COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No.

GLORIA ALCARRAZ; SORONX DE LA CRUZ; and DIEULA ALECTINE,

Plaintiffs,

v.

EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES; and EDWARD M. AUGUSTUS, SECRETARY OF THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Just over ten days ago, State officials announced that on November 1, 2023, Defendants[1] plan to dramatically change how Massachusetts implements its "Right to Shelter" Law, G.L., c. 23B, § 30. Critically, the State will for the first time impose an artificial cap on the number of shelter spaces it provides to homeless families as part of its emergency housing assistance program (the "EA program"). Destitute children, families, and pregnant women who meet the program's eligibility requirements will be denied emergency shelter and placed on a waiting list instead.

[1] Defendants are the Executive Office of Housing and Livable Communities ("EOHLC"); and Edward M. Augustus, Secretary of EOHLC.

Defendants will also prioritize—based on as-yet undefined "health and safety" risks—certain people for movement off the waiting list.

These changes are as sweeping as any that have been proposed in the Right to Shelter Law's 40-year history. They are also illegal. Despite the unprecedented nature of these changes, and the profound effect they will have on desperate families, Defendants have provided no opportunity for public comment prior to their rollout. This failure directly violates the State's Administrative Procedure Act ("APA"), G.L. c. 30A, §§ 1, *et seq*., which is specifically designed to provide "an opportunity for input and debate by the persons affected, and deliberate resolution of issues." *Carey v. Comm'r of Corr.*, 479 Mass. 367, 371 (2018) (internal citations omitted).

As the Supreme Judicial Court has recently emphasized, the APA's coverage is deliberately expansive: its notice-and-comment requirements are triggered not only when an agency promulgates formal regulations, but whenever an agency proposes changes to "*any* part of *every* rule, regulation, standard *or other requirement of general application and future effect*…." G.L. c. 30A, §1(5) (emphasis supplied); *Carey*, 479 Mass. at 371. The significant alterations to the EA program that Defendants have announced unequivocally meet this broad definition. Where a State agency seeks to adopt such a change, but fails to comply with APA requirements, the remedy is to declare the changes void and enjoin them until the agency complies with the APA. *See infra* at 6.

The State's abrupt announcement that it will cap emergency shelter services also violates a specific dictate of the Massachusetts Legislature. When it appropriated funds for the EA shelter program this summer, the Legislature specifically required Defendants to give 90 days' advance notice to the Legislature of "any regulations, administrative practices or policies that would alter eligibility for or the level of benefits under this program…." St. 2023, c. 28, § 2, line item 7004-0101, attached to Compl. as Ex. B. Similar to the APA's expansive reach, this notice mandate was

designed to ensure that *any* proposed changes to the EA shelter program are brought to the Legislature's attention before implementation. It also provides the Legislature time to analyze the "justification for such changes," *see id*., and to consider whether existing appropriations are sufficient to meet the need. As the SJC has ruled, advance notice provisions allow the Legislature to weigh in on proposed changes—and potentially to preempt them altogether by appropriating additional funds. *Wilson v. Comm'r of Transitional Assistance*, 441 Mass 846, 853-54 (2004). Defendants have failed to comply with this legislative mandate as well.

Plaintiffs—two homeless families with small children, and one family with children facing eviction—bring this action on behalf of themselves and others similarly situated, asking this Court to declare that Defendants' planned changes are invalid and to enjoin implementation of the changes. The Plaintiffs urge the Court to compel Defendants to comply with the APA and the 90-day notice requirement.

Assuming, *arguendo*, that Defendants' shelter cap and other changes are even allowable under the Right to Shelter Law and existing regulations, Defendants cannot impose those changes on the public unilaterally and behind closed doors. They must first comply with State laws that are specifically designed to give the public, affected unhoused families, and the Legislature time to weigh in on issues of profound, life-changing importance. The process is just as important as the outcome, and unhoused families with children are seeking judicial relief.

FACTS

On August 8, 2023, Governor Maura Healey issued an emergency declaration and appealed to the federal government for funding to aid the Commonwealth in housing an influx of migrants. Compl. at ¶ 29. On October 16, 2023, the Healey-Driscoll administration announced that "[w]e can no longer guarantee shelter placement for families who are sent here" and outlined a series of

changes to how state officials will implement the EA program, which will take effect on November 1, 2023. *Id*. at ¶¶ 33-34.

The Right to Shelter Law tasks the Executive Office of Housing and Livable Communities ("EOHLC") with administering "a program of emergency housing assistance to needy families" and with "promulgating rules and regulations" to do so. *Id.* at ¶¶ 13-14. It also states that the program's benefits must include "temporary shelter as necessary to alleviate homelessness." *Id.* at ¶ 14. The Legislature is responsible for funding the EA program. *Id.* at ¶ 25. It can and does include provisos in the relevant line-item appropriations that EOHLC must follow. *Id.* at ¶ 26.

EOHLC has fulfilled its statutory duty to promulgate regulations, which detail eligibility requirements that families must satisfy to receive shelter placement. *Id.* at ¶¶ 15-18. Those regulations also state that eligible families "shall be approved for temporary emergency shelter" and that EOHLC must "make reasonable efforts to locate temporary emergency shelter that will accommodate" eligible families. *Id.* at ¶¶ 19-20. To comply with those regulations as the need for shelter has increased in recent months, EOHLC has been contracting with hotels and motels to ensure that there are sufficient units in the shelter system to meet demand. *Id.* at ¶¶ 23-24.

However, that practice is set to cease on November 1, 2023. *Id.* at ¶ 32. Instead, as the Healy-Driscoll administration explained in a press conference and press release, starting that day, the state will cap the total number of shelter units in the system, begin placing shelter-eligible families on a waiting list, and start prioritizing certain "high need" families for shelter. *Id.*

ARGUMENT

I. Legal Standard

A party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of

the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." *Garcia v. Dep't of Housing and Cmty Dev.*, 480 Mass. 736, 747 (2018) (internal citations omitted).[2] Where the plaintiff seeks to enjoin governmental conduct, the Court must also consider the public interest. *Id.* Preliminary injunctive relief "ordinarily is issued to preserve the status quo pending the outcome of litigation." *Doe v. Superintendent of Schools of Weston*, 461 Mass. 159, 164 (2011).

II. Plaintiffs Have Established A Strong Likelihood of Success On the Merits.

A. Defendants' New Right to Shelter Policies Constitute A Regulation, But Defendants Have Not Followed The APA In Establishing Them.

Plaintiffs have demonstrated a high likelihood of success on the merits of their claim that Defendants have failed to comply with the APA. Defendants' newly-announced changes to the EA shelter program clearly constitute "regulations" as defined in the APA, but Defendants have not followed the APA's procedural requirements before implementing them.

The APA "details procedures that State agencies . . . must follow when adopting new regulations (as defined in the statute). Its purpose is to establish a set of minimum standards of fair procedure below which no agency should be allowed to fall and to create uniformity in agency proceedings." *Carey*, 479 Mass. at 371 (internal citations and quotations omitted). One of the key purposes of the APA is to provide interested parties the opportunity to comment on proposed changes to agency practices. *See* G.L. c. 30A, § 3 ("the agency shall give notice and afford interested persons an opportunity to present data, views, or arguments…."). As the SJC has recently emphasized, this notice-and-comment requirement "provides an opportunity for input and

[2] The standard for a temporary restraining order is the same as that for a preliminary injunction. *See*, *e.g.*, *Associated Subcontractors of Mass., Inc. v. Univ. of Mass. Bldg. Auth.*, No. CIV.A.2001-3814, 2001 WL 994120, at *2 (Mass. Supp. Ct., Aug. 29, 2001).

debate by the persons affected, and deliberate resolution of issues." *Carey*, 479 Mass. at 371 (internal citations and quotations omitted).

The APA defines "regulation" broadly. Under the APA, a regulation:

> … includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it ….

G.L. c 30A, § 1. The APA sets forth only limited exceptions to this definition, such as for advisory rulings; internal agency management practices that do not substantially affect the rights of the public or the portion of the public affected by the agency conduct; certain public works regulations; and adjudicatory rulings. *Id*.

Courts do not defer to an agency's determination of whether or not proposed changes constitute a regulation under the APA; that is a matter for courts to determine. *Carey*, 479 Mass. at 371. If an agency is required to follow the APA in implementing planned changes, but does not, the remedy is to declare the proposed changes invalid and enjoin their implementation. G.L. c. 231A, § 2 (declaratory judgment statute "may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any … state agency or official…."); *Nelson v. Comm'r of Correction*, 390 Mass. 379, 387-88 (1983).

Here, there is no question that the State's newly-announced policy of capping shelter space, creating a waiting list, and prioritizing certain families for movement off the waiting list constitutes a "regulation" within the definition of the APA. The regulation was specifically announced as a new policy intended to have general application and future effect. At the press conference announcing the changes, the Governor described the changes as "implementing new strategies" in

the face of a "new reality."[3] These changes cannot plausibly be characterized as internal operating or management procedures or as any other category exempted from the APA. To the contrary, the changes will directly impact children and families who seek access to the EA shelter program.

The SJC has recently highlighted both the expansiveness of the APA's definition of "regulation" and the importance of following the APA's notice-and-comment procedures. In *Carey v. Comm'r of Correction*, the Court reviewed a new Department of Correction ("DOC") policy to use drug-detecting dogs to search correctional facility visitors. *Id*. at 367. The plaintiffs sued under the APA, arguing that the new policy constituted a regulation and seeking an order enjoining DOC from implementing the policy "without its being promulgated pursuant to the APA." *Id*. Citing to the broad language of the APA, as well as its purpose to allow the public to provide input on important governmental policies, the Court made clear: "we interpret [the APA's] definition of regulation broadly." *Id*. at 371. The Court then had little trouble finding that the new policy met the APA's definition of a "regulation":

> Simply put, the introduction of the new policy substantially affected the procedures available to the public because, prior to the implementation of the policy, visitors to correctional facilities were not subject to dog sniff searches, but now they are. This change could have a potentially significant impact on the visiting public's experience, including increased wait times, increased anxiety due to a fear of dogs or of false positives, and concerns in connection with allergies.

Carey, 479 Mass. at 372; *see also Wright v. Mass. Dep't of Correction*, 2020 WL 5792530 (Suffolk Sup. Ct.) (post-*Carey* decision holding that even if a DOC policy of seizing and photocopying incoming mail would be legal, "the DOC may not ignore the APA and the requirement that it proceed through the appropriate procedures to promulgate such a regulation").

[3] MassGovernor, *Governor Healey Provides update on State's Emergency Family Shelter System*, YouTube (Oct. 16, 2023), https://www.youtube.com/watch?v=soyFqHpGy24.

In the instant case, it is plain that Defendants' planned changes to the EA shelter program are "regulations" within the meaning of the APA because they directly affect the population of indigent families seeking to secure emergency shelter. As in *Carey*, a simple before-and-after juxtaposition illustrates the point: as of now, there is no artificial cap on shelter spaces, and there is no waiting list for needy families. But come November 1, without this Court's intervention, there will be. These changes will undoubtedly create delays in the provision of shelter to EA-eligible families, thereby denying them shelter and prolonging the injuries and suffering they experience as a result of being unhoused. *See* Compl. at ¶¶ 34-35

Defendants' rollout of their planned changes to the EA shelter program further highlights that these are material and substantive programmatic changes that trigger the APA's protections. Here, the State issued a press release and held a press conference at which government officials spoke, announcing the change to the public as "implementing new strategies" and a "new reality" that will start on November 1. *See supra* at 6-7. The *Carey* Court specifically cited a similar—indeed, much less elaborate—public media roll-out as evidence to show that the policy change at issue constituted a regulation under the APA:

> Given the department's efforts to publicize the policy, the commissioner cannot credibly argue that the policy concerns only internal management issues…. Clearly the department intended to, and did, broadcast information about the new policy to the public.

Carey, 479 Mass. at 372; *see also id.* ("The fact that the department publicized the new policy by way of a coordinated multimedia campaign well before the policy's planned implementation date is a strong indicator that the department was well aware that implementing canine searches would be of substantial concern to those affected").

The canine searches at issue at *Carey* were intrusive, but the emergency shelter benefits at risk in the instant case are life-changing and life-saving. By adopting the announced regulatory

changes, the State will abandon EA-eligible indigent families with children who will be rendered homeless. At a minimum, these unhoused families deserve the appropriate process afforded by the APA. The State cannot strip indigent families of the right to shelter without, at a minimum, providing a meaningful opportunity for notice and comment.

Plaintiffs have demonstrated a strong likelihood that they will succeed on their claim that Defendants' planned changes to the EA shelter program constitute "regulations" within the meaning of the APA, and that Defendants have failed to follow the required procedures of the APA in making them.

B. Defendants Have Not Provided The Legislature With The Required 90-Day Notice Prior To Implementing The Proposed Changes To The Implementation Of The Right-to-Shelter Law.

Plaintiffs are also likely to succeed on their claim that Defendants' conduct violates a Legislative mandate from the 2024 budget requiring Defendants to provide advance notice to the Legislature of any planned changes to the EA Shelter program. *See* St. 2023, c. 28, § 2, line item 7004-0101, attached to Compl. as Ex. B.

When the Legislature appropriated funds for Defendants to implement the Right to Shelter Law, it specifically required that Defendants give the Legislature a formal 90 days written notice before implementing any changes to eligibility for, or the level of benefits under, the Law. The budget appropriation language states:

> provided further, that notwithstanding any general or special law to the contrary, not less than 90 days before promulgating or amending any regulations, administrative practices or policies that would alter eligibility for or the level of benefits under this program, other than that which would benefit the clients, the department shall submit a report to the house and senate committees on ways and means, the clerks of the house of representatives and the senate and the joint committee on children, families and persons with disabilities setting forth justification for such changes including, but not limited to, any determination by the secretary of housing and economic development that available appropriations

> will be insufficient to meet projected expenses and the projected savings from any proposed changes.

Id. As this provision makes clear, the Legislature specifically sought to avoid what has happened here: an abrupt announcement by Defendants that they will change the program, without a full explanation why, or an accounting of the expenditures made, or projected savings from proposed changes.

Defendants have failed to follow this 90-day notice provision. *See* Compl. at ¶ 28. Similar to the broad definition of "regulation" in the APA, the line item requires that 90-days' notice be given "before promulgating or amending any regulations, administrative practices or policies that would alter eligibility for or the level of benefits under this program, other than that which would benefit the clients…." *Id*. The language is purposefully broad, requiring notice before "any" such change. *See Wilson*, 441 Mass. at 851 ("We apply established rules of statutory construction to the provisos of a line item in a legislative appropriation"). Moreover, the line item is not limited to formal regulations, but also encompasses any "administrative practices or policies…."

The Legislature's use of this expansive language demonstrates the reach of the law. *See* Garcia, 480 Mass. at 740 (stating that budget provisos carry "the force of law"). The fact that this language was included just this Summer, when the increase in the emergency shelter caseload was becoming clear to State officials, is a further indication that the Legislature contemplated the possibility that Defendants might want to alter the program in some way, and specifically mandated that they provide 90-days' notice—accompanied by a justification and a cost analysis—if they decided to do so.

As the SJC has noted, such an advance notice provision is critical, because it "allows the Legislature either to authorize the adjustment passively by doing nothing, or to preempt the

adjustment by providing additional funding through a supplemental appropriation." *Wilson*, 441 Mass. at 853-54.

Plaintiffs have demonstrated a strong likelihood that they will prevail on their claim that Defendants have failed to comply with this legislative mandate.

III. Plaintiffs Will Suffer Immediate And Irreparable Harm In The Absence Of Preliminary Injunctive Relief.

Plaintiffs, and the class of similarly-situated individuals they seek to represent, will suffer immediate and irreparable harm in the absence of preliminary injunctive relief. They are destitute and in desperate circumstances. They are homeless and have no suitable shelter for the night. They have small children. Winter is approaching. Without an order from this Court, they will be forced to sleep on the streets, in cars, and in other dangerous situations. "[T]ime presses sharply on a family with children struggling against destitution." *Smith v. Comm'r of Transitional Assistance*, 431 Mass 638, 652 (2000) (affirming that grant of injunctive relief to those "living on the financial edge" was necessary to avoid irreparable harm and to promote the public interest).

The emergency shelter assistance program is, by definition, for children, their adult caretakers, and pregnant women in emergency situations, who have no other suitable living arrangements. The harm to this already vulnerable population from being denied emergency assistance is severe and irreparable, including worse mental and physical health outcomes as a result of being unhoused. *See* Compl. at ¶ 36.

On Defendants' side of the hardships balance, there is nothing that comes close. A financial outlay, for the relatively brief amount of time necessary to comply with the requirements of the APA and the line-item mandate, do not compare to life-threatening health and safety concerns. *See*, *e.g.*, *Griffin v. Bos. Hous. Auth.*, No. 16-P-1238, 2017 WL 3372253, at *2 (Mass. App. Ct., Aug. 7, 2017 (Rule 1:28 decision) (affirming injunction requiring Boston Housing Authority to

continue paying plaintiffs' housing subsidy during subsidy termination process in part because, absent relief, plaintiff "would face eviction and homelessness … with a disabled child and toddler"). Moreover, whatever burdens Defendants suffer are of their own making. The State declared as early as August 8, 2023 that they saw the rising caseloads of the EA shelter program as a significant problem.[4] Yet State officials took no action at that time—and indeed have taken no action to date—to follow the legal steps required to make changes to the program.

Particularly in light of the compelling health and safety needs of Plaintiffs and the class they represent, the balance of hardships tips sharply in Plaintiffs' favor.

IV. The Public Interest Would Be Served By Granting The Requested Relief.

The APA's requirements—and the parallel 90-day notice mandate—exist precisely to allow input from a wide range of interested parties before an agency can make regulatory changes, particularly ones of this magnitude. *See infra* at 5, 10. The public interest is strongly served by requiring Defendants to comply with those notice mandates.

As the public reaction following Defendants' announcement of changes to how the law will be implemented has illustrated, this is an issue about which many Massachusetts residents care deeply. A poll of Massachusetts residents that overlapped with the announcement of the changes—from October 13 to October 20—found that sixty-three percent of respondents either "strongly" or "somewhat" support the Right to Shelter Law.[5] Additionally, state legislators have taken issue

[4] *See* Press Release, Governor Maura Healey & Lt. Governor Kim Driscoll, Governor Healey Declares State of Emergency, Calls for Support for Newly Arriving Migrant Families (Aug. 8, 2023), https://www.mass.gov/news/governor-healey-declares-state-of-emergency-calls-for-support-for-newly-arriving-migrant-families

[5] Samantha J. Gross, *Massachusetts residents support right to shelter, say burden falls on Biden, Congress, lawmakers*, Bos. Globe, Oct. 24, 2023, https://www.bostonglobe.com/2023/10/24/metro/migrant-crisis-shelter-voter-poll-umass-biden-healey-boston-massachusetts/.

with the lack of advanced notice and communication from the Healey administration regarding the announced changes. *See* Compl. at ¶ 28. The public interest is promoted by requiring Defendants to follow the law and allow interested members of the public, and affected families, to weigh in before changes of this magnitude are made.

Finally, the public interest is served by providing the emergency shelter at issue. The health and safety costs to families sleeping on the streets and in other unsafe conditions are immense. *See* Compl. at ¶ 36. The public interest is served by avoiding the human misery and suffering that will come from denying emergency shelter to needy families and pregnant women.

Conclusion

Based on the foregoing, Plaintiffs respectfully request that this Court enter a temporary restraining order and preliminary injunction preventing Defendants from implementing the above-identified changes to the EA program until Defendants have satisfied the requirements of the APA and budget line item 7004-0101. A proposed order granting said relief is attached hereto.

Dated: October 27, 2023

Respectfully submitted,

/s/ *Jacob M. Love*

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Certificate of Service

I, Jacob M. Love, of Lawyers for Civil Rights, do hereby certify that, on October 27, 2023, a true copy of this document was served upon the following attorneys by email:

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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Defendants.

[PROPOSED] TEMPORARY RESTRAINING ORDER

Pursuant to Mass. R. Civ. P. 65, and based on Plaintiffs' Complaint filed October 27, 2023; the exhibits and declarations filed therewith; the briefs and arguments of the parties; and the record in this case, the Court enters this Temporary Restraining Order (TRO).

The Court finds that Plaintiffs have shown a likelihood of success on their claims that Defendants' planned changes to implementation of G.L. c. 23B, § 30, commonly known as Massachusetts' Right-to-Shelter law, violate the Administrative Procedure Act (G.L. c. 30A) and line item 7004-0101 of the Commonwealth Budget of 2024 (St. 2023, c. 28, § 2); that irreparable harm will result from denial of the TRO; that in light of Plaintiffs' likelihood of success on the merits, the risk of irreparable harm to Plaintiffs outweighs any potential harm to Defendants; and that the public interest is served by entering this TRO. This Order is intended to preserve the *status quo* until Plaintiffs' Motion For A Preliminary Injunction may be heard.

Accordingly, it is HEREBY ORDERED:

1) that Defendants, their officers, agents, servants, employees, attorneys, and those acting in active concert or participation with them, are hereby enjoined from denying Temporary

Emergency Shelter to individuals and households who meet the eligibility criteria specified in 760 CMR 67.00 et seq.;

2) A hearing to determine whether a preliminary injunction shall issue shall be set for _____ at ____ a.m./p.m. in _____. Defendants shall serve on Plaintiffs any Opposition to Plaintiffs' Motion For Preliminary Injunction by _____. Pursuant to Superior Court Rule 9A, Plaintiffs shall file Defendants' Opposition with this Court, together with any Reply, by _____.

3) For good cause shown, the Court orders that no security be given by the Plaintiffs for issuance of this Order.

4) This Temporary Restraining Order shall expire on _____.

IT IS SO ORDERED.

Date: _____ _____

Judge of the Superior Court