

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12623

BOSTON HOUSING AUTHORITY,
PLAINTIFF-APPELLEE,

v.

Y.A.,
DEFENDANT-APPELLANT.

ON APPEAL FROM

A FINAL JUDGMENT OF THE HOUSING COURT DEPARTMENT OF THE TRIAL COURT

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS,
COMMUNITY LEGAL SERVICES OF PHILADELPHIA, MID-
MINNESOTA LEGAL AID, NATIONAL HOUSING LAW PROJECT,
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 1:21, amici curiae American Civil Liberties Union, American Civil Liberties Union of Massachusetts, Community Legal Services of Philadelphia, Mid-Minnesota Legal Aid, National Housing Law Project, National Network to End Domestic Violence, and the Sargent Shriver National Center on Poverty Law make the following disclosures: They are nonprofit corporations with no parent corporations, with no stock, and therefore no publicly held company owning 10% or more of their stock.

STATEMENT OF INTEREST

Amici curiae are state and national advocates who work at the intersection of housing and economic insecurity experienced by survivors of domestic violence and sexual assault. Amici specialize in or run projects devoted to advocating on behalf of survivors, and have specific knowledge of how domestic violence can impact all aspects of a person's life. Specifically, many of the amici have drafted, advocated in support of, and assisted in the implementation of laws to protect the housing rights of survivors, including the Violence Against Women Act ("VAWA") provisions at issue in this case. They have many years of experience enforcing VAWA's housing protections across the country and have a vested interest in its correct application by the courts.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over two million members dedicated to preserving the Constitution and civil and human rights. The ACLU Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, has been a leader in efforts to eliminate barriers to women's full equality in American society. These efforts include challenging discrimination against domestic violence victims, with a particular focus on advancing survivors' rights to obtain and maintain safe and secure housing. The ACLU has litigated cases on behalf of survivors and advocated for policies at the federal, state, and local levels, including the housing protections of VAWA, first enacted in 2005. The ACLU of Massachusetts is the Massachusetts affiliate of the ACLU.

Community Legal Services of Philadelphia ("CLS") was founded in 1966 by the Philadelphia Bar Association and has provided free civil legal assistance to more than one million low-income Philadelphians. CLS attorneys and other staff provide a full range of legal services, from individual representation to administrative advocacy to class action litigation, as well as community education and social work. CLS' Housing Unit provides free legal advice and representation to survivors of sexual assault, dating violence, stalking, and domestic violence on their housing rights under federal, state, and local law,

including helping survivors end their leases early or obtaining transfers to escape further violence. CLS represents dozens of survivors a year who are denied admission to subsidized housing based on their survivor status, or who are facing adverse housing decisions as a result of domestic violence and sexual assault. CLS also engages in policy advocacy at the local, state, and national levels, advocating for increased housing protections and rights for survivors, and for changes to housing policies and regulations that are harmful to survivors.

Mid-Minnesota Legal Aid ("MMLA") is a nonprofit organization providing legal representation and advice to people with low incomes in 20 central Minnesota counties, including the City of Minneapolis. MMLA's mission is to advocate for the legal rights of disadvantaged people to have safe, healthy, and independent lives. In 2017, MMLA provided representation and advice to more than 10,000 low-income households, 34% of those housing cases, and reached tens of thousands more through its online legal information services. Many of the households served in all legal issues involved clients seeking safety from domestic abuse, sexual assault, and stalking. MMLA has received funding from U.S. Department of Justice VAWA grants since 2005 to support its holistic legal representation work with survivors. To fulfill its role as a voice for clients

seeking safety from gender violence, MMLA joins in this brief because the legal issues have significant impact on the vast number of their clients who rely on full implementation of VAWA for their safety and the security of their tenure in public housing.

The National Housing Law Project ("NHLP") is a private, non-profit, national housing and legal advocacy center established in 1968. NHLP's mission is to advance housing justice for poor people. NHLP has worked with thousands of advocates, attorneys, and housing providers throughout the country on ensuring that domestic and sexual violence survivors are able to access and maintain safe, decent, and affordable housing. The case at bar addresses the critical issue of economic abuse perpetrated against survivors of domestic violence and how such abuse threatens the housing security of survivors. This case has vital implications for survivors across the country who seek to utilize the housing protections under VAWA that they do not lose their housing because of violence committed against them.

The National Network to End Domestic Violence ("NNEDV") is a not-for-profit organization incorporated in the District of Columbia in 1994 to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence sexual assault Coalitions and their over 2,000 member programs,

NNEDV serves as the national voice of millions of women, children and men victimized by domestic violence. NNEDV was instrumental in promoting Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005 and 2013 and, working with federal, state and local policy makers and domestic violence advocates throughout the nation, NNEDV helps identify and promote policies and best practices to advance victim safety. Victims and their advocates identify housing as one of the most crucial elements to safety and well-being. NNEDV is deeply concerned about the ability of all individuals, and domestic violence victims in particular, to live safely in their homes.

The Sargent Shriver National Center on Poverty Law ("Shriver Center") is a national nonprofit legal and policy advocacy organization based in Chicago. The Shriver Center's housing unit operates the Safe Homes Initiative, which provides legal representation and policy advocacy to advance and protect the housing rights of survivors of violence. The Shriver Center housing unit drafted sections of the 2013 Reauthorization of VAWA and provides trainings to housing providers, lawyers, and domestic violence advocates on the laws that can protect survivors in housing, and regularly consults with advocates around the country about the housing rights of survivors of violence. The Shriver Center's Women's Law and Policy

Initiative also provides a broad array of legal and policy support to survivors of violence in all other aspects of their lives, including employment, education, public benefits, and access to the courts.

STATEMENT OF THE CASE AND THE FACTS

Amici adopt the statement of the case and the facts set forth in the briefs of Defendant-Appellant, Y.A.

SUMMARY OF ARGUMENT

In the prior proceedings, the Boston Housing Authority ("BHA") erroneously pursued and the Housing Court wrongly ordered eviction, despite Y.A.'s claim of VAWA's protections. Amici explain why Y.A. is entitled to relief from eviction under VAWA.

First, VAWA provides a defense to eviction by covered housing providers for nonpayment of rent, where the failure to pay rent directly results from physical, emotional, and economic abuse. Second, covered housing providers, like the BHA, are not permitted to require that a victim of domestic violence submit a restraining order, or any one form of documentation, in order to claim protection under VAWA. Third, in recognition of the chronic and cyclical nature of domestic violence, VAWA authorizes survivors¹ of abuse to invoke its

¹ For the purpose of this brief, amici uses both "victim" and "survivor" interchangeably when referring to the abused. Moreover, although this brief uses "she," "her," and "hers" pronouns for the survivor and assumes a male perpetrator, domestic violence and other forms of abuse can happen to people of any gender in any type of relationship.

protection multiple times if the abuse continues, including in circumstances where a survivor misses multiple payments as a result of ongoing violence. Finally, to the extent that Massachusetts state law provides fewer protections to victims of domestic violence whose housing is covered by VAWA, VAWA preempts state law and allows a victim of domestic violence to raise an affirmative defense to eviction at the motion to issue execution hearing.

ARGUMENT

I. VAWA PROVIDES A DEFENSE TO EVICTION FROM PUBLIC HOUSING FOR NONPAYMENT OF RENT WHERE THE FAILURE TO PAY RENT AND ARREARAGES WAS THE DIRECT RESULT OF PHYSICAL, EMOTIONAL, AND ECONOMIC ABUSE.

A. Economic abuse is part of a broad pattern of domestic violence defined by an abuser's assertion of coercive power and control.

Domestic violence is not comprised of discrete or isolated acts of physical violence, but rather is part of a broad pattern of power and control perpetrated by the abuser. As scholars have explained:

The broader description of battering relationships is 'premised on an understanding of coercive behavior and of power and control – including a continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation – rather than 'number of hits.'

E.M. Schneider, *Battered Women and Feminist Lawmaking* 65 (2000); see also Dutton, *Understanding Women's Responses*

to Domestic Violence: A Redefinition of Battered Woman Syndrome, 21 Hofstra L. Rev. 1191, 1204-1206 (1993).

Abusers frequently couple physical violence with psychological, emotional, and economic abuse in their attempts to gain control over their partners. Johnston & Subrahmanyam, CAMBA Legal Services, Inc., Denied! How Economic Abuse Perpetuates Homelessness for Domestic Violence Survivors 1 (2018). Economic abuse includes behaviors, implemented by one intimate partner against the other, that are designed to limit a partner's access to financial resources so as to control the abused partner and foster dependence on the abuser. Barzilay, Power in the Age of In/Equality: Economic Abuse, Masculinities, and the Long Road to Marriage Equality, 51 Akron L. Rev. 323, 329 (2017). Therefore, economic abuse compromises a survivor's financial self-sufficiency, erodes her ability to leave, and increases her vulnerability for future abuse. Johnston & Subrahmanyam, supra, at 10. Although economic abuse may occur without being accompanied by other forms of abuse, studies have shown that economic abuse is present in 78% to 99% of all abusive relationships. Johnston & Subrahmanyam, supra, at 1; Adams, Bybee, Greeson, & Sullivan, Development of the Scale of Economic Abuse, 14 Violence Against Women 563, 580 (2008).

Here, Y.A. experienced significant economic abuse at the hands of her partner. Joint R. App., at App. 82-

84. Y.A.'s partner frequently restricted her access to financial resources by taking away her bank card, providing an "allowance" to purchase basic needs, and monitoring the use of her money. Id. Her partner exploited and stole Y.A.'s financial resources by draining her bank account and demanding money from her. Id. The abuser frequently achieved these actions by using actual or threatened physical force when Y.A. refused to comply with his demands. Id. This ongoing violence reinforced Y.A.'s dependence on her partner, despite her multiple attempts to assert financial independence from him.

Upon leaving abusive relationships, survivors often discover that their abusers had taken out loans in their names, ruining their credit. Like Y.A., most find that they cannot afford to pay their bills upon leaving an abusive relationship, further damaging their credit. Sussman & Wee, Ctr. for Survivor Agency & Justice, Accounting for Survivors' Economic Security: An Atlas for Direct Service Providers 13-20 (2016). Given the critical role that credit scores play in securing necessities such as housing and employment, the aftermath of economic abuse can deal a devastating blow to a survivor's financial self-sufficiency. The financial fallout from economic abuse presents particular difficulties for survivors living in poverty, given the costs of relocating, finding new housing, and

lost time at work. Id. at 9; see also Adams, Bybee, Greeson, & Sullivan, supra, at 1361 (noting that intimate partner violence reduces the amount worked by a survivor by three months a year, three years after the abuse ended). Unsurprisingly, domestic violence is a leading cause of homelessness among women. Johnston & Subrahmanyam, supra, at 10.

B. Domestic violence forces the victim to engage in a pattern of strategic behavior to survive, minimize the abuse, and manage the abuser.

Domestic violence survivors frequently engage in strategic behaviors that appease the abuser in order to minimize and manage the abuse they experience. Often, these strategies enable survivors to endure and survive until they can fully disengage from their abusers. See, e.g., Davis, "The Strongest Women": Exploration of the Inner Resources of Abused Women, 12 Qual. Health. Res. 1248, 1255 (2002); Cavanagh, Understanding Women's Responses to Domestic Violence, 2 Qualitative Soc. Work 229, 231 (2003); Goodman, Dutton, Weinfurt, & Cook, The Intimate Partner Violence Strategies Index: Development and Application, 9 Violence Against Women, 163, 184 (2003). Survivors commonly use the tactics of appeasement and accommodation to cope with and manage the abuse. Dutton, supra, at 1202; see also H. Bowker,

Beating Wife-Beating 63-73 (1983); Cavanagh, supra, at 231; Goodman, Dutton, Weinfurt, & Cook, supra, at 163.

Complying with the abuser's demands are a key means of "keep[ing] the peace," thereby avoiding a possible violent or abusive episode. Dutton, supra, at 1227-1228. This description is consistent with Y.A.'s experience. Y.A.'s partner exercised coercive control by abusing her physically, verbally, emotionally, and financially. In addition to extreme physical abuse, the partner called her names and repeatedly told her that if she were allowed to manage money, she would lose it. B.H.A. v. Y.A., Joint R. App., at App. 82-84. Y.A. feared reporting the abuse because her partner had threatened to contact the Department of Children and Services and get her children taken away. Id. The partner financially abused Y.A. by taking her money, emptying her bank account, and giving her an "allowance." Id. This continuum of violence ensured that Y.A. would comply with her partner's ongoing demands.

C. The legal system has been slow to recognize the significant and long-term impact of economic abuse on survivors of domestic violence.

Despite the overwhelming prevalence of economic abuse, the U.S. legal system has not been sufficiently responsive in assisting survivors of economic and financial abuse. Conner, Financial Freedom: Women,

Money, and Domestic Abuse, 20 Wm. & Mary J. Women & L. 339, 363 (2014). In Y.A.'s case, the Housing Court's failure to examine the alleged domestic violence in its opinion underscores this point. B.H.A. v. Y.A., Appellant Br., at Add. 1, Apr. 25, 2018. Economic abuse is "rarely recognized as domestic violence by state criminal and civil laws because of the focus on physical assaults, and seldom falls neatly into the enumerated categories of abuse that provide legal protection." Barzilay, supra, at 355 (internal footnotes omitted). It is, therefore, not surprising, although unacceptable, that the Housing Court failed to appropriately consider the role that economic abuse played in Y.A.'s rental arrears. At least one guide for judges and court staff suggests that the judicial system should view domestic violence survivors' "economic insecurity as a direct threat to their safety," and that judges "should view these financial issues as significant obstacles to a victim's ability to participate in the criminal justice system." Wider Opportunities for Women, The Court's Guide to Safety and Economic Security for Victims of Violence Against Women 5 (2014), <https://iwpr.org/wp-content/uploads/2017/01/WOW-ESS-Courts-Sector-Guide.pdf>. Similarly, the BHA and the court below should have recognized the inextricable link between the economic abuse experienced by Y.A. and the resulting threat to her housing security.

D. VAWA protects survivors of economic abuse, acknowledging it as a form of domestic violence.

In 2005, Congress enacted VAWA's housing protections to ensure "that [] victims have meaningful access to the criminal justice system without jeopardizing [] housing." Pub. L. No. 109-162, § 41,402, 119 Stat. 2960, 3031 (2006). Congress also sought to ensure that "the status of being a victim of such a crime is not a reason for the denial of loss of housing." Id. § 41405, 119 Stat. 2960, 3035.

VAWA's reauthorization in 2013 ("VAWA 2013") built upon VAWA 2005's recognition that survivors cannot be denied or evicted from housing due to the acts of their abusers. In light of this recognition, VAWA 2013 created additional housing protections for survivors, such as providing for emergency transfers and covering sexual assault survivors. See, generally, 34 U.S.C. § 12491 (2018). VAWA 2013 also expanded its coverage to more federal housing assistance programs. Id. § 12491(a)(3).

VAWA 2013 protects domestic violence survivors who have experienced economic abuse, as evidenced by the many references to the effects of economic abuse within the legislative history. Senator Patrick Leahy, one of the co-sponsors of VAWA 2013, stated:

Economic insecurity is among the most formidable obstacles for survivors of domestic

and sexual violence. Abusers often retain their control through economic dependence, sabotaging a victim's credit history or her ability to work productively We must take additional steps to ensure the economic independence of victims.

The Increased Importance of the Violence Against Women Act in a Time of Economic Crisis: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 62 (2010) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary). The congressional record includes the testimonies of several domestic violence experts, one of which described economic abuse as "a central part of domestic violence," which can create "a massive barrier to a victim's ability to flee and eventually develop economic self-sufficiency." Id. at 16 (statement of Auburn L. Watersong, Economic Justice Specialist, Vermont Network Against Domestic and Sexual Violence).

In implementing VAWA 2013, the U.S. Department of Housing and Urban Development ("HUD") clarified that VAWA's anti-discrimination provision protects survivors against non-physical forms of domestic violence. HUD regulations prohibit housing providers from discriminating against survivors "on the basis or as a direct result of" domestic violence. 24 C.F.R. § 5.2005(b)(1) (2018). These protections consider circumstances where domestic violence includes an attack on the victim's financial well-being:

HUD interprets VAWA to prohibit covered housing providers from...terminating a tenant from participation in, or evicting a tenant from housing as a result of factors directly resulting from the domestic violence... Where an individual faces adverse economic factors, such as a poor credit or rental history, that result from being a victim of domestic violence... the individual cannot be denied assistance under a HUD program

Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, 81 Fed. Reg. 80,724, 80,729 (Nov. 16, 2016) (codified at 24 C.F.R Part 5). VAWA's safeguards also include protecting against eviction on the basis of "adverse factors" that are directly related to domestic violence. Id. at 80,728. An adverse factor "may be due to an underlying experience of domestic violence" and "may be present during much of an abusive relationship, or it may present itself only when a victim is attempting to leave, or has left, the abusive relationship." Dep't Housing and Urban Dev., Violence Against Women Reauthorization Act of 2013 Guidance, Notice PIH-2017-08 (HA), at 7. HUD lists "failure to pay rent" as an adverse factor, explaining that, "[d]epending on the circumstances, temporary failure to pay rent may be the direct result of domestic violence" when the abuse leads to "forcing the victim to turn their earnings over to the abuser." Id. at 8.

In sum, HUD, the agency charged with implementing VAWA, recognized that VAWA specifically protects

survivors from being denied assistance or evicted on the basis of a variety of downstream effects of abuse beyond physical and emotional injury.

E. VAWA aims to preserve a survivor's housing assistance whenever possible, especially when domestic violence leads to an eviction.

VAWA 2013's housing protections and HUD's implementing regulations clearly indicate a strong policy preference against taking housing assistance away from, or evicting, survivors because of circumstances arising out of the abuse committed against them. For example, in instances where the perpetrator is removed from the lease of a covered housing program, and the abuser is also the only person eligible for the housing program, housing providers must provide "any remaining tenant or resident an opportunity to establish eligibility for the covered housing program." 34 U.S.C. § 12491(b)(3)(B)(ii). This provision is designed so that, if possible, a survivor and her family can maintain housing assistance despite the violence. Additionally, in instances of a household (family) break-up in the Section 8 Housing Choice Voucher program, HUD regulations require the housing authority to "ensure that the victim retains assistance." 24 C.F.R. § 982.315(a)(2) (2018). Furthermore, in instances where the presence of the domestic violence survivor creates

an "actual and imminent threat" to others, HUD dictates that eviction or termination should be utilized "only when there are no other actions that could be taken to reduce or eliminate the threat." 24 C.F.R. § 5.2005(d)(3)-(d)(4).

Given VAWA's strong policy preference against evicting survivors because of circumstances related to the abuse committed against them, this Court should carefully scrutinize the BHA's decision to evict Y.A. for nonpayment. Y.A.'s inability to afford rent payments is a direct result of the physical, emotional, and financial abuse perpetrated against her. Accordingly, she is entitled to protections under VAWA.

II. UNDER VAWA, COVERED HOUSING PROVIDERS MAY NOT REQUIRE THAT DOMESTIC VIOLENCE VICTIMS SUBMIT ANY ONE FORM OF DOCUMENTATION - SUCH AS A RESTRAINING ORDER - TO DEMONSTRATE THAT THEY ARE ENTITLED TO PROTECTION.

A. The BHA violated VAWA by requiring Y.A. to obtain a restraining order before allowing her to remain in the apartment.

To allow survivors of domestic violence to claim protections under its provisions, VAWA provides victims with broad discretion to submit any of several types of documentation to show that they are entitled to protection. The BHA's requirement for Y.A. to obtain a restraining order before allowing her to remain in the apartment violates VAWA for four reasons. First, Y.A.

had the discretion to submit any one of several forms of documentation to show that she was entitled to protection under VAWA. Second, the BHA's requirement of a restraining order imposed a more demanding standard on Y.A., as a victim of domestic violence, than other tenants. Third, the BHA failed to take reasonable steps to avoid eviction by requiring Y.A. to obtain a restraining order. Finally, the requirement of a restraining order significantly increases the risk of imminent harm for survivors in conflict with the purposes of VAWA.

1. Y.A.'s verbal statements to the BHA, testimony before the Housing Court, VAWA self-certification form, and police report verifying domestic abuse clearly met the documentation requirements demonstrating that she was entitled to VAWA protections.

Contrary to the BHA's request, a covered housing provider cannot require that a tenant obtain a restraining order to show that she is entitled to protection. Rather, the statute explicitly states that a tenant may satisfy a housing provider's request by submitting any one of several types of documentation. A housing provider is not required to ask a survivor for documentation before granting VAWA protections. However, if the provider does request documentation, the provider must do so in writing, and the tenant has the discretion to submit this verification through a variety of forms.

34 U.S.C. §§ 12491(c)(1), 12491(c)(3); see also 24 C.F.R. § 5.2007(b)(1)(2018). The housing provider may apply VAWA protections based solely on the tenant's statement or other evidence. 34 U.S.C. § 12491(c)(3)(D); see also 24 C.F.R. § 5.2007(b)(1)(iv). Alternatively, the tenant may choose which one of the other specified forms of documentation set forth in the law that she will submit. 34 U.S.C. §§ 12491(c)(1), 12491(c)(3)(A)-(C); see also 24 C.F.R. § 5.2007(b)(1)(i)-(iii). Acceptable forms of documentation include: (1) a self-certification form; (2) a record of a law enforcement agency, court, or administrative agency; or (3) a third-party statement, signed by both the third party and domestic violence victim under penalty of perjury. 24 C.F.R. § 5.2007(b)(1)(i)-(iii). Importantly, "it is at the discretion of the tenant or applicant which one of the [] forms of documentation to submit." 24 C.F.R. § 5.2007(b)(1) (emphasis added); see also 81 Fed. Reg. 80,724, at 80,761, 80,763.

Here, Y.A. demonstrated that she was entitled to protection through her statements to the BHA, testimony before the Housing Court, VAWA self-certification form, and police report documenting abuse. In November 2017, Y.A. informed the BHA management that she "had finally ended an abusive relationship and asked for more time on [her] payment plan," prompting management to require that she obtain a restraining order to avoid losing her

apartment. B.H.A. v. Y.A., Joint R. App., at App. 83. Subsequently, during her hearing at the Housing Court, Y.A. testified under oath that she “was in an abuse [sic] relationship” and that her abuser “would take everything from me.”² Id. at App. 92. Moreover, Y.A. has since submitted to the BHA a VAWA self-certification form and police report verifying past physical abuse.

² Ms. Y.A., whose native language is Spanish, waived her right to an interpreter such that the hearing proceeded without the previously requested language assistance. Survivors of domestic violence who are limited English proficient (LEP) face the added language barrier to accessing safety. In a 2013 survey of service providers who work with immigrant survivors of domestic violence, sexual assault, and human trafficking, respondents reported “[h]indered access to public resources, such as housing, education and medical access due to lack of information in their [clients’] language.” Lee, Quinones, Ammar, & Orloff, *National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access*, 30 (Nat’l Immigrant Women’s Advocacy Project 2013). Qualified interpreters “ensure that limited English proficient ... individuals are able to access the same level of service as ... English speakers,” such that in order to ensure meaningful access to services, LEP survivors “must have access to trained and competent spoken ... interpreters.” Asian Pac. Inst. on Gender-Based Violence, *Resource Guide for Advocates & Attorneys on Interpretation Services for Domestic Violence, Sexual Assault, and Trafficking Victims*, 5 (2016), <https://s3.amazonaws.com/gbv-wp-uploads/wp-content/uploads/2017/07/19165514/InterpretationResourceGuide-API-GBV-2016.pdf>. Ms. Y.A. faced her hearing without an interpreter. We include this discussion in order for the Court to understand Ms. Y.A.’s overall circumstances, and the range of barriers faced by survivors like Ms. Y.A.

Notably, it is unclear from the record whether the BHA ever submitted a written request to prompt Y.A. to submit documentation, as required by VAWA. See 34 U.S.C. §§ 12491(c)(1), 12491(c)(3); see also 24 C.F.R. § 5.2007(b)(1). Moreover, HUD VAWA regulations provide Y.A. with the discretion to submit any of the acceptable forms of documentation, and certainly did not require her to meet the BHA's burdensome demand to obtain a restraining order. See 24 C.F.R. § 5.2007(b)(1); see also U.S. Dep't Housing and Urban Dev., Violence Against Women Reauthorization Act of 2013 Guidance, Notice PIH-2017-08 (HA), at 12 ("The [public housing agency] or owner is prohibited from requiring third-party documentation of victim status, except as outlined in Section 8.2(e) of this Notice.").

In any case, Y.A.'s verbal statements alone were more than sufficient to show that she was entitled to VAWA protections as a victim of domestic violence. See 34 U.S.C. § 12491(c)(3)(D); 24 C.F.R. § 5.2007(b)(1)(iv); see also Johnson v. Palumbo, 154 A.D.3d 231, 244 (N.Y. App. Div. 2017) (holding that "the [tenant]'s testimony at the informal hearing was sufficient to establish that she was entitled to the protections of the VAWA"). The BHA's mandate that she obtain a restraining order, therefore, violated the statutory and regulatory provisions of VAWA.

2. By requiring Y.A. to obtain a restraining order to avoid eviction, the BHA subjected Y.A. to a more demanding standard than other tenants in violation of VAWA.

In exercising its authority to evict a tenant for any breach of a lease not premised on an act of violence, a covered housing provider may not "subject an individual who is or has been a victim of domestic violence, dating violence, or stalking to a more demanding standard than other tenants in determining whether to evict or terminate." 34 U.S.C. § 12491(b)(3)(C)(ii). Amici recognize that the BHA appropriately provided Y.A. with multiple opportunities to repay past-due rent and arrears. The BHA's additional mandate that Y.A. seek and obtain a restraining order, however, imposed a separate and far more burdensome standard on Y.A. than other tenants – a standard that would not have been imposed but for Y.A.'s status as a domestic violence victim.

In an effort to address the devastating and far-reaching impact of domestic violence in its Commonwealth, Massachusetts enacted, and has continued to reform, Chapter 209A of its General Laws, which provides eligible domestic violence victims with the civil remedy of obtaining a restraining order against their abusers. G.L. c. 209A; see also Commonwealth v. Gordon, 407 Mass. 340, 346 (1990) (noting that restraining orders issued pursuant to Chapter 209A may

"afford abused individuals the opportunity to avoid further abuse and . . . provide them with assistance in structuring some of the basic aspects of their lives, such as economic support and custody of minor children, in accordance with their right not to be abused."). Chapter 209A reflects the Commonwealth's commitment to protecting the safety and well-being of domestic violence survivors and preventing future harm to its residents.

Like all civil remedies, however, Chapter 209A restraining orders require those seeking relief to complete the necessary judicial procedures and to meet the relevant legal standards set forth in the statute. See G.L. c. 209A, §§ 3, 4, 7. In accordance with Chapter 209A, a petitioner seeking a restraining order must first file a complaint with the court and appear before a judge to demonstrate that she faces a "substantial likelihood of immediate danger of abuse" in order to obtain a temporary order. Id. § 4. To obtain a one-year restraining order, the petitioner must return to the court for another hearing, where she again bears the burden of proof. Id. §§ 3, 4, 7. Ultimately, the court has the sole discretion to award or deny a restraining order to the petitioner.

By requiring a tenant to obtain a restraining order to avoid eviction, a housing provider imposes a significant and unreasonable burden on a tenant due to

her status as a victim of domestic violence and, therefore, violates the provisions of VAWA. VAWA's provisions make clear that a victim need only provide some form of documentation of her abuse, when the provider has made a written request; however, the BHA's requirement would have mandated that Y.A. pursue and obtain a civil legal remedy left at the discretion of the trial court - an additional burden imposed specifically because of Y.A.'s status as a domestic violence survivor. The requirement of a restraining order, therefore, subjected Y.A. to a more demanding standard than other tenants and violates VAWA.

3. The BHA failed to take reasonable steps to avoid eviction by requiring a restraining order.

To effectuate VAWA's purpose in promoting housing stability for domestic violence victims, housing providers "are encouraged to undertake whatever actions permissible and feasible under their respective programs to assist individuals residing in their units who are victims of domestic violence . . . to remain in their units . . . and for the covered housing provider to bear the costs of any transfer, where permissible." 24 C.F.R. § 5.2009(c)(2018). As such, a housing provider may evict a tenant otherwise protected by VAWA only if it "can demonstrate that an actual and imminent threat to other tenants or individuals employed at or providing service

to the property would be present if . . . the tenant is not evicted." 34 U.S.C. § 12491(b)(3)(C)(iii); see also 24 C.F.R. § 5.2005(d)(3). An "actual and imminent threat" consists of "a physical danger that is real, would occur within an immediate time frame, and could result in death or serious bodily harm." 24 C.F.R. § 5.2003 (2018).

VAWA regulations make clear that eviction of tenants otherwise protected by VAWA must come as a last resort. Any eviction, pursued through the "actual and imminent threat" exception, "should be utilized by a covered housing provider only when there are no other actions that could be taken to reduce or eliminate the threat" 24 C.F.R. § 5.2005(d)(4). Prior to evicting a tenant protected by VAWA, a housing provider carries the burden of pursuing all other alternatives, "including, but not limited to, transferring the victim to a different unit, barring the perpetrator from the property, contacting law enforcement to increase police presence or develop other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat." Id. Importantly, such actions "predicated on public safety cannot be based on stereotypes, but must be tailored to particularized concerns about individual residents." Id. (emphasis added).

As an initial matter, it is unclear whether the BHA's requirement for a restraining order was related to any concern with a potential threat to others. Assuming that it was, however, the BHA nonetheless failed to take reasonable steps before evicting Y.A. from her apartment. The BHA carried the burden of barring the perpetrator from the property through its own measures, such as a No Trespass Order, and improperly shifted its burden to Y.A. when it mandated that Y.A. obtain a restraining order. Moreover, the BHA failed to consider the particularized concerns of Y.A., as required by VAWA, and, instead, relied on a blanket assumption that "all women should turn to the legal system for assistance in leaving." Goodmark, *The Legal Response to Domestic Violence: Problems and Possibilities: Law is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 St. Louis U. Pub. L. Rev. 7, 21 (2004). The BHA's failure to take reasonable steps before evicting Y.A. constitutes a clear violation of VAWA's provisions.

4. Requiring a restraining order to avoid eviction places victims of domestic violence at increased risk of harm by failing to account for their individual safety considerations.

While restraining orders serve as an effective safety measure for some domestic violence victims, restraining orders are hardly a guarantee against future harm. In

assessing whether a restraining order is appropriate for a domestic violence survivor, it is necessary to take into consideration the particular concerns and needs of the individual. See P. Quirion, *Massachusetts Divorce Law Practice Manual: Representing Victims of Domestic Violence*, MDLPM MA-CLE 25-1, § 25.3 (3d ed. 2016) (“[I]t is advisable for attorneys for both the plaintiff and defendant to explore the circumstances related to entry of a restraining order as part of an initial case evaluation and to take seriously the potential for future violence and harassment.”). Requiring a tenant to obtain a restraining order to avoid eviction disregards the reality that each and every victim of domestic violence faces unique concerns related to her safety and well-being.

Moreover, many victims may actually face an increased risk of imminent harm as a direct result of obtaining or seeking enforcement of restraining orders. Indeed, victims of domestic violence face the greatest risk of serious injury or death when they leave or attempt to leave an abusive relationship, particularly during moments of legal intervention. Goodmark, supra, 24 (“The very act of seeking legal assistance in a restraining order or other type of case can endanger the battered women.”); see also Champagne v. Champagne, 429 Mass. 324, 327 n.2 (1999) (“In fact, authorities on domestic violence suggest there is an increased risk of harm on

separation or divorce of the parties.”). Indeed, Y.A. reported that she “ha[d] known someone who had a restraining order and still was killed by her abuser” B.H.A. v. Y.A., Joint R. App., at App. 84. By requiring a restraining order for a tenant to avoid eviction, housing providers may inadvertently place victims of domestic violence at greater risk of imminent harm.

Accordingly, in light of the unreasonable burden and increased risk of harm imposed by requiring a restraining order, this Court should find that the BHA violated VAWA by requiring Y.A. to obtain a restraining order to avoid eviction.

III. IN RECOGNITION OF THE CHRONIC AND CYCLICAL NATURE OF DOMESTIC VIOLENCE, VAWA AUTHORIZES A VICTIM TO INVOKE ITS PROTECTIONS ON MULTIPLE OCCASIONS AS LONG AS THE NEGATIVE IMPACTS OF THE ABUSE CONTINUE.

The chronic and complex nature of domestic violence requires that VAWA protections apply in accordance with an individual survivor’s circumstances – particularly in cases of repeated or ongoing abuse. In the preamble to its VAWA 2013 regulations, HUD acknowledged the chronic nature of abuse and confirmed that survivors can invoke VAWA protections on multiple occasions:

HUD agrees that a tenant or family may invoke VAWA protections on more than one occasion and cannot be subjected to additional conditions

that adversely affect their tenancy because they have invoked VAWA protections. Individuals and families may be subject to abuse or violence on multiple occasions and it would be contrary to the intent of VAWA to say that the protections no longer apply after a certain point, even if violence or abuse continues, or the victim and the victim's family members are still in danger.

81 Fed. Reg. 80,724, at 80,731 (emphasis added). Accordingly, to fulfill VAWA's intent, a housing provider must allow a survivor to continue to receive VAWA protections as long as the survivor is still experiencing violence. VAWA's protections, therefore, apply in circumstances such as Y.A.'s case, where a victim misses more than one rental payment due to ongoing abuse.

HUD's instruction directly responds to a profound misunderstanding of domestic violence by people who often wonder why a victim wouldn't just leave their abuser. In addition to the risk of enhanced violence, victims often face severe financial or legal consequences for attempting to leave abusive relationships. As such, many survivors are forced to continue to stay with or return to their abusive partners, or else face homelessness and other serious risks. Nat'l Coal. Against Domestic Violence, Facts About Domestic Violence and Economic Abuse (2015), https://www.speakcdn.com/assets/2497/domestic_violence_and_economic_abuse_ncadv.pdf. Studies have shown that

a victim's lack of financial resources is one of the major reasons why women in abusive relationships remain with or return to their abusers, risking their lives and possibly their children's lives. Reif & Krisher, *Subsidized Housing and the Unique Needs of Domestic Violence Victims*, 34 *Clearinghouse Rev.* 20, 21-22 (2002).

Like many victims, Y.A.'s abuser took complete economic control, using violence and coercion to capture possession of Y.A.'s bank account and financial resources. When Y.A. would ask for her bank card, her abuser would become so abusive that she would fear for her safety. B.H.A. v. Y.A., Appellant Br., at 3-4. The severe economic and physical abuse she faced was also coupled with threats to contact child welfare to remove her children. Id. at 4.

Y.A.'s experiences are well-known features of domestic violence, captured by such tools as the Power and Control Wheel, which demonstrates common abuse tactics such as intimidation, coercion, and threats; using male privilege; economic abuse; using children; minimizing; and emotional abuse. *Domestic Abuse Intervention Programs*, Power and Control Wheel, <https://www.theduluthmodel.org/wheels/>. Furthermore, when a victim attempts to leave the abuser, the abuse often escalates. Women are nearly four times more likely to be killed shortly after leaving their partners,

making it the most dangerous time period for victims. Campbell, et al., Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study, 93 Am. J. Pub. Health 1089, 1091 (2003). Faced with the real possibility of being killed, many choose to stay as a survival tactic while they figure out a way to leave safely. In order to leave safely, a victim needs to have a place to go, to have money to support herself independently, and to be able to cut all ties with the abuser. Otherwise, she will continue to be under the control of the abuser and is at risk of being killed. All of these considerations also contribute to why domestic violence often goes unreported. While it is estimated that over 10 million people experience domestic violence each year, most cases of domestic violence are never reported to the police. Nat'l Coal. Against Domestic Violence, National Domestic Violence Fact Sheet, https://www.speakcdn.com/assets/2497/domestic_violence2.pdf; I.H. Frieze & A. Browne, *Violence in Marriage*, in *Family Violence* (L. Ohlin & M. Tonry eds., 1989).

Y.A.'s testimony recounting her relationship shows a pattern of escalating violence whenever she attempted to take back control of her finances or leave her partner. B.H.A. v. Y.A., Appellant Br., at 3-4. When Y.A. tried to leave the house in October of 2017, her abuser "started punching her to prevent her from leaving

and choking her." Id. at 5. In December of 2017, when Y.A. refused to allow her abuser back into the home, "he grabbed her and hit her." Id. at 6-7. Finally, Y.A. reported that in January of 2018, when she refused to reconcile with her abuser, another violent incident ensued, and her abuser "pulled her by her arm into the other room, grabbed her by the neck and broke her phone." Id. at 9.

The reality that abuse is cyclical and even continues or escalates after a victim attempts to leave means that housing issues related to the domestic violence can persist over time. If domestic violence victims like Y.A. are unable to invoke VAWA on more than one occasion, housing authorities like BHA could issue eviction notices based on repeated domestic violence, thereby limiting VAWA's protections simply because the abuser chose to continue to commit violence.

Research also shows that abusers commonly sabotage a victim's economic stability and isolate them from their family and friends. Reif & Krisher, supra, at 21-22. For example, many victims face the loss of their housing due to the calculated acts of their abusers whose intent is to render their victims homeless and dependent and forced to return to them. See, e.g., Levin, McKean, & Raphael, Ctr. For Impact Research, Pathways to and From Homelessness: Women and Children in Chicago Shelters 15 (2004), (finding that for a substantial

portion of women surveyed in Chicago shelters, housing arrangements were destroyed due to intimate partner violence).

As in Y.A.'s case, amici often see abusers who know that their conduct, including control of income, prevents the victim from paying rent and household bills and jeopardizes a victim's housing. In amici's experience, abusers are equally aware of the importance of affordable housing for their victims and the serious consequences if it is lost. They then use the threat of loss of housing assistance to manipulate their victims. See, e.g., Floyd v. Hous. Auth. of Cook Cnty., No. 12 CH 14563, 2013 WL 753240 (Ill. Cir. Ct. Feb. 27, 2013) (reversing the hearing officer's decision terminating the victim's Housing Choice Voucher after finding, inter alia, that abuser voluntarily and purposefully provided information to the housing authority supporting his claim that he lived with her, seemingly with the intention of getting the victim terminated from the program). In January of 2018, Y.A.'s abuser acknowledged his culpability in placing her housing at risk when he returned to her home to apologize and told her he would help her keep her apartment. B.H.A. v. Y.A., Appellant Br., at 9.

For these reasons, the BHA cannot limit the protections and remedies available under VAWA based on the number of times that Y.A. sought relief. HUD has

made clear in its comments in the Final Rule that there is no numerical limit to how many times VAWA may apply to protect the housing of a tenant or household.

From amici's experience, survivors too often face frustration, hostility, or dismissive attitudes if they need to invoke VAWA protection more than once, as Y.A. experienced with the BHA. Yet, VAWA provides no such limitation. HUD expressly recognized the critical need to ensure survivors can invoke VAWA multiple times because to do otherwise would be contrary to VAWA's intent to keep victims safe from harm.

IV. THIS COURT MUST FIND THAT EITHER MASSACHUSETTS STATE LAW IS CONSISTENT WITH VAWA AND PROTECTS THE HOUSING OF DOMESTIC VIOLENCE SURVIVORS, OR THAT VAWA PREEMPTS ANY STATE LAW THAT PROVIDES FEWER PROTECTIONS TO DOMESTIC VIOLENCE VICTIMS LIVING IN FEDERALLY ASSISTED HOUSING.

Through VAWA, Congress expressly prohibited federally assisted housing providers from evicting domestic violence survivors due to the actions of their abusers. See 34 U.S.C. § 12491 (2018) (b); 24 C.F.R. § 5.2005 (b). Massachusetts law, therefore, must allow for victims of domestic violence to assert a defense to eviction in accordance with VAWA. To the extent that Massachusetts law bars survivors from presenting an affirmative defense to eviction under VAWA, VAWA preempts state law.

As an initial matter, G.L. c. 239, § 10 provides that:

[W]here there is an agreement for judgment that grants the tenant a right to reinstate the tenancy, no execution shall issue prior to the expiration of the period of such stay or stays or such reinstate period unless . . . the court after a hearing shall determine that the tenant or occupant is in substantial violation of a material term or condition of the stay or a material term of the agreement for judgment.

Massachusetts state law, however, does not foreclose the possibility that tenants may raise an affirmative defense to eviction under VAWA.

If this Court finds that G.L. c. 239, § 10 does not allow Y.A. to bring such a defense, however, VAWA preempts Massachusetts state law. The Supremacy Clause of the U.S. Constitution prohibits enforcement of state and local laws that are inconsistent with federal law. U.S. Const. art. VI, cl. 2. Where a state or local law, such as G.L. c. 239, § 10, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it will be preempted by federal law. Michigan Cannery & Freezers Ass'n v. Ag. Marketing & Bargaining Bd., 467 U.S. 461, 478 (1984)) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). As a federally funded housing provider, the BHA is governed by extensive federal statutes and HUD regulations. This governance includes what steps a housing authority, like

the BHA, takes when seeking to terminate a tenant's housing assistance, including those provisions of VAWA that prohibit the eviction of domestic violence victims for the actions of their abusers.

In 2005, in response to the growing national crisis of housing providers evicting and revictimizing domestic violence victims for the acts of their abusers, Congress amended VAWA to specifically prevent such evictions. Pub. L. No. 109-162, § 41402, 119 Stat. 2960, 3041-49 (2006). In testimony before Congress regarding the VAWA 2005 Reauthorization and the need for housing protections for survivors, then-executive director of the National Network to End Domestic Violence Lynn Rosenthal explained that "[m]any victims of domestic violence have been evicted or denied housing due to the crimes committed against them or because of their abusers' actions." Testimony before the S. Committee on the Judiciary on the Violence against Women Act of 2005, 109th Cong. 14 (2005) (statement of Lynn Rosenthal, Executive Director, National Network to End Domestic Violence).

Congress addressed these concerns by incorporating many findings on the subject in VAWA 2005, including identifying: "a strong link between domestic violence and homelessness," and the fact that women "are being discriminated against, denied access to, and even evicted from public and subsidized housing because of

their status as victims of domestic violence." Pub. L. No. 109-162, § 41401(1), §41401(3). Based on these findings, Title VI of VAWA 2005 expressly intended to ensure that "victims have meaningful access to the criminal justice system without jeopardizing . . . [their] housing" and further ensure that "the status of being a victim of such a crime is not a reason for the denial or loss of housing." Id. §§ 41405(a), 41402. The 2013 Reauthorization of VAWA built upon this recognition that victims should not be evicted from housing due to the acts of their abusers and provided additional housing protections for victims of domestic violence, such as an opportunity to receive emergency transfers to safe housing and applying VAWA's coverage to more federal housing programs. See, generally, 34 U.S.C. § 12491, et seq.

To achieve this goal of ensuring survivors of domestic violence do not lose their housing, VAWA makes expressly clear that other laws providing less protections to survivors will be preempted by VAWA:

Nothing in this subsection shall be construed to supersede any provision of any Federal, State or local law that provides greater protection than this subsection for victims of domestic violence. . . .

34 U.S.C. § 12491(c)(8) (emphasis added).

Thus, Congress made clear that VAWA provides protections for survivors of domestic violence that

cannot be ignored in the face of state laws that provide fewer or no protection for survivors. This Court, therefore, must find either that G.L. c. 239, § 10 permits survivors to bring an affirmative defense to eviction under VAWA, or that G.L. c. 239, § 10 is preempted by VAWA.

CONCLUSION

Amici respectfully submit that this Court vacate the ruling of the Housing Court and deny the BHA's Motion to Issue Execution, and allow Y.A. an opportunity to cure the rental arrears and continue to remain in her home.

Respectfully submitted,

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Mass. R. A. P. 16(k) Certification

I, Ruth a. Bourquin, hereby certify that the foregoing brief complies with the rules of court that apply to the filing of appellate briefs, including Rules 16 and 20.

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Certificate of Service

I, Ruth A. Bourquin, hereby certify that on this 9th day of January, 2019, I caused to be served by U.S. mail, first-class postage prepaid copies of this Corrected Brief of Amici Curiae the American Civil Liberties Union et al on:

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No. SJC-12623

BOSTON HOUSING AUTHORITY,
PLAINTIFF-APPELLEE,
v.

Y.A.,
DEFENDANT-APPELLANT.

ON APPEAL FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES
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