

**SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS**

No. SJC-13580

THE ATTORNEY GENERAL,
Plaintiff / Counterclaim Defendant – Appellant,

v.

TOWN OF MILTON,
Defendant / Counterclaim Plaintiff / Third Party Plaintiff – Appellee, AND
JOE ATCHUE,
Defendant – Appellee,

v.

THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES,
Third Party Defendant – Appellant

ON A RESERVATION AND REPORT BY A JUSTICE OF
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

**BRIEF OF AMICI CURIAE HOMES FOR ALL MASSACHUSETTS AND
TRANSPORTATION FOR MASSACHUSETTS IN SUPPORT OF
APPELLANTS**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
CORPORATE DISCLOSURE STATEMENTS.....	IV
PREPARATION OF AMICUS BRIEF.....	IV
IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
I. THE STATEWIDE HOUSING CRISIS IS AN ISSUE THAT IS SQUARELY IN THE PUBLIC INTEREST.	4
A. <i>Housing is the basis for people's well-being and underlies how they live, work, and thrive.....</i>	5
B. <i>Massachusetts is experiencing a housing crisis that threatens the public interest.....</i>	7
C. <i>Housing problems do not affect everyone equally.....</i>	9
D. <i>Transportation and housing are inextricably linked, especially for lower income communities.....</i>	11
II. HOLISTIC, STATEWIDE POLICIES SUCH AS MBTA COMMUNITIES ACT ARE NECESSARY TO COMBAT LOCAL EXCLUSIONARY ZONING.	13
A. <i>Increasing the supply of housing, though not the only solution, is necessary to address the housing crisis and has broad public support.....</i>	14
B. <i>Individual municipalities have resisted housing development.....</i>	17
C. <i>Statewide incentive programs have not worked.....</i>	19
D. <i>State-mandated action is necessary to achieve housing production goals statewide.....</i>	21
III. ALLOWING INDIVIDUAL COMMUNITIES TO OPT OUT OF THE ACT FURTHERS SEGREGATION AND THWARTS THE PUBLIC INTEREST.	22
A. <i>Massachusetts cannot dismantle segregation without state action.....</i>	23
B. <i>Allowing municipalities to opt out of collective housing and transit goals thwarts the public interest.</i>	25
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE.....	27
CERTIFICATE OF SERVICE.....	29

TABLE OF AUTHORITIES

Cases

Commonwealth v. Mass. CRINC, 392 Mass. 79 (1984) 9

Perez v. Dep't of State Police, 491 Mass. 474 (2023) 25

Statutes

G.L. c. 40A §3A 24

St. 2016, c. 219, §§ 37-54 23

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Recognizing Affordable Housing As A Right, 135 HARV. L. REV.

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Brief for the Attorney General, *The Attorney General v.*

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GREGG COLBURN & CLAYTON PAGE ALDERN, HOMELESSNESS IS A HOUSING PROBLEM (2022)

11

MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS THEORY OF GROUPS 2

(1965) 24

Mark Melnik & Abby Raisz, Greater Boston Housing Report Card, The Boston Foundation (2020)	14
Michael Hankison, <i>Why Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism</i> , Am. Pol. Sci. Rev. 1 (Aug. 2018)	21

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Judicial Court Rule 1:21, Homes for All Massachusetts and Transportation for Massachusetts do not issue stock, do not have parent corporations and, consequently, there exist no publicly held corporations which own ten percent or more of the stock for either.

PREPARATION OF AMICUS BRIEF

Pursuant to Mass. R. App. P. 17(c)(5), Homes for All Massachusetts, Transportation for Massachusetts, and their counsel declare that:

- (1) no party or party's counsel authorized this brief in whole or in part;
- (2) no party or party's counsel contributed money to fund preparing or submitting this brief;
- (3) no person or entity, including amicus curiae, contributed money that was intended to fund preparing or submitting this brief; and

(4) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

IDENTITY AND INTEREST OF AMICUS CURIAE

Homes for All Massachusetts (Homes for All Mass) is a coalition of grassroots tenants' rights and housing justice organizations across Massachusetts. Homes For All Mass and each member of the coalition engages in advocacy related to fair housing practices, tenants' rights and protections, and increasing affordable housing at the municipal and statewide level, while expanding grassroots housing justice organizing across the state. Homes for All Mass' member organizations work together with the goals of halting displacement, increasing community control of land, and winning housing justice in Massachusetts.

Transportation for Massachusetts (T4MA) is a statewide coalition of diverse community-based and non-profit organizations seeking to improve the transportation systems in Massachusetts. T4MA is committed to addressing inequitable transportation policies that adversely impact low-income, working class, Black, indigenous and communities of color. T4MA believes that transportation justice is environmental, climate, housing and social justice, and this is achieved when all people have access to safe, reliable, accessible, affordable, equitable

transportation that connects them to places, people, and resources they need to thrive.

Homes For All Mass and T4MA submit this brief to emphasize that state laws requiring municipalities to allow certain zoning types in spite contrary municipal ordinances – laws like the MBTA Communities Act – are necessary to address complex issues in the public interest, such as those related to housing and transportation access. Laws like the MBTA Communities Act are precisely the sort that the Massachusetts Legislature sought to allow when retaining “supreme power in zoning matters” under the Home Rule Amendment.

SUMMARY OF ARGUMENT

Housing is foundational to the health, safety, well-being, and success of individuals, communities, and society as a whole. Lack of access to safe, stable and affordable housing is tied to many negative outcomes for individuals, and creates increased costs on public services, public health, and communities. Among other challenges, Massachusetts is facing a significant shortage of housing – particularly affordable housing – which is putting additional strain on public services such as emergency shelters, public housing, rental assistance and other programs. The MBTA Communities Act is a measure aimed at addressing Massachusetts’s problematic lack of access to housing, particularly near public

transit. See p. 10. This is an issue that is compellingly within the public interest and thus within the Attorney General's enforcement power. See pp. 9-11. The ongoing housing crisis is negatively affecting Massachusetts residents and communities, and causing particular harm to systemically vulnerable communities including racial minorities and low-income households, who also suffer from inequitable access to transportation and transit - all of which are factors that exacerbate the housing crisis. See pp. 11-15.

Measures to address the housing crisis must include statewide action to increase the supply of housing, especially transit-oriented development, in a holistic, statewide, and equitable manner. Despite the fact that increasing the housing supply is a top priority for the Massachusetts public, individual localities have resisted zoning reforms and other mechanisms to increase the supply. This resistance has proven largely impervious to voluntary state incentive programs that are intended to encourage housing development. See pp. 15-19. Statewide mandatory zoning requirements address this collective action problem by compelling individual municipalities to act in favor of broader interests favoring more housing. See pp. 19-20.

There are significant risks to the public if the Attorney General cannot enforce legislation such as the MBTA Communities Act. Allowing communities like Milton to exempt themselves from

compliance with statewide housing initiatives not only perpetuates residential segregation; it also harms the public interest by effectively frustrating the purpose of the MBTA Communities Act and future policies that seek to address the Massachusetts' housing crisis. See pp. 20-23.

ARGUMENT

I. The statewide housing crisis is an issue that is squarely in the public interest.

The Attorney General is statutorily mandated "to protect the public interest" and has a "common law duty to represent the public interest and enforce public rights." *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984). The MBTA Communities Act requires zoning for multi-family housing as of right in over 50% of Massachusetts municipalities, Brief for The Town of Hamilton as Amicus Curiae, p. 8, *The Attorney General v. Town of Milton, Joe Atchue*, SJC No. 13580 (2024), and has ripple effects that address social issues spanning the entire commonwealth.¹ Accordingly, the Act's promotion of additional housing development is firmly within the public interest.

¹ Paula Ebben, *What is the MBTA Communities Law? Here's what it means for your town*, CBS News (Mar. 28, 2024, 8:08AM), www.cbsnews.com/boston/news/mbta-communities-law-housing-zoning-question-everything/ ("[T]he future of Massachusetts is really at stake" because laws like the MBTA Communities Act are necessary if the housing crisis is to be addressed.).

A. Housing is the basis for people's well-being and underlies how they live, work, and thrive.

Housing is the foundation upon which homes, neighborhoods, and communities are built. From birth to death, where we live affects every aspect of our lives, from physical health, mental health, and safety, to education, employment opportunities, and wealth.² The importance of housing to the well-being of the Commonwealth and its residents is difficult to overstate.

Unstable and insufficient housing has long been tied to poor physical and mental health. Housing is a key predictor of a number of health outcomes,³ and has been identified as a social determinant of health by the United States Centers for Disease Control and Prevention.⁴ The intimate role housing plays in shaping individual and societal outcomes have spurred new fields

² Emily Bergeron, *Adequate Housing is a Human Right*, American Bar Association (Oct. 1, 2019), www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/adequate-housing-is-a-human-right/.

³ Liberty Walton, et. al. *The intersection of health and housing: Analysis of the research portfolios of the National Institutes of Health, Centers for Disease Control and Prevention, and U.S. Department of Housing and Urban Development* (Jan. 29, 2024), www.ncbi.nlm.nih.gov/pmc/articles/PMC10824422/ ("Housing is well established as a major social determinant of health, which affects health status, healthcare access, and health outcomes across the lifespan," including on diabetes, cancer, mental health issues, and other conditions).

⁴ *Social Determinants of Health*, U.S. Centers for Disease Control and Prevention (Jan. 17, 2024), www.cdc.gov/about/priorities/why-is-addressing-sdoh-important.html.

of research, study, and advocacy for safe and stable housing.⁵ Research and attention to the importance and housing for children's health, educational, and life outcomes has also exploded in recent years.⁶

Lack of access to safe, stable housing is intimately tied to increases in homelessness. In researching their 2022 book, *Homelessness is a Housing Problem*, Gregg Colburn and Clayton Page Aldern found that "rental costs and vacancy rates were by

⁵ See e.g., Health Affairs, *Housing and Health* (February 2024), <https://www.healthaffairs.org/housing-and-health?campaignid=11972139487&adgroupid=160454153217&creative=699770424225&keyword=federal+government+housing+policy>; PolicyLink, *Call to Action: Picturing a Transformative Future for Housing and Health* (Fall 2021), https://www.policylink.org/resources-tools/equitable_housing_health; Human Impact Partners, *A Primer on Power, Housing Justice, and Health Equity* (September 2020), https://humanimpact.org/wp-content/uploads/2020/11/HIP.RTTC_Final_Housing_Justice_HE_Primer1.pdf

⁶ See e.g., Children's Health Watch Policy Goals, <https://childrenshealthwatch.org/public-policy/policy-focus/#tab-id-2>; Veronica Gaitán, *How Housing Can Determine Education, Health, and Economic Outcomes*, Housing Matters: An Urban Institute Initiative (Sep. 19, 2018), www.housingmatters.urban.org/articles/how-housing-can-determine-educational-health-and-economic-outcomes; Lydie A. Lebrun-Harris, *Prevalence and Correlates of Unstable Housing Among US Children*, JAMA Pediatrics (2024), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2818960?guestAccessKey=cd71a3fb-b30f-4c80-946f-42f57684aa00&utm_source=jps&utm_medium=email&utm_campaign=author_alert-jamanetwork&utm_content=author_author_engagement&utm_term=1m; 32% of Children Live in Cost-Burdened Households: MassBudget Urges Lawmakers to Focus on Affordability (June 10, 2024), <https://massbudget.org/2024/06/10/kids-count-data-book-release-2024/>

far the biggest predictor of rates of homelessness in a community.”⁷ As Colburn notes, addressing homelessness requires “significant commitment at all levels of government and the private sector to ensure we have an adequate supply of housing that’s affordable to people.”⁸

When people are unable to access safe and affordable housing, the negative consequences reach far beyond the individual household. Insufficient and unaffordable housing places strain on schools, businesses, shelters, emergency services and healthcare systems, and is a key driver of – and consequence of – segregation. Because housing is central to so many measures of individual and community health, addressing housing shortages creates benefits across many areas within the public interest.

B. Massachusetts is experiencing a housing crisis that threatens the public interest.

⁷ Gary Warth, *Cause of homelessness? It’s not drugs or mental illness, researchers say*, Los Angeles Times (July 11, 2022), www.latimes.com/california/story/2022-07-11/new-book-links-homelessness-city-prosperity; see *How COVID-19 Could Aggravate the Homelessness Crisis?*, Government Accountability Office (Aug. 25, 2020), www.gao.gov/blog/how-covid-19-could-aggravate-homelessness-crisis (“Specifically, we found that a \$100 increase in median rent was associated with a 9% increase in the estimated homelessness rate—even after accounting for a variety of other relevant factors, such as wages, unemployment rate, and poverty, as well as other demographic and economic characteristics”).

⁸ *Id.*

As community-based organizations working to reverse historical inequities in neighborhoods throughout Massachusetts, Amici possess a deep understanding of the many interlocking crises that have exacted a disproportionate and devastating toll on communities of color, low-income, and working-class communities across the state. Notwithstanding the many complex factors that contribute to what is broadly defined as “the housing crisis,” it is widely agreed that Massachusetts residents are suffering from increasing rates of poor housing conditions, displacement, eviction, instability, and homelessness.

The high cost of housing is straining both renters and homeowners. Seventy-one percent of Massachusetts residents report that monthly housing costs are a financial burden to them.⁹ According to the U.S. Department of Housing and Urban Development, half of the nation’s renters and a quarter of homeowners experience “excessively burdensome” housing costs, meaning that “thirty percent or more of household income” is spent on housing. *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing As A Right*, 135

⁹ *Massachusetts Residents feeling the squeeze from housing, transportation costs*, MassINC Polling Group (2024), www.massincpolling.com/our-work/massachusetts-residents-feeling-the-squeeze-from-housing-transportation-costs.

HARV. L. REV. 1104 (2022). Housing in Massachusetts and many other parts of the country is unsustainably expensive.

Increasing rents have resulted in more families, including working- and middle-class families, seeking public and subsidized housing. This increase in applications over the last few decades has swelled already-lengthy waiting lists for subsidized housing. For example, the waiting time for an applicant to receive a Federal Housing Choice Voucher, or Section 8 Voucher, is approximately ten years.¹⁰ Some waiting times exceed ten years, and many local public and subsidized housing waiting lists remain closed to new applicants altogether.¹¹ This coincides with a broader trend of underinvestment in state government-funded housing support services over many years.

C. Housing problems do not affect everyone equally.

The damage inflicted by the housing crisis is not uniformly experienced among people and communities across Massachusetts.

¹⁰ *Waiting Lists*, Marlborough Community Development Authority (last visited Sep. 19, 2024), www.marlbrough-ma.gov/community-development-authority/affordable-housing/pages/waiting-lists.

¹¹ See generally websites with information about applying for or finding subsidized housing, such as Affordable Housing online, available at <https://affordablehousingonline.com/housing-waiting-lists/massachusetts>; Metro Housing Boston, available at <https://www.metrohousingboston.org/our-programs/housing-stability/housing-choice-voucher-programs-section-8/section-8-waiting-list/>

Lower-income and working-class communities, people of color, and other historically marginalized populations face greater challenges in accessing and maintaining safe, stable and affordable housing. As a result, the associated negative health and social outcomes of housing instability fall disproportionately on these groups.

Historical patterns of racially segregated housing are continuing to widen the disparities between communities that are thriving and those that are not, perpetuating racial segregation across the state. In the greater Boston area, racial minorities disproportionately live in areas with “greater exposure to poverty, higher incidence of unemployment, lower levels of educational attainment, less labor market engagement, and poorer air quality than neighborhoods where white households are more likely to reside.” Mark Melnik & Abby Raisz, Greater Boston Housing Report Card, The Boston Foundation (2020). Newly released data from the United States Census indicates that while racial minorities have made some economic progress, disparities persist.¹²

¹² Tiana Woodard & Vince Dixon, *'This is a call to action': Boston's Black, Latino, Asian families are making more money, but income gaps remain, census data show*, Bos. Globe (Sep. 18, 2024), www.bostonglobe.com/2024/09/18/metro/boston-us-census-data-racial-income-gaps/.

Dismantling and combating segregation is a critical component of the public interest requiring state protection, as the well-being of people with less political, financial, and social power are tied to our collective well-being. These historically disempowered communities should be able to rely on our state leaders — including the Attorney General — to take action to protect their interest in having safe and accessible places to live.

D. Transportation and housing are inextricably linked, especially for lower income communities.

Transportation access determines how people connect from their homes to school, work, childcare, healthcare, social connections, and much more.¹³ Across the country — including in Massachusetts — as communities have grown, the construction of highways and other transit infrastructure has further segregated and isolated people living in low-income communities and communities of color.¹⁴ The results are increased housing disparities plus unequal access to transit, particularly public transit, often along racial lines.

¹³ Nyla Holland, *How Transit-Oriented Housing Can Advance Access to Opportunity While Curbing Climate Change*, Housing Matters (Aug. 2, 2023), housingmatters.urban.org/articles/how-transit-oriented-housing-can-advance-access-opportunity-while-curbing-climate-change.

¹⁴ Kevin Koczwara, *Trapped: Worcester neighborhoods still suffer from the legacy of redlining*, Worcester Business Journal (Dec. 12, 2022), www.wbjournal.com/article/trapped-worcester-neighborhoods-still-suffer-from-the-legacy-of-redlining.

Access to transit is central to the State's efforts to mitigate the housing crisis. As described by MassDOT and the MBTA, transit-oriented development is a pattern of land use that ties development to public transportation in a synergistic way. As indicated in the Act, "the result of transit-oriented development is: [m]ore housing closer to the places we go every day" and "[b]etter access to work, services, and other destinations by increasing mobility and utilization of public transit."¹⁵

It is critical, however, that the State demand equity in transit-oriented development to protect against gentrification and displacement. Access to transit is an "important complement" to housing affordability, enabling lower-income residents to live in "opportunity-rich areas" without having to incur unaffordable transportation costs like owning a car.¹⁶ As housing and transportation are the two largest monthly expenses of low-income households, proximity to transit hubs is a crucial element in the housing landscape, including new housing

¹⁵ Executive Office of Housing and Livable Communities, *Multi-family zoning requirements for MBTA Communities*, Mass.gov (2024), www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities.

¹⁶ Making Transit and Affordable Housing Work Together, Office of Policy Development and Research (Jun. 13, 2023), www.huduser.gov/portal/pdredge/pdr-edge-featd-article-061323.html.

development, and is particularly critical for those who are resource-constrained. Those most burdened by housing and transportation costs are more likely to be renters or public transit users, as compared to the overall population.¹⁷

II. Holistic, statewide policies such as MBTA Communities Act are necessary to combat local exclusionary zoning.

While there is broad agreement that Massachusetts is experiencing a housing crisis, there is less unity when defining its causes and identifying potential solutions. Skyrocketing rents, increases in eviction rates, substandard and dangerous housing conditions, gentrification, discrimination, and increased homelessness are related but distinct crises, and policy solutions must be crafted to consider the effects on each factor as well as the whole.¹⁸ While Amici continue to advocate for policies that increase production and preservation of housing for lower-income people, equitable transit-oriented

¹⁷ MassINC Polling Group & Transportation for Massachusetts, *Poll: Massachusetts residents feeling the squeeze from housing, transportation costs*, T4MA.com (July 23, 2024), t4ma.org/poll-massachusetts-residents-feeling-the-squeeze-from-housing-and-transportation-costs/.

¹⁸ Stephen Menendian, *Deconstructing the 'Housing Crisis'*, University of California, Berkeley: Othering & Belonging Institute (Nov. 30, 2022), belonging.berkeley.edu/deconstructing-housing-crisis (noting that many Americans use the term “housing crisis” when “referring to different problems, even when using the same terms.”).

development, and removing land from the speculative market, it is clear that exclusionary zoning and a shortage of housing supply must also be addressed to alleviate the Massachusetts housing crises.

A. Increasing the supply of housing, though not the only solution, is necessary to address the housing crisis and has broad public support.

Housing costs have skyrocketed across the country for myriad reasons, but one key driver of this increased cost is the shortage of housing. Indeed, the parties in this case agree that both housing supply and affordability challenges exist in Massachusetts, see (Compl. ¶ 8) and (Counterclaim ¶¶ 1-2).

Conservative estimates predict that Massachusetts will face a shortage of 200,000 homes by 2030.¹⁹ This estimate, however, fails to paint a complete picture of the crisis, which is far more dire. While low vacancy rates and high housing costs affect many Massachusetts residents, they are especially problematic for working class and lower income renters. According to the National Low Income Housing Coalition,

¹⁹ Jennifer Smith, *Business leaders say housing shortage is top concern* (May 29, 2024), [commonwealthbeacon.org/housing/business-leaders-say-housing-shortage-is-top-concern/](https://www.commonwealthbeacon.org/housing/business-leaders-say-housing-shortage-is-top-concern/); see also Steph Solis, *Boston metro area vacancies among lowest in 20 years*, Axios Boston (Feb. 13, 2024), www.axios.com/local/boston/2024/02/13/real-estate-home-vacancies-low and The Greater Boston Housing Report Card 2023, Boston Foundation (2023), www.tbf.org/-/media/tbf/reports-and-covers/2023/gbhrc2023-full-report.pdf (rental vacancies remain below one percent).

Massachusetts is *currently* suffering from a shortage of nearly 200,000 housing units for households at or below 50% of the area median income.²⁰ For every 100 extremely low-income households²¹ in need of housing, there are only about 46 available rental homes that are affordable to them.²² Even if a low-income family can find housing, they may nevertheless struggle to afford the rent. Sixty-four percent of extremely low-income households spend 50% or more of their income on rent each month.²³ Despite federal efforts to incentivize the construction of affordable housing, the costs of homes more than doubled between 1998 and 2021.²⁴ Given the breadth and severity of this crisis,

²⁰ *Massachusetts*, National Low Income Housing Coalition (2024), nlihc.org/gap/state/ma.

²¹ "Low-income" is defined by the National Low Income Housing Coalition as at or below either the federal poverty line or 30% of their area's median income, whichever is greater. According to the National Low Income Housing Coalition, there are over 300,000 extremely low-income households across the state of Massachusetts.

²² *No State Has an Adequate Supply of Affordable Rental Housing for the Lowest-Income Renters*, National Low Income Housing Coalition (2024), nlihc.org/gap.

²³ *Id.* Data includes only those households that have housing.

²⁴ Jill Naamane & Alicia Puente Cackley, *The Affordable Housing Crisis Grows While Efforts to Increase Supply Fall Short*, U.S. Government Accountability Office (Oct. 12, 2023), www.gao.gov/blog/affordable-housing-crisis-grows-while-efforts-increase-supply-fall-short.

Massachusetts officials have acknowledged that increasing the number of housing units must be a top priority.^{25,26}

Polling reveals that Massachusetts residents overwhelmingly cite housing as a top concern.²⁷ Transit-based approaches to housing, such as those spurred by the Act, are also widely supported by Massachusetts residents. A recent survey found that 69% of respondents supported transit-oriented development as part of a solution to the housing crisis.²⁸ Despite this broad support for increasing housing and transit in Massachusetts, individual neighborhoods and municipalities

²⁵ Lieutenant Governor Kim Driscoll has called housing unaffordability “the No. 1 issue” that the Massachusetts public is concerned about. WBZ-News Staff, *What can Massachusetts do about its housing crisis?* CBS News (May 19, 2024), www.cbsnews.com/boston/news/massachusetts-housing-crisis-lt-gov-kim-driscoll. In her 2024 State of the Commonwealth Address, Governor Healey acknowledged that housing costs in Massachusetts were “still too high.” Chris Lisinski, *Massachusetts housing crisis testimony reveals complexity of issue*, NBC10 News (January 18, 2024), www.nbcboston.com/news/_local/healey-wu-to-testify-on-housing-costs-in-mass/3250648/

²⁶ Amici agree additional housing units are needed, but believe the state can and must do more to target supply to true affordability needs throughout the Commonwealth; while the MBTA Communities Act falls short of this need by failing to require any new affordable units, if the State is to ever meet its burden of producing enough truly affordable housing, the power to enact and enforce a law like the MBTA Communities Act must be affirmed.

²⁷ Jared Sharpe, *New Umass Amherst/WCBV Poll Examines Bay State Residents’ Views on the Housing Crisis and the ‘State of the State,’* University of Massachusetts Amherst (Jun. 3, 2024), www.umass.edu/news/article/new-umass-amherstwcvb-poll-examines-bay-state-residents-views-housing-crisis-and-state.

²⁸ MassINC Polling Group, *supra*.

continue to oppose specific measures necessary to achieve those goals.

B. Individual municipalities have resisted housing development.

Individual municipalities frequently resist efforts to change zoning laws or otherwise accommodate multifamily housing development, even in spite of popular will. The Town of Milton's refusal to comply with the MBTA Communities Act represents one manifestation of constituents acting contrary to the interests of the collective, but Milton is not alone. Other municipalities such as Winthrop are following Milton's lead by threatening non-compliance with the MBTA Communities Act,²⁹ and at least two towns have submitted amicus briefs in support of Milton's position. See, e.g., Brief for The Town of Hamilton as Amicus Curiae, *The Attorney General v. Town of Milton, Joe Atchue*, SJC No. 13580 (2024). And these are just the neighborhoods that have spoken out. If Milton is successful in this challenge, other neighborhoods are likely to attempt to defy the state's efforts to address the housing crisis.

There are several reasons why localities resist zoning changes that encourage housing construction. One prevailing

²⁹ Bhaamati Bokhetaria, *AG issues 'friendly' warning on MBTA rezoning*, Commonwealth Beacon (Aug. 13, 2024), commonwealthbeacon.org/_housing/ag-issues-friendly-warning-on-mbta-rezoning/.

reason is captured by the term NIMBY, or “Not In my Back Yard.” NIMBY actions are largely driven by local interest groups, backed by neighborhood homeowners, who fight local changes to zoning and other development to prevent any change within their own communities. While the group may support the proposed building or changes in other cities and towns or in the abstract, they oppose it in “their” neighborhoods. These groups are able to “reject new housing proposed for their neighborhood” and contravene “majoritarian preferences for [more] housing.” Michael Hankison, *Why Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, *Am. Pol. Sci. Rev.* 1, 7 (Aug. 2018). This type of opposition is typically framed by local groups as concerns about traffic, parking, safety, noise, and changes to the “character” of the community,³⁰ but it often carries undertones of bias against other racial groups and lower-income people.³¹

Another reason for local opposition may be that the benefits of more affordable housing are spread out across a

³⁰ See Zak Yudishthu, *How Housing Creates a Collective Action Problem, in St. Paul and Beyond* (Mar. 18, 2022), streets.mn/2022/03/18/housing-and-collective-action/ (opposition often fueled by annoyance over “increased demand on [municipal] infrastructure”).

³¹ See Jamie A. Ross, *NIMBYism through a racial lens*, Florida Housing Coalition (Nov. 2021), flhousing.org/wp-content/uploads/2021/11/NIMBYism-Through-a-Racial-Lens.pdf (“NIMBY opposition is the perpetuation of modern-day segregation”).

state's population. Notably, those "who stand to benefit" the most from these zoning reforms are often "not in attendance" at the political processes that lead to zoning changes, largely because they lack the political power or do not yet live in these communities in the first place.³² Empirical evidence suggests that this is happening in Boston. According to the Boston Planning Department (BPD), those who engage with BPD zoning and other matters are disproportionately white and long-term residents.³³

An example of local political processes contravening broader statewide goals of combatting the housing crisis can be seen with the Town of Milton itself. Even while Milton officials were working to comply with the zoning provisions of the MBTA Communities Act, the residents of Milton rejected these plans via referendum, prioritizing local concerns over broader statewide benefits.³⁴

C. Statewide incentive programs have not worked.

³² Zak Yudishthu, *supra*.

³³ Boston Planning Department, X (Aug. 22, 2024), [x.com/BostonPlans/status/1826721729827291404](https://twitter.com/BostonPlans/status/1826721729827291404) (80% of residents engaging with BPD are white and 70% have lived in Boston for over 20 years, much higher than city demographics).

³⁴ Tiffany Chan, *Milton voters reject MBTA Communities Act zoning plan*, CBS News (Feb. 14, 2024 11:24 PM), www.cbsnews.com/boston/news/milton-residents-vote-mbta-communities-act-housing/.

Massachusetts has attempted to increase housing development through the use of voluntary incentive programs, but these efforts have yielded very limited success. In 2016, Massachusetts adopted an amendment to the Small Growth Zoning Overlay District Act Chapter 40R program that would “encourage municipalities to adopt starter home districts,” which were described as containing housing units with “(less stringent) income restrictions” and thus more accessible to lower-income households. See Brief for the Attorney General, *The Attorney General v. Town of Milton, Joe Atchue*, SJC No. 13580 (2024) at 15 (hereinafter Pl.’s Brief) (citing St. 2016, c. 219, §§ 37-54). In return for adopting the zoning and streamlining development processes for 40R districts, cities and towns may receive between up to \$600,000 in state funding, plus additional funds for each new home created. Despite these incentives, the program has been called “a bust,” failing to produce a single home for four years because municipalities have “effectively zoned out single-family starter homes,” largely for the reasons described in detail above.³⁵

³⁵ Scott van Voorhis, *Baker’s starter house effort a bust*, Commonwealth Beacon (Dec. 3, 2020), www.commonwealthbeacon.org/uncategorized/bakers-starter-house-effort-a-bust/; Jenny Schuetz et. al. *From the House to the Ground: Insights into the Challenges of Implementing State Housing Policies*, Lincoln Institute of Land Policy (2023), www.lincolninst.edu/app/uploads/legacy-files/from-house-to-ground-pd.pdf? (the extent to which local governments are able

D. State-mandated action is necessary to achieve housing production goals statewide.

The two primary approaches to zoning – local control and incentives – have failed to produce adequate housing, especially housing for lower-income people. Compulsory measures are often necessary to address collective action problems, such as the dire housing emergency faced by Massachusetts residents and its wide-ranging consequences. “[R]ational, self-interested individuals will not act to achieve their common or group interests” without incentive programs or compulsory measures to “make individuals act in their common interest.” MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS THEORY OF GROUPS* 2 (1965). The crucial aspect of collective action solutions is that the plan is implemented across the collective.

Accordingly, as the MBTA Communities Act envisions, the state can and should require municipalities to act in the public interest regarding transit-oriented housing development. Pl’s Br. at 32 (§ 3A(a) is phrased in terms of what an MBTA community “shall” do) (quoting MGL c. 40A §3A) (it is “axiomatic” that a statute’s use of the word “shall” indicates a mandate) (quoting *Perez v. Dep’t of State Police*, 491 Mass. 474, 486 (2023)).

to “veto” state guidelines on housing supply hinders “implementation,” and this is an especially “thorny” issue in “New England Localities”).

III. Allowing individual communities to opt out of the Act furthers segregation and thwarts the public interest.

State action is necessary to begin to ameliorate deeply entrenched socio-economic and racial segregation. The construction and development costs for multi-family and other affordable housing in Massachusetts are among the highest in the country.³⁶ It is inequitable for lower-income municipalities that need state funding tied to MBTA Communities Act compliance to bear such costs alone, while wealthier municipalities are effectively exempted from participation because they can afford to forgo the relevant state funding.³⁷ Individual cities and towns must not be permitted to buy their way out of statewide requirements that are intended to promote the collective good of the Commonwealth and all of its residents.

³⁶ Owen Minnott & Rebecca Orbach, *A Snapshot of Housing Supply and Affordability Challenges in Boston*, Bipartisan Policy Center (Jun. 13, 2023), www.bipartisanpolicy.org/report/housing-supply-affordability-challenges-boston/; see also *The cost of affordable housing: Does it pencil out?*, Urban Institute (2016), <https://apps.urban.org/features/cost-of-affordable-housing/> ("It turns out building affordable housing is not particularly affordable").

³⁷ MBTA Communities Law Q & A, Mass.gov (2024), www.mass.gov/info-details/mbta-communities-law-qa ("communities that fail to comply with the MBTA communities act automatically lose certain state funding," including for local infrastructure).

A. Massachusetts cannot dismantle segregation without state action.

Allowing such a *de facto* exemption would exacerbate and perpetuate the well-established patterns of income segregation that have pervaded Massachusetts by making it even harder for working-class families to find housing in relatively affluent towns like Milton.³⁸ Therefore, the state of Massachusetts must exercise its power to step in and mandate all localities to comply with the law to prevent certain municipalities from disproportionately bearing the burden of housing development. If Milton prevails despite the MBTA Communities Act's clear directive, municipalities across Massachusetts will have the ability to opt out of addressing the statewide housing crisis, provided they are of a certain income level.

Realized to its full potential, laws like MBTA Communities Act provide a meaningful opportunity to democratize housing and land use policies that have perpetuated segregation. When the MBTA Communities Act was first enacted, 75 of the 175 MBTA communities had fewer than 25% of its housing stock as

³⁸ See Richard D. Kahlenberg, *The Walls of Exclusion in Massachusetts*, The Century Foundation (Dec. 2, 2021), [tcf.org/content/report/walls-exclusion-massachusetts-three-mothers-overcome-discriminatory-zoning-laws-improve-lives-children/](https://www.tcf.org/content/report/walls-exclusion-massachusetts-three-mothers-overcome-discriminatory-zoning-laws-improve-lives-children/) ("upper-income [residents] have built and reinforced zoning walls that exclude working-class families of all races").

multifamily.³⁹ The example of Milton is particularly poignant due to its stark demographic contrast against its neighbors: Mattapan and Dorchester. Demographically, Milton has remained an exclusive, middle- to high-income town that is set against the very dense, multicultural and lower income, 60% black, indigenous, and/or people of color (BIPOC) neighborhoods of Dorchester and Mattapan. The obvious spatial stratification of Milton as against Dorchester and Mattapan exacerbates racialized commuting differences where communities of color get pushed to the fringes of transit reach, thus causing BIPOC folks to incur remarkably more travel time (64 more hours in a year) than their white counterparts.⁴⁰ Milton has resisted urban sprawl and density by maintaining hallmarks of exclusivity like favoring single home plots accessible only to upper-middle class and high-income, mostly white folks. Resisting compliance with the Act will further drive up property prices in Milton, especially since it enjoys access to the Mattapan Line - a line financed by millions of dollars in state tax revenue - therefore deepening the racial divide in who can afford to live in cities like

³⁹ *MBTA Communities Multifamily Mandate Guidelines*, Metropolitan Area Planning Council (Nov. 17, 2021) at 3, www.mapc.org/wp-content/uploads/2022/01/MAPC_Section3A_WorkingPaper.pdf.

⁴⁰ *State of Equity in Metro Boston*, MAPC Regional Indicators (2017), www.regionalindicators.org/topic_areas/7#travel-time-disparity-by-race-and-mode.

Milton. Communities like Milton that are covered by the provisions of the MBTA Communities Act reap enormous benefits from the significant investment of state tax revenue into public transportation within their borders. To allow them to exclude themselves from their similarly shared responsibility to build housing in proximity to transit while benefiting from access to that transit is inequitable and perpetuates the pattern of the low-income taxpayers of Massachusetts financing their own segregation and exclusion.

B. Allowing municipalities to opt out of collective housing and transit goals thwarts the public interest.

As previously stated, if Milton can exempt itself from complying with the MBTA Communities Act requirements, other municipalities will likely follow. In addition to towns like Hamilton and Middleborough, which have voiced opposition to mandatory nature of the MBTA communities act,⁴¹ Winthrop and Medway have already indicated that they intend to cease complying with the zoning provisions of the MBTA Communities Act altogether should Milton win in court.⁴² As previously

⁴¹ See e.g., Brief for The Town of Hamilton as Amicus Curiae, p. 16, *The Attorney General v. Town of Milton*, Joe Atchue SJC No. 13580 (2024) and Brief for The Town of Middleborough as Amicus Curiae, p. 16, *The Attorney General v. Town of Milton*, Joe Atchue SJC No. 13580 (2024).

⁴² Abby Patkin, *Winthrop and Medway among latest towns to chafe against the MBTA Communities Act*, Boston.com (Aug. 15, 2024), www.boston.com/news/local-news/2024/08/15/winthrop-and-medway-chafe-against-mbta-communities-act/.

mentioned, individual towns face a lopsided cost-benefit analysis when it comes to the construction and development of affordable housing that does not mirror the state's collective interest. Therefore, allowing towns to leave this collective arrangement could very well collapse the MBTA Communities Act's ability to at least begin to address Massachusetts' housing crisis.⁴³ Failure to address our housing emergency threatens the future of all who call Massachusetts home.

There is no opting out of the housing crisis for the residents of Massachusetts. To solve this challenge, it will take coordinated efforts of cities, towns, and residents across the state. While the MBTA Communities Act itself is but one step in the State's efforts to address the housing crisis, measures like it are imperative to protecting the Commonwealth's public interest, and the Attorney General has the authority to enforce statewide policies that can bring municipalities together in facilitating the creation of more housing across Massachusetts.

⁴³ See Equitable Zoning Reform: Tackling Exclusionary Zoning, Alliance for Housing Justice (2022), www.allianceforhousingjustice.org/equitable-zoning ("municipalities should be evaluated holistically to ensure they [cannot] comply with new policies . . . while simultaneously undermining the goals of an inclusive zoning plan.")

CONCLUSION

For the foregoing reasons, Amici believe the Court should rule for Appellants in declaring that § 3A(a) places affirmative obligations on the Town of Milton and that the Attorney General is entitled to injunctive remedies to secure the Town's compliance with § 3A(a) and the Guidelines.

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CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including Rule 16(e) (references to the record), Rule 20, and Rule 21.

- (1) Exclusive of the exempted portions of the brief, as provided in Mass. R. A. P. 20(a)(2)(D), the brief contains 5,517 words.
- (2) The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365, in 12-point Courier New font. The undersigned has relied on the word count feature of this word processing system in preparing this certificate.

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September 23, 2024

CERTIFICATE OF SERVICE

I, Patricia A. Whiting, hereby certify that on September 23, 2024, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, pursuant to Mass. R. A. P. 13(c).

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