

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPERIOR COURT

Civil Action No. 2084-CV-01334

MITCHELL MATORIN, and LINDA SMITH,

Plaintiffs,

v.

THE COMMONWEALTH OF
MASSACHUSETTS and its EXECUTIVE
OFFICE OF HOUSING AND ECONOMIC
DEVELOPMENT

Defendants.

**BRIEF OF AMICI CURIAE HEALTH LAW ADVOCATES, HEALTH CARE FOR ALL,
AND THE PUBLIC HEALTH LAW WATCH IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Since at least the early 1900s, the law has recognized that the exercise of individual liberty is subject to the safety and well-being of the community at large. The twin maxims *sic utere tuo ut alterum non laedas* (use that which is yours so as not to injure others) and *salus publica suprema lex est* (public well-being is the supreme law), demonstrate that individual rights, including property rights, have always been subject to the state's police power when it seeks to protect the health and safety of its citizens. And, in this time of pandemic, the obligation of the state to exercise its police powers to preserve the greater good is of critical importance. Not only does society have a moral duty to care for those whose health is particularly at risk, preserving the health of those most vulnerable to SARS-COV-2 and its collateral aftermath is squarely aligned with the goal of ensuring the health of all of the Commonwealth's communities. As public health experts have long argued, failing to protect the health and health care of individuals experiencing housing, food and economic insecurity increases the risk of infection for the general population.¹

The risk of increased COVID transmission is not the only threat to public health that the Commonwealth's temporary suspension of evictions guards against. Indeed, thousands of Massachusetts residents with chronic health conditions will be irreparably impacted by the sudden loss of housing. Public health data and the lived experience of many of the individuals we serve – individuals who contend each day with chronic disease amid the increasing stress of housing instability and economic insecurity during the pandemic – illustrate the precarious circumstances of many Massachusetts residents and the grave health consequences that would

¹ S. Hutchins, B. Truman, T. Merlin, and S. Redd, Protecting Vulnerable Populations From Pandemic Influenza in the United States: A Strategic Imperative, 99 Am J Public Health S243 (2009).

result if Plaintiffs' preliminary injunction is allowed. Unleashing a wave of evictions at this moment will predictably accelerate the rate of SARS-CoV-2 infections and exacerbate existing chronic health conditions especially in communities of color – the very same communities that have already been hardest hit by the pandemic.

While Plaintiffs' challenge raises important questions regarding the exercise of individual property rights, states necessarily retain broad authority to respond and protect the health and safety of the public during times of catastrophe.² As the Commonwealth continues to grapple with a public health crisis that has already cost the lives of over 8,000 Massachusetts residents in just a few short months, special consideration must be given to those who are especially at risk of infection and those whose chronic disease will be made unmanageable with the loss of stable housing.

For these reasons, *Amici Curiae* Health Law Advocates, Health Care For All, and the Public Health Law Watch, a project of the George Consortium, respectfully join with the defendants and other *amici* in opposing Plaintiffs' Motion for Preliminary Injunction.

II. INTEREST OF AMICI CURIAE

Health Law Advocates (HLA) is a Massachusetts-based public interest law firm helping individuals facing economic insecurity overcome barriers to health care. Founded in 1995, HLA provides no-cost legal services to individuals having difficulty accessing health care, particularly those who are most likely to encounter barriers to health care coverage or services due to their race, gender, disability, age, immigration status, or geographic location. Counsel of record in the leading Massachusetts case on immigrant access to state health benefits, Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655 (2011) (Finch I) and 461 Mass. 232

² See South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

(2012) (Finch II), HLA has represented thousands of Massachusetts health care consumers struggling to access the care they need. HLA also advocates for public policy reforms, working with consumers and policy makers at the state and federal levels in all three branches of government. HLA has a direct interest in preserving access to health care coverage and services for Massachusetts communities and individuals experiencing increased health care insecurity during the COVID-19 pandemic.

Health Care For All (HCFA) is a non-profit consumer health advocacy organization that advocates for health justice in Massachusetts by promoting health equity and ensuring coverage and access for all. HCFA advocates for policies and practices to advance access to quality, affordable health coverage and care for consumers in Massachusetts, including for immigrants and communities of color. HCFA operates a toll-free HelpLine that assists Massachusetts residents in English, Spanish, and Portuguese to apply for, enroll in, and troubleshoot health coverage issues. The HelpLine receives 20,000 calls per year and assists many immigrants and persons of color from communities throughout the Commonwealth hardest hit by the pandemic. HCFA has a direct interest in preserving and improving access to high quality health care in Massachusetts especially during this period of heightened need.

The Public Health Law Watch (PHLW) is a project of the George Consortium, a nationwide network of over sixty public health law scholars, academics, experts, and practitioners who are dedicated to advancing public health through law. PHLW's goals are to increase visibility and understanding of public health law issues, identify ways to engage on these issues and provide legal analysis and commentary. The statements expressed in this brief do not necessarily represent the views of any individuals or institutions affiliated with PHLW.

III. ARGUMENT

Plaintiffs are not likely to succeed on the merits of their constitutional claims, particularly when considering harm to the public interest. Foster v. Comm’r of Correction, 484 Mass. 698, 712 (June 2, 2020). In addition to the arguments enumerated in the Commonwealth’s papers, Plaintiffs ignore that the exercise of individual property rights have long been limited by the public interest, especially, but not exclusively, during public health emergencies. If the Commonwealth’s temporary suspension of evictions is enjoined, the number of COVID-19 infections throughout the Commonwealth will rise, and thousands of individuals will no longer be able to manage chronic medical conditions as a result of the sudden loss of stable housing.

A. The Act Safeguards Public Health Beyond Preventing Further SARS-CoV-2 Transmission By Ensuring that Thousands of Individuals with Chronic Medical Conditions Can Continue to Access the Care They Need

As the Commonwealth’s papers demonstrate, the current health care crisis requires coordinated action to meet the threat of a highly transmissible and deadly virus for which there is presently no vaccine or cure. Opp. p. 2. Enjoining the Act would result in a wave of evictions that will further strain the Commonwealth’s emergency housing system. Opp. pp. 13-14. Increasing the numbers of unhoused in Massachusetts will increase the number of SARS-CoV-2 infections, while critically decreasing the capacity of our health care system and risking the health of others.³ Opp. pp. 6-8. These facts, alone, provide sufficient grounds for the state’s temporary exercise of police power to suspend evictions, reduce homelessness and prevent further sickness and death.

³ As many states, including Massachusetts, have witnessed first-hand, the allocation of scarce medical resources to respond to rising COVID-19 infections often means that fewer resources are available to treat other conditions. See Karen Weise, Mike Baker & Nicholas Bogel-Burroughs, The Coronavirus Is Forcing Hospitals to Cancel Surgeries, N.Y. Times, Mar. 16, 2020, <https://www.nytimes.com/2020/03/14/us/coronavirus-covid-surgeries-canceled.html>.

However, the Act does not only prevent further transmission of SARS-CoV-2. It also protects the health of thousands of Massachusetts residents who, even with housing of their own, struggle on a daily basis to manage their chronic disease. If these individuals also suddenly lose access to stable housing during the pandemic due to temporary job loss, the inability to access unemployment benefits, or protracted illness, their ability to effectively manage their chronic conditions will be greatly reduced. As even simple interactions with health care providers have been made much more difficult by the pandemic⁴, the additional effects of eviction and homelessness during the crisis will be especially harsh. Every aspect of their care, from carrying out regular treatment regimens, attending scheduled physicians' visits, securing transportation to and from health care providers, and maintaining medication routines, will become significantly more burdensome. This is so because of both the complications that COVID-19 has caused for the Massachusetts health care delivery system, generally, and also the heightened risk that COVID-19 poses to individuals with one or more comorbid conditions.

Approximately four million Massachusetts residents live with at least one chronic disease⁵, while 45.4% of the population has multiple chronic conditions.⁶ Individuals managing chronic conditions, such as diabetes, will be especially harmed by the loss of housing because access to basic necessities such as healthy meals or refrigeration for their insulation supply will

⁴ For example, cancer patients are experiencing difficulty accessing and affording necessary treatments during the pandemic. See American Cancer Society, Survey: COVID-19 Affecting Patients' Access to Cancer Care, Cancer Action Network (Apr. 15, 2020), <https://www.fightcancer.org/releases/survey-covid-19-affecting-patients%E2%80%99-access-cancer-care>.

⁵ The Partnership to Fight Chronic Disease, What is the Impact of Chronic Disease on Massachusetts?, https://www.fightchronicdisease.org/sites/default/files/download/PFCD_MA_FactSheet_FINAL_1.pdf.

⁶ Daniel Newman, Michelle Tong, Erica Levine, and Sandeep Kishore, Prevalence of multiple chronic conditions by U.S. state and territory, 2017, 15 PLoS One e0232346 (2020).

be made more difficult.⁷ On the other hand, stabilizing housing can help facilitate control over an environment allowing people to manage their chronic conditions, including regulating diabetes routines.⁸ By stabilizing housing and preventing homelessness, these individuals will be more able to manage their chronic conditions and focus on their health, rather than the basics for survival: food, water, and shelter. Additionally, in the face of further health decline, individuals with chronic disease who already suffer from lower rates of gainful employment, will also be less likely to regain their financial footing and secure replacement housing especially as the state's job market remains impacted.⁹

The deleterious effect of homelessness on health is also well-documented. Those who lack housing are three to six times more likely to become ill than the general population.¹⁰ One out of every two homeless people has high blood pressure.¹¹ One out of five have HIV, and 30% have hepatitis B.¹² Coupled with the fact that communities of color are, on the one hand, likely to

⁷ National Health Care for the Homeless Council, Adapting Your Practice: Treatment and Recommendations for Patients who are Homeless with Diabetes Mellitus (2013), https://nhhc.org/wp-content/uploads/2019/08/2013DiabetesGuidelines_FINAL_20130612.pdf.

⁸ Danya E. Keene, Mariana Henry, Carina Gormley, Chima Ndulmele, 'Then I Found Housing and Everything Changed': Transitions to Rent-Assisted Housing and Diabetes Self-Management, 20 *Cityscape* 107 (2018).

⁹ Giorgione G. Cabral, Ana C. Dantas de Souza, Isabelle R. Barbosa, Javier Jerez-Roig, & Dyego L.B. Souza, Multimorbidity and Its Impact on Workers: A Review of Longitudinal Studies, 1- *Safety and Health at Work* 393 (2019) (finding that chronic disease inhibited individuals' work productivity and employability).

¹⁰ David L. Maness, Care of the Homeless: An Overview, 89 *Am Fam Physician* 634 (Apr. 15, 2014).

¹¹ Seena Fazel, John R. Geddes, & Margot Kushel, The health of homeless people in high-income countries: descriptive epidemiology, health consequences, and clinical and policy recommendations, 384 *Lancet* 1529 (2015).

¹² Id.

suffer both from high rates of eviction¹³ and high rates of chronic disease¹⁴, and they are also the very same communities hardest hit by the pandemic, it is all the more imperative for policymakers to address these confluent health threats.

B. HLA's Clients

Many of the communities that the *amici* serve already face considerable challenges to accessing the health care they need. The sudden loss of housing during the pandemic would, at the very least, greatly complicate the management of existing chronic conditions and could, in some cases, lead to cascading health consequences. The following two stories of current HLA clients¹⁵ illustrate the real-world downstream impacts that the loss of housing would have on their health and the health of their families.

M.C. is a 52-year-old Quincy, Massachusetts resident with adult onset type 2 diabetes. He lives in a rental property and is on a fixed income. M.C. relies on his Social Security Disability Insurance (SSDI) payments to pay for rent, food and immediate medical expenses. Over 50% of M.C.'s income goes toward his rent, which categorizes him as a severely burdened renter and housing insecure.¹⁶ Complications from M.C.'s type 2 diabetes resulted in the

¹³ City Life/Vida Urbana, Evictions in Boston: The Disproportionate Effects of Forced Moves on Communities of Color, <https://www.bostonevictions.org/>.

¹⁴ Ana R. Quiñones, et al., Racial/ethnic differences in multimorbidity development and chronic disease accumulation for middle-aged adults, 14 PLoS One e0218462 (2019).

¹⁵ The clients identified herein are represented by HLA and have consented to the disclosure of their stories for the purpose of illustrating the difficulties that they, and many like them, face in navigating the health care system. While they are not represented by the other *amici*, their circumstances are representative of the experiences of many individuals the *amici* have come across in their respective capacities. HLA's representation of these clients is limited to assisting them navigate and overcome barriers to accessing health care. None of the *amici* work with these clients on any landlord/tenant or housing issues.

¹⁶ National Law Center on Homelessness and Poverty, Protect Tenants, Prevent Homelessness, 7 (2018), <https://nlchp.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf> (finding that individuals with significant rent burdens are significantly more likely to be unable to face eviction, due to of a lack of financial resources to address financial emergencies or interruptions in income).

amputation of his toes, ongoing foot ulcers, impaired vision, and kidney damage. As a result, he is disabled and unable to work. Furthermore, he has over \$7,000 of outstanding medical debt associated with his diabetes care that he is unable to pay in order to maintain his ability to continue paying for other necessities, such as rent. If M.C. were to be evicted from his home, he does not have the financial means to relocate and it is likely that he would become homeless.

M.C. and his health care providers are currently working to get his diabetes under control, which involves regular medical appointments at least every two weeks and multiple prescription medications. If M.C. suddenly lost his housing, the impact on his health and his ability to access necessary medical care would be devastating. M.C. would likely be forced to pay increased moving expenses, including a new housing deposit and other costs, instead of paying for the medical care he needs. Moreover, M.C. fears losing access to reliable transportation to medical appointments, healthy meals, and the refrigeration needed for his insulin and other medications, all of which are important to ensure that his diabetes does not accelerate and lead to more significant damage.

K.E. and her 11-year-old son live in Dorchester. After being diagnosed with attention-deficient/hyperactivity disorder (ADHD), post-traumatic stress disorder (PTSD), disruptive mood dysregulation disorder (DMDD), and oppositional defiant disorder (ODD), K.E.'s son has been receiving treatment through outpatient care and in-home services.

K.E. and her son experienced homelessness multiple times between 2015 and 2019, including living in multiple shelters that had significant and detrimental impacts on the child's health. His conditions worsened due to the instability of their living situation, harsh treatment from shelter staff, and forced interactions with people he did not know or trust. K.E. and her son were repeatedly turned away from shelters because of the child's disruptive behavior when his

conditions were triggered. Moreover, because of their constant moving, K.E.’s son fell behind in school and was unable to receive consistent access to health care through his school.

Since 2019, K.E. and her son have been living in an apartment that meets their medical needs¹⁷. K.E.’s son is about to enroll in a therapeutic school placement that is tailored to meet his unique educational needs. However, because of a dispute with their landlord, K.E. and her son planned to move out and find a new apartment at the end of June. After the pandemic struck, K.E. has not been able to find suitable housing. Fortunately, the temporary eviction suspension has allowed K.E. and her son to remain in their apartment for the time being. If they were forced to move now, K.E.’s son would lose all of his mental health services, which are tied to his school placement. Furthermore, the stress of a move would exacerbate his mental health conditions, and he would likely lose any progress he has made under his current treatment plan.

C. The Commonwealth’s Police Powers Operate to Protect the Health of All

State police power jurisprudence, rooted in the social compact, dates back to at least the 1800s when local governments struggled to contain ravaging outbreaks of malaria, yellow fever,

¹⁷ K.E. receives housing benefits through the federal Section 8 program and currently benefit from temporary federal eviction protections. However, these protections expire on July 25, 2020, see CARES Act, 15 U.S.C. § 9058(b), and will run out before K.E. is able to secure replacement housing. Indeed, evictions have already begun. See Matthew Goldstein, Landlords Jump the Gun as Eviction Moratorium Wanes, N.Y. Times, Jul. 23, 2020, <https://www.nytimes.com/2020/07/23/business/evictions-moratorium-cares-act.html>.

In response to local conditions, Governor Charlie Baker recently extended protections in Massachusetts under the Act through October 17, 2020. See Charlie Baker, Foreclosures and Evictions Moratorium Extension July 21 2020, <https://www.mass.gov/doc/foreclosures-and-evictions-moratorium-extension-july-21-2020>. Given the highly localized effects of the pandemic, locally elected officials who are accountable to their respective constituents are in the best position to assess appropriate policy responses. See South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring) (finding that the judiciary should not interfere with the police power of elected officials “in areas fraught with medical and scientific uncertainty” especially where “local officials are actively shaping their response to changing facts on the ground.”).

cholera, and typhoid.¹⁸ Then, as now, the fact remains that individual property rights are not absolute and are inherently subordinate to the preservation of the common good. Commonwealth v. Alger, 61 Mass. 53, 85 (1851); Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 38 (1905).

Indeed, the application of state police powers to individual property rights is hardly novel. The Supreme Judicial Court, in 1851, enumerated a multiplicity of circumstances where “such a power is exercised by all well ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable.” Commonwealth v. Alger at 85. These include prohibitions on the storage of gunpowder near housing or highways, building regulations restricting the height of structures or mandating fireproofing, prohibitions for certain buildings to be used as infectious disease hospitals. Id. The Court held these limitations on the use of property to be appropriate even where it would diminish the rents and profits to be received by the owner.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. . . . If a landlord could let his building for a smallpox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non lædas*.

Id. at 85–86.

Even when considering the right of individuals to be free from government intrusion into matters of their own bodies, Courts have consistently upheld the state exercise of police powers. In Jacobson v. Commonwealth of Massachusetts, Justice Harlan considered the Constitutionality

¹⁸ J.H. Powell, Bring out your dead: the great plague of yellow fever in Philadelphia in 1793 (1949).

of a Massachusetts state law that mandated vaccination against smallpox. Ultimately upholding the state action, Justice Harlan grounded his decision in the social compact:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. . . .

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 26, 25 S. Ct. 358, 361, 49 L. Ed. 643 (1905)

Two years earlier, the Massachusetts Supreme Judicial Court similarly upheld the same Cambridge public health decree at issue in Jacobson on state constitutional grounds.

That such an object is worthy of the intelligent thought and earnest endeavor of legislators is too plain for discussion. Under the police power there is general legislative authority to make laws for the common good. Article 4, § 1, c. 1, of the second part of the Constitution of Massachusetts, states more fully than most constitutions the nature of this power, when it gives authority to ‘the general court from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth,’ etc. That this power extends to the protection and preservation of the public health is not questioned.

Commonwealth v. Pear, 183 Mass. 242, 244 (1903), aff’d sub nom. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

The historical context in which Jacobson and Pear were decided is significant. The determinations that the vaccine mandate at issue in the cases was reasonable under the circumstances should not be separated from the context of the smallpox epidemic in

Massachusetts which, by that time, had resulted in more than 2,300 cases and 284 deaths.¹⁹

Accordingly, in his decision, Justice Harlan repeatedly returns to the “paramount necessity” of protecting Massachusetts residents against an epidemic of disease. *Id.* at 27.

The Act is also not without more modern precedent. States and local governments around the country have taken emergency actions that provide limited protections to tenants during the pandemic. *See* Ariz. Exec. Order No. 2020-14 (March 24, 2020) (delaying evictions for individuals who cannot pay their rent due to COVID-19 until October 31, 2020); Conn. Exec. Order No. 7DDD (June 29, 2020) (delaying evictions until August 22, 2020); N.J. Exec. Order No. 106 (March 19, 2020) (delaying evictions for up to two months after the end of the New Jersey state of emergency); Tenant Safe Harbor Act, 2020 N.Y. Laws, ch. 127 (prohibiting evictions for individuals who experienced financial hardship for non-payment of rent that accrues or becomes due during the COVID-19 period). *See* also CARES Act, 15 U.S.C. §§ 9057-9058. Likewise, states have taken similar temporary actions in the wake of other calamities, such as the September 11, 2001 attacks²⁰, Hurricane Sandy²¹, and Hurricane Katrina²². Indeed, a landlord’s exercise of his or her property rights has never been absolute even outside the context

¹⁹ Wendy Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. Rev. Online 117 (2020). For perspective, the present pandemic has resulted in over 107,000 cases and 8,000 deaths in Massachusetts since the first confirmed case in March. *See* Massachusetts Department of Public Health, *Dashboard of Public Health Indicators* (July 21, 2020), <https://www.mass.gov/doc/covid-19-dashboard-july-21-2020/download>.

²⁰ Honorable Fern Fisher-Brandveen, *Legal Information and Resource Guide For Owners and Tenants Affected By The World Trade Center Disaster* (2001), available at <https://www.nytimes.com/2001/11/11/realestate/postings-a-civil-court-guide-on-sept-11-issues-for-owners-and-tenants.html> (describing rental and mortgage protections available to individuals who were impacted by the September 11, 2001 attacks).

²¹ NYC Housing Authority, *NYCHA Housing Court and Eviction Moratorium* (Nov. 23, 2012), <https://www1.nyc.gov/site/nycha/about/press/pr-2012/housing-court-and-eviction-moratorium-11-23-12.page> (implementing a moratorium to protect those impacted by Hurricane Sandy).

²² La. Exec. Order No. KBB 2005-32 (September 6, 2005) (delaying evictions until September 25, 2005).

of a public health emergency. One need look no further than the U.S. Supreme Court's repeated rejection of constitutional challenges to rent control laws and other laws regulating the use of rental property. Yee v. City of Escondido, 503 U.S. 519 (1992); Harmon v. Kimmel, 566 U.S. 962 (2012).

Plaintiffs' failure to acknowledge the substantial body of authority throughout the last 100 plus years establishing and upholding the state's police powers, especially in the face of a pandemic, is puzzling. Nevertheless, these cases make clear that the exercise of individual property rights cannot be to the exclusion of the public good.

IV. CONCLUSION

The Act's temporary housing protections are of paramount importance to public health, generally, and the safety of those managing chronic illnesses who depend on access to stable housing through the pandemic, in particular. For the reasons set forth above, Plaintiffs' Motion for Preliminary Injunction should be denied.

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