COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2084CV01334

MITCHELL MATORIN and LINDA SMITH

vs.

COMMONWEALTH OF MASSACHUSETTS, and its EXECUTIVE OFFICE OF HOUSING and ECONOMIC DEVELOPMENT

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In a case spawned by the dual public health and economic crises resulting from the coronavirus pandemic, Chief Justice Roberts recently reminded us of two important principles: (1) when state officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad"; and (2) "where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected … judiciary.'" *South Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1613-1614 (2020) (Roberts, C.J., concurring in decision not to issue injunction against enforcement of California Governor's Executive Order placing temporary numerical restrictions on public gatherings at places of worship and elsewhere). "That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground." *Id.* at 1614.

Plaintiffs Mitchell Matorin and Linda Smith are rental property owners seeking to enjoin the enforcement of Chapter 65 of the Acts of 2020, "An Act Providing for a Moratorium on Evictions and Foreclosures During the COVID-19 Emergency" (the "Eviction Moratorium

Law")[1], and the regulations promulgated under that law by Defendant Executive Office of Housing and Economic Development ("EOHED"). See 400 Code Mass. Regs. § 5.0. On July 30, 2020, I heard argument on Plaintiffs' request for a preliminary injunction against enforcement of the Eviction Moratorium Law on the theory that the Law is unconstitutional. For the reasons that follow, I will deny Plaintiffs' Motion for a Preliminary Injunction.

BACKGROUND

1. Procedural History

Plaintiffs filed this lawsuit as an Emergency Petition for Relief in the Supreme Judicial Court, arguing that the Eviction Moratorium Law is unconstitutional. On June 24, 2020, Justice Lowy, in his role as Single Justice, transferred the case to the Superior Court. On July 13, 2020, I allowed City Life/Vida Urbana, the Chelsea Collaborative, Lynn United for Change, and Springfield No One Leaves to participate collectively in the proceedings on Plaintiffs' request for injunctive relief as "Enhanced Amici."[2]

On July 18, 2020, Plaintiffs voluntarily dismissed all federal claims in this case, in deference to another lawsuit, *Baptiste* v. *Commonwealth of Massachusetts*, CA 1:20-cv-11335,

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[1] Although for simplicity I refer to Chapter 65 as the "Eviction Moratorium Law," the statute accomplishes other purposes less relevant to this case. For example, other provisions of Chapter 65 protect certain landlords against foreclosure proceedings.

[2] In addition to the written filings and oral argument by these Enhanced Amici, I acknowledge amicus briefs submitted by (1) Citizens Housing and Planning Association, Massachusetts Public Health Association, and Massachusetts Association of Community Development Corporations; (2) City of Chicago and 28 Cities and Counties; (3) Cranberry Holdings, LLC, Small Property Owners Association, Inc., and Arrowhead Group, Inc.; (4) Golftown, Inc. and JMA Housing LLC; (5) Health Law Advocates, Health Care for All, and the Public Health Law Watch; (6) Institute of Real Estate Management; (7) Jewish Alliance for Law and Social Action; (8) MLPB (f/k/a Medical Legal Partnership|Boston); (9) Massachusetts Coalition for the Homeless; (10) MassLandlords, Inc.; (11) Matthew Desmond, American Civil Liberties Union, William Berman, Justin Steil, and David Robinson; and (12) National Housing Law Project, MetroWest Legal Services.

filed by the same counsel, and one of the same Plaintiffs, in the United States District Court for the District of Massachusetts.[3]

2. The Eviction Moratorium Law

The Eviction Moratorium Law, Chapter 65 of the Acts of 2020, applies (in relevant part) only to "non-essential evictions." The Law defines "non-essential evictions" as:

(i) evictions for non-payment of rent;

(ii) evictions resulting from a foreclosure;

(iii) evictions for no fault or no cause; or

(iv) evictions for cause, unless the cited cause for eviction involves or includes allegations of: (a) criminal activity, or (b) lease violations, that may impact the health or safety of other residents, health care workers, emergency personnel, persons lawfully on the subject property or the general public.

See St. 2020, Ch. 65, § 1.

Where a residential eviction is "non-essential," the Eviction Moratorium Law temporarily prohibits a court with jurisdiction over summary process cases from accepting a summons and complaint, entering judgment or issuing an execution for possession, denying a stay of execution or continuance, or scheduling an event, such as a trial. *Id.* § 3(b). Additionally, the Law bars a landlord from terminating a tenancy, or sending any notice, "including a notice to quit, requesting or demanding that a tenant of a residential unit vacate the premises" in preparation for a non-essential residential eviction. *Id.* § 3(a).

The Eviction Moratorium Law went into effect on April 20, 2020. Its eviction-related provisions expire on the earlier of: (1) 120 days later – on August 18, 2020; or (2) 45 days after

[3] Plaintiff Matorin is also a plaintiff in that case.

the State's emergency declaration is lifted. *Id.* § 6. The Governor may extend the eviction moratorium in increments of up to 90 days, to an outer limit of 45 days after the state of emergency ends. *Id.* Governor Baker has already once extended the eviction moratorium, to October 17, 2020. See https://www.mass.gov/doc/foreclosures-and-evictions-moratorium-extension-july-21-2020. There is no express limitation on how many 90-day incremental periods the Governor may use to extend the Law, and the outer bound of the term is tied to the duration of the COVID-19 State of Emergency declared by the Governor on March 10, 2020, which the Governor solely controls. *Id.* § 6.

The Law preserves affected landlords' rights to recover possession of rented premises after the moratorium expires, because it tolls deadlines and time periods for actions by a party to a non-essential eviction. *Id.* §§ 3(c), 6. In addition, the Law states, "Nothing in this section shall relieve a tenant from the obligation to pay rent or restrict a landlord's ability to recover rent." *Id.* § 3(f).

Since the moratorium on evictions was enacted, government bodies have appropriated and distributed funds intended to help out-of-work tenants make their rent payments. For example, in April 2020, the City of Boston established a Rental Relief Fund, which has already provided rental-assistance relief grants to thousands of City residents. See Affidavit of Domonique Williams, Deputy Director of the City of Boston Office of Housing Stability, Exhibit O to Defendants' Opposition, ¶¶ 18-19. A few days before oral argument of this motion, the state legislature added millions of dollars to the Commonwealth's Residential Assistance for Families in Transition (or "RAFT") funds, which provide grants to allow tenants facing eviction to pay their back rent. And, of course, the federal Coronavirus Aid, Relief, and Economic

Security Act (the "CARES" Act) has provided various financial supports to persons hardest hit by the nation's current economic problems, including residential tenants.

3. The Plaintiffs

Plaintiff Matorin owns rental property at 162 Ingleside Avenue in Worcester. Although Plaintiffs' papers do not mention this fact, 162 Ingleside Ave. is a three-family home. See Affidavit of Amber Anderson Villa, Exhibit N to Defendants' Opposition ("Villa Aff."), ¶ 8 (reporting on review of records of City of Worcester Assessor's Office). Mr. Matorin does not reside at 162 Ingleside Avenue. Amended Emergency Petition for Relief at 22 n.20. Mr. Matorin purchased the property on September 27, 2019 and assumed, as lessor, an existing tenancy-at-will lease agreement between the prior owner and two tenants who live in Unit A. The Unit A tenants repeatedly paid their $1,200 per month rent late, including the last rent payment they made for January 2020. Were tenants in the other two units not paying rent, or were paying their rent late, presumably Mr. Matorin would have included that fact in his papers, but he has not.

When the Unit A tenants did not pay February 2020 rent, Mr. Matorin delivered a 14-day notice to quit for non-payment of rent. On March 11, 2020, Mr. Matorin filed a Summary Process Complaint for non-payment of rent with the Central (Worcester) Housing Court. The Housing Court scheduled trial for March 26, 2020. When the Governor declared the state of emergency before that that date, the Housing Court rescheduled the trial to May 6, 2020 under its COVID-19 Standing Order. The Eviction Moratorium Law, however, now has delayed the trial until after the expiration of the moratorium.

Mr. Matorin has not received any rent from his Unit A tenants since January 2020, and is owed $4,800 through May 31, 2020. Mr. Matorin avers that without the Unit A rental income he

"will struggle to pay" the mortgage, taxes and property expenses, including the cost of the water the tenants continue to use. Affidavit of Mitchell Matorin, Exhibit C to Amended Emergency Petition for Relief, ¶ 5. He states that the tenants have given no indication that they will move out voluntarily, and Mr. Matorin believes he has "zero likelihood of ever recovering [the out-of-pocket costs of providing housing to non-paying tenants] or the unpaid rent in the future." *Id.*

Plaintiff Smith is the owner is rental property at 11 Harvard Terrace in Allston. Again unmentioned in Plaintiffs' papers is that 11 Harvard Terrace is a three-family home, according to the records of the City of Boston Assessor's Office. Villa Aff. ¶ 16. Ms. Smith does not reside there. Amended Emergency Petition for Relief at 22 n.20. Ms. Smith purchased 11 Harvard Terrace in 1975 and has been renting out its apartments since then. Ms. Smith entered a one-year lease with three tenants for Unit 3 from September 1, 2019 to August 31, 2020 for $2,520 per month.

During the tenancy, the Unit 3 tenants paid rent late, and for April 2020, they only paid $840. Thereafter, the Unit 3 tenants refused to pay rent, citing the Eviction Moratorium Law; one tenant told her: "the Governor said I don't have to pay rent if I don't want to." Affidavit of Linda Smith, Exhibit D to Amended Emergency Petition for Relief, ¶ 3. Were tenants in the other two units not paying rent, presumably Ms. Smith would have included that fact in her affidavit, but she has not.

As of May 28, 2020, the Unit 3 tenants owe Ms. Smith $4,200. Ms. Smith wants to serve a 14-day notice to quit for nonpayment of rent, but the Eviction Moratorium Law prohibits her from doing so.

Ms. Smith states that her income is derived solely from the rental property and a small stipend from social security. Without the Unit 3 rental income, she says, she "will struggle to

pay property taxes, insurance, water and perform upgrades and repairs as is my duty as a landlord." *Id.* ¶ 6. Ms. Smith does not believe she will be able to recover possession at the end of the lease, which will terminate August 31, 2020.

DISCUSSION

1. The Police Power

In rejecting a constitutional attack on a Massachusetts law requiring smallpox vaccination, the United States Supreme Court long ago stated, "The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38 (1905). How best to protect public safety and health "was for the legislative department to determine in light of all the information that it had or could obtain." *Id.* at 30.

"The authority of the state to enact this [smallpox vaccination] statute is to be referred to what is commonly called the police power." *Id.* at 24-25. The Supreme Judicial Court has stated that the Commonwealth may exercise this police power "in any reasonable way in behalf of the public health, the public morals, the public safety and, when defined with some strictness so as not to include mere expediency, the public welfare." *Brett* v. *Building Comm'r of Brookline*, 250 Mass. 73, 77 (1924). The police power extends far beyond matters of public health. *Brett* provides a relevant example; there the court upheld against constitutional attack a zoning bylaw permanently restricting how landowners could use their property.

Faced with a serious threat of a highly infectious and dangerous disease, and the economic dislocations caused by the resulting government orders closing businesses and mandating that citizens stay at home, the legislature has now purported to exercise this broad police power by taking various measures, including restrictions on the use of private property, to

protect the public health and welfare. "[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson*, 197 U.S. at 27. "[I]n every well-ordered society charged with the duty of conserving the safety of its members[,] the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id.* at 29.

Massachusetts is not the only state whose officials have temporarily halted at least some evictions because of the pandemic. Recognizing the broad scope of the police power, and the serious nature of the public health and economic crises caused by the coronavirus, in the past few weeks courts across America have declined to enjoin the enforcement of legislative enactments or gubernatorial proclamations that imposed moratoria on evictions. See, e.g, *Elmsford Apt. Assocs., LLC* v. *Cuomo*, 2020 U.S. Dist. LEXIS 115354 (S.D.N.Y 2020); *J.L. Properties Group B LLC* v. *Pritzker*, No. 20-CH-601 (Circuit Court of the Twelfth Circuit, Will County, Illinois, July 31, 2020) and cases cited therein. Plaintiffs have cited no cases in which any court, state or federal, has reached the opposite result.

In their Amended Emergency Petition, Plaintiffs initially argued that *Jacobson* and similar cases are irrelevant, because in their view the Eviction Moratorium Law is not a public health measure, but rather is directed only at the economic crisis that has followed from the coronavirus pandemic. Amended Emergency Petition for Relief at 65. However, Plaintiffs abandoned this overly-limited view in their Reply Brief, switching gears to argue that a moratorium is no longer needed because "Massachusetts Has Flattened The Covid-19 Curve," even providing a chart showing a substantial (and welcome) decrease of confirmed and probable Massachusetts COVID-19 cases over time. Reply Brief at 4-5.

But even if the legislature intended the Eviction Moratorium Law to address only the economic dislocations resulting from the coronavirus, that would change nothing, for the police power authorizes the legislature to act to address purely economic crises. The Supreme Judicial Court has recognized as much in ruling that the legislature may address serious issues unrelated to public health by imposing restrictions on the rights of residential landlords. For example, the court has rejected arguments that the legislature violated the constitution when it enacted rent control laws to alleviate a shortage of rental housing. See, e.g., *Russell* v. *Treasurer & Receiver General*, 331 Mass. 501, 507 (1954) ("The instant act is predicated on a finding by the Massachusetts Legislature that an emergency now exists in this Commonwealth due to a deficit or shortage in residential housing.... In such emergency it is plain that the Legislature in the exercise of its police power can legislate to relieve it.").

Even more relevant to today's case, the Supreme Judicial Court has ruled that temporary moratoria on residential evictions can pass constitutional muster. For example, in *Grace* v. *Brookline*, 379 Mass. 43 (1979), the court found no constitutional fault with a municipal bylaw that imposed a six-month moratorium (which could extend up to one year in certain cases) on evicting a tenant for purposes of converting a rental unit into a condominium. See *id.* at 47. The *Grace* court stated, "[A] shortage of housing threatens the public interest ... and ... legislation which preserves the rental market for low, moderate, and fixed income persons promotes health, safety, and welfare generally. In short, a housing crisis justifies the exercise of the police power." *Id.* at 56. Similarly, the court rejected a constitutional attack on a statute authorizing Chelmsford "to adopt a bylaw to control rents *and evictions* in mobile home parks." *Chelmsford Trailer Park, Inc.* v. *Chelmsford*, 393 Mass. 186, 187 (1984) (emphasis added). See also *Brett*, 250 Mass. at 77 (rights secured under Constitution of Massachusetts are not absolute or

unqualified, and are "in general, subject to the reasonable exercise of the police power"; rights provide protection against "arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community").

I consider the issues in the case, as I must, against the background of this case law broadly defining the Commonwealth's police powers during a health or economic emergency.

2. The Legal Standard for Issuance of an Injunction

"A party seeking a preliminary injunction must show that (1) success is likely on the merits; (2) irreparable harm will result from denial of the injunction; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." *Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 357 (2006) (Spina, J., concurring), citing *Packaging Industries Group v. Cheney*, 380 Mass. 609, 616-617 (1980).[4] "Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Id.* at 617.

In this case, because Plaintiffs ask to constrain government action, a fourth factor comes into play. I must also "examine whether the public interest would support entering an injunction or, in the alternative, whether an injunction would adversely affect the public." *LeClair* v. *Norwell*, 430 Mass. 328, 337 (1999).

I emphasize that a decision about whether to issue a preliminary injunction is not a decision on the merits of the case. My task at this stage is to review the evidence presented by

[4] Citing their alleged "loss of First Amendment freedoms and other constitutional rights," Plaintiffs suggest in one sentence that they need not establish irreparable harm to be entitled to an injunction. Amended Emergency Petition for Relief at 63. Plaintiffs have since voluntarily dismissed their claims of violations of the First Amendment and other federal constitutional rights from this case. In any event, because Plaintiffs have failed to establish a likelihood of success on the merits, I need not reach this argument, even if it had been developed well enough to merit consideration.

the parties (and in this case by the Enhanced Amici), to consider the legal arguments of the parties and all amici, and then to carefully evaluate whether Plaintiffs have carried their burden to show, first of all, that they are likely to win this case. In other words, a decision at this preliminary stage is a prediction. The future course of this case will determine if that prediction is correct.

I. Likelihood of Success on the Merits

Having voluntarily dismissed their federal constitutional claims, Plaintiffs are left with claims challenging the Eviction Moratorium Law as unconstitutional under three provisions of the Massachusetts Declaration of Rights: art. 30 (separation of powers), art. 11 (right to access the courts), and art. 10 (regulatory taking without just compensation). Like any parties arguing that the legislature has acted unconstitutionally, Plaintiffs face a "difficult burden" because of the "settled rule that a reviewing court must grant all rational presumptions in favor of the constitutionality of a legislative enactment." *Boston* v. *Keene Corp.*, 406 Mass. 301, 305 (1989).

A preliminary question concerns the standard of review that applies to these alleged constitutional violations. Where a statute burdens the exercise of a fundamental right or discriminates on the basis of a suspect classification, the court applies a strict judicial scrutiny standard of review. *Gillespie* v. *Northampton*, 460 Mass. 148, 153, 158 (2011). Under strict scrutiny review, a challenged statute may only survive if it is "narrowly tailored to further a legitimate and compelling governmental interest." *Id.* at 153. On the other hand, "[S]tatutes that do not collide with a fundamental right are subject to a 'rational basis' standard of judicial review." *Id.*, quoting *Goodridge* v. *Department of Pub. Health*, 440 Mass. 309, 330 (2003). Under the rational basis standard, a statute is constitutionally sound if it is reasonably related to the furtherance of a valid State interest. *Gillespie*, 460 Mass. at 153.

"[T]he right to use lawfully regulated property as one wishes has never been classified as a fundamental right, which can only be interfered with for a compelling governmental purpose." *Fragopoulos* v. *Rent Control Bd. of Cambridge*, 408 Mass. 302, 306 (1990), citing *Pennell* v. *San Jose*, 485 U.S. 1, 14 (1988) (in upholding rent control ordinance against constitutional attack, Supreme Judicial Court expressly distinguished such ordinance from category of governmental intrusions necessitating stricter scrutiny; because rent control ordinance "does not burden a suspect class or a fundamental interest," defendant city merely had to show that law was "rationally related to a legitimate state interest"). In reviewing what it called a "rent and *eviction* control" bylaw, the Supreme Judicial Court expressly applied rational basis review. *Grace,* 379 Mass. at 58 (emphasis added). The court applied that same standard in reviewing a zoning bylaw that regulated what property owners could build on their real estate. *Brett,* 250 Mass. at 79 (test is whether law is "an unreasonable exercise of power having no rational relation to the public safety, public health or public morals").

As no fundamental right is implicated here, I will follow the lead of the Supreme Judicial Court, as I must, by considering the constitutional questions under a rational basis standard. Applying that standard, I will now consider whether Plaintiffs have carried their burden of establishing that they are likely to succeed on the merits as to any or all of their three claims under the state constitution.

A. Separation of Powers; Article 30 of the Massachusetts Declaration of Rights

Article 30 of the Massachusetts Declaration of Rights prohibits the legislative, executive, and judicial branches from "exercis[ing] the ... powers" of the other branches. The Supreme Judicial Court has recognized that some overlap of the branches is inevitable, and "absolute division of the three general types of functions is neither possible nor always desirable." *Gray* v.

Commissioner of Rev., 422 Mass. 666, 671 (1996) (quotations and citations omitted). The focus, therefore, is on "the essence of what cannot be tolerated under art. 30[:] interference by one department with the functions of another." *Chief Admin. Justice of the Trial Court* v. *Labor Relations Comm'n*, 404 Mass. 53, 56 (1989) (quotations and citation omitted).

The legislature can unconstitutionally impinge on the powers of the judiciary in one of two ways. "The executive and legislative departments impermissibly interfere with judicial functions when they purport to restrict or abolish a court's inherent powers ... or when they purport to reverse, modify, or contravene a court order." *Gray*, 422 Mass. at 671 (internal citation omitted).

Plaintiffs do not appear to argue that the Eviction Moratorium Law reverses or contravenes any court orders. Nor could they, because the Law only concerns when a court can act on an eviction matter. The Law has no effect on the substance of any court order, past or future. See *Keene Corp.*, 406 Mass. at 302-303 (holding that a law modifying statutes of limitation did not violate art. 30 because "in enacting it the Legislature did not attempt to alter the outcome of a completed judicial or administrative proceeding").

Instead, Plaintiffs base their art. 30 argument on the notion that the Eviction Moratorium Law restricts or abolishes the inherent powers of those courts, particularly Housing Court, having jurisdiction over evictions. See *First Justice of the Bristol Div. of the Juvenile Court Dep't* v. *Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep't*, 438 Mass. 387, 396 (2003) (art. 30 forbids legislative interference with judiciary's core functions, including attempts to restrict or diminish those judicial powers that are necessary to court's ability to perform its core judicial functions). They argue that the Eviction Moratorium Law interferes with core judicial functions by temporarily prohibiting a court with jurisdiction over summary process

cases from accepting a summons and complaint, entering judgment, issuing an execution, denying a stay of execution or continuance, or scheduling an event, such as a trial, where a residential eviction is "non-essential."

The Supreme Judicial Court has explained that inherent powers of the judiciary "are those whose exercise is essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases." *Sheriff of Middlesex County* v. *Commissioner of Correction*, 383 Mass. 631, 636 (1981); see also *Gray*, 422 Mass. at 673 (inherent powers are those that are inseparable from judge's power to hear and decide cases). The appellate courts have applied this general rule to many specific judicial functions. Among those powers that the courts have found to be "inherent" are: the power to grant a change of venue to secure an impartial trial; the power to use contempt proceedings to ensure the orderly administration of justice; the power to order the county to pay for adequate resources to ensure the proper operation of the courts; the power to make rules governing the internal organization of the courts and to control the practice of law; the power to appoint a guardian ad litem; the power to impound files; and the power to revoke a judgment obtained by fraud on the court. See *Gray*, 422 Mass. at 672-673 (quotations and citations omitted). The Eviction Moratorium Law does not interfere with any of these inherent powers.

That does not end the analysis, however, because the laundry list of "inherent judicial powers" in *Gray* is not necessarily exhaustive. Plaintiffs might still succeed in this case if they ultimately establish that the Eviction Moratorium Law interferes with "[t]he power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court [, which] is a power absolutely necessary for a court to

function effectively and do its job of administering justice." *Chief Admin. Justice of the Trial Court*, 404 Mass. at 57 (quotations and citation omitted).

However, the Eviction Moratorium Law regulates not *how* the Housing Court decides cases, but rather *when* it decides cases. Plaintiffs have cited no authority for the proposition that the legislature cannot tell the judiciary when it can adjudicate a case. See *Carleton* v. *Framingham*, 418 Mass. 623, 634-635 (1994) ("Until a judicial proceeding is completed, art. 30 does not bar the Legislature from enacting legislation affecting that litigation.").

At this early stage in this case, Plaintiffs have failed to carry their burden of establishing that they are likely to succeed in establishing legislative interference with an inherent judicial power. Thus, Plaintiffs have not shown a likelihood of success on the merits of their art. 30 claim.

B. Access to the Courts; Article 11 of Massachusetts Declaration of Rights[5]

Article 11 of the Massachusetts Declaration of Rights guarantees that: "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." Plaintiffs argue that the Eviction Moratorium Law prevents them from "access[ing] ... a judicial forum to resolve their justiciable disputes." *Graizzaro* v. *Graizzaro*, 36 Mass. App. Ct. 911, 912 (1994).

[5] Plaintiffs originally alleged a violation of art. 29, as well as art. 11. Art. 29 provides, in relevant part: "It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice." At oral argument, Plaintiffs' counsel stated that Plaintiffs were not proceeding under art. 29 because the "access to the courts" case law has mostly developed under art. 11.

But that is not what the Eviction Moratorium Law does. Instead, the Law temporarily limits one of Plaintiffs' possible means of resolving disputes with tenants who do not pay rent, that is, the threat of eviction. Plaintiffs concede, as they must, that the Law does not prevent Plaintiffs from accessing other judicial forums to resolve their disputes with non-paying tenants, such as filing a breach of contract lawsuit for money damages. Indeed, even after the enactment of the Eviction Moratorium Law, landlords have been filing breach of contract cases in Housing Court requesting remedies other than eviction. See, e.g., *41 Iffley, LLC* v. *Rey*, Civil Action No. 20H8400181 (filed May 13, 2020 in Eastern Housing Court; breach of contract action against guarantor for unpaid rent); *Imstar LLC* v. *Espino-Fronk*, Civil Action No. 20H84CV000188 (filed May 21, 2020 in Eastern Housing Court; breach of contract action to eject unauthorized occupants from premises and for damages from tenants of record).

In addition, art. 11's guarantee of "a certain remedy ... for all injuries ... which [one] may receive" has never been construed to grant to any person "a vested interest in any rule of law entitling [such person] to insist that it shall remain unchanged for his benefit." *Decker* v. *Black & Decker Mfg. Co.*, 389 Mass. 35, 44 (1983). "Societal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day." *Klein* v. *Catalano*, 386 Mass. 701, 712-713 (1982) (quotation and citation omitted); see also *Pinnick* v. *Cleary*, 360 Mass. 1, 14 (1971) ("[C]hanges in prior law are necessary in any ordered society, and to argue that art. 11 prohibits alterations of common law rights as such, especially in the face of the specific provision to the contrary in art. 6, flies in the face of all reason and precedent.").

In fact, as noted in *Pinnick*, the state constitution expressly permits the legislature to alter or repeal statutes. Chapter 6, art. 6, of the Massachusetts Constitution provides: "All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of

Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." If the legislature has the constitutional power to "alter[] or repeal[]" laws, it is difficult to see how Plaintiffs will prevail on the merits on a claim that the legislature lacks the power to delay a citizen's right to one form of relief under a law that the legislature is neither altering nor repealing.

Plaintiffs rely on the recent decision in *ACA Int'l* v. *Healey*, 2020 U.S. Dist. LEXIS 79716 *3, *8 (D. Mass. 2020), where the federal court enjoined the enforcement of certain regulations issued by Attorney General Healey that temporarily barred debt collection lawsuits. But *ACA Int'l* is irrelevant here, for at least two reasons. First, the court explicitly based its decision on First Amendment law. See *id.* at *10-*25. Plaintiffs have voluntarily withdrawn all First Amendment claims from today's case in favor of pursuing those claims in federal court. Second, because in his view "it is not is not for a federal court to police the boundaries of a state constitution for violations by its officials," Judge Stearns did not address state constitutional claims in *ACA Int'l*. *Id.* at *7-*9.

In addition to *ACA Int'l*, Plaintiffs rely primarily on two divorce cases in which judges, rather than officials of the other branches of government, unconstitutionally closed their own courthouse doors. See *Bower* v. *Bournay-Bower*, 469 Mass. 690 (2014); *Ventrice* v. *Ventrice*, 87 Mass. App. Ct 190 (2015). The constitutional violation found in those two cases was that "the judge delegated her decision-making authority to a court-appointed official, doing so over the objection of at least one party." *Id.* at 193 (concerning mandated mediation), citing *Bower*, 469 Mass. at 693 (concerning appointment of "parental coordinator" with decision-making

authority). Those cases are inapposite here, because the legislature has done nothing to delegate a court's decision-making power from a judge to someone else.

Plaintiffs have not shown a likelihood of success on the merits of their claim that the Eviction Moratorium Law violates art. 11 by denying them access to the courts.

C. Taking of Real Estate; Article 10 of the Massachusetts Declaration of Rights

Plaintiffs contend that the Eviction Moratorium Law operates as a temporary taking of real estate without just compensation in violation of art. 10 of the Massachusetts Declaration of Rights. Article 10 provides that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." In applying the state "takings" clause in art. 10, Massachusetts courts employ the standards of the Fifth Amendment, which forbids the taking of "private property" for "public use" without "just compensation." See *Steinbergh* v. *Cambridge*, 413 Mass. 736, 738 (1992).[6]

As an initial matter, Plaintiffs do not seem to be arguing that the Law is facially invalid. Nor could they. A statute regulating the uses that can be made of property does not, on its face, effect an unconstitutional taking when there are any circumstances in which an owner retains an

[6] The parties dispute whether injunctive relief is even an available remedy for a takings clause claim. The Supreme Court recently stated that if an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking. *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2179 (2019); see also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."); *Maine Educ. Ass'n Benefits Trust* v. *Cioppa*, 695 F.3d 145, 152 n.3 (1st Cir. 2012) ("[O]rdinarily, injunctive relief is not available under the Takings Clause."). The Commonwealth contends that a suit for the value of the real estate under G. L. c. 79 is an adequate avenue for obtaining just compensation. Plaintiffs respond that G. L. c. 79 does not provide a sufficient remedy for numerous reasons, including because of the interaction between the indefinite length of the moratorium and G. L. c. 70, § 10's one-year statute of limitations. Because I conclude that Plaintiffs have not shown a likelihood of success on the merits on their takings claim, and so will not be issuing an injunction, I need not address this argument.

economically viable use of his or her property. *Blair* v. *Department of Recreation and Conservation*, 457 Mass. 634, 639 (2010); see *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 296-297 (1981) (test to be applied in considering facial challenge is fairly straightforward; statute regulating uses that can be made of property effects a taking if it denies owner economically viable use of land). That Plaintiffs are temporarily unable to evict non-paying tenants from one unit in their three-family houses does not deny all economically viable use of their property.

In analyzing as-applied takings claims, the Supreme Court has distinguished between physical takings and regulatory takings. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (distinguishing "between acquisitions of property for public uses ... and regulations prohibiting private uses"); *Yee* v. *City of Escondido*, 503 U.S. 519, 522 (1992) (one type of taking is where government authorizes physical occupation of property or actually takes title; other type is where government merely regulates use of property). A physical taking occurs when there is a condemnation or a physical appropriation of private property. *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 33 (1st Cir. 2002). A regulatory taking occurs when some significant restriction is placed upon an owner's use of his property for which "justice and fairness" require that compensation be given. *Id.*; *Blair*, 457 Mass. at 641 (regulatory taking arises from regulation enacted under State's police power that severely limits property's use). Plaintiffs argue that the Eviction Moratorium Law constitutes both a physical taking and a taking by over-regulation.

1. Physical Taking

Generally, courts apply "straightforward" per se rules when addressing physical takings. *Philip Morris*, 312 F.3d at 33. "A physical or per se taking necessitating compensation under the

Fifth Amendment requires a permanent physical intrusion on, or outright acquisition of, an interest in the property by the government for public use." *Blair*, 457 Mass. at 639; *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (to extent that government permanently occupies physical property, it effectively destroys rights to possess, use and dispose of property). Plaintiffs suggest that suspending residential evictions constitutes a physical taking because the Eviction Moratorium Law "forces property owners to provide free housing to people with no legal right to occupy the property," and, as a result, "converts privately-owned rental housing into a massive long-term public housing program -- paid for by private property owners rather than the state." Plaintiffs' Reply to Defendants' Opposition to Motion for Preliminary Injunction at 13.

There is no physical taking here, for two reasons. First, the Eviction Moratorium Law has no permanent effect on Plaintiffs' real estate; the Law itself provides for its own expiration. See *Loretto*, 458 U.S. at 435 n.12 ("The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude.... [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property."); *Yee*, 503 U.S. at 528 ("A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."). Second, the government has not physically occupied Plaintiffs' property; rather, the possession, occupancy, and control of Plaintiffs' property rests with Plaintiffs' tenants, whom Plaintiffs invited in. See *Yee*, 503 U.S. at 527-528 ("Petitioners voluntarily rented their land to mobile home owners.... Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants

were invited by petitioners, not forced upon them by the government."). Compare *Elmsford Apt. Assocs., LLC*, 2020 U.S. Dist. LEXIS 115354 *24-*25 (plaintiffs argued New York governor's eviction moratorium "effectively create[ed] an actual, state-sponsored occupancy" of their units that amounts to physical taking; court held no physical taking because order is temporary on its face, and does not disturb landlords' ability to vindicate their property rights).

This case is nothing like *Loretto*, the classic physical-occupation taking case in which the government permitted a cable television company to place its equipment on private apartment buildings without the consent of the owners. Plaintiffs fall short of the mark in their attempt to establish that they are likely to succeed on the merits of their claim for an uncompensated physical taking.

2. Regulatory Taking

Regulatory takings come in two forms. First, a per se, or categorical, regulatory taking occurs when a regulation denies all economically beneficial or productive uses of land. See *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Alternatively, a statute or regulation can amount to a taking, without absolutely banning productive use of the property, if it so substantially restricts owner's use of the property that it becomes unfair for the property owner to bear what is essentially a public burden. See *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

a. Per Se Regulatory Taking

Lucas presents the classic example of a per se or categorical taking by regulation. There a South Carolina statute's limits on coastal construction prevented a waterfront landowner from building anything on his land. The Supreme Court explained that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the

common good, that is, to leave his property economically idle, he has suffered a taking."' *Id.* at 1019 (emphasis in original); see *Blair*, 457 Mass. at 641 ("categorical taking" arises where regulation is such that owner retains no viable economic use of property).

Plaintiffs do not seem to be arguing that Eviction Moratorium Law constitutes a per se regulatory taking. Just in case I misunderstand their theory, though, I will briefly point out why Plaintiffs are not likely to succeed in establishing that the Law works a *Lucas*-style per se or categorical taking.

First, a moratorium that deprives the owner of value for a temporary period is not per se a taking because the deprivation is not permanent. *W.R. Grace & Co.-Conn.* v. *City Council of Cambridge*, 56 Mass. App. Ct. 559, 573-574 (2002) (twenty-three month building moratorium not a taking); see generally *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. 302 (2002) (rejecting argument that thirty-two month moratorium on all development on plaintiffs' properties constituted a per se taking). Non-essential residential evictions have been suspended for about four months (so far) and will not remain suspended forever. *Id.* at 332 ("Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.").

More to the point, the Eviction Moratorium Law does not deprive Plaintiffs of all economically viable use of their land. In fact, the law does not even relieve tenants of the obligation to pay rent. And here, while each of Plaintiffs' properties contains three rental units, each Plaintiff complains only about one unit whose tenants are not paying rent. See *Elmsford Apt. Assocs., LLC*, 2020 U.S. Dist. LEXIS 115354 *25-*26 (New York COVID-19 eviction moratorium "is clearly not a categorical regulatory taking, since Plaintiffs still enjoy many economic benefits of ownership. Even under the eviction moratorium, landlords can continue to

accept rental payments from tenants not facing financial hardship, while also covering the cost of ownership by collecting security deposit funds from consenting tenants who have been affected by the pandemic. As such, their properties have not been rendered worthless or economically idle.").

b. *Penn Central* Factors

When an alleged taking involves neither a physical invasion nor a complete deprivation of use, as in the case here, courts apply an "ad hoc, factual inquiry" to evaluate whether a regulatory taking has occurred. See *Penn Central*, 438 U.S. at 124; see also *Yee*, 503 U.S. at 523 (test necessarily entails complex factual assessments of purposes and economic effects of government actions). Three interrelated factors, called the *Penn Central* factors, are considered in determining whether a compensable taking has occurred: "the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action." *W.R. Grace & Co.-Conn.*, 56 Mass. App. Ct. at 573-573; see *Penn Central*, 438 U.S. at 124.

A regulatory taking occurs where the three *Penn Central* factors establish "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests" is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539-540 (2005); *Yee*, 503 U.S. at 523 (compensation is required only if considerations such as purpose of regulation or extent to which it deprives owner of economic use of property suggest that regulation has unfairly singled out property owner to bear burden that should be borne by public as a whole); *Blair*, 457 Mass. at 641 (when regulation substantially restricts owner's use of the property, so that regulation "goes too far," it may be

deemed regulatory taking of that property for public use). Plaintiffs argue that the Eviction Moratorium Law constitutes a regulatory taking by imposing a burden on their property that is tantamount to a direct appropriation or ouster.

Before reaching the three *Penn Central* factors, I must first decide on the relevant parcel for the taking analysis.

Whether a regulatory taking has occurred is determined by considering the effect of a regulation as applied to the entire parcel at issue. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 327; *Blair*, 457 Mass. at 642-644 (declining to accept argument that, for purposes of regulatory taking, "relevant parcel" may consist only of that part of property affected by regulation; instead, court considers whether regulation has brought about regulatory taking of entire parcel); *Penn Central*, 438 U.S. at 130-131 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."). Accordingly, here the "relevant parcel" is the entire property, including each Plaintiff's land and three-family home, rather than the single unit occupied by non-paying tenants within each Plaintiff's building.

1. Economic Impact on the Claimant

The first *Penn Central* factor is the economic impact of the law at issue on a plaintiff's property. To determine that impact, a court considers the value of that property "before and after the alleged taking." *Blair*, 457 Mass. at 645; see *Giovanella* v. *Conservation Comm'n of Ashland*, 447 Mass. 720, 734 (2006) (commission's action resulted in twenty-nine per cent decrease in value of plaintiff's property; decrease not significant enough to rise to level of

taking). To constitute a compensable regulatory taking, the economic impact on the property value must be severe. See *Fitchburg Gas and Elec. Light Co.* v. *Department of Pub. Util.*, 467 Mass. 768, 784 (2010) (mere diminution in value of property is insufficient to demonstrate taking); *Flynn* v. *Cambridge*, 383 Mass. 152, 160-161 (1981) (while use restrictions "undeniably diminish the value of the property, this alone does not establish a taking"). A regulation "may deprive an owner of a beneficial property use — even the most beneficial such use — without rendering the regulation an unconstitutional taking." *Lovequist* v. *Conservation Comm'n of Dennis*, 379 Mass. 7, 19 (1979). "What may be characterized as forbidden takings are those governmental actions which strip private property of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it." *Id.* (quotations and citation omitted).

Plaintiffs have presented no evidence regarding any change in value to their properties because of the Eviction Moratorium Law. Instead, Plaintiffs focus on the economic impact of their inability to evict tenants for non-payment of rent. While the temporary inability to evict a non-paying tenant may adversely affect a landlord's stream of income from his or her rental units, Plaintiffs have not attempted to show a diminution of their property value severe enough to constitute a taking for which the government must compensate them. See *W.R. Grace & Co.*, 56 Mass. App. Ct. at 574 (that alleged detrimental effects were temporary lent support to conclusion that economic impact on plaintiffs did not transform permissible regulation into compensable taking); see also *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 332 ("Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.").

2. Investment-Backed Expectations

Similarly, Plaintiffs have not presented any persuasive evidence as to the second *Penn Central* factor, unreasonable interference with their investment-backed expectations as to use of their property. See *W.R. Grace & Co.*, 56 Mass. App. Ct. at 574; see also *Penn Central*, 438 U.S. at 136 (concluding that law did not interfere with plaintiff's primary expectation concerning use of parcel).

Plaintiffs argue that the Eviction Moratorium Law interferes with their investment-backed expectation of collecting rent in exchange for occupancy. The Law, however, does not prevent landlords from collecting rent. Instead, it temporarily limits one of the landlord's possible remedies when a tenant is not paying rent, that is, the eviction of that tenant. Deferring the ability of the landlord to evict a tenant for non-payment of rent does not unreasonably interfere with Plaintiffs' investment-backed expectations as to use of their property.

"A property owner's investment-backed expectations must be reasonable." *Leonard* v. *Brimfield*, 423 Mass. 152, 155 (1996); *Fitchburg Gas and Elec. Light Co.*, 467 Mass. at 784 (court considers whether regulation interferes with Plaintiffs' reasonable and legitimate investment-backed expectations). The landlord-tenant relationship is highly regulated in Massachusetts, as Plaintiffs have acknowledged more than once, at oral argument and in their papers. See Amended Emergency Petition for Relief at 61 ("With Massachusetts already one of the most highly regulated states in the nation for rental housing ..."). "Although mere participat[ion] in a heavily regulated industry does not bar a plaintiff from ever prevailing on a takings claim, ... it does greatly reduce the reasonableness of expectations and reliance on regulatory provisions." *Carney* v. *Attorney Gen.*, 451 Mass. 803, 817 (2008) (quotations and citation omitted). "Because landlords understand that the contractual right to collect rent is

conditioned on compliance with a variety of state laws, their reasonable investment-backed expectations cannot extend to absolute freedom from 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.'" *Elmsford Apt. Assocs., LLC*, 2020 U.S. Dist. LEXIS 115354 *31, quoting *Penn Central*, 438 U.S. at 124.

3. Character of the Government Action

The final *Penn Central* factor, the character of the government action, requires consideration of the government's purpose for taking the challenged action. See *Fitchburg Gas and Electric Light Co.*, 467 Mass. at 785. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (internal citation omitted).

The Eviction Moratorium Law serves the legitimate public purpose of protecting the health of Massachusetts residents by temporarily limiting one remedy of landlords, that of non-essential evictions, in an effort to control the risk of an increase in the spread of COVID-19 that would occur if people are forced out of their homes during a pandemic. The Massachusetts Commissioner of Public Health explains in her affidavit that, if evicted tenants – by definition people without the resources to rent another apartment – are forced to move in with relatives or friends, social distancing becomes much more difficult both for the tenants and for those with whom they are now living. Affidavit of Monica Bharel, Exhibit D to Defendants' Opposition, ¶ 19. She also reports that the risk of the spread of the virus is "notably higher" in homeless shelters and other congregate settings into which evicted tenants may be forced. *Id.* ¶ 18. Several amici cite studies supporting Commissioner Bharel's conclusions. The likely spread of

infection, both among those evicted and those whom they encounter as a result of their eviction, puts everyone in the Commonwealth at higher risk. Thus the Eviction Moratorium Law is expected to produce a widespread public benefit by, among other things, permitting currently-housed Massachusetts residents to maintain control over their physical environments, even if they temporarily cannot pay rent because of the economic dislocations that have followed from the pandemic.

As amici point out, the Eviction Moratorium Law applies to all residential landlords in the Commonwealth, not just these two Plaintiffs, thereby spreading the economic burden. Cf. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion) (statute imposing pension burdens was a taking, in part because it "singles out certain employers" as opposed to applying generally to all employers). The legislature has attempted to limit the severity of the economic burden on landlords, by making clear in the Eviction Moratorium Law that tenants are still required to pay rent – and, indeed, statistics presented by certain amici indicate that a substantial majority of Massachusetts residential tenants are continuing to pay their rent. Furthermore, the moratorium has given the legislature, and Congress, and city governments, the time to appropriate and distribute financial aid that tenants can use to pay their rent, *before* they are evicted. And, of course, the economic effect on landlords is mitigated not only by their ability to sue non-paying tenants for breach of contract, but by the temporary nature of the moratorium.

The fact that the Eviction Moratorium Law has a more severe impact on some citizens of Massachusetts than others does not mean it effects a taking. "Legislation designed to promote the general welfare commonly burdens some more than others." *Penn Central*, 438 U.S. at 133; *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) ("In the course of

regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."). If "the restrictions [are] reasonably related to the implementation of a policy ... expected to produce a widespread public benefit and applicable to all similarly situated property," they need not produce a reciprocal benefit. *Penn Central*, 438 U.S. at 134 n.30.

The Eviction Moratorium Law is reasonably related to these goals of public and economic health. Like the other two *Penn Central* factors, the character of the legislature's action cuts against a finding that the Eviction Moratorium Law is a regulatory taking.

In sum, it appears at this early stage that the Eviction Moratorium Law is not a taking by physical occupation, a per se or categorical taking, or a regulatory taking under *Penn Central*. Therefore, Plaintiffs have not shown a likelihood of success on the merits of their art. 10 takings claim.

II. Irreparable Harm to Plaintiffs

Because Plaintiffs have failed to show they are likely to succeed on the merits of any of their three constitutional claims, there is no need to address whether they may suffer irreparable harm if the requested preliminary injunctive relief is denied, to balance any such harm against the harm that might result from the issuance of an injunction, or to consider how the requested relief would affect the public interest. See *Fordyce* v. *Hanover*, 457 Mass. 248, 266-267 (2010); *Student No. 9* v. *Board of Education*, 440 Mass. 752, 767 (2004). In the interest of completeness, however, I will briefly address these factors.

Plaintiffs argue that the Eviction Moratorium Law irreparably harms them because it prevents each of them from removing a non-paying tenant from their property. See *Davis* v. *Comerford*, 483 Mass. 164, 180 (2019) ("[T]ime lost in regaining [real property] from a party in illegal possession can represent an irreplaceable loss to the owner."). Real estate is unique, they argue, and the Eviction Moratorium Law dispossesses them of their real estate, justifying an injunction.

This argument starts from a faulty premise. As explained above in the discussion of physical takings, the Eviction Moratorium Law did not deprive Plaintiffs of their real estate. Rather, Plaintiffs themselves made the choice to rent one unit apiece to tenants who proved temporarily incapable or unwilling to pay the rent during a public health crisis and economic disruption. See *Yee*, 503 U.S. at 527-528 ("Petitioners voluntarily rented their land to mobile home owners.... Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.").

Perhaps recognizing this problem, Plaintiffs emphasize that the specific harm that they suffer results from their inability, as a practical matter, to recover the rent to which they are entitled. Even though the Eviction Moratorium Law specifically states that it does not relieve a tenant from the obligation to pay rent, and even though the Law preserves Plaintiffs' right to eventually recover possession of the apartments whose tenants are not paying rent, Plaintiffs argue, at some length and with some eloquence, that the Eviction Moratorium Law is costing them money every day. See, e.g., Amended Emergency Petition for Relief at 64 ("Every month which goes by the Petitioners will not receive any rental income, while being forced to have non-paying tenants occupy their real property. Petitioners will remain obligated to pay their

mortgages, real estate taxes, insurance, and water/sewer used by non-paying tenants, and to maintain their properties and comply with the state sanitary code, while being deprived of the revenue required to do those things."). Certainly Plaintiffs are suffering many of these harms – although perhaps not an inability to pay their mortgages, as explained below – at least for the moment. But these are economic harms, and can be remedied by money damages. See *Foxboro Co.* v. *Arabian American Oil Co.*, 805 F.2d 34, 36 (1st Cir. 1986) (courts do not find irreparable injury where only money is at stake and where plaintiff has satisfactory remedy at law to recover money).

There are exceptions to the rule that economic harm provides no foundation for the issuance of an injunction. Perhaps the most common is the doctrine that economic harm can become irreparable if it is so serious that it would endanger the very survival of the business of the party seeking the injunction. See *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 227-228 (2001); *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 399 Mass. 640, 643 (1987). But Plaintiffs' affidavits do not suggest that the Eviction Moratorium Law threatens them with that level of economic disaster. For one thing, each Plaintiff owns a three-family house, but only complains about non-payment of rent from one of the units.

Even so, both Plaintiffs complain, in the future tense, that the Eviction Moratorium Law will make them "struggle" to pay certain expenses associated with the properties. Notably, the expenses cited by Plaintiff Smith do not even include mortgage payments. She has owned her property for 45 years, and no mortgage on that property appears in the records at the Suffolk County Registry of Deeds. See Villa Aff. ¶ 15. While Plaintiff Matorin does have a mortgage, the form of that mortgage and related documents suggests that "it is highly likely" that Mr.

Matorin's mortgage is owned by Fannie Mae or Freddie Mac, government-sponsored enterprises that are protecting homeowners with such mortgages from foreclosure, including by allowing for deferred mortgage payments. *Id.* ¶ 11.

In short, the only harm suggested by Plaintiffs is not irreparable because it is economic. And even the economic harm described by Plaintiffs, while certainly painful, falls far short of the showing required to justify an injunction over matters of money. Thus, even if Plaintiffs had established a likelihood of success on the merits, their injunction request would founder on the requirement of irreparable harm.

III. Risk of Harm to Defendants/Public Interest

Finally, I briefly turn to the companion questions of the balance of harms that would be suffered by the parties, and the harm to the public interest should injunction issue.

A preliminary injunction against enforcement of the Eviction Moratorium Law would permit not only these Plaintiffs, but all landlords across the Commonwealth, to immediately commence eviction proceedings against tenants who have fallen behind in the rent. Many of those non-paying (or slow-paying) tenants have lost their jobs in the economic downturn associated with the COVID-19 pandemic, and so lack the resources, at least temporarily, to pay their rent. According to studies cited by several amici, the commencement of an eviction lawsuit – indeed, even the receipt of a notice of default, a notice to quit, or a notice of lease termination that precedes the filing of an eviction lawsuit – often causes tenants to bow to the inevitable by moving out. Without economic resources, many of these tenants will be unable to find other housing. Even those lucky enough to have some place to move will inevitably increase their potential exposure to COVID, by the mere fact of searching for housing, moving their possessions, and, often, doubling up in overcrowded apartments. And, as amici point out, there

are also numerous other devastating consequences that have been shown to result from eviction, such as loss of jobs, stress, anxiety, loss of childcare, and interruptions of the education of children.

Further, access to stable housing is a crucial component of containing COVID-19 for every citizen of Massachusetts. The Eviction Moratorium Law benefits the health of all in several ways. By temporarily keeping people where they currently live, it ensures efficacy of social distancing guidelines, prevents homelessness, and limits housing overcrowding, thereby limiting the spread of the disease. The Law also promotes economic health not only for the potentially displaced tenants but also for all residents of Massachusetts, as displacement and increased reliance on the shelter system and emergency services would increase costs to the Commonwealth. Finally, the government is using the pause in evictions to put together financial aid programs that allow tenants across the Commonwealth to pay their rent with government dollars, at least temporarily – payments that also benefit landlords, the ultimate recipients of those government dollars.

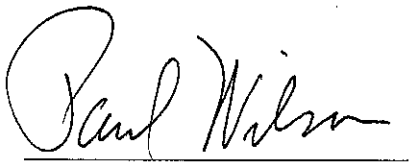
In balancing the relevant interests, any harm to Plaintiffs by a temporary disruption of evictions for non-payment of rent is far outweighed by the potential harm to the Commonwealth and the public of enjoining the operation of the Eviction Moratorium Law. The balance of harms and the public interest favor upholding the Law to protect the public health and economic well-being of tenants and the public in general during this health and economic emergency.

ORDER

In considering constitutional attacks on a town zoning bylaw that imposed permanent restrictions on how landowners could use their land, the Supreme Judicial Court framed the task of the court as follows: "The question to be decided is not whether we approve such a by-law. It

is whether we can pronounce it an unreasonable exercise of power having no rational relation to the public safety, public health or public morals. We do not see our way clear to do that." *Brett*, 250 Mass. at 79.

On the basis of the preliminary record before me, I cannot see my way clear to finding that Plaintiffs are likely to succeed on the merits of their claims that the Eviction Moratorium Law is "an unreasonable exercise of power having no actual relation to the public safety, public health, or public morals," as the Supreme Judicial Court put it in *Brett*. Plaintiffs' motion for a preliminary injunction is **DENIED**.



Paul D. Wilson
Justice of the Superior Court

August 26, 2020