

February 20, 2024

VIA EMAIL

Sunila Thomas George
Chairwoman and Commissioner
Massachusetts Commission Against Discrimination
1 Ashburton Place, Suite 601
Boston, MA 02108

Re: Deficiencies in Intake, Investigation, and Adjudication

Dear Chairwoman and Commissioner George:

Lawyers for Civil Rights (LCR) writes on behalf of our clients and community partners, including the Urban League of Eastern Massachusetts (“Urban League”), to express concerns surrounding the Massachusetts Commission Against Discrimination’s (“MCAD”) ability to fulfill its obligations to its constituencies. Specifically, we are concerned that the MCAD: (1) does not afford *pro se* individuals a meaningful opportunity to file complaints “by intake”; and (2) does not consistently conduct timely investigations or render timely adjudications. These deficiencies rise to the level of federal constitutional violations under the Fourteenth Amendment’s due process guarantees and the First Amendment’s right to access the courts. In light of your leadership and our strong history of working collaboratively and cooperatively, we are requesting a meeting with you to discuss an expedited and amicable resolution of this matter. In the interest of avoiding litigation, we are also requesting that the MCAD voluntarily adopt a formal Memorandum of Understanding (“MOU”) with LCR and the Urban League, outlining remedial steps and detailing specific community commitments. We see this as an opportunity to work together to strengthen the MCAD and to better serve our overlapping constituencies. To avoid spending scarce taxpayer dollars on costly and protracted litigation, we hope you share our goal of focusing on immediate remedial action.

The Urban League of Eastern Massachusetts is a non-profit, membership- and community-based organization designed to enable those affiliated with the group to overcome racial, social, and economic barriers to employment and economic development. Specifically, the organization devotes resources to assist individuals in the area of employment and workforce development, including with issues relating to filing discrimination complaints and overcoming barriers to justice. To further assist its members in pursuing their legal rights at the MCAD, the Urban League is eager to support the creation and implementation of the requested MOU.

LCR works with communities of color and immigrants to fight discrimination and foster equity through creative and courageous legal advocacy, education, and economic empowerment. In partnership with law firms and community allies, we provide free, life-changing legal support to individuals and families. We represent clients in numerous impact areas, including employment and housing discrimination, and, in this capacity, regularly work with clients who are directly

impacted by the MCAD's policies and practices. LCR also has significant experience creating and implementing MOUs with private entities and public agencies.

Discrimination is pervasive and is often aimed at the most vulnerable members of our community, including people of color, immigrants, people with disabilities, the elderly, veterans, low-income individuals, and members of other marginalized groups. In addition to exacerbating individuals' employment, housing, lending, financial, and other conditions, discrimination also causes physical and mental health effects on victims, including depression, stress, anxiety, posttraumatic stress disorder, and psychological distress.¹ While discrimination clearly has these negative effects on an individual level, it also affects the community at large. For example, employers benefit from a power imbalance over employees, which disincentivizes oversight and erodes accountability for employers.² As a result, rampant discrimination and retaliation go unchecked, leading to greater abuses and exploitation of employees. Landlords³ and lenders⁴ similarly have the upper hand in negotiations and interactions with the people seeking their services, who are often in desperate need of affordable housing and financing, especially given the ongoing housing crisis in Massachusetts.⁵

On the whole, discrimination is toxic and corrosive to society. And, because the primary burden to file complaints rests on vulnerable victims, the risk of exploitation is too high – victims must be afforded a clear path to hold those in positions of power accountable. Ensuring that victims of discrimination have recourse is essential to: (1) placing victims back in a position similar to their lives before they were victimized, and (2) punishing wrongdoers while creating a deterrent effect. The MCAD is required to play a crucial role in this life-changing process.

¹ See “We’re Sick of Racism, Literally,” *New York Times*, Dr. Douglas Jacobs, Nov. 11, 2017, available at <https://www.nytimes.com/2017/11/11/opinion/sunday/sick-of-racism-literally.html> (featuring the experience of an LCR client).

² See “Strengthening accountability for discrimination,” Economic Policy Institute, Jan. 19, 2021, available at <https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/> (“The promise of our nation’s anti-discrimination laws has not been fully realized because our current enforcement and legal system has failed to confront the fundamental power imbalance underpinning the employment relationship.”).

³ See “As housing bias in Mass. persists, advocates want tougher penalties for landlords, agents,” WBUR, Dec. 21, 2022, available at <https://www.wbur.org/news/2022/12/21/housing-discrimination-agents-brokers-testing-massachusetts> (detailing accounts of two women from different racial backgrounds who pretended to be looking for apartments in Somerville: “The agent told the white tester he had two units available and could show them right away. Separately, the same agent then told the Black tester nothing was vacant.”).

⁴ See “Massachusetts Mortgage Lending Fact Book,” 2021 Data Edition, Woodstock Institute, June 2023, available at <https://financialequity.net/wp-content/uploads/2023/06/MA-Fact-Book-June2023.pdf> (mortgage denial rates for Black and Latinx applicants were nearly double the denial rate of white applicants in Massachusetts).

⁵ See “Massachusetts needs a housing moon shot,” *Boston Globe*, May 31, 2023, available at <https://www.bostonglobe.com/2023/05/31/opinion/massachusetts-housing-moon-shot/> (“It’s no secret that Massachusetts is facing a housing crisis. There isn’t enough housing being built, and costs have put both homeownership and access to decent rental housing beyond the reach of many.”).

I. Inadequate Intake Process

As you know, the MCAD was established to enforce anti-discrimination laws by receiving, investigating, and adjudicating discrimination complaints involving employment, housing, and public accommodations, among other issues. *See* G. L. c. 6, § 56; G. L. c. 151B, § 3, ¶ 6; 804 C.M.R. 1.00, *et seq.* The MCAD is supposed to provide services to the public to assist represented and unrepresented individuals in obtaining relief under circumstances where they have endured discrimination based on their race, disability, national origin, gender, sexual orientation, veteran’s status, or age. *See* G. L. c. 151B, §§ 3-4; 804 C.M.R. 1.00, *et seq.*

The MCAD’s deficiencies affect some of the most vulnerable members of the community, including people of color and those who cannot afford legal representation and who have to file *pro se* complaints.⁶ In fact, *pro se* complainants can account for approximately 70% of the complaints the MCAD receives annually.

Prospective complainants are required to file discrimination complaints within 300 days of the last discriminatory act against them, G. L. c 151B, § 5, and they are entitled to file “by intake,” 804 C.M.R. 1.04(2). When filing by intake, the complainant is entitled to participate in the intake process by meeting with an MCAD intake specialist at any MCAD office before signing and submitting the complaint.

Through its website, the MCAD repeatedly advises prospective complainants to seek the assistance of an intake specialist with statements such as: “Individuals seeking to file a complaint of discrimination are strongly encouraged to file a complaint in-person or over Zoom so you can receive the assistance of our intake specialists.”⁷ At the same time, however, the MCAD tells prospective complainants that going in person to an office is no guarantee of being seen by a representative that day. And those looking to make an appointment online will wait at least 90 days – and, in practice, there are frequently no appointments available even then.

As an example from LCR’s recent client contacts, an Asian-American woman worked for a local municipality for more than 10 years in roles dedicated to serving marginalized populations, but was subjected to racist statements, unjustified pay disparities, and retaliatory actions by her supervisors throughout her employment. After she was wrongfully terminated, she sought to obtain redress on her own through the MCAD, attempting to file by intake on multiple occasions. Yet when she accessed the MCAD’s website to try to schedule an appointment to file by intake, the message from the MCAD was unequivocal: “No Times Available.”

⁶ According to the Legal Services Corporation, which partners with more than 131 legal aid programs across 890 offices nationally, approximately 75% of low-income households in the U.S. experienced one or more civil legal issues in 2021. Low-income Americans seek legal help in only 25% of situations involving civil legal problems. Nearly half of those who did not seek help cited cost as the reason why. And more than 50% of low-income Americans do not know whether they could find and afford a lawyer if they had a need for one. Overall, low-income Americans “do not get any or enough legal help for 92% of their substantial civil legal problems.” Legal Services Corporation, 2022 Justice Gap Report, *available at* <https://justicegap.lsc.gov/resource/executive-summary/>. Massachusetts is not exempt from these alarming trends.

⁷ *See* <https://www.mass.gov/orgs/massachusetts-commission-against-discrimination>.

After going to the MCAD website one final time to make an appointment, she found that, while time slots were now available, the earliest one was more than 90 days away. If she had waited for that appointment, however, she would have gone beyond the 300-day statute of limitations to file her complaint, which would have made her claim subject to automatic dismissal. In the end, because filing by intake was unavailable to her, she was forced to hire a lawyer who could file the complaint on her behalf without going through the intake process. This is not an isolated incident. LCR consistently hears from individuals who have experienced discrimination in employment and housing, and who have encountered significant appointment barriers.

In light of the frequency of the complaints, LCR monitored and reviewed the MCAD's appointment schedule on 28 business days in December 2023 and January 2024, and on three-quarters of those days there were "No Times Available." In one particularly troubling span of six straight business days from December 11-18, 2023, no appointments were available. *See* Exhibit A. Even today, as we submit this request for corrective action, there are no appointments available. *See* Exhibit B.

LCR's community partners have also closely monitored the MCAD's appointment schedule and have rarely seen available appointments. This includes one community partner representative who works with low-wage workers and who checked the MCAD's website daily for two weeks and only found one available appointment during that period.

For a prospective complainant, the absence of any appointments is extraordinarily burdensome. The MCAD leaves no option to choose a date and time for an appointment and no way of knowing if an appointment will ever be available. On the rare occasions where one or two appointments did appear in LCR's recent review, they were three or more months away, and no other appointments were shown as available for the rest of 2024 or in 2025. Complainants are left with the strong impression that the next available appointment slot would be outside of the 300-day window for filing a complaint. Notably, scheduling an interview with an intake investigator does not extend the 300-day statute of limitations to file a complaint with the MCAD.

A prospective complainant who wishes to exercise their right to file a complaint by intake is forced to choose between: (1) taking the time and traveling the distance to go in person to one of the MCAD's offices, where even the MCAD states that there is no guarantee that the prospective complainant will be seen or helped that same day; (2) making an appointment online, which has a minimum 90-day waiting period and frequently has no available appointments at all; or (3) waiting until the complaint is within 72 hours of missing the statute of limitations and hoping to receive an emergency appointment with an intake specialist. None of these are meaningful or suitable options for low-income *pro se* complainants, many of whom are hourly wage workers with limited transportation options.

Even if it were true, assuming *arguendo*, that the MCAD allows appointments to be scheduled three months out – which does not occur – that waiting period would take away nearly one-third of the time a prospective complainant has to exercise their right to file a complaint with the assistance of an intake specialist. When the MCAD's online scheduling system states that there are "No Times Available," as it generally does, this avenue is completely foreclosed, which

further burdens the prospective complainant's ability to exercise their right to file a complaint by intake.

Further, despite being statutorily required to maintain a regional office in New Bedford⁸ for the purpose of allowing local prospective complainants to exercise their right to access services and file complaints, the MCAD is not complying with this obligation. Instead, the MCAD has failed to open or maintain a regional office in New Bedford for more than three years since it closed in October 2020, placing a significant burden on local residents, particularly those who are elderly, disabled, or without access to technology. In addition, LCR has been informed that the housing crisis in the area surrounding New Bedford has exacerbated housing discrimination issues, particularly in areas with large minority and immigrant populations. Namely, landlords have been using the shortage of housing to pick and choose the specific tenants they want, and to get rid of the "undesirables." Without a New Bedford regional office, residents victimized by discrimination have limited opportunity to avail themselves of their rights through the MCAD.

Filing with the MCAD would exhaust prospective complainants' administrative remedies and entitle these individuals to subsequently bring their claims in court. Without first exhausting their administrative remedies, these individuals would not be eligible to have a court rule on their discrimination complaints. As such, the MCAD plays a pivotal gatekeeping role – it determines whether a person can file a complaint of discrimination and obtain access to a legal remedy. Because a prospective complainant is required to exhaust their administrative remedies as a prerequisite to being able to file a related complaint in court, the MCAD's deprivation of access could be the death of one's claim. That is not a fair or just result where the MCAD holds all the cards – a person's claim for relief based on discrimination they have experienced cannot be at the mercy of a broken intake system.⁹ This is tantamount to taking people – and their claims – hostage. This represents a significant and systemic unconstitutional barrier to access to justice. We urge remedial action to ensure a meaningful opportunity for legal redress.

II. Delays in Investigations and Adjudications

Pursuant to G. L. c. 151B, § 5, "[a]fter the filing of any complaint, the chairman of the [MCAD] shall designate one of the commissioners to make, with the assistance of the [MCAD's] staff, prompt investigation in connection therewith." Pursuant to Section 1.05(5) of the MCAD's regulations on "Prompt Investigation," the MCAD should complete HUD investigations in "no more than 100 days" and non-HUD investigations in "no more than 18 months." In practice, the MCAD's investigation and adjudication operations have been anything but prompt, as it pertains to both represented and unrepresented complainants.

LCR has been informed by individuals, workers centers, coalitions, and other non-profit organizations that there are numerous instances involving pending complaints that have not been acted upon for years, and in many cases, without any communication by the MCAD to the

⁸ See G. L. c. 6, § 56.

⁹ While the U.S. Equal Employment Opportunity Commission may offer an alternative forum in which to file a discrimination complaint, that fact does not relieve the MCAD of its own statutory and regulatory obligations to provide adequate services, including a functioning intake system, to its constituencies.

complainant. In one particular case, LCR learned from a non-profit representative that a delay was caused by the MCAD's refusal to translate critical documents for a complainant who spoke Cantonese. Specifically, the MCAD informed her during the investigation process that the MCAD translates only the documents it determines to be "vital," which, according to the MCAD, does not include a respondent's position statement. This is not simply a delay issue – it also raises a significant language access problem. It is hard to imagine a document more vital to the viability of a complainant's case than the respondent's denial of the merits of the claims.

As documented by the State Auditor's Office, the MCAD has failed for many years to conduct its operations efficiently and in accordance with regulatory standards. On June 29, 2016, the State Auditor issued an Official Audit Report of the MCAD, for the period July 1, 2012, through June 30, 2014 ("2016 Audit Report"). *See* Official Audit Report, Commonwealth of Massachusetts, Office of the State Auditor, Suzanne M. Bump, June 29, 2016.¹⁰ In the 2016 Audit Report, the State Auditor found that the MCAD "did not always complete investigations within regulatory timeframes." *Id.* Specifically, the State Auditor determined that, "as of June 30, 2015, MCAD had 1,839 non-housing complaint cases that averaged 325 days beyond the 18-month timeframe for completing that type of investigation. It also had 108 housing cases that averaged 553 days beyond the 100-day timeframe for completing housing investigations. None of the records we examined contained documentation indicating that it was impractical to complete these investigations within the required timeframes." *Id.* Further, "[a]s of June 30, 2015, approximately 300 cases had spent more than three years in the investigative phase." *Id.*

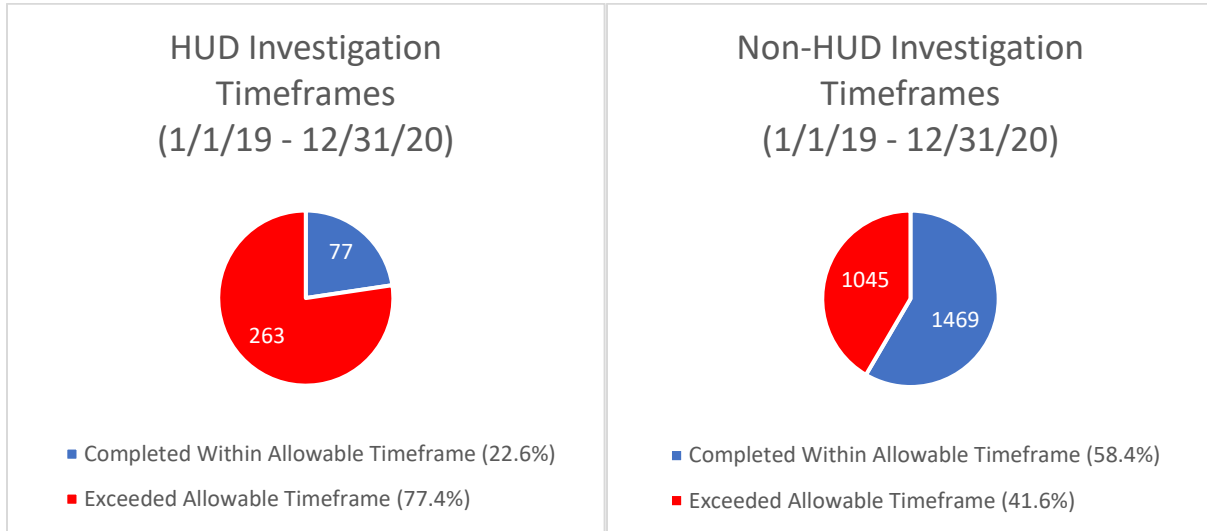
The State Auditor also found that the "MCAD case investigators did not always complete the required monthly minimum number of cases." *Id.* The State Auditor determined: "MCAD investigators who work on non-housing cases only closed their required number of monthly cases approximately 50% of the time during fiscal year 2013 and approximately 40% of the time during fiscal year 2014. Similarly, MCAD's housing investigators did not complete the required number of cases in any month during either fiscal year 2013 or fiscal year 2014. In some instances, investigators did not complete any investigations during a given month." *Id.* The State Auditor noted: "Without ensuring that its investigators complete their required monthly minimum numbers of cases, MCAD will not be able to effectively manage its investigation process, address its backlog of cases, and process cases within the established regulatory timeframes." *Id.* The State Auditor added: "Not completing discrimination cases within regulatory timeframes allows potential perpetrators of discrimination to go unpunished for extended periods. Further, such delays may ultimately cause alleged victims to seek resolution through a more costly judicial process." *Id.*

On April 4, 2022, the State Auditor issued another Official Audit Report of the MCAD, for the period January 1, 2019, through December 31, 2020 ("2022 Audit Report"). *See* Official Audit Report, Commonwealth of Massachusetts, Office of the State Auditor, Suzanne M. Bump, April 4, 2022.¹¹ In the 2022 Audit Report, the State Auditor yet again found that the MCAD "did not

¹⁰ The 2016 Official Audit Report is available at <https://www.mass.gov/doc/massachusetts-commission-against-discrimination-1/download>.

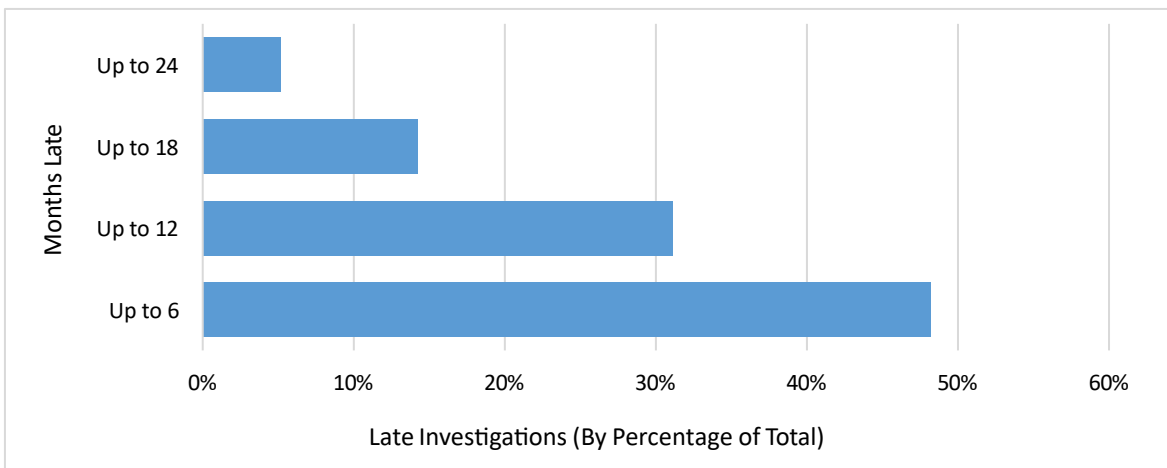
¹¹ The 2022 Official Audit Report is available at <https://www.mass.gov/doc/audit-of-the-massachusetts-commission-against-discrimination/download>.

complete discrimination investigations on time.” *Id.* Specifically, the State Auditor determined: “During the audit period, the [MCAD] exceeded the allowable timeframe for completing 1,308 (45.8%) of the 2,854 discrimination investigations it completed. Within these 2,854 investigations, 263 (77.4%) of the 340 [HUD] investigations and 1,045 (41.6%) of the 2,514 non-HUD investigations exceeded the allowable timeframe.” *Id.*



Further, “of the 1,045 non-HUD investigations that exceeded the allowable timeframe, 504 (48.2%) were completed one day to 6 months late, and 528 (50.5%) were completed 6 to 24 months late.” *Id.* The final 1.3% were completed more than 24 months late. The following demonstrative exhibit illustrates the MCAD’s delays in non-HUD investigations:

Late Non-HUD Cases by Months¹²



¹² This Chart was created by the State Auditor’s Office and is contained in the 2022 Audit Report, *available at <https://www.mass.gov/doc/audit-of-the-massachusetts-commission-against-discrimination/download>*.

According to the 2022 Audit Report, “in several instances, events within an investigation seemed to take excessive time to complete.” *Id.* The Report gave a number of examples of how steps within an investigation were delayed:

- “In 41 of the 88 sampled investigations, it took 100 to 749 days before a complainant’s witness or attorney was contacted.
- MCAD reassigned 83 of the 88 sampled investigations at least once; some reassignments took several months.
- In 15 of the 88 sampled investigations, it took MCAD 182 to 611 days to draft the disposition.”

Id. The State Auditor reiterated that “[i]f investigations take an excessive time to complete, individuals who have allegedly been subjected to discrimination are deprived of timely resolution.” *Id.*

The 2016 and 2022 Audit Reports paint a picture of an organization that has experienced significant compliance challenges even before the pandemic hit. Together, the Audit Reports and the experiences of complainants described above demonstrate the MCAD’s long-running failure to provide adequate services to the public. In this instance, justice delayed is justice denied, and there are particularly egregious examples of delays where the MCAD took more than 17 years to adjudicate a complaint.¹³

We understand that the MCAD is working on bringing more cases to disposition; tackling a substantial backlog of “aged” cases, setting a goal of 100 cases per investigator; considering emergency statute of limitations stop-gap measures for complainants; creating efficiencies with a new case management system; and capitalizing on the recently reopened Worcester regional office. All these goals are commendable. However, the MCAD has not committed to any timelines or benchmarks to achieve these goals. In the meantime, the deficiencies described above continue to affect the most vulnerable people. A timeline with specific remedial steps and commitments for the complaint, investigation, and adjudication processes should be formally adopted by the MCAD and incorporated into an MOU. The proposed MOU is an essential vehicle for greater efficiency and transparency, and it would also provide the public with certain assurances toward measurable progress – all within a reasonable date certain. This alone would help all parties avoid litigation, and would dramatically expand access to justice.

III. Constitutional Violations

The deficiencies identified above are not just problematic from an operational, administrative, and policy perspective; they also violate fundamental rights under the law.

¹³ See “State commission takes years to resolve discrimination cases. One took 17. Another took 15,” WBUR, May 30, 2022, available at <https://www.wbur.org/news/2022/05/30/delays-mcad-discrimination-cases-complaints>.

A. Due Process Violations

The MCAD's failures and deficiencies with regard to intake, investigation, and adjudication constitute violations of the procedural due process rights of prospective complainants under the Fourteenth Amendment, which prohibits state actors from depriving "any person of life, liberty, or property, without due process of law." Prospective complainants have a protected property interest in their discrimination claims to the MCAD. *See Hoffman v. City of Warwick*, 909 F.2d 608, 621 (1st Cir. 1990) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982)) (A "state-created employment discrimination cause of action is property protected by the Fourteenth Amendment's procedural due process requirements.").

Once a protectable interest under the Fourteenth Amendment is established, as here, courts generally analyze procedural due process claims under the test set forth by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The *Mathews* test involves analyzing the following factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27-28 (1st Cir. 2021). Each of these elements will be addressed in turn.

1. Private Interest at Stake

The prospective complainants' property interests here are substantial. Their claims involve discrimination based on a person's race, disability, national origin, gender, sexual orientation, veteran's status, or age in matters involving employment, housing, lending, and public accommodations, all of which are within the MCAD's purview. Victims of discrimination face considerable physical and mental health effects, as well as risks to their employment and housing prospects, *i.e.*, their general well-being. These victims have a right to pursue their claims through a functioning discrimination complaint system. Without the ability to seek redress for these claims, which contemplate monetary and non-monetary relief, prospective complainants are left with no recourse.

2. Risk of Erroneous Deprivation of Property Interest

The risk of erroneous deprivation from the MCAD's current operations is high – individuals with discrimination complaints are unable to file them, or the statute of limitations runs on their claims first. People in the New Bedford area also have a high risk of deprivation because many cannot get to another office, even if they want to do so.

When prospective complainants are deprived of the ability to file by intake or have their complaints investigated and adjudicated in a reasonable time, there is a grave risk that claims – along with corroborating evidence – will be compromised or lost. The harm to prospective complainants includes, but is not limited to, monetary harm, the risk of missing the statute of limitations, a decrease in witness availability over time, a decline in witness memory over time, and the potential destruction, alteration, or disappearance of evidence. *See Logan*, 455 U.S. at

429-30 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)) (“[T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be ‘the equivalent of denying them an opportunity to be heard upon their claimed right[s].’”). Another result is that potential perpetrators of discrimination go unpunished for longer, or possibly forever, as recognized by the State Auditor.¹⁴

Not only is the risk of erroneous deprivation high, but that risk could be substantially reduced with additional safeguards. For example, re-opening the New Bedford regional office, and providing more intake specialists and available appointment slots for filing by intake, would all reduce the risk of individuals’ rights being compromised. The MCAD stands in a gatekeeping role – determining whether a person can access a legal remedy by filing a complaint – and its operational deficiencies keep viable discrimination claims from being filed and processed for victims.

3. Absence of Government Interest in Perpetuating Deficiencies and Delays

The MCAD has no legitimate interest in continuing to deprive the prospective complainants of their right to file and pursue discrimination claims. Where prospective complainants are required by law to exhaust their administrative remedies, which would be achieved by filing at the MCAD, before they are permitted to present their case in court, the impact of the MCAD’s constitutional violations is magnified.

Further, cost is not a legitimate factor to justify the MCAD’s deficiencies and delays. The MCAD has received substantial budget increases in the past few years, yet significant barriers to accessing justice persist. For example, in July 2022, the Massachusetts Legislature passed its fiscal year 2023 budget, which increased the MCAD’s state legislative allocation from \$4.3 million to \$7.6 million, an increase of approximately 78%. In response to the budget increase, the MCAD noted: “These funds will directly impact the Commission’s ability to accept, investigate, adjudicate and resolve complaints of discrimination. Funding at this level will ultimately create a more efficient and effective process for the people of Massachusetts seeking restitution for discriminatory mistreatment.”¹⁵ More recently, the MCAD’s state appropriation from the Legislature increased again, with an allocation now excess of \$8.2 million.¹⁶ Additionally, the MCAD receives substantial funds from the U.S. Equal Employment Opportunity Commission and the U.S. Department of Housing and Urban Development.

¹⁴ See Official Audit Report, June 29, 2016, available at <https://www.mass.gov/doc/massachusetts-commission-against-discrimination-1/download> (“Not completing discrimination cases within regulatory timeframes allows potential perpetrators of discrimination to go unpunished for extended periods.”).

¹⁵ “MA Legislature Sets Its Sights On Discrimination,” available at <https://www.mass.gov/news/ma-legislature-sets-its-sight-on-discrimination>.

¹⁶ See Massachusetts Commission Against Discrimination Fiscal Year 2023 Annual Report, available at <https://www.mass.gov/doc/mcad-fy23-annual-report/download>.

B. Violation of Right to Access Courts

The deficiencies set forth above also violate the First Amendment. The First Amendment protects the rights of individuals to “petition the Government for a redress of grievances,” *i.e.*, guarantees the right of individuals to access state and federal courts. The right to access the courts is “among the most precious of the liberties safeguarded by the Bill of Rights.” *ACA Int’l v. Healey*, 457 F. Supp. 3d 17, 30 (D. Mass. 2020) (quoting *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967)). This fundamental constitutional right “springs in part from the due process clause; the privileges and immunities clause; and the First Amendment.” *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986). Violation of the right to access the courts, particularly with respect to civil rights claims, “states a cause of action under [42 U.S.C.] § 1983.” *Id.*; *see also Lewis v. Casey*, 518 U.S. 343, 354 (1996) (citing *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)) (relevant claims for access to court actions include civil rights violations).

Individuals can assert valid access to court claims by showing either that “systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time,” or that their case “cannot now be tried (or tried with all material evidence), no matter what official action may be in the future.” *Christopher v. Harbury*, 536 U.S. 403, 413-14 (2002). Here, both types of claims are relevant.

First, the MCAD’s failure to adequately provide for filing by intake and the significant delays in investigation are systemic official actions that frustrate a person’s attempts to prepare and file lawsuits. Specifically, a person seeking relief as a victim of discrimination must first exhaust their administrative remedies, which is achieved by filing a complaint with the MCAD, before becoming eligible to file a related claim in court. Therefore, by failing to provide adequate access to filing by intake – due to the unavailability of intake specialists and the continued closure of the New Bedford regional office – the MCAD is violating prospective complainants’ right to access the courts. Moreover, one of the risks attendant to a deficient intake system is that the individual may miss the 300-day statute of limitations and lose their claim entirely. This is another example of how the MCAD’s deficiencies can cause an individual’s claims to be frustrated or impeded, and result in a deprivation of the right to access the courts.

Second, because the harms associated with the MCAD’s deficiencies include a decrease in witness availability, a decline in witness memory, and the potential destruction, alteration, or disappearance of evidence, it raises serious concerns as to whether a complainant can try their case “with all material evidence,” giving rise to an access to courts claim. *Harbury*, 536 U.S. at 414.

C. Harm to Dignity

Ultimately, the MCAD does not provide an efficient or orderly process for victims who have experienced discrimination. The process – from intake through adjudication – lacks basic certainty and reliability. This creates burdens and hardships for people trying to organize their lives. For filing by intake, *pro se* complainants are forced to organize their lives around the MCAD’s availability, which is unpredictable and unforeseeable. For investigations and adjudications, people are left in mystery – and misery – for years wondering when or whether their claims will ever be heard or resolved. These deficiencies in the MCAD’s processes

discourage, frustrate, and impede individuals from pursuing their rights, which runs counter to the purpose for which the MCAD was established in the first place. Altogether, coupled with the challenges outlined above, this compounds the trauma of the underlying discrimination, creating more harm and indignity for people who have already been victimized, which raises constitutional concerns. *See Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (“dignity” is embedded and encompassed in the due process clause of the Fourteenth Amendment); *United States v. Windsor*, 570 U.S. 744, 770 (2013) (deprivation of “dignity” is a cognizable injury under Article III); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (due process recognizes “dignity”); *Cummings v. McIntire*, 271 F.3d 341, 344-45 (1st Cir. 2001) (same). Without being able to hold respondents accountable for their discrimination, victims are left stranded where the MCAD is supposed to provide a lifeline. This inflicts a dignitary harm. *See, e.g., Kirk v. Comm’r of Soc. Sec. Admin.*, 987 F.3d 314, 324 (4th Cir. 2021) (noting “distinct dignitary harm”); *Hicks v. Comm’r of Soc. Sec.*, 909 F.3d 786, 803 (6th Cir. 2018) (same).

IV. Court Oversight of Administrative Agency Delays

It is well established that significant delays in an administrative agency’s processing timelines may constitute “a remediable constitutional violation,” even where the relevant legal framework underlying the agency’s powers does not specify a timeline for agency action. *Machado v. Leavitt*, 542 F. Supp. 2d 185, 194 (D. Mass. 2008) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985); *Schroeder v. Chicago*, 927 F.2d 957, 960 (7th Cir. 1991); *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989); and *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 388-89 (D. Mass. 1995)). Unconstitutional administrative delays are amenable to judicial remedies, including the setting of deadlines for agency action. *Machado*, 542 F. Supp. 2d at 194 (citing *White v. Mathews*, 559 F.2d 852, 855 (2d Cir. 1977); *Kraebel v. New York City Dep’t of Housing Preservation & Dev.*, 959 F.2d 395, 406 (2d Cir. 1992); *Andujar v. Weinberger*, 69 F.R.D. 690, 694 (S.D.N.Y. 1976)). “Justice delayed is justice denied, the saying goes; and at some point delay must ripen into deprivation because otherwise a suit alleging deprivation would be forever premature.” *Schroeder*, 927 F.2d at 960.

Here, the MCAD’s underlying legal framework, including its own regulations, prescribe timelines for “prompt investigations” – 100 days for HUD investigations and 18 months for non-HUD investigations. 804 C.M.R. 1.05(5). However, as described above, the MCAD frequently and substantially exceeds the allowable timeframe for its investigations. In many cases, the MCAD exceeds the allowable timeframe by years.¹⁷ Individuals experiencing these unconstitutional delays can seek redress against the MCAD in federal court. *See Andujar*, 69 F.R.D. at 695-96 (“While we agree that federal courts should not assume the task of supervision of an agency’s work, we do not believe that federal courts can refuse to hear claims of deprivation of constitutional rights on the ground that the result might be a directive to an administrator to adjust procedures so as to comport with constitutional guarantees.”).

¹⁷ *See* “State commission takes years to resolve discrimination cases. One took 17. Another took 15,” WBUR, May 30, 2022, available at <https://www.wbur.org/news/2022/05/30/delays-mcad-discrimination-cases-complaints>.

V. Conclusion

The MCAD's failures and deficiencies outlined above – which violate the Fourteenth and First Amendments – create significant burdens for people of color, immigrants, people with disabilities, the elderly, veterans, low-income individuals, and members of other marginalized groups who seek relief for discrimination they have experienced. It is crucial that the MCAD address these issues expeditiously to provide the requisite services to the public, and to comply with all applicable laws, including the First and Fourteenth Amendments to the U.S. Constitution.

The parties reserve all rights to proceed with legal action – but at this time, in lieu of litigation, we request that the MCAD adopt a remedial MOU. In light of our history of working collaboratively and cooperatively, we are respectfully requesting a meeting with you to discuss a remedial MOU as part of an expedited and amicable resolution of this matter. We stand ready to partner with the MCAD in the implementation of the MOU. Please contact us at mkipkins@lawyersforcivilrights.org to schedule our meeting.

Respectfully submitted,

/s/ Michael A. Kippins

Michael A. Kippins, Esq.
Oren Sellstrom, Esq.
Lawyers for Civil Rights

cc: Maura Healey
Governor
Commonwealth of Massachusetts

Monserrate Rodríguez Colón
Commissioner
Massachusetts Commission Against Discrimination

Neldy Jean-Francois
Commissioner
Massachusetts Commission Against Discrimination

EXHIBIT A

December 11, 2023

zoom 🔊 🔋 🔌 🔍 📄 Mon Dec 11 6:01 PM

mcad.appointlet.com

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Massachusetts Commission Against Discrimination Intake Interview Scheduling Portal

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MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

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December 13, 2023

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Wed Dec 13 12:40 PM

Massachusetts Commission Against Discrimination Intake Interview Scheduling Portal

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Massachusetts Commission Against Discrimination Intake Interview Scheduling Portal

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EXHIBIT B

February 20, 2024

The screenshot shows a web browser window with the address bar displaying "mcad.appointlet.com". The page content includes the MCAD logo, the title "Massachusetts Commission Against Discrimination Intake Interview Scheduling Portal", and a progress bar with steps: 1 Times, 2 Information, and 3 Review. The current step is "Pick a Date & Time", which shows the time zone as "US/Eastern (7:51:11 AM)". Below this, a message states "No Times Available" and suggests that the scheduler may need to update their schedule.

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MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Massachusetts Commission Against Discrimination Intake Interview Scheduling Portal

1 Times 2 Information 3 Review

Pick a Date & Time

Timezone: US/Eastern (7:51:11 AM)

No Times Available

If this is your scheduler you may need to update your schedule.