**COMMONWEALTH OF MASSACHUSETTS**
**SUPREME JUDICIAL COURT**
**DOCKET NO. SJC-13580**

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THE ATTORNEY GENERAL,
Plaintiff/Counterclaim Defendant-Appellant,

v.

TOWN OF MILTON
Defendant/Counterclaim Plaintiff-Appellee,
and
JOE ATCHUE
Defendant-Appellee,

v.

THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES,

Third Party Defendant-Appellant.

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On a Reservation and Report by a Justice of the Supreme Judicial Court for Suffolk County

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# BRIEF OF AMICUS CURIAE FORMER MASSACHUSETTS ATTORNEYS GENERAL IN SUPPORT OF THE ATTORNEY GENERAL

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Gary M. Ronan (BBO# 653899)
GOULSTON & STORRS PC
One Post Office Square, 25th Floor
Boston, MA 02109
(617) 482-1776
gronan@goulstonstorrs.com

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## INTRODUCTION

Massachusetts law has for centuries—and with good reason—recognized that the Attorney General (who is the chief law enforcement officer of the Commonwealth) is empowered to bring civil actions to compel compliance with statutes that pertain to the public interest. The role of the Attorney General predates our constitution, is central to our system of government, and is essential to the protection of the public. Yet in this case, arguments have been advanced that, if accepted, would limit the authority of the Attorney General in a manner that is both unprecedented in the history of the Commonwealth and contrary to longstanding jurisprudence and the public interest. The Court should reject those arguments and reaffirm its prior rulings recognizing the important role the Attorney General plays in protecting the public interest pursuant to his or her authority to petition the courts, in appropriate circumstances, to compel compliance with statutory mandates.

## IDENTIFICATION AND INTEREST OF THE AMICI

This brief is submitted on behalf of three of the Commonwealth's former Attorneys General: Francis X. Bellotti (who served from 1975 to 1987), James M.

Shannon (who served from 1987 to 1991), and L. Scott Harshbarger (who served from 1991 to 1999). Together, they held the office of Attorney General for 24 consecutive years.

Because of their many years of service, former Attorneys General Bellotti, Shannon, and Harshbarger know a great deal about the important role the Attorney General plays in enforcing the laws of the Commonwealth and, in particular, in ensuring compliance with laws impacting the public interest. They believe that their perspectives, set forth in this brief, will aid the Court in understanding the important issues presented in this case.

None of Bellotti, Shannon, and Harshbarger is a party in this case, and none of them has any pecuniary or legal interest in its outcome.

**MASS R. APP. P. 17(C)(5) DECLARATION**

No party or party's counsel has authored this brief in whole or in part.

No party or party's counsel, or any other person or entity, has contributed money intended to fund the preparation or submission of this brief.

None of the amicus curiae or their counsel represents or has represented any of the parties in

this case in another proceeding involving similar issues, and none of them has been a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

## DISCUSSION

### I. The Attorney General Is Empowered to Enforce the Commonwealth's Statutes Impacting the Public Interest by Way of Civil Actions Seeking Injunctive and Declaratory Relief.

As this Court has repeatedly recognized throughout the Commonwealth's history, the Attorney General is "an office of 'considerable antiquity'" bestowed with "broad and ancient power." Opinion of the Justices, 354 Mass. 804, 808-09 (1968), quoting Commonwealth v. Kozlowsky, 238 Mass. 379 (1921). Indeed, the office of Attorney General predates the founding of the United States: its development having been "essentially completed before the main migration of our ancestors to this country." Kozlowsky, 238 Mass. at 385. The first appointment of an Attorney General in Massachusetts occurred in 1680. Id.

Because the office of Attorney General predates both the Massachusetts and the federal constitutions by more than a century, the powers of the Attorney General are a creature of common law. Id. at 386.

After our Constitution was adopted, the "powers and duties [of the office] continued as a part of the common law of the commonwealth save as changes have been made by the general court and in the customs of the commonwealth." Id. Thus, "[i]t often has been recognized that the powers of the Attorney General are not circumscribed by any statute, but that he [or she] is clothed with certain common-law faculties appurtenant to the office." Id. (citing numerous prior decisions of this Court).

Pertinent to this case, the Attorney General's common law powers include, among others, the authority to seek court orders enforcing the statutes of the Commonwealth that pertain to the public interest. See, e.g., Commonwealth v. Mass. CRINC, 392 Mass. 79 (1984) (Attorney General obtained an injunction compelling defendants to comply with statute pertaining to refunds for beverage containers); Board of Education v. City of Boston, 386 Mass. 103 (1982) (Attorney General obtained injunction and declaration requiring City of Boston to finance public schools adequately for a 180-day school year in compliance with statutory mandate).

The Attorney General enjoys "supremacy . . . as the chief law enforcement officer of the Commonwealth." Kozlowsky, 238 Mass. at 389. His or her powers in that regard—although they arise from the common law and therefore do not depend upon statutory authorization—are confirmed by statute. G.L. c. 12 § 10 recognizes that the Attorney General "shall take cognizance of all violations of law or of orders of courts, tribunals or commissions affecting the general welfare of the people . . . and shall institute or cause to be instituted such criminal or civil proceedings before the appropriate state and federal courts, tribunals and commissions as he may deem to be for the public interest . . . ."[1]

Accordingly, along with his or her common law powers, the Attorney General possesses statutory authorization to institute civil actions that he or she "may deem to be for the public interest." Id.

[1]G.L. c. 12, § 10 references "combinations, agreements and unlawful practices in restraint of trade or for the suppression of competition, or for the undue enhancement of the price of articles or commodities in common use" as examples of the subject matter over which the Attorney General may exercise his or her authority. But this Court has properly recognized the Attorney General's authority is not limited to those matters. See Kozlowsky, 238 Mass. at 388-89.

And the Attorney General's powers are "not circumscribed by any statute," "save as changes have been made by the general court and in the customs of the commonwealth." Kozlowsky, 238 Mass. at 386.

These powers have been repeatedly recognized and respected by the Court. For example, in Commonwealth v. Mass. CRINC, 392 Mass. 79 (1984), the Attorney General obtained an injunction compelling defendants to comply with a statute pertaining to refunds for beverage containers. The Attorney General did not need express authorization in the applicable statute because the Attorney General "has a general statutory mandate, in addition to any specific statutory mandate, to protect the public interest" and "also has a common law duty to represent the public interest and enforce rights." Mass. CRINC, 392 Mass. at 88. Similarly, in Lowell Gas Company v. Attorney General, 377 Mass. 37 (1979), the Court held that the Attorney General had standing to assert claims for common law fraud against defendants even without an express grant of standing in the statute at issue, and even without alleging that the Commonwealth itself or its agencies had been harmed by the fraud, because the Attorney General has authority under G.L. c. 12 § 10 and also

"has a common law duty to represent the public interest and to enforce public rights." Lowell Gas Company, 377 Mass. at 48.

It follows that the Attorney General's authority to bring the civil proceedings he or she deems to be in the public interest is not limited when it comes to the relief the Attorney General may seek absent a clear and express limitation imposed by a constitutional amendment or by the general court in an exercise of its due authority: "'as the chief law officer of the state, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He [or she] may institute, conduct, and maintain all such suits and proceedings as he [or she] deems necessary for the enforcement of the law of the state, the preservation of order, and the protection of public rights.'" State v. Robinson, 101 Minn. 277, 288-89, 112 N.W. 269, 272 (1907), quoted approvingly and applied in Kozlowsky, 238 Mass. at 390-91.

Thus, it simply is incorrect to say (as has been suggested by certain parties in this case) that, where a statute is silent on the issue or provides for some

other consequence of noncompliance with a statute, the Attorney General lacks standing and power to file a civil action seeking an injunction or declaration compelling a defendant to comply with a statutory mandate. The law is, and has been for centuries, the opposite. In the absence of some express limitation clearly imposed by a constitutional amendment or by the general court in an exercise of its due authority, the Attorney General retains all his or her authority to seek injunctive and declaratory relief compelling a defendant to comply with the law. That is and has been since before the founding of our nation the proper role of the Attorney General.

## II. The Attorney General's Authority Is Not Limited by the Existence of Other Consequences of Noncompliance with a Statute.

The principles stated above hold true regardless of whether there are other consequences of a party not complying with a statute. To hold that the authority of the Attorney General is eliminated by the presence of administrative penalties or other consequences resulting from noncompliance with a statute—especially a statute that makes no mention of the Attorney General's fundamental powers—would turn centuries of jurisprudence on its head.

For example, in Board of Education v. City of Boston, 386 Mass. 103 (1982), the Attorney General (representing the Board of Education and the Commissioner of Education) was able to obtain an injunction and declaration requiring the City of Boston to finance the City's public schools adequately for a full 180-day school year in compliance with a statutory mandate that the City must operate its schools for a 180-day school year. Other potential consequences existed that would address the City's overspending which led to the funding shortfall. For instance, the City had "authority to seek criminal penalties against school committee members who intentionally spend in excess of the committee's appropriation." Board of Education, 386 Mass. at 111. But the existence of other consequences did not prevent the Attorney General from obtaining an injunction compelling compliance with the statute.

This Court also rejected in Board of Education a contention that the Attorney General lacked authority to bring the case, holding that the Board "properly asked the Attorney General to seek compliance with [the applicable statute] and that it was appropriate for the Attorney General to seek enforcement against

the city as well as the school committee." Id. at 112 n.14. This is because the Attorney General's authority to bring an action seeking to compel compliance with a statute is not undermined by the existence of other consequences.

Certain parties in this case appear to contend that the existence of a non-judicial consequence for non-compliance identified in a statute eliminates the Attorney General's power to seek an injunction or declaration compelling compliance with the statute. A distinction should be made here between legal or equitable "remedies" that can be effectuated by a court order, on the one hand, and administrative penalties or other non-judicial consequences (such as the loss of certain government funding), on the other hand. The existence of administrative or other non-judicial consequences cannot possibly limit the authority of the Attorney General. They have nothing to do with the Attorney General's authority, and they cannot supplant his or her power to bring proceedings to mandate compliance.

It therefore is unsurprising that the cases cited as support for the incorrect contention do not actually support it. Those case have nothing to do

with the authority of the Attorney General. Both Fascione v. CNA Insurance Companies, 435 Mass. 88 (2001), and Commonwealth v. Rainey, 491 Mass. 632 (2023), mention the principle that "[w]here a statute creates a new right and prescribes the remedy for its enforcement, the remedy prescribed is exclusive." Commonwealth v. Rainey, 491 Mass. at 639; Fascione, 435 Mass. at 94. Fascione and Rainey concern the manner in which private parties may enforce new rights given to them by statute. They do not concern the powers of the Attorney General.

The principle mentioned in Fascione and Rainey is irrelevant to the authority of the Attorney General. The authority of the Attorney General is based not upon any "new right" created by a recently enacted statute, but instead upon the Attorney General's longstanding common law and statutory powers, which are "broad" and empower the Attorney General to institute any and all proceedings that "he [or she] may deem to be for the public interest." No case has ever held that the principle mentioned in Fascione and Rainey functions to limit the Attorney General's enforcement powers, nor that it undercuts the principle that a clear and express constitutional

amendment or act of the general court is necessary to curtail the Attorney General's authority.

Furthermore, in circumstances where a statute mentions only administrative consequences, and not any "remedy" that a court may enter, the principle mentioned in Fascione and Rainey finds no purchase because the statue does not prescribe a "remedy" at all. An administrative consequence is not a remedy, and something that is not a remedy cannot be an exclusive remedy.

The importance of these points is illustrated by the MBTA Communities Act. The MBTA Communities Act does not identify any judicial remedy for non-compliance—exclusive or otherwise.[2] Moreover, the administrative consequence identified in the statute (the loss of certain state funding) does not adequately address the public interest underlying the statute: it does not adequately serve to address the Commonwealth's housing shortage. On the other hand, an enforcement action by the Attorney General seeking

[2]The statute also does not say that the administrative consequence it identifies is "exclusive." We see no authority cited in the briefs in this case, and are aware of none, for the proposition that an administrative consequence identified in a statute is exclusive by default where the statute does not expressly make it so.

injunctive and declaratory relief compelling a town to comply with the statute directly advances that public interest and facilitates the creation of much-needed new housing. That is precisely why it is important—and consistent with good public policy and the advancement of the public interest—for the Court to affirm in this case the Attorney General's authority to seek injunctive and declaratory relief compelling compliance with the Commonwealth's statutes.

## CONCLUSION

Former Attorneys General Bellotti, Shannon, and Harshbarger ask the Court to consider the important considerations presented in this brief when it decides this case.

Respectfully submitted,

FORMER ATTORNEYS GENERAL FRANCIS X. BELLOTTI, JAMES M. SHANNON, AND L. SCOTT HARSHBARGER,

By their attorney,

/s/ Gary M. Ronan

Gary M. Ronan (BBO# 653899)
GOULSTON & STORRS PC
One Post Office Square, 25th Floor
Boston, MA 02109 (617) 482-1776
gronan@goulstonstorrs.com

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CERTIFICATE OF COMPLIANCE WITH

MASS. R. APP. P. 20

I certify that this brief complies with the applicable rules of court pertaining to the filing of briefs. The brief is presented to 12-Point Courier New font (a monospace font), was prepared in Microsoft Word, and is 13 non-excluded pages in length.

/s/ Gary M. Ronan
COUNSEL FOR THE FORMER ATTORNEYS' GENERAL

CERTIFICATE OF SERVICE

I certify that I caused copies of this document to be served on the following counsel for the parties by electronic mail on September 16, 2024:

Counsel for the Attorney General and the Executive Offices of Housing and Livable Communities

Eric A. Haskell, Esq. (eric.haskell@mass.gov)
Jonathan Burke, Esq. (Jonathan.burke@mass.gov)
Erin E. Fowler, Esq. (erin.fowler@mass.gov)

Counsel for The Town of Milton and Joe Atchue

Kevin P. Martin, Esq. (kmartin@goodwinlaw.com)
Christopher Herbert, Esq. (cherbert@goodwinlaw.com)
Jaime A. Santos, Esq. (jsantos@goodwinlaw.com)
Peter L. Mello, Esq. (pmello@mhtl.com)

/s/ Gary M. Ronan
COUNSEL FOR THE FORMER ATTORNEYS' GENERAL