/ Boston Hope Field Hospital No Longer Taking New Coronavirus Patients, May 26, 2020, https://boston.cbslocal.com/2020/05/26/boston-hope-field-hospital-no-new-patients-massachusetts-coronavirus-covid-19-news/#:~:text=Boston%20Hope%20Field%20Hospital%20No%20Longer%20Taking%20New%20Coronavirus%20Patients,-May%2026%2C%202020&text=BOSTON%20(CBS)%20%E2%80%93%20As%20Massachusetts,no%20longer%20take%20new%20patients.

workers, decreasing COVID-19 infections, even while the infection rate continued to rise in the surrounding community.[70/]

The relief of emergency field hospitals and mitigation measures released our health care system from the vise it had been in before the Governor's emergency measures. In the throes of the April surge, it was hard to imagine the wave of disease would abate. But it did, as a result of the Governor's emergency actions to stop the spread of the virus, and, when it did, Massachusetts still had a highly functioning health care system that was able to meet the public's health care needs.[71/]

## III. THE EMERGENCY CONTINUES, AND THE NEED FOR COLLECTIVE ACTION HAS NOT ABATED.

The crisis that began last winter is far from over. For one thing, while doctors, nurses, and hospital administrators may no longer have waking nightmares about running out of bed space or being compelled

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70/ Lan, et al., *Effects of universal masking on Massachusetts healthcare workers' COVID-19 incidence*, Aug. 13, 2020, https://www.medrxiv.org/content/10.1101/2020.08.09.20171173v1.full.pdf

71/ Basu and Phillips, P*rimary Care Practice Finances in the United States Amid the COVID-19 Pandemic*, Health Affairs, June 25, 2020, https://doi.org/10.1377/hlthaff.2020.00794.

to ration ventilators, health care resources are still strained, and PPE in particular remains in short supply.

Just as important, we now know that even where the tide has ebbed, it can flow again, and that it will rise most dramatically where the determination to stem it through collective action has diminished, or where the capacity to do so has been depleted. This has been the experience of the United States as a whole: at the end of May, the initial surge appeared to have at least reached a plateau, with daily new cases leveling off at just about 20,000 nationwide, and positive test rates at around 5% and falling.[72/] Around Memorial Day, though, with the active encouragement of the federal government, many states and localities began to relax restrictions on gatherings and commerce, and

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72/ The positive test rate—that is, the percentage of COVID-19 tests that come back positive—is an important metric because it reflects both the extent of the disease and the vigor of the response to it. As one respected resource has put it: "If a positivity rate is too high, that may indicate that the state is only testing the sickest patients who seek medical attention, and is not casting a wide enough net to know how much of the virus is spreading within its communities. A low rate of positivity in testing data can be seen as a sign that a state has sufficient testing capacity for the size of their outbreak and is testing enough of its population to make informed decisions about reopening." The World Health Organization advises that, before a state or country reopens, its positivity rate should remain at 5% or lower for at least 14 days. Johns Hopkins University & Medicine, Coronavirus Resource Center, coronavirus.jhu.edu/testing/testing-positivity.

the picture changed. By the middle of July it was in some ways grimmer than before: even as the overall number of tests continued to increase, the positive test rate had risen, and upwards of 65,000 new cases were being diagnosed every day.[73/]

The nationwide perspective, moreover, blurs the focus and may fail to convey the particularized suffering that this summer's resurgence inflicted on the localities that bore the brunt of it. The initial surge had been concentrated in certain "hot spots," too. Some were situated at or near the busiest entry points of travelers from abroad, and some had the bad luck to experience early "superspreader" events—like the corporate conference in Boston in February—that caused extensive regional dissemination of the virus.[74/]

The locations of the new outbreaks during the summer tended to share a different characteristic: collective action that started too late, or ended too soon. Some states, like Arizona and Florida, had never taken scientific recommendations about social distancing, face coverings, and

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[73/] Lemieux, et al., *Phylogenetic analysis of SARS-CoV-2 in the Boston area highlights the role of recurrent importation and superspreading events*, August 25, 2020, https://www.medrxiv.org/content/10.1101/2020.08.23.20178236v1.

[74/] Lemieux, et al., *Phylogenetic analysis of SARS-CoV-2 in the Boston area highlights the role of recurrent importation and superspreading events* (2020).

limited gatherings fully to heart. Other states, however, had acted effectively and achieved initial success, only to experience setbacks when their leaders reversed effective executive actions in ways that allowed the virus to regain and even extend its prior hold. Governor Newsom of California, for example, issued an executive order requiring residents of his state to shelter in place on March 19,[75/] and his timely intervention bore fruit. The largest state in the Union, with nearly 40 million residents, California had reported about 50,000 infections and slightly more than 2,000 deaths by the end of April.[76/] (The comparable figures for New York, with about half the population, were over 300,000 cases and 18,000 deaths, and for Massachusetts, with about one-sixth the population, were 62,000 cases and 3,700 deaths.) By the time Governor Newsom began to actively ease restrictions in mid-May, California still had well under 100,000 known infections, and the state had been widely hailed as an exemplar of an effectively aggressive COVID response.

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75/ California Executive Order N33-20, March 19, 2020, fmcsa.dot.gov/emergency/California-governor-newsom-shelter-place-executive-order-n33-20.

76/ California Coronavirus Map and Case Count, nytimes.com/interactive/2020/us/California-coronavirus-cases.html.

But the celebration was premature. Lulled into a false sense of security, Californians thought, as one epidemiologist later put it, that "they were safe to just have parties, go to overcrowded beaches, to get close to other people and take off their masks."[77/] And with restrictions on businesses and other public venues eased, they had outlets for their misplaced optimism. Too much commercial and social activity fanned the flames of the inevitable small outbreaks, and even as the state government used harsh measures to roll back the reopening—re-imposing a stay-at-home order over most of California on July 13—the disease spread widely and rapidly. By the end of July, California had surpassed a half-million confirmed cases and was rapidly approaching 10,000 deaths.[78/]

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[77/] Singh, "*They feel invincible": how California's coronavirus plan went wrong* The Guardian, July 5, 2020, theguardian.com/us-news/2020/jul/05/California-coronavirus-outbreak-cases-went-wrong (quoting Dr. Lee Riley, University of California at Berkeley).

[78/] The same kind of scenario played out in Spain. Like Massachusetts, Spain was hit early and hard by the coronavirus, reaching a daily average of nearly 9,000 new cases and 1,000 deaths (out of a population of about 46 million) by late March. A strong response flattened the curve to the point where Spain was experiencing a daily average of fewer than 200 new cases in mid-June, but then a precipitous re-opening sparked a rebound, and by mid-August the daily average of new cases exceeded 5,500. Minder, S*pain's Reopening Stumbles as Virus Cases Rise Among Young People*, New York Times, July 23, 2020, https://www.nytimes.com/2020/07/23/world/europe/spain-

Even though it had been hit hard by the virus in the early going, Massachusetts managed to avoid the worst-case scenario by reacting swiftly and cohesively, taking measures that could only be taken in an executive government-led response, and it has more recently avoided the resurgences experienced in places like California and Spain by maintaining vigilance and deploying targeted, rapid-response mechanisms that could not be implemented by anybody but the Governor, such as: (1) his "Travel Order" of July 24, which placed certain restrictions on travelers entering Massachusetts, but did not isolate the Commonwealth, and (2) his "Third Revised Order Regulating Gatherings Throughout The Commonwealth," issued on August 7, which imposed (or more precisely, re-imposed) limitations on certain gatherings, but did not shut down businesses that had already re-opened or otherwise restrict the activities of the public at large.[79/] These actions have achieved substantial benefits at minimal cost

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coronavirus-reopening.html. As a consequence, Spain has had to retrench and re-impose harsh restrictions on businesses and public gatherings. See e.g., Rolfe, *Restrictions return in Spain as coronavirus infections spike again,* Washington Post, July 24, 2020; Gallardo, *Spain bans smoking, shuts nightclubs under new coronavirus restrictions*, Politico, August 14, 2020.

[79/] Charles D. Baker, Third Revised Order Regulating Gatherings Throughout the Commonwealth, Covid-19 Order No. 46, August 7, 2020.

because they were both timely and tailored to the circumstances at hand.

The authority granted by the CDA has played, and will continue to play, a critical role in enabling Massachusetts to fight the coronavirus. Leadership at the federal level has been inconsistent, absent in important areas, and at times actively counter-productive.[80/] Local volunteer public health boards certainly could not have done the job (especially considering the pandemic's disparate impact on poorer communities whose local boards may lack necessary resources), nor could market forces or the recommendations of any number of practitioners and scientists.

What's past, moreover, will be prologue. Another outbreak will come. This is all but certain, with flu season approaching and students returning to their classrooms and dormitories. The question before the Court is what tools we will have at our disposal to continue to flatten the shape of the curve and to blunt the virus's attack. With the current structure, we are optimistic that Massachusetts will be up to the

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80/ Bump, *The rise and fall of Trump's obsession with hydroxychloroquine*, Washington Post, April 24, 2020; Stolberg, *Top U.S. Officials told C.D.C. to Soften Coronavirus Testing Guidelines*, New York Times, August 26, 2020.

challenge. If the Petitioners prevail, however, then when the inevitable occurs the Commonwealth will lack the wherewithal to defend itself, and people will needlessly die. As the representatives of health care providers who lived and worked through the darkest nights of last March and April, we can say with all sincerity, and on behalf of every single one of our constituents and patients, that we do not wish to repeat history.

## CONCLUSION

For the foregoing reasons, the *amici* respectfully request that the Court respond to the reported issues as the Respondent urges.

Respectfully submitted,

MASSACHUSETTS HEALTH & HOSPITAL ASSOCIATION, MASSACHUSETTS MEDICAL SOCIETY, ORGANIZATION OF NURSE LEADERS,

By their attorneys,

/s/ Elissa Flynn-Poppey

Elissa Flynn-Poppey, BBO No. 647189
Emily Kanstroom Musgrave, BBO No. 678979
Andrew Nathanson, BBO No. 548684
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000
EFlynn-Poppey@mintz.com
EKMusgrave@mintz.com
ANathanson@mintz.com

Dated: September 4, 2020

## CERTIFICATE OF COMPLIANCE

**Pursuant to Rule 16(k) of the**
**Massachusetts Rules of Appellate Procedure**

I, Elissa Flynn-Poppey, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 17 (c)(cover, length, content);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportionally spaced font Times New Roman at size 14 and contains 7,478 words.

/s/ Elissa Flynn-Poppey

## CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on September 4, 2020, I have made service of this Brief upon the attorney of record for each party via the Court's CM/ECF system. Furthermore, courtesy copies will also be emailed to the attorney of record for each party.

Danielle Huntley Webb
HUNTLEY PC
One Boston Place, Suite 2600
Boston, MA 02108

Michael P. DeGrandis
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036

Amy Spector
Office of the Attorney General
1 Ashburton Place, Room 2019
Boston, MA 02108

Douglas S. Martland
Office of the Attorney General—Government Bureau
One Ashburton Place, 20th Floor
Boston, MA 02108

Julia Kobick
Office of the Attorney General—Government Bureau
One Ashburton Place, 20th Floor
Boston, MA 02108

/s/ Elissa Flynn-Poppey

Elissa Flynn-Poppey, BBO No. 647189
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000
EFlynn-Poppey@mintz.com