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COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

**SJC-07874**

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**COMMONWEALTH OF MASSACHUSETTS,**  
Appellee

v.

**David Magadini**  
Appellant-Defendant

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ON APPEAL FROM A JUDGMENT OF THE  
SOUTHERN BERKSHIRE DISTRICT COURT

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**BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION  
OF MASSACHUSETTS, COMMITTEE FOR PUBLIC COUNSEL  
SERVICES, AND MASSACHUSETTS ASSOCIATION OF CRIMINAL  
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### **ISSUE PRESENTED**

Whether and how the defense of necessity applies in the case of a homeless individual who trespasses on private property in order to find safe shelter in winter conditions.

### **INTERESTS OF THE AMICI CURIAE**

The American Civil Liberties Union of Massachusetts ("ACLUM"), an affiliate of the national American Civil Liberties Union, is a statewide nonprofit membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. Consistent with this dedication, ACLUM is concerned about the criminalization of poverty in Massachusetts. See, e.g., Thayer v. City of Worcester, -- F. Supp. 3d -- , No. 13-40057, 2015 WL 6872450 (D. Mass. Nov. 9, 2015) (striking City's anti-begging ordinance as unconstitutional); McLaughlin v. City of Lowell, -- F. Supp. 3d -- , No. 14-10270, 2015 WL 6453144 (D. Mass. Oct. 23, 2015) (same).

The Committee for Public Counsel Services (CPCS), the Massachusetts public defender agency, represents indigent adults and juveniles accused of committing crimes. G. L. c. 211D, §§ 1 et seq. The singular

statutory and constitutional mission of court-appointed counsel is to protect and vindicate the rights of the indigent accused. Innumerable men, women and children served annually by CPCS are homeless; their status as homeless individuals and families creates extraordinary obstacles for them on a daily basis. Because CPCS's intrinsic purpose is to advance and protect the rights of its constituency, it files this Friend of the Court brief to provide this Court with important data addressing the scope and severity of homelessness in Massachusetts. Amici argue that in the circumstances of this case, a jury instruction on the defense of necessity was not only warranted, but imperative.

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to preclude or correct, problems in the criminal justice system. MACDL routinely files amicus curiae briefs in cases

raising questions of importance to the administration of justice, like the instant case.

### **SUMMARY OF ARGUMENT**

The necessity defense applies "where injustice would result from too literal a reading of the law." William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 New. Eng. L. Rev. 3, 6 (2003). It is a critical safety valve, empowering the jury to acquit someone who has broken the law "if the harm that results from his breaking the law is significantly less than the harm that would result from his complying with the law in that particular situation." Model Jury Instruction: Necessity or Duress, MJ MA-CLE, 9.240.

A homeless person who trespasses while seeking shelter from extreme weather undertakes a quintessential example of lawbreaking by necessity. In this case, a homeless person named David Magadini, who could not access an emergency shelter or rent an apartment, trespassed into the hallway of a mixed-use private property to seek warmth and shelter from a bitter winter night in February 2014. Yet, on that occasion and several others, police officers in Great Barrington informed him that he was violating a

trespass order instead of seeking to help him. Worse yet, the trial court refused to instruct the jury on the defense of necessity, and Mr. Magadini was convicted.

The Commonwealth defends this outcome, arguing that a necessity instruction was unwarranted because Mr. Magadini allegedly had “effective legal alternatives to abate the cold weather conditions.” Comm. Br. at 10; see Commonwealth v. Kendall, 451 Mass. 10, 13–14 (2008) (necessity defense can be raised only when there are no effective legal alternatives to abate the danger in question). This argument is wrong on the facts and on the law.

With respect to the facts, the Commonwealth obscures both the scope and severity of homelessness in Massachusetts. Homelessness is increasing faster here than almost anywhere else in the country, with more than 21,000 homeless individuals as of 2014. This crisis is largely the product of entrenched structural problems—a paucity of affordable housing, a woeful dearth of shelter beds and substantial cuts in rental assistance programs—rather than poor individual choices. Tens of thousands of individuals and families do not simply choose to be homeless: their stark

reality is often driven by funding and policy decisions at the federal, state and local levels.

Pgs. 9-30.

Moreover, by arguing that Mr. Magadini had effective legal alternatives to trespassing, the Commonwealth misapprehends the law. First, it briefly argues that, though Mr. Magadini was homeless, he could have found alternative shelter on the nights in question. Second, and at much greater length, the Commonwealth argues that Mr. Magadini could have avoided being homeless in the first place. Both arguments are incorrect.

As to the first argument, the Commonwealth half-heartedly suggests that Mr. Magadini could have asked the police for assistance or travelled to a shelter more than 20 miles away. "The Commonwealth, however, ignores the fact that the legal alternative must be effective." Commonwealth v. McCambridge, 44 Mass. App. Ct. 285, 292 (1998) (emphasis added). The effectiveness of any alternative to breaking the law, in turn, depends on the imminence and gravity of the danger that the defendant sought to avoid. Id. at 291-92. The relevant facts in this case—including the frigid temperature, the late hour, Great Barrington's

limited public transportation, and the police officers' treatment of Mr. Magadini—reveal that none of these putative alternatives were remotely realistic, let alone effective to combat the imminent danger posed by an unsheltered winter night. Because a defendant need not pursue futile alternatives, a necessity instruction was warranted. Cf. Commonwealth v. Kendall, 451 Mass. 10, 16 n.5 (2008). Pgs. 30–34.

As to the second argument, the Commonwealth argues at length that Mr. Magadini had an effective legal alternative to trespassing because he could have avoided being homeless altogether. But this counterfactual has no place in a necessity analysis. Courts typically focus on the options available at the time of the alleged crime, not on whether a defendant could have made remote life choices that might have prevented the dangerous situation from ever arising. See, e.g., Kendall, 451 Mass. at 15–16; McCambridge, 44 Mass. App. Ct. at 290–91; Commonwealth v. Livingston, 70 Mass. App. Ct. 745, 749–50 (2007). Indeed, the Commonwealth has not cited a single case on the necessity defense, including Kendall, in which a court has engaged in such a speculative and

judgmental rewinding of the defendant's life. Pgs. 34-39.

In this case, adopting such an approach would be particularly severe due to the significant structural factors contributing to homelessness in America and the particular circumstances facing Mr. Magadini. Moreover, Mr. Magadini testified that he had nowhere else to go, that he did not have a driver's license, and that he unsuccessfully tried to rent an apartment in Great Barrington on a regular basis for years. TR 115-16, 120-21, 125, 129, 132, 134-37. He tried to stay as warm as possible outside with blankets and clothing "but sometimes the weather is [] so severe . . . that is not possible." TR 121. In light of this evidence, Mr. Magadini's necessity defense should have gone to the jury. Pgs. 40-46.

A necessity defense is especially compelling "when it is society, rather than private actors, that creates the coercive conditions." United States v. Bailey, 444 U.S. 394, 435-36 (1980) (Blackmun, J. dissenting). Homelessness is one such condition that is largely controlled by societal forces. In this case, denying a necessity instruction was "akin to

punishing the defendant for being homeless."

Commonwealth v. Canadyan, 458 Mass. 574, 579 (2010).

**STATEMENT OF THE CASE AND STATEMENT OF FACTS**

Amici adopt the statement of the case and statement of facts as set forth in Mr. Magadini's brief. Def. Br. at 1-14.

## **ARGUMENT**

### **I. THIS COURT SHOULD RECOGNIZE, AND THE COMMONWEALTH MAY NOT OBSCURE, BOTH THE SCOPE AND THE SEVERITY OF THE HOMELESSNESS CRISIS IN MASSACHUSETTS.**

The gravity of the Massachusetts homelessness crisis cannot be overstated. And yet, the Commonwealth does not simply understate this problem; it virtually ignores it altogether. This refusal to recognize the grave and imminent dangers created by homelessness fundamentally taints the Commonwealth's necessity analysis. Context is central to this inquiry. And the context of homelessness in Massachusetts is bleak: exploding numbers of individuals with nowhere to go, and dire consequences for those left exposed to the elements. Most tragically, and significantly, this reality is largely created by structural factors rather than individual choices.

#### **A. The number of homeless individuals in Massachusetts is growing.**

"The problem of homelessness is a stark example of poverty amid plenty." Williams v. Dep't of Human Services, 116 N.J. 102, 120 (1989). In Massachusetts, homelessness is a raging problem. "Statewide, homelessness is increasing faster than anywhere else

in the country<sup>[1]</sup>—up 40 percent since 2007, according to a U.S. Department of Housing and Urban Development report released in October [2014],<sup>[2]</sup> even as the nationwide homeless population declined slightly.” Katie Johnston, *Survey Finds Acute Homelessness in Boston*, *Boston Globe* (Dec. 11, 2014).<sup>3</sup> According to Jim Greene, director of the Emergency Shelter Commission for the Boston Public Health Commission, Massachusetts “[has] one of the highest rates of family homelessness of any state in the country, and there are not affordable housing resources aligned to the emergency system.” Id. In Boston, the demand for

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<sup>1</sup> The homeless figures are based on a survey conducted in Massachusetts and across the nation on a single night in late January of 2014. Agencies around Massachusetts reported 21,237 people in shelters, in transitional housing, or on the streets, an increase of more than 2,200, or 12 percent, from 2013. Katie Johnston, *Homeless Population in Mass. Rising Faster Than Any Other State*, *Boston Globe* (Oct. 30, 2014), <http://www.bostonglobe.com/business/2014/10/30/homeless-population-massachusetts-rose-past-four-years/vKAIjJFwX9g0bw7zJd6zFP/story.html>.

<sup>2</sup> 2014 Annual Homeless Assessment Report (AHAR) to Congress, U.S. Dep’t of Hous. and Urban Dev., at 8–9 (Oct. 2014), <https://www.hudexchange.info/resources/documents/2014-AHAR-Part1.pdf> (“AHAR 2014”).

<sup>3</sup> <https://www.bostonglobe.com/business/2014/12/11/boston-has-highest-homeless-population-among-cities-surveyed-nationwide/MFMhhCbZZFKtQezR7xAVJL/story.html>.

shelters is roughly 22 percent higher than the number of beds available. Id.

From 2007 to 2014, Massachusetts had close to the highest percentage increase in its homeless population across the nation. AHAR 2014 at 8-9. As of 2014, with 14,449 homeless families, Massachusetts had the third highest number of homeless families in the United States, AHAR 2014 at 24, and the number of homeless people in Massachusetts has risen rapidly every year. Despite having just over 2% of the nation's overall population in 2014,<sup>4</sup> Massachusetts accounted for 21,237 homeless people-equal to the entire town population of Winchester-and 4% of the nation's overall homeless population.<sup>5</sup> Id. at 8. From 2013 to 2014, Massachusetts had both the second largest increase in the nation's homeless population

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<sup>4</sup> State & County QuickFacts, U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/25000.html>.

<sup>5</sup> AHAR 2014 noted that fully half of the nation's homeless population was concentrated in five states: California (20% or 113,952 people), New York (14% or 80,590 people), Florida (7% or 41,542 people), Texas (5% or 28,495 people), and Massachusetts (4% or 21,237 people). AHAR 2014 at 8. However, the population of Massachusetts constitutes only 2% of the nation; California has 12% of the nation's population; New York has 6%; Florida has a little over 6%; and Texas has almost 8.5%. State & County QuickFacts, <http://quickfacts.census.gov/qfd/index.html>, <http://quickfacts.census.gov/qfd/states/25000.html>.

and the largest increase nationwide in homeless families. Id. at 8-9, 26. During that same period, other states decreased their homeless populations. Id. at 8-9.

**B. The consequences of being homeless in Massachusetts are severe.**

Homeless people in Massachusetts routinely face life-threatening conditions due to bitterly cold winters.<sup>6</sup> According to data collected at Boston's Logan Airport between 1981 and 2010, the average Boston temperature ranges during the winter months are as follows:<sup>7</sup>

| Month    | High Degree Fahr. | Low Degree Fahr. |
|----------|-------------------|------------------|
| December | 41                | 28               |
| January  | 36                | 22               |
| February | 39                | 25               |
| March    | 45                | 31               |

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<sup>6</sup> At the national level, approximately seven hundred people who are actually homeless or at imminent risk of homelessness die from hypothermia in the United States every winter. Winter Homelessness Services: Bringing Our Neighbors In From The Cold, National Coalition for the Homeless, at 3 (Jan. 2010), available at [http://www.nationalhomeless.org/publications/winter\\_weather/Winter\\_weather\\_report.pdf](http://www.nationalhomeless.org/publications/winter_weather/Winter_weather_report.pdf).

<sup>7</sup> Current Results: Weather and Science Facts, <http://www.currentresults.com/Weather/Massachusetts/Places/boston-temperatures-by-month-average.php>.

In Great Barrington, the winter temperature ranges from December 2014 through March 2015 were often brutal:<sup>8</sup>

| Month    | High Degree Fahr. | Low Degree Fahr. |
|----------|-------------------|------------------|
| December | 60                | 12               |
| January  | 47                | - 6              |
| February | 37                | - 15             |
| March    | 63                | - 2              |

In December 2014, the average high temperature in Great Barrington was about 38 degrees F., and the average low temperature was approximately 28 degrees F. By January of 2015, the average high temperature in Great Barrington was approximately 29 degrees F., and the average low was approximately 10 degrees F. In February, the average high was approximately 24 degrees F., and the average low was not even 2 degrees F. In March, the average high was approximately 38 degrees F., and the average low was approximately 19 degrees Fahrenheit.<sup>9</sup>

"With nowhere to stay except the streets, homeless people are at risk for a variety of conditions caused by exposure to the cold, including

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<sup>8</sup> The Weather Channel, Great Barrington, MA Weather, <http://www.weather.com/weather/monthly/1/Great+Barrington+MA+01230:4:US>.

<sup>9</sup> See fn.8, above.

frostbite and hypothermia, both of which can be permanently damaging to one's health and can sometimes be life-threatening." Winter Homelessness Services: Bringing Our Neighbors In From The Cold at 5.

"Hypothermia is a medical emergency that occurs when your body loses heat faster than it can produce heat, causing a dangerously low body temperature." Mayo Clinic, Hypothermia.<sup>10</sup> This disrupts the normal functioning of the heart, nervous system and other organs. Id. "Left untreated, hypothermia can eventually lead to complete failure of [the] heart and respiratory system and to death." Id. The mortality rate from accidental hypothermia ranges between 30% and 80%. James J. O'Connell<sup>11</sup> et al., Accidental

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<sup>10</sup> <http://www.mayoclinic.org/diseases-conditions/hypothermia/basics/definition/con-20020453>.

<sup>11</sup> Dr. O'Connell is the president of Boston Health Care for the Homeless Program (BHCHP). During the past 30 years, under Dr. O'Connell's vision, BHCHP has evolved into a national service model embodying the core functions and essential services of public health. Each year the program provides integrated medical, behavioral, and oral health care, as well as preventive services, to more than 11,000 homeless people. Services are delivered in clinics located in 2 teaching hospitals, 80 shelters and soup kitchens, and an innovative 104-bed medical respite unit at BHCHP, the Barbara McInnis House. For an in-depth biography of Dr. O'Connell, see, e.g., Visionaries: Dr. Jim O'Connell, Provider Of Health Care To The Homeless, WBUR (Nov. 27, 2012), <http://www.wbur.org/2012/11/27/dr-jim-oconnell>

Hypothermia & Frostbite: Cold-Related Conditions, The Health Care of Homeless Persons: A Manual of Communicable Diseases & Common Problems in Shelters & on the Streets, at 189 (2004).<sup>12</sup>

Contrary to common belief, life-threatening cases of hypothermia do not require extreme temperatures; indeed, they often occur when the ambient temperature is between 32 degrees Fahrenheit and 40 degrees Fahrenheit. Winter Homelessness Services: Bringing Our Neighbors In From The Cold at 15. For example, the most drastic case ever seen at the Boston Healthcare for the Homeless Program, in which a homeless man was brought in with a body temperature of 57 degrees Fahrenheit, occurred when the temperature was greater than 50 degrees F. during the day and fell to 36 degrees F. at night. Id. at 15.

Exposure to the cold can also lead to frostbite, necrosis and death. Accidental Hypothermia & Frostbite: Cold-Related Conditions at 189-197. Depending on the severity of weather conditions, frostbite can occur in as quickly as five minutes.

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<sup>12</sup> Available at [https://web.archive.org/web/20150907132020/http://www.bhchp.org/BHCHP%20Manual/pdf\\_files/Part2\\_PDF/Hypothermia.pdf](https://web.archive.org/web/20150907132020/http://www.bhchp.org/BHCHP%20Manual/pdf_files/Part2_PDF/Hypothermia.pdf).

Id. at 190. Frostbite refers to freezing and injury of the tissue, and can cause excruciating pain, including "electric shock" sensations when the body rewarms and extremities begin to thaw. Id. at 194. Complications of frostbite can include infection, loss of affected body parts, sepsis, and death.

**C. The causes of homelessness are largely structural.**

The increasing number of homeless individuals, and the dire consequences of being homeless, cannot be explained solely by "bad" individual life choices. To the contrary, the paucity of adequate shelter to meet the burgeoning demands "all stem[] from state and federal policy changes in the mid-1990s: welfare reform, the end of rent control, and substantial cuts in the state's rental assistance program." Survey Finds Acute Homelessness in Boston. Structural factors are at the heart of this crisis at the federal, state and local level.

(i) Federal Level

The federal government recently emphasized the structural nature of homelessness. Earlier this year, the United States Department of Justice filed a Statement of Interest of the United States, pursuant

to 28 U.S.C. § 517, in an ongoing lawsuit filed by several homeless people against the city of Boise, Idaho for its ban on sleeping in public places. The plaintiffs maintained that punishing homeless persons for sleeping in public is unconstitutional. Bell v. City of Boise, 1:09-cv-540-REB (D. Idaho)<sup>13</sup> (D.N. 276) (Aug. 6, 2015) ("DOJ Statement").

Substantively, the government argued that making it a crime for people who are homeless to sleep in public places when there is insufficient shelter space unconstitutionally punishes them for being homeless. Id. at 11. In so doing, it emphasized the institutional deficits creating homelessness. The Statement notes that many homeless individuals are unable to secure shelter space because city shelters are over capacity, inaccessible to people with disabilities, or transgress the tolerance of the mentally ill homeless individual; and that needlessly

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<sup>13</sup> See also Pottinger v. City of Miami, 720 F.Supp. 955, 958 (S.D. Fla. 1989), remanded on limited basis on other grounds, 40 F.3d 1155 (11th Cir. 1994) (ruling unconstitutional city's practice of arresting homeless individuals for harmless life sustaining activities that they are forced to perform in public because arrests constituted cruel and unusual punishment in violation of Eighth Amendment, reached innocent conduct in violation of Fourteenth Amendment Due Process Clause, and burdened fundamental right to travel in violation of Equal Protection Clause).

pushing homeless individuals into the criminal justice system does nothing to break the cycle of poverty or prevent homelessness in the future. Id. at 2.

The federal government also recently released a report with goals and concrete proposals to prevent and end homelessness. Opening Doors: Federal Strategic Plan to Prevent and End Homelessness, U.S. Interagency Council on Homelessness (as amended June 2015) ("2015 USICH Report").<sup>14</sup> Recognizing the structural roots of the problem, the report focused on institutional solutions. These strategies involve proposed federal efforts to assist communities in developing adequate housing systems, including the simplification and reduction of entry requirements to access emergency shelters. Id. at 57. Significantly, the 2015 USICH Report stressed the importance of federal partnership with "[s]tates, local governments, nonprofits, faith-based and community organizations, and the private and philanthropic sectors" to take "innovat[ive], and evidence-based approaches" in order to "tackle national challenges like homelessness in the most cost-effective ways possible." 2015 USICH

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<sup>14</sup> Available at [http://usich.gov/resources/uploads/asset\\_library/USICH\\_OpeningDoors\\_Amendment2015\\_FINAL.pdf](http://usich.gov/resources/uploads/asset_library/USICH_OpeningDoors_Amendment2015_FINAL.pdf).

Report at Prefatory Letter.<sup>15</sup> The Report notes that states can now shoulder greater fiscal responsibility for supporting local communities in managing homelessness: "As more individuals experiencing chronic homelessness are eligible for Medicaid through the Affordable Care Act, there are greater opportunities for Medicaid to finance services for people in supportive housing."<sup>16</sup>

(ii) State Level: Massachusetts

Rather than taking the lead to alleviate this problem, Massachusetts policies have amplified the crisis. "Boston and much of the rest of Massachusetts are in the midst of an affordable housing shortage that shows few signs of abating." Katie Johnston, Demand Soars for Affordable Housing in Boston Area,

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<sup>15</sup> USICH also released a report in 2012 recommending constructive alternatives to the criminalization of homelessness. Some of the recommendations in that report included ensuring 24 hour access to shelters that offer alternatives to living in public places and having police officers participate in outreach and engagement. Searching Out Solutions: Constructive Alternatives to Criminalization, U.S. Interagency Council on Homelessness, at 3-4 (2012), available at [http://usich.gov/resources/uploads/asset\\_library/RPT\\_SoS\\_March2012.pdf](http://usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf).

<sup>16</sup> Summary of Changes to Opening Doors as Amended June 2015, at 2. [http://usich.gov/resources/uploads/asset\\_library/Summary\\_Changes\\_2015\\_OD\\_Amendment.pdf](http://usich.gov/resources/uploads/asset_library/Summary_Changes_2015_OD_Amendment.pdf)

Boston Globe (Nov. 28, 2014).<sup>17</sup> Massachusetts has one of the lowest rates of new housing production in the country, and the limited number of new units that are being built are mostly luxury apartments. Id. As of 2014, the “Boston Housing Authority has a wait list of 40,000 households for 15,000 subsidized units.” Id. Compounding this lack of affordable units, as of 2014 the state had only “6,600 rental vouchers to help low-income families pay for apartments, a third of what it had in the early 1990s, due to budget cuts.” Id.; see also Jay Fitzgerald, Construction Drops Amid Restrictions on Home Building, Boston Globe (Nov. 21, 2015) (describing a housing shortage in Massachusetts “that is driving up prices [and] shutting out young workers and their families”).<sup>18</sup>

The struggles of this population to find shelter in an overwhelmed system are magnified by the emergency rules and regulations promulgated by the Department of Transitional Assistance, and practices

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<sup>17</sup> <https://www.bostonglobe.com/business/2014/11/28/demand-for-affordable-housing-soars/hCb4RSkLTbpqdMJR1eCYTI/story.html>.

<sup>18</sup> <https://www.bostonglobe.com/business/2015/11/20/with-restrictions-types-units-affecting-projects-housing-construction-plunges/oJFoASH17KgVo9iD3QLyQK/story.html>.

of shelter providers working with homeless families in Massachusetts. Access to this assistance is, at best, strictly curtailed.

The short and simple annals of the poor could not qualify an ordinary homeless family in Massachusetts for Emergency Assistance ("EA"). To qualify, a household must be homeless by dint of some cataclysmic force—either because it is at the risk of domestic abuse; or due to fire, flood, or other natural disaster which is not the fault of its members; or because it is the subject of eviction through no fault of its own;<sup>19</sup> or if there is a substantial health or safety risk if the family remains at its current housing.<sup>20</sup> 760 Code Mass. Regs. § 67.06. In addition,

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<sup>19</sup> Under this language, it is hard to say whether a family rendered homeless by foreclosure on a home after exhausting their inadequate resources would be viewed as "at fault" under these draconian regulations. See generally, Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis, National Coalition for the Homeless, 2009, available at <http://nationalhomeless.org/wp-content/uploads/2013/01/ForeclosuretoHomelessness0609.pdf>.

<sup>20</sup> Of the nearly 17,000 people who were in emergency shelters in Boston in 2014, with an additional 3,900 in transitional housing, "[m]ore than a third of them are severely mentally ill and nearly a third are physically disabled." It is unclear whether the EA criteria of a "substantial health or safety risk" includes circumstances arising from people struggling with mental illness, physical disability or addiction.

the family must lack feasible alternative housing, which includes staying with relatives, friends, or charitable organizations. Id.

Qualification for EA seems ephemeral for all but the most patently destitute among us. EA can be denied to households with an income of greater than 115% of the Federal Poverty Guidelines,<sup>21</sup> even though these same individuals are “indigent” for purposes of appointment of counsel in Massachusetts state court if their income does not exceed 125% of the Federal Poverty Guidelines.<sup>22</sup> In a twist worthy of Dickens, EA can also be denied for households with too little money, such as when a member of a household reduces his or her earnings. 760 Code Mass. Regs. 67.02(3-4). Misfortune begets misfortune, for EA may also be denied if a household member has an outstanding default or arrest warrant. 760 Code Mass. Regs. 67.02(11). Collectively, these barbaric rules

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Services for such people “are lacking, ... and as a result, many of these people end up homeless, further straining the system.” Johnston, Survey Finds Acute Homelessness in Boston, Boston Globe (Dec. 11, 2014).

<sup>21</sup> Issued pursuant to Federal Register (Vol. 78, No. 16, January 24, 2013, pp. 5182-5183). See 760 Code Mass. Regs. 67.02(5)(a).

<sup>22</sup> See S.J.C. Rule 3:10(f)(ii) (“Assignment of Counsel”).

severely limit access to desperately needed housing assistance.

These shortages have a real and lasting impact on the individuals involved. This past winter, the Boston Globe chronicled the desperation experienced by homeless families seeking emergency housing:

Massachusetts is the only state in the nation with a "right to shelter" law guaranteeing emergency housing for homeless families that qualify<sup>[23]</sup> ... But as the number of people who can't afford to keep a roof over their heads keeps increasing, those who work to find them housing worry that help isn't coming quickly enough. Some even call the "right" to shelter a myth.

Katie Johnston, Strict Shelter Rules for Homeless Families Draw Critics, Boston Globe (Jan. 15, 2015).<sup>24</sup>

For example, one woman, eight months pregnant, lost her housing in the autumn of 2012; out of desperation, and with nowhere else to go, she spent the night with her young son on a beach in Quincy. Id. She applied for shelter the next day, but was

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<sup>23</sup> Significantly, the state's "Right to Shelter" mandate does not extend to homeless individuals. See G. L. c. 23B, § 30 (program of emergency housing assistance to needy families with children and pregnant woman with no other children); 760 Code Mass. Regs. § 67.01(2).

<sup>24</sup> <https://www.bostonglobe.com/business/2015/01/14/strict-rules-force-homeless-families-into-risky-situations-advocates-say/OpdRjVC601VvonOQ3hUp5L/story.html>.

denied and told to return the following day with a photograph to prove that she had slept outside. She slept outside a second night, but when she brought a photograph to the shelter worker, she was accused of "staging" the photograph, and denied shelter. Id.

Another young mother with an 11-month-old son was denied shelter and forced to sleep in a park during August of 2013. "After that," Johnston wrote, the young mother and baby "stayed in a short-term family shelter, [the mother's] possessions loaded into a baby stroller, [and she] ... alternat[ed] between [staying in] South Station and the Boston Medical Center emergency room's waiting room" in an effort to keep the baby safe. Id. Yet another homeless woman, having just come out of a six-month opiate addiction program in Northampton, was told by a state worker that she and her 10-month-old baby should stay on "seven different people's couches for each of the next seven days," and then reapply. Id. Finally, a woman camping out in Boston's South Station after she was turned down for shelter went home with a man who offered her a place to stay, and was raped. Id. It is worth noting that the outcomes for many of the families chronicled by Johnston might have been

tragically different had they been forced to sleep on a beach or in a park in the dead of winter.

(iii) Local Level: Great Barrington

Berkshire County encompasses rural towns<sup>25</sup> and some small cities.<sup>26</sup> Great Barrington is a town of 6,945 people in southern Berkshire County.<sup>27</sup> The surrounding areas do not provide effective alternatives for seeking emergency shelter.<sup>28</sup> Multiple local Massachusetts online homeless shelter

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<sup>25</sup> The United States Bureau of the Census defines "rural" as territory, population, and housing units that are not urban. Urban is defined as "Urbanized Areas (UAs) of 50,000 or more people" or "Urban Clusters (UCs) of at least 2,500 and less than 50,000 people." Urban and Rural Classification, U.S. Census Bureau, <https://www.census.gov/geo/reference/urban-rural.html>.

<sup>26</sup> Visit and Relocate, Berkshire Chamber of Commerce, [http://berkshirechamber.com/index.php?nav\\_id=5](http://berkshirechamber.com/index.php?nav_id=5).

<sup>27</sup> According to the United States Census Bureau, the population of Great Barrington as of July 1, 2014, was 6,945. <http://www.census.gov/quickfacts/table/PST045214/2500326815>. See also Community Master Plan, Town of Great Barrington, MA, Vol.I at 14 (Oct. 10, 2013).

<sup>28</sup> In fact, surrounding towns in Western Massachusetts have seemingly prioritized business development over shelter. See Alessandra Martinez, Holyoke Homeless Hotel to Shut Down Soon, 22 News (Apr. 22, 2015), <http://wwlp.com/2015/04/22/holyoke-homeless-hotel-to-shut-down-soon/> (noting that effective May 1, 2015, several homeless families were forced out of a Western Massachusetts homeless shelter so that the site could be redeveloped into restaurants, shops, and two new hotels, despite the fact that 400 homeless families lived in the area).

directories, including a directory provided by the Commonwealth of Massachusetts, establish that the closest emergency assistance shelter to Great Barrington is in Pittsfield, Massachusetts, over 20 miles from Great Barrington.<sup>29</sup> Great Barrington and the surrounding region have limited public transportation options.<sup>30</sup> The regional bus system does not run seven days a week, and service stops at night. Berkshire Regional Transit Authority, <http://berkshirerta.com/>. Because of this limited transportation, a homeless person on a frigid winter night in Great Barrington is likely to be in clear and

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<sup>29</sup> See, e.g., Emergency Assistance, Massachusetts Housing and Economic Development, <http://www.mass.gov/hed/housing/stabilization/emergency-assistance.html>, Emergency Shelter Assistance (for Individuals), <https://hedfuel.azurewebsites.net/iShelters.aspx>; Great Barrington Homeless Shelters & Services for the Needy, Homeless Shelter Directory, <http://www.homelessshelterdirectory.org/cgi-bin/id/city.cgi?city=Great+Barrington&state=MA>; Individual Shelters In Western Massachusetts, Massachusetts Coalition for the Homeless, <http://www.mahomeless.org/individual-shelters-in-western-massachusetts>; Emergency Shelters, Transitional Housing and Community Service Programs, Western Massachusetts Network to End Homelessness, <http://westernmasshousingfirst.org/wp-content/uploads/2009/12/Network-emergency-shelter-quick-list-6.21.14.pdf>.

<sup>30</sup> Community Master Plan, Town of Great Barrington, MA, at 56. See fn. 27, ante.

imminent danger, and bereft of any effective legal alternative to abate the harm.<sup>31</sup>

With respect to its own town planning, the 2013 Great Barrington "Master Plan" document (see fn. 27) (hereafter, "Master Plan, Vol. \_\_\_\_ at \_\_\_\_") was designed to address the "community's growth and development over a period of one to two decades. It establishes the community's common vision—the desired outcome—and sets priorities, policies and actions, including capital expenditures, to achieve that vision." Master Plan Vol.I at 1. By its own account,

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<sup>31</sup> The National Advisory Committee on Rural Health and Human Services published a policy brief in 2014 highlighting some of the unique problems that the homeless face in rural America. Homelessness in Rural America Policy Brief, Nat'l Advisory Comm. on Rural Health and Human Servs. (July 2014), <http://www.hrsa.gov/advisorycommittees/rural/publications/homelessnessruralamerica.pdf> ("NACRHHS Policy Brief"). Great Barrington itself might not be considered rural, but some of the surrounding areas in Massachusetts and Berkshire County are rural or have rural characteristics. See, e.g., [http://www2.census.gov/geo/docs/reference/ua/PctUrbanRural\\_County.xls](http://www2.census.gov/geo/docs/reference/ua/PctUrbanRural_County.xls). Homeless people in rural areas face numerous challenges. The NACRHHS Policy Brief notes that there is limited public transportation in rural areas, there is a feeling of isolation due to sparse population, and there is a shortage of services and accommodations for homeless people. NACRHHS Policy Brief at 6. There is also less visibility of the problem compared to urban areas, which makes it difficult for communities to take action or convince their government to invest in public resources to help address homelessness. Id. at 5.

the composition of the town's population has changed. Master Plan Vol.I at 2. The town acknowledges that it "will need more 'senior' services and housing that is appropriate for smaller households on fixed incomes. Id. at 2, 15. "There are also many people with lower incomes, who need affordable housing if they are going to live near their jobs and better public transport to get to them. Promoting ... better public transportation will serve the needs of our changing population." Id.

Notwithstanding these admissions, neither the Master Plan nor the town's budget does much to address these needs.

The Master Plan, a 302-page document, is virtually silent on the problem of homelessness or the need for emergency shelters. This helps explain why Great Barrington's resources to assist homeless people in the town's vicinity are so dismal. As noted in Mr. Magadini's brief at p. 4,<sup>32</sup> there is only one homeless shelter, called "Construct", for the town of Great Barrington. Construct, however, provides

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<sup>32</sup> Magadini's brief will be cited as "Def.Br." and the Commonwealth's brief will be cited as "Comm.Br.".

transitional, not emergency, shelter.<sup>33</sup> Construct advertises itself as an organization "changing and saving lives through housing solutions and a continuum of related services."<sup>34</sup> According to its website, people who have lost their homes "may be eligible for temporary room and board and support services [from Construct] while [they] make the transition from homelessness to permanent housing."<sup>35</sup> (emphasis added).

Great Barrington's budget for FY2016 similarly fails to address these critical issues.<sup>36</sup> Of the total proposed budget of over \$26,000,000 for the year, less than .00007% of the budget (\$1,800) is allocated to Construct. 2016 Budget at 10, 82. The "Community Services" section of the budget was allocated less than 2% of the budget, approximately \$380,000 for the year. 2016 Budget at 28-29. \$160,000 of that was

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<sup>33</sup> What Construct Does, Construct, <http://constructinc.org/what-construct-does/>

<sup>34</sup> Construct, <http://constructinc.org/>.

<sup>35</sup> Housing Options, Construct, <http://constructinc.org/housing-options/>.

<sup>36</sup> Town of Great Barrington Fiscal 2016 Municipal Budget for July 1, 2015-June 30, 2016, Town of Great Barrington, [http://www.townofgb.org/Pages/GBarringtonMA\\_Manager/BUCKET%20Part%201.pdf](http://www.townofgb.org/Pages/GBarringtonMA_Manager/BUCKET%20Part%201.pdf), Public Works, Town of Great Barrington, [http://www.townofgb.org/Pages/GBarringtonMA\\_Manager/BUCKET%20Part%202.pdf](http://www.townofgb.org/Pages/GBarringtonMA_Manager/BUCKET%20Part%202.pdf).

allocated to the Council on Aging, which provides various programs and centers for seniors. Budget at 28-29, 80. \$200,000 of the "Community Services" budget was allocated to Veteran's Affairs, which includes veteran's benefits and is mandated (and partially reimbursed) according to state law. 2016 Budget at Introduction 10, 28-29. \$20,000 is allocated to the "Grant and Aid" section of the "Human Services" budget. Budget at 28-29.

Only \$20,000 of Great Barrington's \$26 Million budget is allocated to "Human Services." 2016 Budget at 28-29. The line item for affordable housing has an allocation of \$0 for FY2016, a \$5,314 decrease from the amount allocated in the FY2015 budget. Id. at 29.

**II. THE NECESSITY DEFENSE RELIES ON A BALANCING TEST THAT EVALUATES THE EFFICACY OF POTENTIAL LEGAL ALTERNATIVES RELATIVE TO THE IMMINENCE AND GRAVITY OF THE DANGER IN QUESTION.**

The dire circumstances for homeless individuals in Massachusetts bear directly on the availability of the necessity defense, which asks "whether in terms of a balancing of harms, the defendant's conduct represented the better choice." Commonwealth v. Iglesia, 403 Mass. 132, 136 (1988) (internal quotation

marks omitted).<sup>37</sup> "At its root is an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value." Commonwealth v. Kendall 451 Mass. 10, 13 (2008) (quoting Commonwealth v. Hood, 389 Mass. 581, 590 (1983)).<sup>38</sup>

In addition to this overall comparison of harms, courts look to whether:

(1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his [or her] action will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.

Kendall, 451 Mass. at 13-14 (second alteration in original). The viability of the defense often turns on questions regarding effective legal alternatives.

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<sup>37</sup> See also Commonwealth v. Livingston, 70 Mass. App. Ct. 745, 750 (2007) (necessity fairly raised where "the risk of harm posed by the gunshot wound to defendant's abdomen outweighed the harm posed by his having briefly driven on the wrong side of the road to reach a location where he could obtain assistance.").

<sup>38</sup> See also Wayne R. LaFare, 2 Subst. Crim. L. § 10.1 (2d ed.) (Updated Oct. 2015) ("For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, [an individual] is by virtue of the defense of necessity justified in violating it.").

Two key principles—left unaltered by Kendall—inform this analysis.

First, effective legal alternatives are analyzed relative to the imminence and gravity of the danger to be abated. Cf. Commonwealth v. McCambridge, 44 Mass. App. Ct. 285, 291-92 (1998). Second, courts focus on alternatives that are available at the time of the alleged crime. See United States v. Kpomassie, 323 F. Supp. 2d 894, 901 (W.D. Tenn. 2004); cf. Kendall, 451 Mass. at 15-16; McCambridge, 44 Mass. App. Ct. at 291-92; Livingston, 70 Mass. App. Ct. at 749-50.

**A. Effective legal alternatives must be considered in proportion to the imminence and gravity of the danger the defendant sought to avoid.**

A defendant need not prove that he explored every conceivable alternative to breaking the law: only effective, non-futile alternatives will foreclose a necessity instruction. See Kendall, 451 Mass. at 16 n.5; see also McCambridge, 44 Mass. App. Ct. at 291-92. But an alternative's efficacy cannot be determined in a vacuum. It can be measured only in relation to the immediacy and gravity of the danger it is meant to alleviate. See McCambridge, 44 Mass. App. Ct. at 291-92 (holding necessity instruction required

because the Commonwealth's proposal to wrestle a gun away from an associate was not an effective legal alternative since "there was no assurance that an attempt to take the gun away from [the associate] would have been effective in light of the fact that [the associate] cocked his gun after the defendant pointed a gun at him and told him to back off") (emphasis added); Livingston, 70 Mass. App. Ct. at 749-50 ("In these circumstances, we conclude that there was sufficient evidence produced to raise a 'reasonable doubt whether [the defendant's actions were] justified as a choice between evils.'" (emphasis added) (quoting Commonwealth v. Leno, 415 Mass. 835, 839 (1993))).

Thus, the factors of "imminent danger" and "effective legal alternatives" have an inverse relationship: the more imminent and serious the danger, the fewer legal alternatives that will be sufficiently effective.

For example, the option to abide by traffic laws may preclude a necessity instruction when someone speeds on the wrong side of the road to get medical attention for a dislocated shoulder. After all, driving at normal speed on the proper side of the road

could well be effective in abating the danger posed by a dislocated shoulder. But a more imminent, critical danger leads to a different conclusion: the Appeals Court held that a necessity instruction was appropriate where the defendant fled from a gunman in a speeding vehicle, in the wrong lane of traffic, to get medical treatment for a gunshot wound to the abdomen. Livingston, 70 Mass. App. Ct. at 749-50. Given the increased gravity of the situation, driving at the speed limit on the proper side of the road would not have been effective to abate the danger.

**B. Effective legal alternatives are evaluated at the time of the alleged crime.**

The analysis of "effective legal alternatives" is cabined to options available at the time immediately surrounding the alleged crime. Once confronted with a situation in which obeying the law could cause serious damage, a person cannot go back in time and avoid the situation altogether. See Kpomassie, 323 F. Supp. 2d at 901 ("Although perhaps Defendant could have avoided this whole situation by taking other action in the past . . . the two alternatives proposed by the Government [were] sufficiently far in the past that they were not available alternatives to Defendant at

the time surrounding his alleged crime").<sup>39</sup> Engaging in such a comprehensive analysis of a defendant's life choices would render the defense available to only those who lived perfect lives. It is not so circumscribed.

Indeed, courts have held that the defense is even available to people who seek to escape from prison to avoid an imminent threat of death. See, e.g., Commonwealth v. Mandile, 17 Mass. App. Ct. 657, 659-61 (1984) (affirming lower court's necessity instruction in the context of a prison escape); Commonwealth v. O'Malley, 14 Mass. App. Ct. 314, 319-20 (1982) (holding lower court erred in rejecting availability of necessity defense in the context of a prison escape); see also Commonwealth v. Thurber, 383 Mass. 328, 330 (1981) (assuming without deciding that it

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<sup>39</sup> In Kpomassie, the defendant initiated a physical altercation with DHS officers to prevent a plane from transporting him to his country of citizenship, where he claimed he would be persecuted. 323 F. Supp. 2d at 896-97. The government opposed Kpomassie's efforts to raise a necessity defense against the ensuing criminal charge, arguing that he could have pursued legal alternatives such as designating a different country of deportation or appealing the denial of his application for asylum. *Id.* at 901. The court noted that "by the time of his deportation, these proposed alternatives were 'foreclosed,'" and held that he was entitled to present a necessity defense to the jury. *Id.* at 901-02.

"would apply the doctrine [of necessity] as a justification for escape in a proper case").<sup>40</sup> In so doing, the courts did not reject the necessity defense on the ground that the prisoner never would have faced imminent danger in prison if he had not committed a crime in the first place. Cf. Bailey, 444 U.S. at 410-11 (necessity defense available where escapee "demonstrates that, given the imminence of the threat, [escape] was his only reasonable alternative").

Massachusetts courts employ a similar analysis when confronting necessity claims within the context of violent altercations between acquaintances. See, e.g., Iglesia, 403 Mass. at 132-34 (defendant involved in fight after card game at a bar); McCambridge, 44 Mass. App. Ct. at 286-89 (defendant shot friend in a car after the friend pulled a gun on him). The courts do not ask whether the defendants should have socialized with different people or patronized different establishments. Instead, as the doctrine requires, they focus on whether effective legal alternatives existed at the time of the alleged crime.

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<sup>40</sup> The Appeals Court has since held that, although Thurber "did not formally recognize the doctrine of necessity as a defense" it read "this language as advising that it would likely do so in a proper case." O'Malley, 14 Mass. App. Ct. at 319 n.7.

Iglesia, 403 Mass. at 135-36; McCambridge, 44 Mass. App. Ct. at 291-92.

**C. Kendall does not alter these fundamental principles of the necessity defense.**

These same principles continue to apply post-Kendall. In that case, an intoxicated man drove his wounded girlfriend to the hospital. 451 Mass. at 11-12. He was convicted of driving while under the influence, and this Court held that the trial court had properly barred a necessity defense because the facts did not establish that the available alternatives—including 75 neighbors in close proximity that could have called 9-1-1 or driven the defendant, and a fire station approximately 100 yards from the defendant's trailer—would have been ineffective. 451 Mass. at 15-16. For two reasons, however, this Court's holding in Kendall is consistent with the principles articulated above.<sup>41</sup>

First, Kendall affirmed that only effective, non-futile alternatives will bar a necessity defense; it

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<sup>41</sup> Kendall positively cites Iglesia, see 451 Mass. at 14-15, which along with Livingston continue to be cited by other courts post-Kendall, see Commonwealth v. Donnelly, No. 11-P-1805, 2013 WL 158964, at \*2 n.2 (Mass. App. Ct. Jan. 16, 2013) (unpublished opinion) (citing Livingston); Commonwealth v. Smith, No. 10-P-951, 2011 WL 3444167, at \*2 (Mass. App. Ct. Aug. 9, 2011) (unpublished) (citing Iglesia).

simply determined that in that particular case, a 30-second walk to a neighbor, or a 60-second walk to a fire department,<sup>42</sup> would have been effective. Id. The Court emphasized that it was “not saying . . . that an individual in an emergency situation must spend time and effort deliberating about and investigating all logical alternatives to abate a clear and imminent danger.” Id. at 16 n.5 (emphasis in original). Instead, the instruction still turns on a defendant’s ability to show that “there were no effective legal alternatives to the unlawful conduct he pursued, or that any such alternatives would have been futile in the circumstances.” Id.

Critically, the Commonwealth itself concedes that the Kendall majority opinion is “consistent,” Comm. Br. at 16-17, with the dissent’s determination that “the defendant need only present evidence that he did not explore the legal alternatives because he reasonably deemed them to have been too high a risk” to warrant a necessity instruction. Kendall, 451 Mass. at 18 (Cowin, J. dissenting). Kendall therefore does not alter the requirement that effective

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<sup>42</sup> Based on an average walking speed of 2.5 miles per hour.

alternatives must be evaluated relative to the imminence and gravity of the danger in question.<sup>43</sup>

Second, Kendall continued to focus exclusively on alternatives available at the time of the alleged crime. The Court did not evaluate the defendant's life choices. It passed no judgment on the defendant's economic situation, such as whether the defendant should have moved from the trailer park or bought a cell phone. Nor did the Court sermonize on whether the defendant should have abstained from drinking that night. Instead, reflecting the well-established practice of this Court, Kendall focused on the legally cognizable choices available at the time of the alleged crime. See 451 Mass. at 15-16.

**III. A JURY INSTRUCTION ON THE NECESSITY DEFENSE WAS WARRANTED IN MR. MAGADINI'S CIRCUMSTANCES.**

The foregoing authorities compel the result that a jury instruction should have been given in this case. Here, a homeless individual trespassed on mixed-use private property to find safe shelter in winter conditions when legal alternatives would have

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<sup>43</sup> Even if Kendall had altered this well-established principle—though it did not—this Court should now revert to the prior test for the reasons articulated in the Kendall dissent. See 451 Mass. at 17-19 (Cowin, J. dissenting).

been futile to protect him from grave danger or death. Allowing a necessity defense would have comported with necessity-defense doctrine and the defense's underlying purposes.

**A. Allowing an instruction here comports with the letter of the necessity defense case law.**

As described above, exposure to frigid temperatures in a Massachusetts winter poses a significant, and potentially fatal, danger. Where a homeless individual faces sub-freezing conditions, has no driver's license, no access to public or private transportation, and nowhere to go beyond the heating grate of a street-level hallway in a commercial mixed-use building, it is difficult to conceive of any legal alternatives that would effectively abate such stark dangers. "In these circumstances," there is "sufficient evidence [] to raise a reasonable doubt" about whether a defendant's actions were "justified as a choice between evils." Livingston, 70 Mass. App. Ct. at 749-50 (internal quotation marks omitted).

Walking a few miles in mild weather may be an effective legal alternative to trespass. But the Commonwealth's suggestion that Mr. Magadini should have sought refuge in a shelter more than 20 miles

away, despite lacking access to public transportation, “would have been futile in the circumstances” of a frigid winter’s night. Kendall, 451 Mass. at 16 n.5.<sup>44</sup> So too is the Commonwealth’s allegation that Mr. Magadini could have sought help from the police to obtain shelter. There is no record evidence that Mr. Magadini could have expected that this police department—which had repeatedly forced him to leave protected areas without once offering to help find him shelter—might actually have been the solution to his housing woes. Thus, none of the Commonwealth’s proposed alternatives would have effectively abated the danger of a freezing New England night. Cf. United States v. Schoon, 971 F.2d 193, 198 (9th Cir. 1991) (“A prisoner fleeing a burning jail, for example, would not be asked to wait in his cell because someone might conceivably save him[.]”).

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<sup>44</sup> Mr. Magadini similarly presented evidence that he could no longer stay at Construct, agreeing that there “c[a]me a point where the [] Construct people did not allow [him] to stay there any longer because [he] had certain issues with them.” TR 120. This presented “a question of fact, to be resolved by the jury, as to whether the defendant had sufficiently exhausted legal alternatives to the actions he employed[.]” Commonwealth v. Pina, No. 11-P-1280, 2013 WL 3388611, \*2 (Mass. App. Ct. July 9, 2013) (unpublished opinion) (citing Commonwealth v. Hood, 389 Mass. 581, 590-91 (1983)).

Perhaps for this reason, the Commonwealth focuses its attention on whether Mr. Magadini could have avoided being homeless in the first place. See, e.g., Comm Br. at 13, 23 (suggesting Mr. Magadini may have been able to rent an apartment outside of Great Barrington). But this hypothesis is wholly irrelevant. Just as courts have not asked whether a defendant should have different friends or choose not to drink, it cannot ask whether a defendant could avoid being homeless. Cf. Kendall, 451 Mass. at 15-16; McCambridge, 44 Mass. App. Ct. at 290-91; Livingston, 70 Mass. App. Ct. at 749-50. If courts have not prevented necessity instructions when defendants fail to pursue achievable life-altering choices, they certainly should not do so when considering the impact of factors largely outside defendants' control.

**B. Allowing an instruction here will not lead to a slippery slope.**

Holding that the jury should have been instructed on the necessity defense in this case would not mean that the defense would always be available, let alone successful, whenever a homeless person seeks shelter on private property. In each case, the defense

requires an evaluation of whether the harm that would result from compliance with the law is greater than or less than the harm that would result from its violation. See LaFave, 2 Subst. Crim. L. § 10.1 (2d ed.). A person may therefore "be justified in doing one thing to avoid a greater evil" but may "be culpable and without justification in doing some other act to avoid the same evil." 32 Mass. Prac., Criminal Law § 678 (3d ed.).

Consequently, allowing an instruction where a homeless individual in Mr. Magadini's circumstances trespasses on commercial mixed-use property will not necessarily require a similar instruction if that same individual breaks and enters into someone's living room. Similarly, if a homeless defendant charged with trespass had ready access to a shelter at the time of the alleged crime, but chose instead to trespass on private property, his request for a necessity instruction might lose force. And in all cases, a jury instruction on the necessity defense would merely put the question of necessity in the jury's hands. It would not guarantee an acquittal. "The fact finder . . . remains free to disbelieve (or credit) any evidence offered by either party relating to the

availability of [the necessity] defense[] in a particular case." Commonwealth v. Haddock, 46 Mass. App. Ct. 246, 249 (1999). Thus, even if this Court reverses the judgment below, courts will retain the authority to analyze whether the defense would be appropriate where the harm caused by the trespass was potentially greater than that at issue here.<sup>45</sup>

**C. Allowing an instruction here comports with the underlying purposes of the necessity defense.**

The approach outlined above reinforces the very purpose of the necessity defense.

The underlying "rationale of the necessity defense" is one of "public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." Wayne R. LaFare, 2 Subst. Crim. L. § 10.1 (2d ed.) (Updated

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<sup>45</sup> Compare In re Eichorn, 69 Cal. App. 4th 382 (1998) (necessity instruction appropriate when defendant slept in a sleeping bag outside a public office building), with City of Des Moines v. Webster, 861 N.W.2d 878, 885-86 (Iowa Ct. App. 2014) (necessity instruction inappropriate where "[f]actors weighing against the necessity defense are the dangers associated with the individuals' choice of heating sources, the threat to the individuals' lives in the event of a fire, and the threat to first responders' lives in responding to a fire under the bridge").

Oct. 2015). Because communal benefit is at the heart of the defense, the community itself—through the jury—plays a key role in its implementation. Juries “stand as a check on arbitrary enforcement of the law” and “temper the application of strict rules of law by bringing the common sense judgment of a group of laymen to the case.” Commonwealth v. Schuchardt, 408 Mass. 347, 353 (1990) (Liacos, C.J., concurring in part, dissenting in part). Nowhere is this communal involvement more necessary than in an evaluation of how we, as a state, will confront and combat homelessness in Massachusetts.

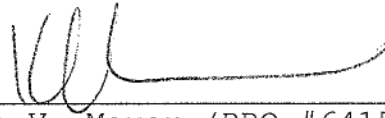
This approach may have the added benefit of incentivizing the police and the community to present viable alternatives to effectively abate the dangers of exposed winter nights. This would decrease the availability of the necessity defense and, more important, decrease the need for people to violate the law in order to keep themselves safe, warm, and sheltered.

### **CONCLUSION**

For the forgoing reasons, Amici respectfully urge this Court to reverse the convictions for trespass,

hold that a necessity instruction was warranted in this case, and remand for a new trial.

Respectfully Submitted,



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Dated: November 24, 2015

**Certification of Compliance**

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.



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**Certificate of Service**

I, Kirsten V. Mayer, certify that on this day an original and seventeen copies of the foregoing brief were served with the clerk of this Court. I further certify that two copies of the foregoing brief were served on counsel for each party separately represented in this matter by sending such copies by first class mail to:

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24th



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