COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-10107

BOSTON HOUSING AUTHORITY,

Plaintiff-Appellee,

v.

EMMITT BRIDGEWATERS,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF THE
HOUSING COURT DEPARTMENT, CITY OF BOSTON DIVISION
AND DENIAL OF RELIEF FROM JUDGMENT
ON FURTHER APPELLATE REVIEW

BRIEF FOR THE CAMBRIDGE HOUSING AUTHORITY AND HOUSING DEVELOPMENT LAW INSTITUTE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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Interest of the Amicus

Amicus the Cambridge Housing Agency ("the CHA") operates over 2000 units of federally-assisted public housing, in addition to operating close to 800 units of state-assisted public housing. The CHA is ranked as a "high performer" by the U.S. Department of Housing and Urban Development, and is the recipient of many awards for its excellence. The CHA's stated mission is "to develop and manage safe, good quality, affordable housing for low-income individuals and families in a manner which promotes citizenship, community and self-reliance."

The CHA's tenant population is diverse, and includes many tenants with disabilities. In appropriate instances, the CHA provides reasonable accommodations to disabled tenants in order to assist them in fully enjoying the public housing program. The CHA has also has to address the needs of all its residents to live in a safe environment and to fulfill its duty to provide for the quiet enjoyment of the premises by those residents. The CHA's operation, and the well-being of the families in its developments, thus will be affected by the legal standard applied in its eviction cases, and the standard determining the scope of the duty to

reasonably accommodate a tenant who has committed a violent criminal act on its property. Therefore, the outcome of the case before the Court is of tremendous significance to the CHA and to many other housing authorities in Massachusetts that operate public housing. The CHA can share the perspective of other housing authorities with the Court.

Amicus the Housing and Development Law Institute ("HDLI"), based in Washington, D.C., is a non-profit, non-partisan member organization that, for more than twenty-four years, has served as a legal resource on public and affordable housing issues nationwide. HDLI's mission focuses solely on the legal issues that impact the public and affordable housing industry. HDLI has hundreds of members, located in Massachusetts and nearly every other state across the nation, which include small, medium, and large public housing and redevelopment agencies (collectively, "PHAs") that currently are managing public and affordable housing programs, and their legal counsel. HDLI and its members have considerable legal expertise in the complex public housing industry generally, and specifically with respect to fair housing law. Indeed, HDLI provides on-

site fair housing training for PHAs, and has trained more than 2,000 employees of PHAs and other groups.

When legal issues, such as those pending in this case, are critical to the efficient and uniform operation of public and affordable housing programs, and are expected to have some precedential effect upon HDLI members across the nation, HDLI offers its expertise and perspective to the court through *amicus curiae* participation. This decision has national implications for the housing industry, as tenant crime, and a landlord's responsibility to protect other tenants from that crime, is pervasive throughout our country.

Summary of Argument

The BHA Had No Duty to Provide a Reasonable Accommodation to a Tenant Who Had Committed a Brutal Act of Violence Against Another Tenant; The Ability to Exclude Violent Tenants From the Public Housing Program is a Fundamental Aspect of that Program.

The issue before this Court revisits a question previously answered in several prior decisions[1]: that is, if and when a landlord or employer must provide a reasonable accommodation to a tenant (or employee) who has committed an egregious act in violation of the

[1] President and Fellows of Harvard College v. Mammone, 446 Mass. 657 (2006) Peabody Properties v. Sherman, 418 Mass. 603 (1994); Shkolnik v. Andover Hous. Auth., 443 Mass. 300 (2005).

standards of conduct applicable to the workplace or housing. The Appeals Court below properly applied the principals set out in those cases by finding that there is no such duty under the circumstances of this case. The conclusion of the Appeals Court comports with precedent and with state and federal laws on disability discrimination.

The tenant in this case asks the court to disregard the actual commission of an extremely serious lease violation involving a heinous and violent crime. The question is not whether this tenant might commit another violent act in the future, which would require this Court and the parties to engage in speculation. Rather, the question is whether the BHA must, as a reasonable accommodation, turn a blind eye to the criminal actions of one of its tenants because the tenant claims to have a mental disability. While it may be appropriate in some circumstances to accommodate a disability by waiving the enforcement of lease provisions that do not speak to violent and criminal acts against other individuals, to require tolerance of dangerous and egregious illegal actions in the guise of reasonably accommodating a disability goes far beyond what either the law requires or Congress envisioned. The impact of

disarming a public housing agency of the eviction remedy will undermine its ability to provide safe developments to all of its tenants, will impose duties that the housing agency is ill-suited to fulfill - either by mandate or budget - and will contradict federal policy that permits eviction for violent crime, even where the leaseholder is not "at fault" or has no direct "control" over the perpetrator of the criminal activity. Indeed, courts facing the issue of tenant crime have refused to extend a "second bite of the apple," or "right to cure" to tenants who commit criminal acts, even where local law generally provides a right to cure before eviction.

I. The Mission of Public Housing Authorities to Provide Decent, Safe and Sanitary Housing at Low Cost to Low Income People Must Allow Strict Enforcement of Lease Terms Prohibiting Violent Criminal Activity.

The federal public housing program was born with the adoption of the U.S. Housing Act of 1937. In the ensuing 70 years, the program changed in very significant ways, encountering problems of type and magnitude that were not imaginable at the inception of the program. Both the physical condition of the buildings and the social environment of the developments became severely compromised.

Congress addressed the problem of crime and safety in federal public housing in numerous statutes, beginning in 1988 with adoption of the Anti-Drug Abuse Act of 1988, P.L. No. 100-690, § 5101, 102 Stat. 4181 (1988). In relevant part, the operative section, 42 U.S.C. § 1437f (d)(1)(B)(iii), provides that each "public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." [2]

Further expansion of the grounds for eviction to criminal activity "on or off" the premises was provided in the Housing Opportunity Program Extension Act of 1996, P.L. No. 104-120, §9, 110 Stat. 834 (1996) ("the Extension Act"). Later, in 1998, Congress adopted the Quality Housing and Work Responsibility Act of 1998,P.L. Law 105-276 (1998), which provided further expanded

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[2] In implementing 42 U.S.C. § 1437f (d)(1)(B)(iii), HUD promulgated 24 C.F.R. § 5.859 (a)(1)which provides that the lease under a subsidized housing program "*must* provide that the owner may terminate a tenancy for . . . any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents."

crime and security provisions in public and other assisted housing.

This Court recently reviewed the aims and objectives of Congress in expanding anti-crime requirements in public housing in the case of Boston Housing Authority v. Garcia, 449 Mass. 727 (2007). In that case, this Court held that federal housing policy allowing evictions for dangerous criminal activity on a strict-liability basis was clear and therefore preempted state law. The Garcia decision was made in light of the case of Dept. of Hous. and Urban Development v. Rucker, 535 U.S. 125 (2002), in which the United States Supreme Court found that Congress intended public housing authorities to have the discretion of when to evict for criminal activity, and did not intend courts to substitute their judgment for that of a public housing agency.

The facts presented in this case fall clearly within the federal policy enunciated in Rucker and Garcia. A no-fault eviction policy applies equally to tenants whose family members have committed a crime without their knowledge or control, and to tenants whose own criminal actions violate the lease, even assuming the action is related to a disability. The objective of

the policy is to give housing authorities the discretion and authority to manage their developments for the benefit of all the residents, as the housing agency deems appropriate. Evicting all tenants who commit violent acts promotes the objectives of Congress to provide safe and crime-free public housing. As discussed infra, there is nothing in fair housing or disability law that requires a different result.

II. In Enacting Fair Housing Laws, Congress Did Not Intend to Force a Landlord to Turn a Blind Eye to the Brutally Violent Actions of a Tenant Who is Disabled.

Congress has enacted a number of fair housing and disability-related laws that protect the rights of disabled persons with respect to their access to, and use of, housing units and programs. These include the federal Fair Housing Act, 42 U.S.C. § 3604(f)(3); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Architectural Barriers Act, 42 U.S.C. 4151, and other fair housing laws and applicable regulations.

Recognizing a landlord's duty to ensure the safety of all tenants, fair housing laws also provide that housing need not be made available to an individual "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy

would result in physical damage to the property of others." 42 U.S.C. 3604(f)(9). Congress adopted this provision of the act specifically "to allay fears of those who believe that the non-discrimination provisions of this Act could force landlords and owners to rent or sell to individuals whose tenancies could pose such a risk." 1988 House Report on the Fair Housing Amendments Act of 1988, 100th Congress, 2d Session, Report 100-711. Congress phrased the provision prospectively (*i.e.*, "*would* constitute a direct threat...") because it was addressing the duty of a landlord to evaluate actual risk *prior* to the inception of a tenancy. Its goal was to limit reliance on subjective fears and speculation. *Id.*

Nowhere does the Act or Congress state that the intention was to require a landlord to overlook egregious acts that already have occurred. In fact, "The Judiciary Committee stated that it did not foresee that a disabled tenant would pose a threat to the health and safety of others simply as a function of being handicapped..." *See* Jennifer L. Dolak, The FHAA's Reasonable Accommodation & Direct Threat Provisions As Applied to Disabled Individuals Who Become Disruptive, Abusive, or Destructive in Their Housing Environment, 36

Ind. L. Rev. 759, 764 (2003). A tenant who viciously attacks another tenant and is evicted as a consequence is not being evicted "as a function of being handicapped," but based on the incident of aggression.

Once a tenant actually has inflicted harm, the landlord is not engaged in evaluation of a future risk; the landlord is responding to an action that is in violation of the lease and the law and has already caused the harm that the statute intended the landlord to avoid. Nor is the landlord acting on speculation or subjective fears. The landlord's actions are specifically grounded in the facts, in response to the tenant's demonstrated conduct. *See* Stout v. Kokomo Manor Apartments, 677 N.E. 2d 1060, 1065 (1997) (commission of a crime of violence in itself constitutes a "direct threat"). Such a response to the tenant's conduct is inherently "individualized," as it relates to the actions of this tenant, and this tenant alone.

The case of School Board of Nassau County, Fla., v. Arline, 480 U.S. 273 (1987), requiring a determination of whether a carrier of tuberculosis posed a threat to the health and safety of children and staff of the school she worked in, does not contradict this analysis. In Arline, the Court required a review based on fact and

not conjecture of the actual nature of the contagion of tuberculosis *before* any student or employee was, in fact, infected. If the teacher in Arline already had communicated her tuberculosis to other people in the school system, the danger would have been established, and no further analysis would be required. It is the *prospect* of possible harm that required an analysis of risk in Arline. Harm that has already occurred has, by definition, already been a threat, and thus no prediction of future conduct is needed. Therefore, the argument that a reasonable accommodation is necessary under the facts of the case before this Court is misdirected. The evaluation of risk after harm has been inflicted is not required by *Arline*, and nowhere in the language of the statute itself is there support for this construction.[3]

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[3] Amici are aware that two other jurisdictions have found it appropriate to evaluate the risk of "reoccurrence" after an initial criminal act has occurred. *See, e.g.*, Roe v. Housing Authority of Boulder, 909 F.Supp. 814 (D. Colo. 1995); Roe v. Sugar River Mills Associates, 820 F.Supp. 636, 637 (D.N.H. 1993). However, amici respectfully believe that this analysis is an incorrect application of *Arline*, which centers on the prediction of future wrongful behavior *before* a wrongful act has occurred. However, should such an analysis be appropriate, in cases involving existing criminal activity and/or violence, the tenant's wrongful conduct already is complete. While there is no effective way to accurately predict whether the tenant will reoffend, certainly his or her past conduct establishes that there

The intent of Congress in drafting the language was to protect from harm members of the public and other participants in a program, and to prevent stereotyping of disabled individuals. It was not created to insulate an individual who commits a violent act from the consequences of the act. Indeed, the disability laws were designed to lend an even hand, not a leg up. "Section 504 seeks to assure evenhanded treatment." Alexander v. Choate, 469 U.S. 287, 304 (1985). "Neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation" on recipients of federal financial assistance. Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979).

III. There Can Be No Suitable "Cure" of a Direct Threat Flowing From a Tenant's Vicious Attack on Another Tenant; Moreover, Courts Do Not Offer A Right to Cure to Tenants Who Commit Criminal Acts.

In essence, Bridgewaters appears to claim that his subsequent efforts following his vicious assault upon the other tenant, namely his seeking counseling and obtaining medication, are remedial actions which "cure" his prior lease violation, such that he no longer is a

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is a possibility of recidivism, which could have dire consequences if fulfilled.

"direct threat" to the peace and enjoyment of other residents, and in compliance with his lease.

By definition, a "cure" is possible if the breach can be rectified, i.e., it is possible to put the parties back into the same position they would have been in before the breach. Meaningful examples are paying rent that is owing, paying for damage to property, or ceasing an ongoing activity. An act that is a discrete material breach of the lease that cannot be undone, as is the brutal attack in this case, cannot be "cured." The damage is irrevocable.

The doctrine of "cure" entails several elements: whether the *status quo ante* can be restored, and the connected consideration of whether a breach is "material," justifying termination of a contract by the non-breaching party, and barring future performance by the breaching party.

> The common meaning of "cure" is to remedy, restore, remove, or rectify. *See* Webster's Third International Dictionary 555 (1971), and as the term relates to defaults, "cure" means to restore matters to the *status quo ante. See, e.g.,* *Jack LaLanne Biltmore Health Spa, Inc. v. Builtland Partners,* 99 A.D.2d 705(1984) (default on lease); *Carolina Commercial Bank v. Allendale Furniture Co.,* 280 S.C. 247 (1984) (default on mortgage loan); *Chesterton State Bank v. Coffey,* 454 N.E.2d 1233, 1237 (Ind. App. 1983) (using cure in the sense of "remedy"); *Federal National Mortgage Association v. Bryant,* 62 Ill. App. 3d 25, 28, 18 Ill .Dec. 869, 378 N.E.2d 333, 336 (1978)

> (mortgage)... "(C)ure" is the end, not the means, and what the term refers to is the restoration of the way things were before the default.

Matter of Clark, 738 F.2d 869, 872 (7th Cir.1984)

Indeed, even where state law provides a statutory opportunity to "cure" before a lease violator may be evicted, courts have refused to provide this opportunity to criminal offenders. For example, in Scarborough v. Winn Residential LLP, 890 A.2d 249 (D.C. App. 2006), a trial court entered a judgment of possession in favor of a Section 8 landlord after finding that the tenant was responsible for the presence in her apartment of a loaded 12-gauge shotgun that had been used in a fatal shooting in that apartment the previous day.

The court stated, "[i]f there were a right to cure, that would effectively gut the import of the federal regulations on this point, namely that endangering health and safety justifies a termination [for a violation] that cannot be cured." The District of Columbia Court of Appeals found that the local requirement of notice and opportunity to cure did not apply when the tenant had engaged in criminal activity. The court noted that "it would be little comfort to fellow residents that a tenant who has endangered their

safety by permitting criminal activity on the premises promises to refrain from doing so again." Id. at 254.

There are a number of District of Columbia lower court decisions that reach the same result. In one such case, District of Columbia Hous. Auth. v. Cherry, Civil Action No. 031t15931, LEXIS 25 (D.C. Super. Ct. 2004), a trial court refused to apply the cure provision to a tenant who committed a criminal act. Notably, the judge pointed to the "absurd results" a contrary reading would entail, stating, "[w]hat would a tenant be required to do to cure? Simply commit no further crimes of the same sort? No further crimes of any sort? In this case, Defendants must press the strained claim that Ms. Cherry could cure by not assaulting other tenants for a month. Taken one step further, this reasoning means that a tenant who murdered another tenant could not be evicted as long as he refrained from killing anyone else -- or perhaps from committing other crimes -- for 30 days. This cannot be what the law is." Id. at 7. Accord District of Columbia Hous. Auth. V. Williams, No. 97-LT-15295 (D.C. Super. Ct. 1997); District of Columbia Hous. Auth. v. Pratt, No. 99-LT-39735 (D.C. Super. Ct. 2000).

The Scarborough court understood that utilizing this type of reasoning makes little sense because "the

criminal act would be washed away by a simple promise not to commit another crime..." Id. at 255-56.

Applying these principles to the acts of the tenant here, the law surely cannot require the BHA to ignore the tenant's criminal conduct, thereby "gut[ting] the import of the federal regulations on this point, namely that endangering health and safety justifies a termination [for a violation] that cannot be cured." Id. at 253.

IV. Traditional Contract Principles Entitle BHA to an Eviction in This Case.

If a party commits a serious "material" breach of a contract that causes serious damage to the purpose of the contract, the non-defaulting party is justified in terminating the contract, and need not permit future performance. Eric Anderson, A New Look at Material Breach of in the Law of Contracts, 21 U.C. Davis L. Rev. 1073 (1988). Factors relevant to determining whether the breach is material include the degree of harm to the non-breaching party and "the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances." Restatement (Second) of Contracts § 241, American Law Institute, current through March of 1998.

That the breach of the lease by the tenant in this case was serious and material cannot be controverted. One of the most important provisions of the lease prohibits violent conduct. The tenant's egregious violent conduct clearly breaches the landlord's reasonable expectations of performance by the tenant of the tenant's obligations. The harm to the landlord and the community is severe, and the tenant can do nothing to mitigate the damage he already inflicted. Therefore, the tenant's argument that the "reasonable accommodation" will permit the tenant the opportunity to comply with the lease is misplaced. The tenant had the opportunity to comply and failed to do so. The requested accommodation does nothing to address that failure. The nature of this breach should not allow a new opportunity for "future performance".

V. A Person Who Commits a Violent Crime No Longer Is Entitled to a Reasonable Accommodation.

In order to be entitled to a reasonable accommodation, an individual must establish that he or she 1) is disabled within the meaning of the discrimination laws, and 2) is "otherwise qualified" for the program he or she is applying to or participating in, with or without accommodation. Once the plaintiff

has established these criteria, he or she must show the requested accommodation is reasonable. The respondent may then show that the accommodation imposes an undue burden or that the accommodation requires a fundamental alteration of the program. Davis, 442 U.S. 397; Peabody Properties v. Sherman, 418 Mass. 603 (1994).

A tenant who commits a violent crime on housing agency property cannot fulfill these elements by virtue of the nature of the act (violence) and the nature of the program (public housing) that are involved. The violent individual is no longer qualified for the program, is not entitled to an accommodation for his disability because he has posed a "direct threat", has not made a "reasonable request", and allowing the accommodation is both an undue burden and a fundamental alteration of the public housing program.[4]

A. Mandating Retention of a Tenant Who has Committed a Violent Crime Constitutes a "Fundamental Alteration" of the Public Housing Program.

[4] The tenant in the case before this Court did not establish on the record at trial that the violent act he committed was caused by or related to his disability. This brief assumes for sake of argument that there is a relationship between the tenant's disability and his actions, as well as that the nature of the disability was such that it meets the definition of disability under Section 504, the ADA, and other discrimination laws.

The seminal cases of Southeastern Community College v. Davis, 442 U.S. 397 (1979) and Alexander v. Choate, 469 U.S. 287 (1985) established that there is no requirement to "reasonably accommodate" an individual if to do so would require a "fundamental alteration" of the program in which the individual seeks to participate. Choate, 469 U.S. 287. "*Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones." Id.

However, there is no requirement that the eligibility criteria and scope of the program's benefits be altered to address the needs of a disabled person simply because such a programmatic alteration could benefit that person. Id. Requiring the housing agency to tolerate violent crime constitutes a "fundamental alteration" of the program. The public housing program does not permit persons who commit violent crimes the right to continue to occupy their units, regardless of

the circumstances. Leases must contain the following provisions:

> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy...

42 U.S.C. 1437d(l)(6).

As aforementioned, in the case of Boston Housing Authority v. Garcia, 449 Mass. 272 (2007) this Court concluded that federal housing policy, as elucidated by the Supreme Court in the case of Rucker, 535 U.S. 125, provided housing authorities the discretion to evict tenants based on criminal conduct, even where the offender was someone else in their household and they had no control over the offender or knowledge of the act. The court in Rucker found that 42 U.S.C. 1437(d) had unambiguously created a strict liability standard for eviction upon the commission of illegal drug activity or violent crime. Congress expressly authorized the local housing agency to decide whether to evict in a particular instance. The court stated "(the statute) entrusts that decision (to evict) to local public

housing authorities who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime' ...' 'the seriousness of the offending action'.. . and 'the extent to which the leaseholder has...taken all reasonable steps to prevent or mitigate the offending action.'" (citations omitted). Rucker, 535 U.S. 125.

In Peabody Properties, 418 Mass. 603, this Court found that a landlord is not required to allow illegal activity on its premises (in that case, drug dealing by a drug dependent tenant). The Court found that the relevant time to examine applicability of the right to reasonable accommodation is the moment at which the tenant has committed the crime, not at some later date, even if the tenant by that later date purports to be less of a risk to repeat the offending activity. Id.

The existence of legal protections for disabled tenants to insure their equal participation in the program does not confer blanket exemption from the requirements and goals of the public housing program. Davis,442 U.S. 397. In light of the particular problems and policies related to crime in public housing, in light of Congress' decision to confer housing

authorities with the power to evict for commission of a crime of violence even without personal fault of a head of household, and in light of the importance of uniform enforcement of rules related to crime and violence, to *require* a housing agency to overlook the commission of violent crime after it has occurred as an "accommodation" constitutes a "fundamental alteration" of the program.

The law is intended to provide disabled tenants with the right to be treated equivalently to other tenants. An accommodation is necessary in order for the disabled person to fully participate in and obtain the benefits of the program, but not to exempt the disabled person from the requirements of the program itself. Davis, 442 U.S. 397.

B. A Person Who Has Committed a Violent Crime On Housing Agency Property is Not "Otherwise Qualified" For the Public Housing Program.

Under public housing program rules, an applicant for public housing who had been convicted of committing a violent crime in a prior tenancy could be rejected from the program, having been found to be "ineligible" for the program based upon the applicant's history of criminal conduct. G.L.c.121B, § 32; 24 C.F.R. § 960.203. *See also* Talley v. Lane, 13 F.3d 1031, 1034

(1994) (nothing in the Fair Housing Act prohibits a landlord from relying on a criminal record in evaluating a prospective disabled tenant). In fact, HUD encourages, if not requires, public housing agencies to screen for criminal activity:

> Under the Public Housing Assessment System (PHAS), PHAs *(i.e., public housing authorities)* that have adopted policies, implemented procedures and can document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories receive points. (See 24 CFR 902.43(a)(5).) This policy takes into account the importance of screening to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.

24 C.F.R. 960.203(b).

The same standard applies during the tenancy: a tenant who has pleaded guilty to a crime of violence is a tenant who has lost their qualification for housing. Id. As HUD recognized in 24 C.F.R. 960.203(b), the entire community is affected when infected with violence. The "program integrity" depends upon lease compliance, and the elimination of a dangerous environment. Uniform enforcement of this standard to all tenants fulfills this important program objective. Breach of this standard establishes that the wrongdoer is not qualified for the program.

This court has already considered the same issue that is presented in this case in the case of President and Fellows of Harvard College v. Mammone, 446 Mass. 657 (2006). In that case, an employee had committed numerous inappropriate and disruptive acts. The Court there found that because of failure to observe basic job requirements by the employee, the employer need not perform further evaluation of eligibility for reasonable accommodation, as there was no prospect that the employee would be able to establish "qualification" for the job.

Citing the case of Garrity v. United Airlines, 421 Mass. 55 (1995), the Court stated "we reasoned (in Garrity) that a disabled individual cannot be a qualified handicapped person 'if he commits misconduct which would disqualify an individual who did not fall under the protection of the statute' (i.e., a non-handicapped employee)." Mammone, *466 Mass. 657* at 666-667. The Court also recalled that in Garrity, "we did not consider whether Garrity could have (in the future) performed satisfactorily with a reasonable accommodation. We simply concluded that Garrity's conduct exceeded the egregious misconduct threshold." Id. at 668-669.

The facts of the Mammone case involved no violence, but the court specifically noted that had there been a violent assault against a patron, there would be absolutely no question that such conduct fell outside the scope of any duty to reasonably accommodate, See Mammone, FN 24.

Even if the violent act arises from a failure to take medication, while not on medication, a person ceases to be "qualified" if their conduct cannot conform to the standards of the workplace or housing program. In the case of Johnson v. Maynard, No. 01 Civ. 7393 U.S.D.C. (S.D.N.Y. 2003), an employee was fired based on her conduct while her medications were being lowered, facts similar to those of the tenant in the case before the Court. The court in that case found that the employee ceased to be "qualified" when she was off her medication and her conduct constituted a "direct threat." The duty to reasonably accommodate was not applied post-incident, but to the incident which constituted the threat.

As in the above cases, the tenant's conduct in this case, even if caused by failure to take medications or otherwise related to disability, should be evaluated at the point the act was committed. At that point, the

tenant had not conformed his conduct to the lease requirements, and consequently, was not a "qualified" individual.

C. Requiring a Person Who Has Committed a Violent Crime to Remain in the Public Housing Program is Not Reasonable and Imposes an Undue Burden on a Public housing agency.

As discussed in the Shkolnik v. Andover Housing Authority, 443 Mass. 300 (2005), there is an interrelationship between the definition of a "qualified" individual and the "reasonableness" of the requested accommodation. The case at bar asks the landlord to accede to commission of a crime against another individual, a crime to which the assailant has pled guilty. As stated in Peabody Properties, 418 Mass. 657 such an expectation is not reasonable.

The tenant in this case makes the self-serving allegation that there is little risk of re-occurrence of the violence that he impacted upon the other tenant in this case. Assuming, for purposes of this brief, that the tenant's reduction in his medications in fact was the cause of the tenant's violent behavior (a fact that was never established at trial or even in post-trial affidavits), even if it were the case, such an event could reasonably recur. A number of employment cases have found that termination is allowable as a protection

against that risk, and vividly describe the problem for the employer and fellow employees once an incident of violence has occurred. These same considerations apply to the housing context.

In Mazzarella v U.S.P.S., 849 F.Supp. 89, (D. Mass. 1994), and Adams v. Alderson, 723 F. Supp. 1531, (D. DC 1989), the employee suffered from "explosive personality disorder." Violent outbursts had not previously occurred, and in each incident, the employee argued that no further incidents might occur, or that many years could elapse before one did. The court found in those cases that an accommodation of allowing the employee to continue to work would not guard against further explosions, even if years later.

VI. It is Unreasonable to Require a Housing Agency to Monitor or Enforce a Tenant's Medical Regimen or Compliance With Medical Treatment.

Tenants have privacy rights, and housing authorities are not authorized to monitor tenants for medical issues. As stated in Shkolnick, 443 Mass. 300 at 313, "it is not reasonable to require a public housing authority to diagnose its tenants' medical problems, to ensure that they are receiving appropriate care, and to ignore the impact of lease violating behavior on other tenants."

> Simply put, the conditions placed on the landlord[5] were not reasonable because they did not relate to housing matters. Rather, the conditions made the landlord responsible for non-housing matters. Reasonable accommodation by a landlord requires that the landlord reasonably accommodate the tenant's housing needs. Peabody Properties, 418 Mass. 603 at 608-609.

See also Caneles v. Hernandez, 13 A.D.3d 263 (2004), "for Housing Authority personnel to monitor this individual's treatment program would be akin to providing a supportive social service, which is contrary to 24 C.F.R. § 100.204, fundamentally altering the nature of the program."

Yet, once the housing agency has notice that a tenant is capable of engaging in violence against another tenant, in order to protect itself from future liability to an innocent third party for some future assault, it would necessarily need to take additional steps to protect itself and others from re-occurrence. A housing authority has a duty to provide other tenants with a safe environment, and could be held liable for failure to do so, particularly if it had prior knowledge based on a tenant's violent conduct. Doe v. New Bedford Hous. Auth., 417 Mass. 273 at 285 (1994) Even if no future assault ever occurs, the possibility that it

[5] i.e., to guard against commission of criminal conduct

might dictates that the housing agency must take precautionary steps to guard against that possibility. Besides the practical difficulty in determining what steps could be effective in such a situation, the housing agency does not have the means, either by mandate or resources, to implement such steps. That there will most certainly be many tenants who would require such attention aggravates the burden, and illustrates how global and challenging such a responsibility would be.

Imposing such obligations on a housing agency thus also constitutes an "undue burden" on the housing agency. See Palmer v. Cir. Ct. of Cook Cty., 117 F.3d 351 (7th Cir 1997) (court observed that keeping a violent employee places employer "on a razor's edge" between a duty to a disabled employee and to other employees, by imposing a constant burden of monitoring and vigilance to insure employee safety. The court also observed that the termination was because of the incident, not because of the disability). Also see, Koshko v. GE,14 Am. Disabilities Cas. (BNA) 208, U.S.D.C., (Northern Dist. Ill. 2003) (employer cannot be expected to "watch" an employee, or to ensure that an employee is following doctor's orders.)

The statute requires a landlord to "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary *to afford such person equal opportunity to use and enjoy a dwelling*"(emphasis supplied), 42 U.S. C. § 3604(f)(3)(B). Any tenant that commits criminal activity, whether disabled or not, is subject to eviction under the lease. A disabled tenant who is evicted for committing a serious crime is being treated equivalently to other tenants. The cost of permitting that tenant to stay after committing such a crime is not reasonable, is overly burdensome, and provides the tenant with rights that no other tenant has under like conditions.

D. Forbearance from Eviction is Not a Reasonable Accommodation in the Case of a Tenant Who has Committed Serious Violence.

Cases addressing the standard to be applied to a requested forbearance from eviction have found an accommodation is necessary only where other tenants are not seriously affected by the conduct. In Shkolnik, 443 Mass. 300, the court states "A delay might have been a reasonable accommodation if no neighbors were being seriously disturbed by the tenants' behavior." See Whittier Terrace Associates v. Hampshire, 26 Mass. App.

Ct. 1020 (1989) (finding the absence of disturbance to other tenants to be a significant factor in evaluating the "reasonableness" of an accommodation) and City Wide Associates v. Penfield, 409 Mass. 140 at 144, (1991) (finding the absence of evidence of adverse impact on other tenants pertinent to the reasonability of the requested accommodation).

In contrast, where the tenant had admitted to sufficient facts to a charge of possession with intent to distribute marijuana, the landlord was entitled to rely on the conviction, and did not need to reasonably accommodate the tenant. Peabody Properties, 418 Mass. 657, ("Pursuant to the terms of the lease, the landlord had the authority to terminate the lease because of the tenant's drug activity").

Tolerance of the commission of dangerous criminal conduct is not equivalent to tolerance of noise, damage, or strange or bizarre behavior that were the basis of Shkolnik and Penfield, or keeping a pet that disturbed no one (Whittier). Also see, Mammone 446 Mass. 55("Our holding today only reaches employees who engage in egregious workplace misconduct...(it would not) allow an employer to take adverse action against a handicapped employee for an incident of bizarre or inappropriate

behavior caused by his handicap that does not rise to this level").

Some courts have utilized a "balancing test" to determine "when the proposed accommodation provides a benefit that outweighs the burden to the property manager and other tenants." Dolak, 36 Ind. L. Rev. 759,781; Groner v. Golden Gate Apartments, 230 F.2d 1039, 1044 (6th Cir. 2001).

In the case before the Court, the conduct is so egregious, and so detrimental to other tenants, that the benefit to the tenant is clearly outweighed, and termination is warranted.

VI. A Landlord is Liable to Third Parties For the Criminal Acts of Tenants Who Have a Prior History of Violence.

The tenant in this case does not acknowledge the BHA's resulting exposure to liability to third parties for the result that he urges in this suit. Courts hold landlords responsible, in negligence, for foreseeable violent acts committed by their tenants against other tenants, particularly when the landlord is aware of the offender's past record of violence. While, ordinarily a landlord might not have a duty to protect tenants from the criminal acts of third parties, if the landlord had knowledge of prior criminal activity, courts impose a

duty on the landlord if the premises is thereby rendered unsafe, and there could be a breach of duty if the landlord improperly performed protective measures. See e.g., Tan v. Arnel Management Co., 162 Cal. App. 4th 621 (2008); Gordon v. Winston, LEXIS 3538 (Conn. Super. Ct. 2006); Monaghan v. SZS 33 Assocs., L.P., 827 F.Supp. 233 (S. D. N. Y. 1993); Hill v. Chicago Hous. Auth., 233 Ill. App. 3d 923 (Ill. App. Ct. 1st Dist. 1992); Scott v. Watson, 278 Md. 160 (1976); Smith v. General Apartment Co., 133 Ga. App. 927 (1975); Kline v. 1500 Massachusetts Ave. Apartment Co., 141 U.S. App. D.C. 370 (D.C. Cir. 1970). Moreover, there is implied in a contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity. Kline, 141 U.S. App. D.C. at 485.

Requiring the BHA, or any landlord, to ignore a tenant's brutal behavior, simply on account that the tenant claims to be mentally disabled, would very likely expose the landlord to untold financial liability for any future violent act(s) of the tenant. It is unlikely that a future victim will find the perpetrator's mental state relevant in the *ad damnum* clause of his or her lawsuit against the landlord. Accordingly, it would be

unreasonable and unfair for this Court to subject the BHA to that exposure, an exposure which most housing agencies simply cannot afford to assume.

Here, the BHA clearly is on notice of this tenant's propensity for egregious violent acts against other tenants. Like any responsible landlord, the BHA immediately took steps to remove the perpetrator from its housing development and restore the peace and safety for other tenants. Any other course of action arguably would have been negligent, and could very realistically result in significant future financial liability for BHA to a third party should this tenant's violent propensities resurface with another victim.

CONCLUSION

Amici Curiae support and understand the special needs of disabled public housing residents. In many circumstances, housing authorities should make changes to their programs and policies to accommodate those special needs. However, in the same vein, the public housing program provides an important resource to a community of low-income families, disabled persons, and the elderly. All tenants participating in the public housing program have the legal right to a safe, peaceful

environment. Tenants are assured this safe environment by enforcement of the lease, which provides clear standards of behavior for all tenants. The lease demands that no tenant interfere with or harm any other tenant. Disabled tenants, like others, are expected to comply with these basic requirements for the safety of the whole community. When a tenant so seriously and materially breaches these requirements by injuring another tenant, the right to continued occupancy terminates, regardless of whether the conduct is attributable to a disability or not. Such a result is consistent with the Fair Housing Act and other laws protecting the disabled. A disabled person who commits a serious act of violence is no longer qualified for the public housing program. A contrary result imposes an unreasonable and undue burden on public housing authorities.

Amici Curiae respectfully urge this Court to affirm the decision of the Appeals Court of Massachusetts so that housing agencies in Massachusetts, like their counterparts across the country, may continue to exercise their eviction rights to exclude from their properties violent tenants who commit criminal activity

on PHA property and thereby violate the peaceful enjoyment of other residents.

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CERTIFICATE OF SERVICE

I hereby certify, on penalty of perjury, that on July 31, 2008 I caused two copies of the foregoing Brief of The Cambridge Housing Authority As Amicus Curiae to be served by first-class mail on each of the following:

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