COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NO. 2022-J-0166

JAMES H. SHANE,

Plaintiff-Appellee,

v.

GEORGE K. REGAN, JR.,

Defendant-Appellant.

Suffolk Superior Court 1984-CV-01643A

MOTION OF THE MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION AND THE NEW ENGLAND FIRST AMENDMENT COALITION FOR LEAVE TO FILE AMICUS BRIEF

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Proposed amici the Massachusetts Newspaper Publishers Association ("MNPA") and New England First Amendment Coalition ("NEFAC") respectfully move for leave to file an amicus brief in the form attached hereto as **Exhibit A** in support of the Petition for Interlocutory Review in this case. Amici submit that the Petition presents an issue worthy of interlocutory appellate review: whether G.L. c. 231, § 92 violates Article 16 of the Declaration of Rights of the Massachusetts Constitution by permitting recovery in defamation for the publication of truthful matters of private concern if the speaker was motivated by common law malice, defined as "disinterested malevolence."

This case is of particular importance because it poses the risk that persons who disseminate accurate information will be subject to lawsuits and damages awards not because of factual errors, but because of an assessment of their underlying motives in publishing the truth.

The harm caused by such a rule would be compounded by the vagaries of determining what is or is not a matter of private concern that permits inquiry into the motives of a person who speaks the truth. The plaintiff in this case, for example, alleges that he was defamed by false reports that he engaged in "unlawful" conduct such as "coercion and bribery," matters typically considered of public concern. Complaint, ¶ 10; see also Restatement

(Second) of Torts § 652D, cmt. f (1977) (those accused of crimes are persons of public interest). The amici believe that such a rule of law would drastically restrict the free flow of accurate information by encouraging both self-censorship and retaliatory suits designed to suppress unpopular truths.

Because of the Commonwealth's history and practice of protecting the rights of free speech, amici respectfully submit that the Petition presents an issue worthy of interlocutory appellate review.

Interest of Proposed Amici

MNPA is an association of approximately forty daily and sixty weekly newspapers published throughout the Commonwealth. Its membership includes virtually all Massachusetts daily newspapers, and it is the recognized spokesman for all such newspapers in the Commonwealth. MNPA has filed briefs as an amicus curiae in Massachusetts appellate courts on numerous occasions over the past forty years in matters affecting the interests of Massachusetts newspapers. See, e.g., Shaari v. Harvard Student Agencies, Inc., 427 Mass. 129, 129 (1998); Boelter v. Bd. of Selectmen of Wayland, 479 Mass. 233 (2018); Carey v. Gatehouse Media Massachusetts I, Inc., 92 Mass. App. Ct. 801 (2018); Pineo v. Executive Council, 412 Mass. 31 (1992).

NEFAC's mission is to advance and protect the five freedoms of the First Amendment, and the principle of

the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. In collaboration with other advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world. The Coalition is a nonpartisan, nonprofit organization that supports the rights of New England journalists to access government records and information, including judicial records and information. The Coalition has filed numerous other amicus briefs in Massachusetts courts. See, e.g., Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016); Commonwealth v. Lucas, 472 Mass. 387 (2015); Butcher v. Univ. of Massachusetts, 483 Mass. 742 (2019); Commonwealth v. George W. Prescott Pub. Co., LLC, 463 Mass. 258 (2012).

Proposed Amici were not able to determine prior to filing whether Plaintiff-Respondent intends to file an opposition to this motion.

WHEREFORE, proposed amici respectfully request that their motion for leave to file an amicus brief be granted.

Respectfully submitted,

PROPOSED AMICI THE MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION and THE NEW ENGLAND FIRST AMENDMENT COALITION

By their attorneys,

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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULES

The undersigned hereby certifies that this motion complies with the typeface requirements of Mass. R. A. P. 20(a)(4)(A)-(C) and the type style requirements of Mass. R. A. P. 20(a)(4)(A)-(C) because this Brief has been prepared in the monospaced font Courier New at size 12. The motion also complies with the requirements Appeals Court Rule 20.0 (a) because it does not exceed 5 pages of text in monospaced text or 1000 words in proportional font compliant with Mass. R. A. P. 20(a)(4)(A)-(C).

/s/ Jonathan M. Albano
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CERTIFICATE OF SERVICE

I, Jonathan M. Albano, hereby certify that on April 14, 2022, I served the attached MOTION FOR LEAVE TO FILE AMICUS, via electronic service and first-class mail or its equivalent, to:

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EXHIBIT A

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PROPOSED AMICUS BRIEF OF THE MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION AND THE NEW ENGLAND FIRST AMENDMENT COALITION

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I. INTRODUCTION

The Massachusetts Newspaper Publishers Association ("MNPA") and the New England First Amendment Coalition ("NEFAC") submit this amicus brief in support of plaintiff's Petition for Interlocutory Appellate Review pursuant to G.L. c. 231, § 118 (1st Paragraph). Amici respectfully submit that the free speech issues raised by the Petition are significant and worthy of interlocutory appellate review.

This case is of particular importance to amici because it poses the question of whether persons who disseminate accurate information will be subject to lawsuits and damages awards not because of factual errors, but because of an assessment of their underlying motives in publishing the truth, an inquiry triggered by whether the speech at issue is deemed a matter of private concern. The harm caused by such a rule would be compounded by the vagaries of determining what is or is not a matter of private concern that authorizes inquiry into the motives of a person who speaks the truth. The plaintiff in this case, for example, alleges that he was defamed by false reports that he engaged in "unlawful" conduct such as "coercion and bribery," matters typically considered of public concern. Complaint, ¶ 10; see generally Restatement (Second) of Torts § 652D, cmt. f (1977) (those accused of crimes are persons of public interest). Amici believe that such a rule of law

would encourage unnecessary self-censorship and retaliatory suits designed to suppress unpopular truths.

II. ARGUMENT

A. Article 16 of the Declaration of Rights of the Massachusetts Constitution Renders c. 231, §92 Unconstitutional.

The Superior Court concluded that G.L. c. 231, §92 permits a libel plaintiff to recover for truthful statements on matters of private concern if published with common law malice, defined by the Superior Court as "disinterested malevolence."[1/] Amici respectfully submit that §92 contravenes Article 16 of the Declaration of Rights of the Massachusetts Constitution. The text of Article 16 broadly provides:

> The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth. The right of free speech shall not be abridged.

The press clause of Article 16 has remained unchanged since 1780 and predates the enactment of the First Amendment. Its scope, therefore, is not limited by constructions of its federal analog. See generally Commonwealth v. Gilfedder, 321 Mass. 335, 343 (1947) ("no inference should be drawn that the Declaration of Rights of the Constitution of this Commonwealth is less capable of protecting the essentials of freedom of

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[1/] See also Brown v. Massachusetts Title Ins. Co., 151 Mass. 127, 128 (1890) (the term "actual malice" as used in statutory predecessor to §92 means "malice in the popular sense of hatred or ill will").

speech, of the press, and of assembly than is the Federal Constitution."); also Lyons v. Globe Newspaper Co., 415 Mass. 258, 267-68 (1993) (the "independent protections of freedom of speech found in our common law and in art. 16" protect expressions of opinion even if the First Amendment does not require such a result). These independent state constitutional protections prohibit a libel plaintiff from recovering damages for the publication of truthful information on matters of public or private concern.

1. The History and Traditions of the Framers of the Massachusetts Constitution Support Construing Article 16 as Protecting Truthful Publications from Civil Defamation Claims.

Strong support for the proposition that Article 16 protects truthful publications from civil liability for defamation claims is found in the pre-Revolutionary history of the Commonwealth that led to the enactment of Article 16. Just as the Framers of the Federal Constitution "were concerned with broad principles, and wrote against a background of shared values and practices," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982), so too were the Framers of the Massachusetts Constitution cognizant of which common law traditions they wished to import to their new government, and which would offend the new Constitution. Article 6 of Chapter 6 of the Constitution, for example, explicitly stated:

> All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall remain and be in full force, until altered or appealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.

The English common law known to the Framers prohibited a plaintiff in a civil slander or libel case from recovering damages for truthful defamatory statements. According to Blackstone, the common law recognized a civil action for "injuries affecting a man's *reputation* or good name...by malicious, scandalous and slanderous *words*, tending to his damage and derogation. As if a man maliciously and falsely utter any slander, or false tale of another." Blackstone, Commentaries on the Laws of England, Vol. II, Book III, Private Wrongs (1891), 122 (italics in original, underscore added) (hereafter "Blackstone, Commentaries").

Because a necessary element of a civil libel claim was falsity, truth was a well-recognized defense.

> [I]f the defendant be able to justify, and prove the words to be true, no action will lie, even though special damage hath ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions; for though there may be damage sufficient accruing from it, yet, if the fact be true, it is damnum absque injuria; and where there is no injury the law gives no remedy.

Blackstone, Commentaries, Vol. II, Book III, Private Wrongs, at 124-25.

A different rule applied in prosecutions for criminal libel, where truth was not a defense. Because criminal prosecutions were intended to prevent breaches of the peace provoked by malicious fighting words, the truth of the provocation not only failed as a defense but might exacerbate the charge. Blackstone, Commentaries, Vol. II, Book IV, Public Wrongs, at 149 n.14 ("the greater the truth, the greater the [criminal] libel") (citations omitted).

> The direct tendency of these [criminal] libels is the breach of the public peace by stirring up the objects of them to revenge, and perhaps to bloodshed.... For the same reason, it is immaterial, with respect to the essence of a libel, whether the matter of it be true or false, since the provocation, and not the falsity, is the thing to be punished criminally;... In a civil action, we may remember, a libel must appear to be false as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it must be against the public peace; and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit.

Blackstone, Commentaries, Vol. II, Book IV, Public Wrongs at 149.[2/]

[2/]See also Blackstone, Commentaries, Vol. II, Book III, Private Wrongs, at 125 ("But in the remedy by action on the case, which is to repair the party in damages for the injury done to him, the defendant may, as for words spoken, justify the truth of the facts, and show that the plaintiff has received no injury at all. What was said with regard to words spoken will also hold in every

Colonial Massachusetts imported the common law's requirement that only false publications exposed the speaker to damages claims. The Act of 1692 gave Justices of the Peace judicial power to punish "lying, libelling and spreading false news to the injury of anyone" by imposing fines of up to twenty shillings. Those unable to pay could be set in the stocks or whipped at the discretion of the Justice. E. Washburn, Sketches of the Judicial History of Massachusetts From 1630 to the Revolution in 1775 (1840) (Da Capo Press, 1974), 170-71.

Massachusetts court records from the 1700's also indicate that the essential element of civil defamation was that the defendant had spoken "false scandalous and lying words," such as in the case of the Minister accused of being "as drunk as the Devil last night," the boat manufacturer whose product was "only fit to drown people," and a man accused of sexual harassment. W.E. Nelson, Americanization of the Common Law, The Impact of Legal Change on Massachusetts Society, 1760-1830 (1975), 40 (hereafter "Nelson, Massachusetts Society").

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particular with regards to libels by writing or printing, and the civil actions consequent thereupon....") (emphasis in original). See also W.E. Nelson, Americanization of the Common Law, The Impact of Legal Change on Massachusetts Society, 1760-1830 (1975), 93 (common law recognized truth as a defense to civil actions for libel).

Pre-Revolutionary Massachusetts in fact appears to have been even more solicitous of truth as a defense than was English common law, permitting it as a defense even in some criminal prosecutions for verbal crimes, including "falsely and maliciously...spreading a Lye...." Id., 38-39.

> Such defamation was an essentially different sort of crime from seditious libel, for a conviction could be had only upon proof that the defendant had acted with malicious intent to deceive and that his words were in fact false. The essence of the crime was that the defendant had spread a falsehood....

Id., 39.[3/]

As political discontent in the Colonies grew, so too did public discussion of freedom of the press. In 1768, after being "pilloried with a violent vituperation" published by the Boston Gazette, Governor Bernard asked the Massachusetts House to take action. Expressing regret that any publication should cause the Governor such concern, the House nevertheless refused to take any further notice of the matter, instead asserting that:

> the Liberty of the Press is a great Bulwark of the Liberty of the People: It is therefore the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it.

[3/]See also id. at 95 ("During the colonial period in Massachusetts, as we have seen, truth had been recognized as a defense in all cases, civil and criminal, except perhaps in seditious libel cases.").

C.A. Duniway, The Development of Freedom of the Press in Massachusetts (1906), 127 (hereafter "Duniway, Freedom of the Press in Massachusetts").

Twelve years later, during the Massachusetts Constitution ratification debates, Chelsea voted to add a provision to Article 16 making it clear that the press was "answerable for false Defamatory and abusive Publications." Id., 134 (emphasis added). A number of towns thought that freedom of speech should be explicitly referenced in Article 16 to ensure that it would not be dangerous "in some future time, even in Publick Town Meetings, to speak the truth of weak or wicked Rulers...." Id., 134-35 (emphasis added). On June 15, 1780, it was officially announced that the people of Massachusetts had accepted their Constitution, and Article 16's Declaration of an "unrestricted but undefined freedom of the press became part of the organic law of Massachusetts." Id., 136.

The early common law judicial opinions of post-Revolutionary Massachusetts also confirm that the organic law of the Commonwealth established truth as a defense to civil actions for libel. See Dodds v. Henry, 9 Mass. 262, 264 (1812) ("But it would be mischievous in a high degree, if a citizen could, with impunity, falsely charge an officer with willful misconduct") (emphasis added); Alderman v. French, 18 Mass. 1, 6 (1822) ("On what ground then is the mere averment of the truth of

the charge a good bar to the civil action for slander? It is, that the plaintiff cannot justly complain of an injury to his reputation, of which he himself has furnished the occasion."); Commonwealth v. Buckingham, Thacher's Criminal Cases, 29, 36 (1824) ("if a man publishes an injurious truth of another, the truth of the publication will be a justification in a civil action for damages").

The principle that truth should defeat an action for libel was so ingrained in the Commonwealth that the early rulings of the Supreme Judicial Court (soon reversed by decision and by statute) to follow the law of England prohibiting truth as a defense in criminal (but not civil) libel cases generated storms of political and legal protest. In 1791, Chief Justice Dana held in Commonwealth v. Freeman, that the English law of criminal libel applied with all its rigors to prosecutions in the Commonwealth. C. Warren, History of the American Bar (1991), 236-37. Although Freeman was acquitted by a jury, see Duniway, Freedom of the Press in Massachusetts, 142-43, Justice Dana soon presided over the prosecution of the Anti-Federalist publisher of the Boston Independent Chronicle, Abijah Adams, and again ruled that truth was not a defense where criminal libel was at issue. Warren, History of the American Bar, 237, Duniway, Freedom of the Press in Massachusetts, 145-46. Describing the English common

law as "our cherished birthright," Justice Dana fined Adams and sentenced him to 30 days in prison.

> The irony of this term, as voicing the real public sentiment, may be seen from an editorial printed in his paper on the day after Adams' release from prison: "Yesterday, Mr. Abijah Adams was discharged from his imprisonment, after partaking of our adequate proportion of his birthright by a confinement of thirty days under the operation of the Common Law of England."

C. Warren, History of the American Bar, 237. Still another editor was indicted for libel in 1801 for referring to Justice Dana as "the Lord Chief Justice of England" who administered "that execrable engine of tyrants the Common Law of England in criminal prosecutions." Id.

Chief Justice William Cushing, the first Chief Justice of the Supreme Judicial Court and the president of the convention which framed the Constitution in 1780[4], decried the return to English criminal libel laws as an abandonment of the principles upon which Article 16 was based. In a letter to John Adams, Cushing wrote:

> But why need any honest man be afraid of the truth? The guilty only fear it; and I am inclined to think with Gordon...that truth sacredly adhered to, can never upon the whole prejudice, right religion, equal government or a government founded upon proper balances and checks, or the happiness of society in any respect, but must be favorable to them all.

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[4] Introductory Statement to the Letters of William Cushing and John Adams, XXVII Massachusetts Law Quarterly 11 (October 1942).

Original Draft of Letter from William Cushing, Chief Justice, to Hon, John Adams, 1789, reprinted in XXVII Massachusetts Law Quarterly (October 1942), 12-15.[5/]

By 1808, the Supreme Judicial Court had taken the first step towards breaking its adherence to the English common law of criminal libel, holding that truthful publications made with a justifiable purpose such as an honest intention of informing the people, were immune from prosecution. Commonwealth v. Clapp, 4 Mass. 163 (1808). Ironically, it appears that continuing efforts to rid the Commonwealth of the remaining vestiges of the English common law of criminal libel ultimately resulted in the subversion of the long-standing tradition of permitting truth as an absolute defense in civil cases by the enactment of the legislative predecessor to §92.

In 1827, the legislature passed St. 1826, c. 107, §1, providing that in every prosecution for a libel, the defendant might give in his defense evidence of the truth of the matter charged, but that such evidence should not

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[5/]Adams replied that, in his view, truth should be a defense to criminal prosecutions for libel if published with good motives. He mistakenly thought English common law was to the same effect in civil actions. Copy of Original Letter to "The Honorable William Cushing, Esqr., Chief Justice of the Massachusetts Boston" from John Adams, reprinted in XXVII Massachusetts Law Quarterly (October 1942), 16. Adams later supported the national Sedition Act of 1798, which explicitly established truth as a defense. C. Duniway, Freedom of the Press in Massachusetts, 143-44, 147-48 n.2.

be a justification unless it was made to appear that it was published with good motives and for justifiable ends. See Perry v. Porter, 124 Mass. 338, 340 (1878). Because the Act restored truth as a defense in criminal libel actions, it was heralded as "the removal of the last substantial legal restriction upon the freedom of the press in Massachusetts." C. Duniway, Freedom of the Press in Massachusetts, 159-160. The statute remained law until 1855, when the legislature passed St. 1855, c. 396, §1, the predecessor to c. 231, §92. With apparently little or no notice, the legislature abandoned the tradition known and adhered to by the Framers and, for the first time, purported to limit the defense of truth in civil actions for libel. The 1855 Act provided that:

> In every prosecution, and in every civil action for writing or for publishing a libel, the defendant may give in evidence, in his defence upon the trial, the truth of the matter contained in the publication charged as libelous; and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved.

As the Perry Court observed, "all the prior legislation had been, not in the direction of limiting the effect of proof of the truth in civil actions, but in the direction of enlarging its effect in favor of the defendant in a criminal prosecution." 124 Mass. at 341. An Act vindicating the right of the press to be free from criminal prosecution for publishing the truth thus became a vehicle for imposing civil liability upon the

press for publishing the truth. That the end result was legislation that treated criminal and civil actions for libel equally did not, and does not, cure the constitutional flaws of the statute. See generally Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal libel statute that limited defense of truth to statements made with good motives violated the First Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964)("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.").

Moreover, if the history and text of Article 16 prior to the enactment of §92 did not by themselves dictate that the statute be held unconstitutional, the addition of the free speech clause to Article 16 in 1948 surely requires that result. Even prior to the adoption of the free speech clause, the Supreme Judicial Court had held that Article 16 granted rights "comparable to the rights of 'freedom of speech' and 'of the press,' ... declared in the First Amendment...." Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 249 (1946).[6/] In 1947, the Executive Committee of the

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[6/]Article 48, The Initiative, II, §2 of the Massachusetts Constitution excludes from the initiative process any proposition inconsistent with "freedom of speech" as "at present declared in the declaration of rights." The drafters of Article 48 therefore "apparently assumed that the Declaration of Rights declared a right of free speech, presumably by

Massachusetts Bar Association voted that "the rights of free speech of the people of Massachusetts were now adequately protected by the Constitutions of Massachusetts and of the United States," and therefore opposed the free speech amendment to Article 16 as "unnecessary." F. Grinnell, The Unnecessary Proposal about Free Speech, XXXII Massachusetts Law Quarterly 51, 56 (1947).[7/] In view of the holding of Bowe, and the arguments offered in opposition to the amendment, the adoption of the free speech clause in 1948 only can be read as expanding state constitutional speech rights. That expansion of free speech rights, adopted almost 100 years after the enactment of § 92's predecessor, leaves no doubt as to the unconstitutionality of legislative measures to impose liability in defamation for truthful speech, whether on matters of public or private concern.

Finally, enforcing § 92 would have far-reaching and counter-Revolutionary implications. Should a Republican have less freedom to speak the truth about a Democrat than does a member of the Democratic party? If the same truthful statement is made by two people, one motivated

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implication." Associated Industries of Massachusetts v. Attorney General, 418 Mass. 279, 287-88 n.7 (1994).

[7/]The author, then the Secretary of the MBA, described the proposed amendment as an "attempt to 'gild the lily;" and questioned the amendment's effect on the law of libel and slander, given the proposal's "appearance of [an] assertion of [an] absolute right." Id. at 52, 56.

by a desire for fame, fortune, or revenge, and the other wholly pure of heart, does Article 16 permit the imposition of damages against one, but not the other? Must witnesses or victims of workplace harassment or domestic abuse think carefully about accurately recounting their experiences lest they be punished for speaking the truth for the wrong reason? This would be to the detriment not just of the press, but to us all.

> And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse, in a free and open encounter?

J. Milton, Areopagitica, in The Portable Milton (1949), 199.

III. CONCLUSION

For the foregoing reasons, amici respectfully submit that the Petition raises significant constitutional issues worthy of interlocutory appellate review.

Respectfully submitted,

MASSACHUSETTS NEWSPAPERS PUBLISHERS ASSOCIATION and NEW ENGLAND FIRST AMENDMENT COALITION

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Dated: April 14, 2022

CERTIFICATE OF COMPLIANCE WITH APPELLATE RULES

The undersigned hereby certifies that this brief complies with the typeface requirements of Mass. R. A. P. 20(a)(4)(A)-(C) and the type style requirements of Mass. R. A. P. 20(a)(4)(A)-(C) because this Brief has been prepared in the monospaced font Courier New at size 12 and does not exceed 35 pages. It also complies with Appeals Court Rule 20.0(b) because it does not exceed 15 pages of text in monospaced font or 3500 words in proportional font compliant with Mass. R. A. P. 20(a)(4)(A)-(C).

/s/ Jonathan M. Albano
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CERTIFICATE OF SERVICE

I, Jonathan M. Albano, hereby certify that on April 14, 2022, I served the attached Proposed Amicus Brief OF Massachusetts Newspaper Publishers Association and the New England First Amendment Coalition, via electronic service and first-class mail or its equivalent, to:

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