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TABLE OF CONTENTS

Massachusetts and Federal Court Cases

Book 2

Massachusetts and Federal Appellate Court Cases

Massachusetts Superior Court Case

GEORGE ATHANASIOU & ANOTHER[1] v. BOARD OF SELECTMEN OF WESTHAMPTON & ANOTHER.[2]

1 Louanne Athanasiou.

2 Town of Westhampton.

No. 15-P-894.

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 94
2017 Mass. App. LEXIS 112

January 12, 2017, Argued
August 22, 2017, Decided

PRIOR HISTORY: [**1] Suffolk. CIVIL ACTION commenced in the Land Court Department on May 20, 2013.

The case was heard by *Alexander H. Sands, III*, J., on motions for summary judgment. *Athanasiou v. Town of Westhampton, 2015 Mass. LCR LEXIS 58 (Apr. 8, 2015)*

DISPOSITION: Judgment affirmed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Adverse Possession and Prescription. *Easement*. *Municipal Corporations*, Adverse possession. *Way*. *Real Property*, Easement, Adverse possession. *Practice, Civil*, Summary judgment.

A Land Court judge properly entered summary judgment in favor of the defendant town, determining that the town had acquired prescriptive rights over a disputed area, where the record established that the town and the public's adverse use of the disputed area was continuous and uninterrupted for a twenty-year period, and where, given that the plaintiffs' submissions contained no admissible evidence in rebuttal, the deposition testimony of the town's highway superintendent established that the town exercised dominion and control over the land in its corporate capacity through authorized acts of its employees to conduct or maintain a public use thereon for the general benefit of its inhabitants, and the absence of a traffic study or a town vote did not, in any event, create a genuine issue for trial.

COUNSEL: *Harry L. Miles* (*Michael Pill* also present) for the plaintiffs.

Janelle M. Austin for the defendants.

JUDGES: Present: VUONO, MILKEY, & HENRY, JJ.

OPINION BY: VUONO

OPINION

VUONO, J. The issue in this case is whether the town of Westhampton (town) has acquired an easement by prescription over a triangular parcel of land (triangle) and an abutting roadway (way), together the "disputed area," owned by the plaintiffs, Louanne and George Athanasiou. On cross motions for summary judgment,[3] a Land Court judge determined that the public's use of the way for a continuous period in excess of twenty years, [*95] coupled with the town's maintenance of the disputed area to provide for such public use, was sufficient to establish a prescriptive easement over the disputed area

for the benefit of the town and its inhabitants. The plaintiffs appeal.

> **3** The plaintiffs commenced this action by filing a complaint in the Land Court seeking, among other things, a declaration that they are the rightful fee title owners of the disputed area. The town counterclaimed, asserting that it had acquired a prescriptive easement over the disputed area. The town's subsequently filed a motion for summary judgment after which the plaintiffs cross-moved for summary judgment on the defendants' counterclaim. Ultimately, summary judgment entered in favor of the plaintiffs on their claim of ownership and in favor of the town on its counterclaim. The town has not cross-appealed; therefore, the issue of ownership is not before us.

Background. The following facts are not in dispute. The way is an unnamed, paved roadway that connects North Road and Southampton [**2] Road in the rural town. The roads merge at an intersection located at the tip of the triangle, and the way provides a convenient connection between the two roads (known in common parlance as a "cut-through"). The way is wide enough to accommodate traffic in both directions and has been used by the public continuously for more than twenty years. The town, which does not maintain private roads, has maintained the way for public traffic during that time. Once in the early 1990s and again in or about 2005, town employees oiled and graveled the way. The town plows and sands the way approximately twenty times per year. It also patches potholes, clears fallen tree limbs, prunes trees, and collects brush obstructing the way.

The triangle is an open area of land abutted on its two sides by North Road and Southampton Road and, at its base, by the way. There was no evidence that members of the general public actively use the triangle. However, the town installed a drainage system on the triangle that allows water to drain from North Road, Southampton Road, and the way. The drainage system, which includes a swale located on the triangle,[4] has been cleared and maintained by the town for more than [**3] twenty years. In addition, the town has mowed the grounds as needed,[5] it has removed dead trees, and it has planted new trees in the triangle. The town has not assessed taxes on any portion of the disputed area to the plaintiffs or to anyone else.

> 4 A "swale" is "an elongated depression in land that is at least seasonally wet or marshy, is usu[ally] heavily vegetated, and is normally without flowing water." Webster's Third New International Dictionary 2305 (2002).
>
> 5 Occasionally a neighboring farmer mows the grass.

On the basis of these uncontroverted facts, the judge determined that the disputed area is subject to the town's prescriptive [*96] rights. The judge further concluded that the easement is limited in scope, ruling that the town may

> "only ... make use of the [d]isputed [a]rea in the manner in which they have been used ... ; the [t]own's prescriptive rights shall not include the right to expand upon the roadway or to take actions that would result in an increase in vehicle traffic upon the [w]ay, or to make any other use of the [d]isputed [a]rea other than to maintain same in such a manner as will ensure road safety, for aesthetic purposes (i.e., mowing), and for purposes of drainage."

Discussion. Summary judgment is appropriate where "all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*. "In reviewing a grant of summary judgment, 'we assess the record de novo and take the facts, together with all reasonable inferences to be

drawn from [**4] them, in the light most favorable to the nonmoving party.'" *Pugsley v. Police Dept. of Boston, 472 Mass. 367, 370-371, 34 N.E.3d 1235 (2015)*, quoting from *Bulwer v. Mount Auburn Hosp., 86 Mass. App. Ct. 316, 318, 16 N.E.3d 1090 (2014), S.C., 473 Mass. 672, 46 N.E.3d 24 (2016)*.

To acquire a prescriptive easement over "land located within its limits for a specific public purpose," a municipality must demonstrate (1) "unexplained use for more than twenty years which is open, continuous, and notorious," and (2) "proof sufficient to satisfy a trier of fact that the municipality has exercised dominion and control over the land in its corporate capacity through authorized acts of its employees, agents or representatives to conduct or maintain a public use thereon for the general benefit of its inhabitants." *Daley v. Swampscott, 11 Mass. App. Ct. 822, 827, 829, 421 N.E.2d 78 (1981)*.

The plaintiffs contend that summary judgment was improper because there is a dispute whether the public's use of the disputed area for more than twenty years was sporadic or continuous. See *id. at 827*. Moreover, the plaintiffs contend, there is a genuine dispute whether the town's maintenance of the disputed area was sufficient to establish "dominion and control" by corporate action.[6] *Id. at 829*.

> 6 The plaintiffs also argue that the judge's holding constitutes a taking by the town for which they are entitled to compensation. We do not reach this issue because it was not before the judge, and because the claim is the subject of a separate action pending in the Superior Court.

We agree with the judge's determination that the town has acquired prescriptive rights over the disputed area. The town's [*97] summary judgment materials establish that the town's and the public's "adverse [**5] use [of the disputed area was] continuous and uninterrupted for a twenty-year period." *White v. Hartigan, 464 Mass. 400, 417, 982 N.E.2d 1115 (2013)*. Nothing in the record supports an inference that the town attempted to conceal its use and maintenance of the disputed area. See *Boothroyd v. Bogartz, 68 Mass. App. Ct. 40, 44, 859 N.E.2d 876 (2007)*. Rather, the facts establish that the plaintiffs and their predecessors in title had "actual knowledge of [the town's and the public's] adverse use of the property." *White, supra*. The judge correctly concluded that the town had satisfied its burden of demonstrating the absence of a triable issue whether the town's use of the disputed area was open, notorious, and "continued uninterruptedly for twenty years." *G. L. c. 187, § 2*.[7]

> 7 The plaintiffs have offered no countervailing evidence to support the allegation that the town's use of the disputed area was permissive. See *Daley, supra at 827*. In their answers to the town's interrogatories, the plaintiffs did allege that Louanne's aunt, Carolyn Fuller Coggins, "has a strong memory of her grandmother ... telling her" that the triangle belonged to the family and that she had given "school kids" permission to play a special game on it. There is no affidavit from Coggins in the record and even the plaintiffs themselves refer to this incident as a "single instance of *permissive* use." As such, this evidence is not sufficient to show that there is a genuine issue for trial. See *Mass.R.Civ.P. 56(e)*, 365 Mass. 824 (1974).

We further conclude, as did the judge, that the undisputed facts are "sufficient to satisfy a trier of fact that [the town] has exercised dominion and control over the land in its corporate capacity through authorized acts of its employees ... to conduct or maintain a public use thereon for the general benefit of its inhabitants." *Daley, supra*. The deposition testimony of the town's highway superintendent, David Blakesley, provides ample "proof that the municipality authorized its employees to conduct activities on the property." *Id. at 828*. Blakesley [**6] testified that he has been employed by the town for twenty-seven years. He has witnessed the way being used by the public, he personally has

maintained the disputed area, and he has both observed and ordered other town highway department employees to do the same. Blakesley and other employees have plowed, sanded, oiled, and graveled the way. They have patched potholes on the way, removed trees and fallen limbs from the triangle and the way, and cleared sediments from the swale on the triangle.

[*98] The case of *Rivers v. Warwick, 37 Mass. App. Ct. 593, 596-597, 641 N.E.2d 1062 (1994)*, upon which the plaintiffs rely, is distinguishable. We concluded in that case that evidence of occasional plowing, grading, and repairing by the town of roads by which the plaintiffs accessed their summer home was insufficient to establish that those roads were made public by prescription. Similarly, in *McLaughlin v. Marblehead, 68 Mass. App. Ct. 490, 500, 863 N.E.2d 61 (2007)*, we concluded that the town had not satisfied its burden of showing corporate action where "[i]t performed no construction, maintenance, or work on [the disputed lane] during the requisite period." Here, by contrast, members of this rural community have used the disputed area, and the town has maintained the area to provide for such use, continuously for more than twenty years. [**7]

The plaintiffs dispute some portions of Blakesley's testimony. They claim that summary judgment is precluded in the absence of (1) a traffic study to demonstrate continuous, uninterrupted public use of the way, and (2) a town vote authorizing the expenditure of town funds to maintain the disputed area. We are not persuaded. The plaintiffs' submissions contain no admissible evidence to rebut Blakesley's testimony, and the absence of a traffic study or a town vote does not create a genuine issue for trial. In order to defeat summary judgment, the plaintiffs are required to "set forth specific facts showing that there is a genuine issue for trial." *Mass.R.Civ.P. 56(e)*, 365 Mass. 824 (1974). They have not done so, and summary judgment properly entered in favor of the town.

Judgment affirmed.

CRISTINA BARBUTO v. ADVANTAGE SALES AND MARKETING, LLC, & ANOTHER.[1]

1 Joanne Meredith Villaruz.

SJC-12226.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

477 Mass. 456
2017 Mass. LEXIS 504

March 9, 2017, Argued
July 17, 2017, Decided

PRIOR HISTORY: [**1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on September 4, 2015.

[*457] A motion to dismiss was heard by *Robert N. Tochka*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Barbuto v. Advantage Sales & Mktg., LLC, 148 F. Supp. 3d 145, 2015 U.S. Dist. LEXIS 162922 (D. Mass., Dec. 4, 2015)

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Marijuana. *Anti-Discrimination Law*, Handicap, Employee, Termination of employment. *Employment*, Discrimination, Termination. *Practice, Civil*, Motion to dismiss.

Discussion of St. 2012, c. 369, which states that there should be no punishment under State law for qualifying patients for the medical use of marijuana, and of the status of marijuana under Federal law.

In a civil action arising from the plaintiff's termination from employment after she tested positive for marijuana as a result of her lawful medical use of marijuana, a Superior Court judge erred in dismissing the counts of the complaint alleging discrimination in employment on the basis of handicap, where the plaintiff was a "handicapped person" within the meaning of *G. L. c. 151B*; where the plaintiff was capable of performing the essential functions of her position with some form of accommodation; and where an accommodation that would permit the plaintiff to continue to be treated with medical marijuana in her home was not per se unreasonable, despite marijuana being illegal to possess under Federal law, and, in any event, the employer owed the plaintiff an obligation, before terminating her employment, to participate in an interactive process with her to determine whether there was an alternative, equally effective medication she could use that was not prohibited under the employer's drug policy.

In a civil action arising from the plaintiff's termination from employment after she tested positive for marijuana as a result of her lawful medical use of marijuana, a Superior Court judge properly dismissed the count of the complaint alleging violation of St. 2012, c. 369, which states that there should be no punishment under State law for qualifying patients for the medical use of marijuana, where that statute did not create a separate private cause of action for aggrieved employees; likewise, the judge properly dismissed the count of the complaint alleging a claim of wrongful termination in violation of the public policy of protecting an employee's right to use marijuana for medicinal purposes, where a competent employee has a cause of action for handicap discrimination under such circumstances.

COUNSEL: *Matthew J. Fogelman* (*Adam D. Fine* also present) for the plaintiff.

Michael K. Clarkson(*M. Tae Phillips* also present) for the defendants.

The following submitted briefs for amici curiae:

Elizabeth Milito, of the District of Columbia, & *Gregory D. Cote* for NFIB Small Business Legal Center.

Reid M. Wakefield & *Constance M. McGrane* for Massachusetts Commission Against Discrimination.

David A. Russcol & Chetan Tiwari for Massachusetts Employment Lawyers Association & others.

JUDGES: Present: GANTS, C.J., LENK, HINES, GAZIANO, LOWY, & BUDD, JJ.

OPINION BY: GANTS

OPINION

GANTS, C.J. In 2012, Massachusetts voters approved the initiative petition entitled, "An Act for the humanitarian medical use of marijuana," St. 2012, c. 369 (medical marijuana act or act), whose stated purpose is "that there should be no punishment under state law for qualifying patients... for the medical use of marijuana." *Id.* at *§ 1*. The issue on appeal is whether a qualifying patient [**2] who has been terminated from her employment because she tested positive for marijuana

as a result of her lawful medical use of marijuana has a civil remedy against her employer. We conclude that the plaintiff may seek a remedy through claims of handicap discrimination in violation of *G. L. c. 151B*, and therefore reverse the dismissal of the plaintiff's discrimination claims. We also conclude that there is no implied statutory private cause of action under the medical marijuana act and that the plaintiff has failed to state a claim for wrongful termination in violation of public policy, and therefore affirm the dismissal of those claims.[2]

> 2 We acknowledge the amicus briefs submitted by the Massachusetts Commission Against Discrimination; the National Federation of Independent Business Small Business Legal Center; and the Massachusetts Employment Lawyers Association, the American Civil Liberties Union of Massachusetts, GLBTQ Legal Advocates & Defenders, Mental Health Legal Advisors Committee, Union of Minority Neighborhoods, the Jewish Alliance for Law and Social Action, and Health Law Advocates.

Background. "We review the allowance of a motion to dismiss de novo." *Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676, 940 N.E.2d 413 (2011)*. In deciding whether a count in the complaint states a claim under *Mass. R. Civ. P. 12 (b) (6)*, 365 Mass. 754 (1974), we accept as true the allegations in the complaint, draw every rea- [*458] sonable inference in favor of the plaintiff, and determine whether the factual allegations plausibly suggest an entitlement to relief under the law. *Id.*

As alleged in the complaint, the plaintiff, Cristina Barbuto, was offered an entry-level position with defendant Advantage Sales and Marketing (ASM) in the late summer of 2014, and accepted the [**3] offer. An ASM representative later left a message for Barbuto stating that she was required to take a mandatory drug test. Barbuto told the ASM employee who would be her supervisor that she would test positive for marijuana. Barbuto explained that she suffers from Crohn's disease, a debilitating gastrointestinal condition; that her physician had provided her with a written certification that allowed her to use marijuana for medicinal purposes; and that, as a result, she was a qualifying medical marijuana patient under Massachusetts law. She added that she did not use marijuana daily and would not consume it before work or at work.

Typically, Barbuto uses marijuana in small quantities at her home, usually in the evening, two or three times per week. As a result of her Crohn's disease, and her irritable bowel syndrome, she has "little or no appetite," and finds it difficult to maintain a healthy weight. After she started to use marijuana for medicinal purposes, she gained fifteen pounds and has been able to maintain a healthy weight.

The supervisor told Barbuto that her medicinal use of marijuana "should not be a problem," but that he would confirm this with others at ASM. He later telephoned [**4] her and confirmed that her lawful medical use of marijuana would not be an issue with the company.

On September 5, 2014, Barbuto submitted a urine sample for the mandatory drug test. On September 11, she went to an ASM training program, where she was given a uniform and assigned a supermarket location where she would promote the products of ASM's customers. She completed her first day of work the next day. She did not use marijuana at the workplace and did not report to work in an intoxicated state. That evening, defendant Joanna Meredith Villaruz, ASM's Human Resources representative, informed Barbuto that she was terminated for testing positive for marijuana. Villaruz told Barbuto that ASM did not care if Barbuto used marijuana to treat her medical

condition because "we follow federal law, not state law."

Barbuto filed a verified charge of discrimination against ASM and Villaruz with the Massachusetts Commission Against Dis- [*459] crimination (MCAD), which she later withdrew in order to file a complaint in the Superior Court. The complaint included six claims: (1) handicap discrimination, in violation of *G. L. c. 151B, § 4 (16)*; (2) interference with her right to be protected from handicap discrimination, in violation [**5] of *G. L. c. 151B, § 4 (4A)*; (3) aiding and abetting ASM in committing handicap discrimination, in violation of *G. L. c. 151B, § 4 (5)*; (4) invasion of privacy, in violation of *G. L. c. 214, § 1B*; (5) denial of the "right or privilege" to use marijuana lawfully as a registered patient to treat a debilitating medical condition, in violation of the medical marijuana act; and (6) violation of public policy by terminating the plaintiff for lawfully using marijuana for medicinal purposes. The second and third claims were brought against Villaruz alone; the rest were brought against both ASM and Villaruz. After unsuccessfully attempting to remove the case to United States District Court, the defendants filed a motion to dismiss the complaint in the Superior Court.

The judge allowed the motion as to all counts except the invasion of privacy claim. At the request of the plaintiff, the judge entered a separate and final judgment on the dismissed claims, and stayed the invasion of the privacy claim pending appeal. The plaintiff filed a notice of appeal regarding the dismissed claims, and we allowed the plaintiff's application for direct appellate review.

Discussion. 1. *Massachusetts medical marijuana act*. Under the medical marijuana act, a "qualifying patient" [**6] is defined as "a person who has been diagnosed by a licensed physician as having a debilitating medical condition"; Crohn's disease is expressly included within the definition of a "debilitating medical condition." St. 2012, c. 369, §§ 2 (K), (C). The act protects a qualifying patient from "arrest or prosecution, or civil penalty, for the medical use of marijuana" provided the patient "(a) [p]ossesses no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and (b) [p]resents his or her registration card to any law enforcement official who questions the patient ... regarding use of marijuana." St. 2012, c. 369, § 4. The act also provides, "Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." *Id.*

Like Massachusetts, nearly ninety per cent of States, as well as Puerto Rico and the District of Columbia, allow the limited [*460] possession of marijuana for medical treatment. See Congressional Research Service, The Marijuana Policy Gap and the Path Forward 7 (Mar. 10, 2017). See also National Conference of State Legislatures, State Medical [**7] Marijuana Laws (2017), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/9VYY-YMP8] (reporting that twenty-nine States, the District of Columbia, Puerto Rico, and Guam allow for "comprehensive public medical marijuana and cannabis programs," while seventeen other States allow use of "'low THC, high cannabidiol ... products' for medical reasons in limited situations or as a legal defense").[3] Yet under Federal law, marijuana continues to be a Schedule I controlled substance under the Controlled Substances Act, *21 U.S.C. § 812(b)(1), (c)* (2012), whose possession is a crime, regardless of whether it is prescribed by a physician for medical use. See *Gonzales v. Raich, 545 U.S. 1, 27, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005)* ("The [Controlled

Substances Act] designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses" [emphasis in original]). Consequently, a qualifying patient in Massachusetts who has been lawfully prescribed marijuana remains potentially subject to Federal criminal prosecution for possessing the marijuana prescribed. It is against this unusual backdrop that we review the judge's dismissal of every claim in the complaint except for the privacy claim.

> 3 In November, 2016, Massachusetts voters approved another initiative petition that legalized the recreational possession and use of marijuana by persons over twenty-one years of age. See St. 2016, c. 334. This initiative is irrelevant to this appeal, because the plaintiff's possession and use of marijuana for medical treatment was already lawful at the time her employment was terminated for its use.

2. *Handicap discrimination*. Under *G. L. c. 151B, § 4 (16)*, it is an "unlawful [**8] practice ... [f]or any employer ... to dismiss from employment or refuse to hire ..., because of [her] handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business."[4] "In interpreting the meaning of these provisions, we give 'substantial deference' to the guidelines [*461] interpreting *G. L. c. 151B*, promulgated by the MCAD, although we recognize that the guidelines do not carry the force of law." *Gannon v. Boston, 476 Mass. 786, 792, 73 N.E.3d 748 (2017)*, citing *Dahill v. Police Dep't of Boston, 434 Mass. 233, 239, 748 N.E.2d 956 (2001)*. "We remain mindful that the Legislature instructed that *G. L. c. 151B* 'shall be construed liberally for the accomplishment of its purposes.'" *Gannon, supra at 793*, quoting *G. L. c. 151B, § 9*.

> 4 The law defines the term "handicap" to mean "(*a*) a physical or mental impairment which substantially limits one or more major life activities of a person; (*b*) a record of having such impairment; or (*c*) being regarded as having such impairment." *G. L. c. 151B, § 1 (17)*. "[H]andicapped person" means "any person who has a handicap." *G. L. c. 151B, § 1 (19)*. A "qualified handicapped person" is "a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to the handicap." *G. L. c. 151B, § 1 (16)*.

The plaintiff alleges that she is a "handicapped person" because she suffers from Crohn's disease and that she is a "qualified handicapped person" because she is capable of performing the essential functions of her job with a reasonable accommodation to her handicap; that is, with a waiver of ASM's policy barring anyone from employment who tests positive for [**9] marijuana so that she may continue to use medical marijuana as prescribed by her physician.[5] She adequately states a claim for handicap discrimination in violation of *§ 4 (16)* if the allegations in her complaint, accepted as true, suffice to make a facial showing that she is a "qualified handicapped person" who was terminated because of her handicap. See Massachusetts Commission Against Discrimination, Guidelines: Employment Discrimination on the Basis of Handicap, Chapter 151B, § IX.A.3 (1998) (MCAD Guidelines).

> 5 "Reasonable accommodation" is not a defined term in *G. L. c. 151B, § 1*, but it is defined in guidelines regarding handicap discrimination issued by the Massachusetts Commission Against

Discrimination: "A 'reasonable accommodation' is any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions and benefits of employment" (footnote omitted). Massachusetts Commission Against Discrimination, Guidelines: Employment Discrimination on the Basis of Handicap Chapter 151B § II.C (1998) (MCAD Guidelines).

Where Crohn's disease is characterized as a "debilitating medical condition" under the medical marijuana act, see St. 2012, c. 369, § 2 (C), and where the complaint alleges that, as a result of this condition, combined with irritable bowel syndrome, the plaintiff has "little or no appetite" and has difficulty maintaining a healthy weight, we conclude that she has adequately alleged [*462] that she has a physical impairment that substantially limits one or more major life activities and therefore is a "handicapped person" as defined in *§ 1 (19)*.[6]

6 Barbuto's complaint does not specify which "major life activity" her Crohn's disease impairs. However, accepting the facts alleged in the complaint as true, it appears that the disease significantly impairs her ability to work, which is a major life activity. See *G. L. c. 151B, § 1 (20)*; *New Bedford v. Massachusetts Comm'n Against Discrimination, 440 Mass. 450, 464-465, 799 N.E.2d 578 (2003)*. We also note that eating is widely recognized as a major life activity under Federal antidiscrimination case law. See *Kapche v. Holder, 677 F.3d 454, 461, 400 U.S. App. D.C. 201 & n.6 (D.C. Cir. 2012)*, and cases cited.

Where a plaintiff is handicapped and where she suffered an adverse employment action even though she was capable of performing the essential functions of her position [**10] with some form of accommodation, the plaintiff adequately alleges a claim of handicap discrimination if the accommodation that she alleges is necessary is facially reasonable. See *Godfrey v. Globe Newspaper Co., 457 Mass. 113, 120, 928 N.E.2d 327 (2010)*. Because a reasonable accommodation claim may arise in a wide variety of contexts, courts are reluctant to set "hard and fast rules" as to when an accommodation is facially reasonable. See *Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 n.5 (1st Cir. 2001)*. Generally speaking, however, a plaintiff must at least show that the accommodation is "feasible for the employer under the circumstances." *Id. at 259*.

The defendants argue that Barbuto has failed to state a claim of handicap discrimination for two reasons. First, they contend that she has not adequately alleged that she is a "qualified handicapped person" because the only accommodation she sought -- her continued use of medical marijuana -- is a Federal crime, and therefore is facially unreasonable. See *Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016)* ("medical marijuana is not an accommodation that must be provided for by the employer"); *Ross v. Raging Wire Telecomm., Inc., 42 Cal. 4th 920, 926, 70 Cal. Rptr. 3d 382, 174 P.3d 200 (2008)* (California's statute prohibiting handicap discrimination "does not require employees to accommodate the use of illegal drugs"). Second, they contend that, even if she were a "qualified handicapped person," she was terminated because she [**11] failed a drug test that all employees are required to pass, not because of her handicap.

As to the defendants' first argument, where an employee is handicapped because she suffers from a debilitating medical [*463] condition that can be alleviated or managed with medication, one generally would expect an employer not to interfere with the employee taking such medication, or to terminate her

because she took it. If the employer, however, had a drug policy prohibiting the use of such medication, even where lawfully prescribed by a physician, the employer would have a duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives to the prescribed medication whose use would not be in violation of its policy. See *Godfrey, 457 Mass. at 120* ("If the accommodation proposed by the employee appears unduly onerous, the employer has an obligation to work with the employee to determine whether another accommodation is possible"). See also *Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination, 450 Mass. 327, 342 n.17, 879 N.E.2d 36 (2008)* (when handicapped employee requests accommodation, "employer is obligated to participate in the interactive process of determining one"); MCAD Guidelines, § VII.C (once handicapped employee notifies employer of need for accommodation [**12] to perform essential functions of job, "the employer should initiate an informal interactive process" with employee to "identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations").

Where no equally effective alternative exists, the employer bears the burden of proving that the employee's use of the medication would cause an undue hardship to the employer's business in order to justify the employer's refusal to make an exception to the drug policy reasonably to accommodate the medical needs of the handicapped employee. See *Godfrey, 457 Mass. at 120,* quoting *Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 386 n.3, 607 N.E.2d 1035 (1993)* ("Once an employee 'make[s] at least a facial showing that reasonable accommodation is possible,' the burden of proof [of both production and persuasion] shifts to the employer to establish that a suggested accommodation would impose an undue hardship"). Because the burden of proving undue hardship rests with the employer, where an employee brings a handicap discrimination claim following her dismissal for the use of her prescribed medication, her complaint will state a claim for relief that will survive a motion to dismiss where it adequately alleges that she is a "qualified handicapped [**13] person" because she could have competently performed her job with the medication, and that allowing her to use the medication was at least facially a reasonable accommodation.

[*464] Here, the defendants contend that, because the prescribed medication is marijuana, which is illegal to possess under Federal law, an accommodation that would permit the plaintiff to continue to be treated with medical marijuana is per se unreasonable. They also contend that, because such an accommodation is facially unreasonable, it owed the plaintiff no obligation to participate in the interactive process to identify a reasonable accommodation before they terminated her employment. We are not persuaded by either argument.

Under Massachusetts law, as a result of the act, the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication. Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an [**14] employer's drug policy to permit its use is a facially reasonable accommodation. A qualified handicapped employee has a right under *G. L. c. 151B, § 4 (16),* not to be fired because of her handicap, and that right includes the right to require an

employer to make a reasonable accommodation for her handicap to enable her to perform the essential functions of her job.

Our conclusion finds support in the marijuana act itself, which declares that patients shall not be denied "any right or privilege" on the basis of their medical marijuana use. St. 2012, c. 369, § 4. A handicapped employee in Massachusetts has a statutory "right or privilege" to reasonable accommodation under *G. L. c. 151B, § 4*. If an employer's tolerance of an employee's use of medical marijuana were a facially unreasonable accommodation, the employee effectively would be denied this "right or privilege" solely because of the patient's use of medical marijuana.[7]

> 7 The language of the Massachusetts medical marijuana act distinguishes this case from a California Supreme Court decision that denied an employee's challenge under the State's handicap discrimination law to a termination based on the employee's use of medical marijuana. The California medical marijuana law at issue in *Ross v. Raging Wire Telecomm. Inc., 42 Cal. 4th 920, 927-928, 70 Cal. Rptr. 3d 382, 174 P.3d 200 (2008)*, did not contain language protecting medical marijuana users from the denial of any right or privilege.
>
> In other published cases where State Supreme Courts have rejected employees' claims for relief from their termination of employment because of their use of medical marijuana, the employees did not bring handicap discrimination claims. In *Coats v. Dish Network, LLC, 350 P.3d 849, 851, 2015 CO 44 (Colo. 2015)*, the plaintiff brought a wrongful termination claim, alleging that his termination was in violation of a State statute that barred an employer from discharging an employee based on the employee's participation in "lawful activities" off-site during nonworking hours. The Supreme Court of Colorado affirmed the dismissal of the claim, concluding that the Legislature did not intend the statute to apply to an activity, such as the possession of marijuana, that was unlawful under Federal law. *Id. at 853*. In *Roe v. Teletech Customer Care Mgt. (Colorado) LLC, 171 Wn.2d 736, 760, 257 P.3d 586 (2011)*, the Washington Supreme Court affirmed the allowance of summary judgment in favor of the employer on the plaintiff's wrongful termination claims, holding that the State's medical marijuana law did not create a private right of action and did not proclaim a public policy prohibiting the discharge of an employee for medical marijuana use.

The act also makes clear that it does not require "any accom- [*465] modation of any on-site medical use of marijuana in any place of employment." St. 2012, c. 369, § 7 (D). This limitation implicitly recognizes that the off-site medical use of marijuana might be a permissible "accommodation," which is a term of art specific [**15] to the law of handicap discrimination.

The fact that the employee's possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation. The only person at risk of Federal criminal prosecution for her possession of medical marijuana is the employee. An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use.

Nor are we convinced that, as a matter of public policy, we should declare such an accommodation to be per se unreasonable solely out of respect for the Federal law prohibiting the possession of marijuana even where lawfully prescribed by a physician. Since 1970 when Congress determined that marijuana was a Schedule I controlled substance that, in contrast with a Schedule II, III, IV, or V controlled substance, "has no currently accepted medical use in treatment in the United States," nearly ninety per cent of the States have enacted laws regarding medical

marijuana that reflect their determination that marijuana, where lawfully prescribed by a physician, has a currently accepted medical use in treatment.[8] See *21 U.S.C. § 812(b)(1)(B)*. To declare an [**16] accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the [*466] vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions. Cf. *Commonwealth v. Craan, 469 Mass. 24, 35, 13 N.E.3d 569 (2014)* ("the fact that [marijuana possession] is technically subject to a Federal prohibition does not provide [the Commonwealth] an independent justification for a warrantless search").[9]

8 See *National Organization for Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123, 134-137 (D.D.C. 1980)* (discussing legislative history of Controlled Substances Act); *id. at 135* (in 1970 "few reliable scientific studies existed that could give accurate information to the legislators").

9 The defendants in this case have waived the argument that Federal preemption requires the conclusion that an employee's use of medical marijuana is facially unreasonable as an accommodation. We note that the Oregon Supreme Court rested its decision that an employee's use of medical marijuana was not a reasonable accommodation under the State's disability act on this ground. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Ore. 159, 189-190, 230 P.3d 518 (2010).*

In addition, even if the accommodation of the use of medical marijuana were facially unreasonable (which it is not), the employer here still owed the plaintiff an obligation under *G. L. c. 151B, § 4 (16)*, before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy. This failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination provided the plaintiff proves that a reasonable accommodation existed that would have enabled her to be a "qualified handicapped person." See *Spurling v. C & M Fine Pack, Inc., 739 F.3d 1055, 1061-1062 (7th Cir. 2014)* (employer [**17] found liable for disability discrimination where it "turn[ed] a blind eye" to plaintiff's sleep impairment and terminated her without interactive dialogue where she could have demonstrated through such dialogue availability of narcolepsy medication that would have enabled her to perform essential functions of job).

As to the defendants' second argument, where a handicapped employee needs medication to alleviate or manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap. By the defendants' logic, a company that barred the use of insulin by its employees in accordance with a company policy would not be discriminating against diabetics because of their handicap, but would simply be implementing a company policy prohibiting the use of a medication. Where, as here, the company's policy [*467] prohibiting any use of marijuana is applied against a handicapped employee who is being treated with marijuana by a licensed physician for her medical condition, the termination of the employee for violating [**18] that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination. Cf. *School Comm. of Braintree v. Massachusetts Comm'n*

Against Discrimination, 377 Mass. 424, 425, 386 N.E.2d 1251 (1979) (employment policy that prohibited teachers from using accrued sick leave for pregnancy-related disabilities that occur in extended maternity leaves was gender discrimination).

Our conclusion that an employee's use of medical marijuana under these circumstances is not facially unreasonable as an accommodation for her handicap means that the dismissal of the counts alleging handicap discrimination must be reversed. But it does not necessarily mean that the employee will prevail in proving handicap discrimination. The defendant at summary judgment or trial may offer evidence to meet their burden to show that the plaintiff's use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the defendants' business. See *Godfrey, 457 Mass. at 120*. See also *G.L. c. § 4 (16)* (listing factors considered in determining whether accommodation would create undue hardship). For instance, an employer might prove that the continued use of medical marijuana would impair the employee's performance of her work or pose an "unacceptably [**19] significant" safety risk to the public, the employee, or her fellow employees. See *Gannon, 476 Mass. at 800*.

Alternatively, an undue hardship might be shown if the employer can prove that the use of marijuana by an employee would violate an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform its business. We recognize that transportation employers are subject to regulations promulgated by the United States Department of Transportation that prohibit any safety-sensitive employee subject to drug testing under the department's drug testing regulations from using marijuana. See *49 C.F.R. §§ 40.1(b), 40.11(a) (2001)*. See also DOT 'Medical Marijuana' Notice, U.S. Dept. of Transp. (Updated: June 20, 2017), https://www.transportation.gov/odapc/medical-marijuana-notice [https://perma.cc/FY24-SEMZ]. In addition, we recognize that Federal government contractors and the recipients of Federal grants are obligated to comply with the Drug Free [*468] Workplace Act, *41 U.S.C. §§ 8102(a), 8103(a) (2012)*, which requires them to make "a good faith effort ... to maintain a drug-free workplace," and prohibits any employee from using a controlled substance in the workplace.[10]

> 10 As noted earlier, we recognize that the Massachusetts medical marijuana act does not require any employer to permit on-site marijuana use as an accommodation to an employee. See St. 2012, c. 369, § 7 (D).

Whether the employer met its burden of proving that the requested accommodation would impose an undue hardship on the employer's business is an issue that may [**20] be resolved through a motion for summary judgment or at trial; it is not appropriately addressed through a motion to dismiss. Because the plaintiff's continued use of medical marijuana under these circumstances is not facially unreasonable as an accommodation for her handicap and because the plaintiff has adequately alleged that ASM failed to participate in an interactive process with the plaintiff to determine whether there was a reasonable accommodation for her handicap, we reverse the dismissal of count 1, alleging handicap discrimination. We also reverse the dismissal of counts 2 and 3 against Villaruz, which allege that she aided and abetted ASM's handicap discrimination and interfered with the plaintiff's exercise of her right to be free from handicap discrimination.

3. *Implied private cause of action under the medical marijuana act*. The plaintiff alleges in count 4 of her complaint that her termination was in violation of the

medical marijuana act, which suggests that she claims she has a private cause of action under the act against an employer who terminates her employment for the lawful use of medical marijuana. When the voters approved the act through the initiative petition, [**21] two New England States, Rhode Island and Maine, already had enacted comparable statutes that expressly included provisions prohibiting employers from taking adverse employment action against an employee for his or her lawful use of medical marijuana. See *R.I. Gen. Laws. § 21-28.6-4(b)* (2006 & Supp. 2017) ("No school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a [registered qualifying patient]"); *Me. Rev. Stat. Ann. tit. 22, § 2423-E* (West 1964 & Supp. 2016) ("A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person for that person's status as a qualifying patient ... unless failing to do so would put the school, employer or landlord in violation of [F]ederal law or cause it to lose a [F]ederal contract or funding"). [*469] The Massachusetts act did not include such language. Therefore, we consider whether, despite the absence of such language, a private right of action of an employee who was terminated for her lawful use of medical marijuana exists under the act by implication.

Legislative intent is "the determinative factor in deciding whether a private cause of action can be implied from a statute." *Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 543, 689 N.E.2d 799 (1998)*, and cases cited. "[W]e have generally been [**22] reluctant to infer a private cause of action from a statute in the absence of some indication from the Legislature supporting such an inference." *Id. at 544*. Where a statute was enacted by the voters through an initiative petition, "it is to the wishes of the people, not the Legislature, that we must look." *Bates v. Director of Office of Campaign & Political Fin., 436 Mass. 144, 173, 763 N.E.2d 6 (2002)*.

In considering whether there is any such indication from the voters, we look to the closest equivalent to legislative history, which is the Information for Voters guide that is prepared by the Secretary of the Commonwealth and sent to each registered voter before the election.[11] See *Roe v. Teletech Customer Care Mgt. (Colorado) LLC, 171 Wn.2d 736, 747, 257 P.3d 586 (2011)* ("If there is ambiguity in an initiative, the court may look to extrinsic evidence of the voters' intent such as statements in the voters' pamphlet"). There is no indication from the guide that the voters understood they were creating a private right of action through passage of the initiative; the guide is silent with respect to adverse employment action arising from an employee's use of medical [*470] marijuana.

> 11 The voter information booklet prepared by the Secretary of the Commonwealth (Secretary) "is a single, comprehensive collection of the information that is officially available to voters in advance of the election. For each ballot question, the guide contains (i) the title given to the question by the Attorney General and the Secretary; (ii) the Attorney General's summary in full; (iii) the two one-sentence statements prepared by the Attorney General and the Secretary describing the effect of a 'yes' and a 'no' vote; (iv) a statement prepared by the Secretary of Administration and Finance describing the fiscal impact of the proposed act; (v) any legislative committee majority reports, together with the names of the majority and minority members of the committees that may have considered the proposed act; (vi) a statement of votes of the General Court on the proposed act, if any; (vii) arguments, not exceeding 150 words each, for and against the proposed act submitted by its proponents and opponents; and (viii) the full text of the proposed act itself."

Hensley v. Attorney Gen., 474 Mass. 651, 660 n.14, 53 N.E.3d 639 (2016), citing *art. 48, General Provisions, IV, of the Amendments to the Massachusetts Constitution*, as amended by *art. 108 of the Amendments*; and *G. L. c. 54, §§ 53, 54*.

We also consider whether the absence of a private cause of action would render the statute ineffective, and frustrate the voters' purpose in approving the initiative. See *Bates, 436 Mass. at 173-174*, quoting *Boston Elevated Ry. v. Commonwealth, 310 Mass. 528, 548, 39 N.E.2d 87 (1942)* ("We will not impute to [**23] the voters who enacted the clean elections law an 'intention to pass an ineffective statute'"). Here, where a comparable cause of action already exists under our law prohibiting handicap discrimination, a separate, implied private right of action is not necessary to protect a patient using medical marijuana from being unjustly terminated for its use. The Legislature's provision of a separate remedy, especially, as here, a separate civil remedy, "weighs heavily against recognizing" an implied private right of action in a statute. See *Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 373, 893 N.E.2d 1187 (2008)*. Cf. *Loffredo, 426 Mass. at 547*, quoting *Transamerica Mtge. Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)* ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

In addition, as noted earlier, the drafters of the act appear to have recognized the existence of a cause of action for handicap discrimination by specifically prohibiting "on-site" medical marijuana use as an "accommodation." St. 2012, c. 369, § 7 (D). The drafters also barred the denial of a "right or privilege" for marijuana use, which suggests a preexisting right or privilege, not a right created by the act. *Id.* at *§ 4*.

We interpret statutes, where we can, to be in harmony with each other. See *Carleton v. Commonwealth, 447 Mass. 791, 809, 858 N.E.2d 258 (2006)*; *Charland v. Muzi Motors, Inc., 417 Mass. 580, 582-583, 631 N.E.2d 555 (1994)*. Recognizing an implied private right [**24] of action under the medical marijuana act for an employee could conflict with the employee's right of action under our antidiscrimination law. *G. L. c. 151B*. In contrast to our antidiscrimination law, which sets forth limitations such as the employer's undue hardship defense, *G. L. c. 151B, § 3 (16)*, the medical marijuana act provides no guidance as to what the appropriate contours of the implied right of action would be. We will not imply a separate private cause of action for aggrieved employees under the medical marijuana act, where such employees are already provided a remedy under our discrimination law, and where doing so would create potential confusion.

4. *Wrongful termination in violation of public policy*. The plaintiff alleges in count 6 of her complaint a claim of wrongful [*471] termination in violation of public policy, where the public policy is the protection of an employee's right to use marijuana for medicinal purposes. "As an exception to the general rule that an employer may terminate an at-will employee at any time with or without cause, we have recognized that an at-will employee has a cause of action for wrongful termination only if the termination violates a clearly established public policy." *King v. Driscoll, 418 Mass. 576, 582, 638 N.E.2d 488 (1994), S.C., 424 Mass. 1, 673 N.E.2d 859 (1996)*. We "consistently [**25] [have] interpreted the public policy exception narrowly, reasoning that to do otherwise would 'convert the general rule ... into a rule that requires just cause to terminate an at-will employee.'" *Id.*, quoting *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 150, 533 N.E.2d*

1368 (1989). Because a competent employee has a cause of action for handicap discrimination where she is unfairly terminated for her use of medical marijuana to treat a debilitating medical condition, we see no need and no reason to recognize a separate cause of action for wrongful termination based on the violation of public policy arising from such handicap discrimination. We also note, as we did in rejecting an implied private cause of action under the act, that recognizing such a wrongful termination claim would invite confusion as to whether its parameters mirror those for handicap discrimination.

Conclusion. For the reasons stated above, we reverse the judge's allowance of the motion to dismiss the plaintiff's claim for handicap discrimination and the related claims under *G. L. c. 151B*, and affirm the allowance of the motion as to the counts claiming an implied private cause of action under the act and wrongful termination in violation of public policy. We remand the case to the Superior Court [**26] for further proceedings consistent with this opinion.

So ordered.

PAUL C. BERGMAN, TRUSTEE,[1] v. BOARD OF ASSESSORS OF WILMINGTON.

1 Of the Bergman Family Trust.

15-P-1701

APPEALS COURT OF MASSACHUSETTS

90 Mass. App. Ct. 1113*; *63 N.E.3d 63
2016 Mass. App. Unpub. LEXIS 1053

November 1, 2016, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, *71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008)*.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

DISPOSITION: Decision of the Appellate Tax Board affirmed.

JUDGES: Trainor, Grainger & Blake, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The appellant, Paul C. Bergman, trustee of the Bergman Family Trust (trust), appeals the dismissal of his petition by the Appellate Tax Board. In his petition, he sought review of a denial of his request to defer property taxes for fiscal year 2014 from the board of assessors of the town of Wilmington (board). We affirm.

The relevant facts are uncontested. Bergman's mother resigned as trustee of the trust by executing an instrument that was dated June 17, 2010, and was recorded with the Middlesex County registry of deeds on August 23, 2010. As a result, Bergman, designated "successor trustee" in the indenture, stepped into her shoes and became the owner of the subject property.[2] For both fiscal years 2012 and 2013, Bergman applied for and received tax deferrals pursuant to *G. L. c. 59, § 5 clause 41A* (clause 41A). This statute allows for qualifying low income elderly taxpayers to defer their entire property tax bill until the deferred tax and interest balance reaches fifty percent of the property's assessed value.[3]

2 21 Shady Lane Drive, Wilmington, Massachusetts.

3 Under the statute, the municipality [*2] granting such deferral receives payment of the full amount deferred plus accrued interest upon sale of the property or death of the taxpayer.

On November 26, 2013, Bergman applied again for a tax deferral pursuant to clause 41A for fiscal year 2014. The board denied his application. The property was valued at $310,700 and a tax was assessed in the amount of $4,424.37. The property tax bills were mailed December 30, 2013. Bergman appealed the denial of his application to the Appellate Tax Board. He did not pay the assessed taxes prior to doing so. The board moved to dismiss the petition; the Appellate Tax Board granted the motion on the grounds that it had no jurisdiction to hear the petition.

General Laws c. 59, § 64, as amended through St. 1998, c. 485, § 3, provides that in order to petition the Appellate Tax Board, a taxpayer must pay the full tax amount without interest if the tax due is over three thousand dollars;[4] this payment "is a condition precedent to the board's jurisdiction over an abatement appeal." *Columbia Pontiac Co. v. Board of Assessors, 395 Mass. 1010, 1011, 481 N.E.2d 440 (1985)* quoting from *Stilson v. Assessors of Gloucester, 385 Mass. 724, 732, 434 N.E.2d 158 (1982)*. It is undisputed that the assessed taxes equaled $4,424.37 and that Bergman failed to pay the taxes owed prior to petitioning the Appellate Tax Board.

4 Alternatively, a taxpayer may petition [*3] the Appellate Tax Board if timely tax payments are made that are at least equal to the average tax for the three preceding years. See *Assessors of New Braintree v. Pioneer Valley Academy, Inc., 355 Mass. 610, 617, 246 N.E.2d 792 (1969)*. Bergman does not dispute that he has not satisfied this requirement.

Even assuming the Appellate Tax Board had jurisdiction over Bergman's petition, he would not qualify for the abatement under clause 41A. Clause 41A requires, in pertinent part, that a person seeking to defer taxes on real property "has so owned and occupied as his domicile such real property ... *for five years*" (emphasis added). Bergman does not dispute that the requisite five years did not pass between the year he became trustee (2010) and the year he applied for the tax deferment (2013). His argument that he acted as de facto trustee before he became the legal owner of the property fails to address the strict requirements of the statute. Although Bergman was a beneficiary of the trust prior to 2010, such beneficial interest does not satisfy the statute's five-year requirement. See *Kirby v. Assessors of Medford, 350 Mass. 386, 391, 215 N.E.2d 99 (1966)* (interpreting "*§ 5, [cl. (41)]*, as requiring not only ownership of a sufficient beneficial property interest, but also ownership of a record legal interest, as a condition of obtaining the exemption").

[*4] The Appellate Tax Board correctly dismissed Bergman's petition.

Decision of the Appellate Tax Board affirmed.

By the Court (Trainor, Grainger & Blake, JJ.[5]),

5 The panelists are listed in order of seniority.

Entered: November 1, 2016.

HELEN BROWN v. OFFICE OF THE COMMISSIONER OF PROBATION.

SJC-11987.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

475 Mass. 675; 59 N.E.3d 1167
2016 Mass. LEXIS 761

March 7, 2016, Argued
October 11, 2016, Decided

PRIOR HISTORY: Suffolk. CIVIL ACTION commenced in the Superior Court Department on August 13, 2007.

Following review by the Appeals Court, *84 Mass. App. Ct. 1109* (2013) [***1], a motion for postjudgment interest was considered by *Paul E. Troy,* J., and judgment was entered by him.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.
Brown v. Office of the Commissioner of Probation, 87 Mass. App. Ct. 729, 2015 Mass. App. LEXIS 88, 35 N.E.3d 1 (2015)

DISPOSITION: Judgment affirmed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Governmental Immunity. *Commonwealth*, Claim against. *Judgment*, Interest. *Interest*. *Damages*, Interest, Punitive, Attorney's fees. *Practice, Civil*, Interest, Costs, Attorney's fees.

A Superior Court judge correctly denied the plaintiff's motion for postjudgment interest on awards of punitive damages, costs, and attorney's fees in connection with a civil action alleging sex discrimination in employment, racial discrimination in employment, and retaliation, where the Legislature did not waive sovereign immunity with respect to the recovery of such interest under *G. L. c. 151B, § 9*, either explicitly or by necessary implication.

COUNSEL: *Jonathan J. Margolis* (*Beth R. Myers* also present) for the plaintiff.

Sally A. VanderWeele, Assistant Attorney General, for the defendant.

Jamie Goodwin, for Massachusetts Employment Lawyers Association & others, amici curiae, submitted a brief.

JUDGES: Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ.[1]

1 Justices Spina, Cordy, and Duffly participated in the deliberation on this case prior to their retirements.

OPINION BY: LENK

OPINION

[**1168] LENK, J. In this case, we consider whether sovereign immunity bars a plaintiff who is awarded punitive damages, costs, and attorney's fees as part of a judgment under *G. L. c. 151B, § 9,* from recovering postjudgment [**1169] interest on those awards from a public employer. The trial judge denied a request by the plaintiff, Helen Brown, for such interest, concluding [***2] that sovereign immu- [*676] nity has not been waived with respect to such interest, and judgment was entered accordingly. A divided panel of the Appeals Court affirmed the judgment, see *Brown v. Office of the Commissioner of Probation, 87 Mass. App. Ct. 729, 735, 35 N.E.3d 1 (2015),* and we allowed the plaintiff's application for further appellate review. Because we conclude that *G. L. c. 151B, § 9,* does not waive sovereign immunity from liability for postjudgment interest, either expressly or by necessary implication, we affirm.[2]

2 We acknowledge the amicus brief of the Massachusetts Employment Lawyers Association, the American Civil Liberties Union of Massachusetts, and the Union of Minority Neighborhoods.

Background. We recite only those facts necessary for understanding in context the question of law at issue here. The plaintiff and a colleague sued the defendant, the office of the Commissioner of Probation, for sex discrimination, race discrimination, and retaliation, pursuant to the procedure set forth in *G. L. c. 151B, § 9*. On February 9, 2011, a Superior Court jury found for the plaintiff on her retaliation claim,[3] and awarded $6,000 in compensatory damages and $500,000 in punitive damages. The award of punitive damages was reduced to $108,000 by an order of remittitur. On January 18, 2012, the office of the Commissioner [***3] of Probation additionally was ordered to pay $233,463.48 in attorney's fees and $13,294.47 in costs related to the trial.[4] Following a decision by the Appeals Court affirming the order of remittitur,[5] judgment after rescript was entered on March 12, 2014. That judgment, which provided for prejudgment interest and was paid in full on July 15, 2014, did not provide for the requested postjudgment interest.[6]

3 The plaintiff did not prevail on her other claims.

4 The amount of attorney's fees to award was a matter of dispute following trial. The final amount awarded was $233,463.48, after the initial award was amended by the trial judge.

5 The plaintiff was ordered to choose between accepting the reduced amount of punitive damages or proceeding to a new trial. She initially elected to proceed to a new trial, and requested that the decision granting remittitur be reported to the Appeals Court pursuant to *Mass. R. Civ. P. 64,* as amended, 423 Mass. 1410 (1996). After the Appeals Court affirmed the decision, see *Brown v. Office of the Commissioner of Probation, 84 Mass. App. Ct. 1109, 993 N.E.2d 373 (2013),* the plaintiff filed a motion to revoke her election to proceed to a new trial, and instead accept the reduced amount. That motion was allowed.

6 The judgment provided for postjudgment interest on the award of compensatory damages. The [***4] defendant did not, however, contest that component of the judgment, and it has been paid.

[*677] *Discussion*. The plaintiff contends that her request for postjudgment interest on punitive damages, costs, and attorney's fees should have been granted, because *G. L. c. 151B* generally waives sovereign immunity with respect to such interest.[7] As that argument presents a question of law, we consider it de novo. See *Commonwealth v. Spencer, 465 Mass. 32, 46, 987 N.E.2d 205 (2013)*.

7 The parties do not dispute that the defendant is a public entity that generally is entitled to sovereign immunity when that immunity has not been waived.

"The general rule of law with respect to sovereign immunity is that the Commonwealth or any of its instrumentalities 'cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the

manner and to the extent expressed [**1170] [by] statute.'" *DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 12, 848 N.E.2d 1197 (2006)*, quoting *General Elec. Co. v. Commonwealth, 329 Mass. 661, 664, 110 N.E.2d 101 (1953)*. While *G. L. c. 235, § 8*, provides for postjudgment interest against private entities for "[e]very judgment for the payment of money," that statute does not apply to claims against the Commonwealth or its subdivisions. See *Onofrio v. Department of Mental Health, 411 Mass. 657, 660 n.5, 584 N.E.2d 619 (1992)*, citing *C & M Constr. Co. v. Commonwealth, 396 Mass. 390, 393, 486 N.E.2d 54 (1985)*. Thus, public employers are not liable for postjudgment interest unless some other statute clearly waives sovereign immunity with respect [***5] to such interest. See *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 465 Mass. 584, 597, 990 N.E.2d 1042 (2013)*. The plaintiff argues that *G. L. c. 151B* contains such a waiver.

General Laws c. 151B, the antidiscrimination statute, establishes the remedies available in judicial and agency proceedings against defendants who have engaged in unlawful discrimination and retaliation. The statute waives sovereign immunity in several respects by including the Commonwealth "and all political subdivisions ... thereof" in its definition of the persons and employers subject to it. See *DeRoche, supra at 12*, citing *G. L. c. 151B, § 1 (1)* and *(5)*. For example, sovereign immunity has been waived with respect to the recovery of punitive damages under *G. L. c. 151B, § 9*, which establishes the remedies available for a plaintiff who raises a claim of discrimination or retaliation in a judicial proceeding. See *Bain v. Springfield, 424 Mass. 758, 763, 678 N.E.2d 155 (1997)*. Sovereign immunity also has been waived with respect to the recovery of prejudgment interest on an award of back pay under *G. L. c. 151B, § 5*, which establishes the remedies available to a [*678] plaintiff who raises such claims in an agency proceeding before the Massachusetts Commission Against Discrimination (commission). See *DeRoche, supra at 14*.[8] We have yet to consider, however, whether sovereign immunity has been waived with respect to the recovery of postjudgment interest under *G. L. c. 151B, § 9*.[9]

> 8 The defendant [***6] does not contest that public employers similarly are liable for prejudgment interest on compensatory damages awarded in judicial proceedings pursuant to *G. L. c. 151B, § 9*. The Appeals Court in *Salvi v. Suffolk County Sheriff's Dep't, 67 Mass. App. Ct. 596, 608, 855 N.E.2d 777 (2006)*, so decided. See *id.* ("It is now settled law that sovereign immunity is no bar to the liability of a public sector employer for prejudgment interest on damages in a *G. L. c. 151B* discrimination case"). Accord *Todino v. Wellfleet, 448 Mass. 234, 240, 860 N.E.2d 1 (2007)*.
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> 9 The court in *DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 14, 848 N.E.2d 1197 (2006)*, additionally affirmed an order requiring the payment of postjudgment interest on the compensatory damages at issue in that case. That determination was made only "for purposes of [that] opinion," however, because the public employer had "presented no independent argument" regarding its liability for postjudgment interest as opposed to prejudgment interest. See *id. at 19 n.19*.

In the plaintiff's view, *DeRoche, supra at 13-14*, interpreted *G. L. c. 151B* as expressing a general waiver of sovereign immunity, thereby making public employers liable for all remedies for which private employers are liable. The plaintiff reasons that, because postjudgment interest is available under *G. L. c. 151B* on a judgment against a private employer, see *Nardone v. Patrick Motor Sales, Inc., 46 Mass. App. Ct. 452, 454, 706 N.E.2d 1151 (1999)*, such interest also must be available against public employers. We do not agree.

[**1171] In *DeRoche, supra*, we considered whether [***7] *G. L. c. 151B, § 5*, which empowers the commission to "take such affirmative action, including, but not

limited to, hiring, reinstatement or upgrading of employees, with or without back pay, ... as, in the judgment of the commission, will effectuate the purposes of this chapter," allows for an award of prejudgment interest against a public employer. At the time *DeRoche* was decided, we already had held, in the private employment context, that the language of *G. L. c. 151B, § 5*, by its own terms, permits the commission to impose prejudgment interest as a remedy. See, e.g., *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, 401 Mass. 566, 583, 517 N.E.2d 1270 (1988)*. In keeping with that precedent, we concluded in *DeRoche, supra at 14*, that *G. L. c. 151B, § 5*, waives sovereign immunity from liability for prejudgment inter- [*679] est, "[b]ecause *G. L. c. 151B, § 5*, authorizes the remedy of prejudgment interest, and public employers are, by virtue of *§ 1 (1)* and *(5)*, subject to the mandates of the statute." We did not, however, conclude that *G. L. c. 151B* includes a waiver of sovereign immunity in all respects.

Sovereign immunity advances important public policies, see *Randall v. Haddad, 468 Mass. 347, 358, 10 N.E.3d 1099 (2014)*, and cases cited, and the "rules of construction governing statutory waivers of sovereign immunity accordingly are stringent" (citation omitted). See *Todino v. Wellfleet, 448 Mass. 234, 238, 860 N.E.2d 1 (2007)*. Waiver must be "expressed by the terms of a statute, or appear[ ] by necessary [***8] implication from them." *Bain, 424 Mass. at 763*, quoting *C & M Constr. Co., 396 Mass. at 392*. *General Laws c. 151B, § 9*, provides, in relevant part:

> "This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply, but nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination . ...
>
> "...
>
> "If the court finds for the petitioner, it may award the petitioner actual and punitive damages. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust."

That language does not expressly waive sovereign immunity from liability for postjudgment interest. Contrast *G. L. c. 79, § 37* (expressly waiving sovereign immunity from liability for postjudgment interest on eminent domain awards). Accordingly, we consider whether *G. L. c. 151B, § 9*, waives sovereign immunity with respect to such interest by necessary implication.

Sovereign immunity from liability for postjudgment interest by necessary implication requires "uncommonly forceful language" indicating a legislative [***9] intent that the Commonwealth should compensate plaintiffs without any loss whatsoever, including loss of the time value of the money awarded. See *Todino, 448 Mass. at 235*. See also *Maimaron v. Commonwealth, 449 Mass. 167*, [*680] *181, 865 N.E.2d 1098 (2007)*. In *Todino, supra at 236-237* & n.7, for example, we determined that *G. L. c. 41, § 111F*, which allows police officers to recover wages they are deprived of during periods of incapacity, waives sovereign immunity from liability for postjudgment interest by necessary implication, because it directs that plaintiffs be compensated "without loss of pay for the period of such incapacity," and that "[a]ll amounts payable under [**1172] [that] section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, ... regular compensation." See *G. L. c. 41, § 111F*. In that context,

postjudgment interest was deemed "essential to vindicate fully an employee's express right to continued, timely compensation." *Todino, supra at 238*. In *Maimaron, supra at 181*, we determined that waiver of sovereign immunity from liability for postjudgment interest likewise was implied necessarily by the language of *G. L. c. 258, § 9A*, which indemnifies police officers "from *all* personal financial loss and expenses, including but not limited to legal fees and costs" incurred as a result of intentional torts or [***10] civil rights violations that take place in the scope of their employment (emphasis added). In making that determination, we stressed that *G. L. c. 258, § 9A*, "places no limitation on the nature, or extent, of the financial loss." *Maimaron, supra.*

In *Onofrio, 411 Mass. at 658-659*, by contrast, we concluded that *G. L. c. 258, § 2*, which makes the Commonwealth and its subdivisions liable for compensatory damages up to $100,000 "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his [or her] office or employment," does not waive sovereign immunity from liability for postjudgment interest. Construing the possibility of a statutory waiver of sovereign immunity stringently, we noted that the language of *G. L. c. 258, § 2*, does not clearly indicate a legislative intent "to compensate the plaintiff for loss of the use of money when damages are not paid on time." *Onofrio, supra at 659-660*. Accordingly, we determined that postjudgment interest was not implied necessarily as an additional remedy. See *id. at 660*.

Given this, we cannot say that *G. L. c. 151B, § 9*, necessarily implies a waiver of sovereign immunity from liability for postjudgment interest on punitive damages, costs, or attorney's fees. [***11] By providing for a broad range of remedies, including compensatory and punitive damages, costs, and attorney's fees, *G. L. c. 151B, § 9*, indicates a strong legislative interest in both vindi- [*681] cating individual rights and eradicating systemic discrimination. Notwithstanding the section's instruction that it should "be construed liberally," however, statutory waivers of sovereign immunity must be understood stringently. See *Todino, 448 Mass. at 238*; *Onofrio, supra at 659*.[10] Unlike the worker's compensation and indemnification statutes at issue in *Todino, supra*, and *Maimaron, 449 Mass. at 181*, *G. L. c. 151B, § 9*, does not describe an "express right to continued, timely compensation." See *Todino, supra.* Without language in *G. L. c. 151B, § 9*, indicating such a clear legislative intent to compensate specifically for the time value of money owed, we are constrained to conclude that sovereign immunity bars the plaintiff in this case from recovering postjudgment interest on the awards at issue.

> 10 The provision enacting *G. L. c. 258, § 2*, the statute at issue in *Onofrio v. Department of Mental Health, 411 Mass. 657, 659-660, 584 N.E.2d 619 (1992)*, similarly instructs that that statute should "be construed liberally for the accomplishment of [its] purposes." See St. 1978, c. 512, § 18.

The Legislature remains free to revise *G. L. c. 151B, § 9*, to waive sovereign immunity with respect to payment of postjudgment interest, on compensatory [***12] and punitive damages. As currently enacted, however, the section does not contain "uncommonly forceful language" that necessarily [**1173] implies that the Commonwealth should be liable for such postjudgment interest. See *Todino, supra at 235*. The trial judge therefore correctly denied the plaintiff's request for postjudgment interest on the award of punitive damages, costs, and attorney's fees.

Judgment affirmed.

BUTLER v. TOWN OF FRAMINGHAM

16-P-743

APPEALS COURT OF MASSACHUSETTS

91 Mass. App. Ct. 1106
2017 Mass. App. Unpub. LEXIS 154

February 17, 2017, Entered

SUBSEQUENT HISTORY: Appeal denied by *Butler v. Town of Framingham, 477 Mass. 1102, 2017 Mass. LEXIS 290 (Mass., Apr. 27, 2017)*

PRIOR HISTORY: *Butler v. Danforth Green, LLC, 2013 Mass. LCR LEXIS 140 (2013)*

DISPOSITION: Judgment affirmed.

JUDGES: Carhart, Massing & Lemire, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Deborah Butler, a resident of Framingham (town) and an elected town meeting member, filed a complaint in the Superior Court alleging that the town unfairly burdens residential property owners by using different valuation formulas for assessing residential and commercial properties. Acting on the defendants' motion for summary judgment, a judge dismissed Butler's complaint on the ground that Butler, who owns no real property in Framingham and has neither been assessed nor paid property taxes in at least ten years, did not have a sufficient interest to proceed. We agree, and affirm.

Courts generally do not pass on questions of only academic interest and will address the merits of a claim only if the plaintiff has "standing," that is, if she has a "definite interest in the matters in contention in the sense that [her] rights will be significantly affected by a resolution of the contested point." *Bonan v. Boston, 398 Mass. 315, 320, 496 N.E.2d 640 (1986)*. Owning no town property, and having herself paid no property taxes, Butler would be unaffected by any judgment addressing her allegations; therefore, she has no standing. See *Slama v. Attorney Gen., 384 Mass. 620, 624, 428 N.E.2d 134 (1981)* ("To have standing in any capacity, a litigant [*2] must show that the challenged action has caused the litigant

injury"). See also *Enos v. Secretary of Envtl. Affairs, 432 Mass. 132, 135, 731 N.E.2d 525 (2000)*, and cases cited.

The facts that Butler resides in the town (in her parents' home) and is an elected town meeting member do not give her representative standing or otherwise change our conclusion. In certain instances, a person without a sufficient individual interest may stand in for others when those who otherwise would have standing are unable to seek available remedies for themselves. See *Slama, supra*; *Arbella Mut. Ins. Co. v. Commissioner of Ins., 456 Mass. 66, 83-84, 921 N.E.2d 537 (2010)*. That is not the case here. As the judge observed, the "plaintiff's parents or other residents have avenues to challenge their tax assessments." See, e.g., *Shoppers' World, Inc. v. Assessors of Framingham, 348 Mass. 366, 370, 203 N.E.2d 811 (1965)* (taxpayers may challenge disproportionate assessments via application for abatement and appeal to Appellate Tax Board). To the extent the town conceded Butler's representative standing, the judge properly disregarded the concession. See *Goddard v. Goucher, 89 Mass. App. Ct. 41, 45, 44 N.E.3d 878 (2016)*, quoting from *Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 289, 37 S. Ct. 287, 61 L. Ed. 722 (1917)* ("[T]he court cannot be controlled by agreement of counsel on a subsidiary question of law"). Nor do the materials Butler submitted in opposition to the defendants' summary judgment motion, such as the town meeting membership orientation materials or Butler's rejected citizen's petition, support an inference [*3] that either the town or anyone else authorized Butler to act on its behalf in any litigation.

Because Butler lacks standing, the judge properly dismissed the complaint.[2]

2 Based on the view we take of this case, we need not address Butler's arguments on the merits.

Judgment affirmed.

By the Court (Carhart, Massing & Lemire, JJ.[3]),

3 The panelists are listed in order of seniority.

Entered: February 17, 2017.

JUDE CRISTO v. LEWIS EVANGELIDIS.[1]

1 Individually and as sheriff of Worcester County.

No. 15-P-91.

APPEALS COURT OF MASSACHUSETTS

90 Mass. App. Ct. 585*; *62 N.E.3d 94
2016 Mass. App. LEXIS 158

November 2, 2015, Argued
October 28, 2016, Decided

PRIOR HISTORY: [***1] Worcester. CIVIL ACTION commenced in the Superior Court Department on September 6, 2011.

A motion for summary judgment was heard by *David Ricciardone*, J.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Civil Rights, Immunity of public official, Termination of employment. *Employment*, Retaliation, Termination. *Constitutional Law*, Freedom of speech and press, Public employment. *Public Employment*,

Termination. *Practice, Civil*, Summary judgment, Civil rights. *Sheriff*.

In a civil action alleging, inter alia, that the defendant sheriff violated *42 U.S.C. § 1983* by terminating the plaintiff's employment in the sheriff's department (department) in retaliation for the plaintiff's exercise of his rights under the *First Amendment to the United States Constitution*, the defendant was entitled to summary judgment on his defense of qualified immunity, where the plaintiff's speech, although related to matters of public concern, was undertaken in his capacity as an employee of the department and not as a private citizen.

COUNSEL: *Andrew J. Abdella* for the defendant.

Timothy M. Burke for the plaintiff.

JUDGES: Present: AGNES, SULLIVAN, & BLAKE, JJ.

OPINION BY: AGNES

OPINION

[**95] **AGNES**, J. The question before us is whether the defendant, Lewis Evangelidis, sheriff of Worcester County, was entitled to judgment as a matter of law on count three of the plaintiff Jude Cristo's complaint, charging Evangelidis with a violation of *42 U.S.C. § 1983*.[2] [**96] In particular, Cristo alleges that Evangelidis retaliated against him by terminating him from employment in the Worces- [*586] ter County sheriff's office (sheriff's office or department) on January 7, 2011, for exercising his rights under the *First Amendment to the United States Constitution* in early 2010, the year before Evangelidis took office. For the reasons that follow, we conclude that Evangelidis's motion for summary judgment, based on the defense of qualified immunity, should have been allowed because on the record before us, Cristo's speech, while related to matters of public concern, was undertaken in his capacity as an employee of the sheriff's [***2] office, and not as a private citizen.[3] See *Garcetti v. Ceballos, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)*.

2 Cristo's original complaint consisted of four counts: a whistleblower claim pursuant to *G. L. c. 149, § 185*; a Massachusetts Civil Rights Act (MCRA) claim pursuant to *G. L. c. 12, §§ 11H* and *11I*; a civil rights claim pursuant to *42 U.S.C. § 1983*; and a conspiracy claim arising out of the elimination of his position at the Worcester County sheriff's office on January 7, 2011. Cristo's MCRA and conspiracy claims were dismissed on Evangelidis's motion. Cristo later stipulated to a dismissal with prejudice of his whistleblower claim. The remaining count, involving the *§ 1983* claim in which damages are sought against Evangelidis in his personal capacity, was ordered stayed pending appeal by a single justice of this court. See note 3, *infra*.

3 Ordinarily, there is no right to an appeal from an order denying a party's motion for summary judgment. However, when the motion for summary judgment is based on the defense of qualified immunity, the order denying qualified immunity is treated as a final order and is immediately appealable. See *Mitchell v. Forsyth, 472 U.S. 511, 525-526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)*; *Littles v. Commissioner of Correction, 444 Mass. 871, 876, 832 N.E.2d 651 (2005)*; *Matthews v. Rakiey, 38 Mass. App. Ct. 490, 493, 649 N.E.2d 770 (1995)*.

Background. We view the summary judgment record in the light most favorable to Cristo, the nonmoving party. Cristo was hired in June, 1999, as the assistant personnel director [***3] of the sheriff's office. Cristo was promoted to human resources director of the sheriff's office in February, 2006, by Guy Glodis, Evangelidis's predecessor. Shortly thereafter, Cristo was also appointed by Glodis to be the payroll director, and given other human resource duties. When, during the summer of 2009, Glodis decided not to seek reelection as sheriff, Shawn P. Jenkins assumed the role of acting sheriff.

In early 2010, Cristo expressed concerns to Jenkins, and to deputy superintendent Paul Legendre, that assistant deputy superintendent Scott Bove, a candidate for the sheriff's position, was not performing his human resource duties and was away campaigning as a candidate for sheriff for some portion of days he marked himself present at the department. Jenkins and Legendre informed Cristo that they were aware of the situation. Cristo also told Jenkins and Legendre that he personally observed Captain Jason Dickhaut, who had duties relating to the payroll for line staff at the sheriff's office, helping Bove with his campaign for sheriff during work hours, and that Dickhaut had given bumper stickers supporting Bove's candidacy to Cristo's assistant for payroll and asked her to record [***4] "missed punches" in the department's time clock system for him and others. Because Dickhaut's [*587] sporadic attendance and failure to perform his payroll duties were "causing problems with the department's ability to process the payroll in a timely manner," Cristo brought his concerns directly to Jenkins, who supervised Dickhaut.

On Friday, February 19, 2010, Dickhaut confronted Cristo about the complaints [**97] made by Cristo about Dickhaut's campaign activities on department time and Dickhaut's interactions with human resource and payroll personnel. Dickhaut was loud and hostile. Jenkins, who was in the next office when Dickhaut confronted Cristo, told Cristo that he had heard the exchange. When asked what he was going to do about it, Jenkins reportedly laughed, and told Cristo "that he let it go on" and "to go home early." The following weekend, Cristo prepared a five-page report on Dickhaut's violations of law and the department's own regulations, but did not submit it to Jenkins.

Cristo attended a meeting with Jenkins and Legendre on Monday, June 14, 2010. Cristo reminded them of the confrontation Dickhaut had initiated with him, and informed them about the five-page report he had prepared. [***5] They did not ask him to submit it. Cristo also brought up his ongoing concerns about Bove's campaign activities and his failure to keep accurate time records, as well as an issue about missing radios that were the property of the department. Jenkins expressed concerns that by putting things in electronic mail (e-mail) messages and writings, Cristo was making him (Jenkins) look like he was not interested in addressing these issues. Cristo told them he simply wanted these problems resolved.

On November 7, 2010, Evangelidis, as sheriff-elect, was interviewed by the Worcester Telegram and Gazette and reportedly said that it was not his intention to replace everyone then employed by the sheriff's office, that he had not yet picked anyone for the management positions, that he was willing to interview current employees, and that if they were doing their jobs well, "they should feel comfortable in the fact that they can keep the job."

Cristo attended the inauguration ceremony for the new sheriff on January 5, 2011. Cristo approached Evangelidis and introduced himself. Evangelidis replied, "Jude Cristo?" and walked away. The following day, an article about Evangelidis's inauguration appeared [***6] in the Worcester Telegram and Gazette in which Evangelidis was quoted as saying that he "is giving employees at the jail a chance to prove themselves." The next day, Cristo was called to a meeting with Jenkins at 3:00 P.M. Jenkins told Cristo [*588] that his position was being abolished, and that if he agreed to resign, he could work for two more weeks. Cristo declined the invitation. Jenkins then handed Cristo an envelope which he said contained Cristo's final check and termination letter.

On January 13, 2011, Cristo requested, in writing, a full accounting of what he had been paid and copies of his personnel file, medical file, and e-mails. He also inquired whether he would receive the same $2,000 severance check that other employees who had been laid off several weeks earlier had received. Cristo also sent a letter to Evangelidis appealing his termination under a department regulation.

On January 14, 2011, Jenkins sent an e-mail message to certain sheriff's office personnel advising them that employee records and personnel files were not to be destroyed or deleted, and that if any information was requested by Cristo, the request was to be forwarded to Jenkins or chief of staff Jason Rives. Staff [***7] were also verbally informed not to have any contact with Cristo.

On January 25, 2011, Rives sent a letter to Cristo explaining that unlike the other former employees, he was not entitled to severance pay because he was not first placed on administrative leave, and that the decision to make the payments was made by the outgoing sheriff. On February 3, 2011, Jenkins sent a letter to Cristo dismissing his appeal and informing him that he lacked the financial background to [**98] perform the duties of the new "combined position."

On March 21, 2011, Cristo wrote to the State retirement board to inform it of a $3,000 pay raise he had received from Glodis in the summer of 2007, which was not included in the salary information provided to the retirement board by the sheriff's office. On March 29, 2011, the retirement board sent a letter to the sheriff's office requesting information about the $3,000. Jenkins responded in writing to the retirement board and stated that the $3,000 was not a salary increase, but a bonus, but did not submit "factual documentation" in support of his statement.

On April 4, 2011, Cristo was notified by the retirement board that his retirement had been approved retroactive [***8] to January 7, 2011, the date of his termination. That same day, Cristo sent a letter to Rives requesting that he be paid twenty percent of his accumulated sick leave days as of the date of his termination. On April 12, 2011, the retirement board informed Cristo that based on the information it had received from the sheriff's office, it could not add $3,000 to his salary for purposes of calculating his retirement benefit. Cristo appealed this decision. On May 16, [*589] 2011, Rives informed Cristo in writing that he would not be paid a percentage of his accumulated sick leave because Cristo had been "terminated" from his employment with the sheriff's office.

In May, 2011, the sheriff's office hired another individual to fill the newly created position of "Director of Administration and Finance/CFO," which consolidated the various positions previously held by Cristo. Prior to joining the sheriff's office, the newly hired person had served as the part-time treasurer of the town of Barre.

Discussion. 1. *Standard of review*. Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Mass.R.Civ.P. 56(c)*, as amended, [***9] 436 Mass. 1404 (2002). A party moving for summary judgment who does not bear the burden of proof at trial demonstrates the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party's case or by showing that the nonmoving party is unlikely to submit proof of that element at trial. See *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991)*; *Flesner v. Technical Communications Corp., 410 Mass. 805, 809, 575 N.E.2d 1107 (1991)*. The nonmoving party cannot defeat the motion for summary judgment by resting on its pleadings and mere assertions of disputed facts. *LaLonde v. Eissner, 405 Mass. 207, 209, 539 N.E.2d 538 (1989)*. "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." *Pederson v. Time, Inc., 404 Mass. 14, 17, 532 N.E.2d 1211 (1989)*.

2. *Section 1983 retaliation claim*. In order to prevail on his *First Amendment* retaliation claim, Cristo must establish three things are more likely than not: (1) that he was speaking "as a citizen on a matter of public concern"; (2) that his interests, "as a citizen, in

commenting upon matters of public concern" outweighed his employer's interest "in promoting the efficiency of the public services it performs through its employees"; and (3) "that the protected expression was a substantial or motivating [***10] factor in the adverse employment decision." *Decotiis v. Whittemore, 635 F.3d 22, 29 (1st Cir. 2011)*, quoting from *Curran v. Cousins, 509 F.3d 36, 44-45 (1st Cir. 2007)*.

[**99] 3. *Qualified immunity*. "Even when an official is personally liable under *§ 1983*, he may be shielded from paying damages when the doctrine of qualified immunity applies. ... [Q]ualified immunity shields government officials performing discretionary [*590] functions from civil liability for money damages when their conduct does not violate clearly established statutory authority or constitutional rights of which a reasonable person would have known. Qualified immunity is an affirmative defense, and thus the burden of proof is on defendants-appellants." *DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 35 (1st Cir. 2001)* (citation and quotation omitted). See *Baker v. Gray, 57 Mass. App. Ct. 618, 622, 785 N.E.2d 395 (2003)*; *Ahmad v. Department of Correction, 446 Mass. 479, 484, 845 N.E.2d 289 (2006)*.

There is a tripartite test for determining whether a defendant is entitled to the defense of qualified immunity in a case such as this: (1) whether the facts taken in the light most favorable to the plaintiff demonstrate that there was a violation of the plaintiff's Federal constitutional or statutory rights;[4] (2) if so, whether at the time of the violation those rights were clearly established; and (3) whether a reasonable person in the defendant's position would understand that his conduct violated those clearly established rights. See *Nelson v. Salem State College, 446 Mass. 525, 531, 845 N.E.2d 338 (2006)*. See also *Saucier v. Katz, 533 U.S. 194, 200-201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*; *White v. Gurnon, 67 Mass. App. Ct. 622, 627, 855 N.E.2d 1124 (2006)*. The present [***11] case is one in which there is overlap between the first element of Cristo's *§ 1983* claim and the first question to be addressed in determining whether Evangelidis is entitled to qualified immunity, namely, whether Cristo is able to prove that Evangelidis violated his *First Amendment* rights. See *Clancy v. McCabe, 441 Mass. 311, 322, 805 N.E.2d 484 (2004)*, quoting from *Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998)* (although inquiry into whether there is qualified immunity is "separate and distinct" from assessment of merits of plaintiff's case, they sometimes "overlap").

> 4 "*[Section] 1983* protects against the violation of Federal statutes and constitutional provisions. It does not protect against the violation of State statutes." *Baker v. Gray, 57 Mass. App. Ct. 618, 624, 785 N.E.2d 395 (2003)*.

In denying the motion for summary judgment, it appears that the judge assumed that Cristo was engaged in the exercise of his *First Amendment* rights when he complained to Jenkins about the conduct of Bove and Dickhaut, because his decision turned on the reason for Cristo's termination.[5] On the record before us, however, such an assumption cannot be squared with the holding in [*591] *Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689*. In *Garcetti*, the United States Supreme Court clarified the law regarding qualified immunity by declaring that when a public employee like Cristo makes a statement [**100] pursuant to his official duties, he is not speaking as a citizen in the exercise [***12] of *First Amendment* rights. The Court relied on the *First Amendment* analysis set forth in *Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will City, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*, and *Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)*, and acknowledged that the initial question in cases such as this is whether the content of the public employee's speech related to "a matter of public concern." *Garcetti, supra at 418*. Here, this question is easily answered in the affirmative because Cristo was calling attention to the fact that other public employees in the sheriff's office

were not performing their assigned duties, conducting the private business of campaigning for public office while they were supposed to be working for the sheriff's office, and committing other acts in violation of law. However, the *Garcetti* court added a further requirement that must be met before it can be said that a public employee has exercised *First Amendment* rights. "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." *Id. at 421*. The Court reasoned that when an employee performs tasks that are part of his duties, the employee's supervisors have a right to review and evaluate his performance independent of judicial oversight. [***13] *Id. at 423*. On the other hand, when an employee "speaks as a citizen addressing matters of public concern, the *First Amendment* requires a delicate balancing of the competing interests surrounding the speech and its consequences." *Ibid.*

> 5 In denying the motion for summary judgment, the judge concluded that Evangelidis's "alleged motivations" created "the ultimate questions of material fact," which suggests that the judge may have denied relief based on the view that Evangelidis could be liable for damages if he harbored a subjective intent to retaliate against Cristo. In his order staying the proceedings pending review by this court (see note 2, *supra*), the single justice noted that that approach "contravenes the Supreme Court's intent to restrict the question of qualified immunity to 'an objective inquiry into the legal reasonableness of the official action.'" *Clancy v. McCabe, 441 Mass. at 323*, quoting from *Anderson v. Creighton, 483 U.S. 635, 645, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*. In view of the approach we take, it is unnecessary to explore this question further.

The determination of the scope of a public employee's duties calls for a "practical" rather than a formal inquiry -- one that depends not simply on a job description, but also on the duties that the employee was expected to perform. *Decotiis v. Whittemore, 635 F.3d at 31*, quoting from *Mercado-Berrios v. Cancel-Alegria, 611 F.3d 18, 26 (1st Cir. 2010)*. In [***14] the present case, we have the [*592] benefit of a record that contains Cristo's deposition in which he testified in detail about the workplace complaints he brought to the attention of Jenkins and others.

On the record before us, there are no material facts in dispute with regard to whether Cristo spoke in his capacity as an employee of the sheriff's office or as a private citizen. Cristo learned about the matters that he reported to Jenkins in the course of performing his job duties. The subjects of his speech are all matters that are directly related to Cristo's myriad duties as payroll director, and his other human resource responsibilities. Cristo's first complaint to Jenkins was that Bove was not performing his human resource duties and not working full days -- matters that relate directly to Cristo's responsibilities. Cristo's second complaint to Jenkins was about Dickhaut's attendance. In making this complaint, Cristo specifically stated that Dickhaut's conduct was interfering with Cristo's ability to perform his payroll duties. Cristo's third complaint to Jenkins concerned missing radios that were the property of the sheriff's office. Once again, during his deposition testimony, Cristo [***15] specifically explained that one of his duties was to ensure that when employees left the sheriff's office, they filled out a form that itemized the return of any sheriff's office equipment that was issued to them. Cristo aired his complaints while on duty. Cristo did not share the contents of his complaints with anyone other than his immediate supervisor. Cristo did not make use of a forum outside the workplace to communicate his complaints. Contrast [**101] *Pickering, 391 U.S. at 566* (plaintiff wrote letter to local newspaper); *Decotiis, supra at 28* (plaintiff urged clients to contact advocacy organizations); *Curran,*

509 F.3d at 41 (plaintiff made Internet postings).

We conclude that Cristo's communications to Jenkins were "made exclusively to fulfill [his] responsibilities" as the director of payroll and human resources. See *O'Connell v. Marrero-Recio, 724 F.3d 117, 123 (1st Cir. 2013)* (human resource director who complained about unethical and illegal activities in workplace was not speaking as private citizen for *First Amendment* purposes). A defendant is not required to establish that the employee had a specific duty to speak or to lodge a complaint. Instead, courts should examine the context in which the public employee's speech occurred. *Decotiis, 635 F.3d at 32*.

Cristo's response that his speech concerned matters of public concern is beside [***16] the point, because under the analytical frame- [*593] work developed in *Garcetti*, it is not sufficient that an employee's speech relates to matters of public concern. Under governing Federal law,[6] "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti, 547 U.S. at 421*. See *Lane v. Franks, 134 S. Ct. 2369, 2373, 189 L. Ed. 2d 312 (2014)* (if "speech is made pursuant to the employee's ordinary job duties, then the employee is not speaking as a citizen for *First Amendment* purposes").[7]

6 Count three is based exclusively on an alleged violation of Federal law, namely, the *First Amendment*. We have no occasion and decline to express an opinion whether under the Massachusetts Declaration of Rights a public employee's right to be protected against discipline by his public employer that is based on the employee's workplace speech is broader than the protections recognized by the Supreme Court in *Garcetti*. See, e.g., *Trusz v. UBS Realty Investors, LLC, 319 Conn. 175, 216, 123 A.3d 1212 (2015)* (adopting view expressed by Justice Souter, in his dissenting opinion in *Garcetti, 547 U.S. at 435*, that "comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's [***17] favor" when employee's speech concerns official duties).

7 Evangelidis also maintains that the summary judgment record contains no evidence that would support an inference that there was a causal relationship between his decision to terminate Cristo and Cristo's complaints before Evangelidis became sheriff. See *Clancy v. McCabe, 441 Mass. at 321*, quoting from *Jones v. Wellham, 104 F.3d 620, 627 (4th Cir. 1997)* (more than "mere cause-in-fact relationship" is required). The evidence in the summary judgment record that bears directly on this question is that in his deposition, Evangelidis states he did not learn of Cristo's complaints until after Cristo filed this lawsuit. Also, Jenkins states in his affidavit that he did not inform Evangelidis of Cristo's complaints until after this lawsuit was filed. Cristo, in turn, relies on an incident at Evangelidis's inauguration event in which he states that Evangelidis abruptly walked away from him without speaking after they were introduced, and the timing of his termination, coming only days after Evangelidis was sworn in as sheriff. In view of our decision with respect to qualified immunity, it is unnecessary for us to address this factual dispute.

Conclusion. For the above reasons, the order denying Evangelidis's motion for [***18] summary judgment is vacated. The case is remanded to the Superior Court for entry of an order allowing the motion for summary judgment.

So ordered.

ESSEX REGIONAL RETIREMENT BOARD v. JUSTICES OF THE SALEM DIVISION OF THE DISTRICT COURT DEPARTMENT OF THE TRIAL COURT[1] & ANOTHER.[2]

1 As nominal parties.

2 John Swallow.

No. 16-P-1158.

APPEALS COURT OF MASSACHUSETTS

91 Mass. App. Ct. 755
2017 Mass. App. LEXIS 91

March 8, 2017, Argued
July 12, 2017, Decided

PRIOR HISTORY: [**1] Essex. CIVIL ACTION commenced in the Superior Court Department on July 14, 2015.

The case was heard by *James F. Lang*, J., on motions for judgment on the pleadings.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Public Employment, Retirement, Forfeiture of pension. *Police*, Retirement. *Pension*. *Constitutional Law*, Public employment, Excessive fines clause. *County*, Retirement board. *Practice, Civil*, Action in nature of certiorari. *District Court*, Appeal to Superior Court.

Substantial evidence supported the decision of a regional retirement board (board) that a police sergeant's convictions of various offenses while on administrative leave rendered him ineligible to receive a retirement allowance, and the decision was not an error of law, where *G. L. c. 32, § 15(4)*, required forfeiture of the pension of any member of the retirement system after final conviction of a criminal offense involving violation of laws applicable to his position, and where the behavior underlying the police sergeant's convictions, although occurring at home in the context of a personal matter, directly violated the public's trust and was a repudiation of his official duties ; however, this court remanded a civil action challenging the board's decision for consideration whether forfeiture of his pension would violate the excessive fines clause of the *Eighth Amendment to the United States Constitution*.

COUNSEL: *Michael Sacco* for the plaintiff.

Thomas C. Fallon for John Swallow.

JUDGES: Present: GRAINGER, BLAKE, & NEYMAN, JJ.[3]

3 Justice Grainger participated in the deliberation on this case and authored this opinion prior to his retirement.

OPINION BY: GRAINGER

OPINION

GRAINGER, J. The plaintiff, Essex Regional Retirement Board (board), appeals from a judgment allowing a motion for judgment [*756] on the pleadings in favor of defendant John Swallow. The board determined that Swallow's convictions of various criminal offenses committed in October, 2012, while on administrative leave, render him ineligible to receive a retirement allowance pursuant to *G. L. c. 32, § 15(4)*. We agree, and conclude that Swallow's convictions fall within the purview of *§ 15(4)*. We remand the case for consideration of the constitutionality of the assessed penalty under

the *Eighth Amendment to the United States Constitution*.

Background. We summarize the procedural history and the underlying relevant facts which are undisputed. In June, 2012, Swallow was placed on administrative leave from his duties as a sergeant in the Manchester police department. At that time he was also suspended from a second job he [**2] held as a paramedic with Northeast Regional Ambulance Service. Although Swallow left his badge and his service handgun at the police station, his license to carry a firearm was not suspended at that point. After being placed on administrative leave, Swallow experienced significant depression and began drinking heavily on a daily basis.

On the afternoon of October 26, 2012, Swallow was at home with his wife, Lauren Noonan. He was drinking heavily and the couple began arguing, initially because Noonan was concerned that Swallow might drive his car. The quarrel escalated; Noonan went to her bedroom and sat on the bed with one of her dogs. Swallow then entered the room with a .45 caliber handgun, and grabbed Noonan by the shirt. He began screaming at her, and waved the gun in her face. He then pointed the gun at the dog and threatened to kill it. Noonan stood up, pushed past Swallow and left the house, walking to her next door neighbors' house. While in the neighbors' driveway, she heard a gunshot and telephoned the police from the neighbors' house.

Swallow apparently had fired the gun into a door, then put the gun down, walked outside, and sat on the front steps of the house. The Beverly [**3] police arrived in response to Noonan's summons and placed Swallow under arrest. The police recovered the fired bullet in the upstairs bedroom. A search of the house revealed numerous guns and other weapons in the bedroom.[4]

> 4 In the basement, the officers observed hundreds of rifles and thousands of rounds of ammunition. Most of these apparently belonged to a friend of Swallow's who was deployed in Afghanistan.

As a result of this incident, Swallow admitted to sufficient facts on the following charges: (1) assault and battery, in violation of [*757] *G. L. c. 265, § 13A(a)*, (2) discharge of a firearm within 500 feet of a building, in violation of *G. L. c. 269, § 12E*, (3) assault by means of a dangerous weapon, in violation of *G. L. c. 265, § 15B(b)*, (4) three counts of improper storage of a firearm, in violation of *G. L. c. 140, § 131L(a)* and *(b)*, and (5) intimidation of a witness, in violation of *G. L. c. 268, § 13B*.

The board determined that Swallow's criminal convictions were violations of laws applicable to the office or position of a police officer as defined in *G. L. c. 32, § 15(4)*, thus requiring forfeiture of his pension. Swallow appealed the board's decision to the District Court; on cross motions for judgment on the pleadings, the District Court judge reversed the board's decision, finding that there was "no evidence of any direct link" between Swallow's criminal convictions and his employment. The board's petition to the Superior Court was certified pursuant to *G. L. c. 249, § 4*. A judge of the Superior [**4] Court affirmed the District Court judge's decision, finding that the narrow scope of *§ 15(4)* did not require pension forfeiture on this record. The board timely appealed.

Discussion. In our review, we are limited to a determination whether the board's decision was unsupported by substantial evidence or was an error of law that either resulted in manifest injustice to Swallow or would have adversely affected real interests of the general public. See *Garney v. Massachusetts Teachers' Retirement Sys., 469 Mass. 384, 388, 14 N.E.3d 922 (2014)*; *Scully v. Retirement Bd. of Beverly, 80 Mass. App. Ct. 538, 542, 954 N.E.2d 541 (2011)* ("Certiorari allows a court to correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the [party appealing]" [quotation omitted]).

1. *Pension forfeiture*. We turn to the statutory basis of the board's decision. *Section 15(4)* requires "any member after final conviction of a criminal offense involving violation of ... laws *applicable to his office or position*" to forfeit his pension (emphasis supplied). *G. L. c. 32, § 15(4)*, inserted by St. 1987, c. 697, § 47. The analysis is necessarily fact specific. See *Garney, supra at 385*.

"The nexus required by *G. L. c. 32, § 15(4)*, is not that the crime was committed while the member was working, or in a place of work, but only that the criminal behavior be connected with the member's position." *Durkin v. Boston Retirement Bd., 83 Mass. App. Ct. 116, 119, 981 N.E.2d 763 (2013)*. It is clear that [**5] *§ 15(4)* "did not intend pension forfeiture to follow as a sequelae of any and all criminal convictions." *Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1, 5, 665 N.E.2d 998 (1996)*.

[*758] When public employees commit criminal acts unrelated to the duties of their position and unconnected to the use of information or property gained through their employment, our courts have found no "direct factual link" between their position and the criminal behavior. *Garney, supra at 389*. In *Retirement Bd. of Maynard v. Tyler, 83 Mass. App. Ct. 109, 981 N.E.2d 740 (2013)*, we determined that the narrow scope of *§ 15(4)* precluded pension forfeiture for a fire fighter who "had, for a number of years, been sexually abusing young boys." *Id. at 109*. Although we recognized "the essential role firefighters play, extinguishing fires and protecting life and property," we concluded that the crimes were "personal in nature, occurring outside the firehouse while [the fire fighter] was not on duty." *Id. at 112-113*.

Similarly, in *Herrick v. Essex Regional Retirement Bd., 77 Mass. App. Ct. 645, 654, 933 N.E.2d 666 (2010)*, we determined that although the employee, a custodian for a public housing authority, sexually assaulted his daughter, he was entitled to his pension as the offense was not "connected with [the employee]'s official capacity[;] ... it was not committed upon anyone who was employed by or who resided at the public property, [and it did not] occur [on the public property]." See *Garney, supra at 384* (pension [**6] forfeiture unwarranted "where a teacher has engaged in criminal activity that endangers children generally, but does not involve the students whom he taught, the school district for which he worked, or the use of his status as a teacher"); *Scully, 80 Mass. App. Ct. at 543-544* (no direct link between library position and possession of child pornography).

On the other hand, our courts have found a direct link when public employees committed arguably less egregious crimes, but acted in a manner contrary to ethics and values central to their position.[5] In *State Bd. of Retirement v. Bulger, 446 Mass. 169, 179-180, 843 N.E.2d 603 (2006)*, the Supreme Judicial Court concluded that a clerk-magistrate of the Juvenile Court forfeited his pension when he was convicted of two counts of perjury and two counts of obstruction of justice.[6] The court emphasized that "[a]t the heart of a clerk-magistrate's role is the unwavering obligation to tell [*759] the truth, to ensure that others do the same through the giving of oaths to complainants, and to promote the administration of justice." *Id. at 179*. Because the employee "violated the fundamental tenets of the [Code of Professional Responsibility for Clerks of the Courts, *S.J.C. Rule 3:12*, as amended, 427 Mass. 1322 (1998),] and of his oath of office, notwithstanding his contention that such misconduct occurred [**7] in the context of what was arguably a personal matter," *§ 15(4)* required that he forfeit his pension. *Bulger, supra at 179*.

5 Most recently, in *State Bd. of Retirement v. Finneran, 476 Mass. 714, 721, 71 N.E.3d 1190 (2017)*, the Supreme Judicial Court categorized these cases as having "direct legal links," reasoning that the crime committed directly implicated a statute that was specifically applicable to the employee's position.

6 These charges stemmed from the employee's testimony in a grand jury investigation of his brother. *Bulger, supra at 171*.

The court decided similarly in *Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 663-664, 6 N.E.3d 1069 (2014)*, where it required a register of probate to forfeit his pension after being convicted of numerous counts of breaking into a depository (i.e., a cash vending machine), larceny, and embezzlement. The court reasoned that the behavior of one holding the office must comport with the Code of Professional Responsibility for Clerks of the Courts, which requires registers to comply with the laws of the Commonwealth. *Id. at 671*. The employee's "commission of such criminal offenses, which was facilitated by his access and proximity to the cash vending machines, compromised the integrity of and public trust in the office of register of probate." *Ibid.*

Turning to the facts of our case, we first acknowledge the special position that police officers hold.

> "Police officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. ... In accepting employment [**8] by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."

Attorney Gen. v. McHatton, 428 Mass. 790, 793-794, 705 N.E.2d 252 (1999) (quotation omitted). "This applies to off-duty as well as on-duty officers." *Falmouth v. Civil Serv. Commn., 61 Mass. App. Ct. 796, 801, 814 N.E.2d 735 (2004)*.

We further recognized this principle in *Durkin, 83 Mass. App. Ct. at 118-119*, where we affirmed pension forfeiture imposed on an off-duty police officer who used his service weapon to shoot a fellow police officer after a night of drinking. "[P]olice officers, who are extensively trained in the use of firearms, and who carry [*760] their service revolvers with them while off-duty, have a high degree of responsibility to which the public deserves and demands adherence." *Ibid.* (footnote omitted). The police officer "engaged in the very type of criminal behavior he was required by law to prevent. Th[e] violation was directly related to his position as a police officer as it demonstrated a violation of the public's trust as well as a repudiation of his official duties." *Id. at 119*.

In the present case, Swallow threatened his wife with a handgun, waving and pointing the gun at her, without any justification. Although the incident occurred at home in the context of a personal matter, we find Swallow's behavior [**9] contrary to the fundamental tenets of the role of a police officer. See *ibid.* ("[A]t the heart of a police officer's role is the unwavering obligation to protect life"). Swallow's use of a gun, despite its not being his service firearm, to threaten another's life directly violated the public's trust and was a repudiation of his official duties. We therefore conclude that the board's decision was supported by substantial evidence and was not an error of law.

2. *Excessive fine*. We turn to the argument that forfeiture of Swallow's pension would violate the excessive fines clause of the *Eighth Amendment*. See, e.g., *Public Employee Retirement Admin. Commn. v. Bettencourt, 474 Mass. 60, 77, 47 N.E.3d 667 (2016)*.

The board determined that "Swallow [is] entitled to a return of his accumulated total deductions, less any accrued interest." However, the record before us is parsimonious with respect to the value of Swallow's retirement allowance[7] and what

portion of that constituted deductions from Swallow's salary.

> 7 The District Court judge's decision states that Swallow's retirement allowance totals $1.6 million. The judge does not state the basis of that determination.

"[A] forfeiture can be excessive 'if it is grossly disproportional to the gravity of a defendant's offense.' ... [The factors to determine proportionality] include the gravity of the offense, the maximum penalties, whether the violation was related to any other illegal activities, and the harm resulting [**10] from the crime." *MacLean v. State Bd. of Retirement, 432 Mass. 339, 346, 733 N.E.2d 1053 (2000)*, quoting from *United States v. Bajakajian, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)*. Swallow bears the burden of proving his pension forfeiture is excessive. *Bettencourt, supra at 72*. The excessiveness determination may be guided by *MacLean, supra at 345-350* (forfeiture of pension totaling approximately $625,000 was not [*761] excessive for State employee who pleaded guilty to two misdemeanor violations of *G. L. c. 268A, § 7*, conflict of interest statute, where employee gained $512,000 through his illegal actions); *Maher v. Retirement Bd. of Quincy, 452 Mass. 517, 523-525, 895 N.E.2d 1284 (2008)* (forfeiture of pension totaling $576,000 not grossly disproportional to employee's convictions of breaking and entering into building in daytime with intent to commit felony, see *G. L. c. 266, § 18*, stealing in building, see *G. L. c. 266, § 20*, and wanton destruction of property, see *G. L. c. 266, § 127*); *Bettencourt, supra at 72-75* (forfeiture of $659,000 not proportional, hence constitutionally excessive, as penalty for unauthorized use of State computer system and invasion of privacy); and *State Bd. of Retirement v. Finneran, 476 Mass. 714, 723-724, 71 N.E.3d 1190 (2017)* (forfeiture of $433,400 not excessive fine after employee committed felony connected to violation of Federal law carrying maximum penalty that includes ten years' imprisonment and $250,000 fine).

We remand for a finding of the specific amount forfeited by Swallow and a determination whether that amount is constitutionally excessive.

Conclusion [**11]. This case illustrates the difficulty inherent in applying the test enunciated by *G. L. c. 32, § 15(4)*. Some of the illustrative fact patterns cited above are reasonably clear (e.g., the disconnect between the duties of a fire fighter and charges of child abuse in *Scully*, contrasted with the evident correlation between perjury and obstruction of justice to the duties of a clerk-magistrate in *Bulger*). But in many instances, and especially those involving police officers whose duties involve enforcement of every law on our books, see *McHatton, 428 Mass. at 793-794*, there is no logical distinction between various areas of misconduct. The diverse arguments that may be employed either to distinguish or apply the facts of *Durkin* to this case amply demonstrate the problem.

This difficulty is exacerbated by applying a de facto criminal penalty to the contractual nature of pension plans, partly funded by the putative defendant. The simple enactment of statutory fines for criminal conduct, without reference to a defendant's employment, would provide a straightforward and time-tested mechanism to arrive at the same result. It would also remove the need for case-by-case determination of the constitutionality of a forfeiture amount that is the [**12] result of employment history and past compensation levels, rather than fittingly based on the degree of misconduct.

[*762] The judgment is reversed, and a new judgment shall enter in the Superior Court reversing the judgment of the District Court and remanding the case to the District Court for further proceedings consistent with this opinion.

So ordered.

ROBERT GEORGE & OTHERS[1] v. NATIONAL WATER MAIN CLEANING COMPANY & OTHERS.[2]

1 Michael Curvin, Mark Bassett, Kevin Colvin, Justin Kordas, Carlos Villarreal, Paul Dockett, Jon Eldridge, Chris Myers, Zef Zeka, Paul LeDoux, Erik Paiva, Jeffrey David, and Chris Mirisola, individually and on behalf of all others similarly situated.

2 Carylon Corporation, Dennis Sullivan, Antonino LaFrancesca, and Carl Cummings.

SJC-12191.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

477 Mass. 371,*
2017 Mass. LEXIS 399 **

February 14, 2017, Argued
June 26, 2017, Decided

PRIOR HISTORY: [**1] Suffolk. CERTIFICATION of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.
George v. Nat'l Water Main Cleaning Co., 2011 U.S. Dist. LEXIS 22362 (D. Mass., Mar. 7, 2011)

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Supreme Judicial Court, Certification of questions of law. *Massachusetts Wage Act*. *Labor*, Wages, Failure to pay wages, Damages. *Damages*, Interest. *Interest*. *Judgment*, Interest. *Practice, Civil*, Interest, Judgment, Damages.

This court concluded that under Massachusetts law, statutory prejudgment interest pursuant to *G. L. c. 231, § 6H*, is to be added by the clerk of court to the amount of lost wages and other benefits awarded as damages on judgments pursuant to the *Wage Act, G. L. c. 149, § 150*, but is not to be added to the additional amount of the award arising from the trebling of those damages as liquidated damages.

COUNSEL: *Adam J. Shafran* (*Jonathon D. Friedmann* also present) for the plaintiffs.

Richard L. Alfred (*Dawn Reddy Solowey & Anne S. Bider* also present) for the defendants.

John Pagliaro & Martin J. Newhouse, for New England Legal Foundation, amicus curiae, submitted a brief.

Annette Gonthier Kiely, Kathy Jo Cook, Thomas R. Murphy, & Timothy J. Wilton, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

JUDGES: Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, & Budd, JJ.

OPINION BY: GANTS

OPINION

GANTS, C.J. Several employees of National Water Main Cleaning Company filed a class action suit against the company and its parent company, Carylon Corporation, in the Superior Court, alleging, among other claims, nonpayment of wages in violation of the Massachusetts Wage Act, *G. L. c. 149, §§ 148, 150* (Wage [*372] Act). After the case was removed to the United States District Court for the District of Massachusetts, the judge granted final approval of a class settlement agreement that resolved all outstanding [**2] issues except one question of law. To resolve that question, the judge

certified to this court the following question pursuant to *S.J.C. Rule 1:03*, as appearing in 382 Mass. 700 (1981):

> "Is statutory interest pursuant to [*G. L. c. 231, § 6B* or *6C*,] available under Massachusetts law when liquidated (treble) damages are awarded pursuant to [*G. L. c. 149, § 150*]?"

In answer to the question, we declare that, under Massachusetts law, statutory prejudgment interest pursuant to *G. L. c. 231, § 6H*, shall be added by the clerk of court to the amount of lost wages and other benefits awarded as damages pursuant to *G. L. c. 149, § 150*, but shall not be added to the additional amount of the award arising from the trebling of those damages as liquidated damages.[3]

> 3 We acknowledge the amicus briefs submitted by the New England Legal Foundation and the Massachusetts Academy of Trial Attorneys.

Interpretation of the certified question. Before we answer the certified question, which the judge issued at the joint request of the parties, we must first ascertain its meaning. The question is an inquiry into the availability of statutory interest pursuant to two statutes: *G. L. c. 231, § 6B*, which directs the clerk of court to add interest at the rate of twelve per cent per year to awards of judgment "for personal injuries to the plaintiff or for ... damage to property"; and *G. L. c. 231, § 6C*, which directs the clerk to add interest at the same twelve per cent rate to awards of [**3] judgment "[i]n all actions based on contractual obligations." The parties appear to treat the certified question essentially as two questions: first, whether Wage Act claims fall within the scope of either *§ 6B* or *§ 6C*, and second, if they do, whether prejudgment interest should be added to the award of damages for lost wages and other benefits where *§ 150*, as amended in 2008, provides for the trebling of those damages and characterizes such an award as "liquidated damages." We decline to answer the first of these questions because, even if prejudgment interest could not be added to Wage Act awards under *§ 6B* or *§ 6C*, it plainly could be added under *G. L. c. 231, § 6H*, which declares that interest at the rate of twelve per cent per year shall be added to the award of [*373] damages "[i]n any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law." The question we shall answer, which we consider to be the true gist of the certified question, is whether the Legislature, when it amended *§ 150* in 2008 to require the award of treble damages on Wage Act judgments and characterized the award as "liquidated damages," intended that prejudgment interest not be added to any part of this award because [**4] such interest was included within the scope of "liquidated damages."[4] See *Tyler v. Michaels Stores, Inc., 464 Mass. 492, 499 n.12, 984 N.E.2d 737 (2013)* (declining to limit answer to narrow confines of certified question where broader discussion was necessary to articulate law regarding issue presented).

> 4 We note from the record that the parties initially had agreed that the unresolved legal issue in their settlement agreement would be resolved through this court's answer to the certified question in *Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 551 (1st Cir. 2015)*, which asked: "Did [*G. L. c. 149, § 150*,] impliedly repeal [*G. L. c. 231, § 6B*,] as to cases in which a party was awarded liquidated damages under *§ 150* and is eligible for prejudgment interest under *§ 6B*, such that the award of prejudgment interest is precluded?" That resolution became impossible when the *Travers* case settled and the certified question was withdrawn. That certified question assumed that an award under the Massachusetts Wage Act, *G. L. c. 149, § 150* (Wage Act), would include prejudgment interest under *§ 6B* unless the Legislature had impliedly repealed that provision as applied to Wage Act awards.

Discussion. The Wage Act was enacted "to protect wage earners from the long-term detention of wages by unscrupulous

employers." *Melia v. Zenhire, Inc., 462 Mass. 164, 170, 967 N.E.2d 580 (2012)*, quoting *Cumpata v. Blue Cross Blue Shield of Mass., Inc., 113 F. Supp. 2d 164, 167 (D. Mass. 2000)*. Employers violate the Wage Act when they fail to pay "each ... employee the wages earned" and when they fail to do so within the time period set by statute. See *G. L. c. 149, § 148*.

Before the 2008 amendment, *G. L. c. 149, § 150*, provided that an aggrieved employee may initiate "a civil action for ... any damages incurred, including treble damages for any loss of wages and other benefits" and, if he or she prevails, "shall be entitled to an award of the costs of the litigation and reasonable attorney fees." St. 2005, c. 99, § 2. In *Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 709, 831 N.E.2d 304 (2005)*, we noted that the text of this statute "states only that a plaintiff 'may' institute a suit for damages that includes a request for treble damages," and concluded that "there is nothing in the plain language of the statute that requires an award of treble damages." We declined to require [*374] a judge to award treble damages to a [**5] prevailing plaintiff where the plain language of *§ 150* did not require it, and declared that the award of treble damages in Wage Act cases was a decision left to the discretion of the judge. *Id. at 710*. This conclusion was similar to the conclusion we reached in *Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-179, 732 N.E.2d 289 (2000)*, where we rejected the argument that the award of treble damages was mandatory once a plaintiff requested such an award for an employer's failure to pay required overtime compensation, in violation of *G. L. c. 151, § 1B*. *Wiedmann, supra*. We noted that we had declared in *Goodrow* that "treble damages are punitive in nature, allowed only where authorized by statute, and appropriate where conduct is 'outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.'" *Wiedmann, supra*, quoting *Goodrow, supra at 178*.

Three years after we decided *Wiedmann*, the Legislature "effected a critical change in the language of the statute, removing the provision that treble damages 'may' be awarded, and replacing it with the directive that treble damages 'shall be awarded.'" *Rosnov v. Molloy, 460 Mass. 474, 479, 952 N.E.2d 901 (2011)*. Under *G. L. c. 149, § 150*, as amended through St. 2008, c. 80, § 5, where an aggrieved employee prevails in a civil action seeking damages under the Wage Act, the employee "shall be awarded [**6] treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees."[5] By its plain language, the 2008 amendment to *§ 150* mandates the award of treble damages for [*375] lost wages and benefits once an aggrieved employee prevails on a Wage Act claim; the plaintiff no longer need show that the defendant's conduct was "outrageous" to obtain such an award.

5 *General Laws c. 149, § 150*, provides, in pertinent part:

> "An employee claiming to be aggrieved by a violation of [*G. L. c. 149, § 33E, 52E, 148, 148A, 148B, 148C, 150C, 152, 152A, 159C,* or *190*, or *G. L. c. 151, § 19*,] may, [ninety] days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within [three] years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits; provided, however, that the [three-]year limitation period shall be tolled from the date that the employee or a similarly situated employee

> files a complaint with the attorney general alleging a violation of any of these sections until the date that the attorney general issues [**7] a letter authorizing a private right of action or the date that an enforcement action by the attorney general becomes final. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees."

General Laws c. 149, § 150, also provides that "[t]he attorney general may make complaint or seek indictment against any person for a violation of *[§ 148*]," an additional enforcement mechanism not at issue in this case. See *Melia v. Zenhire, Inc., 462 Mass. 164, 170, 967 N.E.2d 580 (2012)* ("Wage Act provides for both public and private enforcement").

The 2008 amendment did more than mandate the award of treble damages to a prevailing plaintiff in a Wage Act case; it characterized the treble damages "as liquidated damages." The crux of this appeal is to ascertain what the Legislature intended by this characterization. The defendants contend that the inclusion of this phrase reflects the intent of the Legislature that, apart from the award of reasonable attorney's fees and the costs of litigation, the judgment in favor of a prevailing plaintiff shall be limited to three times the amount of lost wages and benefits; it shall not include any prejudgment interest, whether under *§ 6B*, *6C*, or *6H*, because prejudgment interest is included within the award of liquidated damages. The plaintiff contends that the inclusion of this phrase reflects the intent of the Legislature that treble damages [**8] be treated as compensatory in nature, rather than punitive, and does not reflect an intent to deprive employees of prejudgment interest they would otherwise be due as a matter of statute for their lost wages and benefits.

"Liquidated damages" is a term derived from contract law to identify the amount of damages that the parties agree must be paid in the event of a breach. See *Cochrane v. Forbes, 267 Mass. 417, 420, 166 N.E. 752 (1929)* ("Liquidated damages ... mean damages, agreed upon as to amount by the parties, or fixed by operation of law, or under the correct applicable principles of law made certain in amount by the terms of the contract, or susceptible of being made certain in amount by mathematical calculations ..."). See also 24 R.A. Lord, Williston on Contracts § 65:1 (4th ed. 2002). "A liquidated damages provision will usually be enforced, provided two criteria are satisfied: first, that at the time of contracting the actual damages flowing from a breach were difficult to ascertain; and second, that the sum agreed on as liquidated damages represents a 'reasonable forecast of damages expected to occur in the event of a breach.'" *NPS, LLC v. Minihane, 451 Mass. 417, 420, 886 N.E.2d 670* [*376] *(2008)*, quoting *Cummings Props., LLC v. National Communications Corp., 449 Mass. 490, 494, 869 N.E.2d 617 (2007)*. "Where damages are easily ascertainable, and the amount provided for is grossly disproportionate [**9] to actual damages or unconscionably excessive, the court will award the aggrieved party no more than its actual damages." *NPS, LLC, supra.*

The term is used in the damages provision of the Federal Fair Labor Standards Act (FLSA), *29 U.S.C. § 216(b)*, which provides, "Any employer who violates the provisions of *[§ 206* or *207*] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." The United States Supreme Court has declared that liquidated damages under the FLSA "are compensation, not a penalty or punishment by the [g]overnment." *Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583, 62 S. Ct.*

1216, 86 L. Ed. 1682 (1942). "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Id. at 583-584*. Liquidated damages under the FLSA "constitute[ ] a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration [**10] of the worker to that minimum standard of well-being" (footnote omitted). *Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)*.

Although the legislative history is silent regarding the Legislature's purpose in characterizing treble damages as "liquidated damages" in the 2008 amendment to the Wage Act, we infer that the Legislature knew that

- the FLSA had characterized the "additional equal amount" of unpaid minimum wages and unpaid overtime compensation as "liquidated damages";
- the United States Supreme Court had regarded liquidated damages as compensatory in nature rather than punitive; and
- the characterization of treble damages as "liquidated damages" could be used to defend an award of treble damages from the constitutional challenge that such an award was punitive in nature and therefore required a finding that the [*377] employer's conduct had been "outrageous." See *Matamoros v. Starbucks Corp., 699 F.3d 129, 140 (1st Cir. 2012)* (defendant employer's argument that treble damages under Wage Act violate due process in absence of finding of employer "reprehensibility" was "misplaced" because, "[b]y definition, ... liquidated damages are not punitive damages").

The defendants contend that we should make one further inference: that, by characterizing treble damages as "liquidated damages" under the Wage [**11] Act, the Legislature intended to adopt Federal law and preclude a plaintiff from receiving *any* prejudgment interest on the award, including the award of lost wages and benefits. We conclude that this is one inference too far.

We recognize that the Supreme Court has declared that Congress, by providing an award of liquidated damages under the FLSA, "meant to preclude recovery of interest on minimum wages and liquidated damages." *Brooklyn Sav. Bank, 324 U.S. at 715-716*. The Court described "liquidated damages" as "compensation for delay in payment of sums due under the [FLSA]." *Id. at 715*. Consequently, according to the Court:

> "Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sums in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. ... Allowance of interest on minimum wages and liquidated damages recoverable

> under *§ 16 (b)* tends to produce the undesirable result of [**12] allowing interest on interest." (Citation omitted.)

Id.

We are not persuaded that the Legislature shared the Congressional intent in this regard. When the FLSA was enacted, there was no Federal statute generally mandating the payment of prejudgment interest. See *Milwaukee v. Cement Div., Nat. Gypsum Co., 515 U.S. 189, 194, 115 S. Ct. 2091, 132 L. Ed. 2d 148 (1995)*. The payment of prejudgment interest in Federal court, in the absence of a statute regarding prejudgment interest, "is governed by traditional judge-made [*378] principles." *Id.* In contrast, as noted earlier, the payment of prejudgment interest in a Massachusetts court is governed by statute, either *G. L. c. 231, § 6B, 6C,* or *6H*. The enactment of *§ 6H*, St. 1983, c. 652, § 1, mandating the payment of prejudgment interest where "not otherwise provided by law," reflects the Legislature's intent that prejudgment interest always be added to an award of compensatory damages.

Where *§ 6H* provides for the award of prejudgment interest whenever compensatory damages are awarded, an interpretation of *§ 150*, as amended, that would preclude the payment of prejudgment interest on the award of lost wages and benefits under the Wage Act would be an implied repeal of *§ 6H* with respect to Wage Act awards. Under our "long standing rule of statutory interpretation," the implied repeal of a statute [**13] by a subsequent statute has "never been favored by our law." *Commonwealth v. Hayes, 372 Mass. 505, 511, 362 N.E.2d 905 (1977)*, quoting *Commonwealth v. Bloomberg, 302 Mass. 349, 352, 19 N.E.2d 62 (1939)*. Where two statutes appear to be in conflict, we do not mechanically determine "that the more 'recent' or more 'specific' statute ... trumps the other." *Commonwealth v. Harris, 443 Mass. 714, 725, 825 N.E.2d 58 (2005)*. Instead, we "endeavor to harmonize the two statutes so that the policies underlying both may be honored." *Id.* "[A] statute is not to be deemed to repeal or supersede a prior statute in whole or in part in the absence of express words to that effect or of clear implication." *Id.*, quoting *Hayes, supra at 512*. Repeal is not clearly implied "[u]nless the prior statute is so repugnant to and inconsistent with the later enactment that both cannot stand." *Hayes, supra at 511*.

Here, amended *§ 150* is in conflict with *§ 6H* only if we conclude that the Legislature intended the trebled "liquidated damages" to incorporate all prejudgment interest. But, because we disfavor implied repeal, we may reach that conclusion only if *§ 150* expressly states that "liquidated damages" includes all prejudgment interest or otherwise negates the entitlement in *§ 6H* to prejudgment interest (which it does not), or if the addition of prejudgment interest to an award of lost wages and benefits is clearly inconsistent with the characterization [**14] of treble damages as "liquidated damages" (which it is not). Before *§ 150* was amended in 2008, an aggrieved employee who prevailed on a Wage Act claim was entitled to prejudgment interest on an award of lost wages and benefits. See, e.g., *DeSantis v. Commonwealth Energy Sys., 68 Mass. App. Ct. 759, 768, 771, 864 N.E.2d 1211 (2007)* (upholding award of [*379] prejudgment interest on damages for lost wages and benefits under Wage Act). Where the employer's conduct was so outrageous as to justify punitive damages, prejudgment interest would not be added to the trebled punitive damages award, but the award of punitive damages did not mean the deprivation of prejudgment interest on the award of lost wages and benefits. Cf. *McEvoy Travel Bur., Inc. v. Norton Co., 408 Mass. 704, 717, 563 N.E.2d 188 & n.9 (1990)* (prejudgment interest added to actual damages in *G. L. c. 93A* judgment, but not to multiple punitive damages). There is nothing in the legislative history of the 2008 amendment of *§ 150* to suggest that the Legislature intended to deprive an employee of prejudgment interest on lost wages and benefits when it characterized what had been

punitive damages as liquidated damages. To do so would mean that an employee who was deprived of wages and benefits because of the outrageous conduct of his or her employer would receive the same treble damages under the amended *§ 150* as he or she would [**15] have obtained before the amendment, albeit as liquidated damages rather than punitive damages, but would obtain a lesser judgment because of the preclusion of prejudgment interest. *Section 6H* may be read in harmony with the amended *§ 150* simply by recognizing that the Legislature intended no change in the payment of prejudgment interest.[6]

> 6 Because we recognize that the Legislature intended no change in the payment of prejudgment interest, we also conclude that the Legislature did not intend that prejudgment interest be awarded on the liquidated portion of the award of damages. If it did, an employee under the amended *§ 150* who was deprived of wages because of a good faith error by the employer would obtain a significantly larger judgment than he or she would have obtained before the amendment where the deprivation of wages arose from the employer's outrageous conduct, because prejudgment interest would be added to the "liquidated damages" portion of the award but it would not have been added to the punitive damages portion of the award under the previous version of the statute. Under the amended *§ 150*, prejudgment interest is to be calculated based on the portion of damages reflecting lost wages and benefits alone. The plaintiff does not contend that the class members are entitled to prejudgment interest beyond this.

Nor is there anything in the legislative history to suggest that the Legislature intended that the amended *§ 150* mirror the FLSA with respect to "liquidated damages." We can infer that the Legislature did not intend the Wage Act fully to replicate the FLSA because it declined to adopt a good faith exception to the Wage Act's mandatory damages requirement. As a result of the Portal-to-Portal Act, *29 U.S.C. § 260 (1947)*, liquidated damages [*380] under the FLSA must be remitted "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [Act]." See *Reich v. Southern New England Telecomm. Corp., 121 F.3d 58, 70-71 (2d Cir. 1997)*. By contrast, following the passage of the 2008 amendment to the Wage Act, the Legislature declined to accept the Governor's proposed amendments -- similar to those in the Portal-to-Portal Act [**16] -- that would have allowed an exception to mandatory treble damages for employers who violated the Wage Act in good faith. See *Rosnov, 460 Mass. at 482 n.9*. The amended *§ 150* became law without the Governor's signature. *Id.*

Moreover, prejudgment interest and *§ 150* damages are different in kind and accomplish distinctly different purposes. Prejudgment interest is not generally included within "liquidated damages" under our common law of contract. In fact, prejudgment interest is not even a category of damages; where liquidated damages are awarded in a civil contract action, prejudgment interest is added to the award of liquidated damages. See *Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 840, 494 N.E.2d 1008 (1986)* (prejudgment interest under *G. L. c. 231, § 6C*, paid on both liquidated and unliquidated damages); *Cochrane v. Forbes, 267 Mass. 417, 420, 166 N.E. 752 (1929)* (under common law, prejudgment interest on liquidated damages runs from date of demand).

Prejudgment interest is awarded to compensate a plaintiff for the depreciation of the eventual recovery arising from the often substantial delay between the commencement of the action and the judgment. See *Smith v. Massachusetts Bay Transp. Auth., 462 Mass. 370, 375, 968 N.E.2d 884 (2012)*. In the context of a violation of the Wage Act, "liquidated damages" properly would include the various additional costs that might be incurred by an employee who has not been timely paid his or her full wages, [**17] but

who still needs to pay for the family's housing, transportation, food and clothing, tuition, and medical expenses. The damages arising from delay in paying the wages due might be considerable, depending on the employee's circumstances, but they would be difficult to quantify with precision. In contrast, prejudgment interest on the amount of lost wages and benefits is simple to quantify, and would not properly be a subject of "liquidated damages."

In short, we conclude that the Legislature's characterization of treble damages as "liquidated damages" in the 2008 amendment [*381] to *§ 150* was not intended to produce any change in the award of prejudgment interest in Wage Act judgments. Prejudgment interest is still to be added to the amount of lost wages and benefits, and is still not to be added to the trebled portion of the judgment that previously had been punitive damages and is now characterized as liquidated damages.

Conclusion. For the reasons stated, in answer to the certified question, we declare that, under Massachusetts law, statutory prejudgment interest shall be added by the clerk of court to the amount of lost wages and other benefits awarded as damages pursuant to *G. L. c. 149, § 150*, but shall not [**18] be added to the additional amount of the award arising from the trebling of those damages as "liquidated damages."

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the question certified, and will also transmit a copy to each party. See, e.g., *DiFiore v. American Airlines, Inc., 454 Mass. 486, 497, 910 N.E.2d 889 (2009)*.

MALDEN POLICE PATROLMAN'S ASSOCIATION v. CITY OF MALDEN

No. 16-P-494.

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 53
2017 Mass. App. LEXIS 108

February 7, 2017, Argued
August 11, 2017, Decided

PRIOR HISTORY: [*1] Middlesex. CIVIL ACTION commenced in the Superior Court Department on January 21, 2015.

The case was heard by *Bruce R. Henry*, J., on motions to dismiss and for summary judgment.

HEADNOTES *Practice, Civil*, Motion to dismiss, Summary judgment. *Superior Court*. *Rules of the Superior Court*. *Administrative Law*, Primary jurisdiction, Exhaustion of remedies. *Unjust Enrichment*. *Contract*, Collective bargaining contract, Unjust enrichment, Promissory estoppel. *Public Employment*, Collective bargaining. *Police*, Collective bargaining. *Massachusetts Wage Act*. *Civil Service*, Collective bargaining, Municipal finance. *Municipal Corporations*, Collective bargaining, Municipal finance.

COUNSEL: *Christopher G. Fallon* for the plaintiff.

Albert R. Mason for the defendant.

JUDGES: Present: TRAINOR, BLAKE, & SHIN, JJ.

OPINION BY: BLAKE

OPINION

BLAKE, J. The plaintiff, Malden Police Patrolman's Association (union), is a labor organization comprised of approximately seventy-nine police officers employed by the defendant, the city of Malden (city). The union and the city were parties to a collective bargaining agreement (CBA) covering three fiscal years from July 1, 2010, through June 30, 2013. The CBA set forth the provisions governing, among other matters, paid detail work performed by the officers.[1] During the summer of 2014, the union notified the city that it was in arrears on the payment of compensation to officers for detail work, requested a written explanation for the nonpayment, and demanded the outstanding detail pay. The city took the position that, because [*2] the officers earned the detail pay for work performed for third parties, the city was exempt from the provisions of the Massachusetts wage and hour laws, requiring timely payment of earned wages.

1 Only art. 23 of the CBA, governing "Paid Details," has been included in the record appendix. There are two types of paid details -- those performed for the city, and those performed for third-party vendors.

On January 21, 2015, the union filed a complaint in the Superior Court against the city,[2] alleging that the city owed the officers approximately $410,000 in compensation for the performance of past detail work.[3] The complaint requested relief under theories of breach of contract (count I), breach of an implied covenant of good faith and fair dealing (count II), promissory estoppel (count III), unjust enrichment (count IV), and violation of the Massachusetts Wage Act, *G. L. c. 149, § 148* (Wage Act) (count V). The union then filed a motion for summary judgment pursuant to *Mass.R.Civ.P. 56*, 365 Mass. 824 (1974). The city moved to dismiss the union's complaint or, in the alternative, for summary judgment and declaratory judgment.

2 On November 24, 2014, the union had filed a nonpayment of wage complaint with the Attorney General's office. See *G. L. c. 149, § 150*, as amended by St. 2014, c. 505, § 4. By letter dated January 9, 2015, the Attorney General's fair labor division authorized the union to pursue a private civil action. An aggrieved employee who prevails in such an action "shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees." *Ibid.* See *Melia v. Zenhire, Inc., 462 Mass. 164, 171 n.8, 967 N.E.2d 580 (2012).*

3 The record does not include any information regarding the nature of this detail work, or the time period over which it was performed. Neither party has alleged that the detail work related to anything other than the protection of public safety.

By memorandum of decision and order dated February 9, 2016, the judge denied the union's motion for summary judgment, allowed the city's motion to dismiss with respect to counts I through IV of the complaint, and granted summary judgment for the city with respect to count V of the complaint. First, the judge [*3] stated that the union's claims for breach of contract and breach of an implied covenant of good faith and fair dealing were governed by the CBA and, therefore, those claims were "best resolved by whatever dispute resolution provisions [were] contained in that agreement." While the record does not contain the entire CBA, neither party disputes that it contains an arbitration/grievance procedure. Next, the judge concluded that promissory estoppel was not a viable claim against the city. The judge also determined that the circumstances of the present dispute did not give rise to a claim of unjust enrichment. Finally, the judge concluded that, although detail pay constituted wages under *G. L. c. 149, § 148*, the union could not prevail under the Wage Act due to the provisions of the municipal finance law, *G. L. c. 44, § 53C*.[4] Following the entry of judgment, the union appealed. For the reasons that follow, we reverse the allowance of summary judgment

in favor of the city on count V of the complaint, setting forth the union's Wage Act claim, and remand for further proceedings. In all other respects, we affirm.

> 4 *General Laws c. 44, § 53C*, as amended by St. 1982, c. 70, provides, in pertinent part, as follows: "All money received by a city ... as compensation for work performed by one of its employees on an off-duty work detail which is related to such employee's regular employment or for special detail work performed by persons where such detail is not related to regular employment shall be deposited in the treasury and shall be kept in a fund separate from all other monies of such city ... and ... shall be expended without further appropriation in such manner and at such times as shall, in the discretion of the authority authorizing such off-duty work detail or special detail work, compensate the employee or person for such services; provided, however, that such compensation shall be paid to such employee or person no later than ten working days after receipt by the city ... of payment for such services."

1. *Compliance with Superior Court rules*.[5] The union first contends that the judge erred in granting the city's motion [*4] to dismiss or, in the alternative, for summary judgment because the city failed to comply with *Rules 9A* and *9B of the Rules of the Superior Court* (2014). In particular, the union asserts that the city failed to include with its motion either a separate statement of uncontested material facts with references to supporting materials, or a joint appendix with an index of exhibits. See *Superior Court Rule 9A(b)(5)(i)* and *(vi)*. The union claims that the city, when notified of these deficiencies, did not correct them properly. In addition, the union points out that the city failed to include a certificate of service on the last page of its motion. See *Superior Court Rule 9B*. In the union's view, the city's motion was fatally defective because of these deficiencies and, therefore, should have either not been considered or been denied. We disagree.

> 5 Notwithstanding the fact that the union raised this issue in its memorandum of law in opposition to the city's motion to dismiss, the judge did not address it in his memorandum of decision and order.

We have said that "[r]ules of procedure are not just guidelines. Their purpose is to provide an orderly, predictable process by which parties to a law suit conduct their business. Any litigant who fails to turn a procedural corner squarely assumes the risk that the rules infraction will be used against him and the rule vigorously enforced by the trial judge." *USTrust Co. v. Kennedy, 17 Mass. App. Ct. 131, 135, 456 N.E.2d 775 (1983)*. See *Superior Court Rule 9A(b)(6)* (judge "need not consider any motion or opposition that fails to comply with the requirements [*5] of this rule"). "Every violation of a procedural rule, however, need not -- and should not -- require the perpetrator to be undone. The defect may be harmless." *USTrust Co. v. Kennedy, supra*, and cases cited. Consequently, trial judges "have discretion to forgive a failure to comply with a rule if the failure does not affect the opposing party's opportunity to develop and prepare a response." *Ibid.* See *Greenleaf v. Massachusetts Bay Transp. Authy., 22 Mass. App. Ct. 426, 429, 494 N.E.2d 402 (1986)* (management of case committed to discretion of trial judge).

Here, the judge, in his discretion, chose to consider the merits of the city's motion, notwithstanding the city's alleged noncompliance with procedural rules. We note that in a revised memorandum of law accompanying its motion, the city did set forth agreed factual allegations taken directly from the paragraphs of the union's complaint. It also appears from the Superior Court docket that a statement of material facts was filed, although it has not been included in the record appendix. We agree with the union that the city failed to file a joint appendix with an index of exhibits and to include a certificate of service on the last page of its motion. Nonetheless, the union has not claimed that the city's noncompliance with *Rules 9A* and

9B affected [*6] the union's ability to respond to the city's motion. Absent any prejudice to the union, we conclude that the judge did not abuse his discretion in considering the merits of the city's motion, rather than deeming it fatally defective.

2. *Breach of contract and breach of implied covenant of good faith and fair dealing*. Both parties have characterized the judge's dismissal of the contract-based claims as one under the doctrine of primary jurisdiction and have briefed the issue accordingly. The union contends that the judge erred in this respect because judicial resolution of such claims would not interfere with any pending administrative proceedings, and courts routinely resolve these types of controversies. In the union's view, its claims presented only questions of law for which the expertise of the Department of Labor Relations (department) was unnecessary. That being the case, the union argues, there was no reason for the judge to relinquish jurisdiction over its contract-based claims. We disagree.[6]

> 6 The union also argues that the city waived any challenge to the court's jurisdiction by failing to raise the matter as an affirmative defense. The union's argument is unavailing because primary jurisdiction cannot be waived. See *Everett v. 357 Corp., 453 Mass. 585, 609, 904 N.E.2d 733 (2009)*; *Blauvelt v. AFSCME Council 93, Local 1703, 74 Mass. App. Ct. 794, 801, 910 N.E.2d 956 (2009)*. Even when not raised by the parties, the doctrine may be invoked by a court sua sponte. See *Everett v. 357 Corp., supra.*

Both the doctrine of primary jurisdiction and the doctrine of exhaustion of remedies serve the purpose of "promoting proper relationships [*7] between the courts and administrative agencies." *Lincoln v. Personnel Administrator of the Dept. of Personnel Admin., 432 Mass. 208, 211 n.4, 733 N.E.2d 76 (2000)*, quoting from *Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976)* (*Nader*). The exhaustion doctrine, however, "is commonly applied to prevent premature interference with a pending administrative proceeding." *J. & J. Enterprises, Inc. v. Martignetti, 369 Mass. 535, 539, 341 N.E.2d 645 (1976)*. It "contemplates a situation where some administrative action has begun, but has not yet been completed." *Murphy v. Administrator of the Div. of Personnel Admin., 377 Mass. 217, 220, 386 N.E.2d 211 (1979)* (*Murphy*). See *Lumbermens Mut. Cas. Co. v. Workers' Compensation Trust Fund, 88 Mass. App. Ct. 183, 187, 36 N.E.3d 594 (2015)*. The exhaustion doctrine "preserve[s] the integrity of the administrative process while sparing the judiciary the burden of reviewing administrative proceedings in a piecemeal fashion." *Murphy, supra.*

Here, the city filed a charge of prohibited practice with the department on September 10, 2014, alleging that the union had violated *G. L. c. 150E, § 10(b)(1), (2),* and *(3),* by insisting that the method by which officers were paid for outside detail work was a mandatory subject of collective bargaining. An investigator with the department dismissed the city's charge in its entirety, concluding that there was no probable cause to believe that the union had violated *G. L. c. 150E* in the manner alleged. There is nothing in the record before us to indicate that the union ever initiated proceedings before the department against the city. The judge's decision plainly suggests an unawareness of any pending administrative [*8] proceedings that would resolve the matters raised in the union's complaint. Accordingly, the judge does not appear to have dismissed the union's contract-based claims for failure to exhaust administrative remedies but could, potentially, have dismissed them as falling within the primary jurisdiction of the department.

"The doctrine of primary jurisdiction, like exhaustion [of administrative remedies], 'is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.'" *Murphy, 377 Mass. at 221*, quoting from *Nader, 426 U.S. at 303*. It arises in cases "where a plaintiff, 'in

the absence of pending administrative proceedings, invokes the original jurisdiction of a court to decide the merits of a controversy' that includes an issue within the special competence of an agency." *Fernandes v. Attleboro Hous. Authy., 470 Mass. 117, 121, 20 N.E.3d 229 (2014)* (*Fernandes*), quoting from *Murphy, supra at 220*. See *Everett v. 357 Corp., 453 Mass. 585, 609, 904 N.E.2d 733 (2009)* (*Everett*). The primary jurisdiction doctrine allows a judge to delay or deny judicial review in favor of administrative proceedings "when an action raises a question of the validity of an agency practice, ... or when the issue in litigation involves 'technical questions of fact uniquely within the expertise and experience of an agency'" (citations [*9] omitted). *Murphy, supra at 221*, quoting from *Nader, supra at 304*. See *Leahy v. Local 1526, Am. Fedn. of State, County, & Mun. Employees, 399 Mass. 341, 349-350, 504 N.E.2d 602 (1987)* (*Leahy*).

"Where an agency has statutorily been granted *exclusive* authority over a particular issue, the doctrine of primary jurisdiction requires that a court refer the issue to the agency for adjudication in the first instance" (emphasis in original). *Fernandes, supra*, quoting from *Blauvelt v. AFSCME Council 93, Local 1703, 74 Mass. App. Ct. 794, 801, 910 N.E.2d 956 (2009)* (*Blauvelt*). See *Everett, supra*; *Puorro v. Commonwealth, 59 Mass. App. Ct. 61, 64, 794 N.E.2d 624 (2003)* (*Puorro*). "Where, however, no statute has conferred exclusive authority to the agency, primary jurisdiction is 'a doctrine exercised in the discretion of the court.'" *Blauvelt, supra at 801-802*, quoting from *Columbia Chiropractic Group, Inc. v. Trust Ins. Co., 430 Mass. 60, 62, 712 N.E.2d 93 (1999)*. See *Everett, supra at 610 n.32*. The primary jurisdiction doctrine has no applicability where the issues presented to the court concern only questions of law that do not call for agency expertise. See *Murphy, 377 Mass. at 221-222*; *Casey v. Massachusetts Elec. Co., 392 Mass. 876, 879-880, 467 N.E.2d 1358 (1984)*.

"Labor relations is an area in which the concerns of primary jurisdiction are commonly implicated." *Leahy, 399 Mass. at 346*. *General Laws c. 150E*, the public employees collective bargaining statute, gives the department broad authority to resolve labor disputes. See *id. at 347*. Interpretation of the provisions of a collective bargaining agreement is a "traditional" function of the department, "as to which it possesses special expertise." *Everett v. Local 1656, Intl. Assn. of Firefighters, 411 Mass. 361, 368, 582 N.E.2d 532 (1991)*.

In this case, although the [*10] parties characterized the issue as one of primary jurisdiction, the judge determined that the union's contract-based claims were governed by the terms of the CBA and were "best resolved by whatever dispute resolution provisions [were] contained in that agreement."[7] "Employees may not simply disregard the grievance procedures set out in a collective labor contract and go direct[ly] to court for redress against the employer." *Balsavich v. Local Union 170 of the Intl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 371 Mass. 283, 286, 356 N.E.2d 1217 (1976)*. See *School Comm. of Danvers v. Tyman, 372 Mass. 106, 115, 360 N.E.2d 877 (1977)* (meaning of collective bargaining agreement to be determined by arbitrator, not court); *O'Brien v. New England Tel. & Tel. Co., 422 Mass. 686, 695, 664 N.E.2d 843 (1996)* (employees should pursue grievance procedure under collective bargaining agreement before resorting to judicial process). We note, however, that the CBA in this case expired on June 30, 2013, and the union does not seem to have provided the judge (or this court) with the basis for the parties' ongoing contractual relationship. The parties have given us little guidance on this issue, but we read their papers to suggest that there may have been a period of time when there was no CBA in place, during which the parties litigated whether payment for details was a mandatory or permissive subject of bargaining. If there was a CBA in effect, however, the judge correctly ruled that the

union [*11] was required to follow the grievance procedures provided therein. Whether the dispute falls within the department's primary jurisdiction or whether the CBA provides for a different manner of dispute resolution, a distinction we cannot resolve on this record, we conclude that the judge properly dismissed the union's contract-based claims.[8]

> 7 It appears from the judge's decision that he was unaware of the specific nature of the CBA's grievance procedures, presumably because the relevant portions of the CBA were not provided to him. Given that the CBA's grievance provisions are not part of the record on appeal, we are unable to ascertain how the parties agreed to resolve their labor disputes.
>
> 8 Even if the judge's decision should have been predicated on the doctrine of exhaustion of administrative remedies, the result is the same. See *Leahy, 399 Mass. at 345 n.3*; *Puorro, 59 Mass. App. Ct. at 64*.

3. *Unjust enrichment*. The union next argues that the judge erred in dismissing its unjust enrichment claim. We disagree. A plaintiff is not entitled to recovery on a theory of unjust enrichment where a valid contract defines the obligations of the parties. See *Boston Med. Center Corp. v. Secretary of the Executive Office of Health & Human Servs., 463 Mass. 447, 467, 974 N.E.2d 1114 (2012)*; *York v. Zurich Scudder Invs., Inc., 66 Mass. App. Ct. 610, 619-620, 849 N.E.2d 892 (2006)*. See also Restatement (Third) of Restitution and Unjust Enrichment *§ 2(2)* (2011) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment"). Because the CBA governs the terms of paid details performed by the officers, it precludes recovery by the union under a theory of unjust enrichment.

4. *Promissory estoppel*. The union contends that the judge erred in summarily dismissing its promissory estoppel claim. It argues that, under the terms of the CBA, the city promised to pay the officers for detail work at [*12] a specified rate and within a defined time period, and that this promise induced the officers to perform such work to their detriment. The union asserts that the city reneged on its promise, and that the ensuing injustice to the officers of working without compensation can only be remedied by enforcing the city's promise. In the union's view, dismissal of its promissory estoppel claim was unwarranted. We disagree.

"Promissory estoppel is an equitable doctrine." *Barrie-Chivian v. Lepler, 87 Mass. App. Ct. 683, 686, 34 N.E.3d 769 (2015)*. In the absence of a contract in fact, promissory estoppel implies a contract in law where there is proof of an unambiguous promise coupled with detrimental reliance by the promisee. See *Rhode Island Hosp. Trust Natl. Bank v. Varadian, 419 Mass. 841, 848, 647 N.E.2d 1174 (1995)*. See also *Vickery v. Ritchie, 202 Mass. 247, 249, 88 N.E. 835 (1909)* (absent express contract, "[t]he law implies an obligation to pay for what has been done"). Where an enforceable contract exists, however, a claim for promissory estoppel will not lie. See *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 594 n.33, 864 N.E.2d 518 (2007)*. See also *Knowlton v. Swampscott, 280 Mass. 69, 72, 181 N.E. 849 (1932)* ("A party cannot come into equity to secure relief open to him at law"). Given that there was a written contract between the union and the city (namely, the CBA), the doctrine of promissory estoppel is not applicable, and therefore, the judge did not err in dismissing the union's claim.

5. *Wage Act claim*. Finally, the union contends that [*13] the judge erred in granting summary judgment in favor of the city on the union's Wage Act claim. The union acknowledges that there is no case law governing the interplay between the Wage Act, *G. L. c. 149, § 148*, and the municipal finance law, *G. L. c. 44, § 53C*. Nonetheless, the union asserts that the Wage Act is broad in scope and was designed to prevent precisely what has happened in this case -- nonpayment by the city of wages owed to the officers for their performance of detail work.[9]

9 Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991)*; *Mass.R.Civ.P. 56*, 365 Mass. 824 (1974). We review a decision to grant summary judgment de novo. See *Ritter v. Massachusetts Cas. Ins. Co., 439 Mass. 214, 215, 786 N.E.2d 817 (2003)*.

"The purpose of the Wage Act is 'to prevent the unreasonable detention of wages.'" *Melia v. Zenhire, Inc., 462 Mass. 164, 170, 967 N.E.2d 580 (2012)*, quoting from *Boston Police Patrolmen's Assn. v. Boston, 435 Mass. 718, 720, 761 N.E.2d 479 (2002)*. See *Crocker v. Townsend Oil Co., 464 Mass. 1, 13, 979 N.E.2d 1077 (2012)* (Wage Act intended "to provide strong statutory protection for employees and their right to wages"); *Lipsitt v. Plaud, 466 Mass. 240, 245, 994 N.E.2d 777 (2013)*. *General Laws c. 149, § 148*, as amended by St. 1992, c. 133, § 502, directs "[e]very" employer to pay an employee "the wages earned" by that employee at regular intervals and within a fixed number of days after "the termination of the pay period during which the wages were earned." See *Camara v. Attorney Gen., 458 Mass. 756, 759, 941 N.E.2d 1118 (2011)* (Wage Act requires "prompt and full payment of wages due"). When an employee "has completed the labor, service, or performance required of him, ... he has 'earned' his wage." *Awuah v. Coverall N. America, Inc., 460 Mass. 484, 492, 952 N.E.2d 890 (2011)*, citing Black's Law Dictionary 584 (9th ed. 2009). It is well established "that municipalities are subject to [*14] the Wage Act." *Plourde v. Police Dept. of Lawrence, 85 Mass. App. Ct. 178, 181, 7 N.E.3d 484 (2014)*, and cases cited.[10]

10 We express no opinion whether detail pay is included in the average annual rate of regular compensation utilized to determine retirement benefits, and we note that neither party has raised this issue.

Here, the judge found that compensation earned by police officers for the performance of detail work for third parties constituted "wages" under *G. L. c. 149, § 148*. On this record, however, we are unable to conclude that such compensation, even if "wages," is paid to "employees" of the city.[11] Indeed, neither party addressed the three-part test set forth in *G. L. c. 149, § 148B*, to determine whether the union members, when performing police details, are "employees" of the city for purposes of the Wage Act.[12]

11 In its complaint, the union did not allege that the city violated any provisions of the Fair Labor Standards Act of 1938 (FLSA), *29 U.S.C. §§ 201-219 (2012)*, or related regulations. In its answer, however, the city asserted, in reliance on the FLSA, that detail pay earned by officers from third parties did not constitute wages earned from the city, thereby rendering the Wage Act inapplicable. There is no indication from the judge's decision that he considered the provisions of the FLSA, and the city has not raised the matter on appeal. Accordingly, we deem it waived. See *Mass.R.A.P. 16(a)(4)*, as amended, 367 Mass. 921 (1975) (appellate court need not consider questions or issues not argued in brief).

12 *General Laws c. 149, § 148B*, sets forth a three-part test to determine whether someone is an employee for purposes of the Wage Act. Specifically, an individual performing any service shall be considered to be an employee unless "(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." *G. L. c. 149, § 148B(a)*, as amended by St. 2004, c. 193, § 26.

The judge then stated that the wage determination was not the end of his inquiry.

Taking into consideration the language of *G. L. c. 44, § 53C*, the judge decided that the municipal finance law precluded the union from prevailing on its Wage Act claim. We agree in part. Specifically, we conclude that, where the detail work is performed for third parties, the plain language of *G. L. c. 44, § 53C*, governs with respect to detail pay.[13] But, to the extent that the city "hires" its own officers as "employees" to perform detail services within the meaning of *G. L. c. 149, § 148B*, payment is governed by the Wage Act. Although we reach these conclusions as a matter of statutory interpretation, we cannot resolve the union's claim on this record [*15] because of two unknown factual matters: (1) what portion of the detail work at issue was performed for third parties, rather than for the city, and (2) with respect to detail work performed for third parties, whether the city complied with the requirements of the municipal finance law. A remand is therefore necessary to determine whether the city violated either statute and, if so, what damages are warranted, if any.

> 13 In circumstances where *G. L. c. 44, § 53C*, is applicable, there may be provisions of the Wage Act that do not conflict with *§ 53C* such that the two statutes should be construed and applied harmoniously. Because the union has not raised this argument, we do not consider it.

"A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline, 435 Mass. 353, 360, 758 N.E.2d 110 (2001)*. We assume that the Legislature is aware of existing statutes, such as *G. L. c. 149, § 148*, when it enacts a new one, such as *G. L. c. 44, § 53C*. See *Charland v. Muzi Motors, Inc., 417 Mass. 580, 582, 631 N.E.2d 555 (1994)*. Moreover, "the Legislature is presumed to intend and understand all the consequences of its actions." *Alves's Case, 451 Mass. 171, 179-180, 884 N.E.2d 468 (2008)*. "[W]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." *Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514, 333 N.E.2d 450 (1975)*. See, e.g., *Commonwealth v. Kelly, 470 Mass. 682, 691-692, 25 N.E.3d 288 (2015)* (harmonizing *G. L. c. 265, § 37*, and *G. L. c. 265, § 39*, as related parts of broad statutory scheme to criminalize violations of individual's civil rights); *McLaughlin v. Lowell, 84 Mass. App. Ct. 45, 65-66, 992 N.E.2d 1036 (2013)* (harmonizing *G. L. c. 32, § 8*, governing [*16] reinstatement of public employees who retired because of disability, and *G. L. c. 151B, § 4[16]*, prohibiting employment discrimination on basis of handicap). See also *George v. National Water Main Cleaning Co., 477 Mass. 371, 378, 77 N.E.3d 858 (2017)* (where two statutes appear to be in conflict, court does not mechanically determine that more recent or specific statute controls but, rather, attempts "to harmonize the two statutes so" underlying policies of both may be given effect).

Where the Wage Act, St. 1879, c. 128, is a broad remedial statute designed to protect employees from the prolonged detention of earned wages, see *Fernandes, 470 Mass. at 125-126*, the municipal finance law, St. 1970, c. 344, specifically pertains to the timely payment of compensation for detail work. Pursuant to the Wage Act, an employer shall pay wages to an employee within six or seven days of the termination of the pay period during which such wages were earned by the employee. See *G. L. c. 149, § 148*. In contrast, the municipal finance law states, in relevant part, that "[a]ll money received by a city ... as compensation for work performed by one of its employees on an off-duty work detail which is related to such employee's regular employment ... shall be paid to such employee ... no later than ten working days after receipt by the city ... of payment [*17] for such services.",[14] [15] *G. L. c. 44, § 53C*. We construe this plain statutory language to apply, both with respect to the timing and disbursement of

the payments, to detail work performed for third parties, not for the city itself.

> 14 *General Laws c. 44, § 53C,* also provides that money received by a city as compensation for "special detail work performed by persons where such detail is not related to regular employment shall be ... paid to such ... person no later than ten working days after receipt by the city ... of payment for such services."
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> 15 Under *G. L. c. 44, § 53C,* a city is permitted to impose a fee of up to ten percent of the cost of authorized services on entities requesting private detail work. "Any such fee received shall be credited as general funds of the city." *Ibid.*

The fact that the municipal finance law provides that compensation for off-duty detail work shall be paid to an employee "no later than ten working days after receipt by the city," *G. L. c. 44, § 53C,* does not render this statute incompatible with the Wage Act. The more recent and more specific language of the municipal finance law signals an awareness by the Legislature that when compensation for detail work is coming from a third party, a city's prompt payment of wages to officers who have performed such work may be delayed. See *TBI, Inc. v. Board of Health of N. Andover, 431 Mass. 9, 18, 725 N.E.2d 188 (2000)*. See also *Risk Mgmt. Foundation of the Harvard Med. Insts., Inc. v. Commissioner of Ins., 407 Mass. 498, 505, 554 N.E.2d 843 (1990)*. Consequently, the Legislature has afforded a city more time to pay its employees compensation for detail work than would be permissible with respect to the payment of regular wages that come directly from the city. We do not preclude the possibility, as the union argues, that the city "contracted away any rights to withhold the detail pay wages that it may have had under *G. L. c. 44, § 53C*." Recognizing that payment from third parties for detail work might not always [*18] be forthcoming in a timely manner, the city agreed in art. 23 of the CBA "to fund and maintain a separate budgetary line item in the police budget each July 1 in the amount of $100,000. This amount of money [would] be used to timely pay a patrolman for details performed in the event a vendor [did] not pay within fourteen (14) days of the detail being performed." Further, the city and the union agreed that "accounts receivable for details shall be used to offset such funding after officers have been paid for detail service." The city plainly was aware that it had a legal obligation to ensure the prompt payment of compensation to its police officers who had performed detail work. The CBA serves to ameliorate any harm to officers that may arise from a third party's late payment by directing the city to pay officers for completed detail work if payment from the third party is not forthcoming within fourteen days of the detail being performed. This directive is properly based on the expectation that the city subsequently will be reimbursed by the third party.

Here, the record is devoid of the particulars of the unpaid details and the consumption of the $100,000 budgetary line amount set [*19] forth in the CBA. Accordingly, a remand is necessary to allow the parties to further develop the record in order to determine whether the city violated the Wage Act or the municipal finance law.

6. *Conclusion*. We affirm the judgment of dismissal with respect to counts I, II, III, and IV of the union's complaint. We reverse the entry of summary judgment in favor of the city on count V of the complaint, setting forth the union's Wage Act claim, and remand the matter to the Superior Court for further proceedings consistent with this opinion.

So ordered.

MASSACHUSETTS AUTOMATIC MERCHANDISING COUNCIL, INC., & ANOTHER[1] v. COMMISSIONER OF PUBLIC HEALTH & ANOTHER.[2]

1 R.M. Foley, Inc.

2 Secretary of Administration and Finance.

16-P-1154

APPEALS COURT OF MASSACHUSETTS

91 Mass. App. Ct. 1128
2017 Mass. App. Unpub. LEXIS 647

June 14, 2017, Entered

DISPOSITION: Judgment affirmed.

JUDGES: Green, Hanlon & Kinder, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

We affirm for substantially the reasons articulated in the thoughtful memorandum of decision written by the Superior Court judge. Contrary to the plaintiffs' contention, the failure of the Department of Public Health (department) to expend additional revenues derived from the fee increase (during the relatively brief period between the imposition of the increase and the *rule 9A* statement of undisputed facts filed with the parties' cross motions for summary judgment) on salaries for additional inspectors does not mandate a conclusion that the additional licensing charge is an unlawful tax rather than a permissible fee. See *rule 9A of the Rules of the Superior Court* (2016). As reflected in the summary judgment record, the additional fee revenues were designed to support two full-time-equivalent inspectors, one full-time-equivalent clerk, and one-half of a full-time-equivalent environmental toxicologist to perform duties incident to increased oversight of vending machines arising from State and Federal laws and regulations concerning school nutrition.[3] While not all of those positions were filled during the period encompassed by the summary judgment record, a substantial portion [*2] of the increased revenues were expended to pay the salaries of personnel engaged in preparation for the expanded inspection program, and more are anticipated to be expended as the inspectors are hired. The fees accordingly "are reasonably designed to compensate [the department] for its anticipated regulatory

expenses." *Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 612, 947 N.E.2d 9 (2011)*.

> 3 The laws include *G. L. c. 111, § 223(g),* and *21 U.S.C. § 343(q)(5)(H)(viii)(I) (2012)*.

There is likewise no merit to the plaintiffs' contention that the fee does not provide a particularized benefit to vending machine operators. The increased inspections described in the summary judgment record relate solely to inspections of vending machines and not, as asserted by plaintiffs' counsel at oral argument, to inspections of school cafeterias generally. Insofar as the increased inspections are a necessary element of the regulatory and licensing framework under the newly adopted State and Federal laws, they form essential preconditions to the ability of the plaintiffs to obtain and to maintain licensure, and the concomitant opportunity to operate their vending machine business. See *Silva v. Attleboro, 454 Mass. 165, 171, 908 N.E.2d 722 (2009)*; *Easthampton Sav. Bank v. Springfield, 470 Mass. 284, 296-297, 21 N.E.3d 922 (2014)*. The fee here is quite unlike the user fee evaluated in *Emerson College v. Boston, 391 Mass. 415, 462 N.E.2d 1098 (1984)*, where fees were assessed to reimburse the municipal defendant for the cost of providing fire protection services; [*3] in the present case the fee is designed to defray the administrative costs of a regulatory oversight program, which the plaintiffs' operations necessitate and from which the plaintiffs directly benefit.

For the foregoing reasons, and as more fully expressed in the judge's written memorandum of decision and the defendants' brief, we affirm.

Judgment affirmed.

By the Court (Green, Hanlon & Kinder, JJ.[4]),

> 4 The panelists are listed in order of seniority.

Entered: June 14, 2017.

JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.

No. 15-214

SUPREME COURT OF THE UNITED STATES

137 S. Ct. 1933; 198 L. Ed. 2d 497
2017 U.S. LEXIS 4046; 85 U.S.L.W. 4441; 47 ELR 20082; 84 ERC (BNA) 1713; 26 Fla. L. Weekly Fed. S 717

March 20, 2017, Argued
June 23, 2017, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [**1] ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT III

Murr v. State, 2015 WI App 13, 359 Wis. 2d 675, 859 N.W.2d 628, 2014 Wisc. App. LEXIS 1041 (Dec. 23, 2014)

DISPOSITION: Affirmed.

SYLLABUS

[*502] The St. Croix River, which forms part of the boundary between Wisconsin and Minnesota, is protected under federal, state,

and local law. Petitioners own two adjacent lots--Lot E and Lot F--along the lower portion of the river in the town of Troy, Wisconsin. For the area where petitioners' property is located, state and local regulations prevent the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development. A grandfather clause relaxes this restriction for substandard lots which were in separate ownership from adjacent lands on January 1, 1976, the regulation's effective date.

Petitioners' parents purchased Lots E and F separately in the 1960's, and maintained them under separate ownership until transferring Lot F to petitioners in 1994 and Lot E to petitioners in 1995. Both lots are over one acre in size, but because of their topography they each have less than one acre suitable for development. The unification of the lots under common ownership therefore implicated the rules barring their separate sale or development. [**2] Petitioners became interested in selling Lot E as part of an improvement plan for the lots, and sought variances from the St. Croix County Board of Adjustment. The Board denied the request, and the state courts affirmed in relevant part. In particular, the State Court of Appeals found that the local ordinance effectively merged the lots, so petitioners could only sell or build on the single combined lot.

Petitioners filed suit, alleging that [*503] the regulations worked a regulatory taking that deprived them of all, or practically all, of the use of Lot E. The County Circuit Court granted summary judgment to the State, explaining that petitioners had other options to enjoy and use their property, including eliminating the cabin and building a new residence on either lot or across both. The court also found that petitioners had not been deprived of all economic value of their property, because the decrease in market value of the unified lots was less than 10 percent. The State Court of Appeals affirmed, holding that the takings analysis properly focused on Lots E and F together and that, using that framework, the merger regulations did not effect a taking.

Held: The State Court of Appeals [**3] was correct to analyze petitioners' property as a single unit in assessing the effect of the challenged governmental action. Pp. 6-20.

(a) The Court's *Takings Clause* jurisprudence informs the analysis of this issue. Pp. 6-11.

(1) Regulatory takings jurisprudence recognizes that if a "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322*. This area of the law is characterized by "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517* (citation and internal quotation marks omitted).

The Court has, however, identified two guidelines relevant for determining when a government regulation constitutes a taking. First, "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the *Takings Clause*." *Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592* (quoting *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798)*. Second, a taking may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Palazzolo, supra, at 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592* (citing *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631)*. Yet even the complete deprivation of use under *Lucas* will [**4] not require compensation if the challenged limitations "inhere . . . in the restrictions that background principles of the

State's law of property and nuisance already placed upon land ownership." *Lucas, 505 U. S., at 1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798*.

A central dynamic of the Court's regulatory takings jurisprudence thus is its flexibility. This is a means to reconcile two competing objectives central to regulatory takings doctrine: the individual's right to retain the interests and exercise the freedoms at the core of private property ownership, cf. *id., at 1027, 112 S. Ct. 2886, 120 L. Ed. 2d 798*, and the government's power to "adjus[t] rights for [*504] the public good," *Andrus v. Allard, 444 U.S. 51, 65, 100 S. Ct. 318, 62 L. Ed. 2d 210*. Pp. 6-9.

(2) This case presents a critical question in determining whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? The Court has not set forth specific guidance on how to identify the relevant parcel. However, it has declined to artificially limit the parcel to the portion of property targeted by the challenged regulation, and has cautioned against viewing property rights under the *Takings Clause* as coextensive with those under state law. Pp. 9-11.

(b) Courts must consider a number of factors in determining the proper denominator of [**5] the takings inquiry. Pp. 11-17.

(1) The inquiry is objective and should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or as separate tracts. First, courts should give substantial weight to the property's treatment, in particular how it is bounded or divided, under state and local law. Second, courts must look to the property's physical characteristics, including the physical relationship of any distinguishable tracts, topography, and the surrounding human and ecological environment. Third, courts should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Pp. 11-14.

(2) The formalistic rules for which the State of Wisconsin and petitioners advocate do not capture the central legal and factual principles informing reasonable expectations about property interests. Wisconsin would tie the definition of the parcel to state law, but it is also necessary to weigh whether the state enactments at issue accord with other indicia of reasonable expectations about property. Petitioners urge the Court [**6] to adopt a presumption that lot lines control, but lot lines are creatures of state law, which can be overridden by the State in the reasonable exercise of its power to regulate land. The merger provision here is such a legitimate exercise of state power, as reflected by its consistency with a long history of merger regulations and with the many merger provisions that exist nationwide today. Pp. 14-17.

(c) Under the appropriate multifactor standard, it follows that petitioners' property should be evaluated as a single parcel consisting of Lots E and F together. First, as to the property's treatment under state and local law, the valid merger of the lots under state law informs the reasonable expectation that the lots will be treated as a single property. Second, turning to the property's physical characteristics, the lots are contiguous. Their terrain and shape make it reasonable to expect their range of potential uses might be limited; and petitioners could have anticipated regulation of the property due to its location along the river, which was regulated by federal, state, and local law long before they acquired the land. Third, Lot E [*505] brings prospective value to Lot F. The restriction [**7] on using the individual lots is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus an optimal location for any improvements. This relationship is evident in the lots' combined valuation. The Court of Appeals was thus correct to treat the contiguous properties as one parcel.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking. They have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. See *505 U. S., at 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798*. Nor have they suffered a taking under the more general test of *Penn Central, supra, at 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631*. Pp. 17-20.

Affirmed.

COUNSEL: John M. Groen argued the cause for petitioners.

Misha Tseytlin argued the cause for respondent Wisconsin.

Richard J. Lazarus argued the cause for respondent St. Croix County.

Elizabeth B. Prelogar argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined. Thomas, J., filed a dissenting opinion. Gorsuch, J., took no part in the consideration or decision of the case.

OPINION BY: Kennedy

OPINION

Justice Kennedy delivered the opinion of the Court.

The classic example of a property taking by the government is when the property has been occupied or otherwise [**8] seized. In the case now before the Court, petitioners contend that governmental entities took their real property--an undeveloped residential lot--not by some physical occupation but instead by enacting burdensome regulations that forbid its improvement or separate sale because it is classified as substandard in size. The relevant governmental entities are the respondents.

Against the background justifications for the challenged restrictions, respondents contend there is no regulatory taking because petitioners own an adjacent lot. The regulations, in effecting a merger of the property, permit the continued residential use of the property including for a single improvement to extend over both lots. This retained right of the landowner, respondents urge, is of sufficient offsetting value that the regulation is not severe enough to be a regulatory taking. To resolve the issue whether the landowners can insist on confining the analysis just to the lot in question, without regard to their ownership of the adjacent lot, it is necessary to discuss the background principles that define regulatory takings.

I

A

The St. Croix River originates in northwest Wisconsin and flows approximately 170 miles [**9] until it joins the Mississippi River, forming the boundary between Minnesota and Wisconsin for much of its length. The lower portion of the river slows and widens to create a natural water area known as Lake St. Croix. Tourists and residents of the region have long extolled the picturesque grandeur of the river and surrounding area. *E.g.*, E. Ellett, Summer Rambles in the West 136-137 (1853).

[*506] Under the *Wild and Scenic Rivers Act*, the river was designated, by 1972, for federal protection. §3(a)(6), 82 Stat. 908, *16 U.S.C. §1274(a)(6)* (designating Upper St. Croix River); Lower Saint Croix River Act of 1972, §2, 86 Stat. 1174, *16 U.S.C. §1274(a)(9)* (adding Lower St. Croix River). The law required the States of Wisconsin and Minnesota to develop "a management and development program" for the river area. *41 Fed. Reg. 26237 (1976)*. In compliance,

Wisconsin authorized the State Department of Natural Resources to promulgate rules limiting development in order to "guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations." *Wis. Stat. §30.27(1) (1973)*.

Petitioners are two sisters and two brothers in the Murr family. Petitioners' parents arranged for them to receive ownership of two lots the family used for recreation along the Lower St. Croix River in the town [**10] of Troy, Wisconsin. The lots are adjacent, but the parents purchased them separately, put the title of one in the name of the family business, and later arranged for transfer of the two lots, on different dates, to petitioners. The lots, which are referred to in this litigation as Lots E and F, are described in more detail below.

For the area where petitioners' property is located, the Wisconsin rules prevent the use of lots as separate building sites unless they have at least one acre of land suitable for development. *Wis. Admin. Code §§ NR 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b)* (2017). A grand-father clause relaxes this restriction for substandard lots which were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation. § NR 118.08(4)(a)(1). The clause permits the use of qualifying lots as separate building sites. The rules also include a merger provision, however, which provides that adjacent lots under common ownership may not be "sold or developed as separate lots" if they do not meet the size requirement. § NR 118.08(4)(a)(2). The Wisconsin rules require localities to adopt parallel provisions, see § NR 118.02(3), so the St. Croix County zoning ordinance contains identical restrictions, see St. [**11] Croix County, Wis., Ordinance §17.36I.4.a (2005). The Wisconsin rules also authorize the local zoning authority to grant variances from the regulations where enforcement would create "unnecessary hardship." § NR 118.09(4)(b); St. Croix County Ordinance §17.09.232.

B

Petitioners' parents purchased Lot F in 1960 and built a small recreational cabin on it. In 1961, they transferred title to Lot F to the family plumbing company. In 1963, they purchased neighboring Lot E, which they held in their own names.

The lots have the same topography. A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it. The line dividing Lot E from Lot F runs from the riverfront to the far end of the property, crossing the blufftop along the way. Lot E has approximately 60 feet of river frontage, and Lot F has approximately 100 feet. Though each lot is approximately 1.25 acres in size, because of the waterline and the steep bank they each have less than one acre of land suitable for development. Even when combined, the lots' buildable [*507] land area is only 0.98 acres due to the steep terrain.

The lots remained under separate ownership, with Lot F owned by the [**12] plumbing company and Lot E owned by petitioners' parents, until transfers to petitioners. Lot F was conveyed to them in 1994, and Lot E was conveyed to them in 1995. *Murr v. St. Croix County Bd. of Adjustment, 2011 WI App 29, 332 Wis. 2d 172, 177-178, 184-185, 796 N. W. 2d 837, 841, 844 (2011)*; *2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628* (unpublished opinion), App. to Pet. for Cert. A-3, ¶¶4-5. (There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to petitioners.)

A decade later, petitioners became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project. The unification of the lots under common ownership, however, had implicated the state and local rules barring their separate sale or development. Petitioners then sought variances from the St. Croix County Board of Adjustment to enable their

building and improvement plan, including a variance to allow the separate sale or use of the lots. The Board denied the requests, and the state courts affirmed in relevant part. In particular, the Wisconsin Court of Appeals agreed with the Board's interpretation that the local ordinance "effectively merged" Lots E and F, so petitioners "could only sell or build on the single larger [**13] lot." *Murr, supra, at 184, 796 N. W. 2d, at 844*.

Petitioners filed the present action in state court, alleging that the state and county regulations worked a regulatory taking by depriving them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." App. 9. The parties each submitted appraisal numbers to the trial court. Respondents' appraisal included values of $698,300 for the lots together as regulated; $771,000 for the lots as two distinct build-able properties; and $373,000 for Lot F as a single lot with improvements. Record 17-55, 17-56. Petitioners' appraisal included an unrebutted, estimated value of $40,000 for Lot E as an undevelopable lot, based on the counterfactual assumption that it could be sold as a separate property. *Id.*, at 22-188.

The Circuit Court of St. Croix County granted summary judgment to the State, explaining that petitioners retained "several available options for the use and enjoyment of their property." Case No. 12-CV-258 (Oct. 31, 2013), App. to Pet. for Cert. B-9. For example, they could preserve the existing cabin, relocate the cabin, or eliminate the cabin and build a new residence on Lot E, on Lot F, or across both lots. The court also found petitioners [**14] had not been deprived of all economic value of their property. Considering the valuation of the property as a single lot versus two separate lots, the court found the market value of the property was not significantly affected by the regulations because the decrease in value was less than 10 percent. *Ibid*.

The Wisconsin Court of Appeals affirmed. The court explained that the regulatory takings inquiry required it to "'first determine what, precisely, is the property at issue.'" *Id.*, at A-9, ¶17. Relying on Wisconsin Supreme Court precedent in *Zealy v. Waukesha*, [*508] *201 Wis. 2d 365, 548 N. W. 2d 528 (1996)*, the Court of Appeals rejected petitioners' request to analyze the effect of the regulations on Lot E only. Instead, the court held the takings analysis "properly focused" on the regulations' effect "on the Murrs' property as a whole"--that is, Lots E and F together. App. to Pet. for Cert. A-12, ¶22.

Using this framework, the Court of Appeals concluded the merger regulations did not effect a taking. In particular, the court explained that petitioners could not reasonably have expected to use the lots separately because they were "'charged with knowledge of the existing zoning laws'" when they acquired the property. *Ibid.* (quoting *Murr, supra, at 184, 796 N. W. 2d, at 844*). Thus, "even [**15] if [petitioners] did intend to develop or sell Lot E separately, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994." App. to Pet. for Cert. A-17, ¶30. The court also discounted the severity of the economic impact on petitioners' property, recognizing the Circuit Court's conclusion that the regulations diminished the property's combined value by less than 10 percent. The Supreme Court of Wisconsin denied discretionary review. This Court granted certiorari, *577 U.S. ___, 136 S. Ct. 890, 193 L. Ed. 2d 783 (2016)*.

II

A

The *Takings Clause of the Fifth Amendment* provides that private property shall not "be taken for public use, without just compensation." The Clause is made applicable to the States through the *Fourteenth Amendment*. *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)*. As this Court has recognized, the plain language of the *Takings Clause* "requires the payment of

compensation whenever the government acquires private property for a public purpose," see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)*, but it does not address in specific terms the imposition of regulatory burdens on private property. Indeed, "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)*, it was generally thought that the *Takings Clause* reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," like the permanent [**16] flooding of property. *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)* (citation, brackets, and internal quotation marks omitted); accord, *Horne v. Department of Agriculture, 576 U.S. ___, ___, 135 S. Ct. 2419, 192 L. Ed. 2d 388, 398 (2015*); see also *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)*. *Mahon*, however, initiated this Court's regulatory takings jurisprudence, declaring that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *260 U. S., at 415, 43 S. Ct. 158, 67 L. Ed. 322*. A regulation, then, can be so burdensome as to become a taking, yet the *Mahon* Court did not formulate more detailed guidance for determining when this limit is reached.

[*509] In the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules. This area of the law has been characterized by "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra, supra, at 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517* (citation and internal quotation marks omitted). The Court has, however, stated two guidelines relevant here for determining when government regulation is so onerous that it constitutes a taking. First, "with certain qualifications ... a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the *Takings Clause*." *Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)* (quoting *Lucas, supra, at 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798*). Second, when a regulation [**17] impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Palazzolo, supra, at 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592* (citing *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978))*.

By declaring that the denial of all economically beneficial use of land constitutes a regulatory taking, *Lucas* stated what it called a "categorical" rule. See *505 U. S., at 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798*. Even in *Lucas*, however, the Court included a caveat recognizing the relevance of state law and land-use customs: The complete deprivation of use will not require compensation if the challenged limitations "inhere ... in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id., at 1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798*; see also *id., at 1030-1031, 112 S. Ct. 2886, 120 L. Ed. 2d 798* (listing factors for courts to consider in making this determination).

A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility. This has been and remains a means to reconcile two competing objectives central to regulatory takings doctrine. [**18] One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership. Cf. *id., at 1028, 112 S. Ct. 2886, 120 L. Ed. 2d 798* ("[T]he notion ... that title is somehow held subject to the

'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the *Takings Clause* that has become part of our constitutional culture"). Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.

The other persisting interest is the government's well-established power to "adjus[t] rights for the public good." *Andrus v. Allard, 444 U.S. 51, 65, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979)*. As Justice Holmes declared, "Government hardly could go on if to some extent values incident to property could not be diminished without [*510] paying for every such change in the general law." *Mahon, supra, at 413, 43 S. Ct. 158, 67 L. Ed. 322*. In adjudicating regulatory takings cases a proper balancing of these principles requires a careful inquiry informed by the specifics of the case. In all instances, the analysis must be driven "by the purpose of the *Takings Clause*, which is to prevent the government from 'forcing some people alone to bear public burdens [**19] which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo, supra, at 617-618, 121 S. Ct. 2448, 150 L. Ed. 2d 592* (quoting *Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960))*.

B

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)* (quoting Michelman, Property, Utility, and Fairness, 80 Harv. L. Rev. 1165, 1992 (1967)).

As commentators have noted, the answer to this question may be outcome determinative. See Eagle, The Four-Factor *Penn Central* Regulatory Takings Test, *118 Pa. St. L. Rev. 601, 631* (2014); see also *Wright, A New Time for Denominators, 34 Env. L. 175, 180 (2004)*. This Court, too, has explained that the question is important to the regulatory takings inquiry. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." [**20] *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 644, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)*.

Defining the property at the outset, however, should not necessarily preordain the outcome in every case. In some, though not all, cases the effect of the challenged regulation must be assessed and understood by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value. This demonstrates the contrast between regulatory takings, where the goal is usually to determine how the challenged regulation affects the property's value to the owner, and physical takings, where the impact of physical appropriation or occupation of the property will be evident.

While the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry, there are two concepts which the Court has indicated can be unduly narrow.

First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. In *Penn Central*, for example, the Court rejected a challenge to the denial of a

[*511] permit to build an office tower above Grand Central Terminal. The Court refused to measure the effect of the denial only against [**21] the "air rights" above the terminal, cautioning that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *438 U. S., at 130, 98 S. Ct. 2646, 57 L. Ed. 2d 631*.

In a similar way, in *Tahoe-Sierra*, the Court refused to "effectively sever" the 32 months during which petitioners' property was restricted by temporary moratoria on development "and then ask whether that segment ha[d] been taken in its entirety." *535 U. S., at 331, 122 S. Ct. 1465, 152 L. Ed. 2d 517*. That was because "defining the property interest taken in terms of the very regulation being challenged is circular." *Ibid*. That approach would overstate the effect of regulation on property, turning "every delay" into a "total ban." *Ibid*.

The second concept about which the Court has expressed caution is the view that property rights under the *Takings Clause* should be coextensive with those under state law. Although property interests have their foundations in state law, the *Palazzolo* Court reversed a state- court decision that rejected a takings challenge to regulations that predated the landowner's acquisition of title. *533 U. S., at 626-627, 121 S. Ct. 2448, 150 L. Ed. 2d 592*. The Court explained that States do not have the unfettered authority to "shape and define property rights and reasonable [**22] investment-backed expectations," leaving landowners without recourse against unreasonable regulations. *Id., at 626, 121 S. Ct. 2448, 150 L. Ed. 2d 592*.

By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

III

A

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine [**23] whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition. Cf. *Lucas, 505 U. S., at 1035, 112 S. Ct. 2886*, [*512] *120 L. Ed. 2d 798* (Kennedy, J., concurring) ("The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved").

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. See *Ballard v. Hunter, 204 U.S. 241, 262, 27 S. Ct. 261, 51 L. Ed. 461 (1907)* ("Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings"). A valid takings claim will not

evaporate just because a purchaser took title after the law was enacted. See *Palazzolo, 533 U. S., at 627, 121 S. Ct. 2448, 150 L. Ed. 2d 592* (some "enactments are unreasonable and do not become less so through passage of time or title"). A reasonable restriction that predates a landowner's [**24] acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. See *ibid.* ("[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned"). In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.

Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation. Cf. *Lucas, supra, at 1035, 112 S. Ct. 2886, 120 L. Ed. 2d 798* (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit").

Third, courts should assess the value [**25] of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in [*513] turn, may counsel in favor of treatment as a single parcel and may reveal the weakness [**26] of a regulatory takings challenge to the law.

State and federal courts have considerable experience in adjudicating regulatory takings claims that depart from these examples in various ways. The Court anticipates that in applying the test above they will continue to exercise care in this complex area.

B

The State of Wisconsin and petitioners each ask this Court to adopt a formalistic rule to guide the parcel inquiry. Neither proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests.

Wisconsin would tie the definition of the parcel to state law, considering the two lots here as a single whole due to their merger under the challenged regulations. That approach, as already noted, simply assumes the answer to the question: May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations? It is, of course, unquestionable that the law must recognize those legitimate expectations in order to give proper weight to the rights of owners and the right of the State to pass reasonable laws and regulations. See *Palazzolo, supra, at 627, 121 S. Ct. 2448, 150 L. Ed. 2d 592*.

Wisconsin [**27] bases its position on a footnote in *Lucas*, which suggests the answer

to the denominator question "may lie in how the owner's reasonable expectations have been shaped by the State's law of property--*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *505 U. S., at 1017, n. 7, 112 S. Ct. 2886, 120 L. Ed. 2d 798*. As an initial matter, *Lucas* referenced the parcel problem only in dicta, unnecessary to the announcement or application of the rule it established. See *ibid.* ("[W]e avoid th[e] difficulty" of determining the relevant parcel "in the present case"). In any event, the test the Court adopts today is consistent with the respect for state law described in *Lucas*. The test considers state law but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property.

Petitioners propose a different test that is also flawed. They urge the Court to adopt a presumption that lot lines define the relevant parcel in every instance, making Lot E the necessary denominator. Petitioners' argument, however, ignores the fact that lot lines are [**28] themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power. In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision).

This approach contravenes the Court's case law, which recognizes that reasonable land-use regulations do not work a taking. See *Palazzolo, 533 U. S., at 627, 121 S. Ct. 2448, 150 L. Ed. 2d 592*; *Mahon, 260 U. S., at 413, 43 S. Ct. 158, 67 L. Ed. 322*. Among other cases, *Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)*, demonstrates [*514] the validity of this proposition because it upheld zoning regulations as a legitimate exercise of the government's police power. Of course, the Court's later opinion in *Lingle* v. *Chevron U.S.A. Inc.* recognized that the test articulated in *Agins*--that regulation effects a taking if it "'does not substantially advance legitimate state interests'"--was improper because it invited courts to engage in heightened review of the effectiveness of government regulation. *544 U.S. 528, 540, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)* (quoting *Agins, supra, at 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106*). *Lingle* made clear, however, that the holding of *Agins* survived, even if its test was "imprecis[e]." See *544 U. S., at 545-546, 548, 125 S. Ct. 2074, 161 L. Ed. 2d 876*.

The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations [**29] that originated nearly a century ago. See Brief for National Association of Counties et al. as *Amici Curiae* 5-10. Merger provisions often form part of a regulatory scheme that establishes a minimum lot size in order to preserve open space while still allowing orderly development. See E. McQuillin, Law of Municipal Corporations §25:24 (3d ed. 2010); see also *Agins, supra, at 262, 100 S. Ct. 2138, 65 L. Ed. 2d 106* (challenged "zoning ordinances benefit[ed] the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas").

When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership. Also, as here, the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners [**30] in special circumstances. See 3 E. Ziegler, Rathkopf's Law of Zoning and Planning §49:13 (39th ed. 2017).

Petitioners' insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners. Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today. See Brief for National Association of Counties et al. as *Amici Curiae* 12-31 (listing over 100 examples of merger provisions).

Petitioners' reliance on lot lines also is problematic for another reason. Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure of the reasonable expectations of property owners. Indeed, in some jurisdictions, lot lines may be subject to informal adjustment by property owners, with minimal government oversight. See Brief for California et al. as *Amici Curiae* 17; 1 J. Kushner, Subdivision Law and Growth Management §5:8 (2d ed. 2017) (lot line adjustments that create [*515] no new parcels are often exempt from [**31] subdivision review); see, *e.g., Cal. Govt. Code Ann. §66412(d)* (West 2016) (permitting adjustment of lot lines subject to limited conditions for government approval). The ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property.

IV

Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together.

First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F. *E.g.,* App. to Pet. for Cert. A-3, ¶6 ("The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under [the local ordinance]"). The decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in [**32] every case. See *supra,* at ___. Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.

Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. Cf. App. to Pet. for Cert. A-5, ¶8 ("[Petitioners] asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain"). The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there [**33] is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements. See Case No. 12-CV-258, App. to Pet. for Cert. B-9 ("They have an elevated level of privacy because they do not

have close neighbors and are able to swim and play volleyball at the property").

The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development [*516] restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, [**34] according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.

The State Court of Appeals was correct in analyzing petitioners' property as a single unit. Petitioners allege that in doing so, the state court applied a categorical rule that all contiguous, commonly owned holdings must be combined for *Takings Clause* analysis. See Brief for Petitioners i ("[D]oes the 'parcel as a whole' concept ... establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes"). This does not appear to be the case, however, for the precedent relied on by the Court of Appeals addressed multiple factors before treating contiguous properties as one parcel. See App. to Pet. for Cert. A-9-A-11, ¶¶17-19 (citing *Zealy v. Waukesha, 201 Wis. 2d 365, 548 N. W. 2d 528*); see *id., at 378, 548 N. W. 2d, at 533* (considering the property as a whole because it was "part of a single purchase" and all 10.4 acres were undeveloped). The judgment below, furthermore, may be affirmed on any ground permitted by the law and record. See *Thigpen v. Roberts, 468 U.S. 27, 30, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984)*. To the extent the state court treated the two lots as one [**35] parcel based on a bright-line rule, nothing in this opinion approves that methodology, as distinct from the result.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. See *505 U. S., at 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798*. They can use the property for residential purposes, including an enhanced, larger residential improvement. See *Palazzolo, 533 U. S., at 631, 121 S. Ct. 2448, 150 L. Ed. 2d 592* ("A regulation permitting a landowner to build a substantial residence . . . does not leave the property 'economically idle'"). The property has not lost all economic value, as its value has decreased by less than 10 percent. See *Lucas, supra, at 1019, n. 8, 112 S. Ct. 2886, 120 L. Ed. 2d 798* (suggesting that even a landowner with 95 percent loss may not recover).

Petitioners furthermore have not suffered a taking under the more general test of *Penn Central*. See *438 U. S., at 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631*. The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe. Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated [**36] their acquisition of both lots. Finally, the governmental [*517] action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.

***

Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. See *Arkansas Game and Fish Comm'n v. United States, 568 U.S. 23, 31, 133 S. Ct. 511, 184 L.*

Ed. 2d 417 (2012). Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. Courts must strive for consistency with the central purpose of the *Takings Clause*: to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong, 364 U. S., at 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554*. Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.

The judgment of the Wisconsin Court of Appeals is affirmed.

It is so ordered.

Justice Gorsuch took no part in the consideration or decision of this case.

DISSENT BY: Roberts; Thomas

DISSENT

Chief Justice Roberts, with whom Justice Thomas and Justice Alito join, dissenting.

The Murr family owns two adjacent [**37] lots along the Lower St. Croix River. Under a local regulation, those two properties may not be "sold or developed as separate lots" because neither contains a sufficiently large area of buildable land. *Wis. Admin. Code §NR 118.08(4)(a)(2)* (2017). The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.

Where the majority goes astray, however, is in concluding that the definition of the "private property" at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) "the physical characteristics of the land," (2) "the prospective value of the regulated land," (3) the "reasonable expectations" of the owner, and (4) "background customs and the whole of our legal tradition." *Ante*, at 11-12. Our decisions have, time and again, declared that the *Takings Clause* protects private property rights as state law creates and defines them. By securing such *established* [**38] property rights, the *Takings Clause* protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property"--adopted solely "for purposes of th[e] takings inquiry," *ante*, at 20--undermines that protection.

[*518] I would stick with our traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the "private property" at issue in regulatory takings cases. Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may be taken into account. Because the majority departs from these settled principles, I respectfully dissent.

I

A

The *Takings Clause* places a condition on the government's power to interfere with property rights, instructing that "private property [shall not] be taken for public use, without just compensation." Textually and logically, this Clause raises three basic questions that individuals, governments, and judges must consider when anticipating or deciding whether the government will have to provide reimbursement for its actions. The first is what "private property" the government's [**39] planned course of conduct will affect. The second, whether that property has been "taken" for "public use." And if "private property" has been "taken," the last item of business is to calculate the "just compensation" the owner is due.

Step one--identifying the property interest at stake--requires looking outside the

Constitution. The word "property" in the *Takings Clause* means "the group of rights inhering in [a] citizen's relation to [a] ... thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp., 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945)*. The Clause does not, however, provide the definition of those rights in any particular case. Instead, "property interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)* (alteration and internal quotation marks omitted). By protecting these established rights, the *Takings Clause* stands as a buffer between property owners and governments, which might naturally look to put private property to work for the public at large.

When government action interferes with property rights, the next question becomes whether that interference amounts to a "taking." "The paradigmatic taking ... is a direct government appropriation or physical invasion [**40] of private property." *Lingle v. Chevron U.S. A. Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)*. These types of actions give rise to "*per se* taking[s]" because they are "perhaps the most serious form[s] of invasion of an owner's property interests, depriving the owner of the rights to possess, use and dispose of the property." *Horne v. Department of Agriculture, 576 U.S. ___, ___, 135 S. Ct. 2419, 192 L. Ed. 2d 388, 398 (2015*) (internal quotation marks omitted).

But not all takings are so direct: Governments can infringe private property interests for public use not only through appropriations, but through regulations as well. If compensation were required for one but not the other, "the natural tendency of human nature" would be to extend regulations "until at last private property disappears." *Pennsylvania Coal* [*519] *Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922)*. Our regulatory takings decisions, then, have recognized that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.* This rule strikes a balance between property owners' rights and the government's authority to advance the common good. Owners can rest assured that they will be compensated for particularly onerous regulatory actions, while governments maintain the freedom to adjust the benefits and burdens of property ownership without incurring crippling costs from each alteration.

Depending, of course, on how [**41] far is "too far." We have said often enough that the answer to this question generally resists *per se* rules and rigid formulas. There are, however, a few fixed principles: The inquiry "must be conducted with respect to specific property." *Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)* (internal quotation marks omitted). And if a "regulation denies all economically beneficial or productive use of land," the interference categorically amounts to a taking. *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)*. For the vast array of regulations that lack such an extreme effect, a flexible approach is more fitting. The factors to consider are wide ranging, and include the economic impact of the regulation, the owner's investment-backed expectations, and the character of the government action. The ultimate question is whether the government's imposition on a property has forced the owner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)* (internal quotation marks omitted).

Finally, if a taking has occurred, the remaining matter is tabulating the "just compensation" to which the property owner is entitled. "[J]ust compensation normally is to be measured by the market value of the property at the time of the taking." *Horne,*

576 U. S., at ___, 135 S. Ct. 2419, 192 L. Ed. 2d 388, 398 (internal quotation marks [**42] omitted).

B

Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar "bundle" analogy, each "strand" in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.

And so we do not allow it. In *Penn Central Transportation Co.* v. *New York City*, we held that property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest." *438 U. S., at 130, 98 S. Ct. 2646, 57 L. Ed. 2d 631*. In that case, the owner of Grand Central Terminal [*520] in New York City argued that a restriction on the owner's ability to add an office building atop the station amounted to a taking of its air rights. We rejected that narrow definition of the "property" at issue, concluding that the correct [**43] unit of analysis was the owner's "rights in the parcel as a whole." *Id., at 130-131, 98 S. Ct. 2646, 57 L. Ed. 2d 631*. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979)*; see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)*.

The question presented in today's case concerns the "parcel as a whole" language from *Penn Central*. This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors "would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante,* at 12.

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at [**44] issue. Even in regulatory takings cases, the first step of the *Takings Clause* analysis is still to identify the relevant "private property." States create property rights with respect to particular "things." And in the context of real property, those "things" are horizontally bounded plots of land. *Tahoe-Sierra, 535 U. S., at 331, 122 S. Ct. 1465, 152 L. Ed. 2d 517* ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions"). States may define those plots differently--some using metes and bounds, others using government surveys, recorded plats, or subdivision maps. See 11 D. Thomas, Thompson on Real Property §94.07(s) (2d ed. 2002); *Powell on Real Property §81A.05(2)(a)* (M. Wolf ed. 2016). But the definition of property draws the basic line between, as P. G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue. See, *e.g., Wis. Stat. §236.28* (2016) ("[T]he lots in [a] plat shall be described by the name of the plat and the lot

and block ... for all purposes, including those of assessment, taxation, devise, descent and conveyance").

Following state property lines is also entirely [**45] consistent with *Penn Central*. Requiring consideration of the "parcel as a whole" is a response to the risk that owners will strategically pluck one strand from their bundle of property rights--such as the air rights at issue in *Penn Central*--and claim a complete taking based on that strand alone. That risk [*521] of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim. State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

The majority envisions that relying on state law will create other opportunities for "gamesmanship" by landowners and States: The former, it contends, "might seek to alter [lot] lines in anticipation of regulation," while the latter might pass a law that "consolidates ... property" to avoid a successful takings claim. *Ante*, at 11, 17. But such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm. We rejected the strategic splitting of property rights in *Penn Central*, and courts could do the same if faced with an [**46] attempt to create a takings-specific definition of "private property." Cf. *Phillips v. Washington Legal Foundation, 524 U.S. 156, 167, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998)* ("[A] State may not sidestep the *Takings Clause* by disavowing traditional property interests long recognized under state law").

Once the relevant property is identified, the real work begins. To decide whether the regulation at issue amounts to a "taking," courts should focus on the effect of the regulation on the "private property" at issue. Adjacent land under common ownership may be relevant to that inquiry. The owner's possession of such a nearby lot could, for instance, shed light on how the owner reasonably expected to use the parcel at issue before the regulation. If the court concludes that the government's action amounts to a taking, principles of "just compensation" may also allow the owner to recover damages "with regard to a separate parcel" that is contiguous and used in conjunction with the parcel at issue. 4A L. Smith & M. Hansen, Nichols' Law of Eminent Domain, ch. 14B, §14B.02 (rev. 3d ed. 2010).

In sum, the "parcel as a whole" requirement prevents a property owner from identifying a single "strand" in his bundle of property rights and claiming that interest has been taken. Allowing that strategic approach to defining [**47] "private property" would undermine the balance struck by our regulatory takings cases. Instead, state law creates distinct parcels of land and defines the rights that come along with owning those parcels. Those established bundles of rights should define the "private property" in regulatory takings cases. While ownership of contiguous properties may bear on whether a person's plot has been "taken," *Penn Central* provides no basis for disregarding state property lines when identifying the "parcel as a whole."

II

The lesson that the majority draws from *Penn Central* is that defining "the proper parcel in regulatory takings cases cannot be solved by any simple test." *Ante*, at 20. Following through on that stand against simplicity, the majority lists a complex set of factors theoretically designed to reveal whether a hypothetical landowner might expect that his property "would be treated as one parcel, or, instead, as separate tracts." *Ante*, at 11. [*522] Those factors, says the majority, show that Lots E and F of the Murrs' property constitute a single parcel and that the local ordinance requiring the Murrs to develop and sell those lots as a pair does not constitute a taking.

In deciding that Lots [**48] E and F are a single parcel, the majority focuses on the

importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a "taking." Cramming them into the definition of "private property" undermines the effectiveness of the *Takings Clause* as a check on the government's power to shift the cost of public life onto private individuals.

The problem begins when the majority loses track of the basic structure of claims under the *Takings Clause*. While it is true that we have referred to regulatory takings claims as involving "essentially ad hoc, factual inquiries," we have conducted those wide-ranging investigations when assessing "the question of what constitutes a '*taking*'" under *Penn Central*. *Ruckelshaus, 467 U. S., at 1004, 104 S. Ct. 2862, 81 L. Ed. 2d 815* (emphasis added); see *Tahoe-Sierra, 535 U. S., at 326, 122 S. Ct. 1465, 152 L. Ed. 2d 517* ("[W]e have generally eschewed any set formula for determining *how far is too far*" (emphasis added; internal quotation marks omitted)). And even then, we reach that "ad hoc" *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. See *Tahoe-Sierra, 535 U. S., at 331, 122 S. Ct. 1465, 152 L. Ed. 2d 517*. Both of these inquiries presuppose [**49] that the relevant "private property" has already been identified. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 295, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981)* (explaining that "[t]hese 'ad hoc, factual inquiries' must be conducted with respect to specific property"). There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles--we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of "property" designed for a claim under the *Takings Clause*. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one "parcel," solely for purposes of resisting a particular claim. And under the majority's test, identifying the "parcel as a whole" in such cases will turn on the reasonableness of the regulation as applied to the claimant. The result is that the government's regulatory interests will come into play not once, but twice--first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.

Regulatory takings, [**50] however--by their very nature--pit the common good against the interests of a few. There is an inherent imbalance in that clash of interests. The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, [*523] the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the *Takings Clause* "prevents the public from loading upon one individual more than his just share of the burdens of government," *Monongahela Nav. Co. v. United States, 148 U.S. 312, 325, 13 S. Ct. 622, 37 L. Ed. 463 (1893)*, by considering the effect of a regulation on specific property rights as they are established at state law. But the majority's approach undermines that protection, defining property only after engaging in an ad hoc, case-specific consideration of individual and community interests. The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes "too far" even gets underway.

Suppose, for example, that a person buys two distinct plots of land--known as Lots A and B--from two different owners. Lot A is landlocked, but the neighboring Lot B shares [**51] a border with a local beach. It soon comes to light, however, that the beach is a

nesting habitat for a species of turtle. To protect this species, the state government passes a regulation preventing any development or recreation in areas abutting the beach--including Lot B. If that lot became the subject of a regulatory takings claim, the purchaser would have a strong case for a *per se* taking: Even accounting for the owner's possession of the other property, Lot B had no remaining economic value or productive use. But under the majority's approach, the government can argue that--based on all the circumstances and the nature of the regulation--Lots A and B should be considered one "parcel." If that argument succeeds, the owner's *per se* takings claim is gone, and he is left to roll the dice under the *Penn Central* balancing framework, where the court will, for a second time, throw the reasonableness of the government's regulatory action into the balance.

The majority assures that, under its test, "[d]efining the property ... should not *necessarily* preordain the outcome in *every* case." *Ante,* at 10 (emphasis added). The underscored language cheapens the assurance. The framework laid out today provides [**52] little guidance for identifying whether "expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante,* at 12. Instead, the majority's approach will lead to definitions of the "parcel" that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, "necessarily" in "every" case, but surely in most.

Moreover, given its focus on the particular challenged regulation, the majority's approach must mean that two lots might be a single "parcel" for one takings claim, but separate "parcels" [*524] for another. See *ante,* at 13. This is just another opportunity to gerrymander the definition of "private property" to defeat a takings [**53] claim. The majority also emphasizes that courts trying to identify the relevant parcel "must strive" to ensure that "some people alone [do not] bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Ante,* at 20 (internal quotation marks omitted). But this refrain is the traditional touchstone for spotting a taking, not for defining private property.

Put simply, today's decision knocks the definition of "private property" loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework compromises the *Takings Clause* as a barrier between individuals and the press of the public interest.

III

Staying with a state law approach to defining "private property" would make our job in this case fairly easy. The Murr siblings acquired Lot F in 1994 and Lot E a year later. Once the lots fell into common ownership, the challenged ordinance prevented them from being "sold or developed as separate lots" because neither contained a sufficiently large area of buildable land. *Wis. Admin. Code §NR 118.08(4)(a)(2).* The Murrs argued that the ordinance amounted to a taking [**54] of Lot E, but the State of Wisconsin and St. Croix County proposed that both lots together should count as the relevant "parcel."

The trial court sided with the State and County, and the Wisconsin Court of Appeals affirmed. Rather than considering whether Lots E and F are separate parcels under Wisconsin law, however, the Court of Appeals adopted a takings-specific approach to defining the relevant parcel. See *2015 WI*

App 13, 359 Wis. 2d 675, 859 N. W. 2d 628 (unpublished opinion), App. to Pet. for Cert. A-9, ¶17 (framing the issue as "whether contiguous property is analytically divisible for purposes of a regulatory takings claim"). Relying on what it called a "well-established rule" for "regulatory takings cases," the court explained "that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Id.*, at A-11, ¶20. And because Lots E and F were side by side and owned by the Murrs, the case was straightforward: The two lots were one "parcel" for the regulatory takings analysis. The court therefore evaluated the effect of the ordinance on the two lots considered together.

As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of [**55] the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a "taking." If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis [*525] anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance the Murrs can use Lot E as "recreational space," as the "location of any improvements," and as a valuable addition to Lot F. *Ante,* at 18. These facts could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E. *Lucas, 505 U. S., at 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798*. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. *Ante,* at 18. These facts speak to "the economic [**56] impact of the regulation," interference with "investment-backed expectations," and the "character of the governmental action"--all things we traditionally consider in the *Penn Central* analysis. *438 U. S., at 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631*.

I would be careful, however, to confine these considerations to the question whether the regulation constitutes a taking. As Alexander Hamilton explained, "the security of Property" is one of the "great object[s] of government." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). The *Takings Clause* was adopted to ensure such security by protecting property rights as they exist under state law. Deciding whether a regulation has gone so far as to constitute a "taking" of one of those property rights is, properly enough, a fact-intensive task that relies "as much on the exercise of judgment as on the application of logic." *MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)* (alterations and internal quotation marks omitted). But basing the definition of "property" on a judgment call, too, allows the government's interests to warp the private rights that the *Takings Clause* is supposed to secure.

I respectfully dissent.

Justice Thomas, dissenting.

I join THE CHIEF JUSTICE's dissent because it correctly applies this Court's regulatory takings precedents, which no [**57] party has asked us to reconsider. The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood. In *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922)*, the Court announced a "general rule" that "if regulation goes too far it will be recognized as a taking." But we have since observed that, prior to *Mahon*, "it was generally thought that the *Takings Clause* reached only a 'direct appropriation' of property, *Legal Tender Cases, 79 U.S. 457, 12 Wall. 457, 551, 20 L. Ed. 287 (1871)*, or the functional equivalent

of a 'practical ouster of [the owner's] possession,' *Transportation Co. v. Chicago, 99 U.S. 635, 642, 25 L. Ed. 336 (1879)*." *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)*. In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the *Takings Clause of the Fifth Amendment* or the *Privileges or Immunities Clause of the Fourteenth Amendment*. See generally Rappaport, Originalism and Regulatory Takings: Why [*526] the *Fifth Amendment* May Not Protect Against Regulatory Takings, but the *Fourteenth Amendment* May, *45 San Diego L. Rev. 729 (2008)* (describing the debate among scholars over those questions).

ADRIAN NILES v. HUNTINGTON CONTROLS, INC., & ANOTHER.[1]

1 Paul Milano.

No. 16-P-229.

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 15
2017 Mass. App. LEXIS 105

January 12, 2017, Argued
July 31, 2017, Decided

PRIOR HISTORY: [**1] Norfolk. CIVIL ACTION commenced in the Superior Court Department on November 22, 2013.

Motions for summary judgment were heard by *Thomas A. Connors*, J.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Practice, Civil, Summary judgment. *Labor*, Public works, Wages. *Public Works*, Wage determination. *Administrative Law*, Wage administration.

In a civil action alleging, inter alia, a violation of the prevailing wage law, *G. L. c. 149, §§ 26-27*, a Superior Court judge, in concluding that none of the work performed by the plaintiff was subject to that law, erred in failing to give appropriate deference to opinion letters issued by the Department of Labor Standards that stated that the work performed on a public construction project by a heating, ventilation, and air conditioning (HVAC) technician such as the plaintiff, who, while onsite, installs software in HVAC components and then tests those components to ensure that they operate properly, is employment "in the construction of public works" and thus is subject to the prevailing wage law.

COUNSEL: *Joseph L. Sulman* for the plaintiff.

Stephen P. Kolberg for the defendants.

JUDGES: Present: KAFKER, C.J., HANLON, & AGNES, JJ.

OPINION BY: AGNES

OPINION

AGNES, J. The Massachusetts prevailing wage law, *G. L. c. 149, §§ 26-27* (prevailing wage law), is designed "to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry." *Mullally*

v. Waste Mgmt. of Mass., Inc., 452 Mass. 526, 532 (2008). Under this law, the "rate per hour of the wages" paid to "mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works" may not be less than "the rate or rates of wages" determined by the commissioner of the Department of Labor Standards (department). *G.L. c. 149, § 26*, as amended by St. 1967, c. 296, § 3. The commissioner determines the minimum rate by preparing a classification of "the jobs [*16] usually performed on various types of public works" by "mechanics and apprentices, teamsters, chauffeurs and laborers" employed in such construction. *G.L. c. 149, § 27*, as amended by St. 1967, c. 296, § 4.[2] The commissioner is authorized to "revise such classification [**2] from time to time, as he may deem advisable." *G. L. c. 149, § 27*, as inserted by St. 1935, c. 461, § 27.

> 2 The commissioner carries out this responsibility based on data received annually from the public officials or public bodies awarding contracts for the construction of public works who must submit to the commissioner "a list of the jobs upon which mechanics and apprentices and laborers are to be employed" and who must request that the commissioner "update the determination of the rate of wages to be paid on each job." *G. L. c. 149, § 27*, as inserted by St. 2008, c. 303, § 21.

In the present case, Adrian Niles filed a four-count complaint in the Superior Court alleging a violation of the prevailing wage law (count one), breach of contract (count two), breach of the covenant of good faith and fair dealing (count three), and unjust enrichment (count four). The judge allowed a motion for summary judgment filed by the defendants, Huntington Controls, Inc., and its president, Paul Milano (collectively, Huntington), on all four counts and denied Niles's cross motion for partial summary judgment on liability under count one. Niles appealed. The sole question presented is whether the judge was correct in ruling that Huntington did not violate the prevailing wage law because none of the work performed by Niles for Huntington was subject to the prevailing wage law. We conclude that the judge erred in failing to give appropriate deference to opinion letters issued by the department that stated that the work performed by a heating, ventilation, and air conditioning (HVAC) technician such as Niles, who, while on site, installs software in HVAC components and then tests those components to [**3] ensure that they operate properly, is employment "in the construction of public works" and thus is subject to the prevailing wage law. Because it is undisputed on the record before us that at least some of the hours worked by Niles for Huntington involved such activity, it was error to deny his motion for partial summary judgment and to grant summary judgment to Huntington on count one.[3]

> 3 The plaintiff does not dispute the entry of summary judgment for Huntington on the remaining three counts.

Background. The essential facts are not in dispute. In September, 2009, Niles began working for Huntington as a non-union, [*17] full-time HVAC "controls technician."[4] For approximately three years, Niles worked primarily on two of Huntington's public construction projects: the Sharon Middle School and the Parker Elementary School. He worked approximately 3,200 hours between those projects, for which Huntington paid him thirty-four dollars per hour from September, 2009, to October, 2012, and thirty-six dollars per hour from October, 2012, to October, 2013, when he voluntarily left Huntington's employment.

> 4 The record supports the observation made by the judge below that the plaintiff's job description "changed over the course of his employment. Controls technician is not used here to indicate any type of job classification for determining whether

Niles should have been paid the prevailing wage."

Although the parties do not agree as to all the work activities that were performed by Niles as an HVAC technician, it suffices to say, as the judge below recognized, that at least some of the duties he performed [**4] were on site and included downloading programs to the HVAC system controllers and performing certain tests required to ensure the controllers worked properly. For example, Niles would use a program to turn exhaust fans on and off, in order to ensure that they operated as intended when they received the proper signals. There is evidence that occasionally he would "switch out" a malfunctioning component with one that worked.[5] It is undisputed that the majority of the hours Niles worked on the two school projects were identified by Huntington as work performed under the service code "1-003, Tech/Commissioning."[6] It is also undisputed that he performed this work on those systems after the components were installed and wired by the electricians, but before they were turned over to the customer for operation. There was evidence that another subcontractor also performed testing services after Huntington completed its work.

5 The defendants argue that any replacement of components done by the plaintiff was "unlicensed and illegal" and in contravention of Huntington's express instructions. However, Huntington does not deny that Niles did the work, and the record contains no similar objections contemporaneous with Niles's reports of doing such work that would indicate that, at the time, they felt that he should not do so. In fact, Milano testified at his deposition that while such work was not the regular work of a "control technician," Niles was "trying to get things done," which was encouraged by the defendants.

6 In order to identify the type of work being performed, Huntington uses a series of service codes on its employees' time sheets. Code "1-003, Tech/Commissioning" is defined as an employee working on "prefunctional testing." What constitutes such testing is not further defined.

At least once, prior to turning over the systems to the customer, Huntington required Niles to be on site to "go over our punch list [*18] [items] and functionally test our systems." On that occasion, he was requested by name to be on site to "go through the systems with [his supervisor]" [**5] and "to be available to correct any issues we find." From the record, it is undisputed that any system Niles worked on would not be turned over to the customer until fully tested and operational. However, this work did not comprise the totality of Niles's duties, and there is evidence that his job duties entailed work other than that described above. For example, Niles's job description, as provided by Huntington, also included duties such as "trains customers on system operations," and "works with equipment vendors to coordinate communication protocols." The record is not clear as to exactly how much of Niles's job consisted of the technician work described above, and how much was not.[7]

7 Tasks such as training customers and working with vendors are not considered work subject to the prevailing wage law. The June 11, 2008, opinion letter, discussed *infra*, states that duties such as "maintaining inventory" and "customer contacts" are "clearly not prevailing wage work." However, in assessing the issue of liability under count one, we need only conclude that the undisputed facts show that at least some of Niles's work fell under the prevailing wage law. See *Teamsters Joint Council No. 10 v. Director of the Dept. of Labor & Workforce Dev., 447 Mass. 100, 108-109, 849 N.E.2d 810 (2006)*.

Discussion. 1. *Standard of review*. We review a grant of summary judgment de novo, *Federal Natl. Mort. Assn. v. Hendricks, 463 Mass. 635, 637, 977 N.E.2d 552 (2012)*, to determine "whether, viewing the evidence in the light most favorable to the nonmoving

party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*. "The entry of summary judgment will be upheld when there are no genuine issues of material fact and the nonmoving party' has no reasonable expectation of proving an essential element of its case.'" *Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 780-781, 871 N.E.2d 1117 (2007)*, quoting from [**6] *Miller v. Mooney, 431 Mass. 57, 60, 725 N.E.2d 545 (2000)*. In deciding a motion for summary judgment the court may consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Community Natl. Bank v. Dawes, 369 Mass. 550, 553, 340 N.E.2d 877 (1976)*.

2. *The department's opinion letters*. The commissioner sets the prevailing wages based on "collective agreements or understandings in the private construction industry between organized labor and employers." *G. L. c. 149, § 26*, as amended by St. 1986, c. 665. In addition, the commissioner looks to such agreements to [*19] determine the appropriate job classifications under the prevailing wage law. *Commissioner of Labor & Indus. v. Worcester Hous. Authy., 8 Mass. App. Ct. 303, 307, 393 N.E.2d 944 (1979)*. The schedule of wage rates established by the commissioner must be attached to advertisements for bids on every public works project.[8] *Lighthouse Masonry, Inc. v. Division of Administrative Law Appeals, 466 Mass. 692, 697, 1 N.E.3d 752 (2013)*.

> 8 "Before soliciting bids for any public construction project an awarding authority must obtain a prevailing wage rate sheet from DLS [Department of Labor Standards]. Each prevailing wage rate sheet applies only to the public construction project for which it is issued. The prevailing wage rates for each construction project are in effect for [ninety] days from the date of issue. Projects not bid within [ninety] days of the issued rates will require the awarding authority to request new prevailing wage rates." A Guide to the Massachusetts Prevailing Wage Law for Contractors, http://www.mass.gov/lwd/labor-standards/prevailing-wage-program/a-guide-to-the-ma-prevailing-wage-law-for-1.html [https://perma.cc/8S9Z-J7D3].

The department, in response to inquiries, issues opinion letters stating whether certain jobs are subject to the prevailing wage law.[9] The department issued one such opinion letter on June 11, 2008, in response to an inquiry whether the prevailing wage law applied to a company's HVAC control technicians. The job description at issue stated that a controls technician was responsible for "repair and modification of environmental-control systems, utilizing knowledge of electronics, direct digital control, HVAC theory, [**7] and control applications." In relevant part, the letter stated:

> "As we understand it, after a new system has been installed, or an existing system is replaced in whole or in part, the system must undergo testing, adjusting and balancing (TAB), and commissioning (in the case of a new system) or re-commissioning (in the case of a replacement project)... .The important point seems to be that installation or replacement of a system involves much more than simply installing a 'system' and cleaning up. Such construction work is incomplete unless the owner has the assurance that the system purchased actually works as designed, and this assurance is provided by both the TAB and commissioning processes. Therefore, this agency will consider installation/replacement, TAB, and recommissioning and commissioning of an HVAC system to be all part of the same

> 'construction' work [*20] within the meaning of the statute."

That letter also discussed aspects of the job to which the prevailing wage law did not apply, such as contacting customers, attending training, and offsite work.

> 9 "Prevailing Wage Opinion Letters" dating back to 1960 are posted on the department's official Web site. See http://www.mass.gov/lwd/labor-standards/prevailing-wage-program/opinion-letters/ [https://perma.cc/AVL8-WQMQ].

Subsequently, in an August 18, 2009, opinion letter, the department further stated that job descriptions involving "the programming [**8] and downloading of software and installation and commissioning of electronic direct digital controls (DDC) for HVAC systems in buildings" fell under the prevailing wage law. Specifically referencing the June 11, 2008, opinion letter, the 2009 letter stated that "[t]here is no question that the installation of HVAC systems, including commissioning and re-commissioning and testing and balancing of the HVAC system[,] is 'construction' within the meaning of the statute and covered by the provisions of *G. L. c. 149, §§ 26, 27*." The letter went on to state that "[w]ith the exception of computer programming work performed off-site, [the Department] discern[s] no significant difference" between the work described in the inquiry before it and the work that formed the basis for the June 11, 2008, letter, and that "[i]n both scenarios, technicians use computer software to complete the final phase in the installations or replacement of an HVAC system ... . In both scenarios, the work performed by the technician is essential to the proper functioning of the HVAC system as a whole." It concluded by again stating that "the relevant question is whether the work performed on the job site falls within the scope of work that is covered by a collective [**9] bargaining agreement. This office has determined that the work of commissioning and testing and balancing of HVAC systems, including the work performed ... as described in your letter, is covered by a collective bargaining agreement."

The judge below noted that Niles "failed to support his contentions that his work constitutes prevailing wage work by pointing to facts in the record." Specifically, the judge noted that "[t]he work that [Niles] performs does not fit under 'construction' as defined by the prevailing wage law," because "[his] work as a controls technician does not fall under any of the relevant CBAs [collective bargaining agreements], and therefore cannot be prevailing wage work."[10]

> 10 In its August 18, 2009, opinion letter, in reference to the work performed by an HVAC technician, the department stated, "This office has determined that the work of commissioning and testing and balancing of HVAC systems ... is covered by a collective bargaining agreement. The proper classification is either *Pipefitter* or *HVAC mechanic*, which are the same rate of pay" (emphasis in original).

[*21] The judge was correct in pointing out that the opinion letters relied upon by Niles, unlike regulations adopted under the State Administrative Procedure Act, *G.L. c. 30A, § 15*, do not have the same "force of law" as a statute. *Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 497, 930 N.E.2d 1262 (2010)*. See *Construction Indus. of Mass. v. Commissioner of Labor & Indus., 406 Mass. 162, 170-171, 546 N.E.2d 367 (1989)* (wage rates set by commissioner are specific to each job and are not regulations). However, the judge erred in disregarding the letters. Instead the judge emphasized that "Niles never brought a request to the Department of Labor to establish new job classifications, [**10] nor did the commissioner make a determination regarding Niles's work. Furthermore, it is undisputed that neither party requested an EOLWD [Executive Office of Labor and Workforce Development] letter in regard to Niles['s] job classification." The judge

overlooked the fact that Niles, as an employee, is not authorized to request that the commissioner establish a new job classification. See *G.L. c. 149, § 27*.[11] Further, an employee such as Niles, unlike Huntington, is not authorized to appeal "a wage determination, or a classification of employment ... made by the commissioner. ..." *G.L. c. 149, § 27A*, as appearing in St. 1987, c. 544, § 2.

> 11 *General Laws c. 149, § 27*, provides in relevant part as follows: "Prior to awarding a contract for the construction of public works, said public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices, teamsters, chauffeurs and laborers are to be employed, and shall request the commissioner to determine the rate of wages to be paid on each job. Each year after the awarding of the contract, the public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices and laborers are to be employed and shall request that the commissioner update the determination of the rate of wages to be paid on each job."

Courts customarily defer to an administrative agency's interpretation of its governing statute unless that interpretation is inconsistent with the statute or it purpose. See *Mullally, 452 Mass. at 533* (Department of Labor's opinion letter that defendant violated prevailing wage law entitled to deference because it was not contrary to "plain language of the statutes or their underlying purposes"). See also *Swift v. AutoZone, Inc., 441 Mass. 443, 450, 806 N.E.2d 95 (2004)*, quoting from *Massachusetts Hosp. Assn. v. Department of Med. Sec., 412 Mass. 340, 345-346, 588 N.E.2d 679 (1992)* ("In general, we [*22] grant substantial deference to an interpretation of a statute by the administrative agency charged with its administration"); *Teamsters Joint Council No. 10 v. Director of the Dept. of Labor & Workforce Dev. 447 Mass. 100, 109-110, 849 N.E.2d 810 (2006)* (deputy director's interpretation of prevailing [**11] wage law entitled to deference because Legislature delegated decision-making authority to department). In view of the Legislature's broad delegation to the commissioner of "the details of how the prevailing wage law should be applied," *Teamsters Joint Council No. 10, supra at 109*, we conclude that the judge erred in failing to give deference to the department's opinion letters.[12]

> 12 The cited opinion letters were written prior to the litigation involved in this case. Thus, this is not a case in which the force and effect of opinion letters under the prevailing wage law may be affected by the connection between the request for such letters and litigation that is pending at the time. See *Lighthouse Masonry, Inc., 466 Mass. at 697*.

3. *Scope of "construction" work under G.L. c. 149, § 27*. For purposes of the prevailing wage law, the term "construction" includes "additions to or alterations of public works." *G.L. c. 149, § 27D*.[13] The Supreme Judicial Court has observed that although "[t]he word 'construction' in *§ 26* is ambiguous standing alone," *§ 27D* contains an expanded definition of the term that indicates that "the Legislature has not taken a narrow view of additions and alterations ... ." *Felix A. Marino Co. v. Commissioner of Labor & Indus., 426 Mass. 458, 461, 689 N.E.2d 495 (1998)*. See *Perlera v. Vining Disposal Serv., Inc., 47 Mass. App. Ct. 491, 493-494, 713 N.E.2d 1017 (1999)* (meaning of term used in a statute may expand or contract depending on context). The Supreme Judicial Court also indicated that when it is "fairly debatable" whether the work performed by an employee falls within the scope of the prevailing wage law, the interpretive rulings made by the State agency charged with administration of the law should be respected. *Felix A. Marino Co., supra.*

13 *General Laws c. 149, § 27D*, as appearing in St. 1961, c. 475, § 2, reads as follows: "Wherever used in *sections twenty-six to twenty-seven* C, inclusive, the words 'construction' and 'constructed' as applied to public buildings and public works shall include additions to and alterations of public works, the installation of resilient flooring in, and the painting of, public buildings and public works; certain work done preliminary to the construction of public works, namely, soil explorations, test borings and demolition of structures incidental to site clearance and right of way clearance; and the demolition of any building or other structure ordered by a public authority for the preservation of public health or public safety."

[*23] The two opinion [**12] letters[14] cited by Niles and discussed above indicate that the testing of HVAC systems following their installation to ensure they operate as intended is "construction" work as that term appears in the statute. For example, the opinion letter dated June 11, 2008, identifies job descriptions that are "clearly not prevailing wage work," such as providing "sales leads to personnel," "maintaining files," as well as "maintaining inventory, customer contacts, [and] communications with ... management staff." This letter further states that "work that is performed off-site, such as training sessions at factory locations and off-site computer work," is not work that is covered by the prevailing wage law. However, the department concluded that "the position description also includes work that would require payment of prevailing wage." This letter also quotes an earlier opinion letter, dated August 24, 2005, which, in turn, states that "end-to-end testing, downloading programming, starting up, and commissioning on assigned projects" by a technician may qualify as work subject to the prevailing wage law. Of particular significance is this observation: "[I]nstallation or replacement of a system involves much more [**13] than simply installing a 'system' and cleaning up. Such construction work is incomplete unless the owner has the assurance that the system purchased actually works as designed." The May 18, 2009, opinion letter reiterates the points made in the June 11, 2008, opinion letter and concludes that "programming and downloading of software and installation and commissioning of electronic direct digital controls (DDC) for HVAC systems in buildings," when performed on site, is "construction" within the meaning of the prevailing wage law.

14 The record also contains a third opinion letter dated December 8, 2009, which stated that "post-commissioning writing of computer code to integrate HVAC systems with servers and computers" was not work covered by the prevailing wage law, but reiterated that "testing, adjusting and balancing (TAB) [and] commissioning ... to ensure the proper operation of the HVAC systems is covered by the prevailing wage law."

In reviewing the record, the judge correctly noted that there was no dispute that some of the work performed by Niles "involved downloading a program into every HVAC controller and verifying that those programs are working properly." However, because the work performed by Niles took place after a licensed electrician had installed the wiring, the judge erroneously concluded that it was "post in stallation" work and for that reason was not work that qualified as "construction" work within the [*24] meaning of the prevailing wage law. Here, the judge disregarded the guidance supplied by the two opinion letters, and erred by categorically excluding, from the definition [**14] of "construction," work that took place after the physical components of the system had been installed and wired. Whether such work is regarded as installation or post in stallation work is beside the point. The department is clear in its opinion letters that work performed on site after the initial installation is completed may constitute "construction" work for the purposes of the prevailing wage law. These opinions reflect the fact that many

of the components and systems used in the construction of public works projects, such as HVAC systems, depend on microprocessors to function properly, and that these microprocessors are tested by means of handheld computers and software applications as opposed to more traditional tools. The fact that another subcontractor known as an HVAC mechanical subcontractor also tests the system after Niles completes his work does not affect whether Niles was engaged in construction activity on behalf of Huntington. The judge, therefore, erred as a matter of law in ruling that the work performed by Niles in downloading software into every HVAC controller and verifying that those programs worked properly was not covered by the prevailing wage law.

4. *Establishing* [**15] *a job classification and pay rate for an HVAC technician*. It is undisputed that the work performed by Niles did not all come within the job classifications for licensed electricians or pipefitters that appear in the relevant collective bargaining agreements. Niles is not a licensed electrician. Furthermore, as the judge noted, there is no dispute that the work performed by Niles did not involve the installation of the physical components of the HVAC system, which was handled by licensed electricians, or the handling and installation of tubing and sheet metal as performed by pipefitters. However, the department's two opinion letters that are before us address this question as well. The department states, in its August 18, 2009, letter, that "the relevant question is whether the work performed on the job site falls within the scope of work that is covered by a collective bargaining agreement." In its June 11, 2008, letter the department states that "the collective bargaining agreements with the pipefitters union cover the commissioning of HVAC systems as described. Union pipefitters perform HVAC commissioning on job sites in Massachusetts, and are trained in commissioning processes through [**16] their apprentice training program. Therefore, the proper [*25] job classification for commissioning work is pipefitter or HVAC Mechanic, which are the same pay rate." In both opinion letters, the commissioner determined that the scope of work described in the letters--work similar to the work performed by the plaintiff--was covered by a collective bargaining agreement. This is consistent with the corresponding job description for union pipefitters in the record before us.[15]

15 The pipefitters 'collective bargaining agreement, included in the parties' joint appendix to their statement of material facts, states that the "Union is the sole collective bargaining agency for Journeymen, and Apprentices, performing the work of erecting, installing, joining together, dismantling, adjusting, altering, repairing, maintaining and servicing any and all types of heating ... and air conditioning systems." That agreement goes on to state that the "Work of the Pipefitters" includes "[o]perational tests of each system and of components of that system. Verification of performance, operating instructions, final operation."

Conclusion. For the reasons stated above, the judge erred in allowing Huntington's motion for summary judgment on count one and in denying Niles's motion for partial summary judgment as to liability on count one. We hold that the work performed by an HVAC technician such as Niles who, while on site, downloads and installs software into HVAC components and then tests those components to ensure that they operate properly is employment "in the construction of public works" and thus is subject to the prevailing wage law. Consequently, the judge should have allowed Niles's motion for partial summary judgment as to count one. Because there are material facts in dispute as to the number of hours Niles performed "construction" work, [**17] as opposed to other kinds of work for Huntington, the case must be remanded to the Superior Court.

Insofar as the judgment dismisses count one, it is vacated, and the case is remanded for entry of an order allowing the plaintiff's motion for partial summary judgment as to liability on count one and for further proceedings on count one consistent with this opinion. In all remaining respects the judgment is affirmed.

So ordered.

PARTRIDGE LANE UNIT OWNERS' TRUST v. LISA PEACHEY[1] & OTHERS.[2]

1 Also known as Lisa Flanagan.

2 Shaun J. Flanagan. In addition, the amended complaint named Citibank, National Association, successor to Citicorp Trust Bank, FSB; Department of Housing and Community Development; and town of Lynnfield as "parties in interest."

16-P-1037

APPEALS COURT OF MASSACHUSETTS

91 Mass. App. Ct. 1123
2017 Mass. App. Unpub. LEXIS 527

May 22, 2017, Entered

JUDGES: Meade, Hanlon & Maldonado, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case involves unit 4-3 of the Town Homes at Partridge Lane Condominium, a twenty-four unit condominium in the town of Lynnfield. The Partridge Lane Unit Owners' Trust (Partridge Lane) filed an action against the owners of unit 4-3, Lisa Peachey, also known as Lisa Flanagan, and Shaun J. Flanagan (collectively, Flanagans).[3] Partridge Lane sought a declaratory judgment that unit 4-3 was subject to affordable housing restrictions along with other equitable remedies. Citibank, National Association, successor to Citicorp Trust Bank, FSB (Citibank), the Department of Housing and Community Development (DHCD), and the town of Lynnfield (town) were joined as interested parties.

3 When necessary, we refer to them by their first names to avoid confusion.

The Superior Court judge denied Citibank's motion for summary judgment and

granted summary judgment for Partridge Lane, the DHCD, and the town. Citibank appealed. For the following reasons, we reverse the judgment and order the entry of judgment in favor of Citibank.

Background. We summarize the undisputed facts that are material to this appeal. In 1994, the master deed for the Town Homes at Partridge Lane Condominium (master deed) and a regulatory agreement [*2] were recorded with the registry of deeds. The regulatory agreement stated that six of the twenty-four Partridge Lane units (three two-bedroom units and three three-bedroom units) are designated "Low and Moderate Income Units." Buyers and sellers of low and moderate income units are required to comply with certain requirements, including a maximum sale price of $84,000 for three-bedroom units. According to the terms of the regulatory agreement, "the Project Sponsor shall execute and shall as a condition of sale cause the purchaser of the Low and Moderate Income Unit to execute a Deed Rider in the form of Exhibit C attached hereto." Neither the regulatory agreement nor the master deed specify which particular units are designated low and moderate income units. Five of the Partridge Lane units have recorded deed riders, identifying those units as low and moderate income units.

The Flanagans purchased unit 4-3 at Partridge Lane, a three-bedroom unit, in 1995 for $84,000. The condominium unit deed, recorded in the registry of deeds, did not include a deed rider identifying unit 4-3 as a low and moderate income unit. The Flanagans took out a series of mortgages on unit 4-3. In 2008, the Flanagans [*3] granted a mortgage in the amount of $237,498.47 on unit 4-3 to Citibank. The other mortgages have since been discharged.

The town and the DHCD contend that unit 4-3 is a low and moderate income unit.[4] In 2012, after learning that the Flanagans were attempting to sell the unit for a price greater than the affordable rate, Partridge Lane filed an equitable action seeking a declaration that unit 4-3 was subject to the affordable housing restrictions. Partridge Lane also sought to reform the deed to reflect that unit 4-3 was a low and moderate income unit, to enjoin the sale of unit 4-3 as a nonaffordable unit, to impose a constructive trust on any sale proceeds above the maximum affordable price, and to record a notice of lis pendens in the registry of deeds. Citibank filed "counterclaims and crossclaims" seeking a "declaratory judgment as to all parties" that its mortgage is valid and fully enforceable, and that unit 4-3 is not subject to the affordable housing restrictions.[5]

4 Partridge Lane and the Flanagans have not participated in this appeal.

5 The remaining counts of Citibank's counterclaim against Partridge Lane have been dismissed and are not at issue in this appeal. Citibank also filed a cross claim against the Flanagans, alleging negligent misrepresentation and intentional misrepresentation. Only Shaun filed an answer to the cross claim; Lisa did not file a response. It appears that the cross claim is still pending; the judgment was not entered pursuant to *Mass.R.Civ.P. 54(b)*, 365 Mass. 820 (1974). In light of our conclusion that unit 4-3 is not subject to the affordable housing restriction, the cross claim has no reasonable chance of success.

The parties filed cross motions for summary judgment. Citibank contends that at the time the Flanagans granted it a mortgage on unit 4-3, nothing in the chain of title indicated that the unit was subject to an affordable [*4] housing restriction; therefore, argues Citibank, it lacked actual or constructive notice of the deed restriction. The DHCD and the town contend that Citibank had constructive notice of the affordable housing restriction. The judge granted summary judgment in favor of Partridge Lane, the DHCD, and the town, as well as the equitable relief sought in Partridge Lane's amended complaint. Citibank appeals.

Discussion. Summary judgment is appropriate where "all material facts have been established and the moving party is

entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*. This court reviews the grant of a motion for summary judgment de novo. *Federal Natl. Mort. Assn. v. Hendricks, 463 Mass. 635, 637, 977 N.E.2d 552 (2012)*. "In an action with cross motions for summary judgment, we ask whether the evidence, in the light most favorable to the party losing the contest of cross motions, and the controlling law entitle the prevailing party to judgment." *Verrill Farms, LLC v. Farm Family Cas. Ins. Co., 86 Mass. App. Ct. 577, 579 n.2, 18 N.E.3d 1125 (2014)* (quotation omitted).

Standing. As a threshold issue, the DHCD contends that Citibank lacks standing to bring this appeal because on June 19, 2013, Citibank assigned the mortgage to CitiMortgage, Inc., which is not a party to this action. Citibank, however, holds the note secured by the mortgage. Under Massachusetts law, a mortgage [*5] and note may be split and the party holding the mortgage will become an equitable trustee for the note holder. See *Eaton v. Federal Natl. Mort. Assn., 462 Mass. 569, 578, 969 N.E.2d 1118 (2012)*. Because Citibank, as the note holder, has "a definite interest in the matters in contention in the sense that [its] rights will be significantly affected by a resolution of the point," *Bonan v. Boston, 398 Mass. 315, 320, 496 N.E.2d 640 (1986)*, Citibank has standing to pursue this appeal.

Actual notice. The DHCD now contends that there is a factual dispute as to whether Citibank had actual notice of the encumbrance based on representations made by the Flanagans to Citibank. "Actual notice is a question of fact." *McCarthy v. Lane, 301 Mass. 125, 128, 16 N.E.2d 683 (1938)*. The DHCD relies on Shaun's answer to Citibank's cross claim for negligent misrepresentation, in which Shaun denies Citibank's allegation that he failed to advise Citibank of the affordable housing restriction. See note 5, *supra*. An answer to a complaint merely denying allegations is insufficient to raise a genuine issue of material fact. *LaLonde v. Eissner, 405 Mass. 207, 209, 539 N.E.2d 538 (1989)* ("the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment"). We therefore conclude that on the record presented there were no material facts in dispute.

Constructive notice. An affordable housing restriction [*6] may either be "duly recorded and indexed in the grantor index in the registry of deeds or registered in the registry district of the land court for the county or district wherein the land lies." *G. L. c. 184, § 26*, as amended by St. 1990, c. 520, § 2. Where a property is recorded, as in this case, "[a] buyer of real estate cannot be charged with constructive notice of an equitable restriction unless he can find it recorded somewhere in his chain of title." *Stewart v. Alpert, 262 Mass. 34, 38, 159 N.E. 503 (1928)*. See *McCusker v. Goode, 185 Mass. 607, 611, 71 N.E. 76 (1904)* ("It is the policy of our law in regard to the recording of deeds, that persons desiring to buy may safely trust the record as to the ownership of land, and as to encumbrances upon it which are created by deed"); *Tosney v. Chelmsford Village Condominium Assn., 397 Mass. 683, 687-688, 493 N.E.2d 488 (1986)* (condominium unit owners have constructive notice of documents recorded with master deed). Accordingly, as a matter of law, Citibank lacked constructive notice of the affordable housing restriction.

Here, no recorded document, including the master deed or regulatory agreement, provided that unit 4-3 was subject to any affordable housing restriction. Moreover, the master deed and the regulatory agreement stated that any units subject to the restriction "shall" have a recorded deed rider.[6] Unit 4-3 had no such recorded deed rider. Contrary [*7] to the DHCD's contention, Citibank could not have inferred from unit 4-3's initial $84,000 purchase price alone that the unit was subject to an affordable housing restriction. Nor was it required to look to the original purchase price.

6 The town directs our attention to an affidavit, submitted by James E. Tamagini, a conveyancer and title examiner, who offered his opinion that Citibank had constructive notice that unit 4-3 "could be subject to an affordable housing restriction." A title examiner's affidavit may explain "standard title examination practices." *Dalessio v. Baggia, 57 Mass. App. Ct. 468, 472, 783 N.E.2d 890 (2003)*. However, "[l]ay and expert witnesses are precluded from giving an opinion, for the most part, that involves a conclusion of law or in regard to a mixed question of fact and law." *Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 137, 775 N.E.2d 770 (2002)*. In determining whether, as a matter of law, Citibank had constructive notice of the affordable housing restriction we do not consider this affidavit.

The DHCD also relies on *Guillette v. Daly Dry Wall, Inc., 367 Mass. 355, 359, 325 N.E.2d 572 (1975)*, for the proposition that Citibank had constructive notice of "any deed given by a grantor in the chain of title during the time he owned the premises in question," which would presumably alert Citibank that only five of the condominium units had deed riders. That case is inapposite because it relates to a "common scheme" where each grantee "is an intended beneficiary of the restrictions and may enforce them against the others." *Id. at 358*. In this case, where only six of the twenty-four condominium units are subject to an affordable housing restriction, there is no "common scheme." A prospective buyer need not "hunt for obligations," or study encumbrances in other properties in order to divulge a "pattern." *Popponesset Beach Assn. v. Marchillo, 39 Mass. App. Ct. 586, 589, 658 N.E.2d 983 (1996)*.[7]

7 Although *Popponesset Beach Assn. v. Marchillo* involved registered property, as opposed to recorded property, the same principle applies. See *McCusker v. Goode, supra.*

Where neither the unit 4-3 deed, the master deed, nor the regulatory agreement identified the encumbrance, Citibank lacked constructive notice of the affordable housing restriction. [*8] There is no genuine dispute of material fact preventing the case from being resolved on the summary judgment record. Accordingly, we reverse the judgment and order the entry of a new judgment in favor of Citibank.[8]

8 We need not address Citibank's contention that Partridge Lane, DHCD, and the town are not entitled to equitable relief because of their failure to attempt to enforce the affordable housing restriction sooner.

So ordered.

By the Court (Meade, Hanlon & Maldonado, JJ.[9]),

9 The panelists are listed in order of seniority.

Entered: May 22, 2017.

SARAH QUIGLEY & OTHERS[1] v. CITY OF NEWTON

1 Eleven other taxable inhabitants of Newton.

16-P-425.

APPEALS COURT OF MASSACHUSETTS

90 Mass. App. Ct. 1121*; *65 N.E.3d 670
2016 Mass. App. Unpub. LEXIS 1212

December 19, 2016, Entered

SUBSEQUENT HISTORY: Appeal denied by *Quigley v. City of Newton, 476 Mass. 1113, (Mass., Mar. 6, 2017)*

DISPOSITION: Judgment affirmed.

JUDGES: Sullivan, Maldonado & Neyman, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, twelve residents of Newton, appeal from entry of judgment following the allowance of Newton's motion to dismiss. See *Mass.R.Civ.P. 12(b)(1)* and *(6)*, 365 Mass. 754 (1974). The plaintiffs contend that the judge erred in determining they have no standing under the ten taxpayer statute. See *G. L. c. 40, § 53*. We affirm.

Background. The plaintiffs challenged Newton's selection of Austin Street Partners (ASP) for a mixed-use redevelopment of a parking lot in the Newtonville section of the city, claiming that Newton's actions violated the Uniform Procurement Act. See *G. L. c. 30B, § 16*. In allowing Newton's motion to dismiss, the judge ruled that the plaintiffs did not demonstrate standing under *G. L. c. 40, § 53*, which permits actions to be brought by at least ten taxpayers when a city is "about to raise or expend money or incur obligations" for an illegal purpose.[2]

> 2 The ten taxpayer statute, *G. L. c. 40, § 53*, as appearing in St. 1969, c. 507, states in pertinent part:
>
> > "If a town ... or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town . . . for any purpose or object or in any manner other than that for and in which such town ... has the legal and constitutional right and power to raise or expend money or incur obligations, [*2] the supreme judicial or superior court may, upon petition of not less than ten taxable inhabitants of the town ... restrain the unlawful exercise or abuse of such corporate power."

Discussion. 1. *Standard of review*. "We review the allowance of a motion to dismiss de novo." *Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676, 940 N.E.2d 413 (2011)*. "Factual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Iannacchino v. Ford Motor Co., 451 Mass. 623, 636, 888 N.E.2d 879 (2008)*, quoting from *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "[W]e examine the

sufficiency of the plaintiff's claims in light of the principles that the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true." *Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407, 649 N.E.2d 1102 (1995)*.[3]

3 On a motion to dismiss, we may consider documents which were attached to and made part of the pleadings. *Schaer v. Brandeis Univ., 432 Mass. 474, 477, 735 N.E.2d 373 (2000)*. However, "[w]e cannot base our decision on facts not contained in the record." *Love v. Massachusetts Parole Bd., 413 Mass. 766, 768, 604 N.E.2d 28 (1992)*. The plaintiffs have attempted to include in the record materials which were not appended to the pleadings and were not presented to the motion judge, as well as documents which came into existence after the case was decided in the trial court. None of these documents may be considered on appeal. *Ibid.*

2. *Standing*. "There is no general jurisdiction in equity in this commonwealth 'to entertain a suit by individual taxpayers to restrain cities and towns from carrying out invalid contracts, and performing other similar wrongful acts.'" *Fuller v. Trustees of Deerfield Academy & Dickinson High Sch., 252 Mass. 258, 259, 147 N.E. 878 (1925)*, quoting from *Steele v. Municipal Signal Co., 160 Mass. 36, 38, 35 N.E. 105 (1893)*. The ten taxpayer statute serves as "a vehicle whereby concerned taxpayers may enforce laws relating to the expenditure of their tax money by local officials." *Edwards v. Boston, 408 Mass. 643, 646, 562 N.E.2d 834 (1990)*. "[A] petition by taxpayers may be maintained only when it is brought within the provisions of the statute." *Richards v. Treasurer & Recr. Gen., 319 Mass. 672, 675, 67 N.E.2d 583 (1946)*.[4]

4 For this reason, we reject the plaintiffs' contention that there is an implied cause of action under the Uniform Procurement Act. Not only are taxpayer suits highly circumscribed, but the Uniform Procurement Act contains no language conferring a private right of action. See generally *Tyler v. Michaels Stores, Inc., 464 Mass. 492, 505, 984 N.E.2d 737 (2013)* (a statute must be interpreted in accordance with its plain meaning).

The plaintiffs assert that Newton's ninety-nine [*3] year lease of the parking lot constitutes raising money, because ASP would pay rent and make contributions toward infrastructure improvements for the purposes of the redevelopment project. "The words 'to raise money' as applied to a municipality commonly means to raise by taxation." *Dowling v. Assessors of Boston, 268 Mass. 480, 484, 168 N.E. 73 (1929)*. The preliminary term sheet reached between Newton and ASP in May, 2015, attached to plaintiffs' complaint, offers no suggestion that the money to be received by Newton impacts the plaintiffs as taxpayers in any way.

The limited application of the term "raising money" in *G. L. c. 40, § 53*, was underscored in *Pratt v. Boston, 396 Mass. 37, 483 N.E.2d 812 (1985)*. There, the city and a cultural nonprofit entered into contracts over the latter's sponsorship of a concert series on the Boston Common. *Pratt, supra at 40*. The city received $135,000 as a payment under the sponsorship agreement. *Id. at 41*. The court held that this did not constitute raising money because the conduct in question was not a form of taxation. *Id. at 44*. Similarly, Newton is expected to receive over $1 million in rent from ASP, as well as contributions for infrastructure development, but nothing in the pleadings suggests that Newton is "about to raise ... money" by taxation. *G. L. c. 40, § 53*.

The plaintiffs contend that Newton is "about [*4] to ... expend money" within the meaning of *G. L. c. 40, § 53*, because Newton will incur infrastructure improvement costs related to the redevelopment. These costs include underground wiring, water and sewer improvements, and contingent liabilities such as environmental clean-up costs and traffic-related mitigation.

In order to warrant relief under *G. L. c. 40, § 53*, "there must be allegations of actual vote to raise or to pay money or to pledge credit for an illegal purpose." *Fuller, 252 Mass. at 260*. See *Richards, 319 Mass. at 677* (challengers "must show such a relation between themselves and the proposed expenditure or incurring of obligations that their pecuniary interests will be adversely affected unless the contemplated action is enjoined"). There are no allegations to this effect in the complaint. One of the attachments to the complaint states that the city will meet with the developer to determine infrastructure costs and determine cost sharing as between Newton, the developer, and third parties. Reimbursed expenditures do not provide a basis for standing under *§ 53*. See *Richards, supra.* There is no concrete allegation that unreimbursed contingent expenditures, if any, will have a negative impact on the pecuniary interests of the taxpayers. See *Fuller, supra* (" [*5] [T]here must be allegations of actual vote to raise or to pay money or to pledge credit for an illegal purpose. A well grounded expectation of such conduct is not enough to confer jurisdiction under the statute").

The complaint failed to allege facts sufficient to establish standing, and was therefore properly dismissed. See *Iannacchino, 451 Mass. at 636*.

Judgment affirmed.

By the Court (Sullivan, Maldonado & Neyman, JJ.[5]),

5 The panelists are listed in order of seniority.

Entered: December 19, 2016.

RETIREMENT BOARD OF STONEHAM v. CONTRIBUTORY RETIREMENT APPEAL BOARD & ANOTHER.[1]

1 Christine DeFelice.

SJC-12098.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

476 Mass. 130*; *65 N.E.3d 650
2016 Mass. LEXIS 945

October 5, 2016, Argued
December 22, 2016, Decided

PRIOR HISTORY: [***1] Middlesex. CIVIL ACTION commenced in the Superior Court Department on February 6, 2014.

The case was heard by *Robert L. Ullmann*, J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Stoneham Ret. Bd. v. Contributory Ret. Appeal Bd., 2015 Mass. Super. LEXIS 61 (Mass. Super. Ct., 2015)

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Retirement. *Municipal Corporations*, Retirement board. *Public Employment*, Retirement. *Contributory Retirement Appeal Board*.

A town's retirement board lacked discretion to terminate a part-time school department employee's membership in the

town's retirement system when the employee ceased to satisfy the board's eligibility requirements after the board had granted her membership, where the jurisdiction granted to the board in *G. L. c. 32, § 3 (2) (d)*, to set initial eligibility criteria for employees who are not full-time employees did not include the ability to revoke the membership of such employees once granted, given that *G. L. c. 32, § 3 (1) (a) (i)*, specifies the circumstances pursuant to which membership can be terminated ; further, the employee was not "removed" from service within the meaning of *§ 3 (1) (a) (i)* when she stopped working a second job in the school department, where the employee remained in service in the school department even after she stopped working that second job.

COUNSEL: *Douglas S. Martland*, Assistant Attorney General, for Contributory Retirement Appeal Board.

Thomas F. Gibson for Christine DeFelice.

Michael Sacco for the plaintiff.

JUDGES: Present: GANTS, C.J., BOTSFORD, LENK, HINES, GAZIANO, LOWY, & BUDD, JJ.

OPINION BY: LOWY

OPINION

[**652] LOWY, J. This case requires us to answer two questions: (1) whether a municipal retirement board possesses absolute discretion to terminate a part-time employee's membership in a retirement system to which that board has granted the employee membership; and (2) even if such a board does not have the power to terminate a part-time employee's membership, whether a "separation [*131] from [an employee's] service" under *G. L. c. 32, § 3 (1) (a) (i)*, occurs when a part-time employee working two jobs for the same municipal employer ceases to work only one of those jobs. We answer both questions in the negative and reverse the judgment of [***2] the Superior Court.

Background. Christine DeFelice began working on a part-time basis for the Stoneham school department (department) in November, 2000. In April, 2001, she took on a second part-time job with the department to fill a temporary vacancy, increasing her weekly workload from nineteen and one-half hours per week to over thirty hours per week for the ensuing nine weeks. At the end of the nine-week period, DeFelice continued to work for the department on a part-time basis until at least June, 2009, only occasionally working more than nineteen and one-half hours per week.[2]

> 2 It is not clear when DeFelice's employment with the department ended. At oral argument, DeFelice's counsel indicated that DeFelice was no longer employed with the department. The last date of employment clearly referred to by the Division of Administrative Law Appeals is June 4, 2009. Because of the result we reach in this case, the date her employment with the department ended is not material.

In 2009, DeFelice sought retroactive membership in the Stoneham retirement system as an employee of the department, based on the nine-week period in 2001 during which she worked over thirty hours per week. Under the membership eligibility criteria for part-time employees established by the Stoneham retirement board (board) that were in effect during 2001, Stoneham employees were eligible for membership in the retirement system if they were scheduled to work more than thirty hours per week for a period of more than seven days.[3] Initially, the board denied DeFelice's membership application, because her increase [***3] in hours was temporary. In August, 2010, the board reconsidered its position and granted DeFelice retroactive membership in the Stoneham retirement system for the nine-week period in the spring of 2001, but denied her membership for the subsequent time during which she remained a part-time

employee of the department. The board concluded that DeFelice was not eligible following the nine-week period because her weekly hours did not continue to satisfy the criteria.

3 The board has since changed its eligibility requirements so that, as of April, 2010, non-full-time employees must be "permanently employed" for at least twenty hours per week and earn at least $5,000 annually in order to qualify for membership.

DeFelice appealed from the board's determination, seeking mem- [*132] bership for the years she continued to work for the department as a part-time employee.[4] The Contributory Retirement Appeal Board (CRAB) assigned the case to the division [**653] of administrative law appeals (DALA). DALA determined that, once the board granted DeFelice membership, it could not unilaterally terminate her membership status. DALA concluded that the statute governing membership in a public retirement system precluded the board, in the absence of statutorily specified exceptions, from terminating the membership of individuals who had been granted membership and continued working for the same municipal employer. The board objected, arguing that it possessed authority [***4] to terminate the membership of non-full-time employees who failed to satisfy its membership criteria. CRAB adopted DALA's factual findings and affirmed its decision. The board sought review pursuant to *G. L. c. 30A, § 14*. A judge in the Superior Court reversed CRAB's decision, and DeFelice appealed. We transferred the case here by our own motion, and now reverse the judgment of the Superior Court.

4 The parties acknowledged during oral argument that DeFelice's benefit, upon her retirement, would be proportional to the service she provided as a part-time employee.

Statutory scheme. Massachusetts law permits a municipality to establish a contributory retirement system for the municipality's employees. See *G. L. c. 32, § 20 (4)*. The law further provides for the establishment of municipal retirement boards to manage the retirement systems in a manner consistent with applicable laws. *G. L. c. 32, § 20 (4) (b), (5) (b)*. Municipal retirement boards have the power to make rules and regulations "consistent with law," subject to approval by the public employee retirement administration commission. *G. L. c. 32, § 20 (5) (b)*.

General Laws c. 32, § 3 (2), sets forth various criteria that establish "eligibility" for membership in a retirement system. For example, individuals who are "employees," and therefore "regularly employed,"[5] are generally eligible for membership. *G. L. c. 32, § 3 (2) (a) (x)*. However, municipal retirement boards [*133] possess "full jurisdiction" to determine the eligibility [***5] of "part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service of any employee in any governmental unit."[6] *G. L. c. 32, § 3 (2) (d)*.

5 An "employee," as applicable to this case, is a person "who is regularly employed in the service of," and "whose regular compensation ... is paid by," the Commonwealth or a political subdivision of the Commonwealth. *G. L. c. 32, § 1*. See *Retirement Bd. of Concord v. Colleran, 34 Mass. App. Ct. 486, 489, 612 N.E.2d 1192 (1993)* (town employee was "regularly employed" during three-year period in which she continuously worked three hours per day). The board does not dispute that DeFelice was regularly employed throughout her employment with the department.

6 In this opinion, we refer to such employees as "non-full-time employees," and employees falling outside of the scope of this provision as "full-time employees."

Satisfying the eligibility criteria for membership does not automatically confer membership upon an employee. See *G. L. c.*

32, § 1 (defining "member" as "any employee *included in*" retirement system [emphasis added]). See also *Manning v. Contributory Retirement Appeal Bd., 29 Mass. App. Ct. 253, 255, 559 N.E.2d 630 (1990)* (non-full-time employee was not member of retirement system in absence of determination by pertinent retirement board). Relevant to this case, an employee who is eligible to become a member, but who fails or chooses not to do so, "may apply for and be admitted to membership if [the employee is] under the maximum [entry] age for [the employee's] group on the date of [the employee's] application; provided, that during [the employee's] *present period of service* [the employee] had previously been eligible for membership" (emphasis added). *G. L. c. 32, § 3 (3)*. In other words, the employee must have [**654] continued working for the same municipal employer between the time the employee became eligible for membership and the time the employee submitted the late application for membership.

Once an eligible employee is included in a city or town's retirement [***6] system, that employee becomes a "member" of the system. *G. L. c. 32, § 1*. There are two types of membership: "member in service" and "member inactive." *G. L. c. 32, § 3 (1) (a)*. A member in service, the only membership type relevant in this case, is "[a]ny member who is regularly employed in the performance of [the member's] duties." *G. L. c. 32, § 3 (1) (a) (i)*. Once designated a member in service, the member remains a member in service "until [the member's] death or until [the member's] prior separation from the service becomes effective by reason of [the member's] retirement, resignation, ... removal or discharge from [the member's] office," or another statutorily specified circumstance.[7] *Id.*

> 7 The remaining statutory circumstances include effective prior separation from the member's service by reason of "failure of re-election or reappointment ... or by reason of an authorized leave of absence without pay other than as provided for in this clause." *G. L. c. 32, § 3 (1) (a) (i)*.

[*134] *Standard of review*. Because this case involves the meaning of *G. L. c. 32, § 3*, a pure question of law, we exercise de novo review of CRAB's interpretation. *Rotondi v. Contributory Retirement Appeal Bd., 463 Mass. 644, 648, 977 N.E.2d 1042 (2012)*. See *Rosing v. Teachers' Retirement Sys., 458 Mass. 283, 290, 936 N.E.2d 875 (2010)*. Still, in reviewing CRAB's decisions, courts "typically defer to CRAB's expertise and accord '"great weight" to [its] interpretation and application of the statutory provisions it is charged with administering'" (citation omitted).[8] *Weston v. Contributory Retirement Appeal Bd., 76 Mass. App. Ct. 475, 479, 923 N.E.2d 110 (2010)*. "We ... will reverse only if [CRAB's] decision was based on an erroneous interpretation of law or is unsupported by substantial evidence." *Foresta v. Contributory Retirement Appeal Bd., 453 Mass. 669, 676, 904 N.E.2d 755 (2009)*. See *G. L. c. 30A, § 14 (7) (c), (e)*.

> 8 Both CRAB and the board argue that their respective interpretations of *§ 3* are entitled to deference. As Massachusetts courts have recognized CRAB's role in administering *G. L. c. 32*, and the value of its expertise in the complicated area of retirement law, we afford greater weight to CRAB's interpretation in this case. See, e.g., *Weston v. Contributory Retirement Appeal Bd., 76 Mass. App. Ct. 475, 479, 923 N.E.2d 110 (2010)*; *Namay v. Contributory Retirement Appeal Bd., 19 Mass. App. Ct. 456, 463, 475 N.E.2d 419 (1985)*. Because "eligibility" is also used in *§ 3* regarding membership criteria that fall outside of the board's "full jurisdiction" under *§ 3 (2) (d)*, adopting the board's interpretation could have limiting effects on the meaning of "eligibility" in circumstances outside the board's jurisdiction. See *Commonwealth v. Hilaire, 437 Mass. 809, 816, 777 N.E.2d 804 (2002)* ("When the Legislature uses the same term in the same section, ... the term should be given a consistent meaning throughout").

Discussion. The [***7] first question before the court is whether the board's authority under *§ 3 (2) (d)* to determine the eligibility of non-full-time employees, such as DeFelice, supersedes the provision in *§ 3 (1) (a) (i)* establishing that the status of a member in service "shall continue as such until [the member's] death or until [the member's] prior separation from the service becomes effective by reason of" one of the statutory circumstances. Second, if the board did not have the absolute discretion to terminate DeFelice's membership, we must determine whether DeFelice was nonetheless separated from her service as a result of a "removal or discharge" under *§ 3 (1) (a) (i)* when she stopped working [**655] the second job that increased her weekly hours to a level that initially qualified her for membership.

1. *Interpretation of eligibility*. The first question is whether the board possessed discretion to terminate DeFelice's membership when she ceased to satisfy the board's eligibility requirements, [*135] even after it had granted her retroactive membership, effective April 23, 2001. The board contends that its "full jurisdiction" under *§ 3 (2) (d)* means that it possesses an "absolute" power to determine the eligibility of non-full-time employees [***8] -- notwithstanding the proscription of *§ 3 (1) (a) (i)* -- that once a member is afforded "member in service status," that status "shall continue" until the employee dies or one of the specified circumstances leads to the employee's "separation from ... service." The board argues that the "more specific" authority it possesses over the eligibility of non-full-time employees supersedes *§ 3 (1) (a) (i)*.

CRAB argues that the board's jurisdiction over eligibility means only jurisdiction to set *initial* eligibility criteria. The board's authority, CRAB contends, does not include the ability to revoke the membership of employees once granted, because *§ 3 (1) (a) (i)* specifies the circumstances pursuant to which membership can be terminated.

The language of the statute is the starting point for all questions of statutory interpretation. *Rotondi, 463 Mass. at 648*, quoting *Hoffman v. Howmedica, Inc., 373 Mass. 32, 37, 364 N.E.2d 1215 (1977)*. The effect given to statutory language should be consistent with its plain language. See *id.*, citing *Sullivan v. Brookline, 435 Mass. 353, 360, 758 N.E.2d 110 (2001)*. Courts must look to the statutory scheme as a whole. See *Commonwealth v. Raposo, 453 Mass. 739, 745, 905 N.E.2d 545 (2009)*.

We accept CRAB's interpretation, because (1) it is consistent with the statute's plain language, (2) it is consistent with use of "eligibility" as applied to full-time employees in the same subsection of *§ 3*, and [***9] (3) it avoids an unnecessary conflict between *§ 3 (1) (a) (i)* and *§ (3) (2) (d)*.

First, the plain language of the statute supports CRAB's interpretation. *Section 3 (1) (a) (i)* specifies the circumstances in which a *member's* status as a "member in service" may be terminated. The statute explicitly defines "member" as "any employee included in" the applicable retirement system. *G. L. c. 32, § 1*. The definition of employee does not distinguish between full-time and non-full-time employees. See *id.* A member in service is "[a]ny *member* who is regularly employed in the performance of [the member's] duties," and a member's status as a member in service "shall continue" until the occurrence of a statutorily specified event (emphasis added). *G. L. c. 32, § 3 (1) (a) (i)*. *Section 3 (1) (a) (i)* applies to *members*, who may be full-time employees eligible for membership pursuant to statutory criteria, [*136] or non-full-time employees eligible pursuant to the action of a local retirement board under *§ 3 (2) (d)*. See *G. L. c. 32, §§ 1* and *3 (1) (a) (i), (2) (a)* and *(d)*. The statutorily enumerated events supporting the termination of a member's status as a member in service do not include a member's subsequent failure to satisfy the eligibility criteria that led to that member's admission. See *G. L. c. 32, § 3 (1) (a) (i)*. Accordingly, [***10] *§ 3 (1) (a) (i)* limits the

board's authority over the continuing membership of non-full-time employees.

Second, limiting the board's power to the task of establishing only the initial eligibility criteria of non-full-time employees avoids interpreting the term [**656] "eligibility" inconsistently within *§ 3*. *Section 3 (2)* is titled "Eligibility for Membership,"[9] and *§ 3 (2) (a)* sets forth twelve circumstances establishing a full-time employee's eligibility for membership in a retirement system. Once a full-time employee becomes eligible under *§ 3 (2) (a)* and then becomes a member in service, that employee's status as a member in service "shall continue" until one of the statutorily specified events occurs. See *G. L. c. 32, § 3 (1) (a) (i)*. Because the statutorily specified events do not include a subsequent failure to satisfy the eligibility criteria, a member's status as a member in service continues even if the member ceases to satisfy the criteria that initially qualified the member for admission into the retirement system. See *id.* Therefore, in *§ 3 (2) (a)*, "eligibility" must refer only to whether an employee satisfies criteria for membership prior to the employee becoming a member. See *G. L. c. 32, § 3 (1) (a) (i), (2) (a)*. Eligibility as used in *§ 3 (2) (d)*, a different paragraph [***11] of the same subsection, should not be given a different meaning. *Commonwealth v. Hilaire, 437 Mass. 809, 816, 777 N.E.2d 804 (2002)*.

> 9 Although a heading does not conclusively determine a statute's proper interpretation, it may nonetheless be a relevant factor. Cf. *Davis v. School Comm. of Somerville, 307 Mass. 354, 358-359, 30 N.E.2d 401 (1940)* (rejecting interpretation based on heading, where heading conflicted with statutory language).

If eligibility means an individual's initial qualification, the provisions of *§ 3 (1) (a) (i)* do not conflict with the board's "full jurisdiction" under *§ 3 (2) (d)*. The conflict only arises if one accepts the board's definition that its "full jurisdiction" over eligibility necessarily encompasses something more than the eligibility determination prior to the non-full-time employee's admission to membership. Because such an interpretation is not required by the statutory language and would create an unnecessary conflict between *§ 3 (1) (a) (i)* and *§ 3 (2) (d)*, we decline to adopt [*137] it. See *Raposo, 453 Mass. at 745* (courts must read statutory terms harmoniously); *Fireman's Fund Ins. Co. v. Commissioner of Corps. & Taxation, 325 Mass. 386, 389, 90 N.E.2d 668 (1950)* (rejecting statutory construction that would "bring two provisions of our own statutes into unnecessary conflict").

The board possesses full jurisdiction to determine when non-full-time employees become eligible for membership in the Stoneham retirement system. See *G. L. c. 32, § 3 (2) (d)*. Once the board confers membership, however, it cannot override the explicit statutory mandate governing the duration of membership. See *G. L. c. 32, § 3 (1) (a) (i)*. See also *Galenski v. Erving, 471 Mass. 305, 311, 28 N.E.3d 470 (2015)*, quoting *Cioch v. Treasurer of Ludlow, 449 Mass. 690, 699, 871 N.E.2d 469 (2007)* ("[A] municipality may not enact a bylaw, policy, or regulation that is inconsistent [***12] with State law").

Lexington Educ. Ass'n v. Lexington, 15 Mass. App. Ct. 749, 752, 448 N.E.2d 1271 (1983), is an example of the limitations on a municipality's otherwise broad discretion in light of an explicit statutory requirement. In that case, the statute at issue required municipalities participating in an applicable health insurance program to "purchase certain group insurance 'covering employees,'" and defined "employee" to include any person working at least twenty hours per week for a municipality. *Id. at 750-751*, citing *G. L. c. 32B, §§ 2 (d), 3*. Municipalities had the authority to make a "final" determination of a person's eligibility to participate in the insurance program. See *Lexington Educ. Ass'n, supra at 752*. [**657] The Appeals Court invalidated a municipality's rule that limited participation to employees working at least twenty-five hours per week, because the

statute required municipalities to include individuals working at least twenty hours per week. *Id.* Similarly, the board's authority to determine when non-full-time employees may become members in the Stoneham retirement system cannot supersede *§ 3 (1) (a) (i)*'s requirements regarding the duration of membership.[10]

> 10 The board relies on *Shea v. Selectmen of Ware, 34 Mass. App. Ct. 333, 335-337, 615 N.E.2d 196 (1993)*, in which the Appeals Court upheld the authority of a municipality to terminate the ability of employees working under twenty hours per week to participate in the same type of health insurance plan at issue in *Lexington Educ. Ass'n, supra*. However, that statute contained no language comparable to *§ 3 (1) (a) (i)*, requiring that the municipality "shall continue" providing insurance to such employees until the occurrence of statutorily specified events. See *G. L. c. 32, § 3 (1) (a) (i)*; *Shea, supra* (nothing in text, purpose, or legislative history supported determination that municipality's decision to provide insurance was irreversible).

The *Manning* decision, upon which the board relies for support, [*138] is not analogous to this case. In that case, the Appeals Court held [***13] that a non-full-time employee did not automatically become a member of a retirement system pursuant to *§ 3 (2) (a)*, and the retirement board had not made any determination pursuant to *§ 3 (2) (d)* that the employee was eligible to become a member. *Manning, 29 Mass. App. Ct. at 254-255*. Unlike the retirement board in *Manning*, the board granted DeFelice membership because it determined that she satisfied its eligibility requirement, based on the board's interpretation of its own rule.

CRAB also points out that permitting municipal retirement boards unilaterally to terminate a non-full-time employee's membership in a retirement system would subject such employees to a high degree of uncertainty. Indeed, if the board possessed the breadth of discretion it claims, non-full-time employees could lose their membership status whether they decreased their hours voluntarily or involuntarily, or whenever the board alters the criteria to exclude some non-full-time employees who had previously been granted membership. We do not believe that the Legislature intended to subject non-full-time employees to this level of unpredictability. See *G. L. c. 32, § 3 (1) (a) (i)* (status of member in service "*shall continue*" until specified events [emphasis added]). See also *Galenski, 471 Mass. at 309*, quoting [***14] *Hashimi v. Kalil, 388 Mass. 607, 609, 446 N.E.2d 1387 (1983)* ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation"). Instead, by establishing the authority of municipal retirement boards to determine the eligibility of non-full-time employees at the outset, the Legislature gave such boards ample power to manage participation by non-full-time employees in municipal retirement systems. See *G. L. c. 32, § 3 (2) (d)*.

Municipal retirement systems may well place systemic strain on municipal budgets. The existing legislative framework provides a means for municipalities to address budget issues prospectively by controlling when and how non-full-time employees may, if at all, become members of the retirement systems. Broader public policy decisions concerning municipal pensions rest with the Legislature.

2. *Interpretation of separation from service*. The board argues that, even if it does not have the authority to revoke a non-full-time employee's membership once granted, DeFelice was "removed" when she stopped working her second job at the end of [*139] the 2000-2001 school year.[11] The board contends that "removal" is a statutorily specified circumstance under *§ 3 (1) (a) (i)*, meaning that it had the authority to terminate DeFelice's membership. As [***15] the facts are not in dispute, the question turns on the interpretation of *§ 3 (1) (a) (i)*. We again start with the language of the statute, giving due weight to CRAB's expertise.

11 Although the board raised this issue below, CRAB did not address it. We resolve the issue because, as the facts are undisputed, the parties raise an important matter of pure statutory interpretation.

Section 3 (1) (a) (i) provides that a member's status as a "member in service" continues until the member's "prior separation from the service becomes effective by reason of," among other things, "removal or discharge." The operative event is the separation from service. *Id.* A "removal or discharge" in and of itself does not terminate an individual's member in service status. See *id.*

DeFelice remained in service even after she stopped working her second job after the 2000-2001 school year. "Service" is generally defined, with no distinction between full-time and non-full-time employees, as "service as an employee in any governmental unit for which regular compensation is paid." *G. L. c. 32, § 1*. Following the nine-week period establishing her eligibility, DeFelice remained "in service" of the department in a non-full-time capacity for at least several years. See *id.* Therefore, the statutory requirements for terminating membership were not satisfied because no "prior separation from [DeFelice's] service" had occurred. See *G. L. c. 32, §§ 1, 3 (1) (a) (i)*.

The board's [***16] reliance on *Retirement Bd. of Attleboro v. School Comm. of Attleboro, 417 Mass. 24, 627 N.E.2d 899 (1994)*, is misplaced. That case involved another provision of *G. L. c. 32* containing the phrase "removal or discharge." *Id. at 26-27*.[12] To give effect to both terms, we concluded that a "removal" must mean "something less than a complete termination of the employment relationship" for purposes of certain procedural protections owed to members in service. *Id. at 27*. Unlike *§ 3 (1) (a) (i)*, however, the provision in that case did not hinge upon whether there had been a separation from service. Compare *G. L. c. 32, § 3 (1) (a) (i)* (member in service status "shall continue" until member's "prior separation from the service becomes effective by reason of," among other things, "removal or discharge"), with *Retirement Bd. of Attleboro*, [*140] *417 Mass. at 25 n.3* ("The removal or discharge of [certain] member[s] in service ... shall not become effective unless and until a written notice thereof containing a fair summary of the facts ... has been filed with the board"). *Section 3 (1) (a) (i)* is not satisfied even if DeFelice was "removed" when she stopped working her second job [**658] at the end of the 2000-2001 school year, because there was no separation from service that became "effective by reason of" that removal.

12 The language at issue in *Retirement Bd. of Attleboro, supra*, no longer appears in *G. L. c. 32, § 16*.

Conclusion. The board established a low threshold for membership in [***17] its retirement system and decided DeFelice satisfied that threshold when it granted her membership. DeFelice continued working for the department after she received membership. Therefore, she became a "member in service" and her status as such "shall continue" until her death or a separation from service pursuant to one of the statutorily specified circumstances in *G. L. c. 32, § 3 (1) (a) (i)*. [**659] Because she continued working for the same governmental employer, although at reduced hours, there was no "separation from [her] service." See *id.* As a result, DeFelice remained a member in service during her continued part-time employment following the 2000-2001 school year, and was eligible to apply for retroactive membership. See *G. L. c. 32, § 3 (3)* (allowing employee to obtain membership after date on which employee first became eligible during "present period of service" and if employee satisfies applicable age requirement).

We conclude that CRAB reasonably interpreted *§ 3*. We reverse the judgment of the Superior Court. A new judgment is to be entered affirming the decision of CRAB.

So ordered.

R.I. SEEKONK HOLDINGS, LLC v. BOARD OF ASSESSORS OF SEEKONK

15-P-1722.

APPEALS COURT OF MASSACHUSETTS

91 Mass. App. Ct. 1104
2017 Mass. App. Unpub. LEXIS 119

February 3, 2017, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008)*.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

SUBSEQUENT HISTORY: Appeal denied by *R.I. Seekonk Holdings v. Bd. of Assessors of Seekonk, 476 Mass. 1115, 2017 Mass. LEXIS 231 (Mass., Mar. 29, 2017)*

DISPOSITION: Decisions of the Appellate Tax Board affirmed.

JUDGES: Cypher, Trainor & Desmond, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, R.I. Seekonk Holdings, LLC (Holdings), appeals from the Appellate Tax Board's (ATB) decisions upholding the board of assessors of Seekonk's (board) denial of its property tax abatement requests for two fiscal years.[1] The ATB determined that the subject properties were taxable as separate parcels, while Holdings contended that they were exempt as common areas. On appeal Holdings argues that (1) partially constructed buildings that have not yet become lawful condominium units are exempt from taxation under *G. L. c. 183A, § 14*; and (2) Holdings's development interest in the subject structures is not taxable under *G. L. c. 59, § 11*. We affirm.

1 This is a consolidated appeal from the ATB's decisions upholding the assessors' denials of abatement requests for the two years.

Standard of review. A decision by the ATB will not be modified or reversed if it "is based on both substantial evidence and a correct application of the law." *Boston Professional Hockey Assn., Inc. v. Commissioner of Rev., 443 Mass. 276, 285, 820 N.E.2d 792 (2005)*. "Although the proper interpretation of a statute is for a court to determine, we recognize the [ATB's] expertise in the administration of tax statutes and give weight to [its] interpretations." *Adams v. Assessors of Westport, 76 Mass.*

App. Ct. 180, 183, 920 N.E.2d 879 (2010), quoting from *Raytheon Co. vs. Commissioner of Rev., 455 Mass. 334, 337, 916 N.E.2d 372 (2009)*.

Discussion. 1. *General Laws c. 183A, § 14*. *General Laws c. 183A, § 14*, as appearing in St. 1998, c. 194, § 196, states in part that: "Each [condominium] unit and its interest in the common areas and [*2] facilities shall be considered an individual parcel of real estate for the assessment and collection of real estate taxes but the common areas and facilities ... shall not be deemed to be a taxable parcel." Holdings argues that partially constructed buildings that have not yet become lawful condominium units are exempt from taxation under *c. 183A, § 14*, because they are common areas.

Pursuant to Holdings's master deed, the structures it contends are common areas were reserved and "exclusively owned by [Holdings]." Section 13.1 of the master deed states in part that "[u]ntil such time as additional Phases are added to the Condominium by the recording of 'Phasing Amendments' . . . any buildings or portions thereof existing on the Land ... (other than Phase 1) ... shall not be part of the Condominium or subject to the Act, and shall be exclusively owned by [Holdings]." Section 13.4 of the master deed provides in part that: "[Holdings] reserves for the benefit of itself ... exclusive ownership of [] Building(s) or portions of Building(s) [not part of Phase 1 or included in a Phasing Amendment], as well as the right to fully construct, develop and finish same."

Holdings cites *Spinnaker Island & Yacht Club Holding Trust v. Assessors of Hull, 49 Mass. App. Ct. 20, 23-24, 725 N.E.2d 1072 (2000)*, to support its proposition that partially constructed structures constitute [*3] common area. However, in *Spinnaker Island*, the tax payer did not exclude any land from the common areas in its master deed. *Id. at 24*. Conversely, Holdings reserved the structures in question for itself until they were included in a phasing amendment. Eventually, once the structures were named in a phasing amendment they became "Units" as defined by *c. 183A, § 1*, and, therefore, by definition not part of the condominium's common areas and facilities.

Holdings concedes that the plain language used in its master deed demonstrates an intent to reserve developmental rights as its own property, but contends that labels do not undermine the reality that the structures constituted common area. *Id. at 22*. Nevertheless, c. 183A specifically allows an owner to retain and exclude from its application other interests in real property not expressly declared to be subject to it. See *G. L. c. 183A, § 2*, as appearing in St. 1992, c. 400, § 5 ("The provisions of this chapter shall not be deemed to preclude or regulate the creation or maintenance of other interests in real property not expressly declared by the owner ... ."). The master deed here provided, "The Common area and Facilities of the Condominium ... consist of the entire [*4] Land exclusive of the Units ... (and *exclusive* of any and all rights, interests and/or easements reserved by [Holdings])." The plain, unambiguous language of the master deed clearly defines Holdings's intent to exclude the structures from the condominiums' common areas. Consequently, the ATB did not err in concluding that Holdings was not entitled to the tax exemption for common areas provided by *c. 183A, § 14*.

2. *General Laws c. 59, § 11*. Prior to the subject tax assessments, the town had accepted the provisions of *G. L. c. 59, § 2Aa)*(, which allowed the town to tax in the current fiscal year all new construction built in the six months following the valuation and assessment date for that fiscal year. Pursuant to *c. 59, § 2A(a)*, inserted by St. 1979, c. 797 § 11, "Real property for the purpose of taxation shall include all land within the commonwealth and all buildings and other things thereon or affixed thereto, unless otherwise exempted from taxation under other

provisions of law." Holdings argues that their future development interest in the structures is not taxable under *c. 59, § 11*. We disagree.

The unexercised right to build additional phases of a condominium is a future interest, *First Main St. Corp. v. Assessors of Acton, 49 Mass. App. Ct. 25, 28, 725 N.E.2d 1076 (2000)*, and is therefore not separately taxable under *c. 59, § 11*. [*5] However, as the *First Main St.* court reasoned, an unexercised development right could be converted into a present interest by initiating affirmative actions, such as, "build[ing] the additional buildings and facilities." *Ibid.* Here, as of the relevant valuation and assessment date, units 15 and 16 were 100 percent complete, unit 19 was ninety percent complete, and unit 6,000 was thirty percent complete. Therefore, as the ATB reasoned "even if the subject properties could be considered part of the Condominium and subject to the provisions of c. 183A, under the facts and circumstances here -- where actual construction has taken place and [Holdings] has taken full possession of the property ... [Holdings] had a present interest in the subject buildings and the assessors were warranted in assessing the subject properties to [Holdings.]" The "partially constructed structures," as Holdings categorizes, were in fact mostly completed at the time of the assessments and therefore a taxable present interest.

Decisions of the Appellate Tax Board affirmed.

By the Court (Cypher, Trainor & Desmond, JJ.[2]),

2 The panelists are listed in order of seniority.

Entered: February 3, 2017.

SHRINE OF OUR LADY OF LA SALETTE INC. v. BOARD OF ASSESSORS OF ATTLEBORO

SJC-12021.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

476 Mass. 690; 71 N.E.3d 50
\ 2017 Mass. LEXIS 201

December 5, 2016, Argued
March 22, 2017, Decided

PRIOR HISTORY: [***1] Suffolk. APPEAL from a decision of the Appellate Tax Board.

The Supreme Judicial Court granted an application for direct appellate review.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Taxation, Real estate tax: abatement, Real estate tax: exemption, Real estate tax: classification of property. *Real Property*, Tax.

In denying the taxpayer, a national shrine that was indisputably a house of religious worship, an abatement on certain portions of its property that the taxpayer claimed were exempt from taxation under *G. L. c. 59, § 5*, Eleventh, the Appellate Tax Board (board) erred in concluding that the taxpayer's welcome center was not exempt, where the dominant purpose of the welcome center was connected with religious worship and instruction and accompanied and supplemented the religious work of the taxpayer ; likewise, the board erred in

concluding that the taxpayer's maintenance building was not exempt, where the dominant purpose of the maintenance building was connected with the religious worship and instruction offered by the taxpayer ; on the other hand, the board correctly concluded that a former convent that the taxpayer leased to a nonprofit organization for use as a safe house for battered women and a portion of the taxpayer's property that was exclusively managed by a nonprofit organization as a wildlife sanctuary in accordance with a conservation agreement were not exempt, where those portions of the taxpayer's property had been appropriated for purposes other than religious worship and instruction within the meaning of the statute (even though they each would have been exempt as the real property of a charitable organization occupied for a charitable purpose if the taxpayer had filed the required documents).

COUNSEL: *Diane C. Tillotson* (*Ryan P. McManus* also present) for the taxpayer.

Michael R. Siddall (*James M. Hannifan* also present) for board of assessors of Attleboro.

Heidi A. Nadel, for Massachusetts Council of Churches & others, amici curiae, submitted a brief.

Felicia H. Ellsworth, Eric L. Hawkins, & William R. O'Reilly, Jr., for Roman Catholic Archbishop of Boston & others, amici curiae, submitted a brief.

JUDGES: Present: GANTS, C.J., LENK, HINES, GAZIANO, LOWY, & BUDD, JJ.

OPINION BY: GANTS

OPINION

[**511] [*691] **GANTS**, C.J. This is an appeal from a decision of the Appellate Tax Board (board) concerning property in Attleboro owned by the taxpayer, Shrine of Our Lady of La Salette Inc. (Shrine). The Shrine sought a tax [**512] abatement from the board, claiming that certain portions of its property were exempt from taxation under *G. L. c. 59, § 5, Eleventh* (*Clause Eleventh*), the exemption for "houses of religious worship." The crux of the appeal is the scope of this exemption. For the reasons set forth below, we conclude that property is exempt from taxation under *Clause Eleventh* where the dominant purpose [***2] of the questioned portion of property is religious worship or instruction, or purposes connected with it. Applying this principle, we conclude that the board erred when it found that the Shrine's "welcome center" and maintenance building were not exempt under *Clause Eleventh*. We affirm its denial of an abatement for the former convent that the Shrine leased to a nonprofit organization for use as a safe house for battered women, and for the wildlife sanctuary that was exclusively managed by the Massachusetts Audubon Society in accordance with a conservation easement. The safe house and wildlife sanctuary might have been exempt from real estate taxation under *G. L. c. 59, § 5, Third* (*Clause Third*), as the property of a benevolent or charitable organization devoted to charitable use, had the Shrine satisfied the filing requirements for such an exemption, but they were not exempt under *Clause Eleventh*.[1]

1 We acknowledge the amicus brief jointly submitted by the Roman Catholic Archbishop of Boston, the Roman Catholic Bishop of Fall River, the Roman Catholic Bishop of Springfield, and the Roman Catholic Bishop of Worcester. We also acknowledge the amicus brief jointly submitted by the Massachusetts Council of Churches; CAIR-Massachusetts; the Emanuel Gospel Center; the Episcopal Diocese of Massachusetts; the Episcopal Diocese of Western Massachusetts; the Islamic Society of Boston Cultural Center; the Massachusetts Conference of the United Church of Christ; the New England Conference of the United Methodist Church; the New England Region of the Unitarian Universalist Association; the

New England Synod of the Evangelical Lutheran Church in America; Our Lady of Fatima Shrine, Holliston, Massachusetts; and the United Synagogue of Conservative Judaism; and joined by the New England Yearly Meeting of Friends and the Worcester Islamic Center.

Background. The Shrine is a Catholic religious organization affiliated with the Missionaries of Our Lady of La Salette (missionaries). The missionaries are members of the Catholic faith who are inspired by what they believe to have been an apparition of the Virgin Mary (Our Lady) to two children in the village [***3] of La Salette, France, in 1846. Following that event, supporters erected [*692] a shrine in La Salette to provide the many pilgrims who began traveling there each year a space to express their devotion. Since then, members of the Catholic faith from around the world have erected shrines honoring Our Lady in their respective countries. Although there are a number of these shrines throughout the world, each country is permitted only one designated national shrine. The Shrine in Attleboro, which opened in 1953, became the national shrine for the United States in 2009. Accordingly, thousands of people visit the Shrine each year, ranging from the lone visitor who stays for only a moment to thousands of international pilgrims who stay for most of the day.

The Shrine is a Massachusetts not-for-profit organization whose purposes are described in its articles of organization as follows:

> "To promote the devotion to Our Lady of La Salette through the organization of public pilgrimages and through the administration of the Sacraments of the Church; to provide spiritual guidance to the pilgrims visiting the Shrine; to provide food and housing, if necessary, for the proper care of the pilgrims; to offer [***4] to said pilgrims the opportunity of purchasing religious articles and books of [**513] all kinds; to seek contributions for the development and support of said Shrine; to use any or all of said funds for the religious education of young men training for religious and missionary priesthood; to provide funds to further foreign missions; and to do such further acts as are necessary and incidental to the carrying out of the purposes hereinbefore set forth."

In keeping with the Shrine's purposes, visitors and pilgrims can participate in a range of activities on the Shrine's property. Each day, the Shrine holds a Mass and provides the opportunity for confession. In addition, it offers specialized prayer services and prayer groups at various times. Each year, nearly 400,000 visitors make their way to the Shrine between Thanksgiving and early January for its Festival of Lights, during which the Shrine erects Christmas displays and hangs approximately 400,000 Christmas lights. In addition to these events, the Shrine hosts a variety of other functions and activities, including retreats, concerts, and fundraisers.

In 2012, the fiscal year at issue, the Shrine carried out its operations on 199 acres of [***5] property it owned in the city of Attleboro [*693] (city). This case arises out of the city assessor's determination that the Shrine owed property taxes in the amount of $92,292.98, based on a valuation of $12,815,800, the taxable portion of which was valued at $4,955,740. The Shrine paid its property tax, with interest, and in January, 2013, filed an application for abatement, which the city's board of assessors (assessors) denied in April, 2013. The Shrine appealed to the board, arguing that all of its property was exempt under *Clause Eleventh*.[2]

2 The Shrine of Our Lady of La Salette Inc. (Shrine) also claimed an exemption under *G. L. c. 59, § 5, Third*, which exempts from taxation the real and personal property of a "charitable organization" where the property is "occupied by it or its officers for the purposes for which it is organized." However, the Shrine later waived this claim after conceding that it had failed to file the forms required to obtain such an exemption.

The board, for purposes of its analysis, divided the Shrine's property into eight distinct portions: (1) the Shrine's church, (2) the indoor and outdoor chapels, (3) the monastery, (4) the retreat center, (5) the welcome center and surrounding land, (6) the maintenance building, (7) the former convent, which was leased to a nonprofit organization that uses the building as a safe house for battered women (safe house), and (8) approximately 110 acres of "unimproved land" known as the Attleboro Springs Wildlife Sanctuary (wildlife sanctuary). The board determined that the first four portions of the property (the church, the chapels, the monastery, and [***6] the retreat center, including the surrounding land and parking areas) were exempt under *Clause Eleventh*. It determined that the welcome center was only partially exempt and that the maintenance building, safe house, and wildlife sanctuary were fully taxable. The Shrine appeals these latter four determinations, so we describe at length the board's findings regarding these portions of the property.

1. *Welcome center*. A typical pilgrimage to the Shrine begins in the welcome center, where pilgrims and visitors are shown a video presentation about Our Lady of La Salette. After a visit to the Shrine church to pray or to the chapel for confession, visitors return to the cafeteria in the welcome center for lunch.[3] The cafeteria also [**514] "functions as a soup kitchen serving free meals to the poor every Monday, and it is used on occasion as overflow space in which to host a lecture or workshop offered by the [*694] [S]hrine." Visitors can also visit the "bistro" in the welcome center, where a more limited menu of food is available for purchase from noon to 5 P.M. each day. The Shrine's gift shop is located in the welcome center, where visitors can purchase religious items such as books, statues, and rosary beads. [***7] The Shrine also offers other religious lectures and programs in various spaces within the welcome center.

3 The cafeteria does not charge pilgrims for lunch, apart from a donation fee made in connection with the pilgrimage, and it is not generally open to the public to purchase meals, except during the Christmas Festival of Lights and during the season of Lent.

In addition, the Shrine uses the welcome center and surrounding land for various fundraising activities, including "yard sales, a carnival, a circus, a clambake, and a Christmas Bazaar." The Shrine sometimes hosted these events in partnership with third parties, including various artists, vendors, and, in at least one instance, a for-profit entertainment company. The events yielded various amounts for the Shrine, ranging from $2,000 to $10,000.[4]

4 The Shrine operated the carnival in connection with a for-profit entertainment company. The company received sixty per cent of the profits, and the Shrine received forty per cent, yielding $10,000 for the Shrine.

The Shrine also grants access to the welcome center and surrounding land to various public, religious, and nonprofit groups for various events, and to private groups and individuals for private functions. For instance, the welcome center has been used by the city as a polling station during elections, by the Lions Club for an antique car show fundraiser, by a Native American group for a powwow, and by the American Red Cross for a blood drive. In addition, the Shrine has leased the welcome center to "a family for a baptismal party; ... a family for a wedding rehearsal dinner; ... and ... a for-profit transportation company for a presentation

[***8] on religious tours and travel." Typically, these groups made donations ranging from $200 to $1,000 to the Shrine in return for the use of the space, but the Shrine allowed the American Red Cross to use the space for free.

The board determined that the Shrine "used [the welcome center and surrounding land] in part for 'religious worship or instruction,' and in part for other purposes, such as fundraising activities and private functions." The board found that the assessors were correct to tax the welcome center using a prorated or apportioned basis, wherein the assessors calculated taxes due according to the percentage of time each portion was used for secular rather than religious activity. The board agreed with the assessors' determination that the welcome center and surrounding land were taxable at forty per cent of their value and sixty per cent exempt.

[*695] 2. *Maintenance building*. The Shrine used the maintenance building to store "display items for the Festival of Lights during the off season; inventory for the gift shop; and golf carts and other maintenance vehicles and equipment used on the subject property." The board found the building fully taxable because it was not used for "'religious [***9] worship or instruction' within the meaning of *Clause Eleventh*," and it was "immaterial" whether the building furthered the Shrine's charitable purposes if those purposes did not constitute religious worship or instruction.

3. *Safe house*. The Shrine leased the former convent to a nonprofit organization that uses the building as a safe house for [**515] battered women. The board found it fully taxable because it was no longer a parsonage and was not being used for "religious worship or instruction." The board noted that the safe house's furtherance of a charitable purpose may have qualified this portion of the property for an exemption under *Clause Third*, had the Shrine filed the required documents for this exemption. See note 2, *supra*.

4. *Wildlife sanctuary*. The board found that, in 2009, the Shrine granted the Massachusetts Audubon Society a conservation easement over the wildlife sanctuary,[5] and that organization subsequently managed it in accordance with the easement "as an area containing open space and walking trails and available to the public for passive recreation." The board found that the wildlife sanctuary was not being used for religious worship or instruction, and noted that its furtherance [***10] of a charitable purpose may have qualified it for an exemption under *Clause Third* had the Shrine filed the required documents.

> 5 The Shrine later transferred the fee interest to the Massachusetts Audubon Society, but was the owner of record for the fiscal year at issue.

The board concluded "that the assessors properly exempted so much of the subject property that qualified for the exemption under *Clause Eleventh*," and that the Shrine "failed to prove its entitlement to an abatement." The Shrine appealed from the board's determination, and we granted its application for direct appellate review.

Discussion. *General Laws c. 59, § 2*, articulates the general rule that "[a]ll property, real and personal, ... unless expressly exempt, shall be subject to taxation." The specific exemptions from taxation are enumerated in *G. L. c. 59, § 5*. At issue here is the interpretation of the scope of *Clause Eleventh*, which exempts from taxation:

> [*696] "[H]ouses of religious worship owned by, or held in trust for the use of, any religious organization, and the pews and furniture and each parsonage so owned ... for the exclusive benefit of the religious organizations, ... but such exemption shall not, except as

> herein provided, extend to any portion of any such house of religious worship appropriated for purposes other than religious worship or instruction. The occasional or incidental use of such [***11] property by an organization exempt from taxation under the provisions of [*26 U.S.C. § 501(c)(3)*] of the Federal Internal Revenue Code shall not be deemed to be an appropriation for purposes other than religious worship or instruction."

Exemption statutes, such as *Clause Eleventh*, are "strictly construed, and the burden lies with the party seeking an exemption to demonstrate that it qualifies according to the express terms or the necessary implication of a statute providing the exemption." *New England Forestry Found., Inc. v. Assessors of Hawley, 468 Mass. 138, 148-149, 9 N.E.3d 310 (2014)*, citing *Milton v. Ladd, 348 Mass. 762, 765, 206 N.E.2d 161 (1965)*. "We uphold findings of fact of the board that are supported by substantial evidence. We review conclusions of law, including questions of statutory construction, de novo." *New England Forestry Found., Inc., supra at 149*, citing *Bridgewater State Univ. Found. v. Assessors of Bridgewater, 463 Mass. 154, 156, 972 N.E.2d 1016 (2012)*. We give weight to the board's interpretation of tax statutes, however, because the "board is an agency charged with administering the tax law and has 'expertise in tax matters.'" *AA Transp. Co. v. Commissioner of Revenue, 454 Mass. 114, 119, 907 N.E.2d 1090 (2009)*, [**516] quoting *RHI Holdings, Inc. v. Commissioner of Revenue, 51 Mass. App. Ct. 681, 685, 748 N.E.2d 964 (2001)*. But "principles of deference ... are not principles of abdication." *Commissioner of Revenue v. Gillette Co., 454 Mass. 72, 75-76, 907 N.E.2d 629 (2009)*, quoting *Duarte v. Commissioner of Revenue, 451 Mass. 399, 411, 886 N.E.2d 656 (2008)*. "Ultimately, ... the interpretation of a statute is a matter for the courts." *Onex Communications Corp. v. Commissioner of Revenue, 457 Mass. 419, 424, 930 N.E.2d 733 (2010)*.

In interpreting the scope of *Clause Eleventh*, we recognize that a house of religious worship is more than the chapel used for prayer and the [***12] classrooms used for religious instruction. It includes the parking lot where congregants park their vehicles, the anteroom where they greet each other and leave their coats and jackets, the parish hall where they congregate in religious fellow- [*697] ship after prayer services, the offices for the clergy and staff, and the storage area where the extra chairs are stored for high holy days. In some houses of religious worship, all of these portions of property (apart from the parking area) may be located with the chapel in a single building; in others with larger congregations, they may be located in multiple buildings, some adjoining the chapel, some standing alone. We have long recognized that all of these portions of property are exempt from taxation under *Clause Eleventh* even if no religious worship occurs within these spaces; it suffices that they are used for "purposes connected with" religious worship, *Proprietors of the S. Congregational Meetinghouse in Lowell v. Lowell, 1 Met. 538, 541, 42 Mass. 538, 1 Metc. 538 (1840)*, or, otherwise stated, purposes that "normally accompany and supplement the religious work of a parish." *Assessors of Framingham v. First Parish in Fram* [*698] - *ingham, 329 Mass. 212, 215, 107 N.E.2d 309 (1952)*.

The Shrine is indisputably a house of religious worship, but it is not a typical one, because it is not a parish with a congregation but a national shrine of the Missionaries where [***13] thousands of pilgrims and visitors come for prayer, confession, religious retreats, and religious education, and, during the Christmas season, to find religious inspiration from its Festival of Lights. We

address separately the four portions of property at issue on appeal.

1. *Welcome center*. The board recognized that the welcome center was used at times for "religious worship or instruction" because religious lectures or programs were offered, but it also found that the welcome center was used for purposes other than "religious worship or instruction," such as fundraising activities, including a Christmas Bazaar. The board also found that "religious worship or instruction" did not occur in the bistro or gift shop, "though they may have served to promote the [Shrine's] religious purposes in general." The board concluded that, where properties owned by religious organizations are used only in part for "religious worship or instruction," *Clause Eleventh* "allows" them "to be taxed on an apportioned basis."

The board defined far too narrowly the scope of the religious exemption. A video presentation about Our Lady of La Salette plainly is religious instruction. Pilgrims and visitors who spend [***14] hours at the Shrine need to eat and drink, so the cafeteria and bistro are "connected with" religious worship, and "accompany and supplement" the religious work of the Shrine by sparing pilgrims and visitors the need to bring their own food and drink or leave the Shrine in order to find it. See *Assessors of Fram-* [*698] *ingham, 329 Mass. at 215*; *Proprietors of the S. Congregational* [**517] *Meetinghouse in Lowell, 1 Met. at 541*. Those who are inspired by the Shrine may obtain religious objects and books at the gift shop that might allow them to continue their religious worship and instruction when they leave. The fact that money earned from the cafeteria, bistro, and gift shop may help pay for the Shrine's expenses does not remove them from the realm of religious worship and instruction; even a church cannot live on prayer alone.

Nor is it appropriate for the board to tax the welcome center "on an apportioned basis" based on the assessor's estimation of the percentage of nonreligious use of the welcome center. By the board's logic, a church whose parish hall is used for occasional bake sales, rummage sales, and holiday bazaars to raise money for the church, and the occasional wedding reception, could have its parish hall taxed on an apportioned basis based on an assessor's estimation of the percentage of its use [***15] that is not for "religious worship or instruction." *Clause Eleventh*, however, provides that the exemption shall not "extend to any portion of any such house of religious worship appropriated for purposes other than religious worship or instruction." By choosing the word "appropriated," the Legislature expressed its intent that a portion of a house of religious worship shall either be exempt or not exempt, based on its "dominant purpose." See *Assessors of Framingham, 329 Mass. at 216* ("[t]he right of exemption from taxation ... depends on the dominant purpose for which the rooms are maintained and their actual use for that purpose").

The dominant purpose test thus considers, as to each portion of church property, whether its dominant purpose is religious worship or instruction or connected with religious worship or instruction (and is therefore exempt from taxation), or whether its dominant purpose is something other than religious worship or instruction (and therefore has been "appropriated for purposes other than religious worship or instruction"). See *Assessors of Framingham, 329 Mass. at 216*; *G. L. c. 59, § 5, Eleventh*. See generally 4 W.W. Bassett, W.C. Durham, Jr., & R.T. Smith, Religious Organizations and the Law § 17:90 (2013) ("primary use" standard has been "almost universally adopted" [***16] by States in determining property tax exemptions for religious institutions).

We do not infer from the revision of *Clause Eleventh* in 1980 (which added the provision that "[t]he occasional or incidental use of such property by an organization exempt from taxation [*699] under the provisions of [*26 U.S.C. § 501(c)(3)* of the

Internal Revenue Code] shall not be deemed to be an appropriation for purposes other than religious worship or instruction") that the Legislature intended that the occasional or incidental use of property by a person or entity *other than* a nonprofit organization *shall* be deemed such an appropriation. See 1980 House Doc. No. 6373. The addition of this provision should be read to reflect nothing more than a legislative intent to assure religious institutions that they do not risk their tax exemption by allowing nonprofit organizations occasionally to use their facilities for meetings and events. It cannot reasonably be read to suggest a rejection of the dominant purpose test articulated prior to this statutory revision in *Assessors of Framingham*, which affirmed that the exemption applied to a church building that had occasionally been used for wedding receptions, auction sales, and card parties, as [***17] well as meetings of organizations that were likely not tax-exempt nonprofit organizations. See *Assessors of Framingham, 329 Mass. at 213-214, 216*.

[**518] In conclusion, the board committed an error of law in failing to apply the dominant purpose test to the welcome center. Because the dominant purpose of the welcome center is "connected with" religious worship and instruction, and "accompan[ies] and supplement[s]" the religious work of the Shrine, we conclude that it should have been entirely exempt under *Clause Eleventh*. See *Assessors of Framingham, 329 Mass. at 215*; *Proprietors of the S. Congregational Meetinghouse in Lowell, 1 Met. at 541*.

2. *Maintenance building*. The board found that the maintenance building is used to store display items for the Festival of Lights during the off season, inventory for the gift shop, and maintenance vehicles used on the Shrine's property. In essence, the maintenance building is the equivalent for a larger church of the storage cellar or storage shed of a smaller church, and is similarly connected with the religious work of the Shrine. The Festival of Lights during the Christmas season is part of the Shrine's celebration of Christmas, so the storage of lights in the off season is a purpose connected with religious worship. See *Assessors of Framingham, 329 Mass. at 216*. As earlier noted, the gift shop is also connected with religious worship and instruction, so the storage of its inventory [***18] is a purpose connected with such worship and instruction. Maintenance vehicles assist Shrine staff in maintaining the Shrine and its grounds, so the storage of these vehicles is also connected to religious worship and instruction. The board correctly found that [*700] the parking lot of the Shrine was exempt from taxation; the building where the maintenance vehicles are kept that are used to clear that parking lot from snow and ice in the winter were equally exempt. Because the dominant purpose of the maintenance building is connected with the religious worship and instruction offered at the Shrine, we conclude that the board erred in declining to find it exempt from taxation under *Clause Eleventh*.

3. *Safe house*. The Shrine argues that the portion of its property leased to a nonprofit organization and used as a safe house for battered women should have been exempt because it was incidental to the over-all use of the Shrine's property as a place of religious worship and instruction, and because it furthered the Shrine's religious mission of performing charitable deeds in the community. We disagree for three reasons.

First, we decline to adopt the Shrine's argument that the dominant purpose test [***19] is an "all or nothing" test regarding the exemption of church property, i.e., that an assessor must look at the entirety of a church's property and determine whether the dominant purpose of that property is religious worship or instruction, such that the entirety of the property is either exempt or not. *Clause Eleventh*, in providing that the exemption shall not "extend to any portion of any such house of religious worship appropriated for purposes other than religious worship or instruction," expressly recognizes that the

exemption analysis must focus separately on each "portion" of a house of religious worship. This court conducted such an analysis in *Proprietors of the S. Congregational Meetinghouse in Lowell, 1 Met. at 540-541*, where the second floor of a building erected by a "religious society" was used as a place of worship and a vestry, and six "tenements" on the first floor were rented as commercial stores, with the income from the rentals used to pay the money borrowed to purchase the land and erect the building. The court held that "the exemption in the statute extended to that part of the property only which was used as a place of worship, and for [**519] purposes connected with it ... such as the vestry, the furnace and the like ... but did not extend [***20] to separate tenements used for purposes exclusively secular." *Id. at 541*. The appropriate analysis focuses on whether the dominant purpose of each portion of the property, rather than the property as a whole, is religious worship or instruction.

Second, we recognize that religion embraces charitable deeds and providing help to those in need, but we also recognize that the [*701] Legislature did not include within the scope of *Clause Eleventh* "any portion of any ... house of religious worship appropriated for purposes other than religious *worship and instruction*" (emphasis added). Here, the nonprofit organization's use of the property as a safe house was "permanent and exclusive," see *Assessors of Framingham, 329 Mass. at 216*, rather than "occasional or incidental." See *G. L. c. 59, § 5, Eleventh*. Where a house of religious worship grants a "permanent and exclusive" lease of a portion of its property to a nonprofit organization to perform a charitable mission, rather than religious worship or instruction, we conclude that this portion of its property was "appropriated for purposes other than religious worship and instruction" under *Clause Eleventh*.

Our conclusion is strongly supported by the legislative history regarding the amendment to *Clause Eleventh* enacted [***21] in 1980 that inserted the provision making clear that the "occasional or incidental use" by a nonprofit organization of a portion of a house of religious worship's property "shall not be deemed to be an appropriation for purposes other than religious worship or instruction." The original version of the bill would have extended the exemption to "any portion ... appropriated for the purpose of any [nonprofit organization]." 1980 House Doc. No. 3699. The then Governor returned the bill to the Legislature, declaring that he agreed with the bill's underlying purpose to ensure religious institutions the ability to allow "charitable organizations of the community [to] use their rooms or facilities without fear of exemption loss," but was concerned that the bill was "much too broad" because "[i]t would grant tax exemption to the permanent and exclusive non-religious use of church owned property." See 1980 House Doc. No. 6373. The resulting amendment allows nonprofit organizations, many of which are charitable organizations, to use property owned by houses of religious worship without risk to the exemption so long as that use was merely occasional and incidental. Compare *G. L. c. 59, § 5, Eleventh*, as amended through [***22] St. 1980, c. 411, with 1980 House Doc. No. 3699.

Third, the Legislature expressly provides an exemption from taxation for the real and personal property of a charitable organization occupied for a charitable purpose, but that exemption is under *Clause Third*, not *Clause Eleventh*. Had the Shrine timely filed the documents required under *Clause Third*, it might have obtained an exemption for the safe house. The Shrine cannot [*702] avoid its obligation to file these documents under *Clause Third* by claiming that charitable deeds fall within the rubric of religious worship and education under *Clause Eleventh*.

4. *Wildlife sanctuary*. For essentially the same reasons that we affirm the board's determination regarding the safe house, we affirm its determination that the wildlife

sanctuary was fully taxable. The Shrine notes that it used the sanctuary for meditative walks and granted a conservation easement to the Massachusetts Audubon Society in 2009 to "promote ... ecospirituality and reconciliation with the creation." The easement grants general rights of access to the public while reserving [**520] access rights for those affiliated with the Shrine. According to the Shrine, the easement's express purpose, [***23] coupled with the Shrine's use of the property for meditative walks, establish that the Shrine used this property for religious worship, and any secular use of the property was incidental to this purpose. But under the terms of the easement, the Shrine transferred to the Society the "*exclusive* right and responsibility to manage the [wildlife sanctuary]" and perform a range of conservation-related activities (emphasis added). This grant of access to a nonprofit organization, coupled with unrestricted public access rights, represents a "permanent and exclusive" appropriation of this portion of the Shrine's property for a dominant charitable purpose.

We appreciate that a wildlife sanctuary may be for some a spiritual sanctuary, much as working in a safe house may be for some the realization of a spiritual mission. But the Legislature did not intend either a wildlife sanctuary or a safe house, when used and operated as they were here, to qualify as a house of religious worship. Where their dominant purpose is charitable, both might have been exempt from taxation under *Clause Third*, but neither was exempt under *Clause Eleventh*.

Conclusion. For the reasons stated above, we reverse the board's [***24] determination under *Clause Eleventh* that the welcome center was taxable in part and that the maintenance building was taxable in full, and affirm the board's determination that the safe house and the wildlife sanctuary were subject to taxation. We remand the case to the board for a determination regarding the amount of the abatement.

So ordered.

STATE BOARD OF RETIREMENT v. THOMAS M. FINNERAN & OTHERS.[1]

1 Justices of the Dorchester Division of the Boston Municipal Court Department, as nominal parties.

SJC-12069.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

476 Mass. 714; 71 N.E.3d 1190
2017 Mass. LEXIS 261

December 8, 2016, Argued
April 5, 2017, Decided

PRIOR HISTORY: [***1] Suffolk.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on December 4, 2015.

The case was reported by *Lenk*, J.
Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 2004 U.S. Dist. LEXIS 2681 (D. Mass., 2004)

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES
Retirement. *State Board of Retirement*. *Public Employment*, Forfeiture of retirement benefits. *Constitutional Law*, Excessive fines

clause. *Practice, Civil,* Action in nature of certiorari.

Discussion of the standard of review applicable to an action in the nature of certiorari.

Discussion of the two lines of cases concerning when forfeiture under *G. L. c. 32, § 15 (4),* would be appropriate based on the two types of direct links between a public employee's position and the crimes committed: a direct factual connection between the public employee's crime and position, and the commission of a crime directly implicating a statute that is specifically applicable to the public employee's position.

The State Board of Retirement correctly concluded that the pension of a former Speaker of the House was subject to forfeiture under *G. L. c. 32, § 15 (4),* where his conviction of obstruction of justice arising from his giving false testimony concerned a violation of the laws applicable to his office or position within the meaning of the statute, in that there was a direct factual link between his position and the offense, i.e., his false testimony directly concerned and related to his work on the decennial redistricting plan as Speaker of the House, and his admitted motivation for committing his crime was to vindicate his conduct as Speaker of the House regarding the redistricting plan.

This court concluded that a public employee seeking reinstatement of his forfeited pension based on his conviction of obstruction of justice had waived any claim that such a forfeiture would be an excessive fine in violation of the *Eighth Amendment to the United States Constitution,* but that even if the argument had been preserved, the forfeiture would not constitute an excessive fine, given the gravity of the offense and the maximum potential penalty for it.

COUNSEL: [*715] *David R. Marks,* Assistant Attorney General, for the plaintiff.

Nicholas Poser (*Thomas R. Kiley* also present) for Thomas M. Finneran.

JUDGES: Present: GANTS, C.J., BOTSFORD, LENK, HINES, GAZIANO, & BUDD, JJ.[2]

2 Justice Botsford participated in the deliberation on this case prior to her retirement.

OPINION BY: LENK

OPINION

[**1192] **LENK**, J. Former Speaker of the House Thomas Finneran pleaded guilty in the United States District Court in 2007 to one count of obstruction of justice in violation of *18 U.S.C. § 1503.* The obstruction of justice conviction related to false testimony that he had provided in relation to a Federal court action challenging the 2001 redistricting act, St. 2001, c. 125 (redistricting act). Finneran had played a significant role in the development of the redistricting act from the point of its inception but denied under oath that he had played any part in its development. Indeed, he testified that he had [***2] not even seen the plan before it was released to the full House of Representatives.

After his conviction, Finneran was informed by the State Retirement Board (board) that his crime constitutes a "violation of the laws applicable to his office or position," pursuant to *G. L. c. 32, § 15 (4),* requiring the forfeiture of his pension. Finneran appealed from the board's determination to the Boston Municipal Court. A Boston Municipal Court judge reversed, discerning no direct link between Finneran's "conviction and his position as a Member and/or Speaker of the House." We reach the opposite conclusion and accordingly reverse the decision of the Boston Municipal Court judge and affirm the conclusion of the board.

1. *Background.*[3] Finneran was first elected to the House of Representatives in 1978, as the representative of the Twelfth Suffolk District. Thereafter, he was reelected every

two years and concurrently served as Speaker of the House from 1996 until his resignation in 2004.

3 The facts, which the parties do not materially dispute, are taken from the Boston Municipal Court judge's decision and the administrative record, including the plea colloquy in the Federal court.

In 2001, Finneran played a key role in shepherding the Commonwealth through the redistricting process pursuant to the 2000 decennial United States census. The Legislature bore the responsibility of revising the Commonwealth's legislative [***3] districts to account for the change in population reflected in the census. Toward that end, the Legislature established a joint committee (committee) comprised of members of the Senate and House of Representatives to put together a redistricting plan. Finneran, as Speaker, appointed the House members of the committee. He also took part in the planning process and was consulted in regard to [*716] "virtually all" of the difficult decisions concerning the committee's redistricting plan.

One week before the plan was released to the full House, Finneran convened and attended a meeting concerning the redistricting plan. At that meeting, he reviewed the proposed plan in detail and suggested several changes to it that pertained to his [**1193] own district, at least some of which became part of the final redistricting plan. In the days leading up to the release of the plan, Finneran met with several of his fellow House members and explained to them how it would affect their districts. Shortly after the joint committee released the redistricting plan to the full House, then Acting Governor Jane Swift signed the redistricting act, enacting the plan into law on November 8, 2001.[4] The redistricting act, among [***4] other things, increased the proportion of eligible white voters in Finneran's House district.

4 The plan did not change significantly between the time it was released to the full House and when it was signed into law.

In June, 2002, a group of African-American and Latino voters filed a lawsuit in the United States District Court for the District of Massachusetts against Finneran, then Secretary of the Commonwealth William Galvin, and Acting Governor Swift,[5] challenging the redistricting act as it applied to House districts in the Boston area. They contended that the House districts were redrawn with the purpose of limiting the voting power of African-American and Latino voters, in violation of the *equal protection clause of the Fourteenth* and *Fifteenth Amendments to the United States Constitution*, and that the redistricting act had a discriminatory effect against such voters in violation of the *Voting Rights Act, 42 U.S.C. § 1973(b)*. In particular, they argued that Finneran's Twelfth Suffolk District was redrawn to decrease the number of minority voters in the district and "super-pack" the neighboring Sixth Suffolk District with African-American, Latino, and other minority voters. In May, 2003, the plaintiffs filed an amended complaint naming only Secretary Galvin as a defendant. The case was tried before a three-judge panel appointed by the Chief Judge of the United States Court of Appeals for the First Circuit.

5 The plaintiffs sued all of the defendants in their official capacities.

Finneran [***5] was deposed during the course of the lawsuit, and testified voluntarily on behalf of the defense in November, 2003. The plaintiffs cross-examined Finneran on, among other things, the role he played in relation to the formation of the redistricting [*717] act and, in particular, any effort he had undertaken or role he had had in facilitating the changes made to his House district. In his testimony, Finneran conceded that he had engaged in communications with the House members on the redistricting committee, but denied any substantive knowledge of the

redistricting plan prior to its publication to the full House. When asked whether he had reviewed "any of the redistricting plans as the process proceeded," Finneran responded, "Not as the process proceeded. No sir." Finneran subsequently falsely testified that he first saw the redistricting plan after it was released to the full House.

In February, 2004, the Federal District Court panel ruled for the plaintiffs on the ground that the redistricting act had resulted in a discriminatory impact on African-American voters, in violation of the *Voting Rights Act*. *Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 294 (D. Mass. 2004)*.[6] The panel also stated in a footnote that "[a]lthough Speaker Finneran denied any involvement in [***6] the redistricting process, the circumstantial evidence strongly suggests the opposite conclusion." *Id. at 295 n.3*. One year later, in June, 2005, a Federal grand jury indicted Finneran on three counts of perjury [**1194] and one count of obstruction of justice in relation to his false deposition testimony.[7] On January [*718] 5, 2007, Finneran pleaded guilty to obstruction of justice, in violation of *18 U.S.C. § 1503*, and received a sentence of eighteen months of probation and a $25,000 fine.[8]

> 6 As a result of this conclusion, the court did not reach the plaintiffs' constitutional arguments. *Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 294 (D. Mass. 2004)*.
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> 7 The charge of obstruction of justice alleged that Finneran had provided "misleading and false statements" in his testimony concerning
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> > "(a) whether [he] had reviewed and seen a redistricting plan before the [c]ommittee plan was filed with the Clerk of the House of Representatives ...; (b) when [Finneran] first had information about the [c]ommittee's proposed changes to the [Twelfth] Suffolk District ...; (c) whether [Finneran] spoke with [the committee chairman] about any matters relating to the configuration of the [Twelfth] Suffolk District ...; (d) whether [Finneran] had knowledge of the scope of the work performed by [attorney] Lawrence DiCara in the crafting of the [c]ommittee plan ...; (e) whether [Finneran] had information within his custody and control regarding the racial characteristics of the precincts he lost in redistricting and the precincts he gained in redistricting, other than [***7] that to which he testified in his deposition ... ; (f) the extent of [Finneran's] knowledge, at the time of his deposition, regarding what neighborhoods were removed from the [Twelfth] Suffolk District during redistricting, [and] the areas that were added to the [Twelfth] Suffolk District during redistricting ...; and (g) whether [Finneran] had within his custody and control a calendar which recorded campaign activities or events, including fundraisers, held by or on his behalf ... ."
>
> 8 The three perjury charges were dismissed as part of Finneran's plea bargain.

In January, 2007, the board ceased payments of Finneran's pension on the ground of his conviction, pursuant to *G. L. c. 32, § 15 (4)*.[9] Following a hearing in April, 2012, the hearing officer concluded that Finneran's pension is forfeit under *G. L. c. 32, § 15 (4)*, because he had "been convicted of a criminal offense involving violation of the laws applicable to his office or position." The hearing officer's conclusion rested on three

primary grounds: (1) Finneran had testified in his official capacity; (2) the "subject matter of his testimony was ... directly tied to his official duties;" and (3) "Finneran's duties as a legislator and the mandate of his oath [to uphold the Constitution of the United States and the Constitution of the Commonwealth] [***8] ... gave him a heightened obligation to be forthcoming with the Court" given that the case concerned the right to vote. The board subsequently voted to accept the hearing officer's decision.

> 9 *General Laws c. 32, § 15 (4)*, provides: "In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of *[§§ 1 to 28*], inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero."

Finneran appealed to the Boston Municipal Court under *G. L. c. 32, § 16 (3)*. A Boston Municipal Court judge reversed the board's decision, concluding that Finneran's conviction does not bear "a direct factual link to his position as a House Member and/or Speaker" and that "there is no substantial evidence to support the [b]oard's conclusion that Finneran's conviction violated a core function of his position as a House Member and/or Speaker because there is no evidence in the record of any code, rule or law applicable to Finneran's public position that connects his conviction with his office." The board filed a complaint in the nature of certiorari in the county court, pursuant to *G. L. c. 249, § 4*, asserting that the Boston Municipal [**1195] Court judge had committed an error of law in ruling that there is no "direct link between the criminal offense Finneran committed ... and his official duties as a Member and Speaker of the Massachusetts [*719] House of Representatives." A single justice reserved and reported the matter to the full court.

2. *Discussion* [***9]. The primary question before us is whether Finneran's pension is subject to forfeiture under *G. L. c. 32, § 15 (4)*. Finneran also contends that, even if we were to determine that forfeiture is appropriate under the statute, it nonetheless would constitute an excessive fine in violation of the *Eighth Amendment to the United States Constitution*. We consider each issue in turn.

a. *Standard of review*. *General Laws c. 249, § 4*, "provides for limited judicial review in the nature of certiorari to correct errors of law in administrative proceedings where judicial review is otherwise unavailable." *State Bd. of Retirement v. Bulger, 446 Mass. 169, 173, 843 N.E.2d 603 (2006)*. We may "correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff ... [and] may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public." *Garney v. Massachusetts Teachers' Retirement Sys., 469 Mass. 384, 388, 14 N.E.3d 922 (2014)*, quoting *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth, 430 Mass. 783, 790, 724 N.E.2d 288 (2000)*.

b. *Forfeiture pursuant to G. L. c. 32, § 15 (4)*. The gravamen of the board's argument is that Finneran's conviction of obstruction of justice concerns a "violation of the laws applicable to his office or position" under *G. L. c. 32, § 15 (4)*, and that his pension is thereby forfeit. *General Laws c. 32, § 15 (4)*, provides that "[i]n no event shall any member [of the State employees' retirement system] after final conviction of a criminal [***10] offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance."

Our review of *G. L. c. 32, § 15 (4)*, "is guided by the familiar principle that 'a statute

must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'" *Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 668, 6 N.E.3d 1069 (2014)*, quoting *Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606 (1934). Section 15 (4)* "is considered to be penal" in nature, and "its language must be construed narrowly, not stretched to accomp- [*720] lish an unexpressed result." See *Bulger, 446 Mass. at 174-175*.

Section 15 (4) was enacted in response to this court's decision in *Collatos v. Boston Retirement Bd., 396 Mass. 684, 488 N.E.2d 401 (1986)*, and was adopted to "broaden the range of crimes that would lead to pension forfeiture." See *Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1, 3, 665 N.E.2d 998 (1996)*. In that case, we observed that *§ 15 (4)* was not meant to "operate only in cases of violations of highly specialized crimes addressing official actions," nor to facilitate forfeiture "as a sequelae of any and all criminal convictions." *Id. at 4-5*. Rather, "[l]ooking to the facts of each case for a direct link between the criminal offense and the member's [***11] office or position best effectuates the legislative intent of *§ 15 (4)*." *Id. at 5*. "This 'direct link' requirement 'does not mean [**1196] that the crime itself must reference public employment or the employee's particular position or responsibilities,' ... or that the crime necessarily must have been committed at or during work." See *Garney, 469 Mass. at 389*, quoting *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't, 67 Mass. App. Ct. 612, 616, 855 N.E.2d 1106 (2006)*. Rather, the "substantive touchstone intended by the General Court is criminal activity connected with the office or position." *Gaffney, 423 Mass. at 4*.

The "direct link" standard discussed in *Gaffney* blossomed into two separate lines of cases concerning when forfeiture under *§ 15 (4)* would be appropriate. What has emerged are two recognized types of "direct links" between a public employee's position and the crime committed: factual links and legal links.

i. *Factual links*. In cases involving factual links, a public employee's pension is subject to forfeiture under *§ 15 (4)* only where there is a direct factual connection between the public employee's crime and position. See *Gaffney, 423 Mass. at 4-5* (superintendent of municipal water and sewer department who stole money from town was subject to pension forfeiture); *Durkin v. Boston Retirement Bd., 83 Mass. App. Ct. 116, 116-117, 119, 981 N.E.2d 763 (2013)* (police officer who used department-issued firearm to shoot fellow officer while off duty was subject to pension [***12] forfeiture); *Maher, 67 Mass. App. Ct. at 613, 616-617* (city employee who broke into city hall and stole documents from his personnel file was subject to pension forfeiture). Contrast *Garney, 469 Mass. at 385-386, 389-391* (no forfeiture where teacher purchased and stored child pornography on home computer because no connection to either his students or school property); *Retirement Bd. of Maynard v.* [*721] *Tyler, 83 Mass. App. Ct. 109, 109, 112-113, 981 N.E.2d 740 (2013)* (no forfeiture where fire fighter sexually abused children because acts occurred off duty outside fire house and fire fighter did not use "his position, uniform, or equipment for the purposes of his indecent acts"); *Herrick v. Essex Regional Retirement Bd., 77 Mass. App. Ct. 645, 646-647, 654-655, 933 N.E.2d 666 (2010)* (no forfeiture where housing authority custodian committed indecent assault and battery on daughter because offense not committed on housing authority property nor against any residents there, and did not bear other connection to custodian's position).

ii. *Legal links*. The other line of cases, involving direct legal links, mandates

forfeiture under *§ 15 (4)* when a public employee commits a crime directly implicating a statute that is specifically applicable to the employee's position. See *Buonomo, 467 Mass. at 664-666, 670-671* (pension forfeiture where register of probate embezzled funds in violation of Code of Professional Responsibility for Clerks of Courts); *Bulger, 446 Mass. at 177-180* (same with respect to clerk-magistrate who committed perjury [***13] and obstruction of justice). Contrast *Garney, 469 Mass. at 393* ("Criminal conduct that is merely inconsistent with a concept of special public trust placed in the position or defiant of a general professional norm applicable to the position, but not violative of a fundamental precept of the position embodied in a law applicable to it ... is insufficient to justify forfeiture under *G. L. c. 32, § 15 [4]*"). The requisite direct legal link is shown where the crime committed is "contrary to a central function of the position as articulated in applicable laws." *Id. at 391*.

iii. *Analysis*. Finneran's conduct falls squarely within the first category, requiring [**1197] forfeiture where there is a direct factual link between the public employee's position and the offense.[10] Finneran's false testimony concerning his knowledge of and participation in the redistricting planning process is in at least two respects directly linked as a factual matter to his position as Speaker of the House.

> 10 Because we conclude that Finneran's conviction bears a direct factual link to his position as Speaker of the House, we do not address the question whether there is a direct legal link between the offense and his position.

First and foremost, Finneran's false testimony directly concerns and relates to his work on the redistricting plan as Speaker of the House. Unlike those cited cases where a public employee's crime bore no relationship to his office or position, see, e.g., *Garney, 469 Mass. at 389*, Finneran's crime [***14] directly concerns actions [*722] that he had carried out when he served as Speaker, in his role as Speaker. He worked on the redistricting plan in his capacity as Speaker and later testified falsely about it. On its face, this connection is enough to create a "direct link between the criminal offense and [Finneran's] ... position."[11] See *Gaffney, 423 Mass. at 5*.

> 11 It is irrelevant whether Finneran's work on the redistricting process was a necessary part of his duties as Speaker of the House. That he in fact played an integral part in the redistricting process through his role as Speaker is what creates the direct link to his false testimony.

Another factual link between Finneran's crime and his position as Speaker of the House is his admitted motivation for its commission. It had been alleged that the plan was adopted in order to dilute minority representation in a number of House districts, including Finneran's own district.[12] By his own account, Finneran provided his false testimony to vindicate his conduct as Speaker of the House regarding the redistricting plan. This further underscores the factual connection between Finneran's false testimony and his work on the redistricting plan as Speaker of the House.

> 12 During his plea colloquy, Finneran stated:
>
> > "The accusations contained in the civil suit, your Honor, I found very, very troubling. For [twenty-six] years I had represented a district that was overwhelmingly African-American, and I took great pride in my service of this district. The accusations spoke to -- the plaintiff's civil suit [***15] spoke and alleged a deliberate racial manipulation in order to depress or suppress legitimate efforts at minority representation. I was offended by the accusation. I was angered by it, and I think,

> quite frankly, your Honor, it has led to this entire series of events which brings us here today."

Finneran contends that forfeiture is inappropriate because his offense does not fall within the scope of his duties as Speaker of the House. This argument is unavailing. While Finneran's offense itself does not directly implicate his duties as Speaker of the House,[13] it is nonetheless inextricably intertwined with his position. Simply put, it is only because he had been Speaker of the House at the relevant time that he was in a position to testify as to the genesis of the redistricting plan and to do so falsely. This connection is enough to warrant forfeiture under *§ 15 (4)*. See, e.g., *Maher, 67 Mass. App. Ct. at 616-617* (forfeiture proper where public employee broke into city hall and stole his personnel records). Given this, Finneran's conviction of obstruction of [*723] justice is a "violation of the laws applicable to his office or position," pursuant to *§ 15 (4)* [**1198] and, accordingly, requires the statutory forfeiture of his pension.

> 13 Nothing in the record suggests that Finneran testified in his official capacity as Speaker of the House or that he was in any way obligated to testify pursuant to his duties as the Speaker of the House.

c. *Eighth Amendment claim*. Finneran [***16] also contends that should we conclude, as we have, that his pension is forfeit pursuant to *§ 15 (4)*, such a penalty would be an excessive fine in violation of the *Eighth Amendment*.[14] He relies in this regard upon our recent decision in *Public Employee Retirement Admin. Comm'n v. Bettencourt, 474 Mass. 60, 47 N.E.3d 667 (2016)*. There, we determined that the forfeiture of a police officer's pension, worth at least $659,000, which was due to an offense for which he was given a $10,500 fine, without probation or prison time, violated the *Eighth Amendment*. *Id. at 71-75*. Not having raised this argument below, Finneran is precluded from raising the issue on appeal. See *Commonwealth v. Rivera, 429 Mass. 620, 623, 710 N.E.2d 950 (1999)*. Nonetheless, even if Finneran had preserved the issue, the result would be the same.

> 14 The *Eighth Amendment to the United States Constitution* provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The *Eighth Amendment* is applicable to the States through the *due process clause of the Fourteenth Amendment to the United States Constitution*. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)*.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bettencourt, 474 Mass. at 72*, quoting *United States v. Bajakajian, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)*. In applying this standard, we first consider the amount of the forfeiture. *Bettencourt, supra*. We then "gauge the degree of [Finneran's] culpability and, in that regard, ... [(1)] consider the nature and circumstances of his offenses, [(2)] whether they were related to any other illegal activities, [(3)] the aggregate maximum sentence that could have [***17] been imposed, and [(4)] the harm resulting from them." *Id.*, citing *Bajakajian, supra at 337-339*.

In considering the amount of the forfeiture, Finneran relies on the Public Employee Retirement Administration Commission's determination that the present value of his "future benefits as of his retirement date was approximately $433,400."[15] We apply to that figure the four-factor standard from *Bajakajian* for gauging [*724] proportionality under the *Eighth Amendment*. As to the first and second factors, Finneran was convicted of a felony, viz., obstruction of justice, his crime

consisting of false testimony as to his involvement in a redistricting process that was later found to be in violation of the *Voting Rights Act*.[16] With regard to the third factor, the maximum penalty for Finneran's crime was "a period of imprisonment of ten years, a $250,000 fine, a period of three years of supervised release, a five year period of probation, and a $100 special assessment." Fourth, given that the plaintiffs prevailed in the judicial proceeding, [**1199] little apparent harm flowed from Finneran's crime.

15 The board disputes this amount and points out that Finneran's failure to raise this argument below means that the value of his pension has never been presented to a judicial fact finder.

16 We note that the United States District Court panel held that the redistricting plan had a discriminatory impact on African-American voters, but did not conclude that the plan was enacted with discriminatory intent. *Black Political Task Force, 300 F. Supp. 2d at 315-316.*

The gravity of Finneran's offense and the maximum potential penalty for it distinguish his crime from the circumstances of *Bettencourt.* That case involved [***18] a forfeiture of at least $659,000 in pension benefits, plus health benefits, following a series of misdemeanor offenses[17] that did not relate to any other illegality and carried an aggregate maximum penalty of 630 days imprisonment and a fine of $21,000. See *Bettencourt, 474 Mass. at 72-74.* In stark contrast, Finneran's offense is a felony connected to a redistricting plan that violated Federal law, carrying a maximum penalty that includes ten years' imprisonment and a $250,000 fine. The forfeiture of $433,400 in pension payments pursuant to *§ 15 (4)* therefore does not qualify as an excessive fine in violation of the *Eighth Amendment*.

17 The case involved a police officer who unlawfully accessed the civil service promotional examination scores of twenty-one of his fellow officers in violation of *G. L. c. 266, § 120F*. See *Public Employee Retirement Admin. Comm'n v. Bettencourt, 474 Mass. 60, 61-62, 47 N.E.3d 667 (2016)*.

3. *Conclusion*. The case is remanded to the county court where an order shall enter reversing the judgment of the Boston Municipal Court, affirming the decision of the board, and remanding to the Boston Municipal Court for further proceedings consistent with this opinion.

So ordered.

TOWN OF MONTAGUE v. JEANNE GOLRICK.

16-P-681.

APPEALS COURT OF MASSACHUSETTS

91 Mass. App. Ct. 1109
2017 Mass. App. Unpub. LEXIS 210

March 2, 2017, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT

CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008)*.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PRIOR HISTORY: *Golrick v. Conley, 2011 Mass. LCR LEXIS 113 (2011)*

DISPOSITION: Judgment affirmed.

JUDGES: Vuono, Milkey & Henry, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Jeanne Golrick, appeals from a judgment entered against her in this tax lien case. Her primary argument is that because she was not served notice of the petition seeking foreclosure as contemplated by *G. L. c. 60, § 66*, the judgment must be set aside. We disagree. As we understand the record, Golrick acknowledges that the town of Montague (town) properly recorded both the instrument of tax taking and the petition seeking foreclosure long before she obtained her purported title. Golrick thus had at least constructive notice of the pending petition. Cf. *Frost Coal Co. v. Boston, 259 Mass. 354, 357-358, 156 N.E. 676 (1927)*; *Devine v. Nantucket, 449 Mass. 499, 507, 870 N.E.2d 591 (2007)*. More importantly, Golrick concedes she had actual notice of the petition and, in fact, she actively participated in the process by filing a formal appearance, filing opposition papers, and by appearing in person and arguing at all hearings. Lastly, Golrick does not argue she suffered any prejudice occasioned by the lack of formal *§ 66* notice. Neither due process nor *§ 66* requires more than what occurred here. See *Vincent Realty Corp. v. Boston, 375 Mass. 775, 779-780, 378 N.E.2d 73 (1978)*. Cf. *Adoption of Pearl, 34 Mass. App. Ct. 308, 312 n.5, 610 N.E.2d 337 (1993)* (actual notice satisfied due process requirements).

We need only briefly address Golrick's remaining arguments. The Land Court judge properly exercised subject matter [*2] jurisdiction. See *G. L. c. 185, § 1(b)*; *G. L. c. 60, § 64*. The Land Court recorder had authority to issue the judgment at issue. See *G. L. c. 185, § 6*, final sentence. Had Golrick wished to have the questions presented considered by a Land Court judge she could have done so via a petition in the Land Court to vacate the judgment. See *G. L. c. 60, §§ 69, 69A*. Although Massachusetts does not appear to recognize allodial theory as applied to real property,[1] those few non-Massachusetts jurisdictions addressing it suggest that real property so held does not exempt that property either from court process or local taxation. See *Stevens v. Salisbury, 240 Md. 556, 562-563, 214 A.2d 775 (Md. 1965)*.[2] Golrick has failed to bring to our attention any authority suggesting the contrary. From all that appears of record the town's counsel is admitted to practice before the Massachusetts Bar and properly appeared on the town's behalf. Golrick has brought to our attention nothing suggesting the contrary. To the extent we have not commented explicitly on Golrick's remaining arguments, we have considered and found them to be without merit.

1 The term does not appear in any reported Massachusetts decisions, the General Laws, the Massachusetts Constitution, or in any regulatory enactment.

2 "After the close of the Revolutionary War, the ownership of property in this country has frequently been referred to as 'allodial' in nature or that the property is

> held by 'allodial tenure.' In its strict sense, 'allodium' means land owned absolutely, and not subject to any rent, service, or other tenurial right of an overlord; however, it has been, and is, uniformly recognized throughout this country that the ownership of property is subject to the rights of government to tax the property, to regulate reasonably its use and enjoyment under the police power of the States, and to take the same, upon payment of the values thereof, when needed for a public purpose." *Stevens v. Salisbury, supra.*

Judgment affirmed.

By the Court (Vuono, Milkey & Henry, JJ.[3]),

> 3 The panelists are listed in order of seniority.

Entered: March 2, 2017.

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC., PETITIONER v. CAROL S. COMER, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES

No. 15-577.

SUPREME COURT OF THE UNITED STATES

137 S. Ct. 2012*; *198 L. Ed. 2d 551
2017 U.S. LEXIS 4061*; *85 U.S.L.W. 4419*; *26 Fla. L. Weekly Fed. S 750

April 19, 2017, Argued
June 26, 2017, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [**1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 2015 U.S. App. LEXIS 8915 (8th Cir. Mo., May 29, 2015)

SYLLABUS

[*553] The Trinity Lutheran Church Child Learning Center is a Missouri preschool and daycare center. Originally established as a nonprofit organization, the Center later merged with Trinity Lutheran Church and now operates under its auspices on church property. Among the facilities at the Center is a playground, which has a coarse pea gravel surface beneath much of the play equipment. In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. The program, run by the State's Department of Natural Resources, offers reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires. The Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. Pursuant to that policy, the Department denied the Center's application. In a letter rejecting that application, the Department explained that under *Article I, Section 7 of the Missouri Constitution*, the Department could not provide financial assistance directly to a church. The Department [**2] ultimately awarded 14 grants as part of the 2012 [*554] program. Although the Center ranked fifth out of the 44 applicants, it did not receive a grant because it is a church.

Trinity Lutheran sued in Federal District Court, alleging that the Department's failure

to approve its application violated the *Free Exercise Clause of the First Amendment*. The District Court dismissed the suit. The *Free Exercise Clause*, the court stated, prohibits the government from outlawing or restricting the exercise of a religious practice, but it generally does not prohibit withholding an affirmative benefit on account of religion. The District Court likened the case before it to *Locke v. Davey, 540 U. S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1*, where this Court upheld against a free exercise challenge a State's decision not to fund degrees in devotional theology as part of a scholarship program. The District Court held that the *Free Exercise Clause* did not require the State to make funds available under the Scrap Tire Program to Trinity Lutheran. A divided panel of the Eighth Circuit affirmed. The fact that the State could award a scrap tire grant to Trinity Lutheran without running afoul of the *Establishment Clause of the Federal Constitution*, the court ruled, did not mean that the *Free Exercise Clause* compelled the State to disregard the broader antiestablishment principle reflected in its own Constitution.

Held: The Department's [**3] policy violated the rights of Trinity Lutheran under the *Free Exercise Clause of the First Amendment* by denying the Church an otherwise available public benefit on account of its religious status. Pp. 6-15.

(a) This Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion. Thus, in *McDaniel v. Paty, 435 U. S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593*, the Court struck down a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. A plurality recognized that such a law discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.'" *Id., at 627, 98 S. Ct. 1322, 55 L. Ed. 2d 593*. In recent years, when rejecting free exercise challenges to neutral laws of general applicability, the Court has been careful to distinguish such laws from those that single out the religious for disfavored treatment. See, *e.g., Lyng v. Northwest Indian Cemetery Protective Assn., 485 U. S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534*; *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*; and *Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472*. It has remained a fundamental principle of this Court's free exercise jurisprudence that laws imposing "special disabilities on the basis of ... religious status" trigger the strictest scrutiny. *Id., at 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472*. Pp. 6-9.

(b) The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a [**4] public benefit solely because of their religious character. Like the disqualification statute in *McDaniel*, the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious [*555] institution. When the State conditions a benefit in this way, *McDaniel* says plainly that the State has imposed a penalty on the free exercise of religion that must withstand the most exacting scrutiny. *435 U. S., at 626, 628, 98 S. Ct. 1322, 55 L. Ed. 2d 593*.

The Department contends that simply declining to allocate to Trinity Lutheran a subsidy the State had no obligation to provide does not meaningfully burden the Church's free exercise rights. Absent any such burden, the argument continues, the Department is free to follow the State's antiestablishment objection to providing funds directly to a church. But, as even the Department acknowledges, the *Free Exercise Clause* protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng, 485 U. S., at 450, 108 S. Ct. 1319, 99 L. Ed. 2d 534*. Trinity Lutheran is not claiming any entitlement to a subsidy. It is asserting a right to participate in a government benefit program without having to disavow its

religious character. The express discrimination against religious [**5] exercise here is not the denial of a grant, but rather the refusal to allow the Church--solely because it is a church--to compete with secular organizations for a grant. Pp. 9-11.

(c) The Department tries to sidestep this Court's precedents by arguing that this case is instead controlled by *Locke* v. *Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. Scholarship recipients were free to use state funds at accredited religious and non-religious schools alike, but they could not use the funds to pursue a devotional theology degree. At the outset, the Court made clear that *Locke* was not like the cases in which the Court struck down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." *540 U. S., at 720-721, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is--a church.

The Court in *Locke* also stated that Washington's restriction on the use of its funds was in keeping with the State's antiestablishment [**6] interest in not using taxpayer funds to pay for the training of clergy, an "essentially religious endeavor," *id., at 721, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Here, nothing of the sort can be said about a program to use recycled tires to resurface playgrounds. At any rate, the Court took account of Washington's antiestablishment interest only after determining that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." *Id., at 720-721, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. There is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. Pp. 11-14.

(d) The Department's discriminatory policy does not survive the "most rigorous" scrutiny that this Court applies to laws imposing special disabilities on account of religious status. *Lukumi, 508 U. S., at 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472*. That standard [*556] demands a state interest "of the highest order" to justify the policy at issue. *McDaniel, 435 U. S., at 628, 98 S. Ct. 1322, 55 L. Ed. 2d 593* (internal quotation marks omitted). Yet the Department offers nothing more than Missouri's preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before the Court, that interest cannot qualify as compelling. Pp. 14-15.

Reversed and remanded.

COUNSEL: David A. Cortman argued the cause for petitioner.

James R. Layton argued the cause for respondent.

JUDGES: Roberts, [**7] C. J., delivered the opinion of the Court, except as to footnote 3. Kennedy, Alito, and Kagan, JJ., joined that opinion in full, and Thomas and Gorsuch, JJ., joined except as to footnote 3. Thomas, J., filed an opinion concurring in part, in which Gorsuch, J., joined. Gorsuch, J., filed an opinion concurring in part, in which Thomas, J., joined. Breyer, J., filed an opinion concurring in the judgment. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined.

OPINION BY: ROBERTS

OPINION

Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3.

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from

recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of [**8] Trinity Lutheran under the *Free Exercise Clause of the First Amendment*.

I

A

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year to serve working families in Boone County, Missouri, and the surrounding area. Established as a nonprofit organization in 1980, the Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program [*557] offers reimbursement grants to qualifying nonprofit [**9] organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by *Article I, Section 7 of the Missouri Constitution*, which provides:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide [**10] a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." App. to Pet. for Cert. 131a. After describing the playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project: increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the *Americans with Disabilities Act of 1990*; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. But despite its high score, the Center was deemed categorically ineligible to receive a grant. In a letter rejecting the Center's application, the program director explained that, under *Article I, Section 7 of the Missouri Constitution*, the Department could not provide financial assistance directly to [**11] a church.

The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant.

B

Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the *Free Exercise Clause of the First Amendment*. Trinity Lutheran sought declaratory and injunctive relief prohibiting the Department from discriminating against the Church on that basis in future grant applications.

[*558] The District Court granted the Department's motion to dismiss. The *Free Exercise Clause*, the District Court stated, prohibits the government from outlawing or restricting the exercise of a religious practice; it generally does not prohibit withholding an affirmative benefit on account of religion. The District Court likened the Department's denial of the scrap tire grant to the situation this Court encountered in *Locke v. Davey, 540 U. S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004)*. In that case, we upheld against a free exercise challenge the State of Washington's decision not to fund degrees in devotional theology as part of a state scholarship program. Finding the present case "nearly [**12] indistinguishable from *Locke*," the District Court held that the *Free Exercise Clause* did not require the State to make funds available under the Scrap Tire Program to religious institutions like Trinity Lutheran. *Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1151 (WD Mo. 2013)*.

The Court of Appeals for the Eighth Circuit affirmed. The court recognized that it was "rather clear" that Missouri *could* award a scrap tire grant to Trinity Lutheran without running afoul of the *Establishment Clause of the United States Constitution*. *Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F. 3d 779, 784 (2015)*. But, the Court of Appeals explained, that did not mean the *Free Exercise Clause* compelled the State to disregard the antiestablishment principle reflected in its own Constitution. Viewing a monetary grant to a religious institution as a "'hallmark[ ] of an established religion,'" the court concluded that the State could rely on an applicant's religious status to deny its application. *Id., at 785* (quoting *Locke, 540 U. S., at 722, 124 S. Ct. 1307, 158 L. Ed. 2d 1*; some internal quotation marks omitted).

Judge Gruender dissented. He distinguished *Locke* on the ground that it concerned the narrow issue of funding for the religious training of clergy, and "did not leave states with unfettered discretion to exclude the religious from generally available public benefits." *788 F. 3d, at 791* (opinion concurring in part and dissenting in part).

Rehearing en banc was denied by an equally divided court.

We granted [**13] certiorari *sub nom. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 577 U. S. ___, 136 S. Ct. 891, 193 L. Ed. 2d 784 (2016)*, and now reverse.[1]

1 In April 2017, the Governor of Missouri announced that he had directed the Department to begin allowing religious organizations to compete for and receive Department grants on the same terms as secular organizations. That announcement does not moot this case. We have said that such voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of*

the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U. S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (internal quotation marks omitted). The Department has not carried the "heavy burden" of making "absolutely clear" that it could not revert to its policy of excluding religious organizations. *Ibid.* The parties agree. See Letter from James R. Layton, Counsel for Respondent, to Scott S. Harris, Clerk of Court (Apr. 18, 2017) (adopting the position of the Missouri Attorney General's Office that "there is no clearly effective barrier that would prevent the [Department] from reinstating [its] policy in the future"); Letter from David A. Cortman, Counsel for Petitioner, to Scott S. Harris, Clerk of Court (Apr. 18, 2017) ("[T]he policy change does nothing to remedy the source of the [Department's] original policy--the Missouri Supreme Court's interpretation of *Article 1, §7 of the Missouri Constitution*").

[*559] II

The *First Amendment* provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the *Establishment Clause* of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the *Free Exercise Clause*, because we have recognized that there is "play in the joints" between what the *Establishment Clause* permits and the *Free Exercise Clause* compels. *Locke, 540 U. S., at 718, 124 S. Ct. 1307, 158 L. Ed. 2d 1* (internal quotation marks omitted).

The *Free Exercise Clause* "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 533, 542, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)* (internal quotation marks omitted). Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *McDaniel v. Paty, 435 U. S. 618, 628, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978)* (plurality opinion) (quoting *Wisconsin v. Yoder, 406 U. S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972))*.

In *Everson v. Board of Education of Ewing, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)*, for example, we upheld against an *Establishment Clause* challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of [**14] sending their children to public and private schools, including parochial schools. In the course of ruling that the *Establishment Clause* allowed New Jersey to extend that public benefit to all its citizens regardless of their religious belief, we explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id., at 16, 67 S. Ct. 504, 91 L. Ed. 711*.

Three decades later, in *McDaniel* v. *Paty*, the Court struck down under the *Free Exercise Clause* a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. Writing for the plurality, Chief Justice Burger acknowledged that Tennessee had disqualified ministers from serving as legislators since the adoption of its first Constitution in 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition, however, did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because [**15] of his "*status* as a 'minister.'" *435 U. S., at 627, 98 S. Ct. 1322, 55 L. Ed. 2d 593*. McDaniel could not seek to participate in the convention while also maintaining his role as a minister; [*560] to pursue the one, he would have to give up the other. In this way,

said Chief Justice Burger, the Tennessee law "effectively penalizes the free exercise of [McDaniel's] constitutional liberties." *Id., at 626, 98 S. Ct. 1322, 55 L. Ed. 2d 593* (quoting *Sherbert v. Verner, 374 U. S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)*; internal quotation marks omitted). Joined by Justice Marshall in concurrence, Justice Brennan added that "because the challenged provision requires [McDaniel] to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion." *McDaniel, 435 U. S., at 634, 98 S. Ct. 1322, 55 L. Ed. 2d 593*.

In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

For example, in *Lyng v. Northwest Indian Cemetery Protective Association, 485 U. S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988)*, we held that the *Free Exercise Clause* did not prohibit the Government from timber harvesting or road construction on a particular tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the [**16] tract to be sacred. Accepting that "[t]he building of a road or the harvesting of timber ... would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," we nonetheless found no free exercise violation, because the affected individuals were not being "coerced by the Government's action into violating their religious beliefs." *Id., at 449, 108 S. Ct. 1319, 99 L. Ed. 2d 534*. The Court specifically noted, however, that the Government action did not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Ibid.*

In *Employment Division, Department of Human Resources of Oregon v. Smith, 494 U. S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*, we rejected a free exercise claim brought by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. Along the same lines as our decision in *Lyng*, we held that the *Free Exercise Clause* did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the *Free Exercise Clause did* guard against the government's imposition of "special disabilities on the basis of religious views or religious status." *494 U. S., at 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876* (citing *McDaniel, 435 U. S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593*).[2]

2 This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the *Free Exercise Clause*. Recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U. S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)*, this Court held that the *Religion Clauses* required a ministerial exception to the neutral prohibition on employment retaliation contained in the *Americans with Disabilities Act*. Distinguishing [**17] *Smith*, we explained that while that case concerned government regulation of physical acts, "[t]he present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *565 U. S., at 190, 132 S. Ct. 694, 181 L. Ed. 2d 650*.

Finally, in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, we struck [*561] down three facially neutral city ordinances that outlawed certain forms of animal slaughter. Members of the Santeria religion challenged the ordinances under the *Free Exercise Clause*, alleging that despite their facial neutrality, the ordinances had a discriminatory purpose easy to ferret out: prohibiting sacrificial rituals integral to Santeria but distasteful to local residents. We agreed. Before explaining why the challenged ordinances were not, in fact,

neutral or generally applicable, the Court recounted the fundamentals of our free exercise jurisprudence. A law, we said, may not discriminate against "some or all religious beliefs." *508 U. S., at 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472*. Nor may a law regulate or outlaw conduct because it is religiously motivated. And, citing *McDaniel* and *Smith*, we restated the now-familiar refrain: The *Free Exercise Clause* protects against laws that "'impose[ ] special disabilities on the basis of ... religious status.'" *508 U. S., at 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472* (quoting *Smith, 494 U. S., at 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876*); see also *Mitchell v. Helms, 530 U. S. 793, 828, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000)* (plurality opinion) (noting "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity" (citing *Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)*; *Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U. S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993)*; *Widmar v. Vincent, 454 U. S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981))).*

III

A

The Department's policy [**18] expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Lukumi, 508 U. S., at 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472*. This conclusion is unremarkable in light of our prior decisions.

Like the disqualification statute in *McDaniel*, the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church, just as McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion: "To condition the availability of benefits ... upon [a recipient's] willingness to ... surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional [**19] liberties." *435 U. S., at 626, 98 S. Ct. 1322*, [*562] *55 L. Ed. 2d 593* (plurality opinion) (alterations omitted).

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*, which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church. Brief for Respondent 7-12, 14-16.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the *Free Exercise Clause* protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng, 485 U. S., at 450, 108 S. Ct. 1319, 99 L. Ed. 2d 534*. As the Court put it more than 50 years ago, "[i]t is too late in the day [**20] to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert, 374 U. S., at 404, 83 S. Ct. 1790, 10 L. Ed. 2d 965*; see also

McDaniel, 435 U. S., at 633, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (Brennan, J., concurring in judgment) (The "proposition--that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment--is ... squarely rejected by precedent").

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of *First Amendment* rights." *Sherbert, 374 U. S., at 405, 83 S. Ct. 1790, 10 L. Ed. 2d 965*. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church--solely because it is a church--to compete with secular organizations for a grant. Cf. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U. S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)* ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract"). Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand [**21] the strictest scrutiny.

B

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's [*563] general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree--one "devotional in nature or designed to induce religious faith." *540 U. S., at 716, 124 S. Ct. 1307, 158 L. Ed. 2d 1* (internal quotation marks omitted). Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was *not* at issue. Washington's selective [**22] funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." *Id., at 720-721, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." *Id., at 721, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*--use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is--a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." *Id., at 722, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. The claimant in *Locke* sought funding for an "essentially religious endeavor ... akin to a religious calling as well [**23] as an academic pursuit," and opposition to such

funding "to support church leaders" lay at the historic core of the *Religion Clauses*. *Id., at 721-722, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke*, the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. Brief for Respondent 15-16. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." *540 U. S., at 720-721, 124 S. Ct. 1307, 158 L. Ed. 2d 1* (citing *McDaniel, 435 U. S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593*). As the Court put it, Washington's scholarship program went "a long way toward including religion in its benefits." *Locke, 540 U. S., at 724, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Students in the program were free to use their scholarships at "pervasively religious schools." *Ibid*. Davey could use his scholarship to pursue a secular degree at one institution [*564] while studying devotional theology at another. *Id., at 721, n. 4, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. He could also use his scholarship money to attend a religious college and take devotional theology courses there. *Id., at 725, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. The only thing he could not do was use the scholarship to pursue [**24] a degree in that subject.

In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply. [3]

3 This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

C

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi, 508 U. S., at 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472*. [4]

4 We have held that "a law targeting religious beliefs as such is never permissible." *Lukumi, 508 U. S., at 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472*; see also *McDaniel v. Paty, 435 U. S. 618, 626, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978)* (plurality opinion). We do not need to decide whether the condition Missouri imposes in this case falls within the scope of that rule, because it cannot survive strict scrutiny in any event.

Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. *McDaniel, 435 U. S., at 628, 98 S. Ct. 1322, 55 L. Ed. 2d 593* (internal quotation marks omitted). Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. Brief for Respondent 15-16. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here--in achieving greater separation of church and State than is [**25] already ensured under the *Establishment Clause of the Federal Constitution*--is limited by the *Free Exercise Clause*." *Widmar, 454 U. S., at 276, 102 S. Ct. 269, 70 L. Ed. 2d 440*.

The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the *Free Exercise Clause*. [5]

5 Based on this holding, we need not reach the Church's claim that the policy also violates the *Equal Protection Clause*.

***

Nearly 200 years ago, a legislator urged the Maryland Assembly to adopt a bill that would end the State's disqualification of Jews from public office:

> "If, on account of my religious faith, I am subjected to disqualifications, from which others are free, ... I cannot but consider myself a persecuted man. ... An odious exclusion from any of the benefits common to [*565] the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture." Speech by H. M. Brackenridge, Dec. Sess. 1818, in H. Brackenridge, W. Worthington, & J. Tyson, Speeches in the House of Delegates of Maryland, 64 (1829).

The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The [**26] consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: THOMAS; GORSUCH; BREYER

CONCUR

Justice Thomas, with whom Justice Gorsuch joins, concurring in part.

The Court today reaffirms that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified," if at all, "only by a state interest 'of the highest order.'" *Ante, at 6*. The *Free Exercise Clause*, which generally prohibits laws that facially discriminate against religion, compels this conclusion. See *Locke v. Davey, 540 U. S. 712, 726-727, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004)* (Scalia, J., dissenting).

Despite this prohibition, the Court in *Locke* permitted a State to "disfavor ... religion" by imposing what it deemed a "relatively minor" burden on religious exercise to advance the State's antiestablishment "interest in not funding the religious training of clergy." *Id., at 720, 722, n. 5, 725, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. The Court [**27] justified this law based on its view that there is "'play in the joints'" between the *Free Exercise Clause* and the *Establishment Clause*--that is, that "there are some state actions permitted by the *Establishment Clause* but not required by the *Free Exercise Clause*." *Id., at 719, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Accordingly, *Locke* did not subject the law at issue to any form of heightened scrutiny. But it also did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review.

This Court's endorsement in *Locke* of even a "mil[d] kind," *id., at 720, 124 S. Ct. 1307, 158 L. Ed. 2d 1*, of discrimination against religion remains troubling. See generally *id., at 726-734, 124 S. Ct. 1307, 158 L. Ed. 2d 1* (Scalia, J., dissenting). But because the Court today appropriately construes *Locke* narrowly, see Part III-B, *ante*, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion. I do not, however, join footnote 3, for the reasons expressed by Justice Gorsuch, *post, p. 1* (opinion concurring in part).

[*566] Justice Gorsuch, with whom Justice Thomas joins, concurring in part.

Missouri's law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the *First Amendment* and I am

pleased to join nearly all of the Court's opinion. I offer only two [**28] modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*. See *ante, at 12*. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). See *Cruzan v. Director, Mo. Dept. of Health, 497 U. S. 261, 296, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990)* (Scalia, J., dissenting). Often enough the same facts can be described both ways.

Neither do I see why the *First Amendment*'s *Free Exercise Clause* should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status). *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*. And this Court has long explained that government may not "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)* [**29]. Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. See *Thomas v. Review Bd. of Indiana Employment Security Div., 450 U. S. 707, 716, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)*; *Everson v. Board of Ed. of Ewing, 330 U. S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711 (1947)*. I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey, 540 U. S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004)*. See *ante, at 12*. In that case, this Court upheld a funding restriction barring a student from using a scholarship to pursue a degree in devotional theology. But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here. *Ante, at 13*.

[*567] Second and for similar reasons, I am unable to join the footnoted observation, *ante, at 14, n. 3* [**30], that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing." Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than ad hoc improvisations." *Elk Grove Unified School Dist. v. Newdow, 542 U. S. 1, 25, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)* (Rehnquist, C. J., concurring in judgment). And the general principles here do not permit discrimination against religious exercise--whether on the playground or anywhere else.

Justice Breyer, concurring in the judgment.

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the "public benefit" here at issue. Cf. *ante, at 11* ("Trinity Lutheran ... asserts a right to participate in a government benefit program"); *ante, at 12* (referring to precedent "striking down laws requiring individuals to choose between [**31] their religious beliefs and receiving a government benefit" (internal quotation marks omitted)); *ante, at 10* (referring to Trinity Lutheran's "automatic and absolute exclusion from the benefits of a public program"); *ante, at 9-10* (the State's policy disqualifies "otherwise eligible recipients ... from a public benefit solely because of their religious character"); *ante, at 6-7* (quoting the statement in *Everson v. Board of Ed. of Ewing, 330 U. S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711 (1947)*, that the State "cannot exclude" individuals "*because of their faith*" from "receiving the benefits of public welfare legislation").

The Court stated in *Everson* that "cutting off church schools from" such "general government services as ordinary police and fire protection ... is obviously not the purpose of the *First Amendment*." *330 U. S., at 17-18, 7 S. Ct. 504, 91 L. Ed. 711*. Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. I see no significant difference. The fact that the program at issue ultimately funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. [**32] And it is that last-mentioned fact that calls the *Free Exercise Clause* into play. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the *Free Exercise Clause* to other kinds of public benefits for another day.

DISSENT BY: SOTOMAYOR

DISSENT

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

To hear the Court tell it, this is a simple case about recycling tires to [*568] resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government--that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

I

Founded in 1922, Trinity Lutheran Church (Church) "operates ... for the express purpose of carrying out the commission of ... Jesus Christ as directed to His church on earth." Our Story, http://www.trinity-lcms.org/story (all internet materials as last visited June 22, 2017). The Church uses "preaching, teaching, [**33] worship, witness, service, and fellowship according to the Word of God" to carry out its mission "to 'make disciples.'" Mission, http://www.trinity-lcms.org/mission (quoting Matthew 28:18-20). The Church's religious beliefs include its desire to "associat[e] with the [Trinity Church Child] Learning Center." App. to Pet. for Cert. 101a. Located on Church property, the Learning Center provides daycare and preschool for about "90 children ages two to kindergarten." *Id.*, at 100a.

The Learning Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into ... [its] program." *Id.*, at 101a. In this way, "[t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents" of the area. *Ibid.* These activities represent the Church's "sincere religious belief ... to use

[the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." *Ibid.*

The Learning Center's facilities include a playground, the unlikely source of this dispute. The Church provides the playground and other "safe, clean, and attractive" facilities "in conjunction with an education program structured [**34] to allow a child to grow spiritually, physically, socially, and cognitively." *Ibid.* This case began in 2012 when the Church applied for funding to upgrade the playground's pea gravel and grass surface through Missouri's Scrap Tire Program, which provides grants for the purchase and installation of recycled tire material to resurface playgrounds. The Church sought $20,000 for a $30,580 project to modernize the playground, part of its effort to gain state accreditation for the Learning Center as an early childhood education program. Missouri denied the Church funding based on Article I, *§7*, of its State Constitution, which prohibits the use of public funds "in aid of any church, sect, or denomination of religion."

II

Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind--payments from the government to a house of worship--would cross the line drawn by the *Establishment Clause*. [*569] See, *e.g.*, *Walz* v. *Tax Comm'n of City of New York, 397 U. S. 664, 675, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)*; *Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819, 844, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)*; *Mitchell v. Helms, 530 U. S. 793, 843-844, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000)* (O'Connor, J., concurring in judgment). So it is surprising that the Court mentions the *Establishment Clause* only to note the parties' [**35] agreement that it "does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program." *Ante, at 6*. Constitutional questions are decided by this Court, not the parties' concessions. The *Establishment Clause* does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission. The Court's silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents.

A

The government may not directly fund religious exercise. See *Everson v. Board of Ed. of Ewing, 330 U. S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711 (1947)*; *Mitchell, 530 U. S., at 840* (O'Connor, J., concurring in judgment) ("[O]ur decisions provide no precedent for the use of public funds to finance religious activities" (internal quotation marks omitted)). Put in doctrinal terms, such funding violates the *Establishment Clause* because it impermissibly "advanc[es] ... religion." [1] *Agostini v. Felton, 521 U. S. 203, 222-223, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)*.

1 Government aid that has the "purpose" or "effect of advancing or inhibiting religion" violates the *Establishment Clause*. *Agostini v. Felton, 521 U. S. 203, 222-223, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* (internal quotation marks omitted). Whether government aid has such an effect turns on whether it "result[s] in governmental indoctrination," "define[s] its recipients by reference to religion," or "create[s] an excessive entanglement" between the government and religion. *Id., at 234, 117 S. Ct. 1997, 138 L. Ed. 2d 391*; see also *id., at 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391* (same considerations speak to whether the aid can "reasonably be viewed as an endorsement of religion").

Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship. [2] A house of worship exists to foster and further religious exercise. There, a group of people, bound by common religious beliefs, comes together "to shape its own faith

and mission." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U. S. 171, 188, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)*. Within its walls, worshippers [**36] gather to practice and reaffirm their faith. And from its base, the faithful reach out to those not yet convinced of the group's beliefs. When a government funds a house of worship, it underwrites this religious exercise.

> 2 Because Missouri decides which Scrap Tire Program applicants receive state funding, this case does not implicate a line of decisions about indirect aid programs in which aid reaches religious institutions "only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris, 536 U. S. 639, 649, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002)*.

Tilton v. Richardson, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), held as much. The federal program at issue provided construction grants to colleges and universities but prohibited grantees from using the funds to construct facilities "'used for sectarian instruction or as a place for [*570] religious worship'" or "'used primarily in connection with any part of the program of a school or department of divinity.'" *Id., at 675, 91 S. Ct. 2091, 29 L. Ed. 2d 790* (plurality opinion) (quoting *20 U. S. C. §751(a)(2) (1964 ed., Supp. V)*). It allowed the Federal Government to recover the grant's value if a grantee violated this prohibition within twenty years of the grant. See *403 U. S., at 675, 91 S. Ct. 2091, 29 L. Ed. 2d 790*. The Court unanimously agreed that this time limit on recovery violated the *Establishment Clause*. "[T]he original federal grant w[ould] in part have the effect of advancing religion," a plurality explained, if a grantee "converted [a facility] into a chapel or otherwise used [it] to promote religious interests" after twenty years. *Id., at 683, 91 S. Ct. 2091, 29 L. Ed. 2d 790*; see also *id., at 692, 91 S. Ct. 2091, 29 L. Ed. 2d 790* (Douglas, J., concurring in part and dissenting in part); *Lemon v. Kurtzman, 403 U. S. 602, 659-661, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)* (Brennan, J., concurring); *id., at 665, n. 1, 91 S. Ct. 2105, 29 L. Ed. 2d 745* (opinion of White, J.). Accordingly, [**37] the Court severed the twenty-year limit, ensuring that program funds would be put to secular use and thereby bringing the program in line with the *Establishment Clause*. See *Tilton, 403 U. S., at 683, 91 S. Ct. 2091, 29 L. Ed. 2d 790* (plurality opinion).

This case is no different. The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface--like a Sunday School room's walls or the sanctuary's pews--are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.

True, this Court has found some direct government funding of religious institutions to be consistent with the *Establishment Clause*. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution. See, *e.g., Rosenberger, 515 U. S., at 875-876, 115 S. Ct. 2510, 132 L. Ed. 2d 700* (Souter, J., dissenting) (chronicling cases). The Church has not and cannot provide such assurances here. [3] See *Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U. S. 756, 774, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973)* ("No attempt is made to restrict payments to those expenditures related to the upkeep of facilities [**38] used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions"). The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar.

3 The Scrap Tire Program requires an applicant to certify, among other things, that its mission and activities are secular and that it will put program funds to only a secular use. App. to Pet. for Cert. 127a-130a. From the record, it is unclear whether the Church provided any part of this certification. *Id.*, at 127a-130a. In any case, the Church has not offered any such assurances to this Court.

[*571] B

The Court may simply disagree with this account of the facts and think that the Church does not put its playground to religious use. If so, its mistake is limited to this case. But if it agrees that the State's funding would further religious activity and sees no *Establishment Clause* problem, then it must be implicitly applying a rule other than the one agreed to in our precedents.

When the Court last addressed direct funding of religious institutions, in *Mitchell*, it adhered to the rule that the *Establishment Clause* prohibits the direct funding of religious activities. At issue was a federal program that helped state and local agencies lend educational materials to public and private schools, including religious schools. See *530 U. S., at 801-803, 120 S. Ct. 2530, 147 L. Ed. 2d 660* (plurality opinion). The controlling concurrence assured itself that the [**39] program would not lead to the public funding of religious activity. It pointed out that the program allocated secular aid, that it did so "on the basis of neutral, secular criteria," that the aid would not "supplant non-[program] funds," that "no ... funds ever reach the coffers of religious schools," that "evidence of actual diversion is *de minimis*," and that the program had "adequate safeguards" to police violations. *Id., at 867, 120 S. Ct. 2530, 147 L. Ed. 2d 660* (O'Connor, J., concurring in judgment). Those factors, it concluded, were "sufficient to find that the program ... [did] not have the impermissible effect of advancing religion." *Ibid.*

A plurality would have instead upheld the program based only on the secular nature of the aid and the program's "neutrality" as to the religious or secular nature of the recipient. See *id., at 809-814, 120 S. Ct. 2530, 147 L. Ed. 2d 660*. The controlling concurrence rejected that approach. It viewed the plurality's test--"secular content aid ... distributed on the basis of wholly neutral criteria"--as constitutionally insufficient. *Id., at 839, 120 S. Ct. 2530, 147 L. Ed. 2d 660*. This test, explained the concurrence, ignored whether the public funds subsidize religion, the touchstone of establishment jurisprudence. See *id., at 844, 120 S. Ct. 2530, 147 L. Ed. 2d 660* (noting that the plurality's logic would allow [**40] funding of "religious organizations (including churches)" where "the participating religious organizations (including churches) ... use that aid to support religious indoctrination").

Today's opinion suggests the Court has made the leap the *Mitchell* plurality could not. For if it agrees that the funding here will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality. The problems of the "secular and neutral" approach have been aired before. See, *e.g., id., at 900-902, 120 S. Ct. 2530, 147 L. Ed. 2d 660* (Souter, J., dissenting). It has no basis in the history to which the Court has repeatedly turned to inform its understanding of the *Establishment Clause*. It permits direct subsidies for religious indoctrination, with all the attendant concerns that led to the *Establishment Clause*. And it favors certain religious groups, those with a belief system that allows them to compete for public [*572] dollars and those well-organized and well-funded enough to do so successfully. [4]

4 This case highlights the weaknesses of the rule. The Scrap Tire Program ranks more highly those applicants who agree to generate media exposure for Missouri and its program and who receive the endorsement of local solid waste management entities. That is, it prefers applicants who agree to advertise that the government has funded it and who seek out the approval of government agencies. To ignore this result is to ignore the type of state entanglement with, and endorsement of,

religion the *Establishment Clause* guards against.

Such a break with precedent would mark a radical mistake. The *Establishment Clause* protects both religion and government from the dangers that result when the two become entwined, "*not* by providing every religion with an *equal opportunity* (say, to secure [**41] state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state--at least where the heartland of religious belief, such as primary religious [worship], is at issue." *Zelman v. Simmons-Harris, 536 U. S. 639, 722-723, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002)* (Breyer, J., dissenting).

III

Even assuming the absence of an *Establishment Clause* violation and proceeding on the Court's preferred front--the *Free Exercise Clause*--the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the *Religion Clauses* justify that line. The question here is thus whether those interests support the line drawn in Missouri's Article I, *§7*, separating the State's treasury from those of houses of worship. They unquestionably do.

A

The *Establishment Clause* prohibits laws "respecting an establishment of religion" and the *Free Exercise Clause* prohibits laws "prohibiting the free exercise thereof." *U. S. Const., Amdt. 1*. "[I]f expanded to a logical extreme," these prohibitions "would tend to clash with the other." *Walz, 397 U. S., at 668-669, 90 S. Ct. 1409, 25 L. Ed. 2d 697*. Even in the absence of a violation of one of the *Religion Clauses*, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, [**42] the government may sometimes act to accommodate those concerns, even when not required to do so by the *Free Exercise Clause*, without violating the *Establishment Clause*. And the government may sometimes act to accommodate those concerns, even when not required to do so by the *Establishment Clause*, without violating the *Free Exercise Clause*. "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id., at 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697*. This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government [*573] programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. It may instead "spar[e] the exercise of religion from the burden of property taxation levied on private profit institutions" and spare the government "the direct confrontations and conflicts that follow in the train of those legal processes" associated with taxation. See *id., at 673-674, 90 S. Ct. 1409, 25 L. Ed. 2d 697*. Nor must a State require nonprofit religious entities [**43] to abstain from making employment decisions on the basis of religion. It may instead avoid imposing on these institutions a "[f]ear of potential liability [that] might affect the way" it "carried out what it understood to be its religious mission" and on the government the sensitive task of policing compliance. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U. S. 327, 336, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987)*; see also *id., at 343, 107 S. Ct. 2862, 97 L. Ed. 2d 273* (Brennan, J., concurring in judgment). But the government may not invoke the space between the *Religion Clauses* in a manner that "devolve[s] into an unlawful fostering of religion." *Cutter v. Wilkinson, 544 U. S. 709,*

714, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (internal quotation marks omitted).

Invoking this same principle, this Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders, those "who will preach their beliefs, teach their faith, and carry out their mission," *Hosanna-Tabor, 565 U. S., at 196, 132 S. Ct. 694, 181 L. Ed. 2d 650*. It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders." *Locke v. Davey, 540 U. S. 712, 722, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004)*.

When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so.

B

Missouri [**44] has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice and provides:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Art. I, *§7*.

Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment.

1

This Court has consistently looked to history for guidance when applying the Constitution's *Religion Clauses.* Those Clauses guard against a return to the past, and so that past properly informs their meaning. See, *e.g., Everson, 330 U. S., at 14-15, 7 S. Ct. 504, 91 L. Ed. 711*; *Torcaso v. Watkins, 367 U. S. 488, 492,* [*574] *81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961)*. This case is no different.

This Nation's early experience with, and eventual rejection of, established religion--shorthand for "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz, 397 U. S., at 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697*--defies easy summary. No two States' experiences were the same. In some a religious establishment never took hold. See T. [**45] Curry, The First Freedoms 19, 72-74, 76-77, 159-160 (1986) (Curry). In others establishment varied in terms of the sect (or sects) supported, the nature and extent of that support, and the uniformity of that support across the State. Where establishment did take hold, it lost its grip at different times and at different speeds. See T. Cobb, The Rise of Religious Liberty in America 510-511 (1970 ed.) (Cobb).

Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws. [5]

5 This Court did not hold that the *Religion Clauses* applied, through the *Fourteenth Amendment*, to the States until the 1940's. See *Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)* (*Free Exercise Clause*); *Everson v. Board of Ed. of Ewing, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)* (*Establishment Clause*). When the States dismantled their religious establishments, as all had by the 1830's, they did so on their own accord, in response to the lessons taught by their experiences with religious establishments.

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. For them, support for religion compelled by the [**46] State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion.

Take Virginia. After the Revolution, Virginia debated and rejected a general religious assessment. The proposed bill would have allowed taxpayers to direct payments to a Christian church of their choice to support a minister, exempted "Quakers and Menonists," and sent undirected assessments to the public treasury for "seminaries of learning." A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson, 330 U. S., at 74, 7 S. Ct. 504, 91 L. Ed. 711* (supplemental appendix to dissent of Rutledge, J.).

In opposing this proposal, James Madison authored his famous Memorial and Remonstrance, in which he [*575] condemned the bill as hostile to religious freedom. Memorial [**47] and Remonstrance Against Religious Assessments (1785), in 5 The Founders' Constitution 82-84 (P. Kurland & R. Lerner eds. 1987). Believing it "proper to take alarm," despite the bill's limits, he protested "that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment." *Id.*, at 82. Religion had "flourished, not only without the support of human laws, but in spite of every opposition from them." *Id.*, at 83. Compelled support for religion, he argued, would only weaken believers' "confidence in its innate excellence," strengthen others' "suspicion that its friends are too conscious of its fallacies to trust in its own merits," and harm the "purity and efficacy" of the supported religion. *Ibid.* He ended by deeming the bill incompatible with Virginia's guarantee of "'free exercise of ... Religion according to the dictates of conscience.'" *Id.*, at 84.

Madison contributed one influential voice to a larger chorus of petitions opposed to the bill. Others included "the religious bodies of Baptists, Presbyterians, and Quakers." T. Buckley, Church and State in Revolutionary Virginia [**48] 1776-1787, p. 148 (1977). Their petitions raised similar points. See *id.*, at 137-140, 148-149. Like Madison, many viewed the bill as a step toward a dangerous church-state relationship. See *id.*, at 151. These voices against the bill won out, and Virginia soon prohibited religious assessments. See Virginia Act for Establishing Religious Freedom (Oct. 31, 1785), in 5 The Founders' Constitution 84-85.

This same debate played out in nearby Maryland, with the same result. In 1784, an assessment bill was proposed that would have allowed taxpayers to direct payments to ministers (of sufficiently large churches) or to the poor. Non-Christians were exempt. See Curry 155. Controversy over the bill "eclipse[d] in volume of writing and bitterness of invective every other political dispute since the debate over the question of independence." J. Rainbolt, The Struggle To Define "Religious Liberty" in Maryland, 1776-85, 17 J. Church & State 443, 449 (1975). Critics of the bill raised the same themes as those in Virginia: that religion "needs not the power of rules to establish, but only to protect it"; that financial support of religion leads toward an establishment; and that laws for such support are "oppressive." Curry 156, 157 (internal quotation [**49] marks omitted); see also Copy of Petition [to General Assembly], Maryland Gazette, Mar.

25, 1785, pp. 1, 2, col.1 ("[W]hy should such as do not desire or make conscience of it, be forced by law"). When the legislature next met, most representatives "had been elected by anti-assessment voters," and the bill failed. Curry 157. In 1810, Maryland revoked the authority to levy religious assessments. See Md. *Const., Amdt. XIII* (1776), in 3 Federal and State Constitutions 1705 (F. Thorpe ed. 1909) (Thorpe).

In New England, which took longer to reach this conclusion, Vermont went first. Its religious assessment laws were accommodating. A person who was not a member of his town's church was, upon securing a certificate to that effect, exempt. See L. Levy, The Establishment Clause 50 (1994) (Levy). Even so, the laws were [*576] viewed by many as violating Vermont's constitutional prohibition against involuntary support of religion and guarantee of freedom of conscience. See, *e.g.*, Address of Council of Censors to the People of Vermont 5-8 (1800) ("[R]eligion is a concern personally and exclusively operative between the individual and his God"); Address of Council of Censors [Vermont] 3-7 (Dec. 1806) (the laws' "evils" included "violence done to the feelings [**50] of men" and "their property," "animosities," and "the dangerous lengths of which it is a foundation for us to go, in both civil and religious usurpation"). In 1807, Vermont "repealed all laws concerning taxation for religion." Levy 51.

The rest of New England heard the same arguments and reached the same conclusion. John Leland's sustained criticism of religious assessments over 20 years helped end the practice in Connecticut. See, *e.g.*, Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, *2004 B. Y. U. L. Rev. 1385, 1498, 1501-1511*. The reasons he offered in urging opposition to the State's laws will by now be familiar. Religion "is a matter between God and individuals," which does not need, and would only be harmed by, government support. J. Leland, The Rights of Conscience Inalienable (1791), in The Sacred Rights of Conscience 337-339 (D. Dreisbach & M. Hall eds. 2009). "[T]ruth gains honor; and men more firmly believe it," when religion is subjected to the "cool investigation and fair argument" that freedom of conscience produces. *Id.*, at 340. Religious assessments violated that freedom, he argued. See *id.*, at 342 ("If these people bind nobody but themselves, who is injured by their religious opinions? [**51] But if they bind an individual besides themselves, the bond is fraudulent and ought to be declared illegal"). Connecticut ended religious assessments first by statute in 1817, then by its State Constitution of 1818. See Cobb 513.

In New Hampshire, a steady campaign against religious assessments led to a bill that was subjected to "the scrutiny of the people." C. Kinney, Church & State: The Struggle for Separation in New Hampshire, 1630-1900, p. 101 (1955) (Kinney). It was nicknamed "Dr. Whipple's Act" after its strongest advocate in the State House. *Orford Union Congregational Soc. v. West Congregational Soc. of Orford, 55 N. H. 463, 468-469, n. (1875)*. He defended the bill as a means "to take religion out of politics, to eliminate state support, to insure opportunity to worship with true freedom of conscience, [and] to put all sects and denominations of Christians upon a level." Kinney 103. The bill became law and provided "that no person shall be compelled to join or support, or be classed with, or associated to any congregation, church or religious society without his express consent first had and obtained." Act [of July 1, 1819] Regulating Towns and Choice of Town Officers §3, in 1 Laws of the State of New Hampshire Enacted Since June 1, 1815, p. 45 (1824). Massachusetts held on the [**52] longest of all the States, finally ending religious assessments in 1833. See Cobb 515. [6]

6 To this, some might point out that the Scrap Tire Program at issue here does not impose an assessment specifically for religious entities but rather directs funds raised through a general taxation scheme to the Church. That distinction makes no difference. The debates

over religious assessment laws focused not on the means of those laws but on their ends: the turning over of public funds to religious entities. See, *e.g., Locke v. Davey, 540 U. S. 712, 723, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004)*.

[*577] The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship. To us, their debates may seem abstract and this history remote. That is only because we live in a society that has long benefited from decisions made in response to these now centuries-old arguments, a society that those not so fortunate fought hard to build.

2

In *Locke*, this Court expressed an understanding of, and respect for, this history. *Locke* involved a provision of the State of Washington's Constitution that, like Missouri's nearly identical Article I, *§7*, barred the use of public funds for houses of worship or ministers. Consistent with this denial of funds to ministers, the State's college scholarship program did not allow funds to be used for devotional theology degrees. When asked whether this violated the would-be minister's free exercise rights, the Court invoked the play in the joints principle and answered no. The *Establishment Clause* did not require the prohibition because "the [**53] link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients." *540 U. S., at 719, 124 S. Ct. 1307, 158 L. Ed. 2d 1*; see also *supra, n. 2*. Nonetheless, the denial did not violate the *Free Exercise Clause* because a "historic and substantial state interest" supported the constitutional provision. *540 U. S., at 725, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. The Court could "think of few areas in which a State's antiestablishment interests come more into play" than the "procuring [of] taxpayer funds to support church leaders." *Id., at 722, 124 S. Ct. 1307, 158 L. Ed. 2d 1*.

The same is true of this case, about directing taxpayer funds to houses of worship, see *supra, at 2*. Like the use of public dollars for ministers at issue in *Locke*, turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. The history just discussed fully supports this conclusion. As states disestablished, they repealed laws allowing taxation to support religion because the practice threatened other forms of government support for, involved some government control over, and weakened supporters' control of religion. Common sense also supports this conclusion. Recall that a state may not fund religious activities without violating the *Establishment Clause*. See Part II-A, *supra*. A state can reasonably use status [**54] as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship's activities. And so while not every activity a house of worship undertakes will be inseparably linked to religious activity, "the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." *Amos, 483 U. S., at 345, 107 S. Ct. 2862*, [*578] *97 L. Ed. 2d 273* (Brennan, J., concurring in judgment). Finally, and of course, such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any "'room for play in the joints' between" the *Religion Clauses*, it is here. *Locke, 540 U. S., at 718, 124 S. Ct. 1307, 158 L. Ed. 2d 1* (quoting *Walz, 397 U. S., at 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697*).

As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The rule has a historical pedigree identical to that of the provision in *Locke*. Almost all of the States

that ratified the *Religion Clauses* operated under this rule. See *540 U. S., at 723, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Seven had placed this rule in their State Constitutions. [7] Three enforced it by statute [**55] or in practice. [8] Only one had not yet embraced the rule. [9] Today, thirty-eight States have a counterpart to Missouri's Article I, *§7*. [10] The provisions, as a general matter, date back [*579] to or before these States' original Constitutions. [11] That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk." *Locke, 540 U. S., at 723, 124 S. Ct. 1307, 158 L. Ed. 2d 1*.

7 See *N. J. Const., Art. XVIII* (1776), in 5 Thorpe 2597 ("[N]or shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform"); *N. C. Const., Art. XXXIV* (1776), in *id.*, at 2793 ("[N]either shall any person, on any pretence whatsoever, ... be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform"); *Pa. Const., Art. IX, §3* (1790), in *id.*, at 3100 ("[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent"); *S. C. Const., Art. XXXVIII* (1778), in 6 *id*., at 3257 ("No person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support"); *Vt. Const., ch. 1, Art. III* (1786), in *id.*, at 3752 ("[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience").

Delaware and New York's Constitutions did not directly address, but were understood to prohibit, public funding of religion. See Curry, 76, 162; see also *Del. Const., Art. I, §1* (1792) ("[N]o man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent").

8 See Virginia, Act for Establishing Religious Freedom, in 5 The Founders' Constitution 85 (P. Kurland & R. Lerner eds. 1987); Curry 211-212 (Rhode Island never publicly funded houses of worship); Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, *2004 B. Y. U. L. Rev. 1385, 1489-1490* (Maryland never invoked its constitutional authorization of religious assessments).

9 See *N. H. Const., pt. 1, Arts. I, VI* (1784), in 4 Thorpe 2453, 2454.

10 See *Ala. Const., Art. I, §3*; *Ariz. Const., Art. II, §12, Art. IX, §10*; *Ark. Const., Art. II, §24*; *Cal. Const., Art. XVI, §5*; *Colo. Const., Art. II, §4, Art. IX, §7*; *Conn. Const., Art. Seventh*; *Del. Const., Art. I, §1*; *Fla. Const., Art. I, §3*; *Ga. Const., Art. I, §2, para. VII*; *Idaho Const., Art. IX, §5*; *Ill. Const., Art. I, §3, Art. X, §3*; *Ind. Const., Art. 1, §§4, 6*; *Iowa Const., Art. 1, §3*; *Ky. Const. §5; Md. Const., Decl. of Rights Art. 36; Mass. Const. Amdt., Art. XVIII, §2*; *Mich. Const., Art. I, §4*; *Minn. Const., Art. I, §16*; *Mo. Const., Art. I, §§6, 7, Art. IX, §8*; *Mont. Const., Art. X, §6*; *Neb. Const., Art. I, §4*; *N. H. Const., pt. 2, Art. 83*; *N. J. Const., Art. I, §3*; *N. M. Const., Art. II, §11*; *Ohio Const., Art. I, §7*; *Okla. Const., Art. II, §5*; *Ore. Const., Art. I, §5*; *Pa. Const., Art. I, §3, Art. III, §29*; *R. I. Const., Art. I, §3*; *S. D. Const., Art. VI, §3*; *Tenn. Const., Art. I, §3*; *Tex. Const., Art. I, §§6, 7*; *Utah Const., Art. I, §4*; *Vt. Const., ch. I, Art. 3*; *Va. Const., Art. I, §16, Art. IV, §16*; *Wash. Const., Art. I, §11*; *W. Va. Const., Art. III, §15*; *Wis. Const., Art. I, §18*; *Wyo. Const., Art. I, §19, Art. III, §36*.

11 See *Ala. Const., Art. I, §3* (1819), in 1 Thorpe 97; *Ariz. Const., Art. II, §12, Art. IX, §10* (1912); *Ark. Const., Art. II, §3* (1836), in 1 Thorpe 269; *Cal. Const., Art. IX, §8* (1879), in *id.*, at 432; *Colo. Const., Art. II, §4, Art. V,*

§34 (1876), in *id.*, at 474, 485; *Conn. Const., Art. First, §4, Art. Seventh, §1* (1818), in *id.*, at 537, 544-545; *Del. Const., Art. I, §1* (1792); Fla. Const., Decl. of Rights §6 (1885), in 2 Thorpe 733; *Ga. Const., Art. I, §1, para. XIV* (1877), in *id.*, at 843; *Idaho Const., Art. I, §4, Art. IX, §5* (1889), in *id.*, at 919, 936-937; *Ill. Const., Art. VIII, §3* (1818) and (1870), in *id.*, at 981, 1035; *Ind. Const., Art. 1, §3* (1816), *Art. 1, §6* (1851), in *id.*, at 1056, 1074; *Iowa Const., Art. 1, §3* (1846), in *id.*, at 1123; *Ky. Const., Art. XIII, §5* (1850), in 3 *id.*, at 1312; *Md. Const., Decl. of Rights Art. 36* (1867), in *id.*, at 1782; *Mass. Const. Amdt., Art. XVIII* (1855), in *id.*, at 1918, 1922; *Mass. Const. Amdt., Art. XVIII* (1974); *Mich. Const., Art. 1, §4* (1835), *Art. IV, §40* (1850), in 4 Thorpe 1031, 1050; *Minn. Const., Art. I, §16* (1857), in *id.*, at 1092; Enabling Act for Mo., §4 (1820), *Mo. Const., Art. I, §10* (1865), *Art. II, §7* (1875), in *id.*, at 2146-2147, 2192, 2230; *Mont. Const., Art. XI, §8* (1889), in *id.*, at 2323; *Neb. Const., Art. I, §16* (1866), in *id.*, at 2350; *N. H. Const., pt. 2, Art. 83 (1877)*; *N. J. Const., Art. XVIII* (1776), in 5 Thorpe 2597; *N. M. Const., Art. II, §11* (1911); *Ohio Const., Art. VIII, §3* (1802), in 5 Thorpe 2910; *Okla. Const., Art. II, §5* (1907), in H. Snyder, The Constitution of Oklahoma 21 (1908); *Ore. Const., Art. I, §5* (1857), in 5 Thorpe 2098; *Pa. Const., Art. IX, §3* (1790), *Art. III, §18* (1873), in *id.*, at 3100, 3120; *R. I. Const., Art. I, §3* (1842), in 6 *id.*, at 3222-3223; *S. D. Const., Art. VI, §3* (1889), in *id.*, at 3370; *Tenn. Const., Art. XI, §3* (1796), in *id.*, at 3422; *Tex. Const., Art. I, §4* (1845), *Art. I, §7* (1876), in *id.*, at 3547-3548, 3622; *Utah Const., Art. I, §4* (1895), in *id.*, at 3702; *Vt. Const., ch. I, Art. III* (1777), in *id.*, at 3740; *Va. Const., Art. III, §11* (1830), *Art. IV, §67* (1902), in 7 *id.*, at 3824, 3917; *Wash. Const., Art. I, §11* (1889), in *id.*, at 3874; *W. Va. Const., Art. II, §9* (1861-1863), in *id.*, at 4015; *Wis. Const., Art. I, §18* (1848), in *id.*, at 4078-4079; *Wyo. Const., Art. I, §19, Art. III, §36* (1889), in *id.*, at 4119, 4124.

And as in *Locke*, Missouri's Article I, *§7*, is closely tied to the state interests it protects. See *Locke, 540 U. S., at 724, 124 S. Ct. 1307, 158 L. Ed. 2d 1* (describing the program at issue as "go[ing] a long way toward including religion in its benefits"). A straightforward reading of Article I, *§7*, prohibits funding only for "any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such." The Missouri courts have not read the State's Constitution to reach more broadly, to prohibit funding for other religiously affiliated institutions, or more broadly still, to prohibit the funding of religious believers. See, *e.g., Saint Louis Univ. v. Masonic Temple Assn. of St. Louis, 220 S. W. 3d 721, 726 (Mo. 2007)* ("The university is not a religious institution simply [**56] because it is affiliated with the Jesuits or the Roman Catholic Church"). The Scrap Tire Program at issue here proves the point. Missouri will fund a religious organization not "owned or controlled by a church," if its "mission and activities are secular (separate from religion, not spiritual in) nature" and the funds "will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes." App. to Brief for Petitioner 3a; see also Tr. of Oral Arg. 33-35. Article I, *§7*, thus stops Missouri only from funding specific entities, ones that set and enforce religious doctrine [*580] for their adherents. These are the entities that most acutely raise the establishment and free exercise concerns that arise when public funds flow to religion.

Missouri has recognized the simple truth that, even absent an *Establishment Clause* violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the *Religion Clauses*. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits [**57] this choice.

3

In the Court's view, none of this matters. It focuses on one aspect of *Missouri's Article I, §7*, to the exclusion of all else: that it denies funding to a house of worship, here the Church, "simply because of what it [i]s--a church." *Ante, at 12*. The Court describes this

as a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Its rule is out of step with our precedents in this area, and wrong on its own terms.

The Constitution creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's "status" as such. It is that very status that implicates the interests protected by the *Religion Clauses*. Sometimes a religious entity's unique status requires the government to act. See *Hosanna-Tabor, 565 U. S., at 188-190, 132 S. Ct. 694, 181 L. Ed. 2d 650*. Other times, it merely permits the government to act. See Part III-A, *supra*. In all cases, the dispositive issue is not whether religious "status" matters--it does, or the *Religion Clauses* would not be at issue--but whether the government must, or may, act on that basis.

Start where the Court stays silent. Its opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an [**58] entity's religious status. See *Amos, 483 U. S., at 339, 107 S. Ct. 2862, 97 L. Ed. 2d 273*; *Walz, 397 U. S., at 680, 90 S. Ct. 1409, 25 L. Ed. 2d 697*; *Locke, 540 U. S., at 721, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status. See *Amos, 483 U. S., at 339, 107 S. Ct. 2862, 97 L. Ed. 2d 273* ("[W]e see no justification for applying strict scrutiny"); *Walz, 397 U. S., at 679, 90 S. Ct. 1409, 25 L. Ed. 2d 697* (rejecting criticisms of a case-by-case approach as giving "too little weight to the fact that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution"); *Locke, 540 U. S., at 725, 124 S. Ct. 1307, 158 L. Ed. 2d 1* (balancing the State's interests against the aspiring minister's).

The Court takes two steps to avoid these precedents. First, it recasts *Locke* as a case about a restriction that prohibited the would-be minister from "us[ing] the funds to prepare for the ministry." *Ante, at 12*. A faithful reading of *Locke* gives it a broader reach. *Locke* stands for the reasonable proposition that [*581] the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns. *540 U. S., at 725, 124 S. Ct. 1307, 158 L. Ed. 2d 1*. Second, it suggests that this case is different because it involves [**59] "discrimination" in the form of the denial of access to a possible benefit. *Ante, at 11*. But in this area of law, a decision to treat entities differently based on distinctions that the *Religion Clauses* make relevant does not amount to discrimination. [12] To understand why, keep in mind that "the Court has unambiguously concluded that the individual freedom of conscience protected by the *First Amendment* embraces the right to select any religious faith or none at all." *Wallace v. Jaffree, 472 U. S. 38, 52-53, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)*. If the denial of a benefit others may receive is discrimination that violates the *Free Exercise Clause*, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have, with good reason, rejected that idea, see, *e.g., Amos, 483 U. S., at 338-339, 107 S. Ct. 2862, 97 L. Ed. 2d 273*, and instead focused on whether the government has provided a good enough reason, based in the values the *Religion Clauses* protect, for its decision. [13]

12 This explains, perhaps, the Court's reference to an *Equal Protection Clause* precedent, rather than a *Free Exercise Clause* precedent, for this point. See *ante, at 11* (citing *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U. S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)*).

13 No surprise then that, despite the Court's protests to the contrary, no case has applied its rigid rule. *McDaniel v. Paty, 435 U. S. 618,*

98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978), on which the Court relies most heavily, mentioned "status" only to distinguish laws that deprived a person "of a civil right solely because of their religious beliefs." *Id., at 626-627, 98 S. Ct. 1322, 55 L. Ed. 2d 593* (plurality opinion). In *Torcaso v. Watkins, 367 U. S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961)*, the Court invalidated a law that barred persons who refused to state their belief in God from public office without "evaluat[ing] the interests assertedly justifying it." *McDaniel, 435 U. S., at 626, 98 S. Ct. 1322, 55 L. Ed. 2d 593* (plurality opinion). That approach did not control in *McDaniel*, which involved a state constitutional provision that barred ministers from serving as legislators, because "ministerial status" was defined "in terms of conduct and activity," not "belief." *Id., at 627, 98 S. Ct. 1322, 55 L. Ed. 2d 593*. The Court thus asked whether the "anti-establishment interests" the State offered were strong enough to justify the denial of a constitutional right--to serve in public office--and concluded that they were not. *Id., at 627-629, 98 S. Ct. 1322, 55 L. Ed. 2d 593*. Other references to "status" in our cases simply recount *McDaniel*. See, *e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)*; *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*.

The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. The Court's desire to avoid what it views as discrimination is understandable. But in this context, the description is particularly inappropriate. A State's decision [**60] not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not make the State "atheistic or antireligious." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U. S. 573, 610, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989)*. It means only that the State has "establishe[d] [*582] neither atheism nor religion as its official creed." *Ibid.* The Court's conclusion "that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our *Religion Clause* jurisprudence." *Id., at 652, n. 11* (Stevens, J., concurring in part and dissenting in part).

At bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the *Religion Clauses* protect in other ways. Nothing supports this lopsided outcome. Not the *Religion Clauses*, as they protect establishment and free exercise interests in the same constitutional breath, neither privileged over the other. Not precedent, since we have repeatedly explained that the Clauses protect not religion but "the individual's freedom of conscience," *Jaffree, 472 U. S., at 50, 105 S. Ct. 2479, 86 L. Ed. 2d 29*--that which allows him to choose religion, reject [**61] it, or remain undecided. And not reason, because as this case shows, the same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by denying government-provided benefits to certain religious entities. Cf. *Walz, 397 U. S., at 674, 90 S. Ct. 1409, 25 L. Ed. 2d 697* (entanglement); *Amos, 483 U. S., at 336, 107 S. Ct. 2862, 97 L. Ed. 2d 273* (influence on religious activities).

Justice Breyer's concurrence offers a narrower rule that would limit the effects of today's decision, but that rule does not resolve this case. Justice Breyer, like the Court, thinks that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order," *ante, at 6* (majority opinion) (internal quotation marks omitted). See *ante, at 1-2* (Breyer, J., concurring in judgment). Few would disagree with a literal interpretation of this statement. To fence out religious persons or entities from

a truly generally available public benefit--one provided to all, no questions asked, such as police or fire protections--would violate the *Free Exercise Clause*. Accord, *Rosenberger, 515 U. S., at 879, n. 5, 115 S. Ct. 2510, 132 L. Ed. 2d 700* (Souter, J., dissenting). This explains why Missouri does not apply its constitutional provision in that [**62] manner. See Tr. of Oral Arg. 35-36. Nor has it done so here. The Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. In this context, the comparison to truly generally available benefits is inapt. Cf. *Everson, 330 U. S., at 61, n. 56, 7 S. Ct. 504, 91 L. Ed. 711* (Rutledge, J., dissenting) (*The Religion Clauses* "forbi[d] support, not protection from interference or destruction").

On top of all of this, the Court's application of its new rule here is mistaken. In concluding that *Missouri's Article I, §7*, cannot withstand strict scrutiny, the Court describes Missouri's interest as a mere "policy preference for skating as far as possible from religious establishment concerns." *Ante, at 14*. The constitutional provisions of thirty-nine States--all but invalidated today--the weighty interests [*583] they protect, and the history they draw on deserve more than this judicial brush aside. [14]

> 14 In the end, the soundness of today's decision may matter less than what it might enable tomorrow. The principle it establishes can be manipulated to call for a similar fate for lines drawn on the basis of religious use. See *ante, at 1-3* (Gorsuch, J., concurring in part); see also *ante, at 1-2* (Thomas, J., concurring in part) (going further and suggesting that lines drawn on the basis of religious status amount to *per se* unconstitutional discrimination on the basis of religious belief). It is enough for today to explain why the Court's decision is wrong. The error of the concurrences' hoped-for decisions can be left for tomorrow. See, for now, *School Dist. of Abington Township v. Schempp, 374 U. S. 203, 226, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963)* ("While the *Free Exercise Clause* clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs").

Today's decision discounts centuries of history and jeopardizes the government's ability to remain secular. Just three years ago, this Court claimed to understand that, in this area of law, to "sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the [**63] *Establishment Clause* seeks to prevent." *Town of Greece v. Galloway, 572 U. S. ___, ___, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014)*. It makes clear today that this principle applies only when preference suits.

IV

The *Religion Clauses of theFirst Amendment* contain a promise from our government and a backstop that disables our government from breaking it. The *Free Exercise Clause* extends the promise. We each retain our inalienable right to "the free exercise" of religion, to choose for ourselves whether to believe and how to worship. And the *Establishment Clause* erects the backstop. Government cannot, through the enactment of a "law respecting an establishment of religion," start us down the path to the past, when this right was routinely abridged.

The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that--at least in this case and perhaps in others, see *ante at 14, n. 3*--it must do so whenever it decides to create a funding program. History shows that the *Religion Clauses* separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money [**64] over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where

separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

VERIZON NEW ENGLAND INC. v. BOARD OF ASSESSORS OF BOSTON (AND A CONSOLIDATED CASE[1]).

1 RCN BecoCom LLC *vs*. Board of Assessors of Boston.

SJC-12034.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

475 Mass. 826; 62 N.E.3d 46
2016 Mass. LEXIS 773

April 7, 2016, Argued
November 2, 2016, Decided

NOTICE:

Corrected December 2, 2016.

PRIOR HISTORY: [***1] Suffolk. APPEAL from a decision of the Appellate Tax Board.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Telephone Company. *Taxation*, Assessors, Personal property tax: value. *Constitutional Law*, Taxation.

This court concluded that a split tax rate structure such as the board of assessors of Boston (assessors) employed in assessing property tax on certain personal property owned by each taxpayer telephone company, in compliance with the provisions of *G. L. c. 40, § 56*, did not impose an unconstitutional disproportionate tax on owners of personal property, where the animating purpose of *art. 112 of the Amendments to the Massachusetts Constitution* was to change the meaning of proportionality in *Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution*, in order to enable municipalities to treat residential property differently from other property classes, and where the statute effectuates the overarching objective of *art. 112* and does so in a manner that retains proportionality to a large extent by treating nonexempt personal property used for business purposes the same as commercial and industrial property.

COUNSEL: *William Hazel* for the taxpayers.

Anthony M. Ambriano for board of assessors of Boston.

Maura Healey, Attorney General, *Daniel J. Hammond*, Assistant Attorney General, *& Daniel A. Shapiro*, for Attorney General & another, amici curiae, submitted a brief.

Kenneth W. Gurge, for Massachusetts Municipal Association & others, amici curiae, submitted a brief.

JUDGES: Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, & HINES, JJ.[2]

2 Justices Spina, Cordy, and Duffly participated in the deliberation on this case prior to their retirements.

OPINION BY: BOTSFORD

OPINION

[**48] **BOTSFORD**, J. Two telephone companies appeal from a decision of the Appellate Tax Board (board) upholding the property tax assessments by the board of assessors of Boston (assessors) for fiscal year (FY) 2012 on certain personal property each company [*827] owns. At issue is whether the tax assessments, which were based on a "split" tax rate structure determined in accordance with *G. L. c. 40, § 56* (*§ 56*), constituted a disproportionate tax that, as such, violated the Constitution of the Commonwealth. More particularly, [***2] the question is whether the split tax rate structure authorized by *§ 56* -- a rate structure that provides for taxable personal property to be taxed at a rate identical to the rate applied to commercial and industrial real property but higher than the rate that would apply if all taxable property, real and personal, were taxed at a single, uniform rate -- violates the proportionality requirement of *Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth*, as amended by *art. 112 of the Amendments to the Constitution*, as well as *art. 10 of the Massachusetts Declaration of Rights.* We conclude that the split tax structure authorized by *§ 56* and related statutes does not violate the Massachusetts Constitution. We affirm the board's decision.[3]

3 We acknowledge the amicus curiae briefs submitted by the Attorney General and the Commissioner of Revenue; and by the Massachusetts Municipal Association, Massachusetts Association of Assessing Officers, and Massachusetts Municipal Lawyers Association.

1. *Background*.[4] a. *Procedural background*. Verizon New England Inc. (Verizon) and RCN BecoCom LLC (RCN) (collectively, taxpayers) are subject to property tax in the city of Boston on personal property consisting primarily of machinery, poles, underground conduits, [***3] wires, and pipes (*§ 39* property) that they own and use for business purposes. Pursuant to *G. L. c. 59, § 39*, the Commissioner of Revenue (commissioner) is required on an annual basis to centrally determine and certify the valuation of this type of property owned by telephone and telegraph companies, including the taxpayers; the commissioner's certified central valuations then become the basis for tax assessments by the assessors in each city and town where such property is located and subject to taxation, including Boston. For purposes of property tax assessments for fiscal year 2012, the commissioner centrally valued the *§ 39* property owned by Verizon in Boston at $215,846,800, and the *§ 39* property owned by RCN in Boston at [*828] $48,444,900.[5] The assessors thereafter assessed a property tax for FY 2012 on Verizon's *§ 39* property at the tax rate of $31.92 per thousand dollars of value for a total assessment of $6,889,829.86; they assessed a FY 2012 tax on RCN's *§ 39* property at the same rate of $31.92 per thousand for a total assessment of $1,546,361.21. The taxpayers timely paid the personal property taxes thus assessed, and then timely filed abatement applications with the assessors.[6] The requested [**49] abatements were denied, [***4] and both taxpayers filed timely appeals with the board. On April 24, 2013, the board consolidated the taxpayers' petitions for hearing. On October 24, 2014, the board issued its decision denying the taxpayers' appeals, and thereafter issued findings of fact and a report. The taxpayers timely appealed to the Appeals Court, and we transferred the case on our own motion.

4 The background facts are undisputed. These cases were submitted to the Appellate Tax Board (board) on the parties' statement of agreed facts and accompanying exhibits; the board made findings based on the statement of agreed facts.

5 The taxpayers do not contest the values of their *§ 39* personal property determined by the Commissioner of Revenue (commissioner) for fiscal year (FY) 2012.

6 Verizon sought a tax abatement in the amount of $2,952,784.23, and RCN sought a tax abatement in the amount of $662,726.23. The abatements sought in each case represented the difference

between the amount of property tax assessed at $31.92 per thousand dollars of value and what the assessment would have been if the taxpayer's *§ 39* property had been assessed at $18.24 per thousand dollars, the rate that would have been applied if all taxable real and [***5] personal property were taxed at a single rate in FY 2012, given the total amount of Boston's FY 2012 tax levy.

b. *Constitutional and statutory background. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth (art. 4),* as amended in 1978 by *art. 112 of the Amendments* (*art. 112*) authorizes the Legislature

> "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth, *except that, in addition to the powers conferred under Articles XLI and XCIX of the Amendments,*[7] *the general court may classify real property according to its use in no more than four classes and to assess, rate and tax such property differently in the classes so established, but proportionately in the same class, and except that reasonable* [*829] *exemptions may be granted*" (emphasis supplied).[8]

7 *Article 41 of the Amendments to the Massachusetts Constitution,* as amended by *art. 110 of the Amendments,* and *art. 99 of the Amendments* grant the Legislature broad authority over the taxation of wild or forest lands (*art. 41*) and agricultural or horticultural lands (*art. 99*).

8 The portion of *Part II, c. 1, § 1, art. 4,* of the Constitution of the Commonwealth*(art. 4)* highlighted in the text was added by *art. 112 of the Amendments to the Constitution* (*art. 112*). [***6]

Before it was amended by *art. 112, art. 4* had been consistently interpreted by this court to require that

> "all taxes levied under [the taxing authority of *art. 4*] be 'proportional and reasonable,' and [*art. 4*] forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation."

Cheshire v. County Comm'rs of Berkshire, 118 Mass. 386, 389 (1875). See, e.g., *President, Directors, & Co. of the Portland Bank v. Apthorp, 12 Mass. 252, 255 (1815)*; *Oliver v. Washington Mills, 93 Mass. 268, 11 Allen 268, 275 (1865)*; *Opinion of the Justices, 220 Mass. 613, 618-619, 621, 108 N.E. 570 (1915)*; *Opinion of the Justices, 332 Mass. 769, 778-779, 126 N.E.2d 795 (1955)*; *Bettigole v. Assessors of Springfield, 343 Mass. 223, 230-231, 178 N.E.2d 10 (1961).*

In practice, however, local municipal assessors -- to whom the Legislature has delegated for over two centuries the power to assess local property taxes, see *Opinion of the Justices, 378 Mass. 802, 810 & n.11, 393 N.E.2d 306 (1979)* -- did not follow this constitutional mandate of strict proportionality, or the statutory requirement that local assessment of property taxes be based on "a fair cash valuation of all the estate, real and personal, subject to taxation therein." *G. L. c. 59, § 38*. See *Bettigole, 343 Mass. at 231-232*. See also *Sudbury v. Commissioner of Corps. & Taxation, 366 Mass. 558, 563, 321 N.E.2d 641 (1974)*; *Shoppers' World, Inc. v. Assessors of Framingham, 348 Mass. 366, 371-372, 203 N.E.2d 811 (1965)*. Rather, there was a widespread practice of employing varying percentages of fair [**50] cash values that favored residential properties at the expense

of commercial and industrial properties. See *Keniston v. Assessors of Boston, 380 Mass. 888, 890-891, 407 N.E.2d 1275 (1980)*; *Bettigole, supra at 227-228*. Particularly beginning in the 1960s [***7] this court more insistently declared disproportionate assessments of property illegal and also broadened remedies available to taxpayers bringing claims of disproportionate taxation. See *Sudbury, supra at 568-569*; *Shoppers' World, Inc., supra at 372-373*; *Bettigole, supra at 236-237*; *Stone v. Springfield, 341 Mass. 246, 248, 168 N.E.2d 76 (1960)*. How-[*830] ever, in the midst of the "accelerated judicial enforcement of the [proportionate taxation and] fair cash valuation requirement, ... there was public challenge to the concept of 100% valuation" (citation omitted), *Keniston, 380 Mass. at 891*, and in response to this public sentiment, the General Court approved in 1975 and again in 1977 the constitutional amendment embodied in *art. 112*; the amendment was ratified by the voters on November 7, 1978 -- by a two-to-one margin.[9] See *Associated Indus. of Mass., Inc. v. Commissioner of Revenue, 378 Mass. 657, 659, 393 N.E.2d 812 (1979)*; *Opinion of the Justices, supra at 804*. Accord *Keniston, supra*. *Article 112* empowered the Legislature to establish a property tax system that would impose "different rates of taxation on different classes of real property," *Opinion of the Justices, supra*, and that in practical effect would resemble and legitimize the long-time local practice of establishing relatively lower property tax assessments for residential property and vacant land or open space as compared to other classes of [***8] property. See *id. at 804-805*.

9 See Rogers, Classification Guidelines Ahead, Boston Globe, Nov. 9, 1978, at 45.

Article 112 permits the Legislature to establish different classes of real property and to tax the different classes at different rates, so long as all real property within a class is taxed at the same rate. In anticipation of the ratification of *art. 112*, the Legislature enacted St. 1978, c. 580, which pursuant to the authority contained in the proposed amendment, created a property tax system based on classifying real property in four classes. In 1979, following the amendment's ratification, the Legislature considered a somewhat different classification system and submitted two questions to this court concerning the constitutionality of certain of its features.[10] See *Opinion of the Justices, 378 Mass. at 802, 806-815*. Following receipt of our affirmative answers to its questions, the Legislature enacted new legislation, St. 1979, c. 797, to implement *art. 112*, establishing a property tax structure almost identical to that proposed. At the same time, the Legislature also repealed the classification provisions of St. 1978, c. 580. See St. 1979, c. 797, § 23. See also St. 1980, c. 261, § 16.

10 The constitutional questions we answered in [***9] *Opinion of the Justices, 378 Mass. 802, 393 N.E.2d 306 (1979)*, did not directly concern the central issue in this case about the meaning of "proportional and reasonable assessments" as it relates to personal property in *art. 4*, as amended by amendment *art. 112*. Our opinion in that case is nonetheless of some relevance here, as we discuss in note 22, *infra*.

[*831] The implementing legislation set out in St. 1979, c. 797, is codified as *G. L. c. 40, § 56*; *G. L. c. 58, § 1A*; and *G. L. c. 59, § 2A*, and remains in effect;[11] the assessors [**51] here implemented the split tax structure in place in Boston for FY 2012 pursuant to these statutes.[12] Under them, the commissioner is required every three years to determine, within each city and town in the Commonwealth, whether the locally assessed values represent the full and fair cash valuation for each class of real property, defined in *c. 59, § 2A*,[13] and for all personal property not exempt from local taxation. See *G. L. c. 40, § 56*; *G. L. c. 58, § 1A*.[14] For every municipality that the commissioner determines is using full and fair cash valuation, the commissioner also ascertains a "minimum residential factor" (MRF).[15] See *G. L. c. 40, § 56*; *G. L. c. 58, § 1A*.

11 The sections of the General Laws cited in the text that were added by St. 1979, c. 797, have been subsequently amended in a number of respects, but the amendments do not affect the parties' [***10] arguments in the present case.

12 In FY 2012, there were 108 municipalities, including Boston, that elected a split rate tax scheme pursuant to *§ 56*, and 243 municipalities that elected a single rate tax scheme.

13 Under *G. L. c. 59, § 2A*, real property may be classified into four classes: residential, open space, commercial, and industrial; *§ 2A* defines each such class.

14 When the commissioner certifies that the municipality's assessments are at full and fair cash value, the certification may be relied on for the year in which it is made and the two years following. See *G. L. c. 40, § 56* (*§ 56*).

15 The minimum residential factor (MRF) caps the degree to which the city or town may shift the over-all tax burden from the residential and open space property classes to the commercial and industrial real property classes and to personal property. See *G. L. c. 58, § 1A*, second par.

The municipality next determines "the percentages of local tax levy to be borne by each class of real property, as defined in [*G. L. c. 59, § 2A*], and personal property." *G. L. c. 40, § 56*. To do so, the municipality first adopts a residential factor (RF) to be applied in making the determination of local levy percentages for each class of property; the RF may not be less than the MRF determined by the commissioner. *Id.* The [***11] municipality then determines the tax rate per thousand dollars of value for each class of property by dividing the share of the levy to be raised by each class by the total assessed valuation for that class, and multiplying the result by 1,000.[16] *Id.*

16 In adopting a residential factor (RF), the municipality chooses whether to use a split tax structure or a unified tax structure in assessing property taxes. If it chooses to use an RF of one, a single tax rate applies equally to all taxable property and the percentage of the local tax levy borne by each type of property should equal the percentage of the total value of real and personal property represented by that type of property. By way of illustration, if residential property comprises eighty per cent of the total assessed valuation of all real and personal property in a city, under an RF of one, residential property owners collectively will pay eighty per cent of the total property tax levy. If the city elects to use an RF of less than one, the share of the total tax levy borne by the residential and open space classes of real property will be reduced to a point lower than the percentage of the total property valuation represented by [***12] these two types of property, and the relative share of the total tax levy for which other classes of real property as well as personal property are responsible will correspondingly increase. The result is a percentage shift in tax obligations in favor of residential and open space real property.

The statutory formula is set out in *§ 56*, and also draws on *G. L. c. 58, § 1A*. For present purposes, the formula may be most easily explained by way of illustration. Assume that in a particular city or town, the total value of property by class is as follows:

Residential:	$500,000
Open Space:	$20,000
Commercial:	$200,000
Industrial:	$200,000
Personal:	$80,000
Total Property Valuation:	$1,000,000

Assume further that the city elects a residential factor of .80, or 80%, and chooses to multiply the RF by 75% for the open space determination. The percentage of tax levy borne by each class would be as follows:

Residential:	($500,000/$1,000,000) x 80%	=	40.0%
Open Space:	($20,000/$1,000,000) x (80% x 75%)	=	1.2%
Commercial:	($200,000/$480,000) x (100% - 41.2% [i.e., sum of residential and open space percentages])	=	24.5%
Industrial:	($200,000/$480,000) x (100% - 41.2%)	=	24.5%
Personal:	($80,000/$480,000) x (100% - 41.2%)	=	9.8%

Assuming the city's total [***13] tax levy for this year is $25,000, to determine the tax rate for each class, the percentage of the levy per class is divided by the total assessed valuation for that class and multiplied by 1,000:

Residential:	($25,000 x 40%)/500,000 x 1,000	=	$20.00
Open Space:	($25,000 x 1.2%)/20,000 x 1,000	=	$15.00
Commercial:	($25,000 x 24.5%)/200,000 x 1,000	=	$30.625
Industrial:	($25,000 x 24.5%)/200,000 x 1,000	=	$30.625
Personal:	($25,000 x 9.8%)/80,000 x 1,000	=	$30.625

[*832] [**52] c. *Factual background*. Turning to this case, for FY 2012, Boston elected to adopt a split rate tax structure pursuant to [*833] *§ 56*.[17] The city having elected to use an RF of 59.6005%, the assessors determined the following percentages of the total tax levy to be borne by each class of real property and by personal property:

17 The commissioner had certified in December, 2009, that the assessors were assessing the real and personal property in Boston at full and fair cash value, and that certification remained in effect for FY 2012. See *G. L. c. 40, § 56*.

Classification	*Levy Percentage*	*Tax Rate Per Thousand*
Residential	38.7353%	$13.04
Open Space	0%	$0.00
Commercial	50.9987%	$31.92
Industrial	1.3352%	$31.92
Personal	8.9308%	$31.92

On December 12, 2011, the commissioner approved and certified Boston's [***14] FY 2012 tax rates.

Under the FY 2012 tax rates in Boston, personal property as a whole constituted 8.9308% of the tax levy, but it accounted for 5.1033% of the total valuation of all real and personal property situated in the city; residential property made up 38.7353% of the total tax levy, but accounted for 64.9915% of the total valuation of all real and personal property located in the city. With respect to the two taxpayers in this case, Verizon's taxable property situated in Boston for FY 2012 was approximately 0.2439% of the

value of all taxable property in the city, but Verizon was required to pay 0.4269% of the total tax levy; RCN's taxable property was approximately 0.0547% of the total taxable property, but RCN was required to pay 0.0958% of the total tax levy. At the same time, the value of Verizon's *§ 39* property was approximately 4.78% of the total valuation of personal property and approximately 0.6966% of the total valuation of property in the commercial, industrial, and property (CIP) classes located in Boston for FY 2012, and the tax assessed on that property represented these exact same percentages of the total taxes levied on all personal property and all CIP property, respectively. [***15] For RCN, the value of its *§ 39* property was 1.07% of the total valuation of personal property and 0.156% of the total valuation of property in the CIP classes for FY [**53] 2012, and the same respective percentages of the total taxes levied on all personal property and CIP property, for that year.

2. *Discussion.* The taxpayers argue that *art. 112* created a limited exception to *art. 4*'s overarching proportionality require- [*834] ment, an exception that applies solely to the taxation of real property, and based on the plain language of *art. 112*, the tax treatment of personal property remains unchanged by *art. 112*. That is, the taxpayers argue that, just as was true before the ratification of *art. 112*, in order to conform to *art. 4*'s mandate that tax assessments be "proportional and reasonable," the assessors should have imposed a tax rate on personal property that would result in owners of personal property being responsible only for their proportionate share of the tax levy, measured by the relative value of their personal property compared to the total value of all the taxable property in Boston, real and personal. On the facts of this case, that measurement would have yielded a tax rate of $18.24 per [***16] thousand dollars of value, rather than the rate of $31.92 per thousand dollars of value applied by the assessors, which is 1.75 times greater. The taxpayers contend that because the tax rate applied to their personal property in FY 2012 exceeded this permissible limit, the tax was unconstitutionally disproportionate in violation both of *art. 4* and of *art. 10 of the Massachusetts Declaration of Rights.* We disagree.

As the board's decision states, and the taxpayers do not dispute, the assessors determined the challenged FY 2012 tax rates and assessments in compliance with the provisions of *§ 56*.[18] The taxpayers' challenge, therefore, is that the split tax structure permitted by *§ 56* is unconstitutional because it imposes a disproportionate tax on owners of personal property and there is no constitutional authority to do so. The board disagreed, and its opinion sets forth the board's reasoning in some detail, but questions of constitutional interpretation are questions of law, and we review them de novo. See *RCN-BecoCom, LLC v. Commissioner of Revenue, 443 Mass. 198, 201-202, 820 N.E.2d 208 (2005)*. See also *Geoffrey, Inc. v. Commissioner of Revenue, 453 Mass. 17, 22, 899 N.E.2d 87,* cert. denied, *557 U.S. 920, 129 S. Ct. 2853, 174 L. Ed. 2d 553 (2009)*.

> 18 *Section 56* is the specific statute providing the option of a split tax structure and therefore the focus of the taxpayers' challenge in this case, but it is undisputed that implementation of the split tax structure option under [***17] *§ 56* also brings into play the related statutes, *G. L. c. 58, § 1A*, and *G. L. c. 59, § 2A*. The taxpayers do not challenge the constitutionality of these two statutes.

"We start from the premise that '[a] tax measure is presumed valid and is entitled to the benefit of any constitutional doubt, and the burden of proving its invalidity falls on those who challenge the measure.'" *WB&T Mtge. Co. v. Assessors of Boston, 451 Mass. 716, 721, 889 N.E.2d 404 (2008)*, quoting *Opinion of the Justices, 425 Mass. 1201, 1203-1204, 681 N.E.2d 857 (1997)*. A party challenging the validity of a tax measure must "establish[ ] its invalidity 'beyond a rational doubt'" [*835] (citation omitted). *Geoffrey, Inc., 453 Mass. at 22*.[19]

19 The taxpayers argue that their constitutional challenge to *§ 56* is to the statute as applied to them rather than a facial challenge. Their argument appears to be based on the ground that the statute gives municipalities the option of imposing either a single tax rate to all classes of property, real and personal, or a split tax rate that differentiates between residential (and open space) property and other classes of property. The argument seems to be that if Boston had elected to adopt a single rate tax structure for FY 2012, *§ 56* would have been constitutionally applied to them, and was only unconstitutional in this case because the split tax rate alternative was chosen. The argument fails. Because *§ 56* explicitly authorizes [***18] municipalities to implement a split rate tax structure, the taxpayers' challenge represents a facial attack on the statute itself. A facial challenge is "the weakest form of challenge, and the one that is the least likely to succeed." *Blixt v. Blixt, 437 Mass. 649, 652, 774 N.E.2d 1052 (2002)*, cert. denied, *537 U.S. 1189, 123 S. Ct. 1259, 154 L. Ed. 2d 1022 (2003)*. But whether facial or as applied, when bringing a constitutional challenge to a tax statute, as stated in the text, the challenger bears a heavy burden to overcome a strong presumption of validity. See *Andover Sav. Bank v. Commissioner of Revenue, 387 Mass. 229, 235, 439 N.E.2d 282 (1982)*.

[**54] Determining the constitutional validity of *§ 56* requires an examination of *art. 112* and in particular, how *art. 112* affected the proportionality requirement within *art. 4*. Our cases have defined principles that guide our analysis: "A constitutional amendment should be 'interpreted in the light of the conditions under which it ... [was] framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy.'" *Mazzone v. Attorney Gen., 432 Mass. 515, 526, 736 N.E.2d 358 (2000)*, quoting *Tax Comm'r v. Putnam, 227 Mass. 522, 524, 116 N.E. 904 (1917)*. See *Attorney Gen. v. Methuen, 236 Mass. 564, 573, 129 N.E. 662 (1921)*. "An amendment to the Constitution is one of the most solemn and important of instruments. It commonly is a brief and comprehensive statement of a general principle of government. ... Its words should be interpreted in a sense most obvious to the [***19] common understanding at the time of its adoption, because it is proposed for public adoption and must be understood by all entitled to vote" (citation omitted). *Cohen v. Attorney Gen., 357 Mass. 564, 571, 259 N.E.2d 539 (1970)*.

As discussed earlier in this opinion, before *art. 112* was ratified, beginning early in the Nineteenth Century, see *President, Directors, & Co. of the Portland Bank, 12 Mass. at 255*, and continuing, *art. 4* was uniformly interpreted to forbid the imposition of taxes "upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination [was] effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation." *Cheshire*, [*836] *118 Mass. at 389*. See *Bettigole, 343 Mass. at 230-232*. As also discussed, because of popular dissatisfaction with the combined effect of the constitutional proportionality requirement and the statutory obligation of municipalities to assess residential property and vacant land (open space) at full and fair cash value and in the same manner as all other types of property, the Legislature in response proposed *art. 112* as an amendment to *art. 4*. See *Associated Indus. of Mass., Inc., 378 Mass. at 659*; *Opinion of the Justices, 378 Mass. at 804*.

This history reflects that the animating purpose of *art. 112* was to change the meaning of proportionality in *art. 4* in order to enable residential property to be treated differently from other [***20] property classes. *Article 112* must be interpreted to give effect to this purpose, see, e.g., *Mazzone, 432 Mass. at 526*, and our review of the constitutionality of *§ 56*, in turn, must consider whether the statute helps to effectuate this purpose. It does.

Section 56 -- in combination with *G. L. c. 58, § 1A*, and *G. L. c. 59, § 2A*, see St. 1979, c. 797 -- authorizes a city or town to adopt a split tax rate structure that enables it to tax residential and open space property at a lower effective tax rate than all other classes or types of property. At the same time, *§ 56* adheres to or at least [**55] supports the principle of proportionality with respect to all such other property types by treating commercial real property, industrial real property, and personal property -- the CIP classes -- in the exact same manner.[20] In contrast, the taxpayers' interpretation of *art. 112* would contradict the concept of proportionality by creating a single and separate tax rate for personal property, treating it differently from all other classes of property.

20 Boston's effective tax rates for FY 2012 illustrate this point: residential property had an effective tax rate of $13.04 per thousand dollars of value, and commercial, industrial, and personal property had an effective tax rate of $31.92 [***21] per thousand dollars of value.

The taxpayers argue that *art. 112* effected a "narrow" exception to the proportionality requirement of *art. 4*, one limited to real property, and they suggest that, as an exception, *art. 112* must itself be construed narrowly. Their argument might have more force if it were directed at the language of a statute rather than a constitutional amendment; we have certainly stated that "[e]xceptions to statutory provisions are construed narrowly." See *LeClair v. Norwell, 430 Mass. 328, 336, 719 N.E.2d 464 (1999)*. Cf. *New England Forestry Found., Inc. v. Assessors of Hawley, 468 Mass. 138, 148, 9 N.E.3d 310 (2014)* ("Exemption statutes [here, property tax exemption stat- [*837] ute] are strictly construed ... "). But a constitutional amendment "is a statement of general principles and not a specification of details. ... It is to be interpreted as the Constitution of a State and not as a statute or an ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose." *McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 559, 615 N.E.2d 516 (1993)*, quoting *Cohen, 357 Mass. at 571*. In the case of *art. 112*, its purpose of enabling cities and towns to tax residential property at an effective rate different from and lower than other property is clear, and because *art. 112* is a constitutional amendment, we do not interpret it narrowly, despite its inclusion of the phrase, "except that." The Legislature [***22] understood from the outset -- as shown by the fact that it enacted contingent legislation to implement *art. 112* before the amendment had even been ratified by the voters, see *Associated Indus., 378 Mass. at 659, 662-663* -- that *art. 112* did indeed state "general principles" that would require fleshing out in implementing statutes. *Section 56* is such a statute. It effectuates the overarching objective of *art. 112*, and does so in a manner that retains proportionality to a large extent by treating nonexempt personal property -- which, as in this case, is used for business purposes[21] -- the same as commercial and industrial real property.[22]

21 It may well be the case that most nonexempt personal property is used for business purposes; much if not all personal property used by individuals for nonbusiness purposes is exempt from property tax. See, e.g., *G. L. c. 59, § 5, Twentieth*.

22 Finally, although the taxpayers are correct that *Opinion of the Justices, 378 Mass. 802, 393 N.E.2d 306 (1979)*, did not address directly the proportionality challenge they raise in this case, we think it is of significance that the bill reviewed there by the court, like *§ 56*, treated personal property differently from (and less favorably than) residential and open space property, and exactly the same as commercial and industrial real property, and the court's [***23] opinion clearly indicates that it reviewed and understood this aspect of the proposed legislation. See *id. at 807-808*. The court expressed no reservation about the proposed legislation's treatment of personal property, and certainly did not suggest that insofar as

personal property was treated as part of the same "class" as industrial and commercial real property and permitted to be taxed at a higher effective rate than residential and open space property, the constitutionality of the proposed legislation might be in question because of a possible conflict with the general proportionality requirement of *art. 4*.

[**56] We conclude that the board's decision rejecting the taxpayers' challenge to the constitutionality of *§ 56* and upholding the assessors' denial of the requested tax abatements was correct.

[*838] 3. *Conclusion*. The decision of the Appellate Tax Board is affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 16-01933

GEORGE CAPLAN & others[1]

vs.

TOWN OF ACTON, MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This is a taxpayer suit under G.L. c. 40, § 53 against the Town of Acton, Massachusetts ("Town" or "Acton") for a declaratory judgment, alleging that three grants of public funds by the Town to the Acton Congregational Church and the South Acton Congregational Church (collectively "Churches") under the Community Preservation Act ("CPA"), G.L. c. 44B, §§ 1-17, violate Article XVIII, Section 2 of the Massachusetts Constitution, as amended by articles XLVI and CIII, known as the Anti-Aid Amendment. Plaintiffs have moved for a preliminary injunction to enjoin the Town from distributing these funds. For the following reasons, Plaintiffs' Motion for Preliminary Injunction is **DENIED**.[2]

DISCUSSION

I. Standard

To obtain a preliminary injunction in a taxpayer suit, Plaintiffs must demonstrate:

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[1] Jim Conboy, G. Stodel Friedman, Daniel Gilfix, Maria Greene, Jesse Levine, Dave Lunger, Allen Nitschelm, Scott Smyers, William Alstrom, Jennifer Brown, William Brown, and David Caplan, as taxable inhabitants, citizen-taxpayers of Acton, Massachusetts.

[2] In their Stipulation of Schedule for Responding to Complaint and Briefing on Plaintiffs' Motion for Preliminary Injunction No. 4, the parties have stipulated that the funds will not be disbursed to the Churches until at least thirty (30) days after entry of this Order.

(1) a likelihood of success on the merits; and (2) that "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." LeClair v. Norwell, 430 Mass. 328, 331-32 (1999), quoting Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984). In taxpayer suits under G.L. c. 40, § 53, the taxpayers "act as private attorneys general, enforcing laws designed to protect the public interest." Edwards v. Boston, 408 Mass. 643, 646 (1990). Accordingly, neither irreparable harm to the plaintiffs nor harm to the governmental body are considered in determining whether to issue an injunction. *Id.* at 646-47.

II. Success on the Merits

To determine whether the Town's grants to the Churches under the CPA would violate the Anti-Aid Amendment, this court is guided by the three factors outlined in Helmes v. Commonwealth, 406 Mass. 873, 876 (1990). This court considers whether: (1) the purpose of the grants is to aid the Churches; (2) the grants in fact substantially aid the Churches; and (3) the grants avoid the political and economic abuses which prompted the Anti-Aid Amendment to be enacted. See *id.* The third factor, stated more precisely, requires this court to examine whether there is any use of public funds that aids the Churches "in a way that is abusive or unfair, economically or politically." *Id.* at 878. Though each factor is considered separately, they are "cumulative and interrelated," compelling a conclusion that balances the distinct components. Commonwealth v. School Comm. of Springfield, 382 Mass. 665, 675 (1981). A presumption of constitutionality favors the CPA, which Plaintiffs bear the heavy burden to overcome. See *id.*

Applying the three Helmes factors to the present case, this court concludes there is no likelihood that Plaintiffs will succeed on the merits of their claim that grants to the Churches under the CPA would violate the Anti-Aid Amendment. Under the first prong, Plaintiffs have

failed to demonstrate that the purpose of the grants is to aid the Churches. This court is directed to examine the purpose of the CPA, under which the challenged grants are to be conferred upon the Churches, rather than the stated purpose of the recipients, as Plaintiffs urge. Helmes, 406 Mass. at 877; Attorney Gen. v. School Comm. of Essex, 387 Mass. 326, 330-31 (1982). Grants of public funds to private institutions under the CPA are for "the acquisition, preservation, rehabilitation and restoration of historic resources[.]" G.L. c. 44B, § 5(b)(2). The Churches at issue in this case are historic churches located in historic districts of Acton. Affidavit of Roland Bartl ¶¶ 6-9. Thus, this court finds the purpose of the grants to the Churches under the CPA is to preserve historic resources, and not to aid the Churches.

Similarly, this court finds the Plaintiffs have failed to satisfy the third prong of the Helmes test. There is no credible evidence that the grants under the CPA are economically or politically abusive or unfair. The application and approval procedures for grants under the CPA operate without regard to the applicant's makeup or purpose. Approval thereunder is determined based on the Town's assessment of how best to use public funds to effectuate a legitimate public purpose. Therefore, this court finds no political or economic abuse which the Anti-Aid Amendment was enacted to prevent. Helmes, 406 Mass. at 877.

Assuming arguendo Plaintiffs can satisfy the second prong of the Helmes test, which this court is not convinced they can, there remains no likelihood of success on the merits. It is well established that "[t]he fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a legislature has erroneously appraised the public need." Essex, 387 Mass. at 332, quoting Everson v. Board of Educ., 330 U.S. 1, 6 (1947). As noted above, the factors are

"cumulative and interrelated," and must be balanced as a whole. Springfield, 382 Mass. at 675. Plaintiffs have failed to satisfy the first and third prongs of the Helmes test, precluding them from overcoming the presumption of constitutionality that favors the CPA. *Id.* For these reasons, this court finds that Plaintiffs are unlikely to succeed on the merits of their contention that grants to the Churches under the CPA would violate the Anti-Aid Amendment.

ORDER

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction is **DENIED**.

Leila R. Kern
Justice of the Superior Court

Dated: September 16, 2016