No. 3-20-0305 (cons. w/ 3-20-0304)

In the Appellate Court of Illinois
Third Judicial District

**JL PROPERTIES GROUP B LLC,
MARK DAUENBAUGH and STEVEN COLE,
NOT INDIVIDUALLY BUT AS TRUSTEE OF
THE ALI (401K) TRUST FBO STEVEN COLE,**

Plaintiffs-Appellants,

v.

**JAY ROBERT "J.B." PRITZKER, THE GOVERNOR
OF ILLINOIS, NOT INDIVIDUALLY, BUT IN
HIS EXECUTIVE CAPACITY,**

Defendant-Appellee.

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Case No. 2020 CH 601
The Honorable John C. Anderson, Judge Presiding
Date of Notices on Appeal: August 1, 2020
Date of Judgment: July 31, 2020

BRIEF OF PLAINTIFFS-APPELLANTS

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

What this case does not impugn is the power of the Governor to declare an emergency under the Illinois Emergency Management Agency Act. 20 ILCS 3305, et seq. ("EMAA" or "Act"). Nor does this case raise any claim related to the Establishment Clause of the U.S. Constitution guaranteeing the right to the free exercise of religion, or the First Amendment's guarantee of the right of free speech; in fact, this case raises no federal constitutional issues whatsoever. Only Illinois law is at issue.

This case addresses the Governor's moratoria on the commencement of residential eviction actions and the enforcement of orders of possession. ("Moratoria"). The moratoria were first imposed on March 20, 2020 as part of an Executive Order the Governor issued to address the public health crisis occasioned by the Covid-19 Pandemic, and have been extended several times since.[1] The Moratoria are still in effect and currently prevent two of the Plaintiffs, and every other Illinois landlord, from commencing eviction proceedings against tenants who have not paid their rent, regardless of the tenant's reason for not paying. The Moratoria also enjoins the third Plaintiff from enforcing an order of possession that it obtained before the Moratoria were put in place, indeed before the Pandemic.

At issue in this case is how far the Governor can go, and what are the limits of the power he can wield, to deal with the crisis and still remain within the bounds of Illinois law. The trial court seems to believe his power is nearly unbounded and there are virtually no restrictions to what he can do to address the crisis, and no limits on how long

[1] All of the Governor Pritzker's General Disaster Proclamations and Executive Orders related to COVID-19 may be viewed at https://coronavirus.illinois.gov/s/resources-for-executive-orders. Last viewed October 2, 2020.

he may exercise the powers he was given by the legislature under the EMAA. The gravity of the Pandemic justifies the Moratoria and pretty much anything else the Governor has prohibited, limited or curtailed through the use of Executive Orders.

But the law says otherwise. There are indeed limits to his power. And those limits are found not only under the Illinois Constitution but under the EMAA itself. Section 7 of the Act gives the Governor the limited powers in a public health crisis which are keyed toward buying time for the other levers of government power, the legislature and the judiciary, to take on their assigned roles to pass legislation and organize the court system to address the crisis in a proper democratic fashion. Section 7 of EMAA does not allow the Governor to suspend laws, interfere with the operation of the courts, bar citizens from access to the courts, make landlords responsible for providing housing to non-paying tenants without receiving any remuneration or compensation for doing so, or extend the moratoria after the express purpose for which they were imposed has abated. Furthermore, the crisis does not give the Governor the power to ignore constitutional protections or override constitutional limits on the reach of executive power. "Neither the legislature nor any executive or judicial officer may disregard the provisions of the Constitution even in case of a great emergency." *Jorgensen v. Blagojevich*, 211 Ill.2d 286, 304, 811 N.E.2d 652 (2004), quoting *People ex. rel. Lyle v. City of Chicago*, 360 Ill. 25, 29, 195 N.E. 451 (1935). The Moratoria exceed all these prescriptions and limitations.

Justice Alito's dissent in *Calvary Chapel Dayton Valley v. Sisolak*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 4251360 (Jul. 24, 2020), which addressed Nevada' response to the Pandemic, makes this point most clearly. He stated: "[w]e have a

duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." *Id*. *1. He observed:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.
>
> But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Id. at ——, —— S.Ct. ——, 2020 WL 4251360 at *2.

Plaintiffs do not dispute the gravity of the Pandemic nor the damage it has wracked and continues to wrack across the globe. Plaintiffs also recognize the tremendous efforts made by our political leaders, including the Governor, to deal with this unprecedented catastrophe and agree with the Governor and the *Amici* that those efforts have resulted in a decline in COVID-19 cases and deaths in Illinois. However, the portions of the Governor's Executive Orders prohibiting the commencement of residential evictions, and the enforcement of residential and nonresidential orders of possession, as well-intentioned as they may be, are unlawful and must be invalidated.

ISSUES ON APPEAL

A. Did the Plaintiffs state cognizable claims in Counts I and III that the Governor exceeded his authority under the EMAA in issuing the Moratoria?

B. Did the Plaintiffs state a cognizable claim in Count II that the Moratoria amounted to the possession, control use and occupancy of the Plaintiffs' property such that an offer of just compensation was required?

C. Did the Plaintiffs state a cognizable claim in Count VI that the Moratoria violated their right to a remedy and justice under the Illinois Constitution art. I, § 12?

D. Did the Plaintiffs demonstrate a right to a preliminary injunction to enjoin the Moratoria?

E. Did the balance of the equities favor the Governor such that the preliminary injunction should not be enjoined?

APPELLATE JURISDICTION

Rule 307(a)(1) gives this court jurisdiction to hear this interlocutory appeal from the July 31, 2020 Memorandum Order ("Order") denying Plaintiffs' motion for a preliminary injunction. Ill. Sup. Ct. 307(a)(1). (R.C456-504). In addition, the trial court made the requisite finding under Ill. Sup. Ct. 304(a) that there was no just reason to delay the appeal or enforcement of the portion of the Order dismissing with prejudice Count I, II, III, and VI of Plaintiff's Verified Complaint. A combined Notice of Appeal was filed within thirty days of the entry of the Order on August 11, 2020. (R.C508-510). An Amended Notice of Interlocutory Appeal was filed on August 13, 2020. (R.562-63). And Amended Notice of Appeal under Supreme Court Rule 304(a) was filed that day as well. (R.C615-16).

STATEMENT OF THE FACTS

The suit is brought by three property owners. (collectively, "Plaintiffs"). JL Properties Group B LLC ("JL") is the owner and landlord of a single-family residential property in that portion of Bolingbrook, Illinois, a Village located in Will County, Illinois. (R.C001-45).[2] On January 1, 2020, JL entered into a lease agreement with a tenant for the property. (R.C4). The rental rate is $1,350 per month. (*Id*.) The tenant became delinquent in March of 2020, and as of June, 2020, owed a total of $4,500.00 in back rent. (*Id*.)

Mark Dauenbaugh is the owner and landlord for a multi-unit residential property in Rockford, Illinois, a City located in Winnebago County, Illinois. (*Id*.) On November 1, 2019, Dauenbaugh entered into a lease with tenants for one of the units in its property at a monthly rental rate of $425.00. (*Id*.) The tenants became delinquent on their rent in February 2020 and as of June 2020, owed a total of $1,730.00 in back rent. (*Id*.) On May 13, 2020, Dauenbaugh served a five-day notice on the tenants to cure their delinquency or they would be evicted. (R.C 58-50). As of June 2020, the tenants residing in both JL and Dauenbaugh's properties continue to occupy the respective properties and remain delinquent on their rent payments. (*Id*.)

The ALI (401 K) Trust FBO Steven Cole, ("Cole") is the owner of a residential property located in University Park, Illinois, a Village in Will County, Illinois. (R.C005). Steven Cole is the Trustee for the Trust and landlord for the property. (*Id*.) On March 6, 2020, Cole obtained an order of eviction ("Eviction Order") against the known and unknown occupants in the property. (*Id*.) Under terms of the Eviction Order, the subject

of the order and any unknown occupants were to vacate the property on or before March 13, 2020. (R.C064).

Disaster Proclamations

On March 9, 2020, due to the threat of COVID-19, "a novel severe acute respiratory illness that can spread among people," the Defendant, Governor J.B. Pritzker ("Governor") pursuant to section 7 of the Illinois Emergency Management Agency Act ("EMAA" or "Act") issued a Gubernatorial Disaster Proclamation in which he declared all counties in the State of Illinois a disaster area (the "First Proclamation"). (R.C092-94). This First Proclamation remained in effect for 30 days. (*Id*.)

Based in part on the rising number of COVID-19 cases, on April 1, 2020, the Governor issued a second Gubernatorial Disaster Proclamation finding that a "continuing disaster exists" (based upon the same COVID-19 pandemic) and again declared that all counties in Illinois a disaster area (the "Second Proclamation"). (R.C095-97). Citing section 7 of the Act, the Second Proclamation also declared that it remained in effect for another 30 days. (*Id*.)

Based in part on the fact that the State's modeling, "… shows that its health care resources utilization will not peak until May and resources will continue to be limited after the peak…", and that without a "stay at home" order 100,000 hospital beds, 25,000 ICU beds, and upwards of 100,000 ventilators would be necessary, and the number of deaths in the state would be 10 to 20 times higher than with a "stay at home" order, on April 30, 2020, the Governor issued a third Gubernatorial Disaster Proclamation, for all

[2] All citations to the record refer to the Supporting Record on Appeal filed on August 31, 2020, in the Appeal assigned docket number 3-20-035.

counties, which remained in effect for another 30 days (the "Third Proclamation"). (R.C098-103). This too cited section 7 of the Act as the authority. (*Id*.)

On May 29, 2020, the Governor issued a fourth Gubernatorial Disaster Proclamation, for all counties (the "Fourth Proclamation"). (R.C104-9). The Fourth Proclamation is based in part on the fact that the number of COVID-19 cases continued to increase, and the peak health care resource utilization which was anticipated in May had not occurred. (*Id*). The Fourth Proclamation notes that the R_0, the number of cases that an infectious person will cause during their infection, "has improved based on the State's emergency measures, including most importantly, the "stay at home" order." (*Id*). This is the only reference to the "stay at home" order in the Fourth Proclamation. (*Id*). The proclamation remained in effect by its terms for 30 days, expiring on Sunday, June 28, 2020. (*Id*.) after this suit was commenced.[3]

Executive Orders

Citing sections 7(1), 7(2), 7(8), 7(10), and 7(12) of the EMAA, (20 ILCS 3305/7), on March 20, 2020, the Governor issued Executive Order 2020-10, COVID-19 Executive Order No. 8, ("**EO 2020-10**"). (R.C110-118). EO 2020-10 ordered that all individuals currently living within the State of Illinois are ordered to stay at home or at their place of residence except for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses. ("Stay at Home Order"). (*Id*.) Citing sections 7(2), (8), and (10), of the Act, the Governor in EO 2020-10 also instructed all state, county, and local law enforcement officers in the State of Illinois to cease enforcement of orders of eviction for

[3] Four Gubernatorial Disaster Proclamations have been issued in 30 day increments, on June, 26, 2020, July 24, 2020, August 21, 2020 and most recently on September 18, 2020 https://coronavirus.illinois.gov/s/resources-for-executive-orders.

residential premises for the duration of the Gubernatorial Disaster Proclamation. (*Id*.) The basis for this instruction was that "the enforcement of eviction orders for residential premises is contrary to the interest of preserving public health and ensuring that individuals remain in their homes during this public health emergency…." (herein, "Residential Enforcement Moratorium") (*Id*.) Under EO 2020-10, tenants were not relieved of the obligation to pay rent, or to comply with any other obligation of their tenancy. (*Id*.) EO 2020-10 provided that it and the Stay at Home Order would remain in effect for the remainder of the duration of the Gubernatorial Disaster Proclamation, which at the time extended through April 7, 2020. (*Id*.)

On April 1, 2020, citing sections 7(1), 7(2), 7(3), 7(8), 7(9), and 7(12) of the EMAA, the Governor issued Executive Order 2020-18, COVID-19 Executive Order No. 16, ("**EO 2020-18**") extending EO 2020-10, and the Stay at Home Order, through the remainder of the duration of the Gubernatorial Disaster Proclamations, which at the time extended through April 30, 2020. (R.C119-23).

On April 23, 2020, pursuant to the Third Proclamation, the Governor issued Executive Order 2020-30, COVID-19 Executive Order No. 28, ("**EO 2020-30**"**)** citing sections 7(1), 7(2), 7(8), 7(10), and 7(12) of the Act, 20 ILCS 3305 extending the Stay at Home Order for thirty days, until May 30, 2020. (R.C124-26).

Under Section 2 of EO 2020-30, the Governor also mandated that persons were prohibited from commencing a residential eviction action pursuant to or arising under 735 ILCS 5/9-101 *et seq.*, with limited exceptions (herein, "Residential Eviction Moratorium"). (*Id*.) The Residential Eviction Moratorium was necessary, according to the Governor, because "*** the ongoing public health emergency requires further action

to prevent the initiation of residential eviction proceedings; and, *** residential evictions are contrary to the interest of preserving public health by ensuring that individuals remain in their homes during this public health emergency. *** ". (*Id*.) EO 2020-30 expressly stated that the continued need for the directive related to evictions shall be evaluated upon issuance of a new Gubernatorial Disaster Proclamation. (*Id*.) EO 2020-30 further instructed that all state, county, and local law enforcement officers in the State of Illinois to cease enforcement of orders of eviction for non-residential premises for the duration of the Gubernatorial Disaster Proclamation (the "Non-Residential Enforcement Moratorium"). (*Id*.)

Thereafter, on April 30, 2020, the Governor issued the Third Gubernatorial Disaster Proclamation which ran through May 28, 2020. The Third Gubernatorial Disaster Proclamation does not indicate that the directive related to ceasing evictions had been evaluated and, upon information and belief, the directive had not been evaluated. (R.C098-103). On the same day, citing Article V, Section 8 of the Illinois Constitution, in addition to sections 7(1), 7(2), 7(3), 7(8), 7(9), and 7(12) of the EMAA, the Governor issued Executive Order 2020-32, COVID-19 Executive Order No. 28, ("**EO 2020-32**") revising and expanding the exceptions to the Stay at Home Order. (R.C127-38). The stated intent of EO 2020-32 was '…to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible." (*Id*.)

On the same date, April 30, 2020, the Governor also issued Executive Order 2020-33, COVID-19 Executive Order No. 32, which amended and reissued Executive

Order 2020-30, ("**EO 2020-33**") in its entirety including the Residential Enforcement Moratorium, the Non-Residential Enforcement Moratorium, and the Residential Eviction Moratorium (collectively "Moratoria") and extended them through May 29, 2020. (R.C139-44).

On May 29, 2020 the Governor issued Executive Order 2020-38, "COVID-19 Executive Order No. 26, Restoring Illinois - Protecting Our Communities." ("**EO 2020-38**"). (R. C145-54). The stated intent of the 2020-38 was to "*** conscientiously resume activities that were paused as COVID-19 cases rose exponentially and threatened to overwhelm our healthcare system." (*Id*.) EO 2020-38 superseded EO 2020-32. (R. C012) EO 2020-38 did not contain a stay-at-home requirement, other than urging the elderly and individuals with health conditions that may make them vulnerable to COVID-19 to stay in their residences. 2020-38 Sec. 2 (c). (*Id*.) In effect, the Stay at Home Order was not renewed and was effectively lifted. (*Id*.)

The fact that the Stay at Home order is no longer in effect is confirmed by the Illinois Department of Public Health, which has acknowledged that as of May 20, 2020 that Stay at Home Order was lifted. (R C 155)[4] Yet, despite the lifting of the Stay at Home Order, on the same date, May 29, 2020, the Governor issued Executive Order 2020-39, COVID-19 Executive Order No. 37, ("**EO 2020-39**") which amended and reissued EO 2020-30 in its entirety, including the Moratoria, and extended them through June 27, 2020. (App. C).[5]

[4] The stay at home order has not been reinstated in any of the subsequent Executive Orders.

[5] On July 24, 2020, the Governor issued EO 2020-48, COVID-19 Executive Order 45, extending the Moratoria through August 22, 2020, to allow the Illinois Housing

In issuing EO 2020-39, the Governor did not reissue or extend the Stay at Home Orders found in EO 2020-10 and 2020-32. (App. C). As with the Third Gubernatorial Disaster Proclamation, the Fourth Gubernatorial Disaster Proclamation issued through May 29, 2020 also did not indicate the directive related to evictions had been evaluated and, upon information and belief, the directive had not in fact been evaluated. (R.C104-09).

On June 17, 2020 the Governor announced that in August of 2020 Illinois will launch a rental assistance program for renters impacted by the pandemic, and that the "ongoing residential eviction" ban would be extended through July 31, 2020, "to provide a smooth transition to the assistance Program." (R.C156-7).

The Eviction Moratoria has enjoined Plaintiffs, JL and Dauenbaugh, from commencing eviction of their non-paying tenants, which they would otherwise be able to do but for the Eviction Moratoria. (R.C004-5). The Residential Enforcement Moratorium prohibits the Sheriff of Will County from enforcing lawful orders of possession and has thus prevented Plaintiff Cole from removing the non-paying tenant from the property. (R.C005). As of the date of the filing of the Verified Complaint, the tenants continue to occupy Plaintiffs' properties without paying rent. (R.C004-5).

PROCEEDINGS BELOW

Plaintiffs filed a Verified Complaint for Declaratory and Injunctive Relief on June 23, 2020 alleged statutory and constitutional claims. (R.C001-45). The statutory claims

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Development Authority to distribute monetary assistance under the rental and mortgage assistance programs. On August 21, 2020, EO 2020-52, COVID-19 Executive Order 48 extended the Moratoria to September 19, 2020, and provided for the eviction of tenants who pose a threat to other residents or substantial harm to the property. On September

were predicated on the contention that the pertinent sections of the EMAA did not provide the Governor to impose the Moratoria and that the Governor acted in contravention of the statute by not offering to compensate owners affected by the Moratoria. (Counts II and III). Plaintiffs further alleged that assuming the Governor was authorized to impose the Moratoria, with or without an offer of compensation to landlords, the predicate for issuance of the Moratoria ceased on May 20, 2020 with the lifting of the Stay at Home Order. Such that the extensions of the Moratoria from that time through today, are ultra vires acts. (Count I).

The constitutional theories are that the Moratoria violated the Separation of Powers doctrine enshrined in Article II, Section 1, of the Illinois Constitution, (Count IV); the right to a civil jury trial under Article I, Section 13, (Count V); the constitutionally guaranteed right to remedies and justice in Article I, Section 12; (Count VI); the Equal Protection Clause found in Article I, Section 2, (Count VII); the due process clause of Article I, Section 2, (Count VIII); and where an unconstitutional taking of private property without just compensation in contravention of Article I, Section 15 (Count IX); and impaired the obligation of contracts found in Section I, Article 16, (Count X). (*Id*.)

Plaintiff contemporaneously moved for the entry of a Temporary Restraining Order and Preliminary Injunction to bar the enforcement of the Moratoria. (R.C160-77). The parties agreed to brief the motion and to treat it solely as a request for preliminary injunction. (R.C443). The Governor also filed a motion to dismiss the Verified Complaint with prejudice under Section 2-615 of the Illinois Code of Civil Procedure (735 ILCS

18, 2020, the revised Moratoria were extended to October 17, 2020 in E0 2020-55,

5/2-615) contending that each of Plaintiff's claims failed to state a cause of action. (R.C363-70). These motions were fully briefed and heard on July 22, 2020. (R.C443).

On July 31, 2020, the trial court issued a 49 page written Memorandum Order ("Order") on the Plaintiffs' request for a preliminary injunction and the Governor's motion to dismiss. (R.C456-504). The court denied the request for a preliminary injunction and dismissed the statutory claims (Counts I, II and III) as well as the claim pleading a violation of Plaintiffs' rights to remedies and justice in Article I, Section 12, (Count VI), with prejudice. (R.C 502). Count IV asserting that the Moratoria violated the Separation of Powers provision was allowed to stand. (*Id*.) The remaining counts, Counts IV, V, VII, VIII, IX, and X, the court took under advisement and are still pending. (*Id*.) In dismissing Counts I, II, III and VI with prejudice, the court made a finding under Supreme Court Rule 304(a) that there was no just reason to delay the enforcement or appeal of that portion of the Order. (*Id*.)

In denying the preliminary injunction, the court rightly examined whether Plaintiffs had established all the elements for preliminary injunctive relief. Notice was taken that the Governor had conceded the Plaintiffs have clearly ascertainable rights that require protection. (R.C473; 198). Furthermore, the trial court found the Plaintiffs established that for at least one of the counts, Count IV, Separation of Powers, they were likely to succeed on the merits of that claim. (R.C485-6; 499). As to the irreparable injury element the court noted that there were many aspects of Plaintiffs' claims that can be redressed by monetary damages, but that "there are other aspects which **might** not be compensable (at least, **adequately** compensable) with money damages" (emphasis in

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COVID-19 Executive Order 51, and remains in effect at the time this Brief was filed.

original). (R.C474). The court forwent further analysis on this point because, in the end, the balance of the equities tilted strongly in favor of the Governor such that preliminary injunctive relief was unwarranted. (R.C499-501).

The court concluded its findings and conclusions with the observation that "the claims and issues presented in this case are of the utmost public importance" and certified seven question for the appellate court to review. (R.C502-03). This Court has elected not to certify any of those questions. (Docket Number 3-20-012).

ARGUMENT

I. THE GOVERNOR DID NOT HAVE THE POWER TO ISSUE MORE THAN ONE DISASTER PROCLAMATION OR ANY EXECUTIVE ORDERS AFTER APRIL 8, 2020.

Standard of Review. The issues in Part I are matters of statutory interpretation so the standard of review is *de novo*. *Accettura v. Vacationland, Inc.,* 2019 IL 124285, __ N.2d__.

Although neither party addressed the issue in their briefs, and Plaintiffs conceded below that they were not challenging the power of the Governor to declare more than one disaster, and hence issue any Executive Orders addressing the disaster more than thirty days after he declared the disaster proclamation on March 9, 2020, the trial court felt it was necessary to address this issue before it could address the underlying claims. (R.C463-67).[6] The court found that that EMAA does not disallow the practice, that the practice is consistent with purpose of the Act, and the Governor has been issuing

[6] In fact, the Plaintiff made an application on behalf of the trial court to accept the certified question "[d]oes the EMAA permit the Governor to issue successive 30-day disaster declarations and emergency executive orders". The application was denied. (Docket Number 3-20-012).

successive disaster proclamation for years without the General Assembly amending the Act to stop the practice. (R.C467). From this the trial court concluded that the EMAA permits the Governor to make successive disaster proclamations such that the post-April 8, 2020 Executive Orders are not void *ab initio*. (R.C468). To the extent this Court too deems it necessary to address this issue, and the issue is indeed properly before this Court, the Plaintiffs' position is that the Governor did not have the power to make more than the one disaster proclamation he made on March 9, 2020, such that the Executive Orders issued after April 8, 2020 which are pertinent to this case, EO 2020-55 are void.

In the event of a disaster, as defined in section 4 of the EMAA the Governor is granted emergency powers which he may use to manage the disaster response. 20 ILCS 3305/7. "Disaster" means an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause, including but not limited to … public health emergencies…". 20 ILCS 3305/7. Notably, the definition says that a "disaster" is an "occurrence" or "threat of widespread or severe damage, etc.". In the event of a disaster, *e.g.,* the Covid-19 Pandemic, the Governor may exercise the powers given to him under section 7 by issuing a proclamation declaring, "…that a disaster exists. Upon such proclamation, the Governor shall have the right to execute the emergency powers for a period not to exceed 30 days…" *Id.*

When construing a statute, this court's fundamental objective is to ascertain and give effect to the intent of the legislature. *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2016 IL 120236, ¶ 52, 72 N.E.3d 288. The most reliable indicator of legislative intent is the statutory language itself, giving it its plain and ordinary meaning. *People v. Perry*, 224 Ill. 2d 312, 323, 864 N.E.2d 196

(2007). In determining the plain meaning of statutory terms, the statute must be construed its entirety, keeping in mind the subject it addresses and the apparent intent of the legislature in enacting it. *People ex rel. Madigan v. Wildermuth,* 2017 IL 120763, ¶ 17, 91 N.E.3d 865. The court must attempt to give effect to the expressed intent of the legislature and avoid constructions of a statute which would render any portion of it meaningless or void. *People v. Tarlton*, 91 Ill. 2d 1, 5, 434 N.E.2d 1110 (1982).

The Governor declared a disaster on March 9, 2020. Under the plain language of the Act, his power to use and exercise the extraordinary powers in section 7 lasted only for thirty days. Only in the event of a new disaster, not the same disaster or a "continuing disaster", can the Governor invoke his emergency powers again. No doubt the public health emergency occasioned by the Pandemic still exists, and will likely continue to exist until there is a vaccine, but that does not mean that a new disaster exists. The very definition of "disaster" implies that the event causing the disaster will last more than thirty days, in other words it will be a "continuing disaster". Included in the definition is "epidemic[s]" and "extended periods of severe and inclement weather". *Id*. It also includes "Public health emergency" which means an occurrence or imminent threat of an illness or health condition caused by an array of events, all of which are likely to last more than thirty days. And yet the General Assembly did not give the power to exercise his emergency powers beyond thirty days, even after it amended the Act in 2003 after the SARS epidemic, which lasted longer than thirty days.[7] The legislature did not give the

[7] https://dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/sars

Governor the authorization to extend his emergency powers to address a "continuing disaster".

Construing the statute to allow the Governor to extend the thirty-day period would render the limitation clause meaningless. The more reasonable construction, taking into consideration the other provisions of the Act, is that the Governor is required to seek legislative approval for the exercise of any extraordinary measures beyond thirty days.

This construction is supported by reference to section 9 of the Act (20 ILCS 3305/9), which addresses the financing of disaster response measures. Section 9 provides for the Governor's use of particular appropriated funds for emergency purposes, and, if necessary and the General Assembly is not in session, the transfer of funds, but only "until such time as a quorum of the General Assembly can convene in regular or extraordinary session". *Id*. The purpose of this provision, like the thirty-day limitation in section 7, is to empower the Governor to address emergency situations immediately. Even though many disaster situations, like Covid-19, may last longer than 30 days and could take months to remediate, such as epidemics, droughts and fuel shortages, (20 ILCS 3305/4) normal government processes, including legislative action to respond to the disaster, must be restored after thirty days to address the disaster.

In fact, the General Assembly had already accounted for how the state will address a disaster after the thirty-day period expired. The management of disasters are addressed in the state's existing Emergency Operations Plan. 20 ILCS 3305/4.[8] The Plan does not have an expiration date like the Governor's powers under section 7, but

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8 https://www2.illinois.gov/iema/Preparedness/Documents/IEOP/2019%20IEOP%20Foreword.pdf

presumes the normal functioning of government will take over addressing the disaster once the immediate impact has abated. Also, the Act created within the executive branch, the Illinois Emergency Management Agency. 20 ILCS 3305/5. The director of the agency reports to the Governor and is responsible for carrying out emergency management programs for the mitigation, preparedness, response and recovery from a disaster. *Id*. There is no temporal limitation on his powers and responsibilities either. All this goes to show that the General Assembly understood and intended that the management of a disaster would be coordinated with other state agencies and the General Assembly after the thirty-day period expired.

"Generally speaking, what laws or regulations are necessary to protect public health and secure public comfort is a legislative question …" and "[t]he exercise of the police power is a matter resting in the discretion of the Legislature or the board or tribunal to which the power is delegated…". *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 427, 134 N.E. 815 (1922). The EMAA is the codification of the legislature's police powers and a plain reading of the Act makes it plain that the General Assembly did not intend for Governor's emergency powers to last more than thirty days. While lawmaking may yield to the state's police powers to promote and protect the public health, safety, morals, comfort and general welfare of the people, the legislature could not abrogate its responsibilities as the law-making body of the state with no limitations. Ill. Const. 1970, art. IV, § 1. The legislature was not unaware of this restriction on its powers because it gave the Governor the express power to suspend state regulatory statutes, and the rules and regulations of state agencies, with no limitation but not state statutes. 20 ILCS §3305/7(1).

If additional action is required to deal with the Pandemic beyond that provided for in the EMAA, and existing regulations, such as the suspension of Illinois' eviction laws, it is up to the General Assemble to provide it. As the EMAA limits the Governor's emergency authority to a 30-day period, the only General Disaster Proclamation which was validly enacted during the pandemic, was the one made on March 9, 2020. It expired on April 8, 2020. As the Moratoria were imposed by executive orders that were promulgated more than thirty days after the proclamation went into effect, including the orders at issue here, they are null and void.

II. THE TRIAL COURT ERRED IN DISMISSING COUNTS I, II, III AND VI BECAUSE EACH CLAIM STATED A COGNIZABLE CAUSE OF ACTION.

Standard of Review. A section 2–615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *City of Chicago v. Beretta U.S.A. Corp.,* 213 Ill.2d 351, 364, 821 N.E.2d 1099 (2004). Therefore, an order granting or denying a section 2–615 motion is reviewed *de novo*. *Wakulich v. Mraz,* 203 Ill.2d 223, 228, 785 N.E.2d 843 (2003).

In reviewing the sufficiency of a complaint, the court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Ferguson v. City of Chicago,* 213 Ill.2d 94, 96–97, 820 N.E.2d 455 (2004). The allegations in the complaint are construed in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp.,* 215 Ill.2d 1, 11–12, 828 N.E.2d 1155 (2005). Thus, a cause of action should not be dismissed pursuant to section 2–615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Canel v. Topinka,* 212 Ill.2d 311, 318, 818 N.E.2d 311 (2004).

A. THE POLICE POWERS JURISPRUDENCE THE TRIAL COURT REFERENCED IS INAPPLICABLE WHERE, LIKE HERE, THE STATE HAS EXPRESSLY DEFINED WHAT THOSE POWERS ARE.

The trial court's determination that Plaintiffs fail to state a claim that the Governor exceeded his authority under the EMAA wrongly supposes that a review of his actions is subject to some sort of deference imposed by the "police powers" of the state to secure the protection and well-being of its citizens. (R.C467-71). What the trial court missed is that in the event of a disaster, like the Covid-19 Pandemic, the EMAA ***is*** the state's expression of those police powers such that the legality of the Governor's actions is dictated solely by whether they comply with the Act. No additional police powers exist in disaster situations like the Pandemic.

Recognizing the need for swift action in the face of man-made and natural disasters, the General Assembly adopted the EMAA in 1988, to confer upon the governor several extraordinary powers to deal with such emergencies. The Act traces its origins to the Illinois Civil Defense Act of 1951 (the Civil Defense Act) (1951 Ill. Laws 1219). *See generally* Public Act 79-1084, effective September 22, 1975. The Civil Defense Act's original purpose was to prepare for and carry out such functions, other than functions for which military forces are primarily responsible, as may be necessary or proper to prevent, minimize, repair, and alleviate injury and damage resulting from disasters caused by enemy attack, enemy sabotage, or other hostile action. *See, People v. City of Chicago*, 413 Ill. 83, 88; 108 N.E.2d 16, 19 (1952). The Illinois Civil Defense Act was enacted as the application of the state's police powers in the event of a disaster. *Id*. at 21.

The EMAA was born out of the Illinois Civil Defense Act. It was intended to ensure that Illinois was prepared to and will adequately deal with any disasters, in order

to preserve the lives and property of the people of this State, "and to protect the public peace, health, and safety in the disaster." 20 ILCS 3305/2. The Act provides that if a disaster exists the Governor may issue a proclamation formally declaring that a disaster exists. 20 ILCS 3305/7. The proclamation then enables the Governor to exercise certain enumerated emergency powers to address the disaster, which he can exercise for no more than thirty days. 20 ILCS 3305/7. After the thirty days, presumably after the emergency, but not necessarily the disaster, has passed, the Governor's enumerated powers under section 7 cease. *Id*. The normal law-making process enshrined in the Illinois Constitution and Illinois law resumes.

The EMAA expressly delimits the scope of the state's police powers in the event of a public health emergency. The General Assembly made a legislative determination that in such circumstances the police powers of the state are reposed in the Governor for thirty days and are limited to those powers in enumerated in section 7. The EMAA is the codification of the state's police powers in the event of public health emergency. Because the legislature had the foresight to dictate exactly what those powers will be it is not necessary, indeed it would undermine the purpose of the EMAA altogether, to also grant the state other broad powers "to protect and promote the public health" discussed in *Jacobsen v. Massachusetts*, 197 U.S.11 (1938) and other cases.

Thus, the "police powers" jurisprudence cited by the trial court is inapposite. In those decisions, the legislatures had not prepared for a public health emergency by legislating what the state's police powers would be. The Illinois decisions cited by the court all pre-date the EMAA and therefore have no relevance to the issues posed here. Moreover, the decisions are all directed at the effect a state's police powers have on

constitutional rights, not whether the state's actions are *ultra vires* when as, here, the legislature has previously legislated what they will be. Those cases address situations where the state has to act quickly to address an emergency in the absence of any legislative guidance. Constitutional guaranties will therefore yield to the enforcement of statutes and ordinances that were designed, like the EMAA, for the purpose of protecting the public health as part of state's police powers. *Spalding v. Granite City,* 415 Ill. 274, 113 N.E.2d 567 (1953); *People ex rel. Baker v. Strautz,* 386 Ill. 360, 54 N.E.2d 441 (1944). But the scope of those powers is found in and controlled by the statute. And it is against the statute that they must be measured.

B. THE MORATORIA AND THEIR EXTENSIONS EXCEED THE GOVERNOR'S AUTHORITY UNDER THE ILLINOIS EMERGENCY MANAGEMENT AGENCY ACT.

Plaintiffs have stated a cognizable claim and have a reasonable likelihood of succeeding on the claim that the Governor exceeded his authority under the Act. The EMAA's grant of powers is extensive, but not limitless. The legislature was very clear that it was only conferring upon the Governor "the powers provided herein." 20 ILCS 3305/2(a)(2). In the event of a disaster, the legislature specifically empowered the Governor to declare a disaster, and to exercise the powers expressed in section 7 for no more than thirty days. 20 ILCS 3305/7. These are collectively defined as the "Emergency Powers of the Governor" and are limited to the powers expressed therein. *Id*. Even reading these powers "broadly" as the trial court did, the inescapable conclusion is that the authority invoked by the Governor under section 7, specifically, sections (2), (8), (10), and (12) of the Act, did not empower him to impose the Moratoria. As such, the Governor exceeded his statutory authority and the Moratoria and any further extensions must be declared void and restrained.

1. The Moratoria are not supported by the "State Resources" powers in section 7(2) of the Act

The trial court did not explain how the Moratoria constitutes the use of state resources under section 7(2) of the Act, but merely concluded they did. (RC478). This section authorizes the Governor to "[t]o utilize all available resources of the State government as reasonably necessary to cope with the disaster and of each political subdivision of the State." 20 ILCS 3305/7(2). A "resource", for these purposes, is "1a: a source of supply or support: an available means; b: a natural source of wealth or revenue; c: a natural feature or phenomenon that enhances the quality of human life".[9] Properties belonging to private citizens, such as those belonging to the Plaintiffs, are not "resources of the State government", however. An Illinoisan's right to sue and access to the courts are not "state resources" either. They are rights belonging to every citizen under the Illinois Constitution. Ill. Const. 1970, art. I, §§ 12, 13. A private citizens' contract rights are private property as well and cannot be considered a "state resource". Thus, the Governor has no right to utilize these private resources for the disaster purposes of Section 7(2).

And anyway shutting the doors of the courts to landlords, and prohibiting state law enforcement personnel from executing orders of eviction, are not "utilizing" a resource, state or otherwise. They are the denial of the use of those putative "resources". Section 7(2) does not support the Moratoria.

[9] https://www.merriam-webster.com/dictionary/resource

2. The Moratoria are not supported by the power to promote the safety and security of the civilian population under section 7(12) of the Act

The power granted the Governor in section 7(12) to "perform and exercise any other functions, powers, and duties as may be necessary to promote and secure the safety and protection of the civilian population", 20 ILCS 3305/7(12), does not justify the Moratoria either. Section 7(12) is not a catch-all grant of unlimited power that the trial court describes. (R.C478). Rather, it pertains exclusively to the power to "control, restrict, and regulate … food, feed, fuel, clothing and other commodities, materials, goods, or services" during a disaster. *Id*. These broad powers are found only in this section of the Act and come after the language authorizing the Governor to control commodities and services. They are limited to this these things only.

Under the well-settled rule of statutory construction, "where the legislature includes particular language in one section of a statute but omits it in another section of the same statute, courts will presume that the legislature acted intentionally in the exclusion or inclusion" and that the legislature intended different results." *People v. Smith,* 2016 IL 119659, ¶ 30, 76 N.E.3d 1251. The express inclusion of a provision in one part of a statute and its omission in a parallel section is an intentional exclusion from the latter. *Bank of Am., N.A. v. Kulesza*, 2014 IL App (1st) 132075, 14 N.E.3d 684. Thus, if the legislature intended that the catch-all language in section 7(12) applied to section 7 as a whole it would have done so by either including a similar provision in each of the other sections or making the catch all provision a separate section at the end of the other enumerated powers in section 7.

Nor is the suspension of residential evictions consistent with the first clause of section 7(12) which permits the Governor to control "the use, sale or distribution" of

goods and services. (R.C478. Order p. 24). Section 7 is concerned only with "goods" and "services". Neither residential tenancies nor access to the court house can under even the broadest reading of the EMAA be considered goods or services. "Goods" are "tangible or movable personal property other than money; esp. articles of trade or items of merchandise.[10] "Services" are "the performance of any duties or work for another,"[11] The catch-all power is limited to the power expressly reserved in section 7(12). Since residential tenancies and the right to sue for eviction are not goods or services, section 7(12) does not justify the Moratoria.

3. The Residential Eviction Moratoria are not supported by the power to control the movement of persons and occupancy of premises in section 7(8) of the Act

Similarly, section 7(8) of the EMAA, which authorizes the Governor "[t]o control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein," does not empower the Governor to issue the Residential Eviction Moratoria either. *Id.* § 7(8). Plaintiffs' access to the courts to commence evictions has no effect on the "movement of persons" or the "occupancy of premises." The end result of a successful eviction, like any civil suit, is the plaintiff receives a judgment order for possession. To actually obtain possession, the landlord has to place that order with the sheriff who is statutorily bound to enforce it. 55 ILCS 5/3-109. "[T]he entire point of eviction [may indeed be] to oust the tenant of possession" (RC478),but the commencement of an eviction does physically put the tenant out of the

[10] Black's Law Dictionary, p. 714 (8th Ed. 1999).

[11] Random House Webster's College Dictionary (2001), p. 1202.

property. It puts him or her in court, or it should but for the Moratoria. Thus, the Residential Eviction Moratoria cannot be justified under section 7(8) either.

4. The Moratoria are not supported by the power to use "temporary housing" in section 7(10) of the Act

Nor does section 7(10) of the EEMA, which authorizes the Governor "[t]o make provision for the availability and use of temporary emergency housing" justify the Moratoria. Plaintiff's properties are not "temporary emergency housing." Temporary housing is generally understood to be "any tent, trailer, motor home or other structure used for human shelter which is designed to be transportable and which is not attached to the ground, to other structures or to any utility system on the same premises for more than thirty (30) days."[12] Indeed, the state's own recovery plan uses similar terms in discussing disaster housing.[13] Moreover, the non-paying tenants in this case have been occupying the subject properties pursuant to leases, and have been living in the units, well before the crisis began. Their housing was not temporary.

5. The Moratoria amounts to the "possession, occupancy and use" of Plaintiffs' properties under section 7(4) which therefore required an offer of just compensation.

Even if the Enforcement Moratoria are deemed to be within the Governor's powers to control the movement and occupancy of premises under section 7(8) or to make "availab[le] and use" "temporary emergency housing" under section 7(10), these

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12 https://www.lawinsider.com/search?clauses[0]=Temporary%20housing&_index[0]=contract&tab=definition

13 https://www2.illinois.gov/iema/Preparedness/Documents/IDRP/IDRP_AnnexI.pdf#search=Temporary%20HOusing

powers are not boundless, as the EMAA read in its entirety makes abundantly clear. When the exercise of these powers results in the taking of even temporary possession of private property, then the power is subject to the restrictions imposed by section 7(4). Section 7(4) allows the Governor "to take possession of and for a limited period occupy and use any real estate necessary to accomplish those objectives; but only upon the undertaking by the State to pay just compensation therefor." 20 ILCS 3305/7(4). The requirement that the State pay just compensation in Section 7(4) is intended to ensure that this extraordinary power does not violate the Illinois or Federal Constitutions' prohibition against taking of property without just compensation. Ill. Const. art. I, § 15; U.S. Const. Amend. 5.

While the Governor argued and the trial court agreed that the Moratoria did not amount to the taking of possession or occupancy of Plaintiffs' property, and thus Section 7(4) is inapplicable, under the law on possession that is exactly what the Moratoria did. The trial court well noted that physical possession is not the only means by which property may be possessed. Well-established "Takings" jurisprudence makes this clear. *See, St. Lucas Ass'n v City of Chicago,* 212 Ill.App.3d 817, 571 N.E.2d 865 (1991); *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). But whether the Moratoria amounts to possession of property is not answered by a "Takings" analysis. It is determined by the language of the EEMA which uses the terms "to take possession of" and "occupy and use" any real estate. 20 ILCS 3305/7(4). Critically, the qualifier "physical" is missing. The trial court's statement that the General Assembly made a careful distinction between possession and the physical occupation of land is correct, but not in the way the court meant.

So what does "possession" mean under the EMAA? It means what it means under Property Law: the ability to control the occupancy of premises to the exclusion of the rights of others in real property. This is supported by the definitions of "possession" and "possessory interest" in Section 7 of the Restatement (First) of Property which states that:

> "[a] A possessory interest in land exists in a person who has (a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land; or (b) interests in the land which are substantially identical with those arising when the elements stated in Clause (a) exist." *See*, Restatement (First) of Property (1936) ("Restatement of Property") § 7.

The comment to clause (a) of section 7 of the Restatement of Property explains that possession of land has two elements: (i) "a physical relation to the land that to a certain extent is adapted to give control over the land and to exclude other persons therefrom" and (ii) "an intent to exclude other persons in general from the physical occupation of the land." *Id*. Note that neither element requires physical possession. Likewise, Black's Law Dictionary defines "possession" as:

> "The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.
>
> *The law, in general, recognizes two kinds of possession*: *actual possession and constructive possession.* A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it."

(Emphasis added.) Black's Law Dictionary 1047 (5th ed.1979). Each of these sources acknowledge that possession occurs not only when there is a physical occupation of the land but also control of the property, "either directly or through another person" with the intent to exclude others from it.

Here, the result of the Moratoria was to transfer the physical possession and control of the leased premises to non-paying tenants to the exclusion of landlords. This intent is found and expressed clearly in the Executive Order imposing the Moratoria to "ensur[e] that individuals remain in their homes during this public health emergency." EO 2020-30. If a landlord cannot remove someone from his or her property, then the possession, control and occupancy has passed to the tenant and away from the landlord. Thenceforth, the tenant possesses, controls, occupies and uses the property at the behest of the Government. The Moratoria have thus effectively taken Plaintiffs' properties for which the state was statutorily beholden to contemporaneously offer just compensation.

As the provisions invoked by the Governor did not empower him to issue the Moratoria in March, the Moratoria are ultra vires acts, and should be declared so and enjoined. For the same reason, the Governor exceeded his authority in extending the Moratoria and any further extensions should be also enjoined. Accordingly, the Plaintiffs have stated cognizable claims under Counts I and Count III of the Complaint and the trial court's order dismissing those counts should be reversed. For the same reasons, Plaintiffs have demonstrated they are likely to succeed on these claims.

C. THE GOVERNOR'S DECISION TO EXTEND THE MORATORIA BEYOND MAY 29, 2020, WHEN THE STAY AT HOME ORDER WAS LIFTED, WAS UNREASONABLE AND ARBITRARY.

If the Governor had the statutory authority to impose the Moratoria, their extension beyond May 29, 2020 when the Stay at Home Order was lifted was an arbitrary exercise of executive power and no longer necessary. It is not that a public health emergency no longer exists, (R.C475). Rather, it is that the Governor's stated reason to impose the Moratoria – to shelter in place - no longer exists. As such, the May 29, 2020 extension of the Moratoria, and the subsequent extensions, including EO 2020-48 and EO 2020-51, are perforce null and void.

While he might not have to provide a basis or rationale for his decision to impose or extend the Moratoria, the Governor's decision is not immune from review or reversal. Illinois law is clear that the Governor's decision is subject to review for arbitrariness and unreasonableness. *People ex. rel. Barmore v. Robertson,* 302 Ill. 422, 432, 134 N.E. 815, 819 (1922). "As we have said, while the courts will not pass upon the wisdom of the means adopted to restrict and suppress the spread of contagious and infectious diseases, they will interfere if the regulations are arbitrary and unreasonable." *Id.* at 432. But "[t]he power to amend is not arbitrary. It cannot be exercised merely because certain individuals want it done or think it ought to be done. The change must be necessary for the public good." *Kennedy v. City of Evanston,* 348 Ill. 426, 433, 181 N.E. 312 (1932). Furthermore, a regulation or rule based on a necessity arising from a public health emergency will be set aside where the emergency no longer exists, even in the midst of an epidemic. *Barmore*, at 433. Whether a regulation or rule is still necessary is subject to review by the courts.

On March 20, 2020, the Governor issued EO 2020-10 ordering all individuals currently living within the State of Illinois to stay at home or at their place of residence except for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses. ("Stay at Home Order"). (R. C110-18). The same order imposed the first of the Moratoria instructing all state, county, and local law enforcement officers in the state of Illinois to cease enforcement of orders of eviction for residential premises. (*Id.*) The text of the Executive Order explained that "the enforcement of eviction orders for residential premises is contrary to the interest of preserving public health and ensuring that individuals remain in their homes during this public health emergency…". (*Id.*)

On April 23, 2020, in EO 2020-30, the Governor re-imposed the Moratoria to ensure that people continue to remain in their homes during the Pandemic. (R.C124-26). The Order also stated that the continued need for the directive on evictions will be evaluated upon the issuance of a new Gubernatorial Disaster Proclamation. (*Id.*) Nonetheless, the Governor extended the Moratoria on April 30, 2020 to May 29, 2020 (*Id*). On May 29, 2020, he extended it again to June 27, 2020 (*Id.*) and on June 26, 2020, he extended it again to July 27, 2020. (*Id.*) There is no evidence any consideration went into these extensions, as EO 2020-30 had promised.

Yet, when he extended the Moratoria the second time, on May 29, 2020, the Governor also lifted the Stay At Home Order, EO 2020-38. (R.C145-55). This decision, and the decision to further extend the Moratoria, was unreasonable because the circumstances the Governor cited for imposing in the first place by his own reckoning no longer exist.

Furthermore, the extension of the Moratoria beyond May 29, 2020 was arbitrary and unreasonable because it applied only to delinquent renters and not to the many other types of people confronted with housing insecurity. Occupants of property facing ejectment, foreclosure, and replevin all face the same problems and no doubt share the same anxieties as delinquent renters, but there is no protection for them. The same public health issues, and the same risk of exposure to contracting COVID-19, apply equally to these people. It is also completely arbitrary to allow owners of property seeking possession to file ejectment proceedings, or mortgagees to foreclose and, seek expedited orders of possession, or condominium associations, or obligees on a manufactured home contract, to seek to replevin from the obligors home for defaulting on payment, but not allow landlords to regain possession of their property from their non-paying tenants.

There is no rational reason why every delinquent renter can live in their home for free while their fellow Illinoisans can't. No doubt the search for new housing requires numerous interactions with people outside one's household, including realtors and movers, which increases the risk of contracting COVID-19. But these are the same risks anyone seeking a new place to live face, including home buyers and other renters. If tenants cannot pay their rent because of economic hardships resulting from the Pandemic or that eviction will leave them no place to live other than the street or a shelter, that's one thing.[14] But a blanket ban on evictions is unreasonable.

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[14] Thus, many of the other state eviction moratoria eschewed a blanket moratorium on evictions and tailored it to only tenants who have been economically impacted by the pandemic. See, i.e., Arizona: (https://housing.az.gov/general-public/rental-assistance-resources-eviction-prevention); California:(https://www.gov.ca.gov/2020/08/31/governor-newsom-signs-statewide-covid-19-tenant-and-landlord-protection-legislation); Kansas: (https://governor.kansas.gov/wp-content/uploads/2020/08/EO-20-61-Reissued-Evictions-

If the extensions of the Moratoria were not arbitrary or unreasonable, then they were no longer necessary when the Stay at Home Order lapsed and certainly not when Illinois entered Phase Four of the State's plan for reopening.[15] Executive Order EO 2020-38 lifting the Stay At Home Order is proof that the Governor no longer believes there is a need to shelter in place. If he no longer believed that to be the case, the Governor's decision cannot be countenanced. The current extension of the Moratoria should be lifted and the Governor enjoined from making any further extensions. Plaintiffs have therefore stated a claim in Count III that is reasonably likely to succeed.

D. THE MORATORIA VIOLATE PLAINTIFFS' RIGHT TO REMEDY AND JUSTICE.

Section 12 of the Illinois Constitution mandates that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Ill. Const. art. I, § 12. Illinois courts have long recognized that "[f]ree access to the courts as a means of settling private claims or disputes is a fundamental component of our judicial system, and "… courts should be open to litigants for the settlement of their rights." *Lyddon v. Shaw*, 56 Ill.App.3d 815, 821, 372 N.E.2d 685 (1978); *Berlin v.*

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and-Foreclosures-Executed.pdf); Maryland: (https://governor.maryland.gov/wp-content/uploads/2020/03/Executive-Order-Temp-Evictions-Prohibiting.pdf); New York: (https://www.assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S08192&term=2019&Summary=Y&Text=Y). Likewise, the recent eviction moratorium issued by the Center for Disease Control effective September 4, 2020 halts evictions on tenants who, among other things, attest that they will be at risk of homelessness or a shared living setting if they were evicted. https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html.

[15] Among other things, since the State has entered Phase Four, gatherings of up to 50 people are permitted, non-essential workers can return to work, and child care and summer programs can resume. (R.C006).

Nathan, 64 Ill.App.3d 940, 951, 381 N.E.2d 1367 (1978) ("It is the overriding public policy of Illinois that potential suitors must have free and unfettered access to the courts."). While the right to access and justice is a right protected under the constitution it is not a fundamental right. So in assessing whether Plaintiffs have made out a claim that the Moratoria violate this right, it is subject to the rational basis test. *Begich v. Indus. Comm'n,* 42 Ill. 2d 32, 245 N.E.2d 457 (1969).

The trial court and Governor misconstrue the nature of the violation plead in Count VI. It is not whether Plaintiffs have a statutory remedy in an eviction, (R.C489, p. 34); they most certainly do. But it is whether the Residential Eviction Moratorium prohibits them from enforcing their remedy under the Eviction Act. It unquestionably does. And although the bar is only temporary, it is real, and no one can say how long it will last. The Governor has not hidden the fact that he can and will extend many of the restrictions imposed by the Executive Orders if he feels circumstances warrant it.[16]

The trial court took out of context the Supreme Court and other courts of appeal holdings that Section 12 "is merely an expression of a philosophy and not a mandate that a certain remedy be provided in any specific form" citing *Segers v. Indus. Comm'n,* 191 Ill. 2d 421, 732 N.E.2d 488 (2000), *DeLuna v. St. Elizabeth's Hosp.,* 147 Ill.2d 57, 73, 588 N.E.2d 1139, 1146 (1992), *Sullivan v. Midlothian Park Dist.,* 51 Ill.2d 274, 277–78, 281 N.E.2d 659, 662 (1972), and *Behrens v. Harrah's Ill. Corp.*, 366 Ill.App.3d 1154, 1159, 835 N.E.2d 553 (2006). Those decisions explain that Section 12 either does not

[16] *See*, Appeals Judges Question Pritzker's Ability to impose, lift COVID restrictions on Churches at Will Even if Backed by Data, Cook County Record June 12, 2020.https://cookcountyrecord.com/stories/539642747-appeals-judges-question-pritzker-s-ability-to-impose-lift-covid-restrictions-on-churches-at-will-even-if-backed-by-data; See also, "Restore Illinois Phase Five - What could cause us to move back?" (R.C 74.).

entitle a person to a remedy when a cause of action does not exist or that it limits, but does not abolish, a remedy. Those decisions do not hold that where a cause of action already exists, like it does here, that a law preventing the plaintiff from prosecuting it does not fall within this constitutional mandate. Thus, in *Heck v. Schupp,* 394 Ill. 296, 68 N.E.2d 464 (1946) the Supreme Court held that a statute was invalid under the remedy and justice provision which abolished a cause of action and prohibited a person from filing a pleading in a civil action for alienation of affections. The Court held it was unconstitutional because its effect was to leave one who suffered injury with no remedy. Where the right exists, and government fiat expressly prevents the plaintiff from exercising its right enforce that right, the government's action unconstitutionally denies that litigant access to the courts – no matter if the government intends to restore the right at a later time.

The Moratoria not only violates the constitutional mandate that "every person … shall obtain justice … *promptly*" Ill. Const. art. I, § 12, (emphasis added), but it also violates the legislative intent underpinning the Eviction Act that an eviction is meant to be a summary proceeding to expeditiously restore to the owner possession of its property. *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App 3d 110930, 972 N.E.2d 1234 (2012). If the Moratoria is not a permanent bar to eviction, it is a permanent bar to having that eviction summarily decided. The Moratorium on evictions and the enforcement of possession orders assure that justice will not be prompt and that the eviction will not be summarily decided.

Accordingly, the Moratoria are an unconstitutional violation of Plaintiffs' rights under Article I § 12 of the Illinois Constitution guaranteeing access to the court and to

prompt justice and remedy. The Plaintiffs have therefore stated a claim in Count VI and its dismissal should be reversed. Furthermore, the same reasons, the claim has a reasonable likelihood of succeeding on the merits of this claim.

III. THE TRIAL COURT ERRED IN DENYING THE PRELIMINARY INJUNCTON BECAUSE PLAINTIFFS HAD SATISFIED THEIR RIGHT TO THE RELIEF AND THE BALANCE OF EQUITIES DOES NOT FAVOR THE GOVERNOR.

Standard of Review. A trial court's grant or denial of a preliminary injunction is usually reviewed for an abuse of discretion. *Lifetec, Inc. v. Edwards,* 377 Ill.App.3d 260, 268, 880 N.E.2d 188 (2007). "A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the court's view." *People ex rel. Madigan v. Petco Petroleum Corp.,* 363 Ill.App.3d 613, 634, 841 N.E.2d 1065 (2006). Where, however, a court does not make any factual findings and rules on a question of law, appellate review is de novo. *Clinton Landfill, Inc. v. Mahomet Valley Water Auth.,* 406 Ill.App.3d 374, 378–79, 943 N.E.2d 725 (2010).

To be entitled to preliminary injunctive relief, a plaintiff must demonstrate (1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case. *Mohanty v. St. John Heart Clinic, S.C.,* 225 Ill.2d 52, 62, 866 N.E.2d 85 (2006). While the plaintiff is not required to make out a case which would entitle her to judgment at trial, she "must establish a 'fair question' as to each of the elements." *See People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 177, 781 N.E.2d 223 (2002) ("[o]n appeal, we examine only whether the party seeking the injunction has demonstrated a prima facie case that there is a fair question concerning the existence of the claimed rights"). The trial court may also deny a preliminary injunction where the balance of hardships does not

favor the moving party. *Bollweg v. Richard Marker Associates, Inc.,* 353 Ill.App.3d 560, 572, 818 N.E.2d 873 (2004). "In balancing the equities, the court should also consider the effect of the injunction on the public." *Kalbfleisch v. Columbia Community Unit School District Unit No. 4,* 396 Ill.App.3d 1105, 1119, 920 N.E.2d 651 (2009).

The trial court's denial of the preliminary injunction was not because Plaintiffs had not demonstrated a clearly ascertained right in need of protection. The Governor conceded this point. Nor was it because the Plaintiffs had an adequate remedy at law. The trial court found that some of the claims at least "**might** not be compensable (at least, **adequately** compensable) with money damages" (emphasis in original). (R.C474). And while the trial court found that Plaintiffs were unlikely to succeed on the merits of most of their claims, it did find that they had crossed that threshold on Count IV, their Separation of Powers claim. (R.C501, p. 46). Despite satisfying each of these elements, the trial court's reason for denying the injunction was that the balance of equities "strongly favored" keeping the Moratoria in place. (*Id.*) Other than how it came down on balancing the equities, the trial court was mainly correct in its assessment.

A. PLAINTIFFS DO NOT HAVE AN ADEQUATE REMEDY AT LAW.

A remedy at law is adequate if it is "'clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy.'" *See Lucas v. Peters,* 318 Ill.App.3d 1, 13, 741 N.E.2d 313 (2000), quoting *Cross Wood Products, Inc. v. Suter,* 97 Ill.App.3d 282, 286, 422 N.E.2d 953 (1981). A plaintiff, however, does not have an adequate remedy at law and should be entitled to equitable relief where damages cannot be determined and where plaintiff has shown a continuing

violation that would allow only for the recovery of nominal damages. *Lucas,* 318 Ill.App.3d at 16.

The trial court was correct that Plaintiffs have established that at least some of Plaintiffs' claims will not be satisfied with money damages. (R.C474 p. 19). Simply because the Moratoria does not excuse tenants from paying rent, and that the landlords will eventually be able to sue their tenants for back rent, does not mean the Plaintiffs have an adequate remedy at law. It's the property the Plaintiffs want back, not the rent, or not only the rent. Should Plaintiffs wish to live in the property themselves, or convert it to another use, or change tenants to accommodate a different business, or renovate the property to attract better or different tenants, the fact that the non-paying renter owes rent is immaterial. It's not about rent but about the right to possession and it is the latter which cannot be satisfied with a claim for damages against the tenants. *See, e.g., Abel v. Flesher*, 296 Ill. 604, 609, 130 N.E. 353 (1921); *Moore v. Gar Creek Drainage Dist.,* 266 Ill. 399, 107 N.E. 642 (1914); *Chicago Title & Tr. Co. v. Weiss*, 238 Ill.App.3d 921, 605 N.E.2d 1092 (1992). The Moratoria's several extensions, and the strong likelihood of further extensions, amply establishes that Plaintiffs do not have an adequate remedy at law for the harm is ongoing with no end in sight.

B. PLAINTIFFS HAVE SUFFERED AND WILL CONTINUE TO SUFFER IRREPARABLE HARM IF THE MORATORIA ARE NOT ENJOINED.

The trial court largely skipped over this element. (R.C474). To meet the requirement of irreparable harm the harm must be expected with reasonable certainty and not merely possible. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill.2d 356, 748 N.E.2d 153 (2001). An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated in damages or when damages

cannot be measured by any pecuniary standard. *Travelport, LP v. Am. Airlines, Inc.,* 2011 IL App (1st) 111761. When the harm is of a continuous nature, and involves a constitutional right for which monetary compensation would be inadequate, courts have considered it to be per se irreparable harm for purposes of injunctive relief. *Guns Save Life, Inc. v. Raoul,* 2019 IL App (4th) 190334, ¶ 51, 146 N.E.3d 254; *C.J. v. Department of Human Services*, 331 Ill.App.3d 871, 891-92, 771 N.E.2d 539 (2002); *Lucas v. Peters,* 318 Ill.App.3d 1, 16, 741 N.E.2d 313 (2000). Once a protectable interest is established, irreparable injury to the plaintiff is presumed if the interest remains unprotected. *A-Tech Computer Servs., Inc. v. Soo Hoo,* 254 Ill.App.3d 392, 400, 627 N.E.2d 21 (1993).

Here, the continuous violation of plaintiffs' constitutional rights alone demonstrates that Plaintiffs have suffered an irreparable harm. *C.J. v. Dep't of Human Servs.* But irrespective of the violations of their constitutional rights, Plaintiffs have been harmed and continue to be harmed in one or more or the following ways by the Moratoria: (i) by the state's constructive possession of Plaintiffs' property without the simultaneous payment of just compensation to the Plaintiffs; (ii) by being denied the right to the restoration of their property; (iii) by being prohibited and restricted from commencing an eviction where their tenants are in breach of the lease for non-payment of rent; (iv) by being prohibited and restricted from the right to enforce a valid court order of possession to restore possession of their property following their successful evictions; (v) by being compelled to provide housing to non-paying tenants without receiving any remuneration or compensation for doing so; and (vi) by suffering a violation of their constitutional right to receive just compensation for the taking of their private property.

Plaintiffs will continue to suffer these substantial and irreparable injuries as long as the Moratoria are in place.

Only injunctive relief can remove the illegal impediment to access to the courts to commence evictions against non-paying tenants and/or have possession orders they have already obtained immediately enforced. Plaintiffs have therefore suffered irreparable harm that only injunctive relief can abate.

C. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF ONE OR MORE OF THEIR CLAIMS.

The trial court analyzed each of Plaintiffs' claims and determined that Plaintiffs demonstrated a likelihood of succeeding only on their Separation of Powers claim (Count IV). (R.C485-86). While Plaintiffs submit that all of their claims state valid causes of action, as plead, their statutory claims under Counts I, II, and III, their constitutional claims alleging that the Moratoria violate their rights to a civil jury trial, (Count V), remedy and justice (Count VI) and equal protection (Count VII) are also likely to succeed on the merits for purposes of injunctive relief.[17]

1. The Moratoria violate the Separation of Powers provision of Article II, Section 1 of the Illinois Constitution.

The trial court was correct in holding that Plaintiffs were likely to succeed on the part of Count IV which asserts that the Moratoria violate the Constitution's Separation of Powers provision, insofar that it infringes on the judiciary's power to control and administer its courts. The trial court was incorrect, however, in holding that the Moratoria

[17] The arguments advanced in Part II above demonstrating why the *ultra vires* claims plead in Counts I, II, and III, and why the constitutional claim alleging a violation of the right to a remedy and justice, (Count V) state valid causes of action also demonstrate why they will likely succeed on the merits of those claims. The same arguments will therefore not be repeated in this Part of the brief.

do not also invade the province of the legislature by suspending Illinois' citizens' rights under the Eviction Act and the obligation of state law enforcement personnel to enforce lawful court orders.

Article II, section 1, of the Illinois Constitution of 1970 expressly states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. The doctrine of separation of powers means that "'the whole power of two or more of the branches of government shall not be lodged in the same hands.' " *Strukoff v. Strukoff,* 76 Ill.2d 53, 58, 389 N.E.2d 1170 (1979), *quoting In re Estate of Barker,* 63 Ill.2d 113, 119, 345 N.E.2d 484 (1976). To determine whether a given practice constitutes a violation of the separation of powers courts have to examine the kind of power involved. *See generally, People v. Taylor*, 102 Ill.2d 201, 76, 464 N.E.2d 1059 (1984); *People v. Bryant*, 278 Ill.App.3d 578, 584, 663 N.E.2d 105 (1996). If a branch of government has traditionally performed a certain function over a long period of time, that function probably belongs to that branch. *People v. Hammond*, 397 Ill.App.3d 342, 354, 925 N.E.2d 1185 (2009).[18]

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[18] Reference to federal jurisprudence on separation-of-powers in analyzing whether the Moratoria violates this constitutional provision is unnecessary because the federal constitution does not contain an explicit separation-of-powers provision. *See People v. Caballes*, 221 Ill. 2d 282, 289, 851 N.E.2d 26 (2006) (where a provision may be unique to the state constitution it must be interpreted without reference to a federal counterpart). Indeed, the reason that separation-of-powers challenges are upheld more frequently in Illinois than in the federal courts or in many other states is because the Illinois Constitution contains an explicit separation-of-powers provision. *Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 30, 483 N.E.2d 226 (1985) (Simon J., dissenting).

a. The Moratoria invade the province of the legislative branch which has the exclusive authority to make and change laws.

All legislative power is vested in the General Assembly. Ill. Const.1970, art. IV, § 1. The General Assembly is the department of government to which the constitution has entrusted the power of changing the laws. *Maki v. Frelk*, 40 Ill.2d 193, 196, 239 N.E.2d 445 (1968). Generally, it is beyond the power of the executive department to exercise, question, interfere with, or limit powers conferred on the legislative body. 16 C.J.S. Constitutional Law § 453. Rather, executive power is the power which compels obedience to the laws and executes them. *Witter v. Cook Cty. Comm'rs*, 256 Ill. 616, 100 N.E. 148 (1912).

By the Moratoria, the Governor has directly interfered with the Eviction Act. 735 ILCS 5/9-101 *et seq*. The Eviction Act is a summary, special statutory proceeding to adjudicate and restore rights of possession. *Wells Fargo Bank, N.A. v. Watson,* 2012 IL App 3d 110930, 972 N.E.2d 1234 (2012). It expressly bestows on the "owner of lands, [the right to] sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof, by a civil action…". 735 ILCS 5/9-201. The statute permits a landlord to "any time after rent is due, demand payment thereof and notify the tenant…that unless payment is made…not less than 5 days after service thereof, the lease will be terminated." 735 ILCS 5/9-209. The statute also permits a landlord to terminate a tenancy for reasons other than non-payment of rent. 735 ILCS 5/9-205. "[T] distinctive and limited purpose of [the Eviction Act] is to supply a speedy remedy to permit persons entitled to the possession of lands to be restored thereto. *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 251, 263 N.E.2d 833 (1970)

The trial court reasoned that the Moratoria was not a change in the law, but merely a delay in the execution of the law. (R.C 484). But it missed the point that the delay in execution is the change in the law. The Eviction Act's purpose was to supply a speedy remedy to landlords. *See, Rosewood Corp. v. Fisher*, supra. Thus, ***any*** delay undermines the purpose of the Eviction Act. The denial of the right to a speedy remedy and the summary disposition of a landlord's claim for the return of its property has to made by the legislature. *See Maki v. Frelk*, supra, (the removal of a right provided in a statute has to be made by the legislature). This is not analogous to those laws which "impose reasonable limitations and conditions upon access to the courts." *McAlister v. Schick,* 147 Ill.2d 84, 94, 588 N.E.2d 1151 (1992). It is fundamentally different to say "you can sue, if you first meet a statutory condition" than it is to say "you can't sue". The Moratoria is a complete suspension of the law and a negation of rights bestowed under the Eviction Act.

The same applies to the Enforcement Moratoria. It negates the provisions of County Code requiring the sheriffs to serve and execute all "judgments of every description that may be legally directed or delivered to them." 55 ILCS 5/3-6019. The suspension of the sheriffs' statutory obligation to serve and execute valid court orders may only be done by legislative fiat.

The trial court was wrong that the Moratoria were authorized under the EMAA. Not only does the Act not grant the Governor the right to suspend laws -- such power is conspicuously absent from section 7 --- but if it did it would amount to a different violation of the Separation of Powers doctrine. The legislature cannot off-load the power

to negate or suspend a law to the executive branch.[19] The legislature was not unaware of this restriction on its powers when it enacted the EMAA for it gave the Governor the express power to suspend state *regulatory* statutes, and the rules and regulations of state agencies. 20 ILCS §3305/7(1). But it did not give him the power to suspend other statutes, because it was constitutionally prohibited from doing so. *See, People ex rel. Chicago Dryer Co. v. City of Chicago*. When the legislature includes particular language in one section of a statute but omits it in another section of the same statute, the presumption is that the legislature acted intentionally and purposely in the inclusion or exclusion, and that the legislature intended different meanings and results. *People v. Clark,* 2019 IL 122891, 135 N.E.3d 21. Thus, the EMAA did not give the Governor the power to suspend the Eviction Act and the County Code, certainly not beyond thirty days.

The Moratoria imposed by the Governor exceeded the very power the Governor was entrusted to enforce. He and his office are constitutionally required to obey and execute the law. *Witter v. Cook Cty. Comm'rs*, 256 Ill. 616, 100 N.E. 148 (1912). Ordering a stay on evictions and barring the enforcement of lawfully obtained possession orders is not "obeying" the law or "executing" it. Rather, it is "disobeying" and prohibiting the "execution" of the law.

b. The Moratoria also invade the province of the judicial branch to perform its judicial functions.

The trial court was right in concluding that Plaintiffs showed a likelihood of succeeding on that part of the Separation of Powers claim contending the Moratorium

[19]The doctrine of the separation-of-powers encompasses two fundamental prohibitions, the first of which is that no branch may encroach upon the powers of another, and the second of which is that no branch may delegate to another branch its constitutionally

impermissibly invades the power of the judiciary. Article VI, section 1 of the Illinois Constitution declares that "[t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Ill. Const. art. VI, § 1. "Judicial power is the power which adjudicates upon the rights of citizens and to that end construes and applies the law." *People v. Joseph*, 113 Ill.2d 36, 41, 495 N.E.2d 501 (1986). The concept of "judicial power" includes the authority to prescribe and institute rules of procedure, Ill. Const. art. VI, § 16; *Agran v. Checker Taxi Co*., 412 Ill. 145, 148–149, 105 N.E.2d 713 (1952), and "all powers necessary for complete performance of the judicial functions." *Jorgensen v. Blagojevich,* 211 Ill. 2d 286, 312, 811 N.E.2d 652, 667 (2004) *citing People ex rel. Illinois State Bar Ass'n v. Peoples Stock Yards State Bank*, 344 Ill. 462, 470, 176 N.E. 901 (1931), the power to adjudicate upon the rights of citizens and to that end construe and apply the law" *People v. Joseph*, 113 Ill.2d 36, 41, 495 N.E.2d 501 (1986), and, of particular relevance here, the power to hear and decide cases. *Administrative Office of the Illinois Courts v. State & Municipal Teamsters, Chauffeurs & Helpers Union, Local 726*, 167 Ill.2d 180, 192, 657 N.E.2d 972 (1995).

Thus, the power and authority to hear cases, including eviction cases, belong exclusively to the courts. Consistent with that power many of the courts in this state suspended eviction (and foreclosure) filings in response to the Pandemic pursuant to authority from the Illinois Supreme Court.[20] Will County elected not to impose a

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assigned power. *People ex rel. Chicago Dryer Co. v. City of Chicago,* 413 Ill. 315, 109 N.E.2d 201 (1952).

[20] For example, **Cook County**, per Administrative Order 2020-06, stayed all evictions, foreclosures and suspended all eviction orders through May 31, 2020, which it then extended to July 31, 2020 (Administrative Order 2020-02) ; the **Third Judicial Circuit** (Madison and Bond Counties) per Administrative Order 2020-M-14, opened its courthouses on June 1, 2020 and authorized the Sherriff to resume evictions on June 1,

moratorium on eviction filings, expressly authorizing that "[a]ll cases (including motions and pleadings) may continue to be filed pursuant to Supreme Court Rule." See, Twelfth Judicial Circuit Court Administrative Order 2020-08 (March 17, 2020). Along with almost every other court in the state, Will County re-opened its courts on June 1, 2020 and re-affirmed that all cases may continue to be filed. See, Twelfth Judicial Circuit Court Administrative Order 2020-23 (May 27, 2020)). Will County could have decided not to allow or suspend evictions but chose not to.

The Residential Eviction Moratorium illegally seizes the court's power and authority by prohibiting landlords from exercising their rights under the Eviction Act and barring courts from hearing and deciding eviction cases. The Enforcement Moratoria represents an even a greater encroachment on the power of the courts because the landlord is already in possession of an enforceable court order. By barring the enforcement of possession orders, the Governor has impermissibly interfered with and

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2020; the **Fourth Judicial Circuit** (Christian, Clay, Clinton, Effingham, Fayette, Jasper, Marion, Montgomery, and Shelby Counties), per Administrative Order No. 2020-04 (amended) ordered that "All evictions will cease until the expiration of the Order"; **Macoupin County**, per Local Administrative Orders 2020-AO-004,006, 008 ordered that all evictions and foreclosures are postponed until expiration of the Governor's Moratoria on evictions expire; the **Sixteenth Judicial Circuit** (Kane County) per General Order 20-17 and -18, ordered that al evictions and foreclosures are suspended until June 1, 2020; the **Nineteenth Judicial Circuit** (Lake County) per Administrative Order 2020-23 ordered that "foreclosure sales and the execution of eviction orders relating to residential real estate are suspended until further order of the court"; the **Twenty-First Judicial Circuit** (Kankakee and Iroquois Counties) per Administrative Order 2020-17 directed that no eviction or foreclosure orders will be entered prior to June 1, 2020; **Sangamon County**, per Administrative Order 2020-09 and **Jersey County**, per Administrative Order 2020-50, opened their courts on June 1, 2020 but also ordered that all foreclosure and eviction matters were "continued or otherwise postponed"; **Greene County**, per Administrative Order opened the courts on June 1, 2020 but continued all foreclosure and eviction matters through June 30, 2020; the **Twentieth Judicial Circuit** (St. Clair County) per Administrative Order 20-14, opened its courts on June 1, 2020 and resumed hearings on eviction matters on July 6, 2020.

exercised control over a judgment of the court and, in effect, requires state officers, sheriffs, to disregard court orders.

It is the constitutional duty of the courts to preserve the integrity and independence of the judiciary and to protect the judicial power from encroachment by the other branches of government. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 438, 689 N.E.2d 1057, 1091 (1997); *People v. Davis*, 93 Ill.2d 155, 161, 442 N.E.2d 855 (1982). Except where power is given him, the Governor has no authority to interfere with, control, modify, or annul any judgment of a court or any judicial proceeding. *People ex rel. Smith v. Jenkins*, 325 Ill. 372, 374, 156 N.E. 290 (1927); see also, *People ex rel. Coen v. Henry*, 301 Ill. 51, 53, 133 N.E. 636, 636 (1921) (The entry of an order in a cause pending in court is a judicial function, which is not to be exercised at the direction of the Legislature, but in the judgment of the court); *People v. Joseph*, 113 Ill.2d 36, 41, 123, 495 N.E.2d 501 (1986) (if a power is judicial in character another branch (the legislature in that case) is expressly prohibited from exercising it); *In re Guardianship of Burdge*, 2018 IL App (5th) 170317, 115 N.E.3d 1163 (once the legislature creates a justiciable matter, the circuit court's authority to adjudicate that matter derives exclusively from the state constitution and therefore cannot be limited by the authorizing statute). The Moratoria are expressly usurping the rules and powers of the lower court and however well-intentioned, they violate the Separation of Powers provision of the Illinois Constitution.

2. The Moratoria violate Plaintiffs' right to a Civil Jury Trial.

Article I § 13 of the Illinois Constitution states that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. art. I, § 13. "The right to a jury

trial is a fundamental right guaranteed by the state constitution." *Ney v. Yellow Cab Co*., 2 Ill.2d 74, 84, 117 N.E.2d 74 (1954); *Interstate Bankers Cas. Co. v. Hernandez*, 2013 IL App (1st) 123035, ¶ 31, 3 N.E.3d 353. In cases where the right infringed upon is among those considered a "fundamental" constitutional right, courts subject the offending law to "strict" scrutiny. *Tully v. Edgar,* 171 Ill.2d 297, 304, 664 N.E.2d 43 (1996). To survive strict scrutiny the means employed by the legislature must be "necessary" to a "compelling" state interest, and the statute must be narrowly tailored thereto, i.e., the legislature must use the least restrictive means consistent with the attainment of its goal. *Tully*, 171 Ill.2d at 304–05; *In re R.C.,* 195 Ill. 2d 291, 302–03, 745 N.E.2d 1233 (2001).

There is no question that Plaintiffs' will have the right to a jury trial when they ultimately are allowed to evict. "[I]t is the common law right to jury trial as enjoyed at the time of the adoption of the 1970 constitution to which 'heretofore enjoyed' refers." *People ex rel. Daley v. Joyce,* 126 Ill.2d 209, 215, 533 N.E.2d 873 (1988). The parties to an eviction proceeding had the right to a jury trial prior to 1970 (see, Ill.Rev.Stat. chap. 57, par. 5; *Twin-City Inn, Inc. v. Hahne Enterprises, Inc.*, 37 Ill. 2d 133, 225 N.E.2d 630 (1967)) and that right has been retained in the current iteration of the law. See, 735 ILCS 5/9-108. Thus, under Section 13 the right to a jury trial in eviction proceedings remains "inviolate". "Inviolate", in this context, means "unhurt, uninjured, unpolluted, unbroken." *People ex rel. Denny v. Traeger,* 372 Ill. 11, 16, 22 N.E.2d 679 (1939).

It does not matter that the right to a jury trial is merely suspended, and not abolished altogether as the court concluded. (R.C486). Suspension of the right means the right has been "hurt, injured, polluted and broken." No Illinois case has addressed whether the suspension of the right to a civil jury trial offends the Constitution, but the

Ninth Circuit addressed the temporary suspension of a civil jury trial under the Seventh Amendment of the U.S. Constitution in *Armster v. U.S. Dist. Court for the Cent. Dist. of California*, 792 F.2d 1423 (9th Cir. 1986). In *Armster* the district courts had suspended civil jury trials due the insufficiency of funds appropriated for juries. The Appellate Court held in the clearest of terms that the "right to a civil jury trial is violated when, because of such a suspension, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive." *Armster v. U.S. Dist. Court for the Cent. Dist. of California*, 792 F.2d 1423 (9th Cir. 1986). The court found that a three and a half month suspension of the right to civil jury trial violated the Seventh Amendment. *Id*. at 1430. *See also, Odden v. O'Keefe*, 450 N.W.2d 707 (N.D. 1990) (blanket moratorium on civil jury trials for 18-month balance of biennium to achieve necessary budget cuts involved significant period of time and violated plaintiff's state constitutional right to civil jury trial). Justice delayed is justice denied, as it were. *Gray v. Gray,* 6 Ill.App.2d 571, 579, 128 N.E.2d 602 (1955).

The Residential Eviction Moratorium has deprived Plaintiffs of their right to civil trial by jury for over six months now. The test whether the right was violated is not based on why the delay was imposed, as the trial court supposed, (R.C487) but whether the right has been abridged. As discussed above, the Moratoria could have been more narrowly tailored to address the concerns expressed by the Governor and the Amici that the pandemic has had a greater impact on renters than others. That "[i]f residential evictions were to resume, the consequences would be devastation for communities and tenants who have been hit the hardest by Covid-19". (R.C189). The Governor could have limited the moratoria to apply only to those people whose livelihoods were actually

impacted by the pandemic. As pointed out in footnote 14, many states crafted moratoria along these lines and so did the CDC in its recent pronouncement of a nationwide eviction moratoria. Instead, the present moratoria just imposes a blanket ban on foreclosing non-paying tenants regardless of why they are not paying.

The "temporary suspension" (because it might be renewed) of evictions and enforcement of possession orders constitutes a violation of Plaintiffs' constitutional right to civil jury trial and violates their right to due process. They are likely to succeed on Count V as well.

3. The Moratoria violate the Equal Protection Clause of Article I, Section 2 of the Illinois Constitution.

Article I, Section 2 of the Illinois Constitution, known as the Equal Protection Clause, provides that "[n]o person shall be… denied the equal protection of the laws." Ill. Const. Art. I. Sec. 2. The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless the government can demonstrate an appropriate reason to treat them differently. *People v. Masterson*, 2011 IL 110072, ¶ 24, 958 N.E.2d 686. The applicable level of scrutiny applied to an equal protection challenge is determined by the nature of the right impacted. *Id*.

The trial court determined that Plaintiffs are unlikely to succeed on their Equal Protection Claim as well. It concluded that for one thing the Plaintiffs had not shown that their rights under Section 12 and 13 of Article 1 of the Illinois Constitution were violated. (R.C491). As discussed above, Plaintiffs have shown otherwise will not repeat those arguments here. But the court also held Plaintiffs cannot show they are being treated differently than other, similarly property owners. (R.C489-92). The trial court was

incorrect. Plaintiffs have and can show with a reasonable likelihood of success that their rights under the Equal Protect Clause have been violated.

The Governor argued, and the trial court found it "not all that clear", that the Plaintiffs with tenants who are in monetary default under their leases, are differently situated than other property owners who are free to use the courts to be restored their properties. (R.C490). Landlords, the plaintiff class, are seeking the same thing other owners want: their property back. Property owners with the right of ejectment or replevin, mortgagees whose mortgagors have defaulted on their mortgage loans, holders of a personal property security interests in a manufactured home whose obligor has defaulted and is withholding possession, and condominium associations with unit owners who have not paid their assessments, all currently has unrestricted access to the courts to help them recover their property. Landlords do not. Furthermore, landlords with non-paying tenants, owners with ejectment and replevin rights mortgagees whose mortgagors are in default, and holders of a personal property security interests in a manufactured home, whose obligor has defaulted and is withholding possession, and condominium associations with delinquent unit owners, all share in common an occupant who cannot or will not pay to stay in or on the property. Only landlords are forbidden from using the law to be restored possession, however.

The Governor's stated justification for the overly harsh measure barring evictions is "… residential evictions are contrary to the interest of preserving public health by ensuring that individuals remain in their homes during this public health emergency. … ." EO 2020-30. By that reasoning, ejectment actions, foreclosures and replevins are also contrary the interest of preserving public health because the result is that the occupants in

those cases will have to leave their homes as well. Their experience will be no different than evicted tenants, and the threat to the public the same.

At issue is not the plight of renters per se, but the plight of renters who do not or cannot pay their rent. Failed "renters" face no more hardship than mortgagors who are behind on their payment and facing foreclosure or the obligor on a manufactured home contract who stopped paying, and condominium unit owners who have not paid their assessments and the threat of being removed from their home is the same as these other persons. If they end up homeless, or in a shelter, they will all presumably experience the same increased risk of contracting COVID-19. But that is no basis to treat landlords differently.

In re Adoption of L.T.M., 214 Ill.2d 60, 75, 824 N.E.2d 221 (2005) is directly on point. The case challenged on constitutional grounds, including the Equal Protection Clause, section 13(B)(c) of the Adoption Act which provides the right to counsel only to parents who are alleged to be unfit because of mental disability under section 1(D)(p) of the Act. 750 ILCS 50/13(B)(c). The petitioner claimed that he was discriminated against under the Equal Protection Clause because he was situated similarly to a parent who would be entitled to appointed counsel under section 1-5(1) of the Juvenile Court Act, 705 ILCS 405/1–5(1), which provides appointed counsel to all indigent parents threatened with the loss of parental rights, irrespective of mental fitness. 705 ILCS 405/1–5(1). Petitioner claimed that the statutory scheme provided a benefit to others, but not to him, on the basis of a constitutionally illegitimate classification. *L.T.M.,* 214 Ill.2d at 75. The Supreme Court agreed. Observing that the right threatened was a "fundamental right", it found it was a violation of equal protection not to provide appellate counsel to

an indigent parent whose parental rights had been terminated under the Adoption Act, "when he certainly would have had [a right to counsel on appeal had his rights been terminated] under the Juvenile Court Act." *Id.* Apposite of this case, the Court noted that the consequences under either act were the same: "[A] parent who stands to lose his rights under the Adoption Act if he is found unfit is in a very similar situation to a parent who stands to lose the very same constitutional right, based on the very same finding, in proceedings under the Juvenile Court Act." *L.T.M.,* 214 Ill.2d at 76.

The *L.T.M.* decision undercuts the trial court's finding that Plaintiffs' situation is sufficiently different from the other classes of property owners unaffected by the Eviction Moratorium. The classification is the "distinction between parents who must answer a petition under the Juvenile Court Act and those, like John, who must answer under the Adoption Act." *Id*. at 75. It ruled that the fundamental right "should be afforded to similarly situated parents, facing the prospect of termination, regardless of the provision under which the State proceeded." *Id.* at 77. The right at issue here is the right to a civil jury trial, which is denied JL Properties Group B LLC and Mark Dauenbaugh, but available to the other classes of property owners. And that distinction cannot be reasoned away by the fact that the respective classes of owners use different statutory means to enforce their rights.

Plaintiff, Steven Cole, who is affected by the Residential Enforcement Moratorium is also likely to prevail on his Equal Protection Claim, even though his right to the enforcement of his order is not a fundamental right. His claim is subject to the rational basis test to determine whether the Enforcement Moratorium bears a rational relationship to a legitimate government purpose. *People v. Alcozer,* 241 Ill.2d 248, 262,

948 N.E.2d 70, 79 (2011). Under Illinois constitutional law, a person or class of persons is denied equal protection when the statute arbitrarily discriminates against that person or class of persons by withholding some benefit or privilege which the State gives to all others. *Bilyk v. Chicago Transit Authority*, 125 Ill.2d 230, 237, 531 N.E.2d 1 (1988). If the statute's legitimate goal can, with comparable facility, be achieved without classifying persons, the classifications created by the statute deny some persons equal protection of the laws and render the statute invalid. *County of Bureau v. Thompson*, 139 Ill.2d 323, 335–36, 564 N.E.2d 1170 (1990). With the lifting of the Stay at Home Order on May 29, 2020, the movement to Phase Four, and the re-opening of the courts by the various judicial circuits, there is no rational basis to continue to deny persons in possession of an order of possession from enforcing it. Precluding one class of property owners from enforcing such orders is arbitrary and an unconstitutional violation of equal protection concerns.

In sum, Plaintiffs, JL Properties Group B LLC and Mark Dauenbaugh, have a strong likelihood of prevailing on their Equal Protection Claim because they are being deprived a fundamental right to a jury trial, which other types of property owners seeking to regain possession of their property are not. Either deny all owners their right to a jury trial, or deny it to none of them. But to deny only one class their right is unconstitutional discrimination under the Equal Protection Clause. Furthermore, Steve Cole, whose right to enforce the possession order was curtailed by the Residential Enforcement Moratorium, is also being unlawfully discriminated against. Although his right is not a fundamental right, there is no rational basis to deny persons who have an order of possession from enforcing it, while at the same time allowing other persons to have an

occupant removed from their property by judicial process. The same state interest is at stake, but only landlords have to serve it. Plaintiffs are likely to prevail on Count VII of the Complaint.

D. IT WAS IMPROPER FOR THE TRIAL COURT TO BALANCE THE EQUITIES WHERE CONSTITUTIONAL VIOLATIONS EXISTED AND NOTWITHSTANDING THAT ERROR THE EQUITES TIP IN PLAINTIFFS' FAVOR.

In general, a court may consider the public interest as part of balancing the equities among the parties in granting preliminary injunctive relief. *Kalbfleisch ex rel. Kalbfleisch v. Columbia Cmty. Unit Sch. No. 4,* 396 Ill.App.3d 1105, 1119, 920 N.E.2d 651, 663–64 (5th Dist. 2009). "In balancing the equities, the court must weigh the benefits of granting the injunction against the possible injury to the opposing party from the injunction." *Schweickart v. Powers,* 245 Ill.App.3d 281, 291, 613 N.E.2d 403 (1993). However, "there will be no balancing of equities where the violation is willful [or] where, as here, the existence of a private right and violation thereof are clear." *Barrett v. Lawrence,* 110 Ill.App.3d 587, 593, 442 N.E.2d 599 (1982); *See also, Rosehill Cemetery Co. v. City of Chicago,* 352 Ill. 11, 185 N.E. 170 (1933) (balance of equites will not be made to abate a public nuisance where "the existence of a private right and the violation of it are clear").

While Plaintiffs acknowledge the Court may consider the public interest in balancing the equities among the parties, it should not do so if it would result in the deprivation and infringement of Plaintiffs' rights under the Illinois Constitution. Here, the Moratoria were imposed in clear violations of Plaintiffs' constitutional rights to a trial by jury, a right to a remedy and justice, and equal protection. Given that the trial otherwise found that Plaintiffs have made out the other necessary elements for preliminary

injunctive relief, but it was only the impermissible balancing of the equities that led it to conclude the relief was not warranted, the court's decision was in error.

In the alternative, even if the court balances the equities, the interest of the public is outweighed by the harm to the Plaintiffs. As discussed in length above, the shelter in place order has ended and Illinois has entered Phase Four which means that conditions are no longer the same as they were in March, when the Moratoria were enacted. In Phase Four, gatherings of up to 50 people are permitted, non-essential workers can return to work, child care and summer programs can resume. (R.C065-91). If the extension of the Moratoria was not arbitrary or unreasonable, then it was no longer necessary when the conditions justifying the Stay at Home Order no longer exist.

Removing Illinois landlord's access to the courts, and taking away the only legal means they have of regaining their property, when the stated need for the Moratoria has lapsed by the express concession of the Governor, and the facts on the ground, undermine any claim that the current extension and any future extensions are necessary to meet the exigency created by the Pandemic.

While most Illinois residents are able to resume some semblance of normalcy, it is not so for the Plaintiffs. As long as the Moratoria is in place, the Plaintiffs continue to suffer injury to their constitutional rights and livelihood, they are required to continue to incur liabilities on the properties, such as real estate taxes, insurance and others, without a stream of income to pay them. Lost income puts both renters and small landlords in a vulnerable position. According to Whitney Airgood-Obrycki, of the Joint Center for Housing Studies at Harvard, if too many rent payments are missed, there will be ripple effects in the form of unpaid property taxes, deferred maintenance, and mortgage

delinquencies. Some small landlords may have to leave the market, opening the possibility of more corporate landlords and loss of rental units to owner-occupancy. The loss of small landlords, who own more than half of the stock renting for less than $750, may also threaten the already dwindling low-rent stock.[21]

Moreover, roughly two-thirds of landlords in the apartment industry have mortgages through private rather than federally backed loans, so they are not eligible for relief under the federal CARES Act. See. National Restate Investors Association, *Real Estate Investing Today,* "Breaking Down $1 of Rent," Brad Beckett April, 23, 2020.[22] These mortgage payments make up 39% of each dollar earned in rent. *Id.* Reduced rental income will increase the likelihood of landlords defaulting on their loans. More importantly for the community, and other tenants in the building, for every dollar of rent received, 27 cents (27%) is used to pay the employees, who manage and maintain the property, and maintenance costs, including utilities and insurance. If landlords have to fire or furlough their employees because their tenants are not paying, those employees will be threatened with eviction or foreclosure if they cannot pay their rent or mortgage, exacerbating the problem of housing insecurity. The knock-on effect of this is that if the management and maintenance of the property suffers, the use and enjoyment of the property is reduced for other tenants who may then elect to move.

Landlords are prevented by the Moratoria from restoring possession of their properties and from enjoying it, and they are burdened with funding a public program to aid a certain class of distressed renters out of their own pockets. All this actual harm falls on the Plaintiffs who are still coping with the repercussions of the shelter in place

[21] https://www.jchs.harvard.edu/blog/covid-19-rent-shortfalls-in-small-buildings.

mandate from the Spring unlike the rest of the Illinois public. The stated need for the Moratoria has lapsed by the express concession of the Governor, and the facts on the ground, undermining the argument that the current extension and any future extensions are necessary to meet the exigency created by the Pandemic. Accordingly, even in balancing of the equities the Plaintiffs decisively prevail.

CONCLUSION

For the reasons expressed herein, this Court should reverse the July 31, 2020 Order dismissing Counts I, II, III and VI with prejudice and the denial of the Preliminary Injunction and remand this matter for further proceedings of the trial court, and for any other relief it deems fit.

Respectfully submitted,

/s/ James V. Noonan
One of the Attorneys for the Plaintiffs

I certify that this brief conforms to the requirements of Rules 341(a) and increased page limit allowed by Appellate Court Order dated September 25, 2020. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 58 pages.

Respectfully submitted,

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[22] https://realestateinvestingtoday.com/breaking-down-1-of-rent/.

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No. 3-20-0305

In the Appellate Court of Illinois
Third Judicial District

JL Properties Group B LLC, Mark Dauenbaugh and Steven Cole, not individually but as Trustee of the ALI (401K) Trust FBO Steven Cole,

Plaintiffs-Appellants,

v.

Jay Robert "J.B." Pritzker, the Governor of Illinois, not individually, but in his executive Capacity,

Defendant-Appellee.

NOTICE OF FILING

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On October 2, 2020, I caused to be electronically filed via the Odyssey electronic filing system with the Clerk of the Appellate Court of Illinois, Third Judicial District, 1004 Columbus Street, Ottawa, IL 61350, the attached BRIEF OF PLAINTIFFS-APPELLANTS.

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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

The undersigned certifies, deposes and says upon oath that the undersigned caused to be served the above Notice, together with true and accurate copies of the above stated instruments which was filed and served via the Odyssey electronic filing system upon the above named parties at said addresses on October 2, 2020 and via email on October 2, 2020.

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