

**COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT**

No. 2019-P-1024

Suffolk, ss.

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FLAVIA MORETALARA, *Plaintiff/Appellee*

v.

BOSTON HOUSING AUTHORITY, *Defendant/Appellant*

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On Appeal from Eastern Division of the Housing Court

Docket No. 16-H84-CV-00573

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Brief of AARP, AARP Foundation, Disability Law Center, Inc. and  
National Disability Rights Network As *Amici Curiae*

In Support of Plaintiff/Appellee Flavia Moretalara

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Date: August 26, 2020

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## **CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Supreme Judicial Court Rule 1:21, the Disability Law Center, Inc. (DLC) is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts. National Disability Rights Network (NDRN) is a nonprofit corporation organized under the laws of the District of Columbia.

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. No publicly held corporation owns more than 10% of the stock of the AARP, AARP Foundation, the Disability Law Center or the National Disability Rights Network.

**MASSACHUSETTS RULE OF APPELLATE PROCEDURE 17(c)(5)  
DECLARATION**

Pursuant to Mass. R.A.P. 17(c)(5) the undersigned counsel states: (1) No party or counsel for a party authored this brief in whole or in part; (2) No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief; (3) No other person or entity, other than amici and its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (4) AARP, AARP Foundation, National Disability Rights Network and DLC and their counsel do not represent any of the parties to this case in other litigation presenting the same issues as are presented in this case.

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## STATEMENT OF INTEREST

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 the right of residents in public housing to reasonable accommodations for full-time, live-in caregivers. *Aponte v. Olatoye*, 30 N.Y.3d 693 (2018) (addressing whether a caregiver of a public housing resident could become a permanent resident as a reasonable accommodation).

AARP has also supported the rights of people with disabilities in cases before this Court. *See, e.g., Boston Housing Authority 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); *Ryan v Mary Ann Morse Healthcare Corp.*, 483 Mass. 612 (2019) (holding that certain landlord-tenant consumer laws apply to assisted living facilities to limit the scope of permissible upfront fees).

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The Disability Law Center, Inc. (“DLC”) is a private non-profit organization, and the designated P&A system for people with disabilities in Massachusetts, pursuant to federal statutory authority. *See e.g.*, 29 U.S.C. § 794e (persons with disabilities, including physical disabilities), 42 U.S.C. § 10802, (people with mental illness), and 29 U.S.C. § 3004 (people with disabilities in need of assistive technology). DLC’s core mission includes advocacy on civil rights and public access for people with disabilities living in the community, as well as non-

discrimination in the provision of government services. Since 1978, DLC has provided a full range of legal assistance to people with disabilities in Massachusetts, including legal representation, regulatory and legislative advocacy, and education and training on the legal rights of people with disabilities.

DLC frequently represents people with disabilities who use formal and informal arrangements for personal care and home health assistance, and also has particular knowledge regarding the application of federal disability discrimination laws in the context of private, public and subsidized housing. The outcome of this case will likely have a profound impact on the ability of many of DLC's clients, members, and constituents to fully engage in civic life. On many occasions, DLC has participated in amicus briefs filed before Massachusetts appellate courts.

## SUMMARY OF ARGUMENT

Congress and the Commonwealth of Massachusetts have enacted fair housing and civil rights laws, and developed policies, that reflect an intention to ensure that individuals with disabilities and aging adults live fully integrated lives in the mainstream of society rather than in segregated congregate facilities.

Building on statutes such as Section 504 of the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988, and the Americans with Disabilities Act of 1990, the U.S. Supreme Court declared in *Olmstead v. L.C.*, 527 U.S. 581 (1999) that unjustified isolation is discrimination based on disability, and that integration into the community is best accomplished in non-institutional settings in order to counteract the stereotype that such individuals are incapable of participating in community life. Implicit in this principle is the realization that for many people with disabilities, human-made barriers exist that create limitations to choices they long to make regarding where they live, work, go to school, and participate in social and recreational opportunities, and that these barriers must be overcome through adequate supports and services in the community. For millions of Americans, formal and informal caregivers and home health aides provide the foundation for autonomous decision-making and independent living and are a vital safeguard against institutionalization.

Massachusetts has been a national leader in establishing a commitment to the civil rights of its citizens, and in forming policies with the values of equal opportunity and full integration in mind. This commitment is central to the Commonwealth's Olmstead Plan, and extends to its programs which ensure affordable, accessible housing and self-directed care and other human services in one's own home. Thus, through a combination of both reasonable accommodation in housing, as required by fair housing law, and caregiver assistance, as encouraged through state-level policies and practices, individuals with disabilities and older residents of the Commonwealth have successfully been given the ability to achieve full independence in the community. Long-term services and supports provide the foundation upon which the ideals of the *Olmstead* decision and the Massachusetts Olmstead Plan are built. And of equal significance, the provision of reasonable accommodation upholds the ongoing framework of state policies and practices and prevents homelessness or institutionalization as well as adverse health consequences.

## ARGUMENT

### **I. Fair Housing and Other Disability Rights Laws Reflect National and State Policies of Ensuring that People with Disabilities Are Fully Integrated into the Mainstream of Society and Provided Equal Opportunities to Secure Housing, Programs, and Services.**

- A. Congress Enacted Section 504 of the Rehabilitation Act, the Fair Housing Act, and the Americans with Disabilities Act to Ensure the Integration of People With Disabilities Into the Community.

Americans with disabilities and aging adults are often defined by others according to their medical conditions and limitations. But the real story lies in the barriers that are entirely human-made: inaccessibility within the built environment, social stigma, the crushing weight of paternalism and low expectations, and the lack of supports and services which would otherwise provide equal opportunity.<sup>1</sup>

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<sup>1</sup> Time and again, people labeled as having severe disabilities far exceed all expectations of both professionals and family members when they are provided with adequate supports in community settings. As one former resident raised in, and released from an institution for persons with intellectual disabilities explained:

I had people who believed in me and who supported me – friends and providers. I’ve seen people with severe disabilities who have grown and accomplished great things given the right support... I hear people say that some people are too disabled to live in the community, but I’ve seen people just like the people still in institutions who do so much better in the community – because no one expects you to do anything in that institution but survive.

Some will be fortunate enough to live an integrated life in the community, with family, work, school, social and recreational opportunities. Others will spend years of their life, or even their entire life, behind concrete institutional walls at a nursing home, state hospital, or developmental center. Each person's fate is often determined by the availability of supports and services, especially caregivers and home health aides, rather than the individual's disabilities – or capabilities - or age.

The Rehabilitation Act of 1973, 29 U.S.C. §§ 791-796i, was the first Act passed by Congress intended to protect the rights of people with disabilities to live integrated rather than segregated lives. Section 504 of the Rehabilitation Act prohibits any entity that receives federal funding from discriminating against people with disabilities in a variety of contexts, including housing, such as the BHA and its administration of its Section 8 Housing Choice Voucher Program (“HCVP”). 29 U.S.C. § 794. As one Senator proclaimed, “The time has come when we can no longer tolerate the invisibility of the handicapped in America.” 118 CONG.REC. 29, 525 (1972) (statement of Sen. Humphrey).

In 1988, Congress passed the Fair Housing Amendments Act (FHAA) extending disability rights to the entire national housing market and pronounced “a national commitment to end the unnecessary exclusion of persons with handicaps

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Ricardo, T. Thomas Sr., *We Can't Go Back*, in *Disability Visibility, First-Person Stories from the Twenty-First Century*, 87 (Alice Wong ed., 2020).

from the American mainstream.” H.R. Rep. No. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179. The FHAA seeks to accomplish two critically important objectives: to integrate persons with disabilities into communities and neighborhoods, and to ensure that they are able to have equal access to enjoyment of their homes. Susan B. Eisner, *There's No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1988*, 14 N.Y.L. Sch. J. Hum. Rts. 435, 438 (1998).

In order for the FHAA to accomplish the purpose of truly integrating people with disabilities into the community and ensuring equal access to and enjoyment of the housing market, the statute needed to do more than make it illegal to discriminate on the basis of disability by denying a sale or rental or providing different terms or conditions. 42 U.S.C. § 3604(f)(1) and (2). Taking its cue from the already established case law under Section 504 of the Rehabilitation Act, Congress prohibited the discriminatory practice of failing to provide reasonable accommodations “in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). Each of these three prohibited discriminatory practices – denying a rental or sale, imposing different conditions, or failing to accommodate -- are given equal statutory weight.<sup>2</sup> Congress

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<sup>2</sup> This simplifies the full text of 42 U.S.C. 3604(f) and in particular highlights

understood that to afford equal opportunity and integrate people into the community doors had to be open, treatment had to be fair, and rules and policies had to reasonably accommodate people with disabilities on an individualized basis.

When it passed the Americans with Disabilities Act (ADA) in 1990, Congress expressed its intent to overcome the societal ill of serious and pervasive isolation and segregation of individuals with disabilities. 42 U.S.C. § 12101. It sought to avoid institutionalization and assure opportunities for independent living. *Id.* Nine years later, most notably, the U.S. Supreme Court decided *Olmstead v. L.C.*, 527 U.S. 581 (1999), interpreting Title II of the ADA. 42 U.S.C. § 12131 *et seq.* The Court recognized that unjustified isolation is discrimination based on disability, and that comprehensive integration into the community is best accomplished in the settings that do not force groups of people with disabilities to live together in congregate settings. The Court found that "[i]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 U.S. at 583.

These national goals are the summation of millions of individual desires of Americans for themselves and for others. In 2014, the Census Bureau reports there

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reasonable accommodations, as subsection (c) also includes the requirement to make reasonable modifications in existing premises and to meet certain physical accessibility standards.

were 240,054,000 adults with disabilities living in the community, ten (10) percent of whom needed assistance with activities of daily life. Danielle M. Taylor, U.S. Census Bureau, *Americans With Disabilities: 2014, Current Population Reports 6* (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf>. The vast majority of older adults (77 percent) desire to stay in their homes and communities as they age<sup>3</sup> and almost all older adults will choose to age in their homes and communities as opposed to an institutional facility.<sup>4</sup>

The result is that a significant proportion of society is comprised of people with disabilities who increasingly need supports and services, yet who seek to receive this assistance in community-based rather than institutional settings. More than one out of four people in the United States (27.2 percent) living **outside of** nursing or assisted living facilities has a disability and more than one out of six has

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<sup>3</sup> AARP, *Home and Community Preferences Survey: Staying in the Community* (2018), [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.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).

<sup>4</sup> James H. Johnson & Stephen J. Appold, Kenan Institute, *U.S. Older Adults: Demographics, Living Arrangements, and Barriers to Aging in Place* (May 30, 2017), [https://www.kenaninstitute.unc.edu/wp-content/uploads/2017/06/AgingInPlace\\_06092017.pdf](https://www.kenaninstitute.unc.edu/wp-content/uploads/2017/06/AgingInPlace_06092017.pdf).

a severe disability (17.6 percent).<sup>5</sup> Danielle M. Taylor, U.S. Census Bureau, *Americans With Disabilities: 2014, Current Population Reports 2* (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf>. These percentages increase with age, as likelihood of having a disability rises with age. For instance, people 75 years and older are about five times as likely to have a disability than people between 18 and 24 years; the probability of having a severe disability was less than 1 in 10 for adults between 18 and 24 years, about 3 in 10 for adults between 65 and 69 years, and more than half among adults 75 years and older. *Id.* at 3-5. Indeed, most people during the course of their lives will know a person with a disability or have one themselves.

B. Massachusetts Has Shaped Public Policies Regarding Housing and Human Services to Promote Independence for People with Disabilities Through Caregiving Provided at Home in the Community.

Massachusetts policies embrace the values of independent living and autonomy, expanding affordable housing options in the community for people with

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<sup>5</sup> The Census Bureau considers an individual a person with a disability if they: use a cane, crutches, or walker; have serious difficulty seeing or hearing; have difficulty doing one or more of a range of activities that are needed for daily living such as lifting, walking, concentrating, dressing, bathing, or paying bills whether from a mental or physical impairment; or have certain specific conditions. Taylor, *Americans With Disabilities: 2014*, at 3. The disability status of an individual is not static, a person who is not disabled may become disabled at any time through serving our country, the violent acts of another, illness, accident, or the natural aging process.

disabilities and providing for self-directed services in the home to avoid the twin risks of segregation in an institutional setting such as a nursing home and having no home at all. Significantly, the Commonwealth of Massachusetts has formulated an “Olmstead Plan” to formalize many of these policies and priorities.<sup>6</sup>

Commonwealth of Massachusetts, *2018 Massachusetts Olmstead Plan 2* (2018), <https://www.mass.gov/files/documents/2018/09/20/olmstead-final-plan-2018.pdf>.

The Commonwealth’s Olmstead Plan establishes that:

It is the policy of the Commonwealth of Massachusetts .... to facilitate opportunities for all people with disabilities to live their lives fully included and integrated into their chosen communities – both by increasing the movement of such persons from institutional to community settings and by preventing the unnecessary institutionalization or homelessness of such persons. People with disabilities should have access to accessible, flexible, robust, and quality systems of community-based housing and home-and-community-based long-term services and supports that, working in tandem, support their ability to live, work, and be served in their chosen communities.

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<sup>6</sup> “In 1999, the U.S. Supreme Court rendered a decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), indicating that states have a legal obligation to administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. The Olmstead decision, and subsequent Department of Justice guidance, recognized that a state may satisfy this obligation through development of a comprehensive, effectively working plan for placing qualified persons with disabilities in less restrictive settings. These plans are known as Olmstead Plans.” Commonwealth of Massachusetts, *Commonwealth of Massachusetts Olmstead Plan and Update*, <https://www.mass.gov/orgs/commonwealth-of-massachusetts-olmstead-plan-and-update> (last visited Aug. 19, 2020).

Commonwealth of Massachusetts, 2018 Massachusetts Olmstead Plan 2 (2018), <https://www.mass.gov/files/documents/2018/09/20/olmstead-final-plan-2018.pdf>.

The commitment of Massachusetts to community integration is demonstrated by its efforts to make housing on the private rental market more affordable. For example, the Alternative Housing Voucher Program, established in 1995, provides vouchers for rental assistance to non-elderly handicapped persons of low-income who have been determined eligible and qualified for c. 667 elderly/handicapped housing. *See* Commonwealth of Massachusetts, *Alternative Housing Voucher Program*, <https://www.mass.gov/orgs/commonwealth-of-massachusetts-olmstead-plan-and-update> (last visited Aug. 18, 2020). The Commonwealth is one of a relatively small number of jurisdictions that prohibit discrimination against tenants with housing subsidies. G.L. c. 151B §4 (10). Massachusetts also invests in creating affordable housing for tenants at risk of institutionalization, and others in need of accessible features. The 811 Project Rental Assistance Program provides housing options for extremely low-income adults with disabilities under the age of 62 who are transitioning from long term care facilities into the community or who are at risk of re-institutionalization. Courtney Loiselle, *811 Project Rental Assistance and the Money Follows the Person Demonstration*, *Money Follows the Person* 4 (Jan. 2017),

<https://www.mass.gov/doc/811-project-rental-assistance-year-two-report/download>.

The Massachusetts Department of Housing and Community Development (DHCD) has also taken significant steps to incorporate criteria in its Low Income Housing Tax Credit Qualified Allocation Plan (“QAP”) that promote the development and construction of new accessible housing in the community and the provision of supportive services to tenants, especially those with disabilities, elderly residents, and people who have recently become homeless. *See* Dep’t of Housing and Community Dev., Commonwealth of Massachusetts, *Low Income Housing Tax Credit Program: 2020-2021 Qualified Action Plan*, <https://www.mass.gov/doc/2020-2021-qap-low-income-housing-tax-credit-qualified-allocation-plan-qap/download>.

All of these policies and practices have strengthened the historic commitment of the Commonwealth to civil rights. In 1865, Massachusetts became the first state to pass a public accommodations antidiscrimination law on the basis of race. 1865 Mass. Acts, c. 277. It has also been a leader in values of independent living for people with disabilities, amending its 1865 civil rights act in 1938 to include blind persons accompanied by service dogs and, subsequently, all persons with disabilities. *See*, Mass. Gen. Laws c. 272 § 98 and 98A. In 1909, Massachusetts formed the first public commission on aging in the country. Social

Security Administration, *Chronology: 1900s-1920s*, Special Collections, <https://www.ssa.gov/history/1900.html> (last visited Aug. 19, 2020). In 1980, ten years prior to the enactment of the ADA, Massachusetts adopted Article 114 to its Declaration of Rights and barred discrimination against handicapped persons “under any program or activity within the Commonwealth.” Similarly, the civil rights provisions adding discrimination against persons with disabilities in housing, adopted in 1983, preceded the federal Fair Housing Amendments Act by five years. The Fair Housing Center of Greater Boston, *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts*, <https://www.bostonfairhousing.org/timeline/1946-Chapter-151b.html> (last visited Aug. 19, 2020).

## **II. Many People with Disabilities Need Both Caregiver Assistance and Individualized Reasonable Accommodations In Order to Realize What Congress and State Legislatures Have Long Promised Them.**

### **A. Caregiving by Family and Friends Enables People with Disabilities to Live Independently.**

Caregiving includes a range of different types of help, formal and informal, and tenants may often have more than one caregiver. Long-term services and supports (LTSS) refers to a broad range of services and supports needed by individuals due to a physical, cognitive, or mental disability or condition. *See* Congressional Research Service, *Overview of Long-Term Services and Supports I* (Dec. 30, 2019),

<https://crsreports.congress.gov/product/pdf/IF/IF10427#:~:text=Examples%20of%20community%2Dbased%20LTSS,services%20to%20a%20cognitively%20impaired.> . About 14 million adults in the United States need LTSS, and over half (56%) are aged 65 and over. Most receive care in their own homes from informal caregivers, such as family or friends. *Id.*

Approximately 53 million Americans provide that unpaid care to individuals of all ages who need assistance with daily activities<sup>7</sup>. AARP, *Caregiving in the US: 2020 Report, AARP Family Caregiving* 4 (May 2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf>. Of those caring for adults, more than half of these caregivers are age 50 or older (54 percent) with an average caregiver age of 49.4 years, and almost a quarter (24 percent) provide care to multiple people. *Id.* at 10, 12. Most take care of a relative (89 percent), usually taking care of a parent or parent-in-law (50 percent). *Id.* at 16. They provide an average of 23.7 hours of care per week, with a median of 10 hours. *Id.* at 30. The majority of them (61 percent, manage to do all this while being employed. *Id.* at 62.

The size and the scope of informal caregiving in our national economy is hard

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<sup>7</sup> A year earlier there were almost 7 million care givers in Massachusetts. Susan P. Reinhard, et al., *Valuing the Invaluable: 2019 Update Charting a Path Forward*, AARP Public Policy Institute 24 (November 2019), <https://www.aarp.org/content/dam/aarp/ppi/2019/11/valuing-the-invaluable-2019-update-charting-a-path-forward.doi.10.26419-2Fppi.00082.001.pdf>.

to comprehend. The economic value of family caregiving to adults in 2017 was estimated to be \$470 billion, an amount greater than all out-of-pocket spending on health care in the U.S. and three times as much as total Medicaid spending on LTSS.

Susan P. Reinhard, et al., *Valuing the Invaluable: 2019 Update Charting a Path Forward*, AARP Public Policy Institute 3 (November 2019),

<https://www.aarp.org/content/dam/aarp/ppi/2019/11/valuing-the-invaluable-2019-update-charting-a-path-forward.doi.10.26419-2Fppi.00082.001.pdf>. In

Massachusetts alone the economic value is placed at \$12 billion. *Id.* at 24.

B. Discriminatory Failure to Provide Reasonable Accommodations for Caregiving Will Worsen the Harm Resulting From the Need for Informal Caregiving.

Roughly 12 million older adults in the United States now need assistance with basic life functions, such as eating, dressing, and bathing. *See* Kathleen Ujvari, *Disrupting the Marketplace: The State of Private Long-Term Care Insurance, 2018 Update*, AARP Public Policy Institute (August 2018), <https://www.aarp.org/content/dam/aarp/ppi/2018/08/disrupting-the-marketplace-the-state-of-private-long-term-care-insurance.pdf>. This number will increase dramatically.<sup>8</sup> In 2034 the U.S. will reach a population milestone. The U. S.

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<sup>8</sup> As early as 2013, demographers estimated that the number of older adults most likely to need long-term care would 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., *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family*

Census Bureau projects that in 2034 there will be more adults 65 and older (78.0 million) than children 18 and under (76.7) million for the first time in history. Johnathan Vespa, U.S. Census Bureau, *The Graying of America: More Older Adults Than Kids by 2035* (Oct. 8, 2019), [www.census.gov/library/stories/2018/03/graying-america.html](http://www.census.gov/library/stories/2018/03/graying-america.html).<sup>9</sup> Currently, older adults are 15 percent of the population, but starting in 2030 they will make up 21 percent of the American population. *Id.* By 2060 almost one-fourth of the U.S. will be 65 and older. *Id.*

The most prevalent disability among older adults is serious difficulty walking or climbing the stairs. Andrew W. Roberts, et al., U.S. Census Bureau, *The Population 65 Years and Older in the United States: 2016 15* (October 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf>. From ages 65-74 about 15 percent will have serious difficulty walking or climbing the stairs, and about one-fourth of those 75-84 and one-half of those

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*Caregivers*, AARP 5-6 (August 2013), <https://www.aarp.org/home-family/caregiving/info-08-2013/the-aging-of-the-baby-boom-and-the-growing-care-gap-AARP-ppi-ltc.html#:~:text=It%20documents%20the%20dramatic%20widening,for%20the%20frail%20older%20population.>

<sup>9</sup> Earlier Census Bureau data projected this tipping point to occur in 2035, and at the time of this brief the title of this Census Bureau page did not yet reflect the updated projection of 2034.

85 and older will have these ambulation impairments. *Id.* at 15. A quarter of those 85 and older have difficulty with dressing and bathing and over 40 percent have difficulty being independent because of difficulty shopping, going to the doctor and running errands. *Id.*

Very few individuals with disabilities or their families can afford to purchase the assistance they need. In 2019, the national median annual cost of full-time home health care was approximately \$52,624<sup>10</sup> As a comparison, the maximum household income a family of three could earn in 2019 and be eligible for Section 8 rental assistance is \$54,350 -- about the same as the average cost of home care. Center on Budget and Policy Priorities, *United States Federal Rental Assistance Fact Sheet*, (Dec. 2019) <https://www.cbpp.org/research/housing/federal-rental-assistance-fact-sheets#US>.

Unfortunately, neither private nor public health insurance makes up for most Americans' inability to pay for the help they need out of their own income or savings. Roughly 7.2 million individuals had long-term care policies in 2014. *See* Eric Norden, *The State of Long-Term Care Insurance: The Market, Challenges and Future Innovations*, National Association of Insurance Commissioners and The

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<sup>10</sup> In Massachusetts, the median annual cost of home health care is 62,920. Genworth, *Cost of Care Survey*, <http://www.genworth.com/aging-and-you/finances/cost-of-care.html> (last visited Aug. 20, 2020).<sup>10</sup>, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/12-10-19hous-factsheet-us.pdf>.

Center for Insurance Policy and Research 19 (May 2016)

[https://www.naic.org/documents/cipr\\_current\\_study\\_160519\\_ltc\\_insurance.pdf](https://www.naic.org/documents/cipr_current_study_160519_ltc_insurance.pdf).

Although Medicaid and Medicare, the two primary federal health care and insurance programs, pay for about two-thirds of long-term services, help through these government-funded programs is exceedingly limited by the population served and the scope of services provided. Stuart Hagen, Congressional Budget Office, *Rising Demand for Long-Term Services and Supports for Elderly People* 10 (June 2013), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/44363-LTC.pdf>.

Medicare program provides very little community-based care as it primarily funds home-based services only for short bouts of need directly after hospitalizations. *Id.* at 25. Medicaid eligibility requires recipients to have both very low income and, in some instances, savings and assets under very low thresholds – and often put off applying for Medicaid assistance to avoid depleting their limited lifetime savings. *Id.* at 27. Thus, despite Massachusetts’s best efforts to use its Medicaid program to provide access to independent living, these federally and state funded services reach only small, targeted segments of the population. *Id.* at 102. For many adults, the only long-term care option becomes institutionalization.

**III. The Fair Housing Act Requires An Individualized Assessment of and Consideration of A Request for Reasonable Accommodation in Conjunction With Every Termination of Rental Assistance Consistent with State and National Policy of Integration and Independent Living for People with Disabilities.**

Housing vouchers are a critical resource to low-income people with disabilities in achieving independent, integrated living in the community because voucher participants select their housing unit where they choose in the private market and pay approximately 30% of their income toward rent, and the voucher makes up the difference. 42 U.S.C. 1437f(o)(2)(A)(i). A decision reversing the court below in this case would be a setback to the 107,000 vulnerable low-income people with disabilities currently helped by the Section 8 Voucher Program to live independently in Massachusetts. Center on Budget and Policy Priorities, *Massachusetts Federal Rental Assistance Fact Sheet* (Dec. 10, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/12-10-19hous-factsheet-ma.pdf>.

There are two types of accommodations that commonly arise for people who rely on others for personal care and assistance. The first involves a request to the landlord or housing program to make accommodations of application, occupancy or program rules. For example, a tenant might request an exception to a landlord rule that prohibits long-term visitors or the provision of keys to non-residents in order for a caregiver to have access to their home. A rental assistance recipient might request an

allowance for a subsidy for an apartment with an additional bedroom in order to accommodate a live-in aide.<sup>11</sup> The second type of reasonable accommodation relevant to caregiving involves a tenant with a disability seeking to forestall their eviction for a lease violation or rental assistance termination for violation of program. (For a low-income tenant in a rental assistance program, ending the rent subsidy that pays a portion of the rent directly to the landlord inevitably means the loss of the housing to the tenant.) In this second situation, Massachusetts courts have long recognized the use of the reasonable accommodations to rectify an underlying lease violation and enable a tenant to comply with their obligations of tenancy. *See City Wide Associates v. Penfield*, 409 Mass. 140, 142 (1991) (eviction of tenant with mental disability who had damaged her apartment by striking the walls to quiet voices she heard was prevented by substituting harmless nerf bat as reasonable accommodation).

The SJC has held the responsibility to consider a reasonable accommodation may not be evaded by asserting that the tenant poses a danger to others:

[B]efore a federally assisted public housing authority such as the BHA may lawfully evict a disabled tenant who requests a reasonable accommodation as posing a threat to others, it must either demonstrate the failure of an accommodation instituted at the request of the tenant, or demonstrate that no reasonable accommodation will acceptably minimize the risk the tenant poses to other residents.

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<sup>11</sup> These are examples and are not at issue in Ms. Moretalara's case.

*Bos. Hous. Auth. v. Bridgewaters*, 452 Mass. 833, 842, (2009). In rendering its decision, the Court relied on the statute’s legislative history of its direct threat provision that demonstrated Congress’s intent to ensure that a disabled “tenant would not qualify for protection if ‘he or she would pose a threat to the safety of others, unless such threat can be eliminated by reasonable accommodation.’” *Id.* at 839. (Internal cites omitted.) Likewise, the determination of whether there is a reasonable accommodation that would enable the resident to comply with the lease must be made before for BHA exercises its discretionary right to terminate benefits under the no innocent tenant rule of the Anti-Drug Abuse Act of 1988. 42 U.S.C. § 11901(1). This application of the FHA would be consistent with the Court’s holding in *Bos. Hous. Auth. v. Garcia*, 449 Mass. 727, 734 (2007) (holding that the federal drug related criminal activity statute barring an innocent tenant defense preempted state law requiring consideration of whether the tenant had knowledge of the offence, but just cause was still required for eviction under state law). Here, two federal laws are easily reconciled consistent with compelling civil rights policies and societal needs, including the safety of other residents.

The New York Court of Appeals has addressed the issue of failure to make reasonable accommodations and caregivers of public housing residents in the context of determining whether a resident’s son could become a remaining household member after her death. *Aponte v. Olatoye*, 30 N.Y.3d 693 (2018). Although the court did

not rule for the tenant in the case before it, the court acknowledged “scenarios in which a proper accommodation may be to grant caretakers the assurance of residency in a NYCHA apartment, lest the agency ‘risk consigning the aging resident to worse health outcomes and eventually an institution.’” Amicus Brief of AARP and AARP Foundation, *Aponte v. Olatoye*, 30 N.Y.3d 693, 702 (2018).

The loss of resources or services would fall particularly harshly on a voucher recipient with disabilities. By program design, a PHA must provide 75 percent of its Section 8 vouchers to applicants whose incomes do not exceed 30 percent of the area median income. U.S. Department of Housing and Urban Development, *Housing Vouchers Fact Sheet*, [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited Aug. 20, 2020). At the beginning of 2020, 375,900 people in 195,000 Massachusetts households used federal rental assistance; 70% were seniors, children, or people with disabilities. See Center on Budget and Policy Priorities, *Massachusetts Federal Rental Assistance Fact Sheet* (Dec. 10, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/12-10-19hous-factsheet-ma.pdf> area median income.

For a person with disabilities, the need for help may not be optional. A tenant without disabilities who wants to have absolute control over who enters their apartment may have the option of getting together with family at a park. But

when LTSS needs are not fully met, evidence shows that people experience severe adverse consequences—including needing to stay in bed, going without groceries, and having soiled clothing. Melissa F. Favreault, *Incorporating Long-Term aultServices and Supports in Health Care Proposals: Cost and Distributional Considerations*, The Urban Institute 9 (May 2020), [https://www.urban.org/sites/default/files/publication/102311/incorporating-long-term-services-and-supports-in-health-care-proposals\\_0.pdf](https://www.urban.org/sites/default/files/publication/102311/incorporating-long-term-services-and-supports-in-health-care-proposals_0.pdf). A tenant without a needed caregiver may also lose affordable housing altogether. *See Hardaway v. District of Columbia Housing Authority*, 843 F. 3d 973, 978 (D.C. Cir. 2016) (wrongful denial of permission of sister to be live-in aide makes tenant instantly vulnerable to losing her home, has effect of stripping tenant of government benefit and extinguishes legal entitlement.)

Eviction also has dire consequences for older people and people with disabilities. Eviction interferes with medical treatment and continuity of care. *See e.g.*, Heidi L. Allen, et al, *Can Medicaid Expansion Prevent Evictions*, 38 Health Affairs 9, <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2018.05071> (Evictions lead to poorer health outcomes). For people who rely on caregiving, an eviction that results in not being able to find local, affordable, and – if needed –

accessible housing may mean the total loss of their independence and institutionalization.<sup>12</sup>

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<sup>12</sup> During the COVID-19 Pandemic, people with chronic conditions and the elderly are at increased risk becoming severely ill, including requiring hospitalization, intensive care, or a ventilator to help them breathe, and have higher rates of death. Centers for Disease Control and Prevention, *People at Increased Risk of Severe Illness*, Coronavirus Disease (June 25, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fpeople-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fpeople-at-higher-risk.html).

## CONCLUSION

Where a Section 8 recipient requests, as Ms. Moretalara did, that she be provided a reasonable accommodation in conjunction with BHA's notice of termination pursuant to the Drug Related Crime Statute and policy and the actions of a caregiver, BHA must consider the circumstances on a case-by-case basis or risk consigning the tenant to worse health outcomes and a risk of institutionalization.

Date: August 26, 2020

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## **CERTIFICATE OF COMPLIANCE**

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

I, Richard M. Glassman, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to applicable portions of Mass. R.A. P. 16; Mass R.A.P. 17 (amicus briefs) Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R.A.P. 21 (protection of personal identifying information)

I further certify that the foregoing compliance with the applicable length limitation in Mass. R. A. P. Rule 20 because it is produced in proportionally spaced typeface using Microsoft Word 2010 Times New Roman in 14 point font.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 5,529 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 Times New Roman in 14 point font. The undersigned has

relied upon the word count feature of this word processing system in preparing this certificate.

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## **CERTIFICATE OF SERVICE**

Pursuant to Massachusetts Rules of Appeals Procedure 13(d), I hereby certify under the penalties of perjury, that on August 26, 2020, I made service of this Brief upon the attorney of record for each party, via the Electronic Filing System (Tyler EFileMA) or electronic mail as indicated:

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