
COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

NO. SJC-12708

JAMES M. RYAN, Executor of the ESTATE OF JULIA W. RYAN, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

MARY ANN MORSE HEALTHCARE CORP. d/b/a HERITAGE AT FRAMINGHAM,

Defendant-Appellee.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF AARP, AARP FOUNDATION, THE NATIONAL CONSUMER LAW CENTER AND THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS AS AMICI CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

Elizabeth A. Aniskevich
Pro Hac Vice
Susan Ann Silverstein
On the Brief
AARP Foundation
601 E Street, NW
Washington, DC 20049
202-434-2072
eaniskevich@aarp.org

Richard M.W. Bauer
(BBO# 544035)
National Consumer Law Center
7 Winthrop Square
Boston, MA 02110
857-540-6293
dbauer@nclc.org

Liane Zeitz, CELA
(BBO # 547049)
Rebecca J. Benson
(BBO # 548620)
National Academy of
Elder Law Attorneys
57 Providence Highway,
Suite #210
781-326-5005
lzeitze@zeitze.com
rbenson@specialneeds-
law.com

Dated: August 19, 2019

CORPORATE DISCLOSURE STATEMENTS

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act. Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Amicus curiae National Consumer Law Center, Inc. (“NCLC”) is a Massachusetts nonprofit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focused specifically on the legal needs of low-income, financially distressed and elderly consumers, and operates as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. NCLC has no parent corporation and no publicly held company owns ten percent or more of its stock.

The Internal Revenue Service has determined that National Academy of Elder Law Attorneys (“NAELA”) and the Massachusetts Chapter of NAELA (“MassNAELA”) are each organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(6) of the Internal Revenue Code and are exempt from income tax. NAELA is organized and operated as a nonprofit corporation under Oregon law. MassNAELA is organized and operated as a nonprofit corporation under Massachusetts law. Neither NAELA nor MassNAELA has a parent corporation, nor has either issued shares or securities.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTS2

TABLE OF AUTHORITIES6

STATEMENTS OF INTEREST.....13

SUMMARY OF THE ARGUMENT16

ARGUMENT19

I. AS THE NEED FOR ASSISTED LIVING INCREASES, ENFORCEMENT OF STRONG STATE LAWS, SUCH AS THE SECURITY DEPOSIT STATUTE, IS CRITICAL TO PROTECT THE OLDER POPULATION19

 A. The Need for Assisted Living is Increasing in Massachusetts19

 B. The Security Deposit Statutes was Designed to Protect Vulnerable Populations like the ALR Population.....22

II. ASSISTED LIVING RESIDENCES IN MASSACHUSETTS ARE RENTAL HOUSING COVERED BY THE SECURITY DEPOSIT LAW, G.L. CHAP. 186 § 15B29

 A. Massachusetts has Adopted a Residential Housing Model of Assisted Living29

 B. Assisted Living is Rental Housing Covered by Landlord Tenant Law Section 15B, the Security Deposit Statute33

III. ALR RESIDENTS WILL BE SIGNIFICANTLY HARMED IF THE SECURITY DEPOSIT STATUTE DOES NOT APPLY TO ALRS, WHEREAS THE INDUSTRY WILL SUFFER LITTLE IMPACT IF THE SECURITY DEPOSIT STATUTE DOES APPLY36

CONCLUSION43

CERTIFICATE OF SERVICE45

CERTIFICATE OF COMPLIANCE.....47

TABLE OF AUTHORITIES

Cases

Adjarthey v. Cent. Div. of Hous. Court Dep’t,
481 Mass. 830 (2019)40

Bank of Am., N.A. v. Rosa,
466 Mass. 613 (2013)15

Bevilacqua v. Rodriguez,
460 Mass. 762 (2011)15

Boston Hous. Auth. v. Bridgewater,
452 Mass. 833 (2009)14

Boston Hous. Auth. v. Hemingway,
363 Mass. 184 (1973)38

Cote v. Sylvia,
2008 Mass. App. Div. LEXIS 9 (Mass. App. Jan 22. 2008)28

Easthampton Savings Bank v. City of Springfield,
470 Mass. 284 (2014)15

Eaton v. Fed. Nat’l Mortg. Ass’n,
462 Mass. 569 (2012)15

Ferman v. Sturgis Cleaners, Inc.,
481 Mass. 488 (2019)15

Gowen v. Benchmark Senior Living, LLC,
No. 1684CV03972-BLS2, 2017 WL 3251585 (Mass. Super. May 8, 2017).....41

Hermida v. Artchstone,
826 F. Supp. 2d 380 (D. Mass 2011).....28

<i>Jinwala v. Bizzaro</i> , 24 Mass. App. Ct. 1 (1987).....	28
<i>Johnson v. Wilkinson</i> , 139 Mass 3 (1885)	34
<i>Mazok v. May Dep't Stores Co.</i> , 1999 WL 1261312 (D. Mass. Jan. 27, 1999).....	14
<i>Meikle v. Nurse</i> , 474 Mass. 207 (2016)	40
<i>Mellor v. Berman</i> , 390 Mass. 275 (1983)	28
<i>Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly</i> , 658 F.3d 375 (3d Cir. 2011), <i>cert. granted</i> , 133 S. Ct. 2824 (2013) <i>cert.</i> <i>dismissed</i> , 134 S. Ct. 636 (2013)	13
<i>Phillips v. Equity Residential Mgmt., LLC</i> , 478 Mass 251 (2017)	28
<i>Rental Prop. Mgmt. Services v. Hatcher</i> , 479 Mass. 542 (2018)	15
<i>Roberts v. Enter. Rent-A-Car Co. of Boston</i> , 438 Mass. 187 (2002)	36
<i>Shepard v. Fin. Associates of Auburn, Inc.</i> , 366 Mass. 182 (1974)	36
<i>U.S. Bank Nat'l Ass'n v. Ibanez</i> , 458 Mass. 637 (2011)	15
<i>U.S. Bank Nat'l Ass'n v. Schumacher</i> , 467 Mass. 421 (2014)	15

<i>U.S. v. Fort Norfolk Retirement Community, Inc.</i> , No. 2:15-cv-200 (E.D. Va. 2015),	42
--	----

<i>Wetzel v. Glen St. Andrew Living Cmty., LLC</i> , 901 F.3d 856 (7th Cir. 2018)	13, 41
--	--------

<i>White v. Maynard</i> , 111 Mass. 250 (1872)	34
---	----

Statutes, Rules and Regulations

105 C.M.R. § 150	32
105 C.M.R. § 150.015(G)(4)(a)-(g)	35
105 C.M.R. § 150.015(G)(4)(h)	35
105 C.M.R. § 410.354	37
651 C.M.R. § 12	32
651 C.M.R. § 12.04(1)(a)	35
651 C.M.R. § 12.04(1)(d)	35
651 C.M.R. § 12.04(3)	32
651 CMR §12.04(6)(a)	41
651 C.M.R. § 12(14)	32
651 C.M.R. § 12.14(f)	32
940 C.M.R. § 3.17	38

1994 Act Establishing Assisted Living Residences, ST. 1994, c. 354, § 1	30
ST. 1994, c. 354, § 3	16

Fair Housing Act, 42 U.S.C. § 3601 et seq	41
--	----

G.L. c. 19D	16, 36
G.L. c. 19D, §§ 1-3	32
G.L. c. 19D, § 9(a)(1)	38
G.L. c. 19D, § 9(a)(3)	36
G.L. c. 19D, § 9(1)	34
G.L. c. 19D, § 9(4)	34
G.L. c. 19D, § 9(5)	34
G.L. c. 19D, § 9(16)	33
G.L. c. 19D, § 9(18)	34

G.L. c. 111, § 71.....	32
G.L. c. 111, § 127A et seq	38
G.L. c. 111, § 127L	38
G.L. c. 186.....	38
G.L. c. 186, § 14.....	37
G.L. c. 186, § 15.....	37
G.L. c. 186, § 15B.....	15, 38
G.L. c. 186, § 15B(1)(b)	16
G.L. c. 186, § 15C.....	37
G.L. c. 186, § 15E.....	37
G.L. c. 186, § 21.....	37
G.L. c. 186, § 22.....	37
G.L. c. 186, § 24.....	37
G.L. c. 186, § 25.....	37
G.L. c. 186, § 26.....	37
G.L. c. 186, § 27.....	37
G.L. c. 239.....	38
G.L. c. 239 § 1.....	39
G.L. c. 239 § 8A.....	39, 40

Other Authorities

AAHSA et al., <i>2009 Overview of Assisted Living</i> (2009), https://www.ahcancal.org/ncal/facts/Documents/09%202009%20Overview%20of%20Assisted%20Living%20FINAL.pdf	25, 26
AARP, <i>2018 Staying Home And Community Preference Survey</i> , https://www.aarp.org/content/dam/aarp/research/surveys_statistics/liv-com/2018/home-community-preferences-survey.doi.10.26419-2Fres.00231.001.pdf	22
AARP, <i>2018 Staying Home And Community Preference Survey</i> , https://www.aarp.org/content/dam/aarp/research/surveys_statistics/liv-com/2019/home-community-preferences-survey-home-community-infographic.doi.10.26419-2Fres.00231.007.pdf	21
<i>Assisted Living Costs</i> , HERITAGE ASSISTED LIVING, https://www.heritageassistedliving.org/assisted-living/costs	31

<i>Cost of Care Survey 2018</i> , GENWORTH, https://www.genworth.com/aging-and-you/finances/cost-of-care.html	25
Deborah Cho et al., <i>Planning for Long Term Care in Massachusetts</i> , Ctr. for Health Law and Pol’y Innovation, WilmerHale Legal Services Center, Harvard Law School (Dec. 2013), https://www.chlpi.org/wp-content/uploads/2013/12/Long-Term-Care.pdf	31
Executive Office of Elder Affairs, <i>Assisted Living Residence Certification Program and Resident Aggregate Information Annual Report (2017)</i> https://www.mass.gov/files/documents/2018/09/28/ALR%20Annual%20Distribution%20Report%20Summary%20-%20CY2017.pdf	26, 27, 40
<i>Assisted Living</i> , EXECUTIVE OFFICE OF ELDER AFFAIRS, https://www.mass.gov/assisted-living	31
Paula A. Franzese et al., <i>The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform</i> , 69 RUTGERS L. REV. 1	38
Susan Hegel, <i>Landlord's Right To Enter Your Home (2017)</i> , https://www.masslegalhelp.org/housing/lt1-chapter-8-landlord-right-enter-home	36
<i>How Can I Pay For Assisted Living?</i> , ABOUT ASSISTED LIVING, https://www.aboutassistedliving.org/how-can-i-pay-for-assisted-living	26
Stephanie Hughes, <i>The U.S. Senior Housing Market Facing a Supply Shortage</i> , MEDIUM (May 9, 2018), https://medium.com/@stephanie_hughes_20796/the-u-s-senior-housing-market-facing-a-supply-shortage-5e43b1fc5277	24
James H. Johnson et al., Kenan Institute, <i>U.S. Older Adults: Demographics, Living Arrangements and Barriers to Aging in Place (2017)</i> , https://www.kenaninstitute.unc.edu/wpcontent/uploads/2017/06/AgingInPlace_06092017.pdf	21
Kay Lazar, <i>Assisted Living Facilities Push to Add Medical Services</i> , BOSTON GLOBE (Apr. 24, 2016), https://www.bostonglobe.com/metro/2016/04/24/campaign-for-medical-services-assisted-living-raises-concerns/fo4q9dFSYJDVYKgFbcmG8O/story.html	31

Diana T.F. Lee et al., *A Review of Older People’s Experiences with Residential Care Placement*, 37 JOURNAL OF ADVANCED NURSING (2002)..... 22, 23

Mara Mather et al., *To Brake or Accelerate When the Light Turns Yellow: Stress Reduces Older Adults’ Risk Taking in a Driving Game*, 20 PSYCHOLOGICAL SCIENCE (2009).....23

Mass. Dept. of Elder Affairs, *2017 Annual Legislative Report Fiscal Year*, <https://www.mass.gov/files/documents/2018/06/14/Elder%20Affairs%202017%20Annual%20Legislative%20Report.pdf> *passim*

Massachusetts Group Adult Foster Care and the SSI-G Assisted living Benefit, PAYING FOR SENIOR CARE, <https://www.payingforseniorcare.com/medicaid-waivers/ma-group-adult-foster-care.html>26

MASS-ALA, *Massachusetts Assisted Living Resource Guide* (2019), <https://www.mass-ala.org/assistedlivingresourceguide/>..... 25, 26, 33

NATIONAL CENTER FOR ASSISTED LIVING, *Massachusetts Fast Facts, State Profile for Assisted Living*, <https://www.ahcancal.org/events/CongressionalBriefing/Issue%20Briefs/SNF%20Delegation%20Data/Massachusetts-AL.pdf> 27, 40

Caroline F. Pearson et al., *The Forgotten Middle: Many Middle-Income Seniors Will Have Insufficient Resources For Housing and Health Care*, 38 HEALTH AFFAIRS 851 (2019), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2018.05233>.....24

Dafina Petrova et al., *Risky Decision-Making Is Associated With Residential Choice In Healthy Older Adults*, FRONTIERS IN PSYCHOLOGY (Aug. 31, 2016), <https://www.frontiersin.org/articles/10.3389/fpsyg.2016.01304/full#B17>23

Donald Redfoot et al., AARP Pub. Pol’y Inst., *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers* (2013), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-ltc.pdf 20, 24

Andrew W. Roberts, et al., *The Population 65 Years and Older in the United States: 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf>20

<i>Senior Housing Market Insight</i> , CBRE SENIOR HOUSING (2018), https://www.cbre.us/-/media/cbre/countryunitedstates/ media/files/services/senior-housing/shmi-q2-2018.pdf	33
Eli Sherman, <i>Housing Crisis Leaves Seniors Feeling Stuck in Massachusetts</i> , THE METROWEST DAILY NEWS (Mar. 15, 2019), https://www.metrowestdailynews.com/news/20190315/housing-crisis-leaves-seniors-feeling-stuck-in-massachusetts	24
Paula Spahn, <i>Justice Department Takes Down Barriers in Retirement Homes</i> , N.Y. TIMES, June 8, 2015, https://www.nytimes.com/2015/06/09/health/justice-department-takes-down-barriers-in-retirement-homes.html	41
Kathleen Ujvari, AARP Pub. Pol’y Inst., <i>Disrupting the Marketplace: The State of Private Long-term Care Insurance, 2018 Update</i> (2018), https://www.aarp.org/content/dam/aarp/ppi/2018/08/disrupting-the-marketplace-the-state-of-private-long-term-care-insurance.pdf	21
U.S. Centers for Medicaid and Medicare Services, <i>Is my Test, Item, or Service Covered?</i> https://www.medicare.gov/coverage/long-term-care	26
U.S. Dep’t of Health and Human Services, <i>Findings from the survey of Long-Term Care Awareness and Planning</i> (2015), https://aspe.hhs.gov/system/files/pdf/110366/SLTCAPrb.pdf	25
<i>Vampire</i> , WWW.WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Vampire	36
Jonathan Vespa, <i>The U.S. Joins Other Countries With Large Aging Populations</i> , U.S. CENSUS BUREAU, https://www.census.gov/library/stories/2018/03/graying-america.html	19
Keren Brown Wilson, <i>Historical Evolution of Assisted Living in the United States, 1979 to the Present</i> , 47 THE GERONTOLOGIST (2007).....	29, 30

STATEMENTS OF INTEREST¹

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people’s financial security, health, and well-being. AARP’s charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. Among other things, AARP and AARP Foundation bring litigation and file amicus briefs in federal and state courts to challenge practices that affect housing rights of older low-income people including residents of assisted living facilities. *See, e.g., Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013) (holding that minority residents displaced by a redevelopment plan established disparate impact), *cert. dismissed*, 134 S. Ct. 636 (2013); *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018) (holding that assisted living landlord may be held liable under Fair Housing Act (“FHA”) 42 U.S.C. 3601 et seq., for taking no action when it knew of harassment

¹ No counsel for the parties authored this brief, in whole or in part. No counsel or party, or any other entity or person, made a monetary contribution intended to fund the preparation or submittal of this brief. The amici curiae and their counsel do not represent and have not represented any of the parties to the present appeal in another proceeding involving similar issues. Amici curiae also did not represent a party or serve as a party in a proceeding or legal transaction that is at issue in the present appeal.

of one resident against another based on sex). AARP has also supported the rights of tenants in cases before this Court. *See, e.g., Boston Hous. Auth. v. Bridgewater*, 452 Mass. 833 (2009) (holding that before a public housing authority can evict a tenant for being a threat to the health or safety of others, it must first make an individualized determination of whether a reasonable accommodation would mitigate the risk.)

Since 1969, NCLC has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's activities include policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC has long been recognized nationally as the "leading non-profit low-income consumer advocacy organization in the country." *Mazok v. May Dep't Stores Co.*, 1999 WL 1261312 at * 4 (D. Mass. Jan. 27, 1999). For half a century, it has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-two-volume Consumer Legal Practice Series. Many of these volumes address the impact of unfair practices on consumers, including, *e.g.*, *Unfair and Deceptive Acts and Practices*. A major focus of NCLC's work is to increase public awareness of unfair and

deceptive practices perpetrated against low-income and elderly consumers, and to promote protections against such practices.

NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country, including *Ferman v. Sturgis Cleaners, Inc.*, 481 Mass. 488 (2019); *Rental Prop. Mgmt. Services v. Hatcher*, 479 Mass. 542 (2018); *Easthampton Savings Bank v. City of Springfield*, 470 Mass. 284 (2014); *U.S. Bank Nat'l Ass'n v. Schumacher*, 467 Mass. 421 (2014); *Bank of Am., N.A. v. Rosa*, 466 Mass. 613 (2013); *Eaton v. Fed. Nat'l Mortg. Ass'n*, 462 Mass. 569 (2012); *Bevilacqua v. Rodriguez*, 460 Mass. 762 (2011); and *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637 (2011). NCLC has an interest in seeking strong and effective enforcement of consumer protection laws, such as G. L. c. 186 § 15B.

NAELA is the national professional association of about 4,500 attorneys dedicated to improving the quality of legal services provided to seniors and people with special needs. MassNAELA has 450 members and is the leading organization of elder law professionals in the state. Elder law has developed as a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities. MassNAELA members assist their clients with planning for incapacity, long-term care, Medicaid and Medicare coverage, health and long-term care insurance, and health care decision-making, among other issues, and

advocate for the rights of long-term care residents, including residents of assisted living.

SUMMARY OF THE ARGUMENT

At issue in this case is whether the Security Deposit Statute, G.L. c 186, § 15B(1)(b), applies to Assisted Living Residences (“ALRs”), and the disabled and older adults who enter them.² This case comes at a critical juncture in Massachusetts’ population history. The Commonwealth’s population is aging rapidly and, for the first time, the Commonwealth has more residents over the age of 60 than under the age of 20. As the population ages, the Commonwealth must consider how best to protect its older and disabled residents as their needs for long-term care services increase. *See infra* at 19-22.

The Security Deposit Statute, enacted in 1969, affords protections to tenants at the outset of their tenancies by limiting the upfront fees a landlord can charge. The Security Deposit Statute prohibits landlords from charging anything other than 1) first month’s rent; 2) last month’s rent; 3) a security deposit equal to first month’s rent; and 4) the cost for the purchase and installation of a lock and key. Yet, ALRs in Massachusetts, such as Defendant-Appellee Heritage at Framingham (“Heritage”), charge a one-time, up-front “community fee” that can be thousands of dollars. The community fees are purportedly non-refundable, regardless of

² ALRs are authorized by G.L. c. 19D, inserted by ST. 1994, C. 354, § 3.

whether the term of the residency is one month or years. Older adults in Massachusetts must contend with these community fees at a time of extreme vulnerability. The move to assisted living is fraught with fear and stress, and many older adults making the move are economically vulnerable. Adding to that vulnerability is a senior housing shortage and the high cost of assisted living within the Commonwealth. Without the protections of the Security Deposit Statute, ALRs can charge excessive up-front fees to a vulnerable population that has little bargaining power to push back or negotiate. *See infra* at 22-29.

Moreover, application of the Security Deposit Statute to ALRs is consistent with the Commonwealth's chosen model of assisted living. The Commonwealth has expressly adopted a model of assisted living that is residential in nature and is designed to provide ALR residents with dignity, individuality, privacy, and autonomy. ALRs in Massachusetts are not health care facilities or institutional facilities like nursing homes, and therefore they should be subject to the same laws and restrictions as other residential rental housing. Critically, ALRs in Massachusetts, including Defendant Heritage, hold themselves out as "rental" housing and ALR residents have all of the indicia of a traditional tenant, including a possessory interest in their particular unit and the right to habitability. And, nothing in the Security Deposit Statute exempts ALRs from its purview. *See infra* at 29-36.

Finally, as a consumer protection statute, the Security Deposit Statute should be construed broadly to protect the rights of ALR residents. Refusing to apply to ALRs the Security Deposit Statute and the other protections generally afforded to tenants will significantly impair the rights of ALR residents, which cannot be what the Legislature intended. On the other hand, the predominately for-profit ALR industry can absorb, or include in the monthly rent, the lost income generated by community fees if the Security Deposit Statute does apply, and can continue to operate while also complying with landlord-tenant law. *See infra* at 36-42.

ARGUMENT

I. AS THE NEED FOR ASSISTED LIVING INCREASES, ENFORCEMENT OF STRONG STATE LAWS, SUCH AS THE SECURITY DEPOSIT STATUTE, IS CRITICAL TO PROTECT THE OLDER POPULATION

A. The Need for Assisted Living is Increasing in Massachusetts

Massachusetts has reached a population milestone. For the first time in its history, the Commonwealth has more residents over the age of 60 than under the age of 20. Mass. Dept. of Elder Affairs, *2017 Annual Legislative Report Fiscal Year 6*, <https://www.mass.gov/files/documents/2018/06/14/Elder%20Affairs%202017%20Annual%20Legislative%20Report.pdf> (hereinafter *2017 Leg. Rep.*). Currently adults 65+ are 15 percent of the Massachusetts population, but by 2030 they will make up 21 percent of the population. *Id.* By 2060 the 50+ population in Massachusetts will have more than doubled. *Id.* The fastest growing population in the Commonwealth is those over the age of 85. *Id.* The U.S. will reach a similar population mark in 2035 when the U.S. Census Bureau projects that there will be more adults 65 and older (78.0 million) than children 18 and under (76.7 million). Jonathan Vespa, *The U.S. Joins Other Countries With Large Aging Populations*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2018/03/graying-america.html>.

As a result of the boom in the older population, the need for housing with services, such as assisted living, will rise. The likelihood of disabilities and the commensurate need for assistance with mobility and other activities of daily living increases with age. The most prevalent disability among older adults is serious difficulty walking or climbing stairs. Andrew W. Roberts, et al., *The Population 65 Years and Older in the United States: 2016* 15, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf> . About 15 percent of people ages 65 to 74 will have serious difficulty walking or climbing stairs. As people age, their need for mobility assistance increases many fold. Roughly a quarter of people ages 75 to 84 and a full 50 percent of people over age 85 will have ambulation impairments. *Id.*

A quarter of individuals age 85 and older have difficulty with dressing and bathing and over 40 percent have difficulty maintaining their independence because of difficulty shopping, going to the doctor, and running errands. *Id.* By looking at the relationship between age and impairments involving activities of daily living, it is possible to project the need for long-term services and care in the future. Overall, the number of older adults most likely to need long-term care will increase by 79 percent between 2010 and 2030, by another 44 percent in the next ten years, and by another 17 percent in the ten years after that. Donald Redfoot et al., AARP Pub. Pol’y Inst., *The Aging of the Baby Boom and the Growing Care*

Gap: A Look at Future Declines in the Availability of Family Caregivers 5-6

(2013),

https://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-ltc.pdf. As soon as 2020,

roughly 12 million older adults in the United States will need assistance with basic

life functions, such as eating, dressing, and bathing. Kathleen Ujvari, AARP Pub.

Pol’y Inst., *Disrupting the Marketplace: The State of Private Long-term Care*

Insurance, 2018 Update 1 (2018),

<https://www.aarp.org/content/dam/aarp/ppi/2018/08/disrupting-the-marketplace-the-state-of-private-long-term-care-insurance.pdf>.

At the same time, maintaining independence, choice, and control is of paramount concern for people as they age. Three out of four older adults desire to stay in their homes and communities as they age³ and almost all older adults will choose to age in their homes and communities as opposed to an institutional facility, such as a nursing home. James H. Johnson et al., Kenan Institute, *U.S.*

Older Adults: Demographics, Living Arrangements and Barriers to Aging in Place

1 (2017),

³ AARP, *2018 Staying Home And Community Preference Survey*, https://www.aarp.org/content/dam/aarp/research/surveys_statistics/liv-com/2019/home-community-preferences-survey-home-community-infographic.doi.10.26419-2Fres.00231.007.pdf.

https://www.kenaninstitute.unc.edu/wpcontent/uploads/2017/06/AgingInPlace_06092017.pdf. Yet, many currently live in homes that are not easily accessible. *See, e.g. AARP, 2018 Staying Home And Community Preference Survey 4, https://www.aarp.org/content/dam/aarp/research/surveys_statistics/liv-com/2018/home-community-preferences-survey.doi.10.26419-2Fres.00231.001.pdf* (Of the 60 percent of adults who own their own homes, a third would need major modifications to accommodate aging needs.). Thus, many older adults turn to assisted living so that they can continue to age in the community and maintain independence while also receiving needed long term support and services.

B. The Security Deposit Statute was Designed to Protect Vulnerable Populations Like the ALR Population

As the population of Massachusetts ages, an increasing number of older adults will make the move to assisted living. At the time of move-in they will be confronted with the up-front “community fees” at issue in this case. Given the emotional and economic vulnerabilities of older adults at the time they make the move to assisted living, it is particularly important that the Security Deposit Statute apply, in order to protect them from unfair or deceptive charges.

Moving to an ALR is a significant source of fear and stress among older adults. *See Diana T.F. Lee et al., A Review of Older People’s Experiences with Residential Care Placement, 37 JOURNAL OF ADVANCED NURSING 19-20 (2002).*

Moving is often done quickly and during a time of crisis, typically preceded by “declining health, financial problems, or the death of a spouse.” *Id.* at 19; *see also id.* at 20 (“It has been found that placement usually occurs at a time of distress or crisis e.g., following an acute illness or period of hospitalization.”). Some older adults are pressured into assisted living by their relatives, despite their desire to age in place. Dafina Petrova et al., *Risky Decision-Making Is Associated With Residential Choice In Healthy Older Adults*, FRONTIERS IN PSYCHOLOGY (Aug. 31, 2016), <https://www.frontiersin.org/articles/10.3389/fpsyg.2016.01304/full#B17>. The stress preceding move-in can be powerful and may affect older adults’ decision-making processes. *Id.*; *cf.* Mara Mather et al., *To Brake or Accelerate When the Light Turns Yellow: Stress Reduces Older Adults’ Risk Taking in a Driving Game*, 20 PSYCHOLOGICAL SCIENCE 174-76 (2009) (examining age and the effects of stress).

Additionally, those making the move to assisted living are often older adults who are financially vulnerable. This is particularly true in Massachusetts where older adults have the second lowest levels of economic security in the nation and one in three has an annual income of less than \$20,000. 2017 *Leg. Rep.* at 9. Five of the top ten concerns and questions of older adults in Massachusetts relate to financial security, with the older population asking, among other things, “Will I be able to afford accessible housing and services?” “Will I be able to pay for all my

expenses?” and “How can I avoid scams and financial exploitation so I don’t lose my life savings?” *Id.*

Exacerbating the vulnerability of older adults in Massachusetts is a senior housing shortage that is becoming increasingly acute as the population of Massachusetts ages. Eli Sherman, *Housing Crisis Leaves Seniors Feeling Stuck in Massachusetts*, THE METROWEST DAILY NEWS (Mar. 15, 2019), <https://www.metrowestdailynews.com/news/20190315/housing-crisis-leaves-seniors-feeling-stuck-in-massachusetts>; *see also* Stephanie Hughes, *The U.S. Senior Housing Market Facing a Supply Shortage*, MEDIUM (May 9, 2018), https://medium.com/@stephaniehughes_20796/the-u-s-senior-housing-market-facing-a-supply-shortage-5e43b1fc5277 (discussing the shortage in senior housing nationwide). The increasing age of the population⁴ combined with the increasing number of older adults most likely to need long-term care over the next 30 years⁵ indicate that the demand for senior housing will not only continue, but will increase over time. As demand outpaces supply, rents will rise, wait lists will lengthen, and options for senior housing will be reduced, further squeezing an already vulnerable population. *See* Sherman, *supra*; Hughes, *supra*; *see generally* Caroline F. Pearson et al., *The Forgotten Middle: Many Middle-Income Seniors*

⁴ 2017 Leg. Report at 6.

⁵ Donald Redfoot, *supra*.

Will Have Insufficient Resources For Housing and Health Care, 38 HEALTH AFFAIRS 851, 851-858 (2019),

<https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2018.05233> (describing the lack of affordable senior housing available to middle-income older adults).

Moreover, the cost of assisted living, which in Massachusetts costs, on average, \$65,940 per year, often comes as a surprise to most Americans as they age. *Cost of Care Survey 2018*, GENWORTH, <https://www.genworth.com/aging-and-you/finances/cost-of-care.html> (median cost, searchable by state and region).

Most lack a realistic understanding of the long-term care needs they will face, how and where they can best live as they age, and the cost of long-term care. U.S. Dep't of Health and Human Services, *Findings from the survey of Long-Term Care Awareness and Planning* 3-4 (2015),

<https://aspe.hhs.gov/system/files/pdf/110366/SLTCAPrb.pdf>. Still, ninety percent of ALR residents in Massachusetts pay privately for assisted living. MASS-ALA, *Massachusetts Assisted Living Resource Guide* 3 (2019), <https://www.mass-ala.org/assistedlivingresourceguide/> (hereinafter "*Mass. Assisted Living Resource Guide*"). Because the median national income of individuals at the time they enter

assisted living is approximately \$19,000,⁶ some individuals in Massachusetts have to turn to family for financial assistance,⁷ and others may have to pursue other alternative routes such as long-term care insurance, cashing out life insurance policies, selling or renting their house, taking out a reverse mortgage, or a bridge loan to afford their stay. *How Can I Pay For Assisted Living?*, ABOUT ASSISTED LIVING, <https://www.aboutassistedliving.org/how-can-i-pay-for-assisted-living>. This is because Medicare is not available to cover the cost of living at an ALR. *See*, U.S. Centers for Medicaid and Medicare Services, *Is my Test, Item, or Service Covered?* <https://www.medicare.gov/coverage/long-term-care> (“Medicare doesn’t cover long term care [.]”) Most other potential programs cover the costs of services, but not room and board. *Mass. Assisted Living Resource Guide* at 3. Although Massachusetts has a benefit program that will assist with the cost of rent in an ALR, the SSI-G, it is an extremely difficult benefit for which to qualify, as it is only available to those with very low incomes and assets no greater than \$2,000. *Massachusetts Group Adult Foster Care and the SSI-G Assisted living Benefit*, PAYING FOR SENIOR CARE, <https://www.payingforseniorcare.com/medicaid-waivers/ma-group-adult-foster-care.html>. As a result, only 1.6 percent of ALR

⁶ AAHSA et al., *2009 Overview of Assisted Living* 31 (2009), <https://www.ahcancal.org/ncal/facts/Documents/09%202009%20Overview%20of%20Assisted%20Living%20FINAL.pdf>.

⁷ *Id.* at 32 (summarizing the percentage of residents who rely on family for financial support in different assisted living models).

residents in Massachusetts receive SSI-G benefits. Executive Office of Elder Affairs, *Assisted Living Residence Certification Program and Resident Aggregate Information Annual Report 3* (2017)

<https://www.mass.gov/files/documents/2018/09/28/ALR%20Annual%20Distribution%20Report%20Summary%20-%20CY2017.pdf>. The remainder must find a way to cover the cost of rent on their own.

It is against this backdrop that older adults in Massachusetts enter ALRs and have to contend with one-time up-front non-refundable “community fees.” At the time of move-in the bargaining power between older adults and ALRs could not be more disparate. At one end of the bargaining table are older adults who are dealing with stress and economic and emotional vulnerabilities. On the other end is the predominately for-profit ALR industry, which generates nearly \$2 billion annually in economic activity in Massachusetts alone. NATIONAL CENTER FOR ASSISTED LIVING, *Massachusetts Fast Facts, State Profile for Assisted Living*, <https://www.ahcancal.org//events/CongressionalBriefing/Issue%20Briefs/SNF%20Delegation%20Data/Massachusetts-AL.pdf> (hereinafter NCAL Fast Facts); *see also* Executive Office of Elder Affairs, *Assisted Living Residence Certification Program and Resident Aggregate Information Annual Report 1* (2017) (81.6 percent of ALRs in Massachusetts operate for a profit). It is this very sort of inequity at the time of move-in that the Security Deposit Statute, which seeks to

establish “an equitable relationship between tenants and landlords” was designed to address. *Jinwala v. Bizzaro*, 24 Mass. App. Ct. 1, 6 (1987). “By enacting [the Security Deposit Statute] . . . the legislature manifested a concern for the welfare of tenants in residential property who, as a practical matter, are generally in inferior bargaining positions.” *See Mellor v. Berman*, 390 Mass. 275, 282 (1983); *see also Phillips v. Equity Residential Mgmt., LLC*, 478 Mass 251, 255 (2017) (“In passing the act, the Legislature recognized that tenants have less bargaining power than landlords and are less able to vindicate their right in court.”); *Cote v. Sylvia*, 2008 Mass. App. Div. LEXIS 9, *4 (Mass. App. Jan 22. 2008) (“The overarching objective is the protection of the tenant, who rarely has real bargaining power with the landlord.”) Given the particular vulnerability of older adults in Massachusetts, the Security Deposit Statute should apply to equalize the bargaining power between them and ALRs at the outset of the tenancy. Further, the “community fee” is precisely the type of fee the Security Deposit Statute was designed to prevent because it obscures the transparency of housing costs, causing confusion with regards to pricing among an already vulnerable population. *See Hermida v. Artchstone*, 826 F. Supp. 2d 380 (D. Mass 2011) (explaining that the statute “limits the up-front charges that the landlord legally can collect from the tenant in order to prevent unfair or deceptive charges.”)

The older adult population in Massachusetts needs protection. They are financially and emotionally vulnerable when they move into assisted living. Absent federal regulation of ALRs, enforcement of strong state laws, such as the Security Deposit Statute, is necessary to ensure that older adults in Massachusetts are not taken advantage of at the outset of their tenancy at an ALR.

II. ASSISTED LIVING RESIDENCES IN MASSACHUSETTS ARE RENTAL HOUSING COVERED BY THE SECURITY DEPOSIT LAW, G.L. CHAP. 186 § 15B

A. Massachusetts has Adopted a Residential Housing Model of Assisted Living

ALRs should not be exempted from laws that confer rights to their residents unless an explicit exemption exists because to do so would be antithetical to the roots and the purpose of the Massachusetts ALR Statute. Assisted living as a movement and model for providing long-term care and supportive services emerged in the mid-to-late 1980s from the dissatisfaction older people had to entering the institutional environment of a nursing home. Keren Brown Wilson, *Historical Evolution of Assisted Living in the United States, 1979 to the Present*, 47 *THE GERONTOLOGIST* 8-9 (2007). The assisted living model distinguished itself from the earlier nursing home model by offering a residential-style physical environment that included private space for residences and shared public space combined with a capacity for delivering health-related services. *Id.* Unlike the more institutional settings of a nursing home, assisted living places an emphasis on

privacy, resident choice and continuation of previous lifestyles by providing residents with autonomy over their use of time, space, possessions, contacts, and decisions about health care and services. *Id.* As the assisted living industry took off, the vast majority of providers adopted models that placed consumer autonomy, legal rights of residents, and provision of services in a residential setting at the forefront. *Id.* at 13-17 (discussing how some providers, including nursing homes and hospitals, needed to adapt to the demand for this new type of combined housing and services by adopting either the hybrid, hospitality, or housing model.)

The Massachusetts Legislature fully embraced a model of assisted living where autonomy of the resident and a residential setting were of paramount importance, and rejected a health care only model, as evidenced by the 1994 Act Establishing Assisted Living Residences, which provides that the purpose of the Act:

to promote the availability of services for elderly or disabled persons in a residential environment; to encourage the development of residential alternatives that promote the dignity, individuality, privacy and decision making ability of such persons; to provide for the health, safety and welfare of residents in assisted living residences; to promote continued improvement of such residential alternatives; to encourage the provision of economic, social and health services to residents through such residential alternatives[.]

ST. 1994, c. 354 § 1. The Legislature expressly eschewed an institutional, health care model, instructing that ALRs be “operated and regulated as residential environments with supportive services and not as medical or nursing facilities.” *Id.*

Today, “Massachusetts remains among a handful [of states] that still consider [assisted living] facilities more similar to apartment living.” Kay Lazar, *Assisted Living Facilities Push to Add Medical Services*, BOSTON GLOBE (Apr. 24, 2016), <https://www.bostonglobe.com/metro/2016/04/24/campaign-for-medical-services-assisted-living-raises-concerns/fo4q9dFSYJDVYKgFbcmG8O/story.html>. The Executive Office of Elder Affairs (“EOEA”), explains that “Assisted Living Residences offer housing, meals and personal care services to adults. They do not provide medical or nursing services.” *Assisted Living*, EXECUTIVE OFFICE OF ELDER AFFAIRS, <https://www.mass.gov/assisted-living>. “While assisted living facilities generally have a nurse on staff or have a provider visit once per week or month, they are not equipped to provide medical care or nursing care.” Deborah Cho et al., *Planning for Long Term Care in Massachusetts*, Ctr. for Health Law and Pol’y Innovation, WilmerHale Legal Services Center, Harvard Law School 7 (Dec. 2013), <https://www.chlpi.org/wp-content/uploads/2013/12/Long-Term-Care.pdf>. Indeed, an ALR typically provides only an hour or so per day of assistance, such as bathing, dressing, doing laundry and cleaning, or help with medications. *Id.* Unless a resident pays more, the all-

inclusive monthly rent and service fee at Heritage only includes “Up to 1 hour of daily assistance or supervision with Med reminders, bathing, bed making, dressing, transfers, toileting, incontinence care, and grooming.” *Assisted Living Costs*, HERITAGE ASSISTED LIVING, <https://www.heritageassistedliving.org/assisted-living/costs> (hereinafter “Heritage Assisted Living Costs”).

Further the Department of Public Health licenses nursing homes, G.L. c. 111, § 71, while it is the EOEA that certifies assisted living residences in Massachusetts. G.L. c. 19D, §§ 1-3. The ALR certification process has significantly fewer requirements, and of an entirely different nature than those imposed on licensing for nursing facilities. *Compare* 651 C.M.R. § 12 (1994) *with* 105 C.M.R. § 150. One obvious difference is that being a residential model, ALR staff is not allowed, under the regulation, to provide skilled nursing services. 651 C.M.R. § 12.04(3). ALRs are also exempted from many public health regulations, such as those applicable to nursing homes. 651 C.M.R. § 12(14) (e.g. ALRs do not need to complete a process to determine that the community needs another ALR before opening a residence, nor does it need to test residents for certain enumerated communicable diseases.) Of particular note is that ALRs are exempted from the requirements for the handling of resident deposits and funds in “long term care facilities.” 651 C.M.R. § 12.14(f).

B. Assisted Living is Rental Housing Covered by Landlord Tenant Law Section 15B, the Security Deposit Statute

ALRs fall squarely within the coverage the Security Deposit Statute. Not only are ALRs residential housing, but Massachusetts ALRs specifically hold themselves out and market themselves to consumers and residents as *rental* housing. Heritage, for example, describes itself as a rental model on its website. *See* Heritage Assisted Living Costs. (“Heritage is structured as a rental model with no “buy-in” fees.”). Massachusetts Assisted Living Association (“MA-ALA”) advises that monthly fees always include rent – and then it is up to the individual facility whether to charge for services as a separate monthly flat fee, bundle the rent and charges for services into a monthly fee, or charge for services a la carte. *Mass. Assisted Living Resource Guide* at 3. Further, the senior housing investment community tracks the rates of rent growth in assisted living. *See, e.g., Senior Housing Market Insight*, CBRE SENIOR HOUSING 12 (2018), <https://www.cbre.us/-/media/cbre/countryunitedstates/media/files/services/senior-housing/shmi-q2-2018.pdf>. Finally, in its 2017 Legislative Report, the Department of Elder Affairs confirms that “ALRs in Massachusetts exist as a residential housing option available to adults on a rental basis.” 2017 *Leg. Rep.* at 23. The crux of the Report is unequivocal that “ALRs provide a combination of housing and supportive services,” and that “being a residential model, ALR staff is not allowed under the regulation to provide medical or skilled nursing services[.]” *Id.*

Not only does the industry itself refer to ALRs as “rental” housing, but residents of ALRs have all the hallmarks of traditional tenants. Residents have a possessory interest in their particular and identifiable dwelling unit as required by the ALR Statute. G.L. c. 19D, §§ 9(16) (Residents must have their own dwelling unit with a lockable door beyond which they have a right of privacy). Residents sign an agreement and pay their rent portion for the agreed upon specific unit. ALRs, like Heritage, offer a variety of floor plans and residents often have a choice between one-or two-bedroom apartments. *See* Heritage Assisted Living Costs (Identifying available studio, one-bedroom, and two-bedroom units with links to floor plans). Moreover, the ALR Statute implicitly considers residents tenants as opposed to mere patients or licensees and explicitly announces that they have many of the core rights of tenants, including the right to habitability. *See generally* G.L. c. 19D, § 9(1). *See also* G.L. c. 19D § 9(4) (right to use personal property and possessions in their residential living space), § 9(5) (right to privacy in all communications and to have visiting with any person of one’s choice); § 9(18) (the right to not be evicted except in accordance with landlord tenant law). *Johnson v. Wilkinson*, 139 Mass 3 (1885) (describing factors the court weighed to determine whether a contract was a license or for an interest in the land, including delivery of a key, continuous use and exclusive occupation and control); *White v. Maynard*, 111 Mass. 250 (1872) (explaining the exclusive occupation of the rooms specified

would indicate a real property interest as opposed to a room and board agreement based in contract as existed in the case at bar).

Further, in the medicalized nursing home environment, regulations provide the bare minimum furnishings to which a resident is entitled in their living space, spelling out the minimum equipment and supplies that nursing facilities must provide their residents, including a comfortable bed and two pillows, a bedside cabinet, a toothbrush, and a bar of soap. 105 C.M.R. § 150.015(G)(4)(a)-(g). The only private space a nursing home must provide a resident is “storage space equipped with a lock and key, large enough to accommodate small personal possessions such as letters, jewelry, pictures or small amounts of money.” *Id.* § 150.015(G)(4)(h). In contrast, the assisted living regulations provide residents with the autonomy and privacy expected in a rental unit. For example, the assisted living regulations guarantee residents “single or double units with lockable doors on the entry door of each unit” and grants residents “exclusive rights to their Units.” 651 C.M.R. § 12.04(1)(a). The minimum requirements for ALR units are categorically different from those of a nursing home, mandating, for example, “a kitchenette or access to a refrigerator, sink, and heating element.” 651 C.M.R. § 12.04(1)(d). This difference is a universe further apart from the non-essential distinction between the terms “resident” and “tenant” or “lessee” that the trial court found to be compelling.

Accordingly, residents and ALRs have contracted not merely for services, but ALRs have agreed to provide residents with the exclusive occupancy of specific premises that ALRs have marketed to residents as rental housing. Regardless of how the agreements are titled, residents and ALRs have entered into “leases for real property” and should be covered by, not exempted from, the protections of the Security Deposit Statute.⁸

III. ALR RESIDENTS WILL BE SIGNIFICANTLY HARMED IF THE SECURITY DEPOSIT STATUTE DOES NOT APPLY TO ALRS, WHEREAS THE INDUSTRY WILL SUFFER LITTLE IMPACT IF THE SECURITY DEPOSIT STATUTE DOES APPLY

As a consumer protection statute, the Security Deposit Statute should be construed broadly. *See Roberts v. Enter. Rent-A-Car Co. of Boston*, 438 Mass. 187, 192 (2002) (“[W]e interpret consumer protection statutes broadly to effectuate their remedial purposes”) (citing *Shepard v. Fin. Associates of Auburn, Inc.*, 366

⁸ Heritage’s assertion that applying the Security Deposit Statute will make ALRs liable for a violation of the law each time an employee enters a residence for agreed upon services is preposterous. A landlord, like a vampire, may always enter your home if invited. *See, e.g., Susan Hegel, Landlord's Right To Enter Your Home* (2017), <https://www.masslegalhelp.org/housing/lt1-chapter-8-landlord-right-enter-home> (explaining that “Your landlord must have your permission to enter.”); *see also Vampire*, WWW.WIKIPEDIA.COM, <https://en.wikipedia.org/wiki/Vampire> (“Some traditions also hold that a vampire cannot enter a house unless invited by the owner[.]”) And, G.L. c. 19D § 9(a)(3) guarantees ALR residents with the right to “Privacy within the resident's unit, subject to rules of the assisted living residence reasonably designed to promote the health, safety and welfare of residents.” Thus, entry by invitation to provide agreed upon services is consistent with both landlord-tenant law and with Chapter 19D itself.

Mass. 182, 191 (1974) (“[A] consumer protection statute ... is to be liberally construed to effectuate its remedial purpose.”) If the Court adopts Defendant’s narrow reading of the Security Deposit Statute and finds that the Statute does not apply because ALRs are not governed by traditional landlord tenant laws, not only will the intended protections of the Statute be eviscerated, but ALR residents stand to lose many other landlord-tenant rights including:

- The right of a domestic violence victim to terminate the rental agreement. *See* G.L. c. 186, §§ 24, 27.
- The right of a domestic violence victim not to be discriminated against for having previously terminated the rental agreement. *See* G.L. c. 186, §§ 25, 27.
- The right of a domestic violence victim to have the locks changed. *See* G.L. c. 186, §§ 26, 27.
- The right to have water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service. *See* G.L. c. 186, § 14.
- The right not to be required to pay for water and other utilities unfairly or inappropriately. *See* G.L. c. 186, § 22; 105 C.M.R. 410.354.
- The right to institute an action for injuries sustained by a defect in a common area or for a violation of the building code. *See* G.L. C. 186, § 15E.
- The right not to waive claims against the landlord for injuries. *See* G.L. C. 186, § 15.
- The right to have the landlord disclose insurance information. *See* G.L. C. 186, § 21.

- The right not to be required to pay for property taxes increases unfairly or inappropriately. *See* G.L. c. 186, § 15C.
- The right to seek injunctive relief, actual or statutory damages, and attorneys’ fees for breach of the covenant of quiet enjoyment. *See* G.L. c. 186, § 14.
- The right to bring actions to enforce the State Sanitary Code. *See* G.L. c. 111, § 127A et seq.
- The right to have the obligation to pay rent dependent on the landlord’s compliance with the implied warranty of habitability, including the right to abatement of rent. *See Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 199-201 (1973).
- The right to “repair and deduct.” *See* G.L. c. 111, § 127L.
- The right to enforce the Attorney General’s Chapter 93A regulations regarding the landlord’s obligations. *See* 940 C.M.R. § 3.17.

The Legislature could not and did not intend for ALR residents to go unprotected by these laws. The Legislature demonstrated its intent to treat ALR residents as tenants when it granted, as residents’ first enumerated right, the quintessential modern landlord-tenant right “to [l]ive in a decent, safe, and habitable residential living environment]”. G.L.c. 19D § 9(a)(1).⁹ Further, the

⁹ *See* Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 2 (“In the

Legislature expressly requires that ALRs use the landlord-tenant eviction laws and process set out in G.L.c.186 and c. 239, but it does not exclude ALRs from coverage of any specific landlord-tenant law that forms part of c. 186 or c. 239. And conspicuously, there is no exclusion from G.L. c. 186 § 15B, the Security Deposit Statute. If an ALR brings an eviction case for non-payment under the residency agreement, the resident may raise claims and counterclaims, in particular, claims arising out of a breach of the warranty of habitability, or violations of other laws such as the Security Deposit Statute. c. 239 § 8A.

Indeed, under the statutory scheme, the non-rent terms of any residency agreement are to be interpreted in an eviction as if they were substantive terms of a lease, including whether there was sufficient cause for termination, whether the residency agreement was duly expired, and whether notice was needed and if so was proper. G.L. c. 239 § 1. It defies common sense that ALRs must treat residents fully as tenants at the time of eviction, but have no obligation to do so at the time of admission and move-in.

ALRs are able to bring evictions based on a panoply of issues no different than those arising in any landlord-tenant relationship – for instance: non-payment of rent or failure to meet other basic requirements of tenancy, such as failing to

canon of modern landlord-tenant law, the implied warranty of habitability (“the warranty”) is a staple in the arsenal of tenant-protective measures.”)

keep up the premises, or unduly bothering neighbors or the landlord. Unless the reasons residents are violating their residency agreement is directly related to a health condition and covered by their personal care plan, these problems are no different than garden variety lease violations and may form the underlying bases for terminations and evictions. In those cases, residents *qua* tenants will have their own rights to assert in summary process, such as counterclaims or claims to offsets. G.L.c 239 § 8A; *see Adjartey v. Cent. Div. of Hous. Court Dep't*, 481 Mass. 830, 855 n.14 (2019) (in summary process “potential defenses and counterclaims include, but are not limited to, a landlord’s violation of the security deposit statute.”) (citing *Meikle v. Nurse*, 474 Mass. 207, 208 (2016)). In this full context of the integration of resident rights and tenant rights, it makes no sense that the Legislature would have intended to strip residents of basic tenants’ rights or would single out the Security Deposit Statute as an exemption to the comprehensive congruence of resident and tenant rights.

In contrast to the harm that will befall ALR residents if the Security Deposit Statute does not apply, the industry has failed to demonstrate that it will suffer any substantial harm by a finding that the Security Deposit Statute does apply. ALRs can absorb the lost income that would result if they could no longer charge community fees. The industry, which in Massachusetts generates \$1.8 billion of

economic activity a year¹⁰, operates on a predominately for-profit model, with 81.6 percent of ALRs in Massachusetts operating for a profit. Executive Office of Elder Affairs, *Assisted Living Residence Certification Program and Resident Aggregate Information Annual Report 3* (2017). The for-profit model gives ALRs leeway to structure fees and costs in a way that adheres to the Security Deposit Statute.¹¹

Moreover, experience shows that most housing providers are quite capable of reconciling their business practices and their primary regulatory framework with the myriad consumer and civil rights laws that protect their residents. For instance, there is no dispute that ALRs are covered by the federal Fair Housing Act, 42 U.S.C. § 3601 et seq; *see also Wetzel*, 901 F.3d at 856. Many ALRs have changed longstanding practices in order to comply with the FHA. *See, e.g.* Paula Spahn,

¹⁰ NCAL Fast Facts, <https://www.ahcancal.org//events/CongressionalBriefing/Issue%20Briefs/SNF%20Delegation%20Data/Massachusetts-AL.pdf>.

¹¹ To the extent that an ALR might charge a fee solely to cover up-front service related costs, such as only for the actual required nursing assessment, 651 CMR §12.04(6)(a), then it might be determined that the fee could be charged without violating the Security Deposit Statute. *Gowen v. Benchmark Senior Living, LLC*, No. 1684CV03972-BLS2, 2017 WL 3251585, *5-6 (Mass. Super. May 8, 2017). Of course, if the fee is charged for mixed reasons, including reserves and general funds, as well as allocated to services, it will run afoul of the Security Deposit Statute. To comply with the Security Deposit Statute under such a theory the ALR would need to properly document and account for the use of such limited permissible fees. Whether Heritage would be able to do so in this case cannot be determined on its motion to dismiss under Rule 12(b)(6) because no record was established.

Justice Department Takes Down Barriers in Retirement Homes, N.Y. TIMES, June 8, 2015, <https://www.nytimes.com/2015/06/09/health/justice-department-takes-down-barriers-in-retirement-homes.html> (retirement community agreed to allow assisted living residents to eat in other buildings' dining rooms, to have aides accompany them, and to leave their premises without permission).¹² This experience in another substantive legal area demonstrates that the ALR industry will adjust and continue to thrive after being held accountable to comply with the Security Deposit Statute.

Applying the Security Deposit Statute to ALRs is necessary to protect the rights of an aging population, and prevent ageism, which the EOEA lists as one of its primary missions. The EOEA defines ageism as a 'process of systemic stereotyping or discrimination against people because they are old.' Age discrimination presents an often invisible barrier to full self-determination for older people." 2017 *Leg. Rep.* at 11-12. As people age, and their disabilities increase, they should not be removed from the protection of the Security Deposit Statute, which they would have in any other residential rental housing, simply because they now call an ALR home.

¹² *U.S. v. Fort Norfolk Retirement Community, Inc.*, No. 2:15-cv-200 (E.D. Va. 2015), <https://www.justice.gov/file/fort-norfolk-consent-order/download>.

CONCLUSION

For the reasons discussed above, the Security Deposit Statute should apply to ALRs.

Respectfully Submitted,

/s/Elizabeth Aniskevich

Pro Hac Vice

AARP Foundation

601 E Street, NW

Washington, DC 20049

202-434-2072

eaniskevich@aarp.org

/s/Richard M.W. Bauer

(BBO # 544035)

National Consumer Law Center

7 Winthrop Square

Boston, MA 02110

857-540-6293

dbauer@nclc.org

/s/Rebecca J. Benson

(BBO # 548620)

/s/Liane Zeitz, CELA

(BBO # 547049)

National Academy of Elder

Law Attorneys

57 Providence Highway,

Suite #210

781-326-5005

rbenson@specialneeds-

law.com

lzeitz@zeitzlaw.com

On the Brief:
Susan Ann Silverstein
AARP Foundation
601 E Street, NW
Washington, DC 20049
202-434-2159
ssilverstein@aarp.org

CERTIFICATE OF SERVICE

I, Richard M.W. Bauer, hereby certify that the foregoing Brief of AARP, AARP Foundation, the National Consumer Law Center and the National Academy of Elder Law Attorneys as Amici Curiae Supporting Appellant and Reversal complies with the rules of court that pertain to service of briefs pursuant to Mass. R. A. P. 13(e) and was served on all parties of record through the court's electronic filing system.

Dated: August 19, 2019

/s/Richard M.W. Bauer
(BBO # 544035)
National Consumer Law Center
7 Winthrop Square
Boston, MA 02110
857-540-6293
dbauer@nclc.org

CERTIFICATE OF COMPLIANCE

I, Elizabeth Aniskevich, 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. 16(a) (contents of briefs); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 17 (amicus briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

I also certify that the foregoing brief complies with Mass. R.A.P. 20(a)(2)(C). The brief contains 6,648 non-excluded words in Times New Roman, size 14 font, and was produced using Microsoft Word 2016.

Dated: August 19, 2019

/s/Elizabeth Aniskevich
Pro Hac Vice
AARP Foundation
601 E Street, NW
Washington, DC 20040
202-434-2072
eaniskevich@aarp.org