No. SJC-13406

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

CUMMINGS PROPERTIES, LLC,

Plaintiff-Appellant,

v.

DARRYL C. HINES,

Defendant-Appellee

On Further Appellate Review from an Order
of the Appeals Court

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 17(c)(1), amicus curiae New England Legal Foundation (NELF) states that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's members and supporters include large and small businesses in New England, other business and non-profit organizations, law firms, and individuals, all of whom believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

The question presented in this case is of interest to NELF because it touches on NELF's mission in two important ways. First, it raises an issue of freedom of contract. NELF believes that courts should respect the autonomy of parties when they contract for their mutual benefit. In part that means that courts should hold parties to their word and should enforce the terms freely agreed upon by the parties. Secondly, this case is inextricably bound up with the ability of parties specifically to contract

[1] No party or party's counsel nor any other individual or entity, aside from Amicus and its counsel, authored this brief in whole or in part, or made any monetary contribution to its preparation or submission. Neither Amicus nor its counsel has ever represented any party to this appeal on similar issues, and they have not been either a party or counsel to a party in a proceeding or transaction that is at issue in this appeal.

in such a way as to reduce uncertainty in their commercial transactions. Indeed, the point of departure for liquidated damages is that commercial parties are frequently confronted by the possibility of costly uncertainties in the performance, or not, of their contracts. These parties find liquidated damages to be an invaluable tool by which they are able to introduce some measure of needed certainty into possible future adverse outcomes in their contractual relationships.

NELF therefore has moved for leave to file this brief in order to provide a perspective that may assist the Court in reaching a just and sound decision.

ISSUE PRESENTED

In a commercial lease between sophisticated parties, are post-termination rent payments enforceable as liquidated damages when the lessee is required to pay no more than it had contracted to pay were it to have fully performed under the contract?

ARGUMENT

This case presents the Court with an ideal opportunity to re-affirm principles of contract law that are important to the ability of parties, especially commercial parties, to control the consequences of a possible breach that might occur at any time and under any of a variety of

circumstances. The consequences of such a breach are frequently difficult to ascertain at the time of contracting. Enforcement of liquidated damages provisions like the one at issue in this case helps to assure the "peace of mind and certainty of result," *Kelly v. Marx,* 428 Mass. 877, 881 (1999), that parties desire when contemplating entering into binding contractual commitments.

This Court should reverse the ruling of the Appeals Court because it departed sharply from these foundational principles of freedom of contract and predictability of commercial relations.

"'Liquidated damages * * * is a sum fixed as an estimate made by the parties at the time when the contract is entered into, of the extent of the injury which a breach of the contract will cause.'" *Factory Realty Corp. v. Corbin-Holmes Shoe Co*., 312 Mass. 325, 331 (1942) (quoting 3 Williston, *Contracts*, Rev. Ed. § 776). The question of whether any given liquidated damages provision is enforceable or not is a question of law. *NPS, LLC v. Minihane,* 451 Mass. 417, 419 (2008). This Court more particularly laid out as follows the criteria for enforcing liquidated damages:

> Generally, a liquidated damages provision will be enforced when, at the time the agreement was made, potential damages were difficult to determine and the clause was a reasonable forecast of damages expected to occur in the event of a breach.

> Conversely, "[l]iquidated damages will not be enforced if the sum is 'grossly disproportionate to a reasonable estimate of actual damages' made at the time of contract formation."

TAL Financial Corp. v. CSC Consulting, Inc., 446 Mass. 422, 431–32 (2006) (quoting *Kelly*, 428 Mass. at 880). *See also Cummings Properties, LLC v. National Communications Corp*., 449 Mass. 490, 494 (2007).

When parties have agreed to such a liquidated damages provision, therefore, under "freedom of contract principles," and in recognition of the need for commercial certainty in contract outcomes, "generally, parties are held to the express terms of their contract." *TAL*, 446 Mass. at 430. As Justice Holmes counseled, the "'proper course is . . . not to undertake to be wiser than the parties'" (counsel unheeded by the Appeals Court here, *see infra*, pp. 15-16), but rather "in general when parties say that a sum is payable as liquidated damages they will be taken to mean what they say and will be held to their word." *Kelly*, 428 Mass. at 881 (quoting *Guerin v. Stacy*, 175 Mass. 595, 597 (1900)).

For these reasons, too, a court will not "allow one of [the parties] to escape by calling the provisions a penalty" if the parties have freely chosen to enter into "a contract plainly provid[ing] for liquidated damages." *Factory Realty*, 312 Mass. at 332. Rather, because the parties

are free to contract on this issue as they wish, "[t]he burden of proof regarding the enforceability of a liquidated damages clause, therefore, should rest squarely on the party seeking to set it aside." *TAL*, 446 Mass. at 430. That means that the challenging party "bears the burden of establishing that the damages to which it agreed are disproportionate to a reasonable estimate of those actual damages likely to result from a breach." *Nat'l Comms.*, 449 Mass. at 494-95. Similarly, this Court also "resolve[s] reasonable doubts in favor of the aggrieved party." *NPS*, 451 Mass. at 420 (citing *Nat'l Comms.*, 449 Mass. at 494).

Hence, for example, this Court ruled in *Nat'l Comms*. that the defendant, "[a]s the party contesting its validity," "has failed to satisfy its burden to show that the liquidated damages clause is a penalty, . . . that is, that the amount it agreed to pay was disproportionate to any reasonable estimate of likely damages at the time the lease was executed." 449 Mass. at 497.

Because *Nat'l Comms*. dealt with a Cummings lease provision similar to the one at issue in this case in respect of liquidated damages, it is well worth considering what the Court said of the liquidated damages at issue there:

> It is apparent from the stipulation, and National has not produced evidence to the contrary, that at the time the lease was entered

> into, the parties could not have foreseen when in the lease term a breach for nonpayment of rent would occur, what the commercial rental market would be at that time, or what the cost of finding another tenant and the length of time the property might remain vacant might be. In addition, to the extent that the liquidated damages amount represented the agreed rental value of the property over the remaining life of the lease, decreasing in amount as the lease term came closer to expiration, it appears to be a reasonable anticipation of damages that might accrue from the nonpayment of rent [because] the parties agreed that "payment of rent in monthly installments is for the sole benefit and convenience of LESSEE." Thus, the full amount of rent owed under the lease was due at its commencement, and the acceleration clause only required National to pay Cummings what it agreed to pay up front for the entire term of the lease.

449 Mass. at 496-97 & n.9. *See also Kelly*, 428 Mass. at 881-82; *NPS*, 451 Mass. at 420-21. The Court noted that "the trial record reflects only an assertion by National that the liquidated damages provision is a penalty." *Nat'l Comms.*, 449 Mass. at 497. Similar commercial uncertainties existed in this case at the time of contracting, and here too they far outweigh the lessee's bare assertions. *See infra*, p. 16.

This Court has also "squarely rejected the 'second look' approach" to liquidated damages, *TAL*, 446 Mass. at 431, under which the enforceability of liquidated damages is weighed against the actual damages that accrued after breach. Besides constraining the parties' freedom of contract, a second look would clearly negate other purposes and policies undergirding such provisions, most especially the need for

predictable, economically efficient outcomes in commercial contracts. The Court therefore takes only a single look at liquidated damages, viewing them as they would have appeared to the parties at the time they contracted.

> In addition to meeting the parties' expectations, the "single look" approach helps resolve disputes efficiently by making it unnecessary to wait until actual damages from a breach are proved. By reducing challenges to a liquidated damages clause, the "single look" approach eliminates uncertainty and tends to prevent costly future litigation. The "second look," by contrast, undermines the peace of mind and certainty of result the parties sought when they contracted for liquidated damages. It increases the potential for litigation by inviting the aggrieved party to attempt to show evidence of damage when the contract is breached, or, more accurately, evidence of damage flowing from the breach but occurring sometime afterward. In other words, the 'parties must fully litigate (at great expense and delay) that which they sought not to litigate.

Kelly, 428 Mass. at 881 (cleaned up). *See Nat'l Comms*., 449 Mass. at 496 (citing *Kelly*).

There is, of course, "no bright line" telling the Court when the damages estimated in a liquidated damages provision were reasonable at the time of contract formation. *TAL*, 446 Mass. at 431. However, "[p]enalties usually provide for the payment of a larger sum on the failure of a party to pay a less amount." *Kaplan v. Gray*, 215 Mass. 269, 273 (1913).

On that basis, an acceleration of rent payments used as liquidated damages, as in this case, should be readily enforced as a reasonable contract term. As the Court noted of the Cummings lease in *Nat'l Comms*., the use of rent acceleration for that purpose "only required [the lessee] to pay Cummings what it agreed to pay up front for the entire term of the lease." *See supra*, p.11.

The situation is the same here under another Cummings lease.

> If LEESOR defaults in the payment of any rent, and such default continues for 10 days after written notice thereof, . . . and because the payment of rent in monthly installments is for the sole benefit and convenience of LESSEE, then, in addition to any other remedies, the net present value of the entire balance of rent due herein as of the date of LESSOR's notice . . . shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such a breach.

Lease Agreement, paragraph E (Exhibit A to Complaint Verified Complaint). The same legal result should therefore follow here.

Admittedly, under some sets of circumstances the result produced by liquidated damages might seem harsh. However, such occasional results are inevitable with almost any liquidated damages provision, just as are instances when the liquidated damages prove to be woefully inadequate to actual damages and the aggrieved party is left totally without recourse.

In *NPS*, for example, which also involved the use of an acceleration clause to provide liquidated damages, the Court stated that the "terms may be harsh," but that was only because the breach chanced to occur "early in the life of the agreement," exactly as here. 451 Mass. at 422. Such a result is not unreasonably and grossly disproportionate. *See id*. *See also Perroncello v. Donahue*, 448 Mass. 199, 205 (2007) (court rejected second look in *Kelly*, though "the seller ultimately sold the property at a higher price to another party, thereby suffering *no loss*"; "[w]e held that the liquidated damages clause was enforceable because potential damages were difficult to determine at the time of the contract formation, and the amount agreed to was a reasonable forecast of damages in the event of a future breach, at that time.") (emphasis added).

Nor should the Court impose a duty to mitigate the actual damages that accrue after breach. The rule in Massachusetts is that, "in the case of an enforceable liquidated damages provision, mitigation is irrelevant and should not be considered in assessing damages." *NPS*, 451 Mass. at 423. The Court has enunciated sound reasons for this policy.

> We will follow the rule in many other jurisdictions and hold that, in the case of an enforceable liquidated damages provision, mitigation is irrelevant and should not be considered in assessing damages. When parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a

> breach, including possible mitigation, for the "peace of mind and certainty of result" afforded by a liquidated damages clause. . . . In such circumstances, to consider whether a plaintiff has mitigated its damages not only is illogical, but also defeats the purpose of liquidated damages provisions.

Id. *See Panagakos v. Collins*, 80 Mass. App. Ct. 697, 703 (2011) (overruling trial court that took into consideration landlord's failure to mitigate).

Here the Appeals Court acknowledged the rule that there is no duty to mitigate. *Cummings Properties, LLC, v. Hines*, 102 Mass. App. Ct. 28, 35-36 (2022). Nonetheless, it skirted the prohibition. Engaging in a kind of vague fact-finding about the facts as they existed at the time of contract formation, the panel "undert[ook] to be wiser than the parties," contrary to Justice Holmes' sage admonition. *See supra* p. 9. It ruled that the parties, or rather Cummings specifically, was obligated to base liquidated damages on some degree of expectation of reletting the property. *Hines*, 102 Mass. App. Ct. at 33. The trial judge himself rightly disclaimed the ability to so rule about the reasonableness of the liquidated damages agreed to by the parties.

> Although I can imagine circumstances—and actual trial evidence—that could support this type of challenge to whether the parties' forecast of expected damages was reasonable, *that type of evidence is not before me* in this case. Moreover, Massachusetts precedent poses a high hurdle for such a granular

> attack on whether a liquidated damages clause qualifies as a reasonable forecast.

Findings of Fact, Conclusions of Law and Order Following Jury-Waived Trial (Addendum to Cummings Properties, LLC's Application for Further Appellate Review) (FAR Add.) at 57-8.

The trial judge correctly then went on to recite some of the uncertainties that would plague such a forecast. *Id*. at 58. Not coincidentally they recall the uncertainties recited by this Court in *Nat'l Comms*., dealing with an earlier Cummings lease:

> [A]t the time the lease was entered into, the parties could not have foreseen when in the lease term a breach for nonpayment of rent would occur, what the commercial rental market would be at that time, or what the cost of finding another tenant and the length of time the property might remain vacant might be.

449 Mass. at 496.

The Appeals Court sought to reinforce its conclusion by noting post-breach facts; in other words, it took an impermissible second look to see that Cummings had in fact relet the property, a fact which it treated as decisive in the calculus of damages and hence on the duty to mitigate. *See* 102 Mass. App. Ct. at 36 ("here, the landlord <u>does</u> relet the property") (original emphasis). Again, the trial judge correctly ruled that mitigation is "irrelevant." FAR Add. at 58 (citing *Panagakos*, 80 Mass. App. Ct. at 703).

CONCLUSION

The Court should adhere to established principles founded on freedom of contract and promoting predictable outcomes in commercial contract relations. The Court should therefore reverse the order of the Appeals Court.

Respectfully submitted,

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By its attorneys,

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Dated: April 18, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I certify that this brief complies with the rules pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. A. P. 16, 17, 18, 20, and 21, where pertinent. The document was composed on Microsoft Word 2013 in 14-point Times New Roman. As determined by Word's word-count tool, the number of **non-excluded words** in this brief is **2313** and the number of **excluded words** is **902** *See* Rules 16(a)(5-11) and (k) and Rule 20(a)(2)(C), (D), and (F). Dated: April 18, 2023 /s/ John Pagliaro

John Pagliaro

CERTIFICATE OF SERVICE

In *Cummings Properties, LLC v. Darryl C. Hines.*, pending in the Supreme Judicial Court, No. SJC-13406, I certify that on the date subscribed below, on behalf of New England Legal Foundation, I served the Brief of Amicus Curiae New England Legal Foundation by e-file on Appellee's counsel and, because of uncertainties in the service contact shown by Tyler for Appellant, I served the Appellant by email, after obtaining a waiver of e-service and paper service from same:

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