No. SJC-13840

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

TOWN OF MARSHFIELD AND LYNNE FIDLER, STEPHEN DARCY, AND ERIC KELLEY AS THEY CONSTITUTE THE TOWN OF MARSHFIELD SELECTBOARD,
Plaintiffs-Appellants

v.

COMMONWEALTH OF MASSACHUSETTS AND EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES
Defendants-Appellees

On Direct Appellate Review of a Judgment of the Plymouth County Superior Court

AMICUS BRIEF OF CITIZENS' HOUSING AND PLANNING ASSOCIATION, THE METROPOLITAN AREA PLANNING COUNCIL, CENTRAL MASSACHUSETTS HOUSING ALLIANCE, MASSACHUSETTS ASSOCIATION OF COMMUNITY DEVELOPMENT CORPORATIONS, THE MASSACHUSETTS HOUSING FINANCE AGENCY, COMMUNITY ECONOMIC DEVELOPMENT ASSISTANCE CORPORATION, MASSACHUSETTS HOUSING PARTNERSHIP FUND BOARD, THE BLACK ECONOMIC COUNCIL OF MASSACHUSETTS, THE HOME BUILDERS AND REMODELERS ASSOCIATION OF MASSACHUSETTS, INC., THE BOSTON FOUNDATION, NAIOP MASSACHUSETTS, JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, HARBOR LIGHT HOMES, THE GREATER BOSTON REAL ESTATE BOARD, THE MASSACHUSETTS ASSOCIATION OF REALTORS, THE PLANNING OFFICE FOR URBAN AFFAIRS, CAPSTONE COMMUNITIES LLC, AND BUILDING A BETTER WELLESLEY in support of the Commonwealth.

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Jacob M. Love (BBO #699613)
Citizens' Housing and Planning Association
One Beacon St., 5th Fl.
Boston, MA 02108
Tel: 617-221-8365
jlove@chapa.org

Karla L. Chaffee
(BBO #675699)
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, MA 02109-2835
kchaffee@nixonpeabody.com
(617) 345-1000
(833) 655-1825 (facsimile)

Jillian Lenson
(BBO #690653)
Lawyers for Civil Rights
61 Batterymarch Street, 5th Fl.
Boston, MA 02110
(617) 482-1145
jlenson@lawyersforcivilrights.org
Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to SJC Rule 1:21, Citizens' Housing And Planning Association, The Metropolitan Area Planning Council, Central Massachusetts Housing Alliance, Massachusetts Association Of Community Development Corporations, The Massachusetts Housing Finance Agency, Community Economic Development Assistance Corporation, Massachusetts Housing Partnership Fund Board, The Black Economic Council Of Massachusetts, The Home Builders And Remodelers Association Of Massachusetts, Inc., The Boston Foundation, NAIOP Massachusetts, Jewish Alliance For Law And Social Action, Harbor Light Homes, The Greater Boston Real Estate Board, The Massachusetts Association Of Realtors, The Planning Office For Urban Affairs, and Building A Better Wellesley, hereby state that each such entity is a either a Massachusetts not-for-profit organization or has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

Capstone Communities LLC has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

State Cases

State Statutes

Constitutional Provisions

IDENTITY AND INTERESTS OF *AMICI CURIAE*

This brief is submitted by Citizens' Housing and Planning Association, the Metropolitan Area Planning Council, Central Massachusetts Housing Alliance, Massachusetts Association of Community Development Corporations, the Massachusetts Housing Finance Agency, Community Economic Development Assistance Corporation, the Massachusetts Housing Partnership Fund Board, the Black Economic Council of Massachusetts, the Home Builders and Remodelers Association of Massachusetts, Inc., The Boston Foundation, NAIOP Massachusetts, Jewish Alliance for Law and Social Action, Harbor light Homes, the Greater Boston Real Estate Board, the Massachusetts Association of Realtors, the Planning Office for Urban Affairs, Capstone Communities LLC, and Building a Better Wellesley as *Amici Curiae*. As detailed below, *Amici* urge the Court to rule in favor of the Commonwealth.

Citizens' Housing and Planning Association ("CHAPA") is a non-profit membership organization devoted to the production and preservation of affordable housing in Massachusetts. CHAPA members include non-profit and for-profit developers, local housing providers and advocates, municipal officials, lenders, property managers, architects, consultants, homeowners, tenants,

and local planners. In pursuit of its mission, CHAPA champions legislation designed to encourage the development of safe and affordable housing in the Commonwealth. Among other things, it also operates an "MBTA Zoning Technical Assistance Initiative" that assists MBTA Communities with Section 3A compliance.

The **Metropolitan Area Planning Council** ("MAPC") is the regional planning agency serving the people who live and work in 101 cities and towns of Greater Boston. Established in 1963, MAPC is a public agency created under G.L. c. 40B, § 24. MAPC's mission is to promote sound municipal management, sustainable land use, protection of natural resources, efficient and affordable transportation, a diverse housing stock, public safety, economic development, clean energy, healthy communities, an informed public, and equity and opportunity among people of all backgrounds.

Central Massachusetts Housing Alliance ("CMHA") is a non-profit organization that seeks to eliminate homelessness in Worcester County. It does so by providing services to families that are homeless or at risk of homelessness, working to increase the supply of affordable housing, and educating the public about homelessness and its causes. Among its wide array of

services, CMHA operates an emergency shelter program, which houses families in need and provides them with aid designed to foster long-term housing stability, including help with housing search and placement.

Massachusetts Association of Community Development Corporations ("MACDC") is a non-profit membership organization that seeks to build and sustain a high performing and adaptive community development sector that is supported by private and public investment and sound public policies. It seeks to advance racial and economic equity by creating healthy communities where everyone lives in housing they can afford, benefits from economic opportunities, and can fully participate in the civic life of their community. It also supports community development through member services, which include peer learning, technical assistance, and research on topics relevant to the field.

The **Massachusetts Housing Finance Agency** ("MassHousing") is an independent, financially self-sustaining agency created by the State Legislature in 1966 to confront the Commonwealth's housing challenges. It provides financing to low- and moderate-income homebuyers and homeowners, and to developers who build or preserve rental housing. MassHousing uses

housing finance to strengthen communities, help people build economic prosperity, and expand homeownership. Since its inception, MassHousing has provided more than $30 billion to support homeownership and rental housing opportunities across Massachusetts.

Community Economic Development Assistance Corporation ("CEDAC") is a Massachusetts quasi-public non-profit corporation that is a national leader in the production and preservation of affordable housing. CEDAC provides early-stage capital financing and technical assistance to non-profit, community-based developers that build or preserve affordable housing. CEDAC's enabling legislation recognizes the shortage of housing in the Commonwealth that is affordable to persons of low- and moderate- income and its mission includes both community revitalization and the creation of new housing.

Massachusetts Housing Partnership Fund Board ("MHP") is a public instrumentality that works in concert with the Massachusetts Governor and the Executive Office of Housing and Livable Communities to increase the supply of affordable housing in Massachusetts. MHP's mission encompasses, among other things, breaking down local barriers to housing development through effective guidance, advocacy, research, and technical support. MHP

applies its decades of experience working with local municipalities to propose, develop, and implement an array of state housing programs, policies, and resources, including the MBTA Communities Act. It has also provided technical assistance to over 125 cities and towns to help them comply with said Act.

The **Black Economic Council of Massachusetts** ("BECMA") is a statewide, member-based non-profit focused on closing the racial wealth gap by expanding economic opportunity across Massachusetts. One of the major ways BECMA pursues this mission is by advocating for policies and practices to increase homeownership. These efforts focus on supporting the purchase and long-term retention of homes because both are critical pathways to household stability as well as intergenerational wealth.

The **Home Builders and Remodelers Association of Massachusetts, Inc.** ("HBRMA") is a Massachusetts non-profit trade association affiliated with the National Association of Home Builders. The HBRAMA, has more than 1,100 member companies in the commonwealth. Its members are involved in the permitting and development of land for residential uses, as well as the construction of single-family homes and multi-family housing such as townhomes, condominiums, and apartments.

The Boston Foundation ("TBF") is a non-profit corporation and Greater Boston's Community Foundation. TBF seeks to close the gaps on this region's greatest disparities. Through its resources and relationships, TBF works to open pathways to opportunity and build and sustain vital, prosperous, and equitable communities.

NAIOP MASSACHUSETTS is a not-for-profit organization representing the interests of companies that develop, own, manage, and finance commercial office, lab, industrial, mixed use, multi-family, retail, and institutional real property in the Commonwealth. It has more than 1,800 members, including many that are active in the development and permitting of multi-family housing projects.

The **Jewish Alliance for Law and Social Action** ("JALSA") is a statewide non-profit membership organization based in Boston working for social and economic justice, civil and constitutional rights, and civil liberties for all. JALSA has a long history of working on housing issues and strives for a society in which all communities are affordable and inclusive.

Harborlight Homes ("HH") is a non-profit, Massachusetts-certified Community Development Corporation, focused on creating access to affordable

housing for all persons and families in our communities. HH supports breaking the cycle of poverty by creating and managing homes that everyone can afford and convening partners to provide wrap-around services for families, elders, essential workers and individuals.

The **Greater Boston Real Estate Board** ("GBREB") is a non-profit membership organization with over 11,000 members in residential and commercial real estate. The organization's main focus areas are advocacy, policy, and continuing education for members. GBREB's activities touch on all aspects of the real estate industry, including finance, brokerage, commercial, as well as single- and multi- family residential.

Massachusetts Association of Realtors ("MAR") is a non-profit trade association representing over 22,000 licensed real estate professionals. MAR is a leading voce in Massachusetts real estate and has been working since 1924 to promote public policy initiatives that provide equal access to housing opportunities for all.

The **Planning Office for Urban Affairs** ("POUA"), established in 1969 by the Roman Catholic Archdiocese of Boston, is a non-profit social justice ministry that strives to create vibrant communities through the development of high quality affordable and mixed income

housing, where people of modest means can live with dignity and respect in homes they can afford. In its history, POUA has developed nearly 3,000 housing units to carry out its mission and work for social justice on behalf of those who are housing deprived.

Capstone Communities LLC is a limited liability company that develops affordable, mixed-income, market rate, and historic apartment communities. It is committed to helping neighborhoods across Eastern and Central Massachusetts thrive.

Building a Better Wellesley is a non-profit organization based in Wellesley, Massachusetts that advocates for attainable and affordable housing. Its advocacy efforts support housing that creates economic and racial diversity, provides homes for downsizing seniors, maintains family support networks, allows Wellesley's workforce to be Wellesley residents, enables young families to set down roots, strengthens our retail centers, and builds a more sustainable environment.

Pursuant to Mass. R. App. P. 17(c)(5), *Amici* jointly declare that: (A) no party or party's counsel had any part in authoring this brief; (B) no person other than *Amici* contributed any money intended to fund the preparation and submission of this brief; and (C)

neither *Amici* nor their counsel represented one of the parties to the present appeal in another proceeding involving similar issues.

Pursuant to Mass. R. App. P. 17(c)(5), Amici further state that an attorney on staff at the Massachusetts Housing Finance Agency is serving as a Special Assistant Attorney General on the litigation team of the Attorney General's Office that is representing the Commonwealth in this case. That attorney had no part in preparing this brief.

INTRODUCTION

Faced with an ongoing affordable housing crisis, the Massachusetts Legislature has declared that it must pioneer "innovative policies to encourage the production of more … housing."[1] State policymakers began that process in 2021 by inserting the MBTA Communities Law, G.L. c. 40A, § 3A ("Section 3A" or "3A"), into the Commonwealth's Zoning Act, G.L. c. 40A, *et. seq*.

Section 3A compels 177 communities with access to MBTA service ("MBTA Communities") to have at least one reasonably sized zoning district where multi-family housing can be built without discretionary municipal

[1] 2023 Mass. Legis. Serv. Ch. 7 (H.B. 43) (West).

approval. The statute's design reflects a legislative determination that restrictive local zoning rules across the MBTA region have, for too long, served as a major barrier to housing production in the Commonwealth. To alleviate that problem and "increase housing stock," the statute "require[s] towns benefiting from MBTA services to permit their fair share of multifamily housing." *Attorney General v. Milton*, 495 Mass. 183, 193 (2025).

Yet the Town of Marshfield and a small subset of other MBTA Communities have repeatedly sought to avoid that shared obligation.[2] This latest attempt began as a wave of municipal lawsuits seeking exemptions from 3A under the "local mandates" law, G.L. c. 29, § 27C. Undeterred by the declaration of 3A's constitutionality in *Attorney General v. Milton*, Marshfield and other resistant towns quickly pivoted to a new legal theory aimed at preserving the zoning status quo.

However, after consolidating various communities' claims below, the Superior Court comprehensively rejected that theory. To successfully challenge a law as an unfunded mandate, a party must identify a "direct

[2] For example, prior to this litigation, Marshfield initially declined to achieve interim compliance with Section 3A by the deadline stated in the Commonwealth's then-in-place Guidelines. *See* RAI/17-18.

service or cost obligation … imposed" by the law that is more than an "incidental local administrative expense." *Worcester v. Governor*, 416 Mass. 751, 754-55 (1994). And, as the Superior Court correctly held, each category of costs floated before it——downstream costs related to new housing and expenses tied to achieving zoning compliance——cannot satisfy that standard.

All such costs fail along similar lines: they are indirect, voluntary, speculative, or purely incidental and administrative. Marshfield disputes that conclusion here, contending that the universe of costs alleged below is sufficient to carry its 12(b)(6) burden. But it is wrong as outlined in more detail infra.

Perhaps because of the deficiencies in its unfunded mandate claim, Marshfield pivots once again on appeal—— this time raising a constitutional challenge to 3A. Specifically, the Town's briefing asserts that 3A violates the voting rights provisions of the Massachusetts Constitution by requiring Town Meeting voters to approve a change to local law. This argument, too, must fail. If accepted, it would dismantle the Home Rule Amendment's careful balance of state and local lawmaking authority, effectively subjecting all generally applicable state regulations to a local veto.

SUMMARY OF THE ARGUMENT

The Town primarily challenges Section 3A as an unfunded local mandate and a violation of the voting rights provisions of the Massachusetts constitution. Both contentions are meritless. First, none of the costs propounded by the Town are sufficient to trigger the local mandates law. Even assuming that the Town has adequately pleaded the full universe of costs raised in the consolidated cases below, none of those costs are anything more than indirect, speculative, incidental, and voluntary. (p. 23-30). Second, the constitutional challenge fails after considering the basic constitutional structure of the Commonwealth. The Town's argument boils down to the idea that it cannot be subject to 3A's rules for the exercise of local power because its legislature is comprised of local voters. But that argument cannot be correct because it would effectively nullify the HRA by allowing towns to ignore state laws their voters do not like. (p. 30-34). The Town's arguments to the contrary fail.

LEGAL FRAMEWORK

Amici begin by outlining the constitutional framework which grants the State Legislature authority to regulate municipalities through general laws. Next, they survey

the Legislature's longstanding use of that authority to impose both procedural and substantive constraints on the exercise of local zoning power, situating Section 3A within a broader statutory context. Then *Amici* supplement the parties' briefing by providing a detailed overview of the local mandates statute and the caselaw interpreting that provision.

i. Under the Home Rule Amendment, the State Legislature Retains Broad Authority to Regulate the Exercise of Municipal Power.

Article 89 of the Amendments to the Massachusetts Constitution, the so-called "Home Rule Amendment" ("HRA"), structures the constitutional balance of power between the State Legislature and municipal corporations in Massachusetts. The HRA imbues municipalities with a broad delegation of state legislative power but, critically, also authorizes the Legislature to limit and condition that power by enacting general laws. *Bd. of Appeals of Hanover v. Housing Appeals Comm. in Dept. of Cmty. Affairs*, 363 Mass. 339, 358 (1973).

Sections 6 and 8 of the HRA contain the relevant language. Section 6 permits municipalities to "exercise any power … [the Legislature] has the power to confer" provided such exercise is "not inconsistent" with the Constitution or with state law passed "in conformity

with" Section 8 of the HRA.[3] Section 8 of the HRA, in turn, authorizes the Legislature to "act in relation to cities and towns, but only by general laws which apply … to a class of not fewer than two."[4]

These provisions establish that while municipalities have "independent … powers" to enact local laws, they cannot exercise those powers "in a manner which frustrates the purpose or implementation of a general … law" regulating two or more municipalities. *Hanover*, 363 Mass. at 360. Fundamentally, according to this Court, "[t]he Home Rule Amendment preserves the right of municipalities to self-government in 'local matters,' but preserves the Commonwealth's right to legislate with respect to State, regional, and general matters." *Clean Harbors of Braintree, Inc. v. Bd. of Health of Braintree*, 415 Mass. 876, 881 (1993).

Thus, so long as the Legislature passes laws with regional or statewide effect in accordance with Section 8, it has "extensive authority over municipal government." *Powers v. Sec. of Admin.*, 412 Mass. 119, 126 (1992). In wielding that authority, the Legislature "may restrict local legislative action or deny

[3] Mass. Const. amend. LXXXIX, § 6.
[4] Mass. Const. amend. LXXXIX, § 8.

municipalities power to act at all in certain areas." *Bloom v. Worcester*, 363 Mass. 136, 143 n.4 (1973) (cited with approval in *Arlington v. Bd of Conciliation & Arbitration*, 370 Mass. 769, 773 (1976)); *see Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline*, 357 Mass. 709, 717 (1970) (noting that "the Legislature, under art. 89, may forbid the enactment or control the form of" local bylaws "in some manner").

What follows from all this is that "in the case of inconsistency or conflict" between a local law and "a general law … enacted … in accordance with [Section] 8" the local law "*must give way*." *Arlington*, 370 Mass. at 774 (emphasis added). This Court has "commonly held" that "a by-law or ordinance is invalid" if it "oversteps the bounds of municipal power set by state law." *Beard v. Salisbury*, 378 Mass. 435, 440 (1979). In that sense, the "disability imposed on the Legislature by the [HRA] is quite narrow." *Arlington*, 370 Mass. at 773.

ii. The State Legislature Has Used its Constitutional Authority to Impose a Wide Range of Constraints on Municipal Zoning Power.

It is well-settled that the State Legislature maintains "supreme power in zoning matters as long as … [it] acts in accordance with [Section] 8" of the HRA. *Hanover*, 363 Mass. at 360. And the Legislature has

utilized that power to enact a comprehensive set of rules governing both municipal zoning procedure and substance. This scheme is codified primarily within the Zoning Act.

The Legislature first enacted the "current version" of the Zoning Act in 1975. *81 Spooner Road LLC v. Brookline*, 452 Mass. 109, 113-114 (2008). The Zoning Act "preempts the manner and method in which a municipality may exercise its zoning power." *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 12 (1979). While the Act generally gives municipalities latitude to enact "constitutionally permissible" zoning provisions, local zoning power is also "subject … to limitations expressly stated in that [A]ct …." *Roma, III, Ltd. v. Bd. of Appeals of Rockport*, 478 Mass. 580, 586 (2018).

Chapter 40A's provisions establish rules for both the zoning *process* and the *content* of local zoning laws. With respect to process, Section 5 sets a series of steps municipalities must complete before adopting or amending a zoning ordinance. *See Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 52 (2003) (noting that Section 5 "dictates" the amendment process "a municipality must follow"); *DiRico v. Kingston*, 458 Mass. 83, 85 (2010) (stating that Section 5 "set[s] forth" bylaw adoption and amendment procedure). Those steps include, *inter alia*:

submitting the proposal to the planning board for review and subjecting the proposal to a noticed public hearing.[5] *See* G.L. c. 40A, § 5; *Durand*, 440 Mass. at 52.

Likewise, the Zoning Act imposes numerous substantive limitations and affirmative requirements on the content of local zoning laws. A few examples illustrate this point. On the limitations side, Section 3 outlines a list of things that local zoning ordinances cannot do. It bars "prohibit[ions]" and other kinds of restrictions on various types of land use, including religious uses, non-profit education, commercial agriculture, and childcare facilities. G.L. c. 40A, §3.

Other sections, like Sections 4 and 12, establish substantive obligations that local zoning ordinances must meet. Section 4 lays out the Zoning Act's "rule of uniformity." *Regis Coll. v. Weston*, 462 Mass. 280, 291 (2012). It generally requires local zoning regulations

[5] In its brief, the Town repeatedly asserts that "The Act," which it defines as 3A, itself must be approved through Section 5 procedures "to be effective." Town. Br. at 30, 31. It is unclear if the Town is conflating 3A with the local zoning proposals used as vehicles to enact 3A compliant municipal zoning. But assuming it is not, the Town's assertion is wrong. Section 5, by its terms, applies to the adoption of local "zoning ordinances or by-laws" not state legislation. G.L. c. 40A, § 5. *See Durand*, 440 Mass. at 52 (stating that Section 5 "dictates" process "a municipality must follow *in amending its zoning bylaws*") (emphasis added).

to apply "uniform[ly] … for each class or kind of structures or uses permitted" within a zoning district. G.L. c. 40A, § 4. Similarly, Section 12 mandates that "[z]oning ordinances or by-laws shall provide for a zoning board of appeals …." G.L. c. 40A, § 12.

In short, by codifying these provisions and the rest of the Zoning Act, the Legislature has "with precision, set out limits on the exercise of zoning power by the municipality." *SCIT v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 106 (Mass. App Ct. 1984) (cited with approval in *Gage v. Town of Egremont*, 409 Mass. 345, 347 (1991)). And, in cases where municipalities have enacted zoning rules that violate substantive Zoning Act requirements like Section 4, courts have not hesitated to invalidate those local rules. *See, e.g.*, *id.* at 107, 111 (voiding local zoning provision due to "conflict[]" with uniformity requirement).

iii. Consistent with this Existing Structure, Section 3A is a Zoning Mandate for the MBTA Region.

Section 3A fits comfortably within the HRA and Zoning Act frameworks. It is regional in effect and designed to combat a statewide problem, the "ongoing housing crisis in the Commonwealth." *Milton*, 495 Mass. at 185.

Like the Zoning Act rules discussed above, 3A operates to constrain the choices legally available to municipalities and town meeting voters in exercising local zoning power, without divesting them of that power. And this Court has previously validated, in the context of upholding the legality of G.L. c. 40B, a legislative approach to a housing crisis that "requires 'the strictly local interest of the town' to yield to the regional need for the construction of … housing." *Hanover*,363 Mass. at 384-85.

Section 3A pursues that goal by mandating that MBTA Communities "shall have" at least one "as of right" multi-family zoning district of "reasonable size" with a "minimum gross density of 15 units per acre." G.L. c. 40A, § 3A(a)(1). It is settled that this "creates an affirmative duty" for MBTA communities "to have" a compliant district. *Milton*, 495 Mass. at 196. Under 3A's plain terms, this continuing duty of zoning compliance is the only obligation imposed on MBTA Communities. *See* G.L. c. 40A, § 3A. So long as a community has a compliant district, its 3A charge is fulfilled. *See id.*

iv. The Local Mandates Law Excuses the Municipal Duty to Comply with Unfunded State Laws Imposing Direct Service or Cost Obligations.

Massachusetts enacted the local mandates law in 1980 through a ballot initiative called Proposition 2 1/2. *Mass. Teachers Ass'n v. Sec. of Com.*, 384 Mass. 209, 216 (1981). The main thrust of the local mandates law, subsection (a), states that:

> [a]ny law taking effect on or after January 1, 1981 imposing any direct service or cost obligation upon any city or town shall be effective ... only if such law is accepted by vote or ... appropriation ... unless the general court, at the same session in which such law is enacted, provides ... for the assumption by the commonwealth of such cost, exclusive of incidental local administration expenses.

G.L. c. 29, § 27C(a). Put simply, this means that post-1980 state laws which impose more than incidental expenses on municipalities must be fully funded by the Legislature or subject to local acceptance.

This Court has set out a two-part unfunded mandate test. Specifically, a law violates subsection (a) as applied to a municipality if it: (1) is a "new law" that changes pre-1981 law; and (2) imposes "a direct service or cost obligation which [the municipality] did not voluntarily assume." *Worcester*, 416 Mass. at 754. A

municipality that proves these elements is entitled to an exemption from the mandate at issue. *Id.* at 761.

The first element is not in dispute here. To satisfy the second, a plaintiff must identify a non-speculative cost or service increase that is truly compulsory under the challenged statute. The local mandates law applies only to statutes that "impos[e]" such increases, G.L. c. 29, § 27C(a), and "the word 'imposition' connotes compulsion and involuntariness." *Norfolk v. Dept. of Env. Quality Engineering*, 407 Mass. 233, 239 (1990).

While this Court does not appear to have defined "direct" or "obligation" as used in subsection (a), it has made clear that a challenged law must itself mandate the alleged cost or service increase. *See Worcester*, 416 Mass. at 761 (noting "[G.L. c. 29, § 27C] applies to … obligations" for which there is "no choice but to comply and to pay the costs. It is from these mandatory obligations which Proposition 2 1/2 grants relief") (internal citation omitted).

Voluntary responses to a statute thus cannot serve as the basis for an unfunded mandate finding. The *Worcester v. Governor* case provides an instructive example. There, the City of Worcester challenged the state's increased foreign language standards for public college admission.

Id. at 760-61. Worcester argued that "as a practical matter," raising the standards "imposed new obligations" on it "to expand … course offerings for students preparing for college." *Id.* at 760. But the Court disagreed, noting that while greater offerings "may have been an appropriate response … *the standards did not mandate that response*." *Id.* (emphasis added).

The Appeals Court has also explained that indirect and speculative costs are insufficient. In *Kennedy v. Commonwealth*, a plaintiff municipality challenged a law allowing another town to withdraw from its school district without meeting contractual withdrawal terms. 92 Mass. App. Ct. 644, 645-46 (2018). The plaintiff asserted this would spark "a possible increase" in its costs to "support the … district." *Id.* at 651. However, the Court held such costs too "indirect and … speculative" to "support" an unfunded mandate claim. *Id.*

Finally, the local mandates law provides that "incidental local administration expenses" do not trigger its coverage. G.L. c. 29, § 27C(a). Precedent defines those expenses as "relatively minor expenses related to the management of municipal services and … subordinate consequences of a municipality's fulfilment of primary obligations." *Worcester*, 416 Mass. at 758.

The *Worcester* Court highlighted a few costs of this kind. For example, one of the regulatory changes at issue expanded the scope of a mandatory annual report to the state on local school accessibility plans. *Id*. The change "added the requirement" for submissions to outline plans to make "all school buildings" accessible to limited mobility students. *Id.* Ultimately, the Court held that this new criterion "imposes only administrative expenses incidental (subordinate) to the primary obligation to provide school accessibility." *Id.*

ARGUMENT

On appeal, Marshfield primarily presses an unfunded mandate claim and a constitutional voting rights challenge to 3A. Neither is sufficient to absolve the Town of its shared zoning obligation under the statute.

Amici start with Marshfield's contention that 3A constitutes an unfunded local mandate. The bottom line on this claim is that even assuming, *arguendo*, that the Town adequately pleaded the full spectrum of costs alleged across the consolidated cases below, it still has not carried its burden. None of the costs allegedly incurred due to 3A are anything other than indirect, speculative, voluntary, or incidental.

Next, *Amici* address the Town's constitutional argument, the crux of which is that Section 3A violates Articles 1-9 of the Massachusetts Declaration of Rights, and Article 3 of the Amendments to the Massachusetts Constitution, by "compelling" town meeting voters "to vote yes and approve [Section 3A]." Town of Marshfield Brief ("Town Br.") at 40. Waiver and standing issues aside, this argument must fail. It would operate to nullify the balance of state and local legislative power established by the HRA and lead to absurd results.

i. The Town Has Failed to Establish that Section 3A Constitutes an Unfunded Local Mandate.

Marshfield has not carried its 12(b)(6) burden on its unfunded local mandate claim because the only costs it links to fall well short of fulfilling the essential "direct costs" element of the unfunded mandate test.

Marshfield's briefing points to two categories of costs that Section 3A allegedly imposes on the Town—the same broad categories identified across the consolidated cases below. Those are: (1) future costs related to housing development in 3A compliant zoning districts; and (2) costs tied to implementing compliant districts. *See* Town Br. at 50; RA II at 102-104, 112. *Amici* address these categories in turn, explaining why

the costs falling within them cannot sustain a claim that Section 3A is an unfunded mandate.

a. Future Costs Related to Development are Speculative and, If Incurred, Voluntary.

In line with the dominant narrative raised in the consolidated cases below, Marshfield's briefing suggests that 3A forces it to incur costs to mitigate the impact of new housing.[6] However, Section 3A, which is silent about what happens in municipalities after they have compliant zoning, does no such thing.

According to the Town, its complaint adequately alleges that: "[3A] compel[s] … a zoning district that allow[s] by-right dense multi-family housing and … Marshfield [will] be directly and adversely impacted by costs attributable to such development." Town Br. at 50. The complaint does not elaborate on costs, but the Town's brief asserts that "by-right development" will "impact[]" its provision of "public services." *Id.*

Regardless of whether these allegations are well-pleaded, they fail to support an unfunded mandate claim for a host of reasons. The first is that they erroneously conflate zoning with development. Section 3A mandates

[6] In the order challenged on appeal, the Superior Court outlined many allegations from different plaintiffs that fell into this category of costs. *See* RA II 102-104.

zoning districts where multi-family housing can be built by right, but it does not require or ensure the exercise of that right. This makes it possible that no multi-family housing will be built at all in some 3A districts. Indeed, as *Amici* are frequently reminded in their work, the reality of the development industry is that it faces countless non-zoning barriers to building.[7]

These many and varied obstacles underscore the judgment and necessity behind Section 3A's broad coverage formula. Since both local and broader market conditions can hinder development in any one municipality or zoning district, 3A operates to create more building opportunity *across* communities to meet its housing production goals. Thus, it is pure speculation to assert that multi-family units will be built in any particular district, let alone that those hypothetical units will impact local infrastructure or services.

Second, even if more development was certain, nothing in Section 3A compels municipalities to respond by upgrading infrastructure or services. The plain text of

[7] These impediments include, *inter alia*, a lack of developable land, high land costs, expensive building materials, supply chain issues, stringent and inconsistent environmental regulations, and challenges for developers in obtaining labor and financing.

Section 3A mandates that towns have a compliant zoning district, nothing more. What municipalities decide to do, or not do, once they have met that obligation is up to them as far as Section 3A is concerned. These facts mirror the admission standards situation in *Worcester*. While increased infrastructure and services spending might be an "appropriate response" to new housing, it would not be a "mandatory" one under Section 3A. *Worcester*, 416 Mass. at 761. This makes such spending voluntary and not covered by the local mandates law.

Third, costs incurred to mitigate increased strain on infrastructure or respond to greater demand for services are, at most, indirectly related to Section 3A. Any such costs would be generated by increases in development and population rather than zoning itself. Those kinds of increases——which may never come to fruition, depend on the decisions of private actors (to build or move into new housing), and are impossible to predict——cannot be said to stem directly from Section 3A. Therefore, like the allegation of "possible" cost increases raised in *Kennedy*, they do not support that Section 3A is an unfunded local mandate. 92 Mass. App. Ct. at 65.

b. Administrative Costs Tied to Designating a 3A District Are, at Most, Incidental.

As relevant to this category, Marshfield alleges that it "incurred costs and expenses in evaluating and drafting proposed zoning bylaws and presenting them to Town Meetings that have not been paid by the Commonwealth and/or HLC." RA I at 23. Notwithstanding that the Marshfield-specific costs here are far too vague to be considered obligatory,[8] the costs in this general category are archetypal incidental local administration expenses excluded from the unfunded mandate calculus.

Marshfield concedes, as it must, that certain ordinary costs of rezoning, including those tied to required planning board hearings and town meetings, are "obviously incidental and subordinate costs." Town Br. at 49. Instead, the costs it relies on in its brief are "its technical expenses beyond the ordinary capacity of the town and town planner to evaluate and design a compliant zoning bylaw and map." *Id.*

[8] Without providing details about the scope of Marshfield's compliance efforts, including what actions were taken, by whom, and at what specific cost, the Towns' allegations are far too vague to establish that its actual efforts or related costs were mandatory to comply with 3A. *See* Worcester, 416 Mass. at 761 (refusing to consider the costs of non "mandatory" actions).

An initial problem with this is that, in the relevant allegations stated in the complaint, the town does not actually identify any costs "beyond the ordinary capacity" of its planning staff. It cites only vague, unspecified costs incurred "in evaluating and drafting proposed zoning bylaws and presenting them to Town Meetings." RA I at 23. Without more, it is impossible to tell how these tasks were "beyond … ordinary" or generated new, unusual costs for the Town. If anything, these are quintessentially routine tasks for local planners baked into the ordinary course of business.

Given the procedural requirements of Section 5 of the Zoning Act, municipalities across the Commonwealth already have planning schemes in place to ensure that they can control their land use without violating state law. Marshfield is a perfect example. As the Town makes clear in its brief, it already employs a Town Planner. Town Br. at 49. And one of the basic responsibilities of such an official is to evaluate and design zoning bylaws.

On top of that, as the Commonwealth explains, achieving 3A compliance could be as simple as adding a clause to an existing bylaw stating that: multi-family housing without dimensional restrictions is a by-right use in all zoning districts. *See* Commonwealth's Brief at

24-25. This is a straightforward administrative approach that any city or town could easily pursue without generating "technical expenses beyond the ordinary capacity" of planning staff. Town Br. at 49. To the extent Marshfield eschewed this approach, that was a voluntary choice.

Ultimately, costs related to this and other ordinary rezoning tasks, like the ones Marshfield cites in its complaint, are incidental local administration expenses. The primary obligation imposed by 3A is "*to have*" a compliant district. *Milton*, 495 Mass. at 196 (emphasis added). Just as the expanded reporting requirement in *Worcester* was subordinate to the ongoing "primary obligation" to "provide" school accessibility, basic rezoning steps like evaluating and drafting bylaws are one-time "subordinate" administrative tasks incidental to 3A's primary obligation of long-term zoning compliance. 416 Mass. at 758.

If MBTA Communities do anything more than ordinary planning tasks tailored to achieving technical compliance——like paying to develop complex and bespoke zoning districts——the associated costs would be voluntary and not covered by the local mandates law. The same is true for any compliance efforts that follow a

town meeting decision to reject a compliant initial proposal. Such a rejection would be a policy choice, making all further efforts voluntary extra steps.

ii. The Town's Voting Rights Argument Is Irreconcilable with the Commonwealth's Constitutional Frame of Government.

Marshfield's brief contends that 3A "disenfranchises" town meeting voters by "compelling" them to "vote yes and approve [3A]." Town Br. at 40. This argument must fail because it would negate the constitutional balance of power established by the HRA.

As an initial matter, it is important to note that Section 3A does not say anything about, let alone dictate, how local voters or legislators vote with respect to any particular local zoning proposal before them. Section 3A mandates that MBTA Communities "have" compliant multi-family zoning districts. G.L. c. 40A, § 3A. So long as those districts meet baseline standards, their exact configuration is left to the discretion of municipal legislatures to decide.

Marshfield has an open town meeting form of government, which means that local voters serve as members of the Town's legislative body, Town Meeting. Even under 3A, each voter who participates in Town Meeting retains the ability to vote yes or no on any

zoning proposal. However, if a critical mass of those Town Meeting legislators chooses not to zone consistent with Section 3A's mandate, then, as this Court made clear in *Milton*, the Town will be subject to the legal consequences of non-compliance. *See* 495 Mass. at 193

Section 3A is far from unique in this sense. Acting in their capacity as legislators, Town Meeting voters are already subject to countless state requirements related to the exercise of local power. In the zoning context, local ordinances that depart from the Zoning Act's "uniformity" requirement are legally invalid. *See SCIT*, 19 Mass. App. Ct. at 106. Likewise, this Court has ruled, in the context of municipal property valuation, that local legislatures may not thwart a state law obligation on municipalities by refusing to act. *See Commonwealth v. Andover*, 378 Mass. 370, 372 (1979) (stating that "[n]o municipality may block the attainment of its constitutional and statutory obligation to achieve fair cash valuation by failing to appropriate funds … to achieve that goal").

Against this backdrop, the gravamen of Marshfield's argument is this: because it has a form of government in which local voters act as legislators, Section 3A's rules for the exercise of local power cannot apply to

it. But as a matter of constitutional construction, that position collapses under basic scrutiny.

This Court has often expressed that "constitutional provisions must be construed together to make an harmonious frame of government." *Opinion of the Justices*, 303 Mass. 631, 640 (1939). Similarly, it has explained that a Constitutional Article which "establishes a principle of government … must also be given such scope as to render it practically workable toward the accomplishment of those objects to which it appears to be directed." *Opinion of the Justices*, 237 Mass. 598, 607-08 (1921). Marshfield's argument violates both of these principles because it would effectively render the HRA a nullity.

The HRA strikes a constitutional balance of lawmaking authority between the State Legislature and municipalities. While the HRA imbues cities and towns with broad power in local matters, it permits the State Legislature to "forbid the enactment or control the form of" local laws via general legislation. *Marshal House*, 357 Mass. at 717. Ultimately, under the HRA, local power does not exist "in a vacuum" and "cannot be exercised in a manner which frustrates the purpose or implementation

of a general … law ….” *Rayco Inv. Corp. v. Bd. of Selectmen of Raynham*, 368 Mass. 385, 394 (1975).

To ensure constitutional harmony, the right to vote must operate in concert with, not supersede, this structure. And it is simple to strike a harmonious balance: while the right to vote ensures that voters can freely participate in the local legislative process at town meeting, the exercise of legislative power remains subject to the rules established by the HRA.

Marshfield’s position would instead put the HRA and voting rights provisions of the Constitution at loggerheads. It suggests that any general law that controls the form of local legislation——something that the HRA expressly permits——is invalid as applied to town meeting voters. But this would make the HRA unworkable by effectively allowing towns to ignore state laws their voters dislike. Not only would towns be special among municipalities in this regard, but they would also be able to frustrate the purpose of general laws like 3A that require widespread compliance to work.

It cannot be the case that towns are exempt from generally applicable state rules on the exercise of local power simply because they have a town meeting form of government. For the Commonwealth to overcome its

statewide housing shortage, the State Legislature must be able "to legislate with respect to State, regional, and general matters" within constitutional limits. *Clean Harbors*, 415 Mass. at 881. Since Marshfield's argument would undermine that authority in favor of a less harmonious frame of government, it is untenable.

CONCLUSION

Based on the foregoing, *Amici* support the Commonwealth's position in this case. Section 3A does not constitute an unfunded mandate and is otherwise a valid exercise of the State Legislature's authority.

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Respectfully submitted,

/s/*Jacob M. Love*
Jacob M. Love (BBO #699613)
Citizens' Housing and
Planning Association
One Beacon St., 5th Fl.
Boston, MA 02108
(617) 221-8365
jlove@chapa.org

Karla L. Chaffee
(BBO #675699)
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, MA 02109-2835
kchaffee@nixonpeabody.com
(617) 345-1000
(833) 655-1825 (facsimile)

Jillian Lenson (BBO #690653)
Lawyers for Civil Rights
61 Batterymarch Street
Boston, MA 02110
(617) 482-1145
jlenson@lawyersforcivilrights
.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 17; Mass. R. A. P. 16(a)(3)-(4); Mass. R. A. P. 16(a)(12); Mass. R. A. P. 16(h) (length of briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers); Mass. R. A. P. 17(c)(cover, length, and content of amicus curiae).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 point, 10.5 characters per inch, and contains 35 total non-excluded pages, prepared with Microsoft Word 2013.

/s/ Jacob M. Love
Jacob M. Love (BBO #699613)

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September 2024, I have served on all parties the foregoing Amicus Brief of Citizens' Housing And Planning Association, The Metropolitan Area Planning Council, Central Massachusetts Housing Alliance, Massachusetts Association Of Community Development Corporations, The Massachusetts Housing Finance Agency, Community Economic Development Assistance Corporation, Massachusetts Housing Partnership Fund Board, The Black Economic Council Of Massachusetts, The Home Builders And Remodelers Association Of Massachusetts, Inc., The Boston Foundation, NAIOP Massachusetts, Jewish Alliance For Law And Social Action, Harbor Light Homes, The Greater Boston Real Estate Board, The Massachusetts Association Of Realtors, The Planning Office For Urban Affairs, and Building A Better Wellesley via electronic filing.

/s/ Jacob M. Love
Jacob M. Love (BBO #699613)