Supreme Court No. 100,992-5

Court of Appeals No. 55915-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

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Gene Gonzales and Susan Gonzales, Horwath Family Two, LLC, and the Washington Landlord Association,

Appellants

v.

Governor Jay Inslee and State of Washington,

Respondents.

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# Appellants' Supplemental Brief

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## Introduction

The COVID-19 pandemic was a crisis that shocked the world like nothing before it in modern history. Yet, it is

> under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees.

*Kennedy v. Mendoza—Martinez*, 372 U.S. 144, 165 (1963).

In the pandemic's wake, Governor Inslee issued a series of proclamations, numbered as Proclamation 20-19 through 20-19.6 (A-32-40), and 21-09 (the "Proclamations"), each of which prohibit Appellants ("Housing Providers")[1] from exercising their statutory and contractual remedies to evict tenants (or even squatters) who have no right to remain in the owners' property. The Proclamations took away all recourse against the few "bad actor" tenants who refuse to pay rent solely because they

[1] Appellants are Gene and Susan Gonzales, Horwath Family Two, LLC and the Washington Landlord Association.

know they cannot be evicted or be charged late fees for nonpayment.

Housing Providers were and are sympathetic to tenants who have suffered from the pandemic and were always willing to work with tenants who could not pay their rent. However, the Proclamations actively undermined such cooperation and allowed tenants with the ability to pay to escape their obligations.

While many businesses suffered under the pandemic, landlords are the only ones required by any proclamation to provide a good or service without payment in return. Retail stores, restaurant and hotel owners lost business, but they were not required to continue to provide clothing, goods, food, or accommodations to customers without payment in return. In contrast, the Proclamations' prohibition on evictions required Housing Providers to provide rental housing without an ability to insist that tenants honor their most basic obligations to pay rent or comply with conditions of tenancy.

Emergencies call for "close examination under our constitutional system." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). Here, close examination of the Governor's response to the pandemic reveals the violation of Housing Providers' constitutional rights by forcing them alone to bear the burden of meeting a public need that should be borne by the public as a whole.

## Issues Presented for Review

1. Whether a prohibition on seeking resolution of disputes interferes with the constitutional right to access justice and the judiciary's power to administer justice?

2. Whether the Proclamations regarding landlord-tenant relations were authorized by RCW 43.06.220(1)(h) in light of the statute as a whole?

3. If the Legislature authorized the Proclamations, was such authorization a lawful delegation of pure legislative power to suspend statutes?

4. Whether the requirement that Housing Providers continue to provide housing to tenants who do not pay rent or who violate other conditions of the tenancy causes a taking of property that requires

payment of just compensation under Article I, Section 16 of the constitution?

5. Whether the prohibitions on evicting rule-breaking tenants coupled with the restriction on treating unpaid rent as a collectible debt together unconstitutionally impairs contracts?

6. Whether the public officer statute trumps all other venue statutes?

## Statement of the Case

### A. In response to the COVID-19 pandemic, the Governor issued Proclamations that suspended statutory remedies for breaches of rental agreements, including the potential remedy of Court-ordered eviction.

On March 18, 2020, Governor Inslee issued Proclamation 20-19, which suspended provisions of state law that allows residential rental housing providers to seek Court-ordered eviction of tenants for non-payment of rent and other violations of statutory and contractual provisions governing the landlord-tenant relationship. Proclamation 20-19 lasted to a particular date, only to be extended by

subsequent Proclamations. *See, e.g.,* Appendix A-32, to Appellants' Petition for Review.

The Proclamations in the 20-19 series, each with minor variations and limited exceptions, prohibit Housing Providers from accessing the courts to seek any judicial determination of their rights regardless of whether a tenant can pay rent or has suffered any pandemic-related hardship.

Under the Proclamations, tenants could continue to occupy their respective premises indefinitely at no charge, including utility services that Housing Providers must provide out of pocket. By stripping remedies away from Housing Providers–without even minimally requiring tenants *to communicate* with their Housing Providers–the Proclamations created a clear legal disincentive for tenants who could pay rent because there was no recourse for going silent and refusing to do so.

### B. Housing Providers had tenants who could pay rent but chose not to and violated conditions of the tenancy or who refused to communicate about their circumstances, while the Proclamations prohibited pursuit of any remedy.

Housing Providers here own rental housing in Lewis County. Some of their tenants did not paid rent for many months and refuse to communicate, frustrating the ability to offer a reasonable repayment plan tailored to the tenants' individual financial and health circumstances.

A Gonzales tenant, identified as Tenant X to protect privacy, had not paid the $1,000 per month rent since June 2020. CP 251. Because Tenant X received income from government disability payments, Tenant X likely had not suffered any reduction in income due to COVID-19. *Id*. Also, Tenant X didn't reimburse the Gonzales for utilities as required by the lease.

Tenant X has been hard on the property—having broken cupboards, cracked a ceramic top stove, removed smoke alarms (contrary to RCW 59.18.130(7)) and pulled out a ceiling light. *Id.* Neighbors to the property occupied

by Tenant X complained about Tenant X's yelling and setting off fireworks in the middle of the night. *Id.*

The Gonzales family has a mortgage on the property, and they pay property taxes and insurance. Unlike Tenant X, they have had COVID-19-related loss of income. Susan Gonzales taught for the Centralia School District and was laid off because of COVID-19. *Id.* They struggled to pay the mortgage, taxes, insurance and upkeep and repairs for property occupied by Tenant X who had no loss in income. *Id.* Neither had the Gonzales family received compensation for the deprivation of their statutory right to evict or the deprivation of their contractual and statutory right to receive rent. CP 253.

Similarly, Horwath Family Two, LLC (the Horwath Family) owns a single-family home leased to Tenant Y, who had not paid rent since March of 2020. CP 246. The rental properties constitute the Horwath's retirement income. CP 245. Under the lease agreement, Tenant Y is obligated to pay rent in the amount of $1,175 per month,

and the unpaid rent totaled $12,915 as of January 2021. CP 246. Tenant Y is also obligated under the lease agreement to pay for utilities, but like Tenant X, Tenant Y had not paid for utilities for many months. *Id.*

The Horwath Family made many attempts to find an equitable solution for Tenant Y. Inquiries were made about Tenant Y's ability to pay any part of the rent owed—numerous emails, texts, voice mail messages and postings on the door of the rental unit. *Id.* Tenant Y never responded. *Id*.

As a result of Tenant Y's silence, the Horwath Family had not been able to offer a repayment plan that would be reasonable based on the tenant's financial, health, and other circumstances. CP 1158-59. The Horwath Family would not conduct illegal surveillance on Tenant Y. The only lawful way to learn of Tenant Y's circumstances would be to file suit, but that was prohibited by the Proclamations.

Like the Gonzales family, the Horwath Family has received no compensation from the State for the deprivation of their contractual and statutory right to evict or the deprivation of the right to receive rent. CP 248. While the state and federal governments have made funds theoretically available to help with unpaid rent, it was only available at the *tenant's* request. CP 253, 248. Because paying was not a top priority for the "bad actor" tenants, Housing Providers did not receive rent or rental assistance. *Id.*

### C. The Superior Court granted summary judgment to the State and the Court of Appeals affirmed.

Housing Providers filed this action against Governor Inslee and the State (hereinafter "State") in their home county—Lewis County. CP 194, *et seq*. That court granted the State's motion to change venue to Thurston County. CP 2-3, 178.

Thereafter, the Thurston County Superior Court considered cross-motions for summary judgment. It

granted the State's motion and denied Housing Providers' motion. CP 1370. Housing Providers filed an appeal and Division Two affirmed. *Gonzales v. Inslee*, 21 Wn.App.2d 110 (2022).

## Standard of Review

The standard of review of a summary judgment order is *de novo. Owen v. Burlington Northern and Santa Fe R.R. Co.,*153 Wn.2d 780, 787 (2005).

## Argument

### I
### This case should not be dismissed as moot.

The State previously argued this case was moot because the Proclamations have expired. Brief of Respondents in the Court of Appeals, at 20. Although rejected by the Court of Appeals, *Gonzales*, 22 Wn.App.2d at 124,[2] Housing Providers briefly address the argument here.

[2] The State did not seek review of the appellate decision on this basis.

**A. This case is not moot because the question as to whether Appellants are entitled to compensation needs to be decided.**

As addressed below, Appellants contend that the Proclamations temporarily took their property for purposes of Article I, Section 16 of the Washington constitution, entitling them to compensation.[3] Whether the Proclamations were rescinded has nothing to do with Housing Providers' rights to compensation for past, completed temporary taking of their property.

Additionally,

> [c]essation of illegal conduct does not deprive a tribunal of the power to hear and determine the case; *i.e.*, it does not render the case moot.

*State v. Ralph Williams' North West Chrysler Plymouth, Inc.,* 87 Wn.2d 298, 312 (1976). While the Proclamations may not currently be in effect, there is no promise by the State to never again restrict Housing Provider's rights in

[3] RCW 7.24.080 expressly authorizes "[f]urther relief based on a declaratory judgment." If a temporary taking occurred, compensation to Housing Providers would be proper.

this manner. This is unsurprising, given the numerous times the Proclamations were extended and the ongoing uncertainty of COVID-19 and its variants. This case is not moot.

### B. Alternatively, this case fits within the exception for matters of continuing and substantial public interest which the State has not challenged.

Division Two agreed that this case is a matter of continuing and substantial public interest and should be decided even if the matter were moot. *Gonzales,* 22 Wn.App.2d at 124 (citing *Dzaman v. Gowman*, 18 Wn.App.2d 469, 476 (2021)); *see also Sorenson v. Bellingham*, 80 Wn.2d 547, 558 (1972). Courts look at four factors: (1) whether the issue is public; (2) whether guidance to public officers is desirable; (3) whether the issue is likely to recur, and (4) whether the genuineness and quality of the advocacy is sufficient. *Westerman v. Cary*, 125 Wn.2d 277, 286-87 (1994).

As to the first factor, the issues surrounding the statutory authority and constitutional consequences of Governor's Proclamations are public issues, not merely private disputes. The related second factor also tends toward retaining review. It is desirable both for the chief executive—the Governor—to know whether his actions were authorized and the constitutional ramifications, and for all courts to know whether a Governor's proclamation can block the courts from considering certain legal disputes.

Concerning the third factor, restrictions on Housing Providers arising from COVID-19 are likely to recur. As the Governor states publicly "[T]he COVID-19 pandemic remains." https://www.governor.wa.gov/news-media/state's-covid-emergency-order-ends-next-week. And the news from China is that COVID-19 still runs rampant. *See* https://www.cnn.com/2022/11/24/asia/china-covid-highest-daily-case-number. (shortened). Just as

another volcano eruption like that in *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466 (1982)[4] is likely at some point in time, another pandemic is just as likely.

Importantly, this is not a case where the Legislature amended the statute under which the Proclamations were issued; the Governor's legal bases all remain. Having a decision on the Governor's authority and constitutionality of his Proclamations is essential for the Governor, the courts, landlords and tenants to be prepared for the future.

This factor on recurrence also considers "the likelihood that the issue will escape review because the facts of the controversy are short-lived." *Seattle v. State*, 100 Wn.2d 232, 250 (1983) (Rosellini, J., dissenting), *quoted in Westerman,* 125 Wn.2d at 286-87. But this factor is balanced by typically requiring a hearing on the merits to have already occurred. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 253–54 (1984).

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[4] *Abrogated on other grounds in Yim v. City of Seattle*, 194 Wn.2d 682, 700 n.6 (2020).

Here, a hearing on the merits in Superior Court was held and the issues are relatively short-lived. Housing Providers filed suit, filed, and defended cross motions for summary judgment, pursued an appeal and then sought review in this Court, all relatively expeditiously. There were no extensive delays that might be avoided in a future case. Plainly, dismissing the appeal at this stage would be "wasteful of judicial resources." *Orwick,* 103 Wn.2d at 253.

Finally, on the fourth factor, both the genuineness and quality of the advocacy strongly suggest that the Court is not being asked to issue unnecessary decisions on which the parties do not care enough to provide quality briefing.

In summary, this appeal raises important public issues in which the parties and the judicial system has invested substantial resources and effort to resolve. To not resolve them now would be a disservice, not only to Housing Providers, but to the State, the judiciary, and the public at large.

## II.
## The Proclamations' prohibition on seeking relief in court interferes with the independent power of the judiciary and the constitutional right of access to the courts—only courts should decide how to administer justice during a pandemic.

The Proclamations deny access to the judiciary for the resolution of disputes and infringe on the courts' inherent powers by shutting the courthouse doors—prohibiting courts from dealing with the pandemic as it relates to landlord/tenant disputes.[5]

### A. The Proclamations prohibit Housing Providers from seeking from courts the relief Washington law provides.

The Proclamations contain the following prohibitions:

> *Landlords, property owners, and property managers are prohibited from serving or enforcing*, or threatening to serve or enforce, *any notice* requiring

[5] The Court reviewed a recall petition that alleged the Governor violated the separation of powers by prohibiting landlord's access to the courts. *Matter of Recall of Inslee*, 199 Wn.2d 416, 426 (2022). But the *pro se* recall proponent "fails to provide facts in support of this charge." *Id.* Housing Providers brought this case because they were in fact barred from the courthouse.

> a resident to vacate any dwelling or parcel of land occupied as a dwelling.

Proclamation 20-19.6 (emphasis added). The prohibition on serving notices precludes Housing Providers from filing anything in court to obtain an eviction. *See Housing Auth. of City of Seattle v. Silva*, 94 Wn.App. 731, 734 (1999) (addressing mandatory notices prior to eviction).

But there is more:

> Landlords, property owners, and property managers are *prohibited from seeking* or enforcing, or threatening to seek or enforce, *judicial eviction orders* involving any dwelling or parcel of land occupied as a dwelling.

Proclamation 20-19.6 (emphasis added) (with exceptions not relevant here).

Division Two's analysis is simply nonsensical on this point:

> [T]he proclamations do not interfere with a court's authority in any way. None of the proclamation provisions are directed to the courts, and the proclamations do not purport to prevent the courts from taking any actions. For example, the proclamations do not prohibit courts from issuing

> eviction orders or otherwise resolving disputes between landlords and tenants.

*Gonzales,* 22 Wn.App.2d at 131.

This statement is empty rhetoric unattached to reality. Before the Proclamations, the courts had the power to evict tenants upon request with proof by Housing Providers. After the Proclamations, Housing Providers were prohibited from pursuing eviction lawsuits in court. Division Two suggests that courts could issue eviction orders or resolve landlord/tenant disputes *sua sponte.* The Proclamations flatly prohibited landlords from filing any such requests with any court or giving the notices which are essential before filing. Courts do not issue eviction orders on their own. The claim that the Proclamations do not interfere with the courts' role in resolving disputes should be rejected.

### B. The ban on seeking relief in court interferes with the power of the judiciary to resolve disputes and the right to petition government for redress.

The prohibition on seeking relief in courts interferes with the court's inherent powers "to do all that is reasonably necessary for the efficient administration of justice." *State v. Wadsworth,* 139 Wn.2d 724, 740-41 (2000). The Governor violated separation of powers because the Proclamations prohibited the judiciary from resolving landlord/tenant disputes.

This Court in *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974 (2009), ruled the Legislature could not condition the filing of suit upon a certificate of merit for medical malpractice practice claims. And, in *Waples v. Yi*, 169 Wn.2d 152 (2010), this Court held that a statutory requirement requiring a medical malpractice plaintiff to give a 90-day notice of intent to sue conflicted with the Court's power over the adjudication of disputes. *Id.* at 161.

Here, the laws regarding landlord/tenant relations did not change substantively, but the Proclamations completely barred Housing Providers from seeking relief in any court to effectuate their statutory (and common law) right to evict when a tenant refused to pay rent. CP 223-24.

No one disputes that the pandemic called for a change in the status quo, but rather than the Governor shutting the courthouse doors for landlords, the Courts should have been allowed to decide how to handle such claims considering the pandemic and its effect on the parties. This is what courts do—equitably administer justice in consideration of all the facts of individual cases.

Making matters worse, the Proclamations' ban on legal proceedings created incentives for not complying with the law or with the lease. For some, that a court might rule that rent must be paid could have motivated the payment of rent for those who were able to do so. But the

Proclamation took away all incentives because landlords were locked out of the courthouse.

### C. The separation of powers problem is not solved by one branch having a rational basis for its intrusion into the other branch.

Contrary to the State's position, for one governmental branch to have a rational basis for intruding on another branch is not sufficient. Division Two concludes that access to the courts can be regulated, or even banned, if the regulation "rationally serves a legitimate end." *Gonzales,* 22 Wn.App.2d at 132 (quoting *In re Marriage of Giordano*, 57 Wn.App. 74, 77 (1990)). This conclusion cannot be reconciled with *Putnam*, 166 Wn.2d 974, and *Waples*, 169 Wn.2d 152. The Legislature had reasons for the pre-claim notices in those cases, but reasons did not preclude this Court from striking down the laws as improperly interfering with the judiciary.

Moreover, Division Two misappropriates the rational basis test as if no specific right, like the access to courts,

were involved. The rational basis test applies to review of *any* government action when there is no other constitutional right involved. *See, e.g., Amunrud v. Board of Appeals*, 124 Wn.App. 884, 888 (2004) (revocation of a driver's license); *American Network, Inc. v. Wash. Util. and Transp. Com'n,* 113 Wn.2d 59 (1989) ("purely economic regulation"); *Weikal v. Wash. Dep't of Fisheries,* 37 Wn.App. 322 (1984) (fishing licenses).

To apply the rational basis test here suggests that the access to the courts is no more important than the right to make choices about driving, charging utility rates or fishing. The role of the courts as established in the constitution as the civilized method for resolving disputes is far more important than these. Guaranteeing justice and equity goes to the heart of the First Amendment rights to petition government for redress[6] and to speak.[7]

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[6] *See Cal. Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972).

Additionally, Division Two's reliance on *Giordano,* 57 Wn.App. 74, is misplaced because of its facts. The party in *Giordano* argued that a court-imposed restriction on filing unlimited motions on whatever and whenever they wanted constituted a deprivation of access to the court. *Id.* at 78. The argument failed because there was access to the court—the dispute was being handled by the judiciary. The right to be in court did not entitle a litigant to be free from court-imposed restrictions. Here, Housing Providers were completely barred from even getting into court.

Rather than rational basis, federal law examines infringements on the right of access to the courts with a "more searching judicial review." *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004). As addressed *infra* at 24-27, the Washington constitution should not be interpreted in a way that is **less** protective of rights than the federal constitution.

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[7] *See Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 429 (1963).

Here, Housing Providers were not allowed to file anything in court to present their legal issues with tenants—not because the court decided to handle matters differently during the pandemic—but because the Governor did. It is the courts' role to determine when cases may be filed, when matters will be heard, and what changes to normal claim-processing should be made during extenuating circumstances like a pandemic. A court could have stayed proceedings, or stayed enforcement, depending upon all the circumstances. But the Proclamations' one-size-fits-all approach prohibited the judiciary from exercising any discretion whatsoever.

### D. The Court should interpret the right to access the judiciary under the Washington constitution consistent with the federal Constitution.

While Washington's jurisprudence on the right to access the court's is independent of federal law, Washington law should not be less protective of these rights than the federal Constitution. The federal

constitution guarantees the "fundamental right of access to the courts." *Lane*, 541 U.S. at 533-34. This constitutional guarantee is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).

Going all the way back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the primacy of access to courts is established:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. … [Government] will certainly cease to deserve this high appellation [as a government of laws, and not of men], if the laws furnish no remedy for the violation of a vested legal right."

*Id.* at 163.

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively

> settle their differences in an orderly, predictable manner.

*Boddie v. Connecticut,* 401 U.S. 371, 374 (1971). "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for the resolution of legal disputes." *Boroguh of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).[8]

Despite the importance of access to the judiciary, Division Two asserts that the ability to bring eviction proceedings was only delayed, as if shutting the courthouse doors for well over a year is inconsequential. The delay is significant because the potential for eviction motivates tenants to pay and, if they leave, attempting to recover withheld rent is, as several courts have recognized, "speculative at best."[9]

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[8] *See McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("filing a complaint in court is a form of petitioning").

[9] *Melendez v. City of New York,* 16 F.4th 992, 1033 (2nd Cir. 2021), *quoted in Farhoud v. Brown*, 2022 WL 326092, at *7 (D. Or. Feb. 3, 2022).

Only courts should decide when their doors are shut, to whom and under what circumstances. The courts are best equipped to manage cases and the judiciary is the entity the constitution entrusts with that responsibility. The Proclamations interfered with courts' independence and primary role in providing justice.

## III.
## Requiring property owners to house people whose right to occupy has ended constitutes a temporary taking of property for a public benefit.

The Proclamations' mandate that Housing Providers allow others to remain in physical occupation of property constitutes a classic taking of property, requiring payment of just compensation. Washington follows federal law on the state takings clause. *See Yim v. Seattle,* 194 Wn.2d 651, 658-59 (2019). Federal law is now clear that mandatory physical occupations of property, even if temporary, constitute *per se* takings. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021).

> [A] physical appropriation is a taking whether it is permanent or temporary. … The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation.

*Id*. at 2074 (citations omitted).

Laws preventing landlords "from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs*., 141 S.Ct. 2485, 2489 (2021) (per curiam).

### A. Housing Providers do not lose their constitutionally protected rights simply because they agreed to the initiation of the occupancy.

The Supreme Court's holding in *Cedar Point Nursery*—that a temporary occupation is a per se taking—directly and conclusively applies here. The Proclamations required Housing Providers to be subject to the occupation of others who had lost their right to occupy.

Relying heavily on *Yee v. City of Escondido,* 503 U.S. 519 (1992), Division Two concludes that Housing

Providers have no protection from physical occupations because they voluntarily chose to rent their properties, even though the choice was on conditions such as timely payment of rent. Division Two misses the key difference—*Yee* did not involve a prohibition on eviction. Division Two mistakenly describes *Yee* as a case where "mobile park owners who rented pads to the owners of mobile homes challenged a state statute" that "limited their ability to terminate a mobile homeowner's tenancy." *Gonzales*, 21 Wn.App.2d at 135 (citing *Yee*, 503 U.S. at 524) (emphasis added)). Division Two's characterization of *Yee* is a gross misstatement of this Supreme Court decision.

The error of Division Two's analysis is evident from the *Yee* decision itself. The owners of mobile home sites in *Yee* mounted a facial challenge to a city ordinance controlling rent, not to a state statute; they merely argued the ordinance should be "viewed against the backdrop" of state law. *Id.* at 523. However, the *Yee* landlords did not

sue the state, nor challenge the state law. The Court's focus was on the city ordinance, which did not restrict eviction. *Id*. at 528. "[W]e do not find that right [to exclude] to have been taken from petitioners on the *mere face of the Escondido ordinance*." *Id.* (emphasis added).

Division Two capitalizes on an prior sentence in *Yee* that "Petitioners voluntarily rented their land to mobile homeowners." *Gonzales,* 21 Wn.App.2d at 135 (citing *Yee*, 503 U.S. at 527). But the very next sentence in *Yee* demonstrates that the voluntary initial entry does not justify an unlimited right to stay:

> [N]either the city nor the State compels petitioners, once they have rented their property to tenants, to continue to do so.

*Id*.; *see also id.* at 524 (recognizing termination for "nonpayment of rent").[10]

[10] Division One in *Rental Housing Association v. Seattle*, 22 Wn.App.2d 426 (2022), held that a six-month restriction on evictions did not cause a taking because of this Court's decision in *Margola Associates v. City of Seattle*, 121

Unlike a restriction on rents, the Proclamations directly required an unwanted physical occupation. *Yee* does not stand for the proposition that requiring an owner to allow tenants to physically occupy property, even after permission has expired, is somehow not a mandatory physical occupation of property.[11] *See Cwynar v. City and*

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Wn.2d 625, 648 (1993), *abrogated by Yim v. Seattle*, 194 Wn.2d 682 (2019). The Court in *Margola* concluded that a rental license fee was not a physical invasion, recognizing that in *Yee* the owners "could still evict" tenants. *Margola,* 121 Wn.2d at 648.

[11] The court in *Rental Housing Association*, 22 Wn.App.2d 426, also held that a six-month limit on eviction and winter eviction ban did not cause a taking because the

> Supreme Court has previously held that "statutes regulating the economic relations of landlords and tenants are not per se takings."

*Id.* at 447 (citations omitted). The analysis is paper thin. Some landlord/tenant laws might not cause a *per se* taking, such as antidiscrimination laws, health and safety regulations or notice requirements. But statutes which mandate occupancy are not exempt from a *per se* taking analysis simply because they involve landlords and tenants.

*County of San Francisco*, 90 Cal.App.4th 637, 656-57 (2001) (addressing *Yee*).

The conclusion that landlords once invited tenants does not logically demand that there is no unwanted physical occupation when landlords are directly forced by the Proclamations to extend the occupation far beyond the invitation. *See Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022) (recognizing claim that eviction moratorium deprived landlord of right to exclude). *Yee* does not remotely suggest that a person once invited can stay as long as they want without triggering a right to compensation.

### B. The remedy for a temporary taking of property is payment of compensation which causes the public to pay for resolving a public burden.

To conclude there is a physical taking does not prohibit any Proclamation or make it impossible to ensure that tenants may remain in their tenancies until the pandemic is over. The takings clause simply requires, if the

prohibition on evictions caused a taking of an interest in property, then the State must pay for it. *See Knick v. Township of Scott, Pennsylvania,* ___ U.S. ___, 139 S.Ct. 2162, 2170 (2019).

Given the significant amount of money appropriated for relief caused by the eviction moratoria, Brief of Respondents at 13-15 (billions of dollars), a ruling that Housing Providers should be paid with public dollars for what they lost to accommodate a public need simply ensures that the funds go to the persons whose property interests were in fact taken.

Housing Providers contend this principle should apply to whomever is required to give up their property for the public good. If hotels were required to provide rooms at no cost, they should be reimbursed with public funds. The same is true with grocery stores and food. But neither hotels, nor groceries stores were so burdened; no business except landlords were required by the

Proclamations to continue to provide to their customers without compensation.

As the Supreme Court explained in its seminal regulatory takings case:

> [Private] misfortunes or necessities will [not] justify his shifting the damages to his neighbor's shoulders. ... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (citation omitted).

Forcing one group of people to bear the cost of addressing a public need simply because it is convenient is what the constitution's takings clause was designed to avoid. *Mission Springs, Inc. v. City of Spokane,* 134 Wn.2d 947, 964 (1998); *see also Armstrong v. United States,* 364 U.S. 40, 49 (1960). This Court should reverse the Court of Appeals' decision and enforce this foundational principle.

## VI.
## The Governor's authority under RCW 43.06.220(1)(h) does not extend to suspending statutory rights or obligations.

The authorization of the Governor's emergency powers in RCW 43.06.220(1)(h) to prohibit "activities" is insufficient to justify suspension of statutory rights and obligations. Division Two concludes otherwise. *Gonzales,* 22 Wn.App.2d at 127 (citing *Cougar Business Owners Ass'n*, 97 Wn.2d 466). However, *Cougar* is far from definitive on Subsection (1)(h)—or even applicable to the situation at hand. In response to the eruption of Mt. Saint Helens, the Governor closed roads, depriving businesses of access. Although mentioning Subsection (1)(h), the Court relied on the far more explicit authority in RCW 43.06.220(1)(g) regarding restricting "certain streets, highways or public ways," rather than relying solely on an open-ended authority to prohibit "activities."

As addressed below, the wording of the entire statute suggests that the Legislature was not intending the reference to "activities" in Subsection (1)(h) to include suspending statutory rights or obligations.

### A. The Proclamations suspended statutory rights to evict and obligations to pay rent timely.

The Proclamations suspend the right to evict and obligation to pay rent on a timely basis, a statutory obligation in RCW 59.18.080 and RCW 59.18.130. In response, Division Two opines that the Proclamations did not suspend statutory rights or obligations—they merely delayed them. A-15. Division Two's analysis is flawed because a delay is the same thing as a suspension.

"Suspend" means "to stop temporarily" or "to set aside or make temporarily inoperative" or "to defer to a later time on specified conditions, or "to hold in an undetermined or undecided state awaiting further information." https://www.merriam-webster.com/dictionary/suspend.

*See Schwartz v. King County*, 200 Wn.2d 231, 238 (2022) (using dictionary definitions). The required deferral or delay of the duty to pay rent or delay of the right to bring evictions is synonymous and meets every reasonable understanding of the word "suspend."

### B. To read Subsection (1)(h)'s authorization to prohibit "activities" as broad enough to include suspending statutory rights and obligations renders Subsections (2) and (4) superfluous.

The reference to "activities" in Subsection (1)(h) cannot include suspension of statutory rights or obligations because Subsection (2) deals with suspensions and is limited to subjects not at issue here. Moreover, Subsection (4) imposes a 30-day time limit for suspensions under Subsection (2) and requires the involvement of leadership of the Legislature for situations involving suspension of statutes.

If the reference to prohibiting "activities" in Subsection (1)(h) includes suspension of statutory obligations, then

both Subsections (2) and (4) are superfluous, a result contrary to standard rules of statutory interpretation. *In re Detention of Strand,*167 Wn.2d 180, 189 (2009). There's no point to having a restriction on the subject matter for suspending statutes in Subsection (2) and limiting time and requiring notice to the Legislature in Subsection (4) if the Governor can simply suspend statutory provisions under his authority to prohibit "activities" under Subsection (1)(h).

For these reasons, the Governor's authority in RCW 43.06.220(1)(h) regarding "activities" is not broad enough to suspend the statutory right to evict or the statutory obligation to pay rent on a timely basis.

## V.
## If Subsection (1)(h) authorizes suspension of statutory rights and obligations, such authorization violates the constitutional prohibition on delegation of legislative powers.

If Subsection (1)(h)'s open-ended reference to "activities" is sufficient to provide the Governor with the

authority to issue the Proclamations challenged here, then that subsection constitutes an unlawful delegation of legislative authority. Limitations on the delegation of legislative powers arise implicitly from Article II, Section 1: "The legislative authority of the state of Washington shall be vested in the legislature." *Id., quoted in Keeting v. Public Utility Dist. No. 1 of Clallam County*, 49 Wn.2d 761, 767 (1957). Suspending statutes is a nondelegable legislative function and, even if it were delegable, Subsection 1(h) fails the procedural and substantive safeguard requirements for delegations of legislative power.

### A. The suspension of statutory rights and obligations is a quintessential legislative power not delegable to anyone.

Suspension of statutes is a quintessential legislative power. *See Diversified Inv. P'ship. v. Dep't of Social and Health Services*, 113 Wn.2d 19, 24 (1989) ("nondelegable powers include the power to … suspend … laws"). As a

pure legislative function, it cannot be delegated to anyone—including another branch of government. *Id.*

### B. Subsection (1)(h) fails basic unlawful delegation criteria because there are no clear standards or procedural safeguards.

Unlawful delegation cases typically involve delegated rule-making authority to agencies within the executive branch. Nevertheless, no agency is free to adopt rules inconsistent with statutes. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19 (2002). Because an executive branch agency cannot suspend statutes, it is anomalous to conclude that the Governor or any other public officer can.

Nevertheless, if the rulemaking rubric for delegation of legislative authority applied, then the analysis in *Barry & Barry, Inc. v. State Dept. of Motor Vehicles,* 81 Wn.2d 155, 159 (1972), governs. *Barry* requires clear standards to the entity given lawmaking power and procedural safeguards. *Id.* A delegation to allow the Governor to suspend statutes

with the word “activities” is no standard at all. It is not based on standards or guidelines established by the Legislature, especially where the principle of *ejusdem generis* was not applied to limit “activities” to those associated with other specifically listed items, suggesting riots or insurrections. *See* RCW 43.06.220(1).

This Court has recognized that procedural safeguards for state agency rules exist because rules are reviewable under the Administrative Procedures Act (APA). *State v. Crown Zellerbach*, 92 Wn.2d 894, 901 (1979). Here, however, the Proclamations were not reviewable under the APA, so those procedural safeguards were entirely absent.

An unlawful delegation occurred in *In re Powell*, 92 Wn.2d 882, 893 (1979), because there were no “notice and public comment procedures which are normally afforded in the rulemaking process” and the ability to

institute a challenge after the fact was inadequate. *Id.* at 893.

*Crown Zellerbach* and *Powell* apply here. No rulemaking procedures existed for the development of the Governor's Proclamations. The Proclamations were imposed without substantive standards and without procedural protection. If this was authorized by the Legislature, then it was an unlawful delegation.

## VI.
## The Proclamations unconstitutionally impair rental contracts.

Contracts are protected by both Article I, section 10 cl. 1 of the federal Constitution and Article I, section 23 of the state constitution. The leading Contracts Clause case, *Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), confirms an impairment of contracts here because Housing Providers' contractual rights were violated in the absence of compensation. In *Blaisdell*, a legislature responded to the Great Depression by extending the

mortgage redemption period and thereby suspending the right to remove people from their homes. *Id.* at 439, 445. However, the law required the *de facto* tenants to pay rental value.

The Supreme Court was clear that this interference with contractual rights was constitutional because the law required payment of rental value during the extended possession. *Blaisdell*, 290 U.S. at 445. The Court specifically relied upon three eviction cases, each of which required tenants to pay rent as a condition on the suspension of the right to evict: *Block v. Hirsh*, 256 U.S. 135 (1921), *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) and *Edgar A. Levy Leasing Co. v. Siegal*, 258 U.S. 242 (1922), *cited in Blaisdell*, 290 U.S. at 440.[12]

*Blaisdell,* and the cases on which it is based, confirm that contractual rights are impaired when the government

[12] The Supreme Court also cited these cases in *Pennsylvania Coal,* 260 U.S. at 416.

bans evictions without requiring rent to be paid. *Blaisdell,* 290 U.S. at 441-42. The Proclamations did not ensure reasonable compensation to the Housing Providers while they were prevented from regaining possession. With this fundamental element of the *Blaisdell* missing—payment of rental value—Division Two's decision is out of step with federal Contracts Clause jurisprudence.

## VII.
## The change of venue to Thurston County was erroneous.

The Superior Court granted the State's motion to change venue from Lewis County under RCW 4.12.020(2), governing claims against public officers,. Division Two affirmed based on this Court's order granting an emergency motion for discretionary and accelerated review in *Johnson v. Inslee*, 198 Wn.2d 492 (2021). That reliance was misplaced.

### A. *Johnson* is not controlling because different venue statutes apply.

In *Johnson,* a state employee challenged the Governor's requirement that employees be vaccinated. The trial court refused to change venue to Thurston County under the public officer statute. *Id.* This Court reversed. *Id.*

*Johnson* is not controlling because this Court was basing its decision on the arguments made to it, none of which are the same as those made here. *See* A-41-54 to Petition for Review. For instance, *Johnson* did not involve a taking or damaging of property which would authorize venue where the property is located under RCW 4.12.020 or any argument that a cause of action arises where the injury is experienced. *Id.*

### B. Under traditional venue jurisprudence, plaintiffs are entitled to choose between permissible venues.

Where there is more than one proper venue under the statutes, parties are "not entitled to a change of venue as

a matter of right." *Ralph v. Weyerhaeuser Co.*, 187 Wn.2d 326, 342 (2016). Choice of venue among authorized options lies with the plaintiff. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 314 (2011).

**1. The original venue was proper because venue in cases against the State may be in the plaintiffs' county of residence or where the real property is situated.**

Venue in cases against the State may be in the county of plaintiff's residence, principal place of business, where the cause of action arose or where the real property is located. RCW 4.92.010. Housing Providers' residence, place of business and location of their real property was in Lewis County. CP 29-32.

Similarly, RCW 4.12.010(1) places venue where the property is located for cases involving questions of title or damage to property. Claims under Article I, Section 16 of the Washington constitution should be resolved where the property is located. *See Deaconess Hospital v. State,* 10 Wn.App. 475, 479 (1974) (rejecting State's argument as

unfairly benefitting the State if not deciding takings claim where property was located). Claims that property has been taken by government must be heard in the Superior Court where the property is located—Lewis County in this case.

#### 2. Even under the public officer statute, the original venue was proper because part of the cause of action—the injury—occurred in Lewis County.

Additionally, the public officer statute allows venue where any part of the cause of action arose. RCW 4.12.020. "Part of a cause of action is the injury to the Plaintiff." *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 757 (1988) (footnote and citations omitted). The injury in the present case arose in Lewis County. Housing Providers' venue choice was not erroneous.

### C. A change of venue was not justified by convenience of the witnesses or ends of justice.

The Superior Court was not changing venue for convenience of witnesses or the ends of justice and there

are no findings on this fact intensive question. CP 1-3. The present case does not depend upon the information collected by State officials in Olympia regarding the pandemic. Whether the Proclamations violated constitutional rights has nothing to do with the severity of the pandemic. Rather, *all of the material witnesses* are in Lewis County as to the taking or damaging of property because those damaged and the property alleged to have been taken are in Lewis County.

As to the ends of justice basis for changing venue, the State suggested that a change was appropriate for one reason: "the risk of inconsistent results, a particularly intolerable outcome given the need for a coordinated response to the ongoing COVID-19 pandemic." CP 187. This is based on two false assumptions: (1) that other cases existed in Thurston County related to COVID-19 addressing the ban on evicting nonpaying or destructive tenants, and (2) that all the cases in Thurston County were

consolidated to ensure there are no inconsistent results. Neither assumption was true.

If the case is remanded for the determination of compensation, it should be remanded to the Lewis County Superior Court where Housing Providers' property is located, and all witnesses on compensation are likely to be.

## Conclusion

No one denies that the pandemic was devasting to many and that changes in the status quo was necessary. However,

> [e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.
>
> The Constitution was adopted in a period of grave emergency. ...
>
> What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

*Blaisdell*, 290 U.S. at 426 (paragraph breaks added). Regardless of good intentions, the close examination here reveals the Proclamations' impact on Housing Providers calls for compensation—they were required to shoulder a public need at their own private expense. They urge the Court to reverse the Division Two's decision in this case.

The undersigned certifies that this motion contains 7409 words in compliance with RAP 18.17(c)(8) and this Court's order enlarging the word limit to 7500 words dated November 22, 2022.

Respectfully submitted this 9th day of December 2022, by

STEPHENS & KLINGE LLP

*/s/ Richard M. Stephens*
Richard M. Stephens, WSBA 21776

Attorneys for Petitioners and
Appellants Below

## Declaration of Service

I, Richard M. Stephens, declare as follows pursuant to GR 13 and RCW 9A.72.085 that counsel for Respondents was served through the Court's electronic filing portal on December 9, 2022

Executed this 9th day of December 2022, at Woodinville, Washington.

*/s/ Richard M. Stephens*
Richard M. Stephens

## STEPHENS & KLINGE LLP

## December 09, 2022 - 2:30 PM

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