SJC-13580. Attorney General versus Town of Milton and Joe Atchue, in his official capacity.

(gavel pounds)

[Chief Justice Budd] Okay, Attorney Haskell?

[Attorney Haskell for the State] Good morning, Chief Justice Budd, and may it please the court. I'd like to begin this morning by emphasizing two propositions that are not disputed in this case, but still have a big, big influence on our conversation today.

One is that the legislature undisputedly had the constitutional authority, under the police power and the home rule amendment, to enact Section 3A to address the housing crisis. And the second, it's undisputed that section 3A requires towns to zone and thereby creates a legal mandate.

The Town of Milton argues that the Commonwealth, that that is its chief law enforcement officer invoking the authority of its judiciary, is powerless to compel Milton to honor that undisputed mandate. But there's a reason why the town can't identify a single situation in which municipality has been deemed free to ignore a state law mandate.

And it's this. The legislature ordinarily intends its mandates to be obeyed. It is expressly assigned enforcement of mandatory state laws to the Attorney General through the enactment of Chapter 12, Section 10. And when the legislature doesn't want its mandates to be obeyed and wants to render a requirement advisory only, it needs to say so clearly in order for the law to recognize that.

[Justice Wendlandt] Well, as I understand the argument from the town, it's not so much that they can ignore the mandate, but that the price for ignoring it is not having access to certain funding.

[Attorney Haskell for the State] That's right, Your Honor. It goes to the effect of subsection b of Section 3A.

[Justice Wendlandt] Right, so their argument is not so much that they can just ignore it, but that the cost of ignoring it is set forth in the statute and that's what the legislature had intended. What is your response?

[Attorney Haskell for the State] Our response to that is twofold, Your Honor. First of all, that argument requires 3A sub b, it makes it function as a deprivation of the Attorney General's background existing authority under 1210 and her common law authority to enforce mandatory state law through seeking declaratory and injunctive remedies. That's the kind of thing that the legislature can only do expressly. And there's no contention that the legislature has expressly deprived the Attorney General

[Justice Wendlandt] Well, is it on the possible construction of the act that the AG gets to enforce it but the remedies are limited to those set forth in that second section?

[Attorney Haskell for the State] I don't think so, Your Honor. And at least one reason that I would point to is that last paragraph of Chapter 40A, Section 7. So the legislature made a considered choice here to situate section 3A within Chapter 40A. Chapter 40A, in that last paragraph of Section 7, already had a preexisting provision that grants the courts jurisdiction to enforce the provisions of this chapter and to restrain, by injunction, violations thereof.

[Justice Wendlandt] And where in that section should this claim have been brought then?

[Attorney Haskell for the State] What that does

[Justice Wendlandt] Doesn't it say that it's supposed to be in the superior court, not here.

[Attorney Haskell for the State] It gives the superior court and land court jurisdiction to issue injunctions of that type. Of course, we're also seeking a declaratory judgment under 231A. The county court has jurisdiction to grant declaratory judgments.

[Justice Wolohojian] I thought it's not that you're also seeking a declaration. I thought that you've, at least in the postures, the cases here now have abandoned your request for an injunction. Is that correct?

[Attorney Haskell for the State] Let me be clear on that, Your Honor. We have not abandoned our request for an injunction. However, it's our view that, on the circumstances of this case, a declaratory judgment ought to be all it takes to obtain Milton's compliance with this law.

[Justice Wolohojian] What would the declaration say?

[Attorney Haskell for the State] The declaration would say that Milton is obligated to zone in accordance with 3A sub a, and that the Attorney General has the authority to enforce Milton's compliance with that requirement through declaratory and injunctive remedies. Now, the actual issuance of an injunction has many steps.

[Justice Wolohojian] I'm a little puzzled. Ordinarily, I think of the town as an entity as acting through its Board of Selectmen. Is that correct?

[Attorney Haskell for the State] Your Honor, I'm afraid it's a good deal more complicated than that.

[Justice Wolohojian] Okay. So in this case, you're not arguing that the Board of Selectmen did anything wrong, are you?

[Attorney Haskell for the State] No, Your Honor. We are.

[Justice Wolohojian] Okay, so it seems to me that what you're actually arguing is that, it seems to me you're almost taking on the right to the franchise of the citizens of Milton.

[Attorney Haskell for the State] So let me unpack that a bit, Your Honor. So what 3A sub a, the entity that it speaks to, is the town. The town, as you say, has its own executive and legislative branches, it has its own legislative process, it also has a fairly complex process under Chapter 40A that the planning board needs to go through regarding notice and public hearing of proposed zoning amendments, needs to go to the town's legislature, in this case, representative town meeting, And really one of the features, one of the notable things about Section 3A is the way that while requiring towns to do this zoning, it still preserves the flexibility of towns to choose what they want their zoning district to look like. That is to use all of these procedures and processes

[Justice Wolohojian] Didn't they do that?

[Attorney Haskell for the State] to zone what it chooses. –

[Justice Wolohojian] Didn't they do that?

[Attorney Haskell for the State] They did. And ultimately, well, we know

[Justice Wolohojian] And I understand the Attorney General is not contesting the outcome of that. They think that the plan, or she thinks that the plan that came out would satisfy the guidelines.

[Attorney Haskell for the State] Had it been adopted by the town, Article One would have satisfied 3A sub a.

[Justice Wolohojian] Okay, so I go back to my former question. How is it that you're not, in this case, actually trying to take on the right of the residents of Milton to exercise their franchise?

[Attorney Haskell for the State] You know, what I would point to in this situation, Your Honor, is this court's decision in the Town of Hudson case in 1943. That was a situation in which the legislature passed a special act, it was during the war, passed a special act that allowed the State Department of Public Health to order municipalities to basically treat their drinking water in a certain way to protect against sabotage, right? So the Town of Hudson considered an article at their town meeting to buy the chlorination equipment the DPH had told them they needed to, and they rejected it. And so the Attorney General brought an enforcement action against the Town of Hudson to say, "You know, look, you didn't have a choice. You have to do this." The town's defense was town meeting does its thing, it's a democratic process, we can't control it. And this court's opinion was very clear and very strong that even where a state law mandate is subject to a political process of adoption and implementation like that, it's still a mandate and the town still needs to follow it, and the court still has equitable remedies available to it to compel the town to comply with that mandate. Does that get at your question?

[Justice Wolohojian] I think it does.

[Justice Kafker] So can I, just to follow up. Are you saying that submitting the question whether to comply or not was not within the authority, submitting the question of whether to comply with the law or not was not within the authority of the town Board of Selectmen, is that what you're saying?

[Attorney Haskell for the State] I think that's right if the responsible bodies of the town failed to put forward a plan. Under the guidelines, the point at which they would be out of compliance with the law is when they hit that deadline. In Milton's case, it was December 31st of last year.

[Justice Gaziano] The select people would have to ignore their town charter?

[Attorney Haskell for the State] I'm sorry, say again?

[Justice Gaziano] The select people would have to ignore their town charter?

[Attorney Haskell for the State] I'm sorry, the charter?

[Justice Gaziano] Well, the referendum to take it to the vote. You're saying they would have to ignore it.

[Attorney Haskell for the State] No. No, we aren't saying that, Your Honor. The referendum is part of the process by which the Town of Milton enacts bylaws, and so

[Justice Gaziano] Would you say it was a meaningless act?

[Attorney Haskell for the State] I'm sorry, the referendum?

[Justice Gaziano] Yeah, in this context.

[Attorney Haskell for the State] Our contention, Your Honor, I don't think needs to go that far. Our contention, Your Honor

[Justice Gaziano] Oh, as my question goes that far.

[Attorney Haskell for the State] I'm sorry, can you

[Justice Gaziano] Was that a meaningless act?

[Attorney Haskell for the State] Oh, the referendum?

[Justice Gaziano] Yeah.

[Attorney Haskell for the State] I'm sorry, I'm sorry. I didn't hear your question correctly. No, it's not our view that the referendum was a meaningless act. It was part of the process

[Justice Gaziano] Just the result was meaningless. The result was meaningless.

[Attorney Haskell for the State] I wouldn't say that either, Your Honor. Again, this Section 3A, the MBTA Communities Act, gives towns choices and flexibility about what their district's going to look like, where it's going to be situated, any number of other features of it, You know, the town can choose whatever plan it wants to attempt to comply with this thing within the boundaries of the statute and the guidelines. And so our point is that the town needs to enact something.

[Justice Wolohojian] Where does the deadline come from?

[Attorney Haskell for the State] The deadline comes from the guidelines, Your Honor.

[Justice Wolohojian] Okay, so I guess that takes us to maybe the second argument. If we were to determine that the guidelines were not

[Justice Kafker] Are we done with the first argument though? I mean, towns can't vote not to comply with state laws, right? So if you have the authority in the AG's office through Chapter 12 or through 40A, Section 7, you can compel compliance with the law. A town can't vote not to abide by state law, it's mandatory, right?

[Attorney Haskell for the State] That's correct, Your Honor.

[Justice Kafker] So if that's the case, and then the question is, are the remedies exclusive? That's really the only issue we have to, can I ask how much money did Milton get from those grants in prior years? I'm just curious how much, is this a paper tiger without teeth or claws? I mean, how much money went through those grants to Milton?

[Attorney Haskell for the State] In a lot of ways, it is, Your Honor, a paper tiger. The grant programs that are specified in 3A sub b, there's four of them. The Housing Choice initiative is actually something that

[Justice Kafker] How much money? I'm trying to understand, I understand the different grants. How much money are we talking about for Milton the year before this past, or the year before that?

[Attorney Haskell for the State] 0000. To get to a point that Milton received money under one of those four programs, you'd have to go back to 2012 when they received a million dollars from the MassWorks program. The Housing Choice initiative, the town of Milton isn't even eligible. They haven't taken steps

to make themselves eligible for that funding. The MassWorks program, as I said, it's been many years since they received anything. In fact, in the past three fiscal years, only 62 of the 177 municipalities we're talking about have received money from the MassWorks program. The HousingWorks program has only been in existence for one year. Their one round of grant awards, 8 out of 15 went to MBTA communities, so 159 got nothing.

[Justice Kafker] So your argument is this is significant legislation addressing a societal crisis. And without your ability as the AG to enforce this, there's no real remedy here. Is that

[Attorney Haskell for the State] That's right, Your Honor. And, you know, 3A sub b does something. Our view is that the legislature included that in there so that municipalities would know there is going to be a concrete consequence of not complying, and it's gonna be automatic and it's going to be swift and it's going to be certain, but it does not in any way take the place of the power of the Attorney General to enforce this mandatory state law.

[Chief Justice Budd] I have a different question.

[Attorney Haskell for the State] Yes.

[Chief Justice Budd] So you acknowledged that the EOHLC didn't put together the small business impact statement that was required under the statute, right?

[Attorney Haskell for the State] Well, I guess our first position on that, Your Honor, is that it wasn't required in this situation because these guidelines weren't subject to Chapter 30A. If we were to assume that they were subject to 30A, then that's correct. The HLC didn't do the small business impact statement.

[Justice Wendlandt] How do we determine whether the guidelines are subject to 30A given the definition of regulation in 30A?

[Attorney Haskell for the State] Your Honor, that is an

[Justice Wendlandt] It can't be, because the legislature called them guidelines. So let's assume, at least this jurist, does not agree with that argument. What would the test be?

[Attorney Haskell for the State] Our position, Your Honor, is the one that you've just indicated, that we ought to go to the language. And there's a history of the legislature using the term guidelines and agencies responding to that in a certain way.

[Justice Wendlandt] Any guidelines that deal with the public in this way, in zoning in this way? –

[Attorney Haskell for the State] Zoning, what I would point to on zoning

[Justice Wendlandt] As the list that you have in your brief deals with scholarship money?

[Attorney Haskell for the State] Graham's and the like.

[Justice Wendlandt] Specific programs where there's a pot of money and then the guidelines define somewhat how that is to be monitored? This is not the same.

[Attorney Haskell for the State] What I would point to, Your Honor, is two things. First of all, a piece of recently enacted legislation that's actually not cited in the briefs, it's the recent housing bond bill, it's Chapter 150 of the Acts of 2024. And what the legislature did as part of that, it's Section Eight of that special act, was added a provision to 40A, Section 3, that is the Dover Amendment. It added a provision to the Dover Amendment saying that municipal zoning codes cannot prohibit or unreasonably restrict accessory dwelling units in single family residential zones. And then the legislature went on to say, in Chapter 150 of the Acts of 2024, that HLC may issue guidelines or promulgate regulations to administer this paragraph. And so that's just an example of the legislature perceiving a difference between guidelines and regulations. Because in that legislation

[Justice Wendlandt] Well, how does 30A define regulation?

[Attorney Haskell for the State] HLC, excuse me.

[Justice Wendlandt] To say a regulation is a regulation or is it more expansive?

[Attorney Haskell for the State] It's defined by its effect, general application and prospective effect.

[Justice Wendlandt] And you're suggesting that these guidelines don't have the kind of effect that 30A uses to define the term regulation?

[Attorney Haskell for the State] So we know that guidelines, as kind of a general background principle, are usually a form of subregulatory guidance, right, and lack force of law. But we also know, from this court's decision in Fairhaven last year, that where the legislature says so

[Justice Wendlandt] First, in Fairhaven, though, guidelines in that context were used, as I recall, to define the internal workings of the state government itself. They were not outward looking to things that the public needed to do.

[Attorney Haskell for the State] There was a footnote to that effect in Fairhaven

[Justice Wendlandt] I recall that.

[Attorney Haskell for the State] And it's not our contention... I remember standing here and arguing it, Your Honor. And it's not our contention that these guidelines about the MBTA Communities Act are the type that don't affect the public. Candidly, they do. Our argument is legislature said guidelines, we know from other examples, including that recent legislation that I mentioned, that guidelines and regulations are two different things. And when the legislature wants to invoke the term of art regulations under 30A, Section 1 sub 5, they know how to do it, that's not what they did here.

[Justice Kafker] The cases where we say an agency exceeded its power by passing something with another name are all different, right? I mean, the legislature can tell an agency how to do things and not violate 30A. The focus is when an agency tries to get around 30A, isn't it? I mean, if the legislature tells an agency to pass something, they can choose. They know the word regulation. They use it all the time. Most statutes say the agency will pass regulations to carry this out. They didn't do that here. Isn't that enough for you? I mean, you don't really need to go much beyond that, do you? I mean, don't all the cases where we say 30A is violated, it's when an agency, on its own, does something that it should pass as a regulation to avoid the regulatory process, it's not when it's carrying out the intention of the legislature, is it?

[Attorney Haskell for the State] I think that's right, Your Honor. I do think that it's very significant that here, the agency, HLC, really did what the legislature told it to do and went out and promulgated guidelines. And as we argue in our brief, and you know from the record, really went above and beyond what it needed to do by way of putting out these draft guidelines, soliciting public comment, making sure that interested stakeholders knew about it. Really the only thing that 30A calls for that HLC didn't address in this case was the small business impact statement. And our view is that that's outside of the Town of Milton's zone of interest

[Justice Gaziano] Can I ask you? What happens if we agree with you that the statutory remedy is not exclusive and the AG has civil enforcement authority, the common law or by Section 10, but we then find that the guidelines aren't guidelines or that the agency has run amok in a way or violated 30A? Now what?

[Attorney Haskell for the State] So I think, as part of your question, or assuming that you don't indulge us on the harmless error argument that we've made, in that situation, what we would look at, Your Honor, is this court's decision in Carey versus Commissioner of Correction. What happened there was this court found that a policy of the department needed to have been passed down as a regulation but wasn't. And yet it had been out there, people had been relying on it. In that case, it had significance to the institutional safety in the department. And so what this court said was, "We aren't gonna strikebdown this guideline, this policy immediately, we're going to give it a period of time for the agency to do regulations." Certainly if that is the outcome this court reaches, that's what I would advise HLC to do.

[Justice Wolohojian] What would that do, this goes back to the question I wanted to ask you before. Since the deadline, as I understand your argument on the first issue, is that the town's failure here is that it did not adopt a plan by the deadline, but the deadline comes from the guidelines. So, if the guidelines go away, what happens to your first argument then, at least with respect to Milton?

[Attorney Haskell for the State] I think if the decision from this court comes out in a way that HLC needs to repromulgate the guidelines, it would be HLC's choice in that situation what to do by way of deadlines. I think it's safe to assume they couldn't specify a deadline in the past. I guess...

[Justice Wolohojian] So the request for injunctive relief would go away vis a vis Milton?

(Haskell exhales) So the hypothetical is that this court issued a decision that says the guidelines were unenforceable, HLC goes and repromulgates something under 30A

[Justice Wolohojian] If we were to conclude that the guidelines were unenforceable, is there any other issue we need to reach?

[Attorney Haskell for the State] I think so, Your Honor. I think the question

[Justice Wolohojian] Which one?

[Attorney Haskell for the State] The first question of the enforceability

[Justice Wolohojian] It wouldn't apply to Milton though, if I understand correctly. Because if I understood what you argued before, the point at which Milton, in your view, violated the statute was when it didn't enact zoning plan by a certain date. But if the certain date only comes from the guidelines and the guidelines need to be done over, then what is there to enforce against Milton?

[Attorney Haskell for the State] I don't know in that situation, Your Honor, whether the issue of Milton's non compliance would be moot. I think that even if it were, it would be

[Justice Wendlandt] It would actually be not ripe.

[Justice Wolohojian] Be premature.

[Attorney Haskell for the State] (chuckles) I think in that situation we would be in a issue of important public interest capable of repetition evading review situations such that this court ought to reach the issue about the enforceability

[Justice Wendlandt] I don't understand that at all. How would it evade review?

[Justice Wolohojian] You'd have to wait for someone to actually violate a properly promulgated guideline or regulation. –

[Attorney Haskell for the State] That's right. You know, I think

[Justice Kafker] Is this one of the statutes that passed with an emergency preamble that says this is effective immediately or

[Attorney Haskell for the State] Yes, Your honor, it was.

[Justice Kafker] So the statute, put the regulations aside, the statute immediately is in effect, right?

[Attorney Haskell for the State] In January of '21, that's right.

[Justice Kafker] Okay, so the statutes in effect, the guidelines maybe have some problems, although I'm not sure the timing one may be a problem. And does Milton get to challenge everything 'cause they never submitted anything, right? Milton only, I understand they can challenge whether they're an MBTA community. I understand they can challenge whether they have to submit a zoning plan, but do they get to challenge all the niceties of this? 'Cause they didn't submit a plan that may have violated, you know, one piece of those guidelines. They just didn't comply.

[Attorney Haskell for the State] Didn't do anything. That's right, Your Honor. And so in that situation

[Justice Kafker] What did they get to challenge in terms of detail in these guidelines?

[Attorney Haskell for the State] I think that's right, Your Honor. I think that's right. And in that situation, the mere face of 3A sub a, which requires municipalities to maintain a zoning district of this type, there's no argument at all that Milton has complied with that certainly on, again, if we take away the guideline-based deadline which really gave a lot of leeway to towns, the statute itself

[Justice Wendlandt] But I think the problem with that argument is that I think there's a third subsection that requires the guidelines in order to determine whether or not a town is in compliance. So if the guidelines were improperly promulgated, because in fact they are regulations, I think the answer to Justice Wolohojian's question is that this case must be dismissed.

[Attorney Haskell for the State] Your Honor, I don't think that's right. Section 3Ac does indicate that the agency should promulgate guidelines to determine if an MBTA community is in compliance. But in our view, the best reading of that section is that the agency is allowed to fill in the details and resolve the

ambiguities in the policy that expressed in 3A sub a where the Town of Milton, it's undisputed, it's in the stipulation of facts, in the record, Your Honor, where it's undisputed that the Town of Milton does not have any zoning district in which multifamily housing is allowed of right. Regardless of any guidelines, they're violating 3A sub a.

[Justice Wendlandt] So you think that 3A sub a was effective immediately upon passage? That there was no time for any community to construct such a district?

[Attorney Haskell for the State] The legislature did not indicate otherwise in passing the legislation. That's where the agency comes in. And as you know, from the record, very shortly after the legislation was passed, the agency said, "We're gonna be doing the guidelines. It's gonna take some time, because we want to go through a robust process. You don't need to do anything until we pass out the guidelines." And then the guidelines allowed these, frankly, generous compliance deadlines three, four or five years later.

[Justice Kafker] Are there cases that say guidelines are enforced like regulations? I mean, guidelines are normally sort of background music, right? They're not sort of specific requirements like a regulation is. I understand the legislature said guidelines, and at least that to me allows a different process, but it seems like we're making them into specific requirements and that just seems counterintuitive, the meaning of guidelines. Do we have other cases where we say that a guideline produces this kind of specific compliance requirements?

[Attorney Haskell for the State] Yeah, so that was really the principal issue. Setting aside that one footnote, that was really the principal issue in Fairhaven Housing Authority.

[Justice Kafker] Fairhaven had a separate provision in the statute that allowed enforcement, right? There was guidelines, but there was also a separate statutory provision.

[Attorney Haskell for the State] That's right. What that statute said was that the agency, it was actually also HLC, was to do guidelines and had the ability to strike contracts by the LHAs that were non-compliant with the guidelines. Our view, and I think this is what the court held in Fairhaven, is that, you know, ordinarily, guidelines, as you say, are background music, they're subregulatory guidance, but there's nothing to prevent the legislature in its legislation from saying, "Hey, these guidelines are gonna have teeth and they're going to be specifically enforceable." In our view, that's what the legislature has done here.

[Justice Wendlandt] I'm wondering what guidelines with teeth is. How is that different than a regulation? If guidelines are usually background information and this Town of Milton's lack of compliance with the guidelines is what the AG is trying to enforce and thereby calling them guidelines with teeth, aren't they regulations?

[Attorney Haskell for the State] Our argument, Your Honor, our review, is that the difference between guidelines and regulations in this context, where 3A sub c has indicated that the guidelines are going to be obligatory for towns, the difference goes to promulgation method and that the legislature has contemplated and condoned non 30A promulgation methods when it has said guidelines in the past, and that was what it intended here. And of course, in any event, even if the court isn't with us on that, our view is that what HLC did here was absolutely harmless, especially harmless to the Town of Milton.

[Justice Wendlandt] What's the metric for that? 'Cause the cases that you cite for harmless error are slightly different than not doing the small business impact and the other deficiencies in the way these guidelines were promulgated.

[Attorney Haskell for the State] At the outset, Your Honor, the only deficiency that we see, and deficiency probably isn't the right word, the only way in which this method did not meet the requirements of Chapter 30A was the small business impact statement. Beyond that, HLC went candidly far above and beyond what it would've needed to do under 30A. The cases that we cite for that proposition are, particularly the federal cases, are really on all fours.

[Justice Wendlandt] But just to clarify. You say in your opening brief that the guidelines were not filed with the Secretary of State for a notice of public hearing, notice of proposed adoption and amendment of the regulation, or the small business impact. So those three things is what I was referring to.

[Attorney Haskell for the State] I understand. I understand. And on the requirement of filing with the secretary and getting it published in the mass register, what HLC did instead, as we indicate in the stipulated facts, was affirmatively sent a copy of the draft guidelines, not just a summary or a thumbnail, but the draft guidelines to every affected MBTA community, including Milton. And that gave all of the affected municipalities the opportunity to participate via notice, comment, these public hearing type meetings that HLC did. And of course, we also see, from the stipulated facts, that Milton took advantage of that. They participated, they attended these meetings, they asked questions, they submitted a comment letter. In fact, HLC picked up on the comment in their comment letter and changed the draft guidelines to reflect the Town of Milton's concerns. The theme you see in the federal cases that we cite about harmless error is did the procedures that the agency actually used give an opportunity for participation that was equal to or greater than what would've happened otherwise? That's the situation with the fishery framework in Conservation Law Foundation. It's the situation with the orange growing quotas in the Ninth Circuit case that we cite. And that set of facts is on all fours with what we see here. Milton and other MBTA communities had every opportunity to participate. And the proof is kind of in the pudding that they weren't prejudiced by this. And this is actually a theme that the Ninth Circuit case, that we cite, discusses. Neither Milton nor any other town has challenged the promulgation method until they failed to comply with the mandate.

[Chief Justice Budd] Attorney Haskell, can I ask you a question separate from that, just about the

[Attorney Haskell for the State] Please.

[Chief Justice Budd] additional funding sources that the agency sort of added on that they would take into consideration. Is that something that they can do? Can the agency do that?

(Haskell laughs) So, Your Honor, as we mentioned in our reply brief, we're concerned with the adequacy of the briefing on this. Each of those 13 programs is subject to its own enabling legislation or policy, which we haven't seen the town unpack. And there's also no allegation that the town was actually affected by any of those. I've looked into them myself. What I can tell you about those programs is that they're discretionary. Many, or most of them, have language in their enabling authority that allows the program's administrator to impose other conditions in that person or that agency's discretion. In addition, a number of those programs actually have as a condition of eligibility, and it's not uncommon for the state to impose this condition as a matter of discretion either, they have as a condition of

eligibility that the applicant needs to certify that they comply with state law. And so that kind of bakes in this idea that, hey, you aren't complying with 3A sub a, you can't certify that you're eligible for these other opportunities. But the bottom line is that they're discretionary.

[Chief Justice Budd] Okay.

[Justice Kafker] I have one last question. Legislative history, neither, I mean you both have briefed this intensely, but the only discussion of legislative history is in another amicus brief 'cause the legislative history is not informative here? I mean, given how significant this legislation was, I assume there was debates and other. Do we have any legislative history here

[Attorney Haskell for the State] We do have a little bit of legislative history, Your Honor, and we cited in our blue brief. What we have in particular is a statement made by Senator Crighton when he was introducing the amendment that ultimately became Section 3A. We also have a press release that Senate President Spilka issued immediately after the legislation was passed. And the significance of both of those is that they confirm that this is a requirement, this is mandatory, this is something that towns must do. Both of those legislators spoke about requiring towns to zone under this legislation.

[Justice Kafker] But they don't address the remedy issue beyond that.

[Attorney Haskell for the State] I haven't seen anything to address the remedy issue, Your Honor.

[Chief Justice Budd] Okay, thank you very much. Thank you.

[Attorney Martin for Milton] (clears throat) Oh, good morning, Your Honors, and may it please the court. Your Honors, I'd like to start with the question of the Attorney General's authority even to bring this action to compel compliance with Section 3A. Under this court's precedence, the Attorney General lacks the ability to do so because the statute specifies a different consequence for non-compliance. The AG seems to be arguing that she can always seek injunctive relief in addition to statutory remedies unless a particular statute forecloses her from doing so. But that decision ignores the relevant precedence from this court, such as Attorney General versus Williams, Attorney General versus Everett, and the relevant language in Attorney General versus Pitcher

[Justice Kafker] What about 40A, Section 7? 40A, Section 7, I mean this statute is jammed right into 40A. 40A, Section 7 has empowering language. Why can't the AG enforce that?

[Attorney Martin for Milton] 'Cause that language does not refer to an action by the Attorney General to challenge zoning bylaws. There used to be language in Section 40A, which expressly provided for the Attorney General to bring an action challenging a town zoning bylaw, and that language was removed by the legislature. The current language in Section Seven

[Justice Kafker] So the AG, in your view, has no power whatsoever to enforce 40A, Section 7 language. They're out of the zoning business.

[Attorney Martin for Milton] I mean, in our brief, Your Honor, quote the Attorney General in a letter dealing with this issue, saying, "We do not enforce Chapter 40A."

[Justice Kafker] In individual fights. But this isn't an individual fight, this is a societal issue.

[Attorney Martin for Milton] So, Your Honor, Section 40A, Section 22 used to specifically say, "If the Attorney General questions the validity of any ordinance or bylaw, then the Attorney General can bring an action challenging it, challenging it for declaratory relief to determine the validity of it." That language appeared right next to the language that's currently in Section Seven. It would've been surplusage if the language in Section Seven already provided for that kind of action. The language was removed by the legislature. And this court has said numerous times, and just to pick one case, Commonwealth versus Benefield, it would violate basic principles of statutory construction to keep reading into a statute language that was expressly removed by the legislature.

[Justice Wendlandt] Can you respond then to the AG's response to your argument to that effect? Namely that what happened when that particular provision was taken out, was the replacement of an ex-post challenge to a zoning law with the ex-ante provision?

[Attorney Martin for Milton] I believe the ex-ante language was already there, Your Honor. But another point I want to make about Section Seven is that Section Seven has numerous requirements for the action, right? It has the jurisdictional requirement that Your Honor already mentioned. In addition, Section Seven talks about providing notice of any action to at least one of the owners of the parcel in question. Section Seven is all about violations of zoning bylaws, or Chapter 40A, by the owner of a parcel. It's not about the Attorney General bringing the kind of action that the Attorney General used to be able to bring under the language that was removed from the statute. In addition, we have a specific statute here, and usually specific statutes govern over general statutes.

[Justice Kafker] We have a specific statute that provides basically no remedy, right? It's a zeroed... I mean, what's your reaction to that? You've got this massive, this is a significant piece of legislation, right? We're dealing with one of the biggest problems in Massachusetts. And the legislature's only remedy if you don't comply with their shall language is three minor grant programs that most towns haven't gotten money on. That just seems odd.

[Attorney Martin for Milton] So, Your Honor, a few points here. The first is that this court has said many times, including in cases involving the Attorney General, like Williams and Pitcher, as well as the Everett case, which I'd like to get to 'cause I think it's the case which is closest to this one, that when the legislature creates a statutory duty or right, then the legislature gets to decide what the consequence will be for non-compliance.

Here the legislature, having created this zoning obligation in the MBTA Communities Act, could put a value on it. In putting a value on it, the legislature could take into account the benefits of increased multifamily housing near certain MBTA stations. It could also take into account the fact that increased density is not always a good thing. It could take into account the value judgment that's in our state constitution under the Home Rule amendment.

[Justice Kafker] So they only cared... I mean, I'm trying to understand where you're going with this. So they created instead of a stick a twig to hit at it.

[Attorney Martin for Milton] Well, Your Honor, it's not a twig. I mean, dozens of communities have already brought themselves into compliance. Other communities have not yet hit the deadline, and very well may. They've already withheld a grant of over $100,000 from the Town of Milton based upon failure to comply. This is in record appendix 2, page 412.

And at the end of the day, again, the legislature gets to decide the value here, and we know that they're laser-focused on what the remedy should be. Because, originally, the statute provided for three sources of grant funding to be withheld if you weren't in compliance. The legislature went back a couple of years later and increased that to four, right? They're focused on this issue. And they've decided that weighing all of the different values that are at stake here, that's the appropriate remedy. If they wanted to provide for something more, they could've. They could've provided for more financial penalties. They could've provided for injunctive relief, as they have done, for example, in Chapter 40B, the Fair housing statute, which allows the Executive Office of Housing and Livable Communities to issue orders that are enforced in equity, it didn't do that.

[Justice Kafker] That's assuming they didn't think that 40A, Section 7 or Chapter 12, Section 10 provided the ability to do that, right? We have to conclude that, right? 'Cause taking care of their own money directly makes some sense, right? They're saying, "Okay, money that we're providing to these agencies should not go to this," but they may think there are other existing ways of correcting the problem, right?

[Attorney Martin for Milton] If they thought, Your Honor, that by passing this statute with a specific statutory consequence for non-compliance, they were allowing the Attorney General to bring injunctive relief, then they would be ignoring all of this court's precedence to the contrary.

[Justice Gaziano] Let me ask you about that. Justice Kafker mentioned Chapter 12, Section 10. Can you address the Attorney General's office's civil enforcement authority pursuant to that statute? I'm looking at the language, including on the anti competition, which, to me, denotes that there are other things other than that. So could you address that, please?

[Attorney Martin for Milton] Yeah, I mean, the major problem with the Attorney General's argument under Chapter 12, Section 10 is that this court has never held that that section overrides the general rule that when a statute provides for a specific remedy, then that remedy is ordinarily exclusive, which, again, this court has said in cases involving the Attorney General, like Williams and Everett and Pitcher. And I want to focus on the Everett case because we talked about the Everett case in our response brief and the Attorney General did not talk about it in her reply. She didn't mention any of the cases that this court has issued dealing with the Attorney General's authority when a statute provides a specific remedy. In Everett, the Attorney General brought a suit in equity challenging the local election result. You know, saying that they were balloting irregularities. That's an important issue. We want elections that are not tainted by fraud. The Attorney General wanted to have the election voided. But by statute, in the election laws, the legislature had provided a different administrative process for ballot fights. The Attorney General, in briefing in that case, made all the same arguments about Chapter 12 and common law authority that the Attorney General is making in this case. And this is what the court said in response, in rejecting that argument: The conduct of elections and election contests is controlled entirely by statute. Unless the legislature has granted to the Attorney General, the right to the relief sought, he is not entitled to it and the court may not grant it. Now, state control over zoning, just like state control over elections, is entirely the creature of statute. Under the Home Rule amendment, unless by statute the legislature has provided something differently, cities and towns get to control their own zoning. Having created the MBTA Community Act's zoning requirement by statute, the legislature had the ability to decide how that would be enforced. And it chose an administrative process. It chose having the relevant state agencies withhold certain grant funding from cities and towns until they brought themselves into compliance. The Attorney General's argument that she can ignore that legislative

remedy, that legislative choice of remedy and go directly to equitable relief just violates Williams, Everett, the relevant language in

[Justice Kavker] What about the Krinke case –

[Justice Georges] Or the City of Boston case?

[Attorney Martin for Milton] So in those cases, there's usually a statute which provides specifically for injunctive relief. So Krinke involved Chapter 93 and Chapter 93A, both of which anticipate injunctive relief. The City of Boston case provided for the Board of Education to send the matter to the Attorney General for action to obtain compliance. The Hudson case was mentioned by my friend.

The statute in the Hudson case said that the SJC or the superior court shall have jurisdiction and equity to enforce any such order. There's always an underlying statute which anticipates suit being brought to obtain compliance. None of those cases involved what we have here, which is a statute which provides for a financial consequence, but not any kind of equitable relief or order to obtain compliance.

[Budd] But in the Everett case, didn't the AG still have the ability to bring injunctive relief and just used the wrong process?

[Attorney Martin for Milton] Well, no, Your Honor, there'd be a fight before the Board of Registrars. The Board of Registrars would sort out what the election result should've been. And then someone could challenge the Board of Registrar's determination, but that would not be the Attorney General bringing an action against town officials to have the election results changed or a new election conducted. That's certainly not what the court said in the Everett case. The court has reached the same result in cases not involving the Attorney General as well, but other government enforcement officials. And if you look at cases we cite in our brief, like the Cosmopolitan Trust case, Lexington versus Suburban Land Company, this court has consistently said that when the legislature creates a new statutory regime and provides specifically what the consequences will be for someone who's not in compliance with the statute, then those are exclusive remedies, and they displace common law remedies. I do want to go back again to the paper tiger point, 'cause it's an important point. You know, we already mentioned that the legislature gets to decide the value here. If the legislature thought that harm, the harm from not complying with the statute, were effectively irreparable, then the legislature could have specifically provided for injunctive relief as it has done in so many other statutes, such as the statutes we cite in our brief. They could always go back. This case has been pending for almost a year

[Justice Kafker] 'Cause 40B is the closest analogy, how is the AG empowered under 40B and how to contrast with here?

[Attorney Martin for Milton] – So under 40B, if an applicant challenges a permitting decision by a local government, they can bring a complaint to the Executive Office of Housing and Livable Communities. A committee in the executive office will review the decision made by the local government, they can then decide to overturn it.

[Justice Kafker] But is there any expressed reference, 'cause the AG, for years and years and years, is enforcing 40B. We see them all the time up here, 'cause towns are not complying with 40B. Is the AG specifically referenced in 40B or is it the same idea that you have an agency that has some responsibility and then the AG comes in and enforces those rights?

[Attorney Martin for Milton] It's the latter, Your Honor. Under Section 23 in 40B, the executive office shall have the power to enforce orders of the committee at law or in equity. And then presumably the Attorney General represents the executive office.

[Justice Kafker] So the AG is expressively referenced there, but we derive their power from the power of another agency, right?

[Attorney Martin for Milton] To obtain equitable relief, right. And they're effectively the lawyer for the executive office in court the way they ordinarily are for agencies.

[Justice Wendlandt] So let's assume that the AG has the power to bring this action for injunctive relief, can you address the harmless error question on the promulgation of the guidelines?

[Attorney Martin for Milton] Right, well, there are some big problems with the harmless error argument. They've referenced federal case law. The state APA and the federal APA differ in some important ways. And one way is that, under state law, there's a requirement to have a small business impact statement as well as a public and private fiscal impact analysis. Those are two separate requirements. Under Section Five of our APA, the legislature was quite clear that a law cannot be effective. No law, sorry, no rule or regulation shall be effective until the small business impact statement has been filed, and until the public and private fiscal analysis have been filed. The Section Five also says that compliance with rules and regulations promulgated by the Secretary of State to govern the rulemaking process is a condition precedent to the effectiveness of any regulations. So, where they've admitted that they have not filed the small business impact statement, then, by the plain language of Section Five, it's not effective.

[Justice Kafker] Are there any cases, I mean, I get it. We don't want agencies going outside of 30A and passing things that are the equivalent of regulations. But when the legislature tells them to pass guidelines, I mean, isn't that different? Are there any cases like that where they're doing exactly what the legislature says and we're finding a 30A violation?

[Attorney Martin for Milton] There are two cases. They say that when the legislature says guidelines, they mean something less than regulations. That's just not correct. So first

[Justice Kafker]I mean, I've read thousands of statutes. They know how to say the agency shall pass regulations. They use this language much less frequently, this idea of past guidelines. I mean, it may not be that they're supposed to have the same kinda teeth as we're talking about, but

[Attorney Martin for Milton] Yeah, I mean, two examples here, Your Honor. One is the sex offender guidelines, right? They're called guidelines. They're clearly regulations. They are in the Code of Mass Regulations. When this court upheld the constitutionality of the statutory process back in 1999, it was clear that they had to be promulgated as regulations to be constitutional. In other examples, the Fairhaven case, those were mandatory, right? They were effectively regulations, but they fell within an exception for internal administration. But, otherwise, they would've met the definition of regulation. You wouldn't have to find, they've come with an exception. And here the language is not just guidelines, right? It's guidelines to determine compliance with the law. And under the APA's functional definition of what a regulation is, if the agency is promulgating something to determine if you're in compliance

[Justice Kafker] I get that they may be too detailed, but okay, I mean, they're fleshing out the meaning of a very short statute, right? That seems appropriate to do. Do you get to challenge all the details of that

when you don't, I mean, I understood if you submitted a zoning regulation that was different that didn't comply with two provisions in those guidelines, that's a different question. But you just don't submit a zoning regulation. Or you just say, "We don't have to do it." Do we have to get into the niceties of all of those guidelines? Again, you're presenting a facial challenge. The question is, would there be a reasonable way of reading those guidelines to make it legal? I don't know if you get to challenge everything in them.

[Attorney Martin for Milton] So there are a couple of different issues here, Your Honor. There's the harmless error argument that they make for compliance with Chapter 30A. And I think our position is that there is no harmless error exception there. And before we move on to the next point, when it comes to harmless error, they point to the process that took place before the adoption of the first set of final guidelines. We're now in the third iteration of final guidelines and they don't point to anything in the record appendix suggesting that there was nearly the same level of public outreach with respect to either the second or third promulgations of final guidelines. And under the APA, they need to have notice and comment with respect to amendments of regulations as well. So there's really no harmless error argument with respect to the current operative set of guidelines, which are the guidelines, for example, that added the additional 13 grant programs. We also have the argument that the guidelines are ultra vires, that they go beyond what was authorized by the legislature. And I think there we are making a, well, both a constitutional and a facial argument, facial statutory argument to the validity of the guidelines. I think we are entitled to make that. They were trying to enforce these guidelines against us

[Justice Kafker] I get that you're entitled to, they pass guidelines and they should've done it as a 30A regulation. I get you can do that, that makes sense, 'cause that's an all or nothing argument. But bits and pieces of these things, well, I don't see why. And also, can't the legislature say, "This is such a big crisis. We want you to act immediately." Get the guidelines out, issue them. They may already have been drafted and not go through a 30A process. Isn't that within the legislature's authority?

[Attorney Martin for Milton] There is provision in the APA for emergency regulations, but that's

[Justice Wendlandt] They don't have to. More specific laws can override general laws, right? They can override 30A.

[Attorney Martin for Milton] They can, but they did not here, right?

[Justice Kafker] Or they went around it.

[Attorney Martin for Milton] But they said promulgate regulations to determine

[Justice Kafker] They said promulgate guidelines.

[Attorney Martin for Milton] Sorry, promulgate guidelines to determine compliance. And usually if you're promulgating some, if the agency's promulgating a body of law to determine compliance with a statute, then that has to follow Chapter 30A. –

[Justice Wendlandt] Let's say we agree with you on that, does your counterclaim go away or is that the end of the case?

[Attorney Martin for Milton] So if you were to decide that the current version of the guidelines is unlawful, whether for 30A violations or something else, and we have a few different arguments, then that would address our counterclaim.

You know, they have already withheld grant money from us. I think we'd hope to get that awarded to us again in the future. I will say, I'm not sure if I'm speaking for both parties here, and we've spent an awful lot of time briefing the case, it has relevance to a lot of communities. And so certainly the court could decide the case on a narrow ground and dismiss it, but it could be useful for Milton to know what the landscape is.

[Justice Kafker] They're just gonna go past it. I don't know how long it takes to go through the 30A process, but we're gonna be right back here. How quickly can you go through a 30A process? You know this better than I do.

[Attorney Martin for Milton] I'm not sure I do, Your Honor, but it would probably take a while. It's also not clear that they would adopt exactly the same regulations, right? The statute was passed in the middle of the COVID epidemic, pandemic, and things have moved forward. As we've seen, as this litigation has progressed, there's actually a lot of resistance to this law in many communities. And it may be, based upon some of the feedback that's coming out of this case and other public comment over the last year, that they would in fact do something different.

[Justice Wendlandt] Or maybe even the small business impact statement.

[Attorney Martin for Milton] They could look at the small business impact statement. I mean, the Town of Milton has an interest in its own finances. There was no public fiscal analysis that's required under Section Five. So it's entirely unclear what would come out if they were to do the process. And that's why the APA is so important, because it ensures that agencies do the hard work of thinking about all these things before they promulgate regulations and not afterwards in the middle of litigation.

[Attorney Martin for Milton] If the court has no further questions on Chapter 30A, if I might address very briefly, Your Honor, just the subway issue. There was some suggestion

[Chief Justice Budd] Is it in the brief?

[Attorney Martin for Milton] It's in the brief, Your Honor.

[Chief Justice Budd] Okay, because I think this is the main thing.

[Attorney Martin for Milton] Yes.

[Chief Justice Budd] Do we agree? Okay. I want to make sure that you get equal time, but I'm just not sure we want to spend time on something that's

[Attorney Martin for Milton] That's fine, Your Honor.

[Chief Justice Budd] Unless people have questions about that particular

[Attorney Martin for Milton] If there are no further questions, then.