NO. 100992-5

SUPREME COURT OF THE STATE OF WASHINGTON

GENE GONZALES; SUSAN GONZALES; HORWATH FAMILY, TWO, LLC; and WASHINGTON LANDLORD ASSOCIATION,

Petitioners,

v.

GOVERNOR JAY INSLEE and STATE OF WASHINGTON,

Respondents.

SUPPLEMENTAL BRIEF OF GOVERNOR JAY INSLEE AND STATE OF WASHINGTON

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I. INTRODUCTION

The COVID-19 pandemic drove Washington State into an unprecedented public health crisis that required government entities at all levels to take emergency measures to protect public health and avert mass deaths. Governor Inslee recognized that the ensuing economic crisis would prompt an eviction surge that, in turn, would cause widespread homelessness and exacerbate the pandemic.

To avoid turning people out of their homes exactly when the pandemic required them to remain there, the Governor issued Proclamation 20-19 (the Moratorium) temporarily prohibiting certain residential evictions for COVID-19-related reasons. The Moratorium expressly did not forgive tenants' rental debt or eliminate their obligations. It did not prevent landlords from evicting tenants for safety and health reasons or to personally occupy or sell their property. Nor did it prevent landlords from suing tenants for past due rent if tenants refused or defaulted on a reasonable repayment plan. In addition, the Moratorium and

related legislation have been coupled with rent relief measures meant to assist tenants and reimburse landlords for at least some of the burden of unpaid rent.

The Court of Appeals correctly upheld the Moratorium against state statutory and constitutional challenges and affirmed that venue was mandatory in Thurston County. The Moratorium was a lawful exercise of the emergency power the Legislature delegated to the Governor to prohibit activities as he reasonably believed necessary to help preserve and maintain life and health. The Moratorium respected the judiciary's independence, maintained property owners' petition rights, and comported with the Contracts and Takings Clauses. Affirmance would accord with courts that have overwhelmingly rejected challenges to eviction moratoria during the COVID-19 pandemic, including the Moratorium challenged here.

Alternatively, the Court should dismiss review because the Moratorium expired in 2021 and the COVID-19 state of emergency is no longer in effect.

II. ISSUES PRESENTED

1. Given the pandemic's economic dislocations and the public health risks posed by displaced tenants, the Governor issued the Moratorium as part of his broad authority "to help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). Was the Moratorium a valid exercise of the Governor's emergency power?

2. RCW 43.06.220 meets the delegation test because the statute provides standards and there are procedural safeguards. Is the legislative delegation of emergency power to the Governor constitutional?

3. The Moratorium did not define a judicial procedure; it delayed landlords' abilities to pursue the remedy of eviction for nonpayment of rent. Did the Moratorium respect the judiciary's power and the right to petition?

4. The Moratorium temporarily adjusted the terms under which landlords could evict—in the midst of a deadly pandemic—tenants whom they had *voluntarily invited* onto their

properties. Was the Moratorium a regulation of the landlord-tenant relationship and not a physical taking?

5. The Moratorium did not substantially impair contractual relationships between landlords and tenants, a highly-regulated relationship, and was drawn in an appropriate and reasonable way to advance the significant and legitimate purpose of reducing economic hardship and the progression of COVID-19. Did the Moratorium comport with the Contracts Clause?

6. Under the public officer venue statute, claims against the validity of the Proclamations arose where Governor Inslee issued them: Thurston County. Was the case correctly transferred to Thurston County under that mandatory venue statue?

7. The issues presented are not likely to recur because the Moratorium ended by its own terms and by statute and the Governor ended the state of emergency. Should the Court dismiss review?

III. STATEMENT OF THE CASE

A. The COVID-19 State of Emergency

COVID-19 is a fatal, highly contagious virus that has caused more than one million deaths in the United States and more than 14,800 deaths in Washington.[1]

The Governor declared a state of emergency in February 2020 to combat the COVID-19 pandemic. Procl. 20-05.[2] With few proven therapeutics and no vaccine at the outset of the pandemic, a primary strategy to slow COVID-19 was to minimize interactions outside households. CP 548-49.

B. The Risks and Costs of Mass Evictions

From the start, the Governor's Office understood that the pandemic would significantly reduce economic output, making

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[1] Centers for Disease Control and Prevention, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#datatracker-home; Department of Health, *COVID-19 Data Dashboard*, https://doh.wa.gov/emergencies/covid-19/data-dashboard.

[2] The Governor's Proclamations are available at https://www.governor.wa.gov/office-governor/official-actions/proclamations.

many tenants unable to afford rent. CP 779. A homelessness and housing instability crisis predated the pandemic, where 21 percent of tenants were extremely low-income and affordable housing stock declined by one-third since 2012. CP 789, 923. Between 2013 and 2017, over 130,000 Washington adults faced an eviction. CP 923.

Against that backdrop, the Governor's Office anticipated that, without countermeasures, the COVID-19 pandemic's economic dislocations would cause mass evictions, exacerbating housing instability and homelessness. CP 779, 941. Mass evictions would not only displace people from their residences at the very time that it was critical to stay home but would also force many into congregate settings like shelters and over-occupied homes, further spreading COVID-19. *Id.*; CP 549; CP 1047-49. The Governor's Office also recognized that allowing evictions would flood the court system with unlawful detainer filings, forcing tenants to risk their health to appear in housing courts that are crowded even in normal times. CP 784-85.

C. The Moratorium

The Governor issued Proclamation 20-19 (the Moratorium) on March 18, 2020, temporarily prohibiting certain residential evictions. Procl. 20-19. Correctly predicting COVID-19 to "cause a sustained global economic slowdown," the Governor determined that "the inability to pay rent by these members of our workforce increases the likelihood of eviction from their homes," which in turn would "increas[e] the life, health, and safety risks to a significant percentage of our people from the COVID-19 pandemic." *Id.* at 1. The Moratorium was amended and extended as the pandemic and recession persisted, culminating in Proclamation 20-19.6, which expired on June 30, 2021.

The Governor's Office sought input from stakeholders on crafting amendments, including residential property owners and managers. CP 690-91, 782-84. Based on their input, the Governor added several exceptions to protect property owners.

In its most recent (now expired) form, Proclamation 20-19 prohibited property owners from pursuing eviction unless: (1) it was "necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident"; (2) the landlord intended to "personally occupy the premises as [a] primary residence" (with timely notice to the tenant); or (3) the landlord intended to "sell the property" (also with timely notice). Procl. 20-19.6 at 5.

The Proclamation also provided a mechanism to collect unpaid rent during the Moratorium. CP 784. Though it prohibited landlords from treating unpaid rent "as an enforceable debt or obligation that is owing or collectable," that prohibition applied only when nonpayment was "a result of the COVID-19 outbreak and occurred on or after February 29, 2020." Procl. 20-19.6 at 6. Thus, the Moratorium permitted action other than eviction to collect unpaid rent that predated or was unrelated to the pandemic. The Moratorium also permitted a landlord to collect *any* unpaid rent if a tenant refused or failed to comply with an

offered "re-payment plan that was reasonable based on the individual financial, health, and other circumstances of that resident." *Id.* The Moratorium did not forgive any unpaid rent and stressed that tenants "who are not materially affected by COVID-19 should and must continue to pay rent[.]" *Id.* at 2.

D. The Pandemic's Impacts

During the pandemic, over 1.6 million Washingtonians filed unemployment claims. CP 778, 932. Census survey data reported that, in February 2021, nearly 10 percent of Washington renters were behind on their rent, CP 1138, and 15 percent of Washington renters reported having little or no confidence in their ability to make rent, CP 1140. An analysis found that up to 789,000 Washingtonians would have been at risk of eviction without the Moratorium. CP 975.

The consequences of mass evictions would have been catastrophic. They could have resulted in up to 59,008 more eviction-attributable COVID-19 cases, 5,623 more hospitalizations, and 621 more deaths in the State. CP 1356.

E. Federal and State Assistance Measures

In March 2020, Congress provided $150 billion in direct assistance for state, territorial, and tribal governments. Pub. L. No. 116-136, 134 Stat. 281 (2020). From this fund, Washington allocated more than $100 million in rental-assistance grants. CP 782. Congress later enacted legislation giving more than $21 billion in rental assistance. Pub. L. No. 117-2, 135 Stat. 4.

In February 2021, the Legislature adopted a $2.2 billion COVID relief bill. Engrossed Substitute H.B. 1368, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* Laws of 2021, ch. 3. The bill provided the Department of Commerce $325 million to administer an emergency rental and utility assistance program, which provided grants to local housing providers. *Id.*, § 3(1). It also sent $40 million toward other housing programs, including grants to landlords who lost "rental income from elective nonpayor tenants during the state's eviction moratorium[,]" *id.*, § 3(7). The State's operating budget appropriated $658 million to the Department of Commerce to administer rental and utility

assistance. Engrossed Substitute S.B. 5092, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* Laws of 2021, ch. 334.[3]

The Legislature additionally created a permanent revenue source for eviction prevention and housing stability services, including rental assistance. Engrossed Second Substitute H.B. 1277, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* Laws of 2021, ch. 214.

The Legislature also enacted Engrossed Second Substitute S.B. 5160, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* Laws of 2021, ch. 115, to provide durable tenant protections during and after the state of emergency. E2SSB 5160 ended the eviction moratorium instituted through Proclamation 20-19.6 on June 30, 2021. The law requires that if a tenant has remaining unpaid rent that accrued between March 1, 2020, and the end of the public health emergency, a landlord must offer that tenant a reasonable

[3] Department of Commerce, *Emergency Rent Assistance Distribution*, https://insight-editor.livestories.com/s/v2/washington-state-department-of-commerce-emergency-rental-relief-distribution/ce5d59f3-36fe-4633-8768-759eca2ea077.

plan for rent repayment whose monthly payments cannot exceed one-third of the monthly rent during the period of non-payment. *Id.*, § 4. But if that tenant "fails to accept the terms of a reasonable repayment plan within 14 days of the landlord's offer," the landlord may pursue an unlawful detainer action, subject to requirements of the Eviction Resolution Pilot Program. *Id.* If a tenant defaults on the repayment plan, the landlord may apply for reimbursement from the Landlord Mitigation Program or proceed with an unlawful detainer action. *Id.*

The law provides that landlords are eligible to file certain reimbursement claims up to $15,000 for unpaid rent. *Id.*, § 5. And it provides for court-appointed counsel for indigent tenants in unlawful detainer proceedings. *Id.*, § 8.

Because the new programs in E2SSB 5160 took time to implement, Governor Inslee issued Proclamation 21-09 as a bridge to meet the emergency and ensure the protections of E2SSB 5160 were respected until it was implemented. Proclamation 21-09, as amended, expired on October 31, 2021.

F. The Courts Below Uphold the Moratorium

Petitioners (the Landlords) are residential property owners and an association of such owners. On cross-motions for summary judgment, the trial court ruled for the State on all claims. CP 1370-71. The Court of Appeals affirmed. *Gonzales v. Inslee*, 21 Wn. App. 2d 110, 504 P.3d 890 (2022). These rulings align with others, which have nearly uniformly rejected challenges to state and local eviction moratoria during the pandemic.[4] This Court granted review.

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[4] *See, e.g.*, *Jevons v. Inslee*, 561 F. Supp. 3d 1082 (E.D. Wash. 2021); *El Papel LLC v. Durkan*, No. 20-cv-01323-RAJ-JRC, 2021 WL 4272323 (W.D. Wash. Sept. 15, 2021), *report and recommendation modified in part*, 2022 WL 2828685 (W.D. Wash. July 20, 2022); *Rental Hous. Ass'n v. City of Seattle*, 22 Wn. App. 2d 426, 512 P.3d 545 (2022); *Apt. Ass'n of Los Angeles Cnty. v. City of Los Angeles* (*AALAC*), 10 F.4th 905 (9th Cir. 2021); *Williams v. Alameda County*, No. 22-cv-01274-LB, 2022 WL 17169833, at *1 (N.D. Cal. Nov. 22, 2022); *Gallo v. District of Columbia*, No. 21-cv-03298, 2022 WL 2208934 (D.D.C. June 21, 2022); *Farhoud v. Brown*, No. 20-cv-2226-JR, 2022 WL 326092 (D. Or. Feb. 3, 2022); *S. Cal. Rental Hous. Ass'n v. County of San Diego*, 550 F. Supp. 3d 853 (S.D. Cal. 2021); *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020), *appeal dismissed sub nom. 36 Apt. Assocs., LLC v. Cuomo*, 860 F. App'x 215 (Mem.) (2d

IV. ARGUMENT

A. The Governor Validly Exercised His Emergency Power in Issuing the Moratorium

The Moratorium partially and temporarily prohibited acts of private parties—evicting tenants and treating unpaid rent as enforceable debt—as deemed necessary by the Governor to "help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). The Governor "issued Proclamation 20-19 [the Moratorium] pursuant to that discretionary authority." *In re Recall of Inslee*, 199 Wn.2d 416, 426, 508 P.3d 635 (2022); *see* Procl. 20-19.6 at 5 (citing RCW 43.06.220(1)(h)).

The proclamation of an emergency under RCW 43.06.010(12) "unlock[ed] 'the powers granted the governor during a state of emergency.'" *Colvin v. Inslee*, 195

Cir. 2021); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353 (D. Mass. 2020); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337 (E.D. Pa. 2020); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020); *but see Heights Apts., LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022).

Wn.2d 879, 895, 467 P.3d 953 (2020) (quoting RCW 43.06.101(12)). These emergency powers are "broad." *Id.*; Laws of 2019, ch. 472, § 1 ("[T]he governor has broad authority to proclaim a state of emergency . . . and to exercise emergency powers during the emergency.").

The Governor's powers under RCW 43.06.220 fall into two categories. Subsection (1) authorizes the Governor to prohibit various activities. The subsection lists seven activities, addressing a wide swath of conduct from assembly on public streets to the sale of alcohol. RCW 43.06.220(1)(a)-(g). A general clause follows, which authorizes restriction of "[s]uch other activities as [the Governor] reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h).

Under subsection (2), the Governor may "waive[ ] or suspen[d] . . . statutory obligations or limitations" in certain areas. The subsection lists six areas concerning governmental responsibilities. RCW 43.06.220(2)(a)-(f). A residual clause

follows, allowing the Governor to waive or suspend "[s]uch other statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business," or "orders, rules, or regulations of any state agency[,]" if strict compliance would hinder responding to the emergency. RCW 43.06.220(2)(g). Any waiver or suspension under subsection (2) may last no "longer than thirty days unless extended by the legislature[.]" RCW 43.06.220(4).

The plain language of RCW 43.06.220(1)(h) is unambiguous and broad; the Governor's power to prohibit "activities" encompassed the Moratorium's prohibitions on evictions and collection of unpaid rent. Given the pandemic's economic dislocations and the public health risks posed by displaced tenants, the Governor "reasonably believe[d]" that temporarily prohibiting most evictions would "help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h); *cf. Recall of Inslee*, 199 Wn.2d at 426-27 (petitioner failed to show the Moratorium was "a manifestly

unreasonable exercise" of the Governor's authority under RCW 43.06.220(1)(h)).

The Landlords contend that the power to prohibit "activities" under RCW 43.06.220(1)(h) cannot include the power to suspend statutory rights and obligations. But that argument was rightly rejected by the courts below.

First, the Moratorium temporarily prohibited certain conduct by property owners—evicting tenants, with exceptions, and treating unpaid rent as enforceable debt without first offering a reasonable repayment plan. The Moratorium did not waive or suspend statutory "obligations or limitations." RCW 43.06.220(2). The provision of the Residential Landlord Tenant Act (RTLA) allowing landlords to bring unlawful detainer actions, RCW 59.18.160(1), is a statutory remedy; it does not impose obligations or limitations. Landlords may choose to bring an unlawful detainer action, but no statute mandates they do so. And while the Moratorium temporarily delayed a landlord's ability to exercise the remedy of eviction for

nonpayment of rent, it also left open the eviction remedy for health and safety reasons or if the landlord wanted to live in or sell the property. Nor did the Moratorium waive or suspend the RTLA provision making tenants liable for nonpayment of rent, RCW 59.12.030(3). Procl. 20-19.6 at 2; *Gonzales*, 21 Wn. App. 2d at 129. The Moratorium prohibited conduct without suspending any statute.

Second, subsection (2) does not apply to emergency suspension or waiver of any and all statutory obligations—only those that fall into either the six enumerated areas or the residual clause. The Moratorium did not fall into any of those. None of the clauses remotely relate to the RLTA provisions the Moratorium purportedly suspended.

Third, even if the Governor somehow could have issued some version of the Moratorium under subsection (2), that would not foreclose him from issuing it under his subsection (1) prohibitory powers. Nothing in the text or structure of RCW 43.06.220 suggests that the Governor's authority under

subsections (1) and (2) are mutually exclusive. These two sets of powers are listed separately without a disjunctive, confirming they are independent options. For example, subsection (1) expressly authorizes the Governor to prohibit the "sale, purchase or dispensing of alcoholic beverages" while subsection (2) simultaneously empowers him to waive or suspend statutory obligations or limitations concerning "[p]ermits for industrial, business, or medical uses of alcohol." RCW 43.06.220(1)(e). These parallel provisions would make no sense if the Legislature had intended the subsection (2) powers to cabin the Governor's subsection (1) powers. The Landlords' proposed statutory construction would eviscerate the Governor's express subsection (1) powers, doing violence to the statute's plain meaning and undermining its larger purpose.

RCW 43.06.220(1)(h) authorized the Governor to issue the Moratorium.

B. The Emergency Powers Statute Is a Valid Legislative Delegation

RCW 43.06.220(1)(h) constitutionally delegates legislative authority. As this Court held in *Cougar Business Owners Association v. State*, statutes—including RCW 43.06.220(1)(h)—"evidence a clear intent by the legislature to delegate requisite police power to the governor in times of emergency," and that "*[t]he necessity for such delegation is readily apparent*." 97 Wn.2d 466, 474, 647 P.2d 481 (1982), *abrogated in part by Yim v. City of Seattle* (*Yim II*), 194 Wn.2d 682, 451 P.3d 694 (2019) (emphasis added). Recognizing that "in times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential," and that "the executive is inherently better able than the legislature to provide this immediate response," this Court observed that "state chief executives have frequently been given substantial discretionary authority in the form of emergency powers to deal with anticipated crises." *Id.* at 474-75 (cleaned up).

Even setting this precedent aside, the Landlords' arguments fail under the Court's delegation standard. *See Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972).

First, RCW 43.06.220(1)(h) sets forth what is to be done—prohibit activities to help preserve and maintain life, health, property or the public peace—based on clear "standards or guidelines" framed in "general terms." *Barry*, 81 Wn.2d at 159. This standard makes sense because "one of the legislative powers granted by [the state and federal constitutions] is the power to determine the amount of discretion an [executive actor] should exercise in carrying out the duties granted to it by the [L]egislature." *Id.* at 162. "Simply because a delegation is expansive, as it should be in a state of an unforeseen . . . emergency, does not mean a delegation of power is invalid." *Sehmel v. Shah*, 23 Wn. App. 2d 182, 198, 514 P.3d 1238 (2022).

When the Legislature delegates powers to the Executive, this Court has repeatedly found "general standards to be

adequate." *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 900, 602 P.2d 1172 (1979). Thus, this Court has upheld broader delegations than RCW 43.06.220. *See, e.g.*, *Hi-Starr, Inc. v. Wash. State Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986) (upholding "broad and extensive" delegation of powers to enact rules providing "for the protection of the welfare, health, peace, morals, and safety of the people of the state," (quoting RCW 66.08.010)).

Regarding the second requirement, sufficient procedural safeguards constrain the Governor's powers. A person prosecuted under RCW 43.06.220(5) for violating a proclamation may challenge its validity, with all the "statutory and common-law procedural safeguards which are normally afforded a defendant in a criminal prosecution." *Crown Zellerbach*, 92 Wn.2d at 901. Or else, a party with standing may file a declaratory judgment action challenging a proclamation pre-enforcement (like the Landlords did here). RCW 7.24.010.

The Landlords' argument that the Governor's proclamations must be subject to rulemaking procedures is wholly unsupported. Imposing rulemaking requirements would hinder the Governor from promptly acting in emergencies where "immediate and decisive action by some component of state government is essential[.]" *Cougar*, 97 Wn.2d at 474. And the Court "repeatedly ha[s] found adequate procedural safeguards" in the availability of "judicial review of an agency's decision." *McDonald v. Hogness*, 92 Wn.2d 431, 446, 598 P.2d 707 (1979) (citing cases).

RCW 43.06.220 does not violate the delegation doctrine.

C. The Moratorium Interfered with Neither the Judiciary's Power nor the Right to Petition

The Moratorium did not infringe on the courts' inherent powers. Courts apply the separation of powers doctrine to reserve to the judiciary those "fundamental functions [that] are within the inherent power of the judicial branch, including the power to promulgate rules for its practice." *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). This

inquiry distinguishes between procedural and substantive matters. If a court rule and a statute cannot be harmonized, "the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Id.* at 984. (law requiring certification with pleading violated civil rules); *Waples v. Yi*, 169 Wn.2d 152, 161, 234 P.3d 187 (2010) (notice requirement conflicted with the judiciary's power to set court procedures).

The Moratorium did not address, let alone constrain, judicial procedures. Rather, it did exactly what RCW 43.06.220(1)(h) authorizes the Governor to do in an emergency: prohibit activities that otherwise endanger public health in a global pandemic.

This Court's decision in *Recall of Inslee* supports this conclusion. There, the petitioner failed to show "how a temporary limitation on the ability of residential landlords to initiate unlawful detainer proceedings infringes on the power of Washington's judiciary." 199 Wn.2d at 427. "Courts generally exercise their power only when a legal action is before them.

Proclamation 20-19 does not limit what courts may do when an unlawful detainer action is filed but, rather, temporarily limits the filing of particular unlawful detainer actions in the first instance." *Id.*

The Moratorium also did not infringe on the right of access to courts. *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp.*, 101 Wn. App. 923, 934-35, 6 P.3d 74 (2000), *aff'd*, 144 Wn.2d 570 (2001). The right of access to the court "is not recognized, of itself, as a fundamental right." *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 562, 800 P.2d 367 (1990). Washington courts apply rational basis review to access-to-court claims when access is not essential to advance a fundamental right. *See, e.g.*, *In re Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.2d 51 (1990).

The abrogation of a remedy—even one available at common law—does not violate any right of access to the courts. *Shea v. Olson*, 185 Wash. 143, 161, 53 P.2d 615 (1936) ("There is . . . no express, positive mandate of the Constitution which

preserves such rights of action from abolition by the Legislature, even when acting under its police power."). It follows that the Moratorium did not violate landlords' rights to access the courts by delaying their ability to obtain one possible remedy. And the Moratorium delayed that remedy only in part, because landlords could pursue eviction to (a) respond to a significant and immediate risk to health, safety, or property; (b) personally occupy the premises; or (c) sell the property. Procl. 20-19.6 at 5. The Moratorium did not prohibit landlords from bringing other actions, like breach of contract claims, to obtain money judgments in cases where tenants did not pay rent after refusing or failing to comply with a reasonable repayment plan.

But to the extent the Moratorium prevented landlords from accessing the courts to bring eviction actions, that delay was not a constitutionally impermissible "total deprivation." *Sosna v. Iowa*, 419 U.S. 393, 410, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975) (upholding Iowa's one-year durational residency requirement to file a divorce petition). "Mere delay to filing a lawsuit cannot

form the basis of a Petition Clause violation when the plaintiff will, at some point, regain access to legal process." *Elmsford*, 469 F. Supp. 3d at 174 (cleaned up); *D.C. v. Towers*, 260 A.3d 690, 691 (D.C. 2021) (no fundamental constitutional right to evictions on a particular timetable). The temporary delay to bringing certain unlawful detainer actions did not infringe the right of access to the courts.

D. The Moratorium Did Not Effect a Physical Taking

The Proclamation temporarily restricted landlords' uses of their properties, preventing them from evicting—in the midst of a deadly pandemic—the tenants whom they had voluntarily invited. This kind of regulation on pre-existing relationships does not constitute a physical taking.

There are two general categories of takings: (1) a physical taking, where "the government authorizes a physical occupation of property"; and (2) a regulatory taking, "where the government

merely regulates the use of property[.]"[5] *Yee v. City of Escondido*, 503 U.S. 519, 522, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). The Landlords allege only the first type—that the Moratorium was a per se, physical taking. This claim is not tenable because the Moratorium did not authorize invasion or occupation of their properties. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527.

Courts have consistently acknowledged that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *accord Yee*, 503 U.S. at 528-29; *Fed. Commc'ns Comm'n v. Fla. Power*

[5] In *Yim v. City of Seattle* (*Yim I*), 194 Wn.2d 651, 451 P.3d 675 (2019), this Court adopted the federal takings analysis set forth in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

Corp., 480 U.S. 245, 252, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987). States' "broad power" to impose restrictions on the *use* of property is perfectly compatible with the rule that the government not compel "the permanent occupation of the landlord's property by a third party." *Loretto*, 458 U.S. at 440.

The Moratorium did not effect a physical taking because landlords voluntarily invited tenants onto their properties, subjecting their property to regulation. *Yee* is controlling. There, mobile-home park owners challenged a city ordinance that, along with a state law, prevented them from either "set[ting] rents," "decid[ing] who their tenants will be," "evict[ing] a mobile home owner," or "easily convert[ing] the property to other uses." *Yee*, 503 U.S. at 526-27. City and state laws made "the mobile home owner . . . effectively a perpetual tenant of the park," according to the park owners. *Id.* at 527. The Court rejected the park owners' physical takings claim. *Id.* at 532. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527. The

mobile home laws did "no such thing" because the park owners "voluntarily rented their land to mobile home owners." *Id.* The tenants had been "invited by petitioners, not forced upon them by the government," and the mobile home park owners could still "change the use of [their] land [and] evict [their] tenants, albeit with 6 or 12 months notice." *Id.* at 528. Given the acquiescence, the laws "merely regulate[d] petitioners' *use* of their land by regulating the relationship between landlord and tenant[,]" and did not constitute a physical taking. *Id.*

Like the owners in *Yee*, the Landlords "voluntarily open[ed] their property to occupation by others," so they "cannot assert a per se right to compensation based on their inability to exclude particular individuals." *Id.* at 531. The Landlords did not suffer any trespass and were not forced to accept tenants. The Moratorium granted no right to third parties to access their properties. Instead, only those tenants to whom they had granted possession could remain on their properties. Moreover, the Landlords could still evict tenants for reasons other than

nonpayment of rent and thus retain their right to exclude. The Moratorium did not compel the Landlords "over objection to rent [their] property" or prohibit them "in perpetuity from terminating a tenancy." *Id.* at 528.

The Landlords narrowly cast *Yee* as just a rent control case. But *Yee* involved a combination of state and municipal law that restricted evictions as well. Namely, the state law "limit[ed] the bases upon which a park owner may terminate a mobile home owner's tenancy," which, together with the municipal ordinance, prevented park owners from evicting owners of mobile homes to secure higher-paying tenants. *Id.* at 524. Here too, the Proclamation temporarily prevented landlords from replacing their tenants to obtain more rent. In both situations, governments regulated the terms on which property owners could terminate the relationships they had voluntarily started with their tenants. That is not a physical taking.

Yes, the *Yee* owners could pursue eviction for nonpayment of rent. But as long as they wished to rent out their property, they

could not evict their rent-controlled tenants. And the fact that a park owner in *Yee* could evict a mobile home owner for other reasons—such as the "owner's desire to change the use of his land[,]" *id.* at 524—likens that case to this one, as the Landlords were likewise free to evict their tenants for that reason. *Compare id.* at 528 ("a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice[ ]"), *with* Procl. 20-19.6 at 5 (requiring 60-day notice for sale or re-occupation).

Because *Yee* is premised on a landlord having already voluntarily invited tenants onto the property, the Landlords do not benefit from decisions dealing with government-imposed, physical easements forcing a landowner to suffer an invasion in the first instance. This is particularly true of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). *Cedar Point* addressed an access regulation forcing certain property owners (agricultural employers) to suffer an intermittent invasion by people they never invited onto their land (union

organizers). *Id.* at 2069. The only new issue in *Cedar Point* was whether the law created any less of a physical easement for per se takings purposes when the right to invade did not span every hour of every day of the year. *Id.* at 2074.

Importantly, *Cedar Point* did not disturb precedent that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." *Fla. Power Corp.*, 480 U.S. at 252. Nor did *Cedar Point* overrule or undermine *Yee*; instead, it cited *Yee* favorably for general takings principles. 141 S. Ct. at 2072. *Cedar Point* similarly distinguished laws that regulate how landowners must treat those they have already invited onto their land: "Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Id*. at 2077; *see Yee*, 503 U.S. at 532 ("[I]t is the invitation . . . that makes the difference." (cleaned up)).

The Moratorium did not establish a "once invited, you can stay forever" rule. Pet. at 20. The Moratorium restricted evictions

only temporarily, and it provided escape valves, permitting eviction if landlords wished to sell or occupy their property or if tenants threatened the health or safety of others. The notion that the Moratorium extended the Landlords' invitations "forever" is overt exaggeration, as the Moratorium expired June 2021.

Landlords cannot maintain takings claims based on the theory that the occupation of the tenants they voluntarily invited amounts to a physical occupation. The tenancies began with their invitation, not by any action by the government. *Fla. Power Corp.*, 480 U.S. at 252 ("Th[e] element of required acquiescence is at the heart of the concept of occupation."). Numerous other courts, as the court below, have read *Yee* and *Cedar Point* this way and have correctly rejected physical takings claims against eviction moratoria. *See Jevons*, 561 F. Supp. 3d at 1105-06; *El Papel*, 2021 WL 4272323, at *16-17; *Rental Hous. Ass'n*, 22 Wn. App. 2d at 450; *Williams*, 2022 WL 17169833, at *11; *Gallo*, 2022 WL 2208934, at *8-9; *S. Cal. Rental Hous. Ass'n*, 550 F. Supp. 3d at 865.

E. The Moratorium Comported with the Contracts Clause

The Moratorium did not unconstitutionally impair contractual relationships between landlords and tenants.

Under the Contracts Clause, "a constitutional violation will be found if the challenged action substantially impairs an existing contract and, even then, only if the action was not reasonable and necessary to serve a legitimate public purpose." *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 414, 377 P.3d 199 (2016).[6]

1. The Moratorium did not substantially impair contractual relationships

The Moratorium did not impose a "substantial impairment" on a contractual relationship under the three factors governing the analysis. *Sveen v. Melin*, 138 S. Ct. 1815, 1822, 201 L. Ed. 2d 180 (2018).

[6] The standard under Wash. Const. art. I, § 23 is the same as that under U.S. Const. art. I, § 10. *Lenander*, 186 Wn.2d at 414.

First, the Moratorium did not undermine the Landlords' contractual bargain because it did not relieve tenants of their obligations to pay rent or stop unpaid rent from accruing. The Moratorium was temporary. The mere delay in the right to exercise a statutory remedy does not materially alter the lease agreements.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934), controls. The Court upheld a Depression-era mortgage moratorium law extending mortgagors' redemption period for up to two years. It recognized that contractual obligations may be "impaired by a law which renders them invalid, or releases or extinguishes them," such as a "state insolvent law" that wholly "discharge[s] the debtor from liability" for preexisting debts. *Id.* at 431. The mortgage moratorium, however, did not impose such an impairment, for it represented a "temporary restraint of enforcement . . . to protect the vital interests of the community[]" from a "great public calamity." *Id.* at 439.

Second, the Moratorium did not interfere with reasonable expectations because there is a long history of regulations governing the landlord-tenant relationship and of courts upholding eviction moratoria. *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (courts should consider "whether the industry the complaining party has entered has been regulated in the past"); *see Blaisdell*, 290 U.S. 398; *Block v. Hirsh*, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1921) (prohibiting eviction of holdover tenants); *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010) (eviction moratorium during winter conditions). "[P]arties entering into residential leases do so subject to further legislation limiting the right to evict[.]" *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993), *abrogated in part by Yim II*, 194 Wn.2d 682.

Third, the Moratorium allowed landlords to protect their contractual rights. The Moratorium neither relieved tenants' obligation to pay all rent owed nor eliminated landlords' right to

later enforce that obligation. Landlords could also sue to recover unpaid rent if they offered a reasonable repayment plan to a tenant and the tenant refused or violated that plan. Procl. 20-19.6 at 6. The Moratorium altered the tools immediately available to landlords, but it did not prevent them from safeguarding their rights. *Jevons*, 561 F. Supp. 3d at 1099-1100.

Below, the Landlords hyperbolically argued that the Moratorium imposed an unending prohibition on ever treating unpaid rent as an enforceable debt because some tenants may refuse to communicate about a repayment plan. But in reality, the Moratorium barred landlords from treating unpaid rent as an enforceable debt if the landlord had not offered the tenant a "reasonable re-payment plan." Procl. 20-19.6 at 6. The Landlords could have availed themselves of the remedy by offering a "reasonable re-payment plan." *Id.* The Court of Appeals rejected the Landlords' argument that tenant nonresponsiveness prevented such efforts, observing that the Landlords could have

made assumptions from financial information obtained from tenants at the start of the lease and that trial courts would not penalize landlords who made a "good faith effort to design a reasonable repayment plan despite the tenant's failure to cooperate." *Gonzales*, 21 Wn. App. 2d at 140.

2. The Moratorium advanced a significant public purpose in an appropriate and reasonable way

Even assuming the Moratorium substantially impaired any contract, it still would not violate the Contracts Clause. As a temporary emergency measure to prevent economic dislocation and slow the spread of disease, the Moratorium furthered "a significant and legitimate public purpose" in "an appropriate and reasonable way." *Sveen*, 138 S. Ct. at 1822 (cleaned up); *see AALAC*, 10 F.4th at 914 ("the eviction moratorium that [the appellant] challenges may be viewed as reasonable attempts to address that valid public purpose[ ]").

First, the Moratorium's purposes—to "reduce economic hardship" of those "unable to pay rent as a result of the

COVID-19 pandemic" and "promote public health and safety by reducing the progression of COVID-19 in Washington State," Procl. 20-19.6 at 2, 3—were not just significant and legitimate, but compelling. *See, e.g.*, *Munns v. Martin*, 131 Wn.2d 192, 200, 930 P.2d 318 (1997) ("compelling interests are based in the necessities of national or community life such as clear threats to public health . . ."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) (per curiam) ("Stemming the spread of COVID-19 is unquestionably a compelling interest . . . .").

The Moratorium was one of several tools addressing the gravest public health crisis in over a century and the associated economic fallout that triggered soaring unemployment. CP 778, 932. With as many as 789,000 Washingtonians at risk of eviction, CP 975, the Moratorium provided a lifeline to those facing unprecedented hardships. By keeping renters in their homes—and out of homeless shelters, doubled up with family or friends, and other congregate settings—the Moratorium

prevented additional cases, hospitalizations, and deaths. CP 1356. And the Moratorium's provision limiting the treatment of unpaid rent as an enforceable debt prevented "soft" or "informal" evictions, in which tenants "self-evict" to avoid negative credit history, an adverse judgment, or other collateral consequences. CP 784.

Second, the Moratorium was reasonable and appropriate to advance the State's interests. Where, as here, the State is not itself a "contracting party," the Court should "defer" to the Governor's "judgment as to the necessity and reasonableness of a particular measure" in answering that question. *Energy Rsrvs. Grp.*, 459 U.S. at 412-13 (cleaned up); *accord Carlstrom v. State*, 103 Wn.2d 391, 394, 694 P.2d 1 (1985).

The Moratorium fits paradigmatically within the standard for a reasonable and appropriate law. Like the mortgage moratorium upheld in *Blaisdell*, the Moratorium was "not for the mere advantage of particular individuals but for the protection of a basic interest of society[,]"—to prevent mass evictions and the

spread of COVID-19. 290 U.S. at 445. Its terms were reasonable: it did not repudiate or reduce tenants' rent obligations, so their "indebtedness is not impaired[.]" *Id.* And the Moratorium was "temporary in operation[ ]" and "limited to the exigency which called it forth." *Id.* at 447.

No case requires the inflexible rule that tenants pay rental compensation during its interim to pass constitutional muster. The *Blaisdell* Court upheld a moratorium on foreclosures in part because it "secure[d] to the mortgagee the rental value of the property[.]" *Id.* at 432. But as the Court later explained, *Blaisdell* identified several other factors that supported that moratorium's constitutionality. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978).

The overarching consideration must be the reasonableness of the impairment based on the facts of the case. For this reason, courts have rejected the exact argument made by the Landlords in holding that "there is no apparent ironclad constitutional rule that eviction moratoria pass Contracts Clause scrutiny only if

rent is paid during the period of the moratoria. Instead, each of the cases [plaintiff] cites turned on its own facts and circumstances." *AALAC*, 10 F.4th at 915.

And though the Moratorium did not condition its protection on the continued payment of rent, the State has allocated hundreds of millions of dollars to landlords and tenants to cover unpaid rent during the course of the pandemic—rental assistance funds of which the Landlords could have taken advantage. The Landlords ignore this aspect of the State's pandemic response, which significantly mitigates the burdens of the Moratorium. *See supra* pp. 10-12 (detailing rental assistance measures and programs).

The Moratorium helped Washingtonians remain in their homes and minimize the transmission of COVID-19.

F. The Public Officer Venue Statute Mandated Venue in Thurston County

The public officer venue statute, RCW 4.12.020(2), applied, making venue in Thurston County "mandatory." *Johnson v. Inslee*, 198 Wn.2d 492, 496, 496 P.3d 1191 (2021).

The statute provides that, for suits against a "public officer," for an "act done by him or her in virtue of his or her office," the action "shall be tried in the county where the cause, or some part thereof, arose[.]" RCW 4.12.020(2).

The challenged Proclamations "constitute[d] acts performed by [the Governor] in virtue of his office within Thurston County." *Johnson*, 198 Wn.2d at 498 (cleaned up). The Landlords' challenge to the Proclamations accordingly "arose only in Thurston County, making Thurston County Superior Court the mandatory venue for the action." *Id.* at 498-99 (cleaned up).

The Landlords' argument that venue should have been permitted in Lewis County under other venue provisions is wrong for multiple reasons.

First, RCW 4.12.020(2) is mandatory if it applies, and it trumps other venue statutes that may apply. *Johnson*, 198 Wn.2d at 498; *Eubanks v. Brown*, 180 Wn.2d 590, 595-96, 327 P.3d 635 (2014). This is because the public officer venue statute permits

no flexibility—claims within its ambit must be filed where the cause arose. As the "specific" and "mandatory" statute, it must be applied "to the exclusion" of "permissive" and "general" venue statutes. *Ralph v. Weyerhaeuser Co.*, 187 Wn.2d 326, 340, 386 P.3d 721 (2016).

Second, RCW 4.92.010(1) and (3) do not apply here. This case is not one "against the state." It "now settled beyond question that a suit against state officers in which an attack is made against the constitutionality of a state statute is not a suit against the state." *Deaconess Hosp. v. State Highway Comm'n*, 66 Wn.2d 378, 391, 403 P.2d 54 (1965) (cleaned up). It is the now-expired Moratorium instituted by the Governor—not real property—that is actually the subject of this action.

Third, RCW 4.12.010(1) does not apply either. The Landlords asserted no claims for "injuries to real property." RCW 4.12.010(1). *See* CP 198-99, 217-18; *Ralph v. Dep't of Nat. Res.*, 182 Wn.2d 242, 250-51, 343 P.3d 342 (2014) (noting that

"contract claims" are "not the same as a claim for injuries to land[ ]" under RCW 4.12.010(1)).

Finally, this Court has already rejected the argument that "some part" of the Landlords' claims arose in Lewis County because their injuries occurred in Lewis County. *See Johnson*, 198 Wn.2d at 497 n.6. Thus, the "cause of action challenging the lawfulness of the proclamations 'arose' only in Thurston County[.]" *Id.* at 498-99.

G. Alternatively, the Court Should Dismiss Review Because the Case is Moot

The Landlords' claims are now moot, and the Court should dismiss review as improvidently granted.

The challenged Moratorium expired on its own terms and by operation of statute on June 30, 2021. Procl. 20-19.6; E2SSB 5160, § 4(1). By the time the Court hears oral argument, Proclamation 20-19 will have been expired for nearly 20 months. There is no prospective relief that can be given to the Landlords.

The substantial and continuing public interest exception to mootness does not apply because there is no reasonable

expectation that Governor Inslee will issue the same Moratorium in the future. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004); *cf. Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022) (en banc). Additionally, the Governor ended the state of emergency on October 31, 2022, *see* Procl. 20-05.1, extinguishing the power to issue new proclamations involving COVID-19-related restrictions.

V. CONCLUSION

The Moratorium was a lawful exercise of the Governor's emergency power and did not violate the Washington Constitution. The Court should affirm.

This document contains 7,500 words, in accordance with the Court's November 22, 2022 letter ruling, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 9th day of December 2022.

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