UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:20-CV-11335

MARIE BAPTISTE and MITCHELL MATORIN

Plaintiffs,

v.

COMMONWEALTH OF MASSACHUSETTS, EXECUTIVE OFFICE OF HOUSING AND ECONOMIC DEVELOPMENT, and the

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Richard D. Vetstein, Esq. (BBO# 637681)
Vetstein Law Group, P.C.
945 Concord Street
Framingham, MA 01701
Phone: (508) 620-5352
Email: rvetstein@vetsteinlawgroup.com

Jordana R. Greenman, Esq. (BBO# 667842)
134 Main Street
Watertown, MA 02472
Tel: 617-379-6669
Email: jordana@jrglegal.com

Counsel for Plaintiffs

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INTRODUCTION

> "The constitution was made for times of commotion. . . Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude."

United States v. Bollman, 1 Cranch, C.C. 373 (D.D.C. 1807).

> "[T]he mere fact of an emergency does not increase constitutional power, nor diminish constitutional protections."

ACA Int'l v. Healey, No. CV 20-10767-RGS, 2020 WL 2198366, at *5 (D. Mass. May 6, 2020) (Stearns, J.).

Plaintiffs are two small rental property owners in the Commonwealth of Massachusetts who seek to declare unconstitutional and enjoin the enforcement of Chapter 65 of the Acts of 2020, *An Act Providing for a Moratorium On Evictions and Foreclosures During the COVID-19 Emergency* (hereinafter, "the Act" or "Eviction Moratorium") and the regulations promulgated thereunder by the Massachusetts Executive Office of Housing and Economic Development ("EOHED"). See 400 C.M.R. 5.0: COVID-19 Emergency Regulations ("Regulations").

The Act has shut down virtually every pending and future eviction case in the Commonwealth, from April 20, 2020 through at a minimum August 18, 2020, and likely much longer.[1] The Commonwealth has survived the Civil War, Great Depression, two World Wars, the 1917 Influenza pandemic, and numerous recessions, and until now has never implemented a wholesale moratorium on the exercise of the most basic right underlying the entire field of rental housing, the right to evict. Plaintiffs Marie Baptiste and Mitchell Matorin are likely to succeed

[1] The Legislature is currently considering a bill that would extend the moratorium for an additional 12 months *beyond* whenever the current moratorium is lifted, in addition to imposing other draconian measures that will unconstitutionally crush rental housing owners. This makes it even more critical that the Court resolve Plaintiffs' constitutional challenge. *See* H.D. No. 5166, filed on June 30, 2020; Sen. S.D. No. 2992. https://malegislature.gov/Bills/191/HD5166; https://malegislature.gov/Bills/191/SD2992.

on the merits of showing the Act violates four (4) separate constitutional rights: (1) the right to petition the judiciary; (2) the right of free speech under the First Amendment; (3) the right to just compensation for an unlawful taking of their property under the Fifth Amendment; and (4) the right not to have their lease agreements unconstitutionally impaired under the Contracts Clause.

Plaintiffs (and all other Massachusetts rental housing providers similarly situated) have already suffered and will continue to suffer significant and irreparable harm if the Act and Regulations are not enjoined and struck down. The state has eviscerated the core remedy contained in the Plaintiffs' leases and tenancy agreements – the right to evict for breach, including the most fundamental breach, non-payment of rent. Plaintiffs remain obligated to pay their mortgages, real estate taxes, insurance, and water/sewer used by non-paying tenants, and to maintain their properties and comply with the state sanitary code, while being deprived of the revenue required to do those things. The Act has already imposed a tremendous burden on Plaintiffs and other rental housing providers by barring any effort to evict non-paying tenants – whether or not those tenants were actually unable to pay due to COVID-19 – since March, and will continue to do so for the indefinite future. Worse, the Governor has the unfettered right to extend it for unlimited 90-day periods, and legislative efforts are already underway to extend the moratorium for an additional 12 months *after* the COVID-19 state of emergency is lifted by the Governor (whenever that may occur). Small rental property owners such as Plaintiffs depend on rent payments to cover the costs of ownership, and in some cases also rely on rents to afford to live in their own homes.[2] Forcing them to provide free housing and denying them the ability to

[2] Research shows that small property owners such as Plaintiffs provide most of the private housing for low- and middle-income renters. Most privately-owned affordable rentals are multi-families of 5 units or less with "mom-and-pop" owners; 92% of multifamily rentals with 10 or fewer units are owned by individuals. *Preserving Affordable Rental Housing: A Snapshot of*

exercise their most basic legal rights under their leases and tenancy agreements presents an ongoing, dire, and fundamentally unconstitutional burden.

Lastly, the public interest favors striking down and enjoining this unconstitutional statute and regulations. Fundamental constitutional rights are not quarantined even during a global pandemic. Whatever emergency interests the Government seeks to promote through the Act can – indeed, must – be implemented consistently with the Constitution and basic fairness.

FACTUAL BACKGROUND[3]

The Eviction Moratorium Act

In early March 2020, as the COVID-19 crisis took hold and while quarantined at home, state legislators began considering a temporary moratorium on evictions. Bill drafts were quickly e-mailed between legislators during remote "informal" sessions which "met" (virtually) every 72 hours and without roll call votes.[4] Concerned about this process, Rep. Shawn Dooley (R- Norfolk) objected to the bill, which under House rules suspended debate for that day.[5] However, within 25 days, the moratorium bill went from introduction to enactment, without any

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Growing Need, Current Threats, and Innovative Solutions, Department. of Housing and Urban Development, Office of Policy Development and Research, Summer 2013, available at https://www.huduser.gov/portal/periodicals/em/summer13/highlight1.html (last checked July 14, 2020).

[3] All facts are taken from the Complaint, Affidavit of Mitchell Matorin and Affidavit of Marie Baptiste, filed herewith. Background on the COVID-19 Pandemic and the Massachusetts court response to it can be found in the Verified Complaint.

[4] See *Mass. State Lawmakers Work from Home Amid Coronavirus Outbreak*, NBC Boston, April 7, 2020 (found at https://www.nbcboston.com/news/coronavirus/mass-state-lawmakers-work-from-home-amid-coronavirus-outbreak/2104230/ (last checked 5/15/20).

[5] See *Emergency Coronavirus Housing Bill Takes Detour in Mass. House*, State House News Service (Apr. 17, 2020) found at https://www.wbur.org/news/2020/04/17/coronavirus-housing-bill-massachusetts-stalled.

real consideration of its wisdom or constitutionality. See H.B. 4624 (first bill filed 3/26/20); H.B. 4647 (final bill signed by Gov. Baker on 4/20/20).

No legislative record exists of any public hearing or testimony taken on the Act, despite the fact that it is the an unprecedented legislative attack on rental housing in Massachusetts.[6] There is also no record of any study or committee report as to the impacts of the Act's unilateral and unconstitutional shifting of the entire COVID-19 financial burden to rental property owners.

Provisions of the Eviction Moratorium Act

The Act completely and indefinitely halts virtually every eviction in Massachusetts. First, the Act creates two new classes of summary process cases – defined as "non-essential" and "essential" evictions and permits only the latter. "Non-essential" evictions include four classes of summary process cases that for well more than a century have been treated as *quintessential* to the entire rental housing system:

1. All non-payment cases
2. All post-foreclosure cases
3. All "no-fault" cases[7]
4. All "for cause" cases other than those involving criminal activity or lease violations "that may impact the health and safety of other residents, health care workers, emergency personnel, persons lawfully on the subject property, or the general public."[8]

[6] See H.B. 4647 (Bill History) found at https://malegislature.gov/Bills/191/H4647.

[7] "No-fault cases" include evictions based on the expiration of a written lease, a holdover tenant, a tenant at sufferance, and the termination of a tenancy at will.

[8] In recent Bench/Bar Zoom Seminars attended by Housing Court justices, "for cause" cases that are considered "essential" under the Act will not include cases relating to smoking in a unit in violation of a lease, noise disturbances, and allowing authorized occupants (with unknown COVID-19 infection status) to occupy a unit in violation of a lease.

The Act prohibits filing any new "non-essential" evictions and a imposes a *de jure* stay of all such cases that were pending prior to the Act:

> Notwithstanding chapter 186 or 239 of the General Laws or any general or special law, rule, regulation, or order to the contrary, a court having jurisdiction over an action for summary process pursuant to said chapter 239, …, shall not, in an non-essential eviction for a residential dwelling unit or small business premises unit: (i) accept for filing a writ, summons or complaint; (ii) enter a judgment or default judgment for a plaintiff for possession or a residential dwelling unit or small business premises unit, (iii) issue an execution for possession of a residential dwelling unit or small business premises unit; (iv) deny, upon the request of a defendant, a stay of execution, or upon the request by a party, a continuance of a summary process case; or (v) schedule a court event, including a summary process trial.

St. 2020, c. 65, § 3(b).[9]

The Act also prohibits the levy and enforcement of any execution for possession (move-out order) for all "non-essential" evictions, even based on judgments preceding the Act. See Act, §3(d). Thus, rental property owners who were on the eve of obtaining move-out orders—or who had obtained them but not yet executed – against their tenants (many of whom owed them thousands in rent or otherwise violated their leases) are prohibited from regaining possession.

The Act further prohibits residential rental property owners from exercising fundamental contractual rights such as terminating tenancies and issuing notices to quit. See Act, § 3(a) ("Notwithstanding chapter 186 or chapter 239 of the General Laws or any other general or special law, rule, regulation or order to the contrary, a landlord or owner of a property shall not, for the purposes of a non-essential eviction for a residential dwelling unit: (i) terminate a tenancy; or (ii) send any notice, including a notice to quit, requesting or demanding that a tenant of a residential dwelling unit vacate the premises.")

[9] Plaintiff Matorin's pending summary process action arising out of non-payment of rent unrelated to COVID and that was filed before the Moratorium is one of those that has been indefinitely delayed. For the past six months and counting, Matorin has received no rent.

The Act further prohibits late fees for non-payment if the tenant gives the rental property owner notice and documentation of a COVID-19 related financial hardship. See Act, §3(e).

The duration of the Act remains indefinite. The eviction moratorium provisions will expire on the earlier of August 18, 2020,[10] or 45 days after the Governor lifts the COVID-19 State of Emergency. However, the Act specifically authorizes the Governor alone to extend the moratorium in unlimited 90-day increments (but no later than 45 days after the State of Emergency is lifted, which the Governor also controls). See Act, § 7.

As noted above, the Legislature is now considering a bill that would extend the moratorium for an *additional* 12 months *after* the COVID-19 State of Emergency is lifted by the Governor, whenever that may be. See House Docket, No 5166; Senate Docket, No. 2992.[11]

EOHED Regulations

The EOHED issued regulations implementing the Act. See 400 C.M.R. 5.0: COVID-19 Emergency Regulations. The Regulations mandate that all rental property owners use specific language in a new type of notice for a late or missing rent payment, called a "Notice of Rent Arrearage." The new notice must contain specific language:

> "THIS IS NOT A NOTICE TO QUIT. YOU ARE NOT BEING EVICTED, AND YOU DO NOT HAVE TO LEAVE YOUR HOME. An emergency law temporarily protects tenants from eviction during the COVID-19 emergency. The purpose of this notice is to make sure you understand the amount of rent you owe to your landlord."

[10] The moratorium by its terms expires 120 days after the effective date of the Act (April 20, 2020). Act, § 7.

[11] See https://malegislature.gov/Bills/191/HD5166; https://malegislature.gov/Bills/191/SD2992.

> "For information about resources that may help you pay your rent, you can contact your regional Housing Consumer Education Center. For a list of agencies, see https://www.masshousinginfo.org/regional-agencies. Additional information about resources for tenants is available at https://www.mhp.net/news/2020/resources-for-tenants-during-covid-19-pandemic."

> "You will not be subject to late fees or a negative report to a credit bureau if you certify to your landlord in writing within 30 days from the missed payment that your non-payment of rent is due to a financial impact from COVID-19. If possible, you should use the approved form at: https://www.mass.gov/lists/moratorium-on-evictions-and-foreclosures-forms-and-other-resources. If you cannot access the form on this website, you can ask your landlord to provide the form to you. You may also send a letter or email so long as it contains a detailed explanation of your household loss in income or increase in expenses due to COVID-19."

The required "Notice of Rent Arrearage" may also include other information that will "promote the prompt and non-judicial resolution of such matters, such as the total balance due, the months remaining, the total number of lease payments expected to be made on a lease for a term of years, information on how to contact the landlord to work out a revised payment arrangement, and a reminder that after the state of emergency ends the tenant may face eviction if rent remains unpaid."

Impact to the Plaintiffs As Rental Property Owners

Plaintiff, Marie Baptiste owns the rental property located at 30 Country Club Drive, Randolph, MA ("Baptiste Property"). After emigrating from Haiti in 1985, Baptiste worked as a nurse for 10 years to save money to buy her first home. She purchased the Baptiste Property on

or about June 9, 1995, then later moved out and began renting it out. *See* Affidavit of Marie Baptiste, filed herewith.

In or around September, 2015, Stanley Chukwu and Blessing Chukwu ("the Chukwu's") moved into the Baptiste Property as tenants, paying $2,100.00 in monthly rent. Over the years, the Chukwu's have frequently paid rent late, provided bounced checks, and as of October 2019, have not paid rent at all. Baptiste has never increased the rent for them.

On January 30, 2020, with the Chukwu's owing Baptiste $6,300.00 in unpaid rent, she served them with a 14 Day Notice to Quit for Non-Payment of Rent. On or about March 9, 2020, Baptiste, through counsel, served the Chukwu's with a new 14 Day Notice to Quit for Non-Payment of Rent, at which point they owed $10,500.00 in back rent. The Chukwu's continue not to pay rent, and as of this date they owe Baptiste $18,900 from November 2019 through the date of this Complaint. Due to the Act, Baptiste is unable to file a non-payment summary process action against her tenants because it is a prohibited "non-essential eviction."

Baptiste has been a Registered Nurse for 16 years. Her income covers only the mortgage for her primary residence but does not cover any of the other expenses for her home nor does it cover any expenses of the Baptiste Property. Without rental income from her tenants, Baptiste has and will continue to struggle to pay the mortgage, taxes and property expenses on her rental property, including the cost of the water that the tenants continue to use, and the expenses on her primary residence. Because of this deficit, Baptiste has been forced to borrow three times from her retirement funds, totaling more than $18,000, to cover her costs, thereby incurring early withdrawal penalties. Due to the continued non-payment, Baptiste anticipates having to access her retirement funds for a fourth time to continue paying those expenses. Her situation is further compounded by the fact that she suffered a foot injury in June, and has been

unable to work since then. She has thus been deprived not only of her limited work income above and beyond the income she should be receiving from rent – all while still having to pay for her own home and all of the expenses of the Baptiste Property. Baptiste has no expectation of recovering any of the unpaid rent from the Tenants. The inability to collect rent or to evict for nonpayment has resulted in Baptiste's rental property operating at a loss that is continuing to worsen as the Moratorium continues.

Matorin owns rental property located at 162 Ingleside Avenue #A (First Floor), Worcester, Massachusetts ("162 Ingleside"). Matorin purchased 162 Ingleside on or about September 27, 2019, at which time he assumed, as lessor, an existing tenancy at will agreement between the prior owner and two tenants. See Affidavit of Mitchell Matorin, filed herewith. Matorin's two tenants repeatedly paid their $1,200/month rent late before making their last payment for January 2020, also late. When the tenants did not make their rental payment on February 1, 2020 or thereafter despite several promises to pay imminently, on February 19, 2020, Matorin had a constable serve a 14-day notice to quit for non-payment. The tenants continued to promise imminent payment, leading Matorin to delay filing a summary process action until finally, with the rent remaining unpaid, on March 9, 2020, a constable served a Summary Process Summons and Complaint for non-payment of rent, filed with the Central (Worcester) Housing Court on March 11, 2020. See Matorin Aff., Ex. C. The original trial date of March 26, 2020 was rescheduled by the Housing Court under its then-applicable COVID-19 Standing Order. See Docket, Matorin Aff., Ex. D. Thereafter, pursuant to the Act's definition of his case as "non-essential," the Housing Court on April 27, 2020 noted on the case docket that the case was "Suspended COVID-19 Reschedule TBD." The tenants have not paid any rent since January 2020, and currently owe $7,200.00 through the date of this Complaint, which will

continue to accrue at $1,200 per month unless and until he is able to regain possession. Meanwhile, Matorin continues to have to pay out-of-pocket for the municipal water usage by the non-paying tenants, plus local property taxes, insurance, maintenance, and repairs. As a result of the Moratorium, Matorin's property is operating at a net loss of at least several thousand dollars annualized and will continue running deeper in the red until he can regain possession of the unit.

These substantial financial burdens that the Act unconstitutionally imposes on Plaintiffs are representative of the impact on rental property owners throughout the Commonwealth.

STANDARD OF REVIEW

To establish entitlement to a preliminary injunction, a plaintiff "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011). In the conventional case, "[t]he party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor." Esso Standard Oil Co. v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006). However, "[i]n the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis. . . . [I]rreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." Sindicato Puertorriquefio de Trabajadores v. Fortufio, 699 F.3d 1, 10-11 (1st Cir. 2012).

ARGUMENT

A. The Act Violates Plaintiffs' First Amendment Right to Petition The Courts.

The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of

grievances."[12] The Supreme Court has emphasized that "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government," and that the American constitutional system has long viewed this right as fundamental and inviolate. Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387, 395 (2011). Since at least 1876, the Supreme Court has considered the right of access to the judiciary "implicit in '[t]he very idea of government." McDonald v. Smith, 472 U.S. 479, 482 (1985) (quoting United States v. Cruikshank, 2 Otto 542 (1876)). In United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967), the Court exalted the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights." It is a fundamental liberty, protected against encroachment by federal, state, and local governments alike. See NAACP v. Button, 371 U.S. 415 (1963).

The Act is an unprecedented violation of the Plaintiffs' constitutional right to petition and access the courts. The Act completely shuts down the entire Massachusetts summary process system for rental property owners with non-paying or defaulting tenants. Not only does it prohibit filing any "non-essential" eviction, it also bars state court judges from exercising their inherent powers to schedule any "court event," including all aspects of a summary process case: motion hearings, status, case management, and pre-trial conferences, motions to set an appeal bond, motions to issue execution, and of course, bench or jury trials.

Just last month, this Court struck down as unconstitutional the COVID-19 emergency debt-collection regulations promulgated by the Massachusetts Attorney General which prohibited the filing of new debt collection civil actions and many other judicial remedies such

[12] The First Amendment applies to the states through the Fourteenth Amendment of the U.S. Constitution. DeJonge v. Oregon, 299 U.S. 353 (1937).

as attachment, wage garnishment and seizure of assets. See ACA Int'l v. Healey, No. CV 20-10767-RGS, 2020 WL 2198366, at *5 (D. Mass. May 6, 2020). In ACA Int'l, Judge Stearns held those regulations unconstitutional, reasoning that the constitutional guarantee of the right to access the courts is "among the most precious of the liberties safeguarded by the Bill of Rights." Slip op. at 23, quoting United Mine Workers of Am. Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967). The Attorney General's debt collection regulations at issue there are of the same ilk as the Eviction Moratorium. Both prohibit the filing and maintenance of a certain type of lawsuit by a certain class of litigants (debt collectors vs. landlords). Moreover, as Judge Stearns also correctly reasoned, the temporary nature of the debt moratorium did not save them. "[T]he mere fact of an emergency does not increase constitutional power, nor diminish constitutional protections." Slip op. at 25-26, citing Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). Indeed, Judge Stearns' decision makes clear that even a temporary moratorium is constitutionally unacceptable – in the ACA case, the debt collection moratorium was merely for 60 days, but the Eviction Moratorium has already been in place for almost 90 days, and the Governor has unfettered discretion to extend it indefinitely.[13]

B. The Act and Regulations Violate Plaintiffs' Free Speech Rights.

The Act impermissibly infringes Plaintiffs' First Amendment rights by prohibiting rental property owners from (1) terminating any tenancy, or (2) sending "any notice, including a notice to quit, requesting or demanding that a tenant of a residential dwelling unit vacate the premises." See Act, §3(a)(ii). The First Amendment prohibits states from restricting speech because of its message, ideas, subject matter, or content. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2224

[13] As noted previously, the Legislature is currently considering a moratorium for most evictions for an additional 12-months after the Emergency Declaration is lifted. If passed, Plaintiffs may well have been deprived of their right to access to the courts for nearly 2 full years.

(2015). Content-based restrictions are presumptively unconstitutional, justified only if the government proves they are narrowly tailored to serve a compelling state interest. Id. A restriction is "content based" if it "applies to particular speech because of the topic discussed or the idea or message expressed." Id. at 2227. Courts consider whether the law "on its face draws distinctions based on the message a speaker conveys." Id. (internal quotes omitted). Such facial distinctions may identify a particular subject to be restricted, while others may identify the speech's function or purpose. Id. Even if the challenged law does not make these facial distinctions, it is still content-based if it "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys[.]'" Id. (quoting Ward v. Rock Against Racism, 491 U.S. at 791 (1989)). Echoing these fundamental principles, the Massachusetts Supreme Judicial Court, citing First Amendment jurisprudence, recently held:

> A prior restraint is permissible only where the harm expected from the unrestrained speech is grave, the likelihood of the harm occurring without the prior restraint in place is all but certain, and there are no alternative, less restrictive means to mitigate the harm.

Shak v. Shak, 484 Mass. 658 (May 7, 2020). Moreover, "the mere fact that speech proposes a commercial transaction does not mean that the First Amendment drops altogether from the picture. A State has no constitutional power to suppress truthful, nonmisleading commercial messages." ACA Int'l, 2020 WL 2198366, at *5. Similarly, "a restriction on commercial speech will not be upheld if it provides only ineffective or remote support for the government's purpose." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

Under the four-part analysis for commercial speech cases set out in Central Hudson, the court first determines whether the speech is protected by the First Amendment, *i.e.* whether it

concerns lawful activity and is not misleading. Second, the court asks whether the asserted governmental interest is substantial. Third, the court determines whether the regulation directly advances the governmental interest. Fourth, the Court determines whether it is no more extensive than necessary to serve that interest. Cent. Hudson, 447 U.S. at 566.

The Regulations violate this test. A notice to quit or to terminate a tenancy is non-misleading commercial speech: it is a legal notice that a lease or tenancy is being terminated. Indeed, a notice to quit is a *prerequisite* to filing a summary process action. See G.L. c. 186, §11-13; Unif. Summ. Proc. R. 2(d). As for the second prong, although the government may have a substantial interest in responding to the COVID-19 pandemic, that interest does not extend to prohibiting Plaintiffs from sending legally-required notices that do not in any way interfere with that public health response. The bar on serving a notice to quit does not directly advance any legitimate Government interest, and indeed it is far more extensive than necessary to advance any interest. The categorical ban prevents rental property owners from communicating with tenants that they have violated the lease and are subject to eviction when the Act is lifted, and further interferes with the ability of rental property owners to negotiate financial resolutions with tenants with an eye toward avoiding eventual eviction. In many cases, the statutory notice to quit is the first formal notice to a tenant that there is a problem and leads the property owner and the tenant to work out a mutually acceptable arrangement. The ban thereby feeds into the misperception that, tenants "don't have to pay rent," which only compounds the confusion and will increase the likelihood that evictions ultimately will occur. For example, tenants under a lease have a statutory right to cure a payment default by tendering unpaid rent on or before the date a summary process answer is due, while tenants at will may cure a payment default within 10 days of service of a 14-day notice to quit. M.G.L. c. 186, §§11-12. Similarly standard form

written leases typically give cure rights for "cause" notices to quit. The Act and the Regulations unconstitutionally bar these non-misleading communications and thereby actually compound the damage being done to both property owners and their tenants whose arrears continue to mount beyond their capacity to pay. The Act therefore actually increases the chances of eventual eviction – indeed, it virtually guarantee evictions once it is lifted.

Again, Judge Stearns' decision in ACA Int'l is instructive. Judge Stearns held under the Central Hudson test that the ban on debt collector telephone calls violated the First Amendment by imposing a "blanket suppression order" on telephone calls. ACA, Slip op. at 17. The Act is even more restrictive because it bans property owners from serving *legally-required* notices that may lead to negotiations that will eliminate the eventual need to evict. The Act therefore does not even provide "only ineffective or remote support for the government's purpose." Bulldog Inv'rs Gen. P'ship v. Secretary of Commonwealth, 460 Mass. 647, 669–70 (2011). Rather, it is completely counterproductive to that purpose.

C. The Regulations Violate the First Amendment By Compelling Plaintiffs' Speech.

In addition to censoring Plaintiffs' speech, the Regulations violate the First Amendment by compelling a certain type of speech. Free speech also includes the right to refrain from speaking. Janus v. American Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2463 (2018). With all non-payment notices to quit prohibited, the EOHED Regulations mandate a specific notice and language for any rental property owner who opts to send a "missed rental notice" to a tenant at their own expense. The notice must state in pertinent part:

> THIS IS NOT A NOTICE TO QUIT. YOU ARE NOT BEING EVICTED, AND YOU DO NOT HAVE TO LEAVE YOUR HOME. An emergency law temporarily protects tenants from eviction during the COVID-19 emergency. The purpose of this notice is to make sure you understand the amount of rent you owe to your landlord.

> "For information about resources that may help you pay your rent, you can contact your regional Housing Consumer Education Center. For a list of agencies, see https://www.masshousinginfo.org/regional-agencies. Additional information about resources for tenants is available at https://www.mhp.net/news/2020/resources-for-tenants-during-covid-19-pandemic."

Not only does a state agency mandate certain bold type language, but it requires rental property owners to provide government approved and sponsored tenant advocacy websites in the notice itself.[14] By "compelling individuals to speak a particular message," the Commonwealth is engaged in content-based regulation of speech. National Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). Worse, the Government requires property owners to direct tenants to organizations that have historically been adverse to rental property owners. Rental property owners who want to remind tenants of missed rent payments are obligated to give tenants information which will facilitate their continued non-payment.

D. The Eviction Moratorium is a Taking of Real Property Without Just Compensation In Violation of the Fifth Amendment.

The Takings Clause of the Fifth Amendment provides: "private property [shall not] be taken for public use, without just compensation." The Takings Clause applies to the states through the Fourteenth Amendment. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

[14] The website www.masshousinginfo.org/regional-agencies lists a number of federally and state funded housing organizations which historically cater to consumers and tenants. The website https://www.mhp.net/news/2020/resources-for-tenants-during-covid-19-pandemic/ is hosted by the Massachusetts Housing Partnership, which describes itself as a "statewide public non-profit affordable housing organization, MHP works in concert with the Governor, the Department of Housing and Community Development and the state's other quasi-public housing organizations. MHP was established in 1985 to increase the state's overall rate of housing production and work with cities and towns to demonstrate new and better ways of meeting our need for affordable housing."

The Act imposes both a physical and regulatory taking of real estate by tenants who cannot be evicted despite nonpayment of rent.[15]

1. The Act Operates as a Physical Taking of Real Estate.

With respect to a physical taking, the Act forces property owners to provide housing to people who have no legal right to occupy that property. In essence, the Act creates a forced governmental housing program throughout the Commonwealth's private rental housing stock, without providing any compensation at all. As the Supreme Court has held:

> [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative."

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). As particularly relevant in this case, the Court noted the fundamental right a property owner has "to ***exclude*** the occupier from possession and use of the space." Id. at 435. The Court stated:

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.

Id. (internal citations omitted.).

[15] The Act provides a "fig leaf" that purports to require ongoing payment of rent if a tenant deems it financially feasible, but this is mere verbiage that has no real effect whatsoever. Who decides if a tenant is able to pay? Many if not most tenants have been able to participate in the Pandemic Unemployment Insurance Assistance program, which provides an additional $600 per week on top of usual unemployment insurance. Others have been continuing to work and be paid as usual. But regardless of whether they can pay or simply do not pay, rental property owners are powerless to enforce their lease contracts by pursuing the statutory scheme to regain possession of their property. And property owners in the vast majority of cases will never be able to recapture the money they are owed – either from the sheer cost of litigation, the judgment-proof nature of their tenants, or other obvious reasons. The Moratorium cannot be reconciled with the Takings Clause or the case law applying it.

The Court also noted the particular constitutional problem a property owner faces when a regulation denies the owner the power to control the use of her property:

> He not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property. . . property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Id. at 436. See also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) ("We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

At its core, the Act's evisceration of the core remedy of eviction forces rental property owners to physically house those tenants against their will. Indeed, this is a far worse intrusion than the inanimate cable TV conduit wire at issue in Loretto. The Government is requiring property owners to allow human beings to physically occupy their property to the exclusion of the property owners themselves, and to do so *indefinitely* without compensation. And it is not only the physical occupation property owners must endure, but the out-of-pocket costs that property owners must pay for the water the involuntary occupants use every day, as well as for maintenance/repair and damage and wear and tear to that property.[16]

[16] The Massachusetts Moratorium is very different from Yee v. Escondido, 503 U.S. 519 (1992), where the Court found the combination of rent control and an eviction limitation did not

2. The Act Is a Regulatory Taking.

Where "the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." Lucas, 505 U.S. at 1019. Regulatory takings challenges are governed by the standards set forth in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) where the Court acknowledged it had been "unable to develop any 'set formula' for" evaluating regulatory takings claims, but identified several significant factors. Id., at 124. Primary is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." Id. In addition, the "character of the governmental action"— for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. Id. The Penn Central factors have served as the principal guidelines for resolving regulatory takings claims not within the physical takings or Lucas rules. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–39 (2005).

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constitute a taking. There, mobile home park owners challenged rent control and eviction restrictions but the ordinance at issue expressly allowed eviction for non-payment of rent, even though the mobile home owners (unlike tenants of rental property) had made substantial sunk-cost investments into their mobile homes. With the Moratorium, the Plaintiffs are precluded from enforcing their right to receive rent. Nor is the "fig leaf" that the Act technically requires payment (if tenants are "financially able") sufficient to avoid a Fifth Amendment Taking, where property owners are barred from taking any step to obtain that payment, will not be able to do so for an extended and indefinite period, and have no hope of recovering the unpaid rent from tenants who are likely to be almost exclusively judgment-proof. Indeed, should the currently pending bills become law, rental property owners will be explicitly barred from *ever* obtaining unpaid rent or from evicting based on that unpaid rent.

The Act deprives rental property owners of all legal recourse and enforcement remedies to remove a non-paying tenant while the Act is in effect. Eviction is without question the most and often the only effective way to access the value of a rental property. Both Plaintiffs have suffered significant direct losses in rent that have resulted in pushing their investments deeply into the red, with no end in sight. Baptiste is currently owed an incredible $18,900 in rent and has repeatedly had to access her retirement funds to pay the costs of the property and her own expenses, a situation that is further worsened by her current inability to work due to an injury. Matorin is currently owed $7,200 in lost rent. Both Plaintiffs continue to have to pay substantial monthly expenses associated with their properties despite the lack of rental income, thereby pushing their operating costs deep into the red. These losses are directly caused by the Moratorium making it impossible to regain possession of their property and re-rent to paying tenants (or at the very least cutting their monthly out-of-pocket expenses).

The same is true for every other Massachusetts rental property owner with a non-paying tenant who nevertheless must continue providing housing and incurring the out-of-pocket costs associated with that housing, amounting to many millions of dollars of losses that will inevitably financially ruin many rental property owners, and could result in foreclosure and loss of their own properties.

The Act forcibly transfers the entire financial burden of the COVID-19 State of Emergency from society as a whole and imposes it instead directly and exclusively on Massachusetts rental property owners, without providing any compensation to rental property owners for the service they are providing not only to their tenants but to the residents and the Government of the Commonwealth as a whole. In the words of the U.S. Supreme Court, the Moratorium seeks to "forc[e] some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). The Act is an unconstitutional regulatory taking in violation of the Fifth Amendment.

E. The Act Violates The Contracts Clause of Article 1 of the Constitution.

Article 1, Section 10 of the U.S. Constitution states: "No State shall…pass any…Law impairing the Obligation of Contracts." While the Supreme Court has held this express limitation on state action is "not absolute," and has found exceptions, the express limitation is still the rule. The Supreme Court has established the test for an exception to that rule: for a State action causing a substantial impairment to a contract to be constitutional, it must be both reasonable and necessary to a legitimate public purpose. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978); United States Trust Co. v. New Jersey, 431 US 1 (1977). The determinative questions are: (1) did the State action cause a substantial impairment to a contract; (2) was the impairment reasonable; and (3) was the impairment necessary for a legitimate public purpose? Allied, *supra*, at 242. There is no question that the Act substantially impairs the Plaintiffs contracts, rendering them both financially meaningless and legally unenforceable. Indeed, the loss of all rent from the non-paying tenant is sufficient to move Matorin's cash flow from somewhat positive to negative, thereby causing a complete loss of the economic benefit of his property. That impairment is neither reasonable nor necessary for a legitimate public purpose.

1. The Act Substantially Impairs The Plaintiffs' Lease Contracts.

A lease or tenant at will agreement is fundamentally a simple exchange: rent for occupancy. Without one, there cannot be the other. This has been the case for centuries, whether governed purely by contract and common law or by statute. For at least the last 195 years – spanning economic disruptions and emergencies at least as severe – Massachusetts law

has provided owners of rental property the right to promptly regain possession from a non-paying or holdover tenant through a summary process eviction proceeding. See Howard v. Merriam, 59 Mass. 563 (1850) (discussing the 1825 summary process statute, which had these same essential statutory provisions then, 195 years ago, as today).

This summary process statute benefits not only rental property owners but also tenants:

> These rules seek to reconcile two competing principles. The first is that time is of the essence in eviction cases. This is based on the notion that real estate constitutes unique property and that because it generates income, time lost in regaining it from a party in illegal possession can represent an irreplaceable loss to the owner. The Legislature clearly recognized these factors in creating a special chapter of the General Laws establishing a "summary" procedure. The other principle involved is the unique and fundamental need of tenants for dwellings that are habitable and secure. Recognition of this need has resulted in extensive changes through case law in the legal relationship between tenants and landlords and a host of legislative enactments providing tenants with new rights and remedies...
>
> The need, then, is for rules that will ensure expeditious proceedings and yet comprehend all potential substantive and procedural complexities. It is believed that these rules meet that need …, and … the rules are to be construed and applied so as 'to secure the just, speedy, and inexpensive determination' of summary process actions.

Mass. Unif. Summ. Proc. R. 1 (Commentary). While Commonwealth's summary process regime has changed around the periphery periodically over the past 195 years, the fundamental core has remained constant: absent payment, the rental property owner may promptly regain possession. Even where the Legislature has enacted and modified various limits on the right to evict (*e.g.*, providing certain stays and tenant protections), the core *quid pro quo* of occupancy in exchange for the prompt payment of rent has never changed. Indeed, the Massachusetts Supreme Judicial Court recently reaffirmed that rental property owners have a statutory and common law right to seek ongoing use and occupancy payments while an eviction case proceeds. Davis v. Comerford, 482 Mass. 164, 180-82 (2019). Yet, the Act eliminates even that attenuated remedy.

In short, the rent obligation is the core of every lease contract, and the ability to promptly regain possession from a non-paying tenant is the equally core remedy for breach of that most basic agreement, absent which the entire foundation of the rental housing concept collapses. That the Act eviscerates and thereby substantially impairs the basic agreement between a rental property owner and a tenant cannot be reasonably disputed.

In the seminal case considering a legislatively-enacted state moratorium delaying the recovery of possession of real estate, in a mortgage foreclosure context during the Great Depression, the Supreme Court held:

> The obligation of a contract is 'the law which binds the parties to perform their agreement.' … [T]he laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. … Nothing can be more material to the obligation than the means of enforcement. … The ideas of validity and enforcement are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. …

Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 429-30 (1934),

Using similar analysis, in W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935), the Court struck down an Arkansas law enacted during the Great Depression that sought to impose delays to bondholders' foreclosure (i.e., dispossession) remedies. The Court explained how the delay in the core remedy of dispossession equated to a substantial impairment of the contract:

> To know the obligation of a contract we look to the laws in force at its making. . .. Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes [i.e., moratorium] he has every incentive to refuse to pay a dollar, either for interest or principal.

Id., at 60.

This principle is directly applicable here: before the moratorium, the Plaintiffs' tenants "w[ere] spurred by every motive of self-interest to pay [rent] without delay. Under the [Moratorium they] ha[ve] every incentive to refuse to pay a dollar…." W.B. Worthen, 295 U.S.

at 61. See also, Allied Structural Steel Co. v. Spannaus, *supra*, 438 U.S. at 245-47 (striking down legislation that substantially impaired reasonable and important contract expectations of an employer in its pension obligations); United States Trust Co., 431 U.S. 1 (1977) (striking down statute that substantially impaired bond agreements that repealed important security covenants).

2. The Act Is Not Reasonable Because It Fails To Provide Any Safeguards To Adequately Compensate For The Contractual Impairment.

In cases involving emergency statutes allowing delays for a mortgagee or rental property owner seeking to recover possession, Supreme Court precedent asks whether the statute provides reasonable conditions and safeguards to compensate for the impairment. Those conditions and safeguards must include ongoing payment of rent or other compensation to a rental property owner. Supreme Court precedent unambiguously demonstrates that any delay of a right to recover possession must be accompanied by payment of ongoing rent or an equivalent as a condition precedent to continued occupation.

In Home Building & Loan Association v. Blaisdell, 290 U.S. 398, the Court made clear that payment of ongoing monthly "rental equivalent" is necessary to satisfy the reasonableness test. There, the Court upheld a Minnesota foreclosure moratorium as constitutional, but did so only after clearly stating the absolute importance (to the constitutionality of the legislation) of safeguarding the mortgagee's interests with meaningful conditions, specifically the ongoing monthly payment of the rental equivalent, and distinguished several cases where legislation was struck down as unconstitutional because they lacked such conditions.

The Minnesota foreclosure moratorium, enacted in the Great Depression, allowed a struggling property owner (mortgagor), who confronted a foreclosure situation, to proactively apply to a local court for relief, whereupon the court could delay the foreclosure up to 2-years,

but *only after an affirmative showing* of hardship and *only if (and as long as) the mortgagor continued to pay* a monthly "rental equivalent" to the mortgagee. The Court in Blaisdell stated:

> [T]he relief afforded [by the moratorium], in order not to contravene the constitutional provision, … could be granted only upon reasonable conditions. … [While t]he mortgagor, during the extended period, is not ousted from possession, … **he must pay the rental value** …

Id. at 445-446 (emphasis added). The Court explained in more detail that legislative interference is unconstitutional without meaningful conditions, id. at 431-434, citing Bronson v. Kinzie, 1 How. 311 (state legislation enacted for relief of debtors following the panic of 1837 unconstitutional because relief was unconditional, *i.e.*, no provision to secure to the mortgagee the rental value of the property during the extended period); Howard v. Bugbee, 24 How. 461 (similar); and Barnitz v. Beverly, 163 U.S. 118 (similarly finding a debtor relief statute unconstitutional because its limited conditions were inadequate to safeguard mortgagee).

Blaisdell also points to several:

> decisions relating to the enforcement of provisions of leases during a period of scarcity of housing." Again, as in the mortgage context, "[i]n these cases of leases, it will be observed that the relief afforded [delaying landlords' recovery of possession] was temporary and conditional, that it was **sustained because…provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession**."

Id. at 440-442 (emphasis added). In Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), one of these lease cases cited by Blaisdell, the rent control statute at issue nonetheless "allow[ed] summary dispossession proceedings for nonpayment of rent."[17]

In short, the conditions make all the difference when it comes to *reasonableness* and, in turn, to the constitutionality of State action that substantially impairs contracts. In all the cases

[17] The statutory language is not cited in the decision itself, but is provided in the publication of the case on https://supreme.justia.com/cases/federal/us/256/170, at page 7 of 9.

upholding legislative delays to recovering possession (whether mortgagee or landlord), rent had to be paid in order to sustain the delay. Accordingly, even though Blaisdell upheld the Minnesota statute, there is no question it would find the Massachusetts Moratorium unconstitutional, because of the absence of conditions and safeguards to meaningfully protect rental property owners (either requiring rent be paid in order to delay eviction, or the state making rent replacement payments directly to owners as part of the moratorium). As noted above, the Massachusetts eviction Moratorium provides no meaningful conditions to safeguard owners and is therefore unconstitutional.[18]

A year after Blaisdell was decided, the Supreme Court drove this home in W.B. Worthen Co., (striking down Arkansas legislation enacted during the Great Depression that sought to impose, *inter alia*, substantial delays to bondholders' foreclosure remedies). In doing so, it distinguished Blaisdell because the Arkansas statute failed to provide meaningful and reasonable conditions and safeguards:

> With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.

W.B. Worthen Co., 295 U.S. at 60.

3. The Moratorium Is Unnecessary.

Finally, the Moratorium is not "necessary" to any legitimate purported public interest. In determining whether a state action that substantially impairs a contract is necessary to serve a legitimate public purpose, most of the cases have been in the context of so-called "emergencies"

[18] Worth noting here, even though from the Taking Clause context, is Yee v. Escondido, 503 U.S. 519 (1992), where the Court found the combination of rent control and an eviction limitation did not constitute a "taking"; however, the ordinance at issue expressly allowed eviction for nonpayment of rent (and other violations), unlike the Moratorium.

(e.g., the Great Depression), and so the finding of an emergency and the limiting of the state action only to the duration of the emergency is important to the assessment. See Allied Structural Steel Co., supra, 438 U.S. at 242.

As a threshold matter, the Eviction Moratorium simply does not explain why it is necessary, and therefore fails to carry its burden to establish constitutionality. It simply states it is enacted for the "public convenience," which is hardly sufficient to satisfy the constitutional burden. In Allied Structural Steel Co., supra, at 243, discussing W.B. Worthen Co., supra, the Court stated the following with respect to legislative "public welfare" declarations:

> [When] confronted with [a State] law that diluted the rights and remedies of mortgage bondholders[, t]he Court held the law invalid under the Contracts Clause. 'Even when the public welfare is invoked as an excuse,' Mr. Justice Cardozo wrote for the Court, the security of a mortgage cannot be cut down 'without moderation or reason, or in a spirit of oppression.' *Id*. at 295 U.S. 60.

The Court went on to add:

> [I]n *Treigle v. Acme Homestead Assn.,* 297 U. S. 189, the Court held invalid under the Contract Clause a Louisiana law that modified the existing withdrawal rights of the members of a building and loan association. 'Such an interference with the right of contract,' said the Court, 'cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that, in the same interest, their charters may be amended.' *Id.* at 297 U. S. 196.

Moreover, as discussed above, the Massachusetts Moratorium does not explain why potentially more moderate means were unavailable to achieve the alleged "public convenience." See United States Trust Co. v. New Jersey, 431 U.S. at 29-30 (rejecting legislation that substantially impaired bondholder security covenants where "less drastic modification" and "alternative means" were available to achieve the declared public purpose).

For example, the Legislature could have provided payments to rental property owners in lieu of unpaid rent. Instead, the Legislature simply ignored the cost to rental property owners and forced them – and them alone – to bear the full cost of whatever goal the Legislature was

trying to achieve, indefinitely. Moreover, even if the goal was to avoid the prospect of actual evictions, there is no rational basis to prohibit the mere service of statutorily mandated notices to quit. Nor is there a reason to prohibit the filing of summary process actions, even if hearings must await further developments for remote hearings, etc. Indeed, the Moratorium is counterproductive and guarantees the exact result that it purports to want to avoid. By barring rental property owners from taking any steps to regain possession, the Moratorium increases the likelihood that tenants will not pay and will not even try to work out arrangements with rental property owners. As a result, when the Moratorium eventually ends it is a virtual certainty that there will be deluge of evictions of tenants who have not paid in the interim. The Moratorium also guarantees that rental housing will become less available, as rental property owners hold vacant units off the market indefinitely—why would a rental property owner list a property when they know that if the tenant does not pay rent, they will not be able to regain possession—or are forced to convert their properties to other uses simply to stay alive? The Moratorium is legally untenable and logically counterproductive.

Finally, it is now mid-July, and substantially all of Massachusetts has now been "re-opened." Even if the Moratorium may have been necessary for a month or two (which it was not), it is not necessary now. The substantial impairment has extended well beyond the duration of the purported emergency and is therefore even more unreasonable and unnecessary. See Allied Structural Steel Co., *supra.* With the Governor's ability to extend the Moratorium indefinitely into the future and the current efforts to further extend it for an additional 12 months thereafter, it is critical that the Court resolve these serious constitutional issues.

F. Plaintiffs Will Suffer Irreparable Harm If Injunctive Relief Is Not Granted.

It is well established that the loss of First Amendment and other constitutional rights constitutes irreparable injury, by definition. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See New York Times Co. v. United States, 403 U.S. 713 (1971); Elrod v. Burns, 427 U.S. 347, 373 (1976).[19] See Maceira v. Pagan, 649 F.2d 8, 18 (1st Cir. 1981); Sindicato Puertorriqueno de Trabajadores v. Fortuno, 699 F.3d 1, 10-11 (1st Cir. 2012).

Aside from the numerous constitutional violations established by the Plaintiffs, it cannot be seriously disputed that they will continue suffering irreparable harm if the operation of the Act is not enjoined immediately. The Official Commentary to Massachusetts summary process Rule 1 explicitly notes that "time is of the essence in eviction cases. This is based on the notion that real estate constitutes unique property and that because it generates income, time lost in regaining it from a party in illegal possession can represent an irreplaceable loss to the owner."

Every month that goes by is another month during which Plaintiffs will be forced to allow non-paying tenants to physically occupy their real property while being stripped of their rental income to house those tenants. Yet, Plaintiffs remain obligated to pay their mortgages,

[19] In making these declarations about First Amendment violations being *per se* irreparable harm, the Supreme Court does not exclude any First Amendment rights from such protection. Moreover, the Court has expressly noted the similar importance between the right to free speech and the right to petition as found in the First Amendment. "[T]he rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are 'cognate rights.' Thomas v. Collins, 323 U.S. 516, 530 (1945)… 'It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people … to petition for redress of grievances.' Thomas, 323 U.S., at 530. Both speech and petition are integral to the democratic process…." Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011).

real estate taxes, insurance, and out-of-pocket costs of water/sewer used by non-paying tenants, and to maintain their properties and comply with the state sanitary code, while being deprived of the revenue required to do those things. The continued moratorium poses an immediate and ongoing existential threat to rental property owners – and indeed to the entire Massachusetts real estate market. The same is true for owners dealing with certain "for cause" situations that do not fit into the narrow exception under the Act. They are hand-cuffed by not being able to evict problem tenants, and dangerous situations will result. Massachusetts law is well-established that real estate is "unique" and therefore appropriate for equitable remedies to address violations concerning property rights. See McCarthy v. Tobin, 429 Mass. 84, 89 (1999). The Plaintiffs' irreparable harm is established in this important case.

With respect to any claimed irreparable harm by the state or the class of tenants the Act purports to protect, it is important to note that the Act targets the financial impact of the COVID-19 crisis, not the public health impact. The Act is not a public health order such as a requirement to wear masks in public, to socially distance, or to limit public gatherings of 10 or more people. Thus, the line of cases invoking a state's police power to address public health issues are inapplicable here. See, e.g. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that state under police power could mandate smallpox vaccine over petitioner's objections). The Court in Jacobson recognized as much, holding that courts may review a measure that has "no real or substantial relation" to protecting the public health or "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Id. at 31. The Act falls within this category of a law not reasonably related to true public health impacts and goes way over the line in violating numerous fundamental constitutional rights. The Plaintiffs do not discount the financial impact upon tenants due to the COVID-19 crisis, as they too face those

impacts. However, the Act unfairly shifts the entire burden of financial impact from tenants to the state's rental property owners, while at the same time, imposing an unprecedented assault on Plaintiffs' fundamental constitutional rights. The Commonwealth was free to enact a constitutionally permissible and economically justifiable provision if it deemed it necessary. It did not, and Plaintiffs are being irreparably injured as a result.

Moreover, the perceived "temporary" nature of the Act does not alter the irreparable harm analysis. First, there is no such thing as a "temporary" prior restraint on free speech. See, e.g, Nyer v. Munoz-Mendoza, 385 Mass. 184, 188 (1982). Second, with respect to access to the courts, the Act, provides for a 120-day moratorium,[20] but can be extended by Gov. Baker for an unlimited number of 90-day incremental periods. The Uniform Summary Process Rules set forth the "just, speedy and inexpensive determination of every summary process action." See Unif. Summ. Proc. R. 1. Under these Rules, a plaintiff in a summary process case can at least theoretically have a trial date and resolution of a case as quickly as 17 days from the service of a summary process summons and complaint.[21] Id. Rule 2. The Act's 120-day moratorium, therefore, imposes—at a bare minimum—nearly a ten-fold increase in the time a typical summary process case is heard. That is a *per se* violation of the right to petition in the eviction context. Moreover, a four to six month (or 12+ month) delay in all summary process cases statewide will wreak absolute havoc in the rental housing market. Take that delay, then extrapolate it to thousands of rental properties and owners

[20] Theoretically, it is possible that the Governor could lift the COVID-19 State of Emergency before the 120 day period is up, but that appears to be highly unlikely given the current state of the crisis and the fact that the State of Emergency is linked to federal disaster funding and several other legislative bills dealing with the crisis. See https://www.mass.gov/news/baker-polito-administration-announces-federal-disaster-declaration-for-covid-19-response

[21] Indeed, Matorin's summary process was originally scheduled for such a quick resolution.

across the state. This will also have spill-over effects into the purchase market because tenants will be able to essentially "squat" in place, and new buyers and their families who have purchased occupied homes will not be able to move in. Nor will rental property owners be able to sell their property if they wish, at least not at a heavy discount—who would buy a rental property with non-paying tenants and no ability to evict?

Lastly, the state courts' own administrative actions in dealing with the COVID-19 crisis such as delaying jury trials likewise do not affect the irreparable harm analysis. Putting aside whether the various COVID-19 standing orders violate the right to petition and access the courts, they are not a blanket prohibition on summary process actions and issuance of notices to quit, as the Act provides. Plaintiffs believe that the courts are better suited and equipped than state representatives to deal with any public safety challenges raised by the COVID-19 with respect to the judiciary, and that they are doing so admirably. The courts have used innovative measures to move cases along, such as Zoom video conferences, and they are already working well. There is no reason that the Housing Court could not continue to hear summary process cases, or at least motions in pending cases through video or telephone hearings. Cases could also be screened for mediation with housing specialists via Zoom, with agreements for judgment filed electronically.[22] But the Legislature has taken away all such flexibility.

G. Injunctive Relief Will Serve the Public Interest.

Injunctive relief will also serve the public interest by upholding the fundamental state and federal constitutional rights asserted by the Plaintiffs in this case and given the broad impact the

[22] Moreover, Housing and District Courts already have the statutory power to stay the issuance of executions for possession if a tenant shows good cause or hardship. See G.L. c. 239, § 9-10.

Act has on rental property owners statewide. While we recognize the impact of the COVID-19 crisis, that impact is also felt by rental property owners, and the Act is an unprecedented legislative assault on their constitutional rights. It is also unprecedented in terms of its interference with the operations of the Trial Court, and as the pending bill demonstrates, the beginning of a slippery slope of legislative interference in judicial decision making.

It is important to note that Plaintiffs, and rental property owners generally, appreciate and respect good tenants. Plaintiffs, and virtually all rental property owners, have always been willing to work with tenants in times of financial distress and the Massachusetts housing courts are well-staffed with representatives from various legal organizations to assist tenants. The Moratorium is a drastic over-reaction for a problem that may very well not exist. It is vastly overbroad in preventing evictions even of tenants who can continue meeting their rental obligations but choose not to, and it was intended to prevent a flood of evictions for nonpayment that was unlikely to happen. Rental property owners would much prefer to work with good tenants than to try to find new tenants. Also, by postponing the ability to evict in cases where a tenant should be evicted, the Act guarantees mounting unpaid rent leading to a flood of evictions the moment the Moratorium expires. This will create months and months of backlogs in already over-burdened Housing and District Courts, and make the already long eviction process even longer, during which tenants may continue to avoid paying rent and rental property owners will continue having to bear the burden by themselves. While perhaps well-intended, the Act was not properly vetted for constitutionality and was rushed into law in a panic without much thought as to how it would drastically impact the entire rental housing market in the Commonwealth. It must be struck down. The Legislature is free to enact a statute that satisfies its intended goals without so severely violating the constitutional rights of rental property owners.

CONCLUSION

For these reasons, this Court should enter a preliminary injunction enjoining the enforcement of the Act and Regulations throughout the Commonwealth.

Respectfully submitted,

MARIE BAPTISTE and
MITCHELL MATORIN

By their attorneys:

/s/ Richard D. Vetstein
Richard D. Vetstein
Vetstein Law Group, P.C.
945 Concord St
Framingham, MA 01702
Phone: (508) 620-5352
Fax: (888) 448-1344
Email: rvetstein@vetsteinlawgroup.com

/s/ Jordana R. Greenman
Jordana R. Greenman, Esq. (BBO# 667842)
134 Main Street
Watertown, MA 02472
Tel: 617-379-6669
jordana@jrglegal.com

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