

2018

CIVIL RIGHTS/ANTI-DISCRIMINATION—HOW THE MASSACHUSETTS LEAD POISONING PREVENTION AND CONTROL ACT CODIFIES SYSTEMIC HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN IN VIOLATION OF THE FEDERAL FAIR HOUSING ACT

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Recommended Citation

Meris L. Bergquist, *CIVIL RIGHTS/ANTI-DISCRIMINATION—HOW THE MASSACHUSETTS LEAD POISONING PREVENTION AND CONTROL ACT CODIFIES SYSTEMIC HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN IN VIOLATION OF THE FEDERAL FAIR HOUSING ACT*, 40 W. New Eng. L. Rev. 1 (2018), <http://digitalcommons.law.wne.edu/lawreview/vol40/iss1/1>

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CIVIL RIGHTS/ANTI-DISCRIMINATION—HOW THE
MASSACHUSETTS LEAD POISONING PREVENTION AND
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VIOLATION OF THE FEDERAL FAIR HOUSING ACT

*Meris L. Bergquist**

This Article asserts that the Massachusetts Lead Poisoning Prevention and Control Act violates the federal Fair Housing Act (FHA) by discriminating against families with children under age six. The Massachusetts Lead Law was hailed as a ground-breaking effort to prevent childhood lead poisoning when it was enacted in 1971. However, because it requires landlords to incur the costs of lead abatement only when a child under age six resides in a dwelling, it has created a profoundly discriminatory rental housing market for these families.

Part I of this Article discusses the scope of the problem for families with children under age six and provides an overview of the Massachusetts Lead Law. Part II advances the argument that the Massachusetts Lead Law violates the FHA. Part III explores the problems of housing instability and homelessness caused by housing discrimination against families with young children. The Conclusion recommends that the legislature amend the Massachusetts Lead Law to avoid discriminating against families with children under age six for three reasons: (1) to eliminate the harm of systemic discrimination; (2) to fully comply with the FHA; and (3) to achieve the original goal of the statute—to end childhood lead poisoning through a housing approach that requires property owners to abate lead hazards.

I. SYSTEMIC HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN UNDER AGE SIX: AN UNINTENDED CONSEQUENCE OF THE MASSACHUSETTS LEAD POISONING PREVENTION AND CONTROL ACT

A. *Catch-22 and the Massachusetts Lead Poisoning Prevention and Control Act*

Unfortunately, all-too-many Massachusetts families with children under age six are caught in a frustrating catch-22 when they seek rental housing.¹ This problem is embedded in the framework of the Massachusetts Lead Law.² The text of the statute plainly prohibits housing discrimination against families with children under age six.³ However, because the statute imposes the costs of lead abatement on property owners *only* when a child under age six resides in the unit,⁴ the

* Meris Bergquist is the Executive Director of the Massachusetts Fair Housing Center, B.A., Hunter College, J.D., Temple University School of Law. This article is dedicated to the many families with young children, who have struggled to find rental housing in an intensely unfair and discriminatory housing market. The author especially thanks Jacob and Theresa for sharing their experience in the hope it would make a difference. Finally, the author thanks Geoff Walsh for his ongoing support and encouragement.

1. The definition of catch-22:

1: a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule the show-business

catch-22—no work unless you have an agent, no agent unless you’ve worked—
Mary Murphy

also: the circumstance or rule that denies a solution

2 a: an illogical, unreasonable, or senseless situation

b: a measure or policy whose effect is the opposite of what was intended

c: a situation presenting two equally undesirable alternatives

3: a hidden difficulty or means of entrapment: CATCH

Catch 22, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/catch-22> [<https://perma.cc/QG9W-8JUV>].

2. In 1971, Massachusetts was the first state to pass comprehensive legislation aimed at preventing childhood lead poisoning. See Rafael Mares, *Enforcement of the Massachusetts Lead Law and Its Effect on Rental Prices and Abandonment*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 343, 343 (2003). To accomplish this goal, the new law used a housing approach and required property owners to engage in lead abatement efforts whenever a child under six resided in a dwelling. See also Amy E. Souchuns, *Old Paint, New Laws: Achieving Effective Compliance with the Residential Lead-Based Paint Hazard Reduction Act*, 47 CATH. U. L. REV. 1411, 1427–30 (1998). However, since the trigger for mandatory lead abatement under the statute is the presence of a child under age six in the dwelling, it “invites discrimination against children.” Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 427 (1997).

3. MASS. GEN. LAWS ch. 111, § 199A (2017).

4. MASS. GEN. LAWS ch. 111, § 197 (2017).

statute produces the very housing discrimination it prohibits. The financial incentive for landlords to avoid the costs of mandatory lead abatement by denying rental housing to families with children under age six is irresistible. As a result, these families are never on an equal footing with other similarly situated applicants for most of the rental housing built before 1978.

The pervasive nature of this systemic discrimination and its adverse consequences for families with children under age six has been well documented by government agencies,⁵ legal scholars,⁶ newspaper reporters,⁷ and others.⁸ The enormity of the problem cannot be

5. See LEAD POISONING TASK FORCE, MASS. ATT'Y GEN., REPORT OF THE ATTORNEY GENERAL'S LEAD POISONING TASK FORCE 5 (1992), <http://archives.lib.state.ma.us/bitstream/handle/2452/201755/ocm26883372.pdf?sequence=1> [<https://perma.cc/WJ4Z-RPFK>] (“The courts and other law enforcement personnel must also be aware of and work to prevent the increasingly common discrimination against families with children by property owners who do not want to delead rental units.”). More recently, the Massachusetts Department of Housing and Community Development identified lead paint as negatively affecting the availability of housing for families with children “despite landlord obligations under state law.” DEP’T OF HOUS. & CMTY. DEV., ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 255 (2014), <http://www.mass.gov/hed/docs/dhcd/hd/fair/2013analysis.pdf> [<https://perma.cc/Q3P3-SGKW>].

6. See Mares, *supra* note 2, at 357 n.101; Rechtschaffen, *supra* note 2, at 425, 427, 431 (when “the statutory trigger for mandatory [lead] controls [is] the presence in a dwelling of children under six, [there is] too much potential for rental discrimination against families with children, something that has in fact occurred in Massachusetts.”); Souchuns, *supra* note 2, at 1441 (“The [Massachusetts Lead Law] is applicable only to property where children under the age of six reside. As a result, this provision may prompt lessors to discriminate against families with small children due to the imposition of additional requirements, an effect already seen in Massachusetts.”); William Berman et al., *Lingering Lead: Strategies for Eliminating Familial Status Discrimination Due to Lead Paint*, SUFFOLK U. L. SCH. (2013), <http://www.suffolk.edu/documents/Law%20Documents/LingeringLead.pdf> [<https://perma.cc/VG94-VZ6Y>].

7. See Kathleen Burge, *Lead Law Fallout: Lead Paint Poisoning is Down, but Families Face Another Harship [sic] Landlords Don't Want Them*, BOS. GLOBE, Mar. 18, 2007, 2007 WLNR 5368452; Tina Cassidy, *New Lead Paint Law Slow to Create Impact Lack of Publicity Leaves Confusion*, BOS. GLOBE, Oct. 7, 1995, 1995 WLNR 2099283; Jon Gorey, *Families Need Not Apply People with Young Children Face 'Rampant' Discrimination in Apartment Search*, BOS. GLOBE, June 25, 2017, 2017 WLNR 19572322 (quoting Jamie Langowski, Assistant Director of the Housing Discrimination Testing Program at Suffolk Law School; “There is rampant illegal discrimination occurring.”); see also Jack Flynn, *Springfield Landlord Fined \$43,500 After Losing Housing Discrimination Lawsuit*, MASSLIVE (Oct. 31, 2017), http://www.masslive.com/news/index.ssf/2017/10/springfield_landlord_fined_400.htm.

8. PIONEER VALLEY PLANNING COMM'N, PIONEER VALLEY REGIONAL HOUSING PLAN 151 (2014), <http://www.pvpc.org/sites/default/files/PV%20Housing%20Plan.pdf> [<https://perma.cc/N2LY-2KGG>] (“Cost barriers for abatement of lead-based paint can lead to circumvention of lead laws by owners. . . . Housing discrimination on the basis of familial status is very prevalent in the Commonwealth because of lead-based hazards in homes coupled with the lack of knowledge and understanding of lead paint laws by property

overstated. “Massachusetts has the fourth oldest housing stock in the country, with approximately [seventy-one percent] of housing built before 1978—the year lead was banned in residential paint.”⁹ In Massachusetts, the problem of lead paint in housing may affect up to 1.2 million housing units¹⁰ and it is estimated that only ten percent of homes likely to have lead paint hazards have undergone deleading activity.¹¹ If ninety percent of 1.2 million housing units in Massachusetts have lead paint and housing discrimination against families with children under age six is rampant, it is almost impossible for these families to secure rental housing.

B. *Families with Children Under Age Six Struggle to Find Housing in an Intensely Discriminatory Rental Housing Market*

To overcome pervasive housing discrimination, families with children under age six have to engage in extended housing searches, beg, offer to pay more, or give up their right to live in a lead-safe environment.

The story of Jacob and Theresa highlights the constellation of problems confronting families with children under age six, who are trying to find rental housing in Massachusetts. In November 2015, Jacob and Theresa decided to move back to Western Massachusetts with their two-year-old son.¹² They were returning from Guatemala, where Jacob had been working as a Fulbright Fellow. The family was eager to find a place to live because Theresa was pregnant with their second child. They were qualified applicants, with steady income, good credit, and impeccable landlord references. Based on past experience—before they had a child—they assumed they would easily find a rental. They looked for apartments on Craigslist and through the University of Massachusetts. Theresa estimates that they made at least one hundred calls and sent countless emails during their search, but were only invited to see about a dozen units. The couple quickly learned that landlords, who initially seemed enthusiastic about renting to them, changed their

managers.”).

9. MASS. DEP’T OF PUB. HEALTH, DATA BRIEF: CHILDHOOD LEAD EXPOSURE IN MASSACHUSETTS (2016), <http://www.mass.gov/eohhs/docs/dph/environmental/lead/lead-data-brief-june-2016.pdf> [<https://perma.cc/3B7T-K6Q7>].

10. See also David Abel, *Shrinking Safety Net Meets Wider Toxic Risk U.S. Preparing to Cut Aid for Lead Poisoning Prevention Efforts*, BOS. GLOBE, Dec. 5, 2011, 2011 WLNR 25119151.

11. See MASS. DEP’T OF PUB. HEALTH, *supra* note 9.

12. Jacob and Theresa are former clients of the Massachusetts Fair Housing Center.

tone when the couple mentioned they had a two-year-old child. These landlords, in various ways, suggested the apartments might not be “a good fit for them,” and abruptly terminated the calls after vaguely promising “to get back to them,” which they never did.

At the end of January 2016, Theresa was seven months pregnant, and the family was beginning to lose all hope of finding a rental. At that time, they found an older home in Florence, Massachusetts, and a landlord who was willing to rent to them. They signed a lease and moved their belongings in on March 1, 2016. Shortly thereafter—when the landlord was preparing to do some repairs to the apartment—the couple asked if they should be concerned about lead paint. The landlord completely shut down and told them it was not going to work. Despite their lease, the landlord notified them in writing that they could no longer be on the property.

As the family was unable to find a long-term rental, they looked into short-term rentals. After finding there were no short-term rentals on the market, they were forced to move to an Airbnb unit, as a temporary solution.¹³ Jacob, who had a full-time job, felt like he had a second full-time job trying to find rental housing before the birth of his second child. He scoured Craigslist and began considering the rentals at the bottom of the rental market, which were not family-friendly. He changed the way he interacted with landlords. He left generic messages and did not disclose his familial status.

When Jacob eventually managed to get an invitation to look at an apartment in Northampton, he went to the showing by himself, because he was afraid to reveal he had a child. He met the landlord, toured the apartment, and knew immediately that it would be a good home for his family. He braced himself when the landlord asked who would be living in the apartment. He told her it would be for his family, his wife and their two-year old son. She told him that sounded fine, the apartment had been delead and was available to families with children. Finally, after four months, numerous emails, a hundred phone calls, surviving one illegal eviction, and having to move into and out of a temporary Airbnb unit, Jacob and Theresa moved into a home—three weeks before Theresa gave birth to their second child.

This family’s story shows the devastating effects of the housing discrimination embedded in the Massachusetts Lead Law. The travails

13. Airbnb is a service that allows property owners to list spare rooms or apartments for rent by temporary guests. See *Local Destinations for a Global Community*, AIRBNB <https://www.airbnb.com/how-it-works> [<https://perma.cc/Q752-74UU>].

of other families with children under age six have been reported in the *Boston Globe* since the mid-nineties. In the first of these profiles, a professional couple was seeking a larger apartment following the birth of their first child.¹⁴ The couple's experience was humiliating. The couple reported that once landlords found out they had a child, "they treated us like we had a disease."¹⁵ They had to resort to begging and offering to pay a higher rent.¹⁶ When they finally found a landlord who would rent to them, he required them to sign a document saying they would not force him to delead—a blatantly illegal practice.¹⁷ In another personal story of discrimination, published by the *Boston Globe* in 2007, the reporter recounted her own difficult experience trying to find a rental with a child under age six.¹⁸

More recently, in 2017, the *Boston Globe* addressed the topic again in an article entitled *Families Need Not Apply*. This article reported on the almost impossible housing search of Kara Olivere, a special education teacher with a one-year-old son.¹⁹ Ms. Olivere, who was looking for housing in the Boston area, could not find any landlords, or real estate agents, who were willing to work with her after they learned she had a one-year-old.²⁰ It took her nine months to find landlords who would rent to her and her child.²¹ In this case, the landlords had delead the unit before putting it on the market "for their own piece [sic] of mind."²² This was the only delead unit that Ms. Olivere found during her nine-month housing search.²³ For her, finding this unit after a nine-month search was "something of a miracle."²⁴

These first-hand accounts demonstrate how difficult it is for families

14. Cassidy, *supra* note 7.

15. *Id.*

16. *Id.*

17. *Id.*

18. See Burge, *supra* note 7 (quoting attorney Raphael Mares's observation that the law "really puts significant pressure on landlords to discriminate.").

19. Gorey, *supra* note 7.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* This matches the experience of Theresa and Jacob and illustrates that the only rentals available to families with children under age six, on equal terms with all other applicants, are the ten percent of pre-1978 units that are in compliance with the Massachusetts Lead Law, or units built after 1978. See MASS. DEP'T OF PUB. HEALTH, *supra* note 9 (approximately ten percent of homes likely to have lead paint have undergone deleading activity).

24. Gorey, *supra* note 7.

with children under age six to access rental housing because of the powerful incentive to discriminate embedded in the Massachusetts Lead Law. Landlords easily and routinely avoid the financial costs of lead abatement by refusing to deal with applicants with children under age six. When there are multiple applicants for rental housing, it is easy for a landlord to shuffle the applications of families with children under age six to the bottom of the stack and choose a different applicant. As a direct result of the Massachusetts Lead Law, *most pre-1978 rental housing is unavailable* to families with children under age six.

C. *The Massachusetts Lead Poisoning Prevention and Control Act*

Massachusetts led the nation in 1971 when it passed legislation to prevent childhood lead poisoning, using a housing approach. Lead poisoning has devastating and irreparable consequences for young children. Although the law has reduced childhood lead poisoning, it has done little to reduce children's exposure to lead-based paint, which remains in approximately ninety percent of the state's pre-1978 housing.

When the legislature passed the Lead Poisoning Prevention Act in 1971, Massachusetts was the first state in the nation to enact a comprehensive law to prevent childhood lead poisoning caused by ingesting or inhaling lead-based household paint.²⁵ The goal of this pioneering statute was to end childhood lead poisoning through primary prevention.²⁶ Primary prevention involves a housing approach and focuses on the removal of lead-based paint hazards from housing.²⁷ This is in contrast to secondary prevention strategies, which rely on screening and intervention *after* there is a finding of childhood lead poisoning.²⁸

25. Mares, *supra* note 2, at 343, 359 n.1; *see also* Souchuns, *supra* note 2, at 1439 (“The current Massachusetts provisions arguably create the nation’s most comprehensive program for the eradication of childhood lead poisoning.”).

26. *See* Rechtschaffen, *supra* note 2, at 422 (noting that Massachusetts and Maryland are among the very few states that have adopted comprehensive primary prevention lead-based paint statutes).

27. *See* Mares, *supra* note 2, at 343; *see also* Souchuns, *supra* note 2, at 1449, n.45 (explaining that the housing approach seeks to eliminate lead poisoning through inspection, testing, and abatement prior to any reports of illness. This approach is considered to be better than the health approach because it is directed at preventing lead poisoning.).

28. *Id.*; *see also* Rechtschaffen, *supra* note 2, at 388.
In almost all jurisdictions, the existing state and local laws focus on responding to identified cases of lead-poisoned children—addressing the problem *after* children have been poisoned, rather than *preventing* hazards from occurring in the first place. This is particularly undesirable because most of the health problems caused by lead poisoning are untreatable.

Rechtschaffen *supra* note 2, at 388.

Experts have noted that childhood lead poisoning is a *preventable* disease.²⁹

Preventing lead exposure is of critical concern for all children under age six for two reasons: first, they are more vulnerable to its toxic effects, which can be life-altering; and second, they are more likely to ingest or inhale lead paint.³⁰ Lead paint is universally regarded as a dangerous neurotoxin that can cause irreparable damage to a child's brain and nervous system; slowed growth and development; learning and behavioral problems (e.g., reduced IQ, ADHD, delinquency, and criminal behavior); and hearing and speech problems.³¹ There is no known safe blood-lead level.³²

To prevent childhood lead poisoning due to lead-based paint, the Massachusetts Lead Law mandates that whenever a child under six years of age resides in any premises with “dangerous levels of lead, *the owner shall abate or contain said paint,*” and obtain a letter of full compliance or interim control.³³ It is not necessary to abate all lead in a unit to qualify for a letter of full compliance from a licensed lead inspector.³⁴ Instead, a property owner can receive a letter of full compliance by correcting the surfaces most likely to cause lead poisoning in children.³⁵

Starting in 1995, the Massachusetts Lead Law also gave property owners the right to delay obtaining a letter of full compliance by engaging in a form of interim compliance, known as interim control.³⁶ This option allows property owners to *delay* the commencement of a tenancy to a family with a child under age six until a letter of compliance or interim control certificate has been issued.³⁷ This option is only

29. See Mares, *supra* note 2, at 345 (stating childhood lead poisoning is a preventable public health problem).

30. See *Lead Poisoning and Health*, WORLD HEALTH ORG. (Aug. 2017) [hereinafter WHO, *Lead Poisoning and Health*], <http://www.who.int/mediacentre/factsheets/fs379/en/> [<https://perma.cc/TQU6-HVVSJ>]; Rechtschaffen, *supra* note 2, at 390 (citing the U.S. Centers for Disease Control & Prevention) (“lead poisoning remains the most common and societally devastating environmental disease of young children.”).

31. WHO, *Lead Poisoning and Health*, *supra* note 30; see also Rechtschaffen, *supra* note 2, at 390–91.

32. *Lead*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 9, 2017), <https://www.cdc.gov/nceh/lead/> [<https://perma.cc/S7WM-ZV2P>].

33. MASS. GEN. LAWS ch. 111, § 197(a) (2017) (emphasis added). For the definition of a letter of full compliance, see 105 MASS. CODE REGS. 460.020 (2017).

34. Mares, *supra* note 2, at 346.

35. *Id.*

36. *Id.*

37. MASS. GEN. LAWS ch. 111, § 197(h) (2017).

available if there is no lease between the owner and tenant and the delay does not exceed thirty days.³⁸ During this period of delayed occupancy, the prospective tenant is required to bear the cost of any living expenses.³⁹ If the property owner obtains a letter of interim control, he or she must correct all the hazards and bring the property into full compliance within a year, unless he or she applies for and receives a one-year extension to achieve full compliance within the second year.⁴⁰

The Massachusetts Lead Law has significantly reduced childhood lead poisoning rates in Massachusetts.⁴¹ In 2004, there were 1919 children with blood-lead levels greater than ten micrograms of lead per deciliter of blood; this number dropped to 591 in 2015.⁴² Despite this progress, experts believe that “lead exposure remains a significant health risk for children across the Commonwealth,” because children will continue to be exposed to lead-based paint hazards in approximately ninety percent of the state’s pre-1978 housing.⁴³ Unfortunately, the housing approach taken by the legislature in 1971 has failed to achieve the overarching goal of the Massachusetts Lead Law: to prevent exposure to lead poisoning by mandating the abatement of lead hazards in any dwelling occupied by a family with a child under age six. Landlords have avoided this mandate by systemically refusing to rent to these families. As a result, only ten percent of housing units built prior to 1978 are presumed to be lead safe. The remaining ninety percent continue to pose a significant risk of lead poisoning to children under age six.

II. THE MASSACHUSETTS LEAD LAW DISCRIMINATES AGAINST FAMILIES WITH CHILDREN UNDER AGE SIX IN VIOLATION OF THE FEDERAL FAIR HOUSING ACT

The FHA was intended to provide for fair housing across the nation.

38. *Id.*

39. *Id.*

40. MASS. GEN. LAWS ch. 111, § 197(b) (2017).

41. MASS. DEP’T OF PUB. HEALTH, *supra* note 9; *see also* Memorandum from Jan Sullivan, Acting Dir., Bureau of Env’tl. Health, to Monica Bharel, Comm’r, and Members, Pub. Health Council (July 13, 2016). Lead exposure is measured by the number of micrograms of lead per deciliter of blood. Regulations that took effect on December 1, 2017, lowered the threshold blood-lead level that defined lead poisoning from 25 micrograms of lead per deciliter to 10 micrograms of lead per deciliter. *See* 105 MASS. CODE REGS. 460.020 (2017).

42. *See supra* note 41.

43. MASS. DEP’T OF PUB. HEALTH, *supra* note 9 (emphasis omitted).

In 1988, Congress amended the FHA to prohibit discrimination against families with minor children. The Massachusetts Lead Law violates the FHA by facially discriminating against families with children under age six; making housing otherwise unavailable to this subset of families; and by imposing different terms and conditions on these families.

A. *The History and Scope of the Fair Housing Act*

On April 11, 1968, exactly one week after the assassination of Dr. Martin Luther King Jr., President Johnson signed the Fair Housing Act.⁴⁴ Its purpose was to “provide, within constitutional limitations, for fair housing throughout the United States.”⁴⁵ In *Trafficante v. Metro Life Ins. Co.*, a unanimous Supreme Court announced that the “language of the Act is broad and inclusive,” and was intended to promote a “policy that Congress considered to be of the highest priority.”⁴⁶ This policy can only be achieved “by a generous construction” of the Act.⁴⁷ Later courts have reaffirmed the broad sweeping authority of the FHA.⁴⁸

At the time of its enactment in 1968, the FHA prohibited housing discrimination against individuals in four protected categories: “race, color, religion, [and] national origin.”⁴⁹ Sex was added as a protected category in 1974.⁵⁰ In 1988, Congress passed the Fair Housing Amendments Act, adding protections for families with minor children and people with handicaps.⁵¹

B. *The Fair Housing Amendments Act*

It has always been a struggle for families with minor children to find

44. 42 U.S.C. § 3608 (2017).

45. 42 U.S.C. § 3601 (2017).

46. *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209–11 (1972).

47. *Id.* at 212.

48. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982); *Cabrera v. Jakobovitz*, 24 F.3d 372, 388 (2d Cir. 1994); *United States v. California Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988).

49. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 726 n.1 (1995).

50. Fair Housing Act, Pub. L. No. 93-383, § 808(a), 88 Stat. 633, 728 (1974) (codified as amended at 42 U.S.C. §§ 3604–06, 3608, 3631).

51. Familial status is defined as a household with “one or more individuals (who have not attained the age of 18 years) being domiciled with—(1) a parent or another person having legal custody of such individuals; or (2) the designee of such parent or other person.” 42 U.S.C. § 3602(k) (2017). Also included is “any person who is pregnant or is in the process of securing legal custody” of someone under the age of 18. *Id.*

rental housing.⁵² When Congress amended the FHA in 1988 to include families with children as a protected class, it was because of a “nationwide housing crisis.”⁵³ According to a 1980 study of eighty thousand units conducted by the federal government, twenty-five percent of housing providers excluded children completely, while an additional fifty percent imposed age restrictions.⁵⁴ Other studies conducted in the 1980s supported the conclusion that discrimination against families with children was “widespread.”⁵⁵ The “crisis” was believed to be partially due to the poverty of families with children and a lack of large rental units capable of housing them.⁵⁶ “As a result, by 1980, [it was] estimated that one-third of the homeless population were families with children.”⁵⁷

C. *Forms of Discrimination Prohibited by the FHA*

The FHA prohibits a full range of discriminatory housing practices in public and private housing markets.⁵⁸ Generally, the Act prohibits housing discrimination based on race, color, national origin, religion, sex, familial status, and disability.⁵⁹ It is unlawful to discriminate

52. See *infra* notes 53–57.

53. See Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L.J. AM. U. 297, 301–02 (1995) (citing 143 CONG. REC. H4612) (daily ed. June 22, 1988) (statement of Rep. Miller).

54. See Jonathan I. Edelstein, *Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995*, 52 U. MIAMI L. REV. 947, 951 (1998) (citing ROBERT W. MARANS, ET AL., MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY (1980)).

55. *Id.*

56. *Fair Housing Amendments Act of 1988: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 372–73 (1987) (statement of James Morales, Staff Attorney, National Center for Youth Law).

57. *Id.* at 301; see also *R.I. Comm’n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 117 (D.R.I. 2015).

At a hearing in August 1988, Representative Nancy Pelosi (D–CA), then a member of the Housing Subcommittee, stated: “More people are homeless today in America than at any time since the Great Depression. Overall, the homeless population grew by 25 percent in 1987 alone. Families with children are now the fastest growing group among the homeless. In the richest Nation on earth, growing numbers of men, women, and children are living on the streets and eating out of garbage cans. . . . When families are unable to obtain rental housing, 63% resort to living with relatives or friends and 33% end up living in cars, vans, abandoned buildings, or tents.”

Id. (citation omitted).

58. 42 U.S.C. § 3601 *et seq.* (2017).

59. 42 U.S.C. § 3604 (2017).

against anyone in a protected class—including families with minor children—in the sale or rental of most housing, unless one of the limited exemptions apply.⁶⁰ The specific housing practices that are prohibited include: (1) refusing to sell, rent, negotiate for, “*or otherwise make unavailable or deny, a dwelling*”;⁶¹ (2) discriminating “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith”;⁶² (3) making or publishing any discriminatory statement in regard to a sale or rental;⁶³ (4) making a false representation of availability;⁶⁴ (5) “blockbusting”;⁶⁵ (6) discriminating in access to real estate services;⁶⁶ and (7) interfering, coercing, intimidating, or threatening anyone in a protected class who has exercised a right under the FHA.⁶⁷

D. *The Rights Guaranteed by the FHA are Superior to State Law*

The FHA preempts state and municipal laws if they “purport[] to require or permit any action that would be a discriminatory housing practice under [the Act].”⁶⁸ The Massachusetts Lead Law permits discriminatory housing practices against families with children under age six by imposing a financial burden on landlords only when a family with a child under the age of six resides in the unit. Landlords easily avoid this financial burden by categorically denying rental housing to this subset of families. This results in an unequal and profoundly limited

60. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW & LITIGATION § 4:4 (2017).

The principal exemptions from the prohibition on familial status discrimination are: (1) single-family houses sold or rented by the owner without the use of real estate agent or of discriminatory advertising; (2) units in dwellings where the owner lives that are occupied by no more than four families . . . ; (3) dwellings owned by religious organizations or private clubs for their own members’ use; and (4) . . . housing for older persons.

Id.

61. 42 U.S.C. § 3604(a) (2016) (emphasis added).

62. 42 U.S.C. § 3604(b) (2016).

63. 42 U.S.C. § 3604(c) (2016).

64. 42 U.S.C. § 3604(d) (2016).

65. 42 U.S.C. § 3604(e) (2016). Block-busting is “induc[ing] or attempt[ing] to induce any person to sell or rent any dwelling by represent[ing] . . . the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.” *Id.*

66. See 42 U.S.C. §§ 3605–06 (2016).

67. 42 U.S.C. § 3617 (2016).

68. 42 U.S.C. § 3615 (2016); see also *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1499–1500 n.15 (10th Cir. 1995).

rental housing market for these families. To the extent these discriminatory housing practices violate the FHA, they are invalid.

E. *The Massachusetts Lead Law Violates the FHA by Facially Discriminating Against Families with Children under Age Six*

“A facially discriminatory [law or] policy is one which on its face applies less favorably to a protected group.”⁶⁹ Facial discrimination has also been described as singling out a protected group for “explicitly differential—i.e. discriminatory—treatment.”⁷⁰ Undeniably, the Massachusetts Lead Law singles out and applies less favorably to a subset of families with children under age six, who experience systemic discrimination in the rental housing market.⁷¹ Therefore, the Massachusetts law discriminates on its face in violation of the FHA.

F. *Facially Discriminatory Laws Can Violate the FHA by Making Housing Unavailable to Families with Children, Contrary to 42 U.S.C. § 3604(a)*

Courts have been inconsistent in categorizing claims of facial discrimination.⁷² Some courts analyze them as a violation of 42 U.S.C. § 3604(a) because they make housing otherwise unavailable.⁷³ Other courts analyze them as violations of 3604(b) because they impose different terms and conditions on individuals in a protected class.⁷⁴ Since it is well documented that the Massachusetts Lead Law makes most pre-1978 housing unavailable to families with children under six,⁷⁵ it is fitting to analyze the facial discrimination claim under the making housing “otherwise unavailable” clause contained in 42 U.S.C. § 3604(a).⁷⁶

The FHA makes it unlawful “[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of

69. *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007).

70. *Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1089 (E.D. Cal. 2016).

71. *See supra* Part I.

72. *See infra* notes 73–74.

73. *See Cnty. House, Inc.*, 490 F.3d at 1046–47; *Sierra v. City of New York*, 552 F. Supp. 2d 428, 429–30 (S.D.N.Y. 2008).

74. *See Bischoff*, 183 F. Supp. 3d at 1088; *Iniestra v. Cliff Warren Inv., Inc.*, 886 F. Supp. 2d 1161, 1166 (C.D. Cal. 2012).

75. *See supra* Part I.

76. *See infra*, Subpart II.G, for the ways in which the Massachusetts Lead Law allows landlords—who are willing to rent an unabated unit to families with children under age six—to impose different terms and conditions on these families.

familial status.”⁷⁷ This phrase is extremely broad.⁷⁸ As a leading scholar observed, “the catch-all phrase ‘*otherwise make unavailable or deny*’ [which is] located after two prohibitions directed to more specific types of refusals to deal, can be read to include *almost every housing practice imaginable*.”⁷⁹ “Several courts have concluded that this language is ‘as broad as Congress could have made it.’”⁸⁰ Since the terms “otherwise make unavailable or deny” apply to “discriminatory housing practices that do not fit neatly within the other provisions of the statute, such as steering, exclusionary zoning[,] and redlining,”⁸¹ they should be interpreted to apply to the systemic *unavailability* of housing for families with children under age six generated by the Massachusetts Lead Law.⁸²

The evidence of systemic discrimination against families with children under age six because of the Massachusetts Lead Law is undeniable.⁸³ As attorney Raphael Mares observed in a *Boston Globe* article in 2007, “[i]f you put an ad on Craigslist and asked for people who are experiencing discrimination, everyone with a child under six would tell you they’ve experienced discrimination.”⁸⁴ The results of a recent investigation conducted by the Suffolk University Law School Housing Discrimination Program reinforce this point.⁸⁵ The investigation was undertaken by trained fair housing testers, who were instructed to contact property owners in the Boston area who had advertised that their rentals did not have a lead certificate.⁸⁶ Although the testing sample was modest, with twenty-seven tests conducted, the results showed an astonishing ninety-three percent rate of discrimination against families with children under age six.⁸⁷ These results match the anecdotal evidence of Theresa and Jacob and the other families profiled in the *Boston Globe* articles.⁸⁸

77. 42 U.S.C. § 3604(a) (2016).

78. SCHWEMM, *supra* note 60, § 13:4.

79. *Id.* § 4:4.

80. *Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co.*, 472 F. Supp. 1106, 1108 (S.D. Ohio 1979).

81. SCHWEMM, *supra* note 60, § 13:4.

82. *See Sierra v. City of New York*, 552 F. Supp. 2d 428, 429–30 (S.D.N.Y. 2008).

83. *See supra* notes 5–8 and accompanying text.

84. *See Burge, supra* note 7.

85. *See Berman et al., supra* note 6.

86. *Id.* at 2–3. “[T]esters’ are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful . . . practices.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

87. *Berman et al., supra* note 6, at 3.

88. *See supra* Part I.

Thus if the phrase, *otherwise making housing unavailable*, can be construed to cover almost every discriminatory housing practice imaginable, it must be available to remedy the systemic housing discrimination against families with children under age six produced by the Massachusetts Lead Law.

G. *The Massachusetts Lead Law Violates the FHA By Imposing Different Terms and Conditions on Families with Children Under Age Six, Contrary to 42 U.S.C. § 3604(b)*

The Massachusetts Lead Law not only makes housing unavailable to families with children under age six, it also imposes different terms and conditions if a landlord decides to rent to such a family.⁸⁹ The terms of the Massachusetts Lead Law allow landlords—who are renting units with unabated lead paint hazards to the public—to delay renting to a family with a child under the age of six, for up to thirty days, while the landlord does the work necessary to achieve interim compliance with the Massachusetts Lead Law.⁹⁰ Thus, whenever a rental unit with unabated lead paint hazards is marketed to the public as *immediately available*, it is only immediately available to households *without* a child under age six. It will never be immediately available to families with children under six. These families may have to delay their initial occupancy by up to thirty days, without a lease, while the work needed to obtain a certificate of interim control is completed.⁹¹

Immediate availability can be an important term of a new lease.⁹² Many reasons for moving are time-sensitive. Families with children under age six may be moving to start a new job or to enroll their child in a better school district. Other families may be moving because their landlord is selling the property, or the property has been foreclosed. These applicants for rental housing need a definite move-in date and applicants with children under age six should enjoy the same rights to

89. 42 U.S.C. § 3604(b) (2016); *but see* 24 C.F.R. § 100.65 (2018).

90. MASS. GEN. LAWS ch. 111, § 197(b) (2017). A property owner may be able to “contain and control [lead hazards] . . . on an interim basis until achieving compliance . . . [by obtaining] a letter of control from a licensed lead inspector pursuant to an emergency lead management plan.” *Id.*; *see* 105 MASS. CODE REGS. 460.105 (2017). Interim control requires that urgent lead hazards be corrected while remaining lead hazards are kept under control. *See* MASS. GEN. LAWS ch. 111, § 197(b). Interim controls are believed to “protect occupants from lead poisoning until the home is brought into full compliance.” Mares, *supra* note 2, at 346.

91. *See* MASS. GEN. LAWS ch. 111, § 197(h) (2017).

92. *See* E. GEORGE DAHER ET. AL, 33 MASS. PRACTICE SERIES, LANDLORD AND TENANT LAW § 9:2 (3d ed. West 2017).

certainty and immediate occupancy as all other applicants.

Delays in availability can impose other burdens on families with children under age six. While waiting up to thirty days, these families will have to bear all of the related financial and personal costs of the disruption caused by the delay.⁹³ Assuming the family is able to find a suitable short-term rental at a reasonable cost,⁹⁴ they will likely incur the additional burdens and expense of moving twice, putting their belongings in storage, having their mail forwarded to a temporary address, and setting up temporary utility services.

The date a tenancy commences is a basic term related to the rental of a dwelling.⁹⁵ Treating applicants from a protected class differently by offering later dates of availability is evidence of discrimination.⁹⁶ Thus, allowing any property owner to delay the availability of a unit—by up to thirty days to temporarily abate lead hazards for a rental applicant with a child under age six—violates the FHA by imposing different rental terms and conditions on these families in violation of 42 U.S.C. § 3604(b).

H. *Proving a Violation of the FHA*

Although the Massachusetts Lead Law violates the FHA on its face by making housing unavailable and imposing different terms and conditions, this section will focus on the standards for proving that the law facially discriminates against families with children under age six as a violation of 42 U.S.C. § 3604(a).

1. Standards of Proof

[A] plaintiff may establish a violation [of] the FHA by showing

93. MASS. GEN. LAWS ch. 111, § 197(h) (2017).

94. See *supra* Subpart I.B. When Theresa and Jacob attempted to find a short-term rental, the only options available were Airbnb units, most of which had high daily rental rates.

95. See DAHER, ET AL., *supra* note 92.

96. See *United States v. Balistreri*, 981 F.2d 916, 929 (7th Cir. 1992). Although in a different context, reviewing whether a municipality violated the FHA by discriminating against a housing provider for people with disabilities, the court in *South Middlesex Opportunity Council, Inc., v. Framingham* observed that “[d]iscrimination under the FHA, however, includes delays in issuing permits that are caused in part by discriminatory intent, even if the permits are ultimately granted.” *S. Middlesex Opportunity Council, Inc., v. Framingham*, 752 F. Supp. 2d 85, 97 (D. Mass. 2010); see also *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973) (“The imposition of more burdensome application procedures, [and] of delaying tactics . . . constitutes a violation of” the FHA.) (citing *Hall v. Freitas* 343 F.Supp. 1099, 1101 (N.D.Cal.1972)); SCHWEMM, *supra* note 60, § 13:4 (“[D]elaying tactics and burdensome application procedures used to limit . . . access to housing, are clearly covered by [the] phrase . . . ‘otherwise make unavailable or deny.’”).

either: (1) that the defendants were motivated by an intent to discriminate . . . (“discriminatory intent” or “disparate treatment”); or (2) that the defendant’s otherwise neutral [law, practice, or policy] has an unnecessarily discriminatory effect (“disparate impact”).⁹⁷

A facially discriminatory law is a form of disparate treatment discrimination.⁹⁸ Where there is explicitly differential treatment, as here, courts have ruled that plaintiffs have made out a prima facie case of facial discrimination.⁹⁹ Once a prima facie case of facial discrimination has been established, “the burden shifts to the defendant to justify the differential treatment.”¹⁰⁰

2. In Evaluating the Validity of State Laws That Violate the FHA on Their Face, a Majority of Courts Favor a More Searching or Heightened Level of Scrutiny Over the “Rational Basis” Test

a. *Rational basis review*

There is some uncertainty regarding the appropriate standard for evaluating the validity of state laws that are facially discriminatory under the FHA, with a majority of courts favoring a “more searching” or “heightened” scrutiny over “rational basis” scrutiny.¹⁰¹ Among the circuit courts that have considered the issue, “[t]he Eighth Circuit, standing alone, subjects statutes that facially discriminate . . . to ‘rational basis’ scrutiny.”¹⁰² Under this deferential standard borrowed from Equal Protection jurisprudence, “a law will be upheld ‘upon a finding that it is ‘rationally related to a legitimate state interest.’”¹⁰³

Every other circuit court to rule on the issue—the Sixth, Ninth, and Tenth Circuits—has rejected the rational basis test in favor of applying a more searching or heightened level of scrutiny.¹⁰⁴ The Ninth Circuit, for

97. *Larkin v. Mich. Dept. of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996).

98. *Id.* at 289 (“[F]acially discriminatory actions are just a type of intentional discrimination or disparate treatment[] and should be treated as such.”).

99. *Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1089 (E.D. Cal. 2016); *Blackington v. Quogue Family Tr.*, No. 11-CV-1670, 2013 WL 1701883, at *4 (S.D. Cal. Apr. 18, 2013) (“[T]he bar for establishing that a rule is ‘facially discriminatory’ is extremely low.”).

100. *Bischoff*, 183 F. Supp. 3d at 1090.

101. *Sierra v. City of New York*, 552 F. Supp. 2d 428, 430 (S.D.N.Y. 2008).

102. *Human Res. Research & Mgmt. Grp., Inc. v. City of Suffolk*, 687 F. Supp. 2d 237, 255 (E.D.N.Y. 2010) (citing *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996)); *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991).

103. *Human Res. Research & Mgmt. Grp., Inc.*, 687 F. Supp. 2d at 255 (citations omitted).

104. *See, e.g., Larkin v. Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th

example, rejected the Eighth Circuit's ruling as "inappropriate for Fair Housing Act claims because some classes of persons specifically protected by the Fair Housing Act, such as families and the handicapped, are not protected classes for constitutional purposes."¹⁰⁵

b. *Heightened scrutiny*

The exact formulation of the heightened scrutiny test for claims of facial discrimination under the FHA "varies slightly from court to court."¹⁰⁶ The Ninth and Tenth Circuits have articulated the standard this way: a defendant must show either that the restriction benefits the protected class or that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes.¹⁰⁷ If the restriction purports to benefit the protected class, it would be valid only where it is narrowly tailored, and the benefit to the protected class in their housing opportunities clearly outweighs whatever burden might result to them.¹⁰⁸

In the Second Circuit, courts have modified this standard by relying on the standard used in disparate impact cases.¹⁰⁹ This disparate impact test "puts the burden on the defendant to prove that 'its actions furthered, in theory and in practice, a legitimate, bona fide, governmental interest and that no alternative would serve that interest with less discriminatory effect.'"¹¹⁰ This standard is "essentially a broader wording of the standard adopted by the Ninth Circuit in *Community House*."¹¹¹

The logic of adopting the heightened scrutiny standard embraced by *Human Resource* and *Sierra* to analyze the facial discrimination embedded in the Massachusetts Lead Law against families with children under age six is compelling. Both *Human Resource* and *Sierra* were based on claims that a state or local law violated the FHA by discriminating against families with children or people with

Cir. 2007); *Larkin v. Mich. Dept. of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995).

105. *Cnty. House, Inc.*, 409 F.3d at 1050.

106. *Human Res. Research & Mgmt. Grp., Inc.*, 687 F. Supp. 2d at 256.

107. *See, e.g., Cnty. House, Inc.*, 490 F.3d at 1050; *Bangerter*, 46 F.3d at 1503.

108. *Human Res. Research & Mgmt. Grp., Inc.*, 687 F. Supp. 2d at 257 (citing *Bangerter*, 46 F.3d at 1054).

109. *Id.* (citing *Sierra v. City of New York*, 552 F. Supp. 2d 428, 431 (S.D.N.Y. 2008)).

110. *Id.* (quoting *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003)).

111. *Id.* (quoting *Sierra*, 552 F. Supp. 2d at 431).

disabilities.¹¹² Both cases were brought against governmental units.¹¹³ The basis of the facial challenge to the Massachusetts Lead Law is government action. Therefore, the standard articulated in the Second Circuit cases, which analyzes whether the government's actions furthered, in theory or in practice, *a legitimate governmental interest*, and whether *that interest could be achieved with a less discriminatory alternative*,¹¹⁴ is the appropriate standard to evaluate claims that the Massachusetts Lead Law facially discriminates against families with children under age six.

3. Although the Discriminatory Sections of the Massachusetts Lead Law May in Theory Further a Legitimate, Bona Fide, Governmental Interest, in Practice They Do Not

Legislation to protect the health and safety of children furthers a legitimate bona fide governmental interest.¹¹⁵ There is no doubt that the legislature intended to protect the health and safety of Massachusetts' children when it enacted a comprehensive scheme to prevent childhood lead poisoning in 1971.¹¹⁶ As noted in Part I, the Massachusetts Lead Law emphasizes primary prevention of childhood lead poisoning through residential lead abatement, rather than the secondary interventions that follow after a child has been diagnosed with lead poisoning.¹¹⁷ In theory, the primary prevention goals of the statute were to be achieved by *requiring* all owners of properties with lead-based paint hazards to comply with the statute and abate lead paint hazards when a child under age six resided in the property.¹¹⁸ Since it is estimated that only ten percent of pre-1978 housing has undergone any deleading activity since 1971, this theory has failed to achieve the governmental objective of eliminating lead paint from pre-1978 housing

112. *Id.* at 240 (discussing how plaintiffs sued Suffolk County on the grounds that a County law discriminated against people with disabilities in violation of the FHA); *Sierra*, 552 F. Supp. 2d at 429 (discussing how plaintiff brought action for familial status discrimination under the FHA against city agencies to challenge a section of the New York City Housing Maintenance Code).

113. *Sierra*, 552 F. Supp. 2d at 429.

114. *Human Res. Research and Mgmt. Grp., Inc.*, 687 F. Supp. 2d at 257.

115. *Pedalino v. Giuliani*, 629 N.Y.S.2d 643, 644 (N.Y. Sup. Ct. 1995). "It is beyond cavil that the health and safety of the citizenry represents a legitimate government purpose" and interest. *Id.* at 645.

116. *See supra* note 25.

117. *See supra* Part I.

118. MASS. GEN. LAWS ch. 111, § 197(a) (2017).

as a means of preventing children's exposure to lead paint.¹¹⁹

In practice, the law has created systemic housing discrimination against a subset of families—those with children under age six—as landlords circumvent the law to avoid having to incur the costs of lead abatement.¹²⁰ As a result, children are illegally excluded from most of the rental housing built before 1978.¹²¹ While this likely reduces lead poisoning, it also deprives young children of shelter—a fundamental human need. There is a paradox at the heart of the lead law; although it bans discrimination against families with children under age six,¹²² the law itself has produced an intensely discriminatory and highly restricted rental housing market for these families.¹²³ Since the Supreme Court has observed that the FHA embodies “a policy that Congress considered to be of the highest priority,”¹²⁴ a state law that violates the FHA cannot serve a legitimate governmental interest.

4. There is a Less Discriminatory Alternative to Achieve the Primary Prevention Goals of the Massachusetts Lead Law

A fundamental goal of the Massachusetts Lead Law was to prevent childhood lead poisoning by requiring landlords to abate lead hazards when a child under age six resides in the property.¹²⁵ This goal has been obstructed by the housing discrimination created by the statute, which systemically denies families with children under age six the same access to rental housing that all other similarly situated applicants for the housing enjoy.¹²⁶ A nondiscriminatory alternative would require all landlords to comply with the statute in a way that would completely open the rental housing market to families with children under age six.

One reasonable nondiscriminatory alternative was proposed by scholar Clifford L. Rechtschaffen.¹²⁷ In his 1997 law review article, *The Lead Poisoning Challenge: An Approach for California and Other States*, he described the process of developing proposed legislation for

119. See MASS. DEP'T OF PUB. HEALTH, *supra* note 9.

120. See *supra* Part I.

121. See *supra* Part I.

122. ch. 111, § 197(a).

123. See *supra* Part I.

124. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

125. See *supra* note 2 and accompanying text.

126. See *supra* Part I.

127. See Rechtschaffen, *supra* note 2, at 429–44 (discussing model legislation to prevent childhood lead poisoning, prevent discrimination against families with children under age six, and preserve safe and affordable housing).

states to eliminate childhood lead poisoning, maintain affordable housing, and avoid housing discrimination against families with children under age six.¹²⁸ The author, who worked on a drafting committee for the proposed legislation, looked at the Massachusetts Lead Law and acknowledged that it “is ground-breaking in many important respects and very protective of children’s health.”¹²⁹ However, he also identified some major problems with the Massachusetts approach.

First, the standards for full compliance are too strict. “[T]his level of control is not required to protect against most harmful exposures, is not always cost-effective, and may endanger the supply of affordable housing.”¹³⁰ Second, because the “statutory trigger for mandatory controls [is] the presence in a dwelling of children under six,” it creates too much potential for housing discrimination against families with children, “something that has in fact occurred in Massachusetts.”¹³¹

To avoid the type of discrimination produced by the Massachusetts Lead Law, maintain affordable housing, and eliminate childhood lead poisoning, the authors of the proposed legislation recommended an approach that sets a timetable for achieving lead hazard control in rental housing.¹³² Accordingly, within the first six months, property owners would have to engage in “essential maintenance practices.”¹³³ Then—depending on the age of the housing—lead hazard control would have to be completed within three to seven years.¹³⁴

128. *Id.*

129. *Id.* at 424.

130. *Id.*

131. *Id.* at 425. The author was also critical of imposing strict liability for childhood lead poisoning on property owners who failed to comply with the law, on the grounds that this standard “is unacceptable to most if not all property owners.” *Id.*

132. *Id.* at 430–33.

133. *Id.* These essential maintenance practices, or EMPs, are the basis of the primary prevention approach in Vermont. *See id.* According to Rechtschaffen, they would “be relatively inexpensive additions to routine maintenance practices and could be carried out by in-house personnel once these workers received a short training course.” *Id.* at 431.

These EMPs would focus on routinely inspecting for and repairing deteriorating paint, responding to tenants’ reports of peeling paint or other conditions, and avoiding unsafe paint removal practices that are currently in widespread use. The costs of these practices to property owners would be quite modest, estimated to range from \$50 to \$75 annually per unit in a large rental property and \$85 to \$110 for a single-unit property.

Id. at 431–32 (footnote omitted).

134. *Id.* at 430 (“[Proposed legislation] would require that lead hazard evaluation and control measures be implemented within three years for homes built before 1950 and within seven years for property built between 1950 and 1978.”).

Enforcement would be the responsibility of local agencies.¹³⁵ Although agencies would “be able to investigate lead-related violations as part of ordinary code inspections,”¹³⁶ the bill also provides for private enforcement by any “affected person.”¹³⁷ The bill broadly defines “affected person” to encompass any “occupant, neighbor, worker, or adjacent property owner whose health and safety may be affected.”¹³⁸ The inclusion of the private enforcement provision would make the proposed law “the strongest of any state’s primary prevention laws.”¹³⁹

It is beyond the scope of this Article to propose draft legislation to eliminate the illegal systemic discrimination against families with children contained in the Massachusetts Lead Law. However, to bring the law into compliance with the FHA, such legislation must remove the statutory trigger of having a child under age six reside in a unit before a property owner is mandated to abate lead hazards. Moreover, it must also require all property owners to bring their properties into lead compliance within a reasonable period of time.

In considering what would be a reasonable timetable for requiring property owners in this state to abate lead hazards, it bears noting that the Massachusetts Lead Law has been in effect for over forty-five years and the deleading requirements of the statute are well known.¹⁴⁰ As one realtor put it: “My attitude at this point . . . is that even if you don’t like the law, if you think it’s ridiculous and too stringent, you knew what it was when you got into the landlord business.”¹⁴¹ However, the cost of deleading—which is the underlying cause of the decades of discrimination experienced by families with children in Massachusetts¹⁴²—will have to be taken into account.

It is difficult to put an exact price tag on the cost of deleading activities in Massachusetts because of differences in the housing

135. *Id.* at 439–40.

136. *Id.* at 440.

137. *Id.*

138. *Id.*

139. *Id.* at 441.

140. Gorey, *supra* note 7.

141. *Id.* (quoting Al Norton, rental manager at Unlimited Sotheby’s International Realty).

142. *See supra* Part I.

stock.¹⁴³ Estimates range from \$5000 to \$15,000 per apartment.¹⁴⁴ The City of Boston agency Lead Safe Boston recently completed a three-year federal grant that produced 166 lead-safe units with an overall per unit abatement cost average of \$8650, with additional charges for inspection fees for each unit averaging \$500–700.¹⁴⁵

Fortunately, new regulations that will substantially reduce the costs of lead abatement have recently been approved in Massachusetts.¹⁴⁶ Effective December 1, 2017, these regulations have relaxed the standards for lead abatement by reducing the number of surfaces required for abatement.¹⁴⁷ It is estimated that the new regulations will cut the costs of lead abatement by up to a third.¹⁴⁸ This is in addition to existing resources available to property owners to reduce the costs of lead abatement. These include zero or low-interest loans and a state tax credit of \$1500 per unit.¹⁴⁹

These cost-saving measures address the concerns that compliance with the abatement standards contained in the Massachusetts Lead Law will cause landlords to increase rents or abandon rental properties, which would primarily hurt low-income tenants.¹⁵⁰ This topic was explored at length by Raphael Mares in a 2003 law review article, *Enforcement of the Massachusetts Lead Law and its Effect on Rental Prices and Abandonment*. In that article he found that “landlords would not be able to pass on the cost of lead abatement through rent increases. . . . [and] only in very limited circumstances would comprehensive lead law enforcement lead to abandonment.”¹⁵¹

In light of the fact that landlords have been circumventing the law

143. See Craig Lemoult, *Proposed Regulations Target Lead Poisoning in Massachusetts*, WGBH NEWS (Apr. 24, 2017), <http://news.wgbh.org/2017/04/24/local-news/proposed-regulations-target-lead-poisoning-massachusetts> [https://perma.cc/583R-MLNT] (“The cost of de-leading varies wildly based on the condition of a home.”).

144. Gorey, *supra* note 7. The author interviewed Skip Schloming, former executive director of the Small Property Owners Association. *Id.* Schloming estimated that the cost of making an apartment unit lead safe—which includes paying for alternative housing while the work is being done—may range from \$5000 to \$15,000. *Id.*

145. E-mail from David George, Senior Project Manager, Lead Safe Bos., to author (August 15, 2017, 9:07 AM) (on file with author).

146. See 105 MASS. CODE REGS. 460.000 (2017); see also Sullivan, *supra* note 41.

147. *Id.*

148. See Lemoult, *supra* note 143 (“[The] state Department of Public Health estimates the new standard would cut the cost of lead abatement by a third.”).

149. *Id.*

150. See Mares, *supra* note 2, at 348.

151. *Id.* at 359.

by discriminating against families with children under age six for over forty-five years,¹⁵² it is not reasonable to allow the discrimination to continue. Amending the law to require landlords to bring units into compliance should be a legislative priority. Any timetable for removing lead-based paint hazards in rental dwellings established by the legislature should reflect the urgent need to end systemic housing discrimination against families with children under age six. This will promote the primary prevention goals of the Massachusetts Lead Law by effectively increasing the number of lead-safe properties on the rental market, while eradicating the harms of systemic housing discrimination—housing instability and homelessness—caused by the statute.

III. THE DISCRIMINATION CREATED BY THE MASSACHUSETTS LEAD LAW CAUSES IRREPARABLE HARM TO FAMILIES WITH CHILDREN UNDER AGE SIX

A. *The Systemic Discrimination Created by the Massachusetts Lead Law Contributes to the High Rates of Housing Instability and Homelessness for Families with Young Children in Massachusetts*

Ironically, the Massachusetts Lead Law was enacted to prevent the irreparable harms associated with childhood lead poisoning. However, through the systemic discrimination embedded in the statute, it has also likely contributed to the harms of family homelessness and housing insecurity. Homelessness can cause irreparable harm and interfere with a child's healthy development and educational attainment.

According to a 2017 report on family homelessness by the Boston Foundation, children make up sixty percent of the 13,000 individuals in families who are experiencing homelessness on any given day in Massachusetts.¹⁵³ “This percentage of families among the homeless population is considerably higher than the national percentage of [thirty-

152. *See supra* notes 5–8.

153. DEBRA J. ROG ET AL., THE GROWING CHALLENGE OF FAMILY HOMELESSNESS: HOMELESS ASSISTANCE FOR FAMILIES IN MASSACHUSETTS 7 (Sandy Kendall ed., 2017) https://www.tbf.org/~media/TBFOrg/Files/Reports/Homelessness%20Report_Feb2017R.pdf [<https://perma.cc/K5PR-WSXQ>].

five percent].”¹⁵⁴ This number has more than doubled in nine years.¹⁵⁵ The length of time that Massachusetts families remain in shelters is also increasing. Recent estimates show that statewide, the stay for families is almost a year.¹⁵⁶ “On average, a family staying in a Massachusetts shelter is headed by a female about 30 years old with one or two children.”¹⁵⁷ It is likely that many of these families have at least one child under age six and that they have experienced housing discrimination, housing instability, and homelessness because of the Massachusetts Lead Law.¹⁵⁸

B. Homelessness Causes Irreparable Harm to Families with Children

It has been argued that homelessness is a form of psychological trauma.¹⁵⁹ As a matter of law, the “threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable injury.”¹⁶⁰ It is well known that for children, homelessness can adversely affect their health, education, and general welfare.¹⁶¹ “Homeless children are more likely than other children to have moderate to severe acute and chronic health problems, and less access to medical and dental care. Symptoms of asthma, hyperactivity/inattention, and behavior problem[s] are more prevalent among this group.”¹⁶² Homeless children also struggle to maintain their mental health. “[M]ore than half [of all homeless children] have problems with anxiety and depression.”¹⁶³

154. *Id.* at 11.

155. Akilah Johnson, *Homeless-Families Count Rises Number in Mass. Doubled in 9 Years*, *Foundation Reports*, BOS. GLOBE, Feb. 24, 2017, 2017 WLNR 5895803.

156. ROG ET AL., *supra* note 153, at 23.

157. *Id.* at 7.

158. The claim that housing discrimination—as a result of lead paint and the Massachusetts Lead Law—contributes to housing instability and homelessness in Massachusetts is based on the data and arguments set forth in Parts I and II, *supra*, which detail the systemic nature of the discrimination against families with children under six and their lack of access to most rental properties built before 1978.

159. *See generally* Lisa Goodman et al., *Homelessness as Psychological Trauma: Broadening Perspectives*, 46 AM. PSYCHOLOGIST 1219 (1991).

160. *McNeill v. N.Y. City Hous. Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989); *accord* *Young v. Maryville Hous. Auth.*, No. 3:09–CV–37, 2009 WL 2043891, at *9 (E.D. Tenn. July 2, 2009); *see also* *Baumgarten v. County of Suffolk*, No. 07–CV–539, 2007 WL 1490482, at *5 (E.D.N.Y. May 15, 2007) (finding irreparable harm in impending eviction and resulting homelessness).

161. CHILD TRENDS DATA BANK, HOMELESS CHILDREN AND YOUTH: INDICATORS OF CHILD AND YOUTH WELL-BEING 2 (2015) https://www.childtrends.org/wp-content/uploads/2015/10/112_Homeless_Children_and_Youth.pdf [<https://perma.cc/Z58J-BHDN>].

162. *Id.*

163. *Id.*

Homelessness negatively affects a child's education. Unfortunately, homeless families move frequently and children often have to change schools, because new accommodations may be located in a different school district.¹⁶⁴ These children face daunting bureaucratic hurdles when changing schools.¹⁶⁵ In recent years, according to the National Coalition for the Homeless, "42% of homeless children transferred schools at least once, and 51% of these students transferred twice or more."¹⁶⁶ Every transfer is disruptive to a child's education. "According to some estimates, 3–6 months of education are lost with every move."¹⁶⁷ "[I]n New York City, 23% of homeless children repeated a grade, and 13% were placed in special education classes, many times inappropriately . . ."¹⁶⁸ "[O]nly 77% [of homeless children] attend school regularly."¹⁶⁹

The Massachusetts Lead Law's original focus was to prevent the battery of harms caused by lead poisoning in young children.¹⁷⁰ The harms to a child's brain and central nervous system are irreparable.¹⁷¹ But the Massachusetts Lead Law has also been the cause of irreparable harm to young children, by causing systemic discrimination against their families and denying them access to most pre-1978 rental housing. This systemic discrimination predictably leads to housing instability and homelessness,¹⁷² which can cause lasting negative effects on a child's health, education and general welfare.¹⁷³

CONCLUSION: MASSACHUSETTS FAMILIES WITH CHILDREN UNDER AGE SIX SHOULD ENJOY THE SAME RIGHT TO HOUSING AS EVERY OTHER RESIDENT OF MASSACHUSETTS

Despite the good intentions and efficacy of the Massachusetts Lead Law in reducing childhood lead poisoning, the statute is flawed because

164. NAT'L COAL. FOR THE HOMELESS, EDUCATION OF HOMELESS CHILDREN AND YOUTH: NCH FACT SHEET #10 (2007), <http://www.nationalhomeless.org/publications/facts/education.pdf> [<https://perma.cc/P29J-VWQ2>].

165. *Id.*

166. *Id.* (citing the Inst. for Children & Poverty, 2003).

167. *Id.*

168. *Id.* (citing the Inst. for Children & Poverty, 2003).

169. *Id.* (citing the U.S. Dept. of Educ., 2004).

170. Mares, *supra* note 2.

171. See WHO, *Lead Poisoning and Health*, *supra* note 30.

172. See *supra* Parts I–II.

173. See *supra* notes 116–25.

it facially discriminates against families with children under age six.¹⁷⁴ While we celebrate the success of the law, we must acknowledge that it has inflicted a separate set of severe harms on these families, by generating systemic discrimination and making it almost impossible to find rental housing. This discrimination can cause irreparable harm to a child's health and welfare, and interfere with their educational achievements.

To address the harmful effects caused by the discrimination at the heart of the Massachusetts Lead Law, the Massachusetts legislature must amend the law to reopen the rental housing market for *all families with children*. Amending the current law will allow families with children under age six to compete equally with all other similarly situated applicants for pre-1978 rental housing, and bring the Massachusetts Lead Law into compliance with the FHA. Finally, by removing the discriminatory provisions of the statute, while including a statutory requirement that residential lead-based paint hazards be abated by property owners according to a reasonable timetable, the legislature will more fully advance the original goal of the Massachusetts Lead Law: *to prevent all childhood lead poisoning caused by lead-based paint hazards in residential housing*.¹⁷⁵

174. See *supra* Parts I–II.

175. See Mares, *supra* note 2.