

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION NO.  
20-1334-G

\_\_\_\_\_  
MITCHELL MATORIN and  
LINDA SMITH,

Plaintiffs,

v.

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

Defendants.  
\_\_\_\_\_

**MOTION OF THE CITY OF CHICAGO AND 28 CITIES AND COUNTIES  
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

The City of Chicago, together with the Cities of Albuquerque, Austin, Baltimore, Boston, Cambridge, Chelsea, Cincinnati, Columbus, Dayton, Everett, Gary, Holyoke, Lawrence, Los Angeles, Malden, Oakland, Portland, Revere, Richmond, St. Paul, Seattle, Somerville, South Bend, Tucson, and West Hollywood as well as Cook County, King County, and the County of Santa Clara (collectively, “*Amici* Cities and Counties”), seek leave of the Court to submit the attached amicus curiae brief in support of Defendants the Commonwealth of Massachusetts and the Executive Office of Housing and Economic Development and in opposition to the motion for preliminary injunction.<sup>1</sup> In a time of an unprecedented crisis, Plaintiffs seek to enjoin a statewide

<sup>1</sup> Pursuant to this Court’s order of July 9, 2020 and as provided in Massachusetts Rule of Appellate Procedure 17(c)(5), *Amici* declare the following: (A) none of the parties nor their counsel prepared this brief in whole or in part; (B) no party or party’s counsel contributed money that was intended to fund the preparation or submission of the brief; (C) no person or entity contributed money that was intended to fund the preparation or submission of the brief; and (D) neither *Amici* or its counsel represents or has represented one of the parties to the present action in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present case.

eviction moratorium, a central component of Massachusetts's response to the COVID-19 pandemic and resulting economic downturn. Current estimates provide that as many as 28 million American households are at high risk of displacement due to eviction.<sup>2</sup> Many of these families reside within the boundaries of the *Amici* Cities and Counties. To ensure an effective public health and economic response in support of our residents, *Amici* as well as our states require flexibility and capacity to tailor necessary programs and policies such as eviction moratoriums. Accordingly, *Amici* have a substantial interest in the outcome of this litigation.

Cities and counties are on the frontlines of response to the COVID-19 pandemic. Many of the *Amici* operate hospitals and clinics, run emergency response systems (including EMT departments and ambulance transport), and/or administer public health departments. Local governments engage in testing, contact tracing, and public education. Cities and counties issue orders regarding the scope and capacity of business operations, social distancing, the wearing of masks in public, and many other health and safety regulations. Through these efforts, local governments are seeking to deliver care to those who need it, limit the spread of COVID-19, and strike a sensible balance between public health precautions and economic activity informed by science.

Policies aimed at ensuring housing security are core to both the economic and public health responses to the current pandemic. *Amici* have adopted stay-at-home orders and other social distancing measures that cannot be fully effective without housing security. The stay-at-home orders reduce the spread of, hospitalizations related to, and deaths from COVID-19.

Individuals who are not sick can wash their hands with great frequency, work from home (if that

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<sup>2</sup> Annie Nova, *Looming Evictions May Soon Make 28 Million Homeless in U.S., Expert Says*, CNBC (July 22, 2020), <https://www.cnbc.com/2020/07/10/looming-evictions-may-soon-make-28-million-homeless-expert-says.html>.

option is available to them), avoid public spaces, and limit their interactions with other members of the general public. Children can receive remote educational instruction and other training from their homes. Individuals who become sick can self-quarantine.

Maintaining housing security for millions of families is not sustainable in the current economic climate, absent regulatory intervention. Nationwide, approximately 1 in 5 households in the United States are at high risk of eviction in the coming months.<sup>3</sup> According to one recent survey, 36% of all renters missed their payment at the beginning of July.<sup>4</sup> The economic crisis is likely to worsen if federal unemployment support runs out or is extended at diminished levels and if the federal eviction moratorium expires later this month. Even with these programs in place — which have mitigated some of the economic harm of COVID-19 — the situation is quite challenging for many families. For example, Massachusetts set a 44-year record high in June with an unemployment rate of 17.4 percent, the highest in the country.<sup>5</sup> Given the current trajectory of COVID-19 cases around the country, economic losses are likely to deepen as state and local governments are required to re-impose business restrictions, stay-at-home orders, and other measures to flatten the curve (once again). The country is facing the possibility of millions of people displaced from their homes if at least some protections do not remain in place for the foreseeable future.

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<sup>3</sup> Katherine Lucas McKay et. al., *20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship*, Aspen Inst. (June 19, 2020), <https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/>.

<sup>4</sup> Rob Warnock & Chris Salviati, *Missed Housing Payments Continue Piling Up In July*, Apartment List (July 8, 2020), <https://www.apartmentlist.com/research/july-housing-payments>.

<sup>5</sup> Larry Edelman, *Mass. Unemployment Rate Led the Nation in June*, Boston Globe (July 17, 2020), <https://www.bostonglobe.com/2020/07/17/business/massachusetts-employers-added-83700-jobs-june-economy-reopened/>.

*Amici*'s overall response to this dual crisis is also and crucially a matter of racial justice. COVID-19 has had devastating effects on communities of color. The disparities in case counts, hospitalizations, and deaths have been widely reported,<sup>6</sup> and are a direct result of a history of racial discrimination and inequities in social determinants of health. Black and Latinx families also have been disproportionately harmed by the economic downturn. They are more likely to have experienced disruption in the business operation of their workplaces and are less likely to be able to work from home.<sup>7</sup> Many work in jobs deemed essential without adequate safety precautions, which has placed them at greater risk of exposure to the virus. The disparate impacts on health and earnings, in turn, affect housing stability disproportionately. For example, in response to a survey by the U.S. Census Bureau conducted in late May and early June, about 44 percent and 41 percent of adult Latinx and Black renters, respectively, said they had no or slight confidence they could pay their rent the next month or were likely to defer payment.<sup>8</sup> These rates were twice as high as for white renters. In some locations where eviction moratoriums have been lifted, the disparity in outcomes is already apparent. In Milwaukee, for example, early reports

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<sup>6</sup> See, e.g., U.S. Ctrs. for Disease Control & Prevention, *COVID-19 in Racial and Ethnic Minority Groups*, (June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>; Richard A. Oppel et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. Times (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

<sup>7</sup> See, e.g., Carlos Ballesteros, *Working from Home not an Option for Most Black, Latino Workers During Coronavirus Crisis*, Chi. Sun Times (Apr. 9, 2020), <https://chicago.suntimes.com/coronavirus/2020/4/9/21212043/coronavirus-covid-19-racial-disparity-black-latino-workers-work-from-home>.

<sup>8</sup> Renae Merie, *Evictions are Likely to Skyrocket this Summer as Jobs Remain Scarce. Black Renters Will be Hard Hit*, Wash. Post (July 6, 2020), <https://www.washingtonpost.com/business/2020/07/06/eviction-moratoriums-starwood/>.

indicate that nearly two-thirds of all eviction actions have taken place in predominantly Black neighborhoods thus far.<sup>9</sup>

Local governments also have an important fiscal stake in maintaining tenant protections. *Amici* provide direct services to alleviate housing instability and to support people who are homeless. Without eviction moratoriums and other housing stabilization efforts, *Amici* will be overwhelmed by needs for funding and services at a time when municipal budgets are getting cut or frozen at prior levels. In its first round of COVID-19 funding, the City of Chicago distributed \$2 million in rental assistance to low-income residents. Between 1,000 and 2,000 residents received assistance, but 83,000 residents applied for assistance over five days.<sup>10</sup> By reducing housing instability, a statewide eviction moratorium enables *Amici* to target our resources towards our most vulnerable residents during a time of crisis. But-for protections such as these eviction moratoriums, homelessness will increase significantly, which will require local governments to offer more by way of direct services to these displaced populations and will worsen the overall well-being of our residents.

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<sup>9</sup> Emma Cueto, *Is Milwaukee's Eviction Spike 'The Canary In The Coal Mine'?*, Law360 (July 12, 2020), <https://www.law360.com/articles/1291062>; accord Rebecca Cowin et al., *Measuring Evictions during the COVID-19 Crisis*, Cleveland Fed. Res. (July 17, 2020) (documenting eviction rates spiking as moratoriums lift across the country), <https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20200717-measuring-evictions-during-the-covid-19-crisis.aspx>.

<sup>10</sup> Justin Laurence, *City Council Approves \$20 Million Fund To Help Renters, 7-Day Grace Period For Residents Facing Eviction*, Block Club Chi. (July 17, 2020), <https://blockclubchicago.org/2020/06/17/city-council-approves-20-million-fund-to-help-renters-7-day-grace-period-for-residents-facing-eviction/>. Similarly, in King County, Washington applications related to a \$1.5 million housing stabilization fund had to be paused after only 48 hours when more than 7,000 applications had been received already. Rich Smith, *A Massive Wave of Evictions Will Probably Hit Washington Next Month*, Stranger (July 1, 2020), <https://www.thestranger.com/slog/2020/07/01/43994517/a-massive-wave-of-evictions-will-probably-hit-washington-next-month>. Nationally, twenty rental assistance programs closed after accepting applications for seven days or less. Andrew Aurand et al., *State and Local Rental Assistance Programs*, Nat'l Low Income Hous. Coal. (July 20, 2020), <https://nlihc.org/sites/default/files/State-and-Rental-Assistance-Programs.pdf>.

Given the crucial importance of housing stability during the pandemic, and for all the foregoing reasons, *Amici* Cities and Counties seek leave of this Court to file the attached amicus curiae brief and respectfully request that the Court deny the motion for preliminary injunction.

Respectfully submitted,

/s/ Jonathan B. Miller

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### **CERTIFICATION OF SERVICE**

I, Jonathan B. Miller, hereby certify that I served the foregoing Motion of the City of Chicago and 28 Cities and Counties for Leave to File Brief as Amicus Curiae on all counsel for the plaintiffs and the defendants in pdf form as an attachment to an email on July 24, 2020.

/s/ Jonathan B. Miller

Jonathan B. Miller

Dated: July 24, 2020

# **EXHIBIT A**

COMMONWEALTH OF MASSACHUSETTS

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**[PROPOSED] BRIEF OF AMICI CURIAE CITIES AND COUNTIES**

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## SUMMARY OF ARGUMENT

At a moment of unprecedented crisis, state and local governments have been indispensable to the public health and economic responses to the COVID-19 pandemic. Standing at a crucial cornerstone of health and welfare, and integral to that overall response, is housing security. Across America, state and local governments – through a variety of means, including legislative actions, executive orders, and judicial rules – have restricted or barred eviction proceedings during some or all of the current pandemic.<sup>1</sup> Because of the critical role that eviction restrictions and other housing security measures will continue to play in our collective and long-term response to COVID-19, the City of Chicago, along with the Cities of Albuquerque, Austin, Baltimore, Boston, Cambridge, Chelsea, Cincinnati, Columbus, Dayton, Everett, Gary, Holyoke, Lawrence, Los Angeles, Malden, Oakland, Portland, Revere, Richmond, St. Paul, Seattle, Somerville, South Bend, Tucson, and West Hollywood as well as Cook County, King County, and the County of Santa Clara (collectively, “*Amici* Cities and Counties”), submit this brief as *amicus curiae* in opposition to the motion for preliminary injunction and in support of Defendants the Commonwealth of Massachusetts and the Executive Office of Housing and Economic Development.

*Amici* Cities and Counties address arguments in this case that have broad ranging implications for state and local governments across the country. In short summation, all of Plaintiffs’ arguments challenging Act of Apr. 20, 2020, ch. 65, § 6, 2020 Mass. Acts. (hereinafter, the “eviction moratorium”) should be rejected by this Court. First, the eviction moratorium squarely falls within the state’s police power to promote public health, safety, and

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<sup>1</sup> The federal government, through the CARES Act, Pub. L. 116–136, and other means have imposed certain restrictions on evictions and foreclosures depending on whether a property has received a federally-backed loan or a tenant receives federal assistance of some kind. *See, e.g.*, § 4024(b).

welfare during a pandemic. The moratorium has done so by enabling residents to shelter in place and socially distance. Additionally, by maintaining the economic welfare of tenants, the moratorium protects individuals and neighborhoods against the dangers and risks associated with evictions, including health and safety harms. These housing stability safeguards are crucial as a matter of both public health and economic response to the current crises.

Second, the moratorium is not a taking under the Fifth Amendment to the U.S. Constitution or Massachusetts law. The moratorium does not meet the standard required by the Supreme Court's established test in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), as there is insufficient economic harm or interference with investment-backed expectations. Further, the character of the moratorium protects the public welfare of residents without physically invading Plaintiffs' property.

Third, the moratorium does not substantially impair a landlord's contractual rights with tenants. The eviction moratorium follows established precedent which has upheld similar responses to recessions and significant economic downturns, even without the additional challenges imposed by a global pandemic in the current moment. If adopted, Plaintiffs' expansive and incorrect reading of the Contracts Clause of the U.S. Constitution could unduly limit state and local governmental authority to enact regulatory measures to safeguard the welfare of their residents during a crisis.<sup>2</sup>

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<sup>2</sup> *Amici* Cities and Counties are aware that Plaintiffs have dismissed their federal law claims in this litigation. Given the overlap between some of the federal claims now pursued in a federal court action and state law claims remaining in this case, *Amici* write to address several issues with implications that extend beyond Massachusetts.

## ARGUMENT

### **I. THE EVICTION MORATORIUM PROMOTES THE PUBLIC HEALTH AND ECONOMIC WELFARE OF MASSACHUSETTS RESIDENTS**

Massachusetts' eviction moratorium falls well within the expansive police power authority granted to states to uphold public health and safety. Plaintiffs offer conclusory assertions that the eviction moratorium does not address the public health aspect of the COVID-19 crisis and bears "no real or substantial relation" to protecting the health of Massachusetts residents. Petition at 63-64. Public health data contradicts this assertion. Evidence demonstrates that access to stable housing is a crucial component of containing the novel coronavirus. Eviction moratoriums ensure that tenants maintain this access.

In the seminal case *Jacobson v. Massachusetts*, the U.S. Supreme Court upheld Massachusetts's authority to enforce its compulsory vaccination law. 197 U.S. 11 (1905). The Court concluded that public health measures are constitutional so long as they demonstrate a "real or substantial relation" to the protection of public health. *Id.* at 30-31. Here, the eviction moratorium undoubtedly maintains a real and substantial relation to protecting the public health in the face of the COVID-19 pandemic by increasing housing stability and allowing Massachusetts to implement social distancing and quarantining measures. The eviction moratorium, moreover, does not discriminate against members of a protected class nor implicate a fundamental right.<sup>3</sup>

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<sup>3</sup> Unless public health legislation impermissibly interferes with the "exercise of a fundamental right" or disadvantages a "suspect class," courts under the Equal Protection and Due Process Clauses use rational basis review. *See, e.g., Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Both federal and Massachusetts courts have found that landlords are not a protected class. *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013) ("We apply rational basis review because landlords are not a protected class..."); *accord Marshal House, Inc. v. Rent Control Bd.*, 358 Mass. 686, 694-95 (1971). Similarly, because a limitation on the use of property does not implicate a fundamental right, it need only be rational. *See, e.g., Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir. 1991)

## **A. The Eviction Moratorium Promotes Public Health and Safety by Ensuring Residents Have Stable Housing in which to Social Distance and Shelter-in-Place**

Federal and Massachusetts law require public health regulations to have a rational connection with the promotion of public health and safety. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *Commonwealth v. Finnigan*, 326 Mass. 378, 379 (1950) (“The right to engage in business must yield to the paramount right of government to protect the public health by any rational means...the decisive question in the present case is whether the statute cannot reasonably be thought to have a tendency to protect the public health.”) (internal citations omitted).<sup>4</sup> The eviction moratorium meets this standard by promoting public health in three distinct and critical ways: (1) ensuring efficacy of stay-at-home and social distancing guidance; (2) preventing homelessness; and (3) limiting housing overcrowding.

### **1. Stay-at-Home and Social Distancing Guidance**

Eviction moratoriums promote public health and safety by ensuring that stay-at-home orders can reduce the spread of COVID-19. Stay-at-home orders work to stop the spread of COVID-19 by limiting contagious contact outside of homes and thus lowering the number of new people infected by each case.<sup>5</sup> States that implemented stay-at-home orders saw a 48.6% reduction in new cases after three weeks and a 59.8% reduction in weekly fatalities.<sup>6</sup> States that

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(“Rent controls violate due process only if ‘arbitrary, discriminatory, or demonstrably irrelevant’ to a legitimate governmental purpose”) (quoting *Pennell v. San Jose*, 485 U.S. 1, 11 (1988)).

<sup>4</sup> Federal and state courts have upheld public health measures on this basis in the context of COVID-19. *S. Bay United Pentecostal Church v. Newsom*, 590 U.S. \_\_\_, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring), *Elmsford Apartment Associates, LLC v. Cuomo*, 2020 WL 3498456, at \*10 (S.D.N.Y. Jun. 29, 2020) (upholding New York’s eviction moratorium), *Friends of Danny Devito v. Wolf*, 227 A.3d 872 (Pa. 2020) (holding that the Pennsylvania Governor could close all “non-life-sustaining” businesses by executive order).

<sup>5</sup> James H. Fowler et al., *The Effect of Stay-at-Home Orders on COVID-19 Cases and Fatalities in the United States*, medRxiv, 1, 10-11 (May 12, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.13.20063628v3.full.pdf>.

<sup>6</sup> *Id.* at 8.

imposed stay-at-home orders also saw a reduction in the average number of new people infected by a person sick with COVID-19 to less than one, a vital benchmark for successful suppression of the virus.<sup>7</sup> The reduction in spread happened because residents were able to stay at home, away from public transit and other public spaces.<sup>8</sup>

Eviction moratoriums play a crucial role in ensuring that stay-at-home orders are effective by preventing tenants from becoming homeless or relocating to overcrowded homes.<sup>9</sup> The economic downturn associated with the COVID-19 pandemic has increased the number of households at risk of eviction.<sup>10</sup> Even under normal circumstances, evictions cause substantial increases in both homelessness and overcrowding, as people lose their homes and either have no place to go or find shelter wherever they can.<sup>11</sup> With public and nonprofit housing assistance and other social services strained due to tight budgets and rising need, experts predict that if the moratorium is lifted, increases in homelessness and overcrowding will be more severe than normal.<sup>12</sup> Homelessness and overcrowding will in turn increase the risk of both individual infection and uncontrolled outbreaks because individuals cannot effectively socially distance.

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<sup>7</sup> Juliette T. Unwin et al., *Report 23: State-level tracking of COVID-19 in the United States*, Imperial College London, 9 (May 28, 2020), <https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-05-28-COVID19-Report-23-version2.pdf>.

<sup>8</sup> *Id.* at 4. *See also* Monica Bharel, M.D. Aff. ¶¶ 10, 15-20 (July 14, 2020) (Commissioner of the Massachusetts Department of Public Health (DPH) explaining the impact of social distancing and stay-at-home measures in reducing the spread of the virus).

<sup>9</sup> *See, e.g.*, Dominique Williams Aff. ¶ 10 (Deputy Director of Boston’s Office of Housing Stability stating that in Boston, “Evictions can also result in homelessness or long-term housing instability, which compound the negative health effects of the eviction itself.”).

<sup>10</sup> *See* Pamela Schwartz Aff. ¶¶ 12-16 (July 6, 2020) (Director of the Western Massachusetts Network to End Homelessness discussing increased housing insecurity in Western Massachusetts); Williams Aff. ¶ 15 (stating after March 2020 the Office “saw a significant rise in requests for assistance from renters facing economic hardship”).

<sup>11</sup> Kimberly Skobba & Edward G. Goetz, *Mobility Decisions of Very Low-Income Households*, 15.2 *Cityscape: A J. of Pol’y Dev. & Res.* 155, 158 (2013).

<sup>12</sup> Jen Kirby, *America’s looming housing catastrophe, explained*, *Vox* (July 8, 2020), <https://www.vox.com/21301823/rent-coronavirus-covid-19-housing-eviction-crisis>. *See also* William

## 2. Homelessness

Homelessness increases the risk of infection and death caused by COVID-19. The Centers for Disease Control and Prevention (“CDC”) noted that observing their recommended precautions to avoid contracting COVID-19, such as avoiding public spaces and frequent handwashing, may be impossible for people experiencing homelessness.<sup>13</sup> Homelessness can create additional health problems and accelerate aging for those who experience it chronically, which places this generally older population at particularly high risk for severe illness and death from COVID-19.<sup>14</sup> In other states, as individuals experiencing homelessness crowd into shelters without resources to fully implement safe practices, these shelters have become hotspots for community spread, threatening broader public health.<sup>15</sup> While shelters in Massachusetts have implemented a range of COVID-19 safety protocols to reduce spread, infection control remains very difficult.<sup>16</sup>

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Bartosch Aff., ¶¶ 20-21 (July 2, 2020) (Director at the Commonwealth’s Department of Housing and Community Development (DHCD) stating DHCD shelter space has restricted capacity due to concerns about spread in congregate shelters and co-shelter multi-family units); Ann Gibbons-Smith Aff., ¶¶ 17-18 (July 17, 2020) (Interim Executive Director of the Central Massachusetts Housing Alliance stating that the COVID-19 crisis has stretched their resources and that “lifting the eviction moratorium prematurely would further stress CMHA’s limited resources” by destabilizing at-risk households’ housing, straining the Alliance’s finances, and increasing caseloads for counselors).

<sup>13</sup> *People Experiencing Homelessness*, Centers for Disease Control and Prevention (June 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html>. See also Schwartz Aff. ¶¶ 11-13 (noting shelters in Western Massachusetts were overcrowded and forced to close due to COVID-19 infections).

<sup>14</sup> Dennis P. Culhane et. al., *Estimated Emergency and Observational/Quarantine Capacity Need for the US Homeless Population Related to COVID-19 Exposure by County; Projected Hospitalizations, Intensive Care Units and Mortality*, National Alliance to End Homelessness, 2-5 (Mar. 27, 2020), [https://endhomelessness.org/wp-content/uploads/2020/03/COVID-paper\\_clean-636pm.pdf](https://endhomelessness.org/wp-content/uploads/2020/03/COVID-paper_clean-636pm.pdf).

<sup>15</sup> See, e.g., Vianna Davila, *Coronavirus hot spots in Texas homeless shelters highlight challenges unsheltered residents face social distancing, staying clean*, Tex. Tribune (May 24, 2020), <https://www.texastribune.org/2020/05/24/texas-homeless-shelters-coronavirus-houston-austin-dallas/>.

<sup>16</sup> See Jessie M. Gaeta Aff., ¶¶ 8-21 (Chief Medical Officer for Boston Health Care for the Homeless Program explaining the protocols in Boston shelters and difficulties in preventing spread).

### 3. Overcrowding

Overcrowding or “doubling up” of households in non-shelter housing presents similar risks. Multiple studies have found that neighborhoods with a higher proportion of overcrowded homes had higher rates of infection, with greater risks especially for the elderly living in close quarters with younger people.<sup>17</sup> These studies reinforce the data and other evidence submitted by the Commonwealth, which demonstrates that communities with higher percentages of overcrowding generally have had higher case infection rates. *See generally* Defs.’ Opp. at 9-10. Household members cannot effectively socially distance when they share common areas such as restrooms and may even share sleeping quarters. Essential workers in sectors with exposure to the general public, like food service and healthcare, also face disproportionate overcrowding, heightening the risk of overcrowding-related COVID-19 exposure to themselves, their households, and the community.<sup>18</sup>

As cases continue to rise nationally, experts also anticipate a “second wave” of community spread even in states and localities that have significantly reduced the number of active COVID-19 cases.<sup>19</sup> In Massachusetts, experts expect local cases to rise as governments relax shelter-in-place requirements and people begin to move more freely in public spaces.<sup>20</sup>

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<sup>17</sup> *COVID-19 Cases in New York City, a Neighborhood-Level Analysis*, NYU Furman Center (Apr. 10, 2020), <https://furmancenter.org/thestoop/entry/covid-19-cases-in-new-york-city-a-neighborhood-level-analysis>. *See also* Gaeta Aff., ¶ 33 (stating that “residing in a shelter or “doubl[ing]-up” in a home can increase the risk of COVID-19” due to overcrowding); Jackie Botts & Lo Bénichou, *The neighborhoods where COVID collides with overcrowded homes*, CalMatters (June 12, 2020), <https://calmatters.org/projects/california-coronavirus-overcrowded-neighborhoods-homes/>.

<sup>18</sup> Marisol Cuellar Mejia & Paulette Cha, *Overcrowded Housing and COVID-19 Risk among Essential Workers*, Pub. Pol. Inst. of Cal. (May 12, 2020), <https://www.ppic.org/blog/overcrowded-housing-and-covid-19-risk-among-essential-workers/>.

<sup>19</sup> Cory Stieg, *What a ‘second wave’ of Covid-19 could look like and how to prevent it*, CNBC (June 28, 2020), <https://www.cnbc.com/2020/06/28/what-second-wave-of-covid-19-means-and-how-to-prevent-it.html>.

<sup>20</sup> *See* Bharel Aff., ¶¶ 12-14 (Commissioner of Massachusetts Dept. of Public Health).



Low existing immunity in the general population and the contagiousness of the virus both make a resurgence even more likely.<sup>21</sup> Even after rigorous shelter-in-place orders, the City of Baltimore and the State of California have both seen rises in community spread.<sup>22</sup> Local governments as service providers have also started shifting resources to treat and prevent COVID-19 and influenza cases in the fall.<sup>23</sup> Absent the maintenance of the eviction moratorium, a worsening public health crisis could accelerate as households are evicted just as COVID-19 cases begin rising again. At increased risk of contracting and spreading COVID-19 due to homelessness or overcrowded housing, those evicted from their residences could spark new outbreaks and undermine Massachusetts' relative success thus far in addressing the pandemic.<sup>24</sup>

### **B. The Eviction Moratorium Promotes Public Health and Safety by Maintaining Economic Welfare**

The eviction moratorium is also essential to maintaining the economic security of Massachusetts residents. The severe harms caused by the nearly unparalleled national economic crisis instigated by the pandemic imperil the public welfare of our communities. Even if the eviction moratorium is considered solely through the lens of economic regulation (rather than as

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<sup>21</sup> Tyler S. Brown & Rochelle P. Walensky, *Serosurveillance and the COVID-19 Epidemic in the US: Undetected, Uncertain, and Out of Control*, JAMA Network (July 21, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2768835>.

<sup>22</sup> Ovetta Wiggins et al., *Maryland suburbs, Baltimore County and city want to roll back reopening as virus numbers climb*, Wash. Post (July 20, 2020), [https://www.washingtonpost.com/local/maryland-coronavirus-surge-restrictions/2020/07/20/f8aefabe-cad8-11ea-bc6a-6841b28d9093\\_story.html](https://www.washingtonpost.com/local/maryland-coronavirus-surge-restrictions/2020/07/20/f8aefabe-cad8-11ea-bc6a-6841b28d9093_story.html); German Lopez, *How California went from a coronavirus success story to a worrying new hot spot*, Vox (July 13, 2020) <https://www.vox.com/future-perfect/2020/7/6/21308351/california-coronavirus-pandemic-covid-outbreak>.

<sup>23</sup> See, e.g., Erin Allday, *Bay Area doctors prepare for coronavirus in looming flu season*, S.F. Chron. (May 14, 2020), <https://www.sfchronicle.com/health/article/Bay-Area-doctors-prepare-for-coronavirus-in-15268742.php> (Bay Area hospitals expanding testing and surge capacity to handle flu and COVID-19 cases); Colin A. Young, *Mass. Stepping Up Flu Vaccine Push*, Boston Globe (June 25, 2020), <https://www.bostonglobe.com/2020/06/25/nation/mass-stepping-up-flu-vaccine-push/>.

<sup>24</sup> Bharel Aff., ¶¶ 18-19 (homeless shelters at particularly high risk for virus spread and infection).

a public health measure, which it is as well), state and local governments are still granted broad deference in review. *See, e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125-26 (1978); *accord Shell Oil Co. v. Revere*, 383 Mass. 682, 686-88 (1981). Given the scale of the economic crisis faced by Massachusetts and the rest of the country, and the devastating consequences of eviction on economic stability and public health and safety, a temporary eviction moratorium against nonpayment cases is an appropriate exercise of the Commonwealth's authority.

Our residents are struggling economically. Between February and April of this year, the national unemployment rate has increased from a low of 3.5% to a peak of 14.7%.<sup>25</sup> The most recently reported numbers from June showed the national unemployment rate at 11.1 percent, higher than its peak during the 2008 recession, despite extraordinary measures taken by the federal, state, and local governments.<sup>26</sup> The Massachusetts unemployment rate in June was the highest in the country at 17.4 percent.<sup>27</sup>

Other indicators, such as rising food insecurity, further illustrate the economic peril that so many families across the country are facing right now. Nationally, enrollment in the Supplemental Nutrition Assistance Program ("SNAP" or "food stamps") has increased by more than six million Americans since the beginning of the crisis,<sup>28</sup> while Massachusetts has witnessed

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<sup>25</sup> *Civilian Unemployment Rate*, U.S. Bureau of Labor Statistics <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> (last visited July 23, 2020).

<sup>26</sup> *Id.*; Rakesh Kochhar, *Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession*, Pew Res. Cent. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

<sup>27</sup> Callum Borchers, *Mass. Unemployment Rate Rises To 17.4%, Worst In The Country*, WBUR (July 17, 2020), <https://www.wbur.org/bostonmix/2020/07/17/massachusetts-unemployment-rate-worst-country>.

<sup>28</sup> Dottie Rosenbaum, *Boost SNAP to Capitalize on Program's Effectiveness and Ability to Respond to Need*, Cent. on Budget and Pol'y Priorities (July 18, 2020), <https://cbpp.org/research/food-assistance/boost-snap-to-capitalize-on-programs-effectiveness-and-ability-to-respond>.

a 21.5% increase in the state's nutritional assistance caseload since March.<sup>29</sup> Lines for donations by food banks are sometimes hours and miles long, with supplies running out before everyone is served.<sup>30</sup> Residents in our communities have lost their health care coverage, which places them at greater risk of further economic devastation should they fall ill.<sup>31</sup> Uninsured people may also face barriers in seeking medical care, hampering the broader public health response to the COVID-19 pandemic.<sup>32</sup>

Finally, due to surging unemployment and other economic factors, 36% of renters nationally reported that they were unable to pay their full July rent on time.<sup>33</sup> In Massachusetts, 29% of renters reported failing to pay at least some rent since the COVID-19 crisis began.<sup>34</sup> One study estimates that 20 million renters nationwide could be at risk of eviction in the coming months.<sup>35</sup> These issues compound in a vicious cycle: for instance, while unemployment can cause difficulty in paying rent, housing insecurity also leads to job loss among low-income

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<sup>29</sup> Michael Cole Aff. ¶ 14.

<sup>30</sup> See, e.g., Janelle Nanos and Victoria McGrane, *Volunteer shortages, surging demand: Mass. food banks say this is unlike any other point in history*, Bos. Globe (Apr. 12, 2020), <https://www.bostonglobe.com/2020/04/12/business/food-banks-see-surge-need-amid-coronavirus-crisis/>.

<sup>31</sup> Stan Dorn, *The COVID-19 Pandemic and Resulting Economic Crash Have Caused the Greatest Health Insurance Losses in American History*, Families USA (July 17, 2020), <https://www.familiesusa.org/resources/the-covid-19-pandemic-and-resulting-economic-crash-have-caused-the-greatest-health-insurance-losses-in-american-history/>.

<sup>32</sup> Jennifer Tolbert, *What Issues Will Uninsured People Face with Testing and Treatment for COVID-19?*, Kaiser Fam. Found. (Mar. 16, 2020), <https://www.kff.org/coronavirus-covid-19/fact-sheet/what-issues-will-uninsured-people-face-with-testing-and-treatment-for-covid-19/>.

<sup>33</sup> Rob Warnock & Chris Salviati, *Missed Housing Payments Continue Piling Up In July*, ApartmentList (Jul. 8, 2020), <https://www.apartmentlist.com/research/july-housing-payments>.

<sup>34</sup> Sofia Rivera, *The Coming Eviction Crisis Will Be Worse Than You Think*, Boston Mag. (July 8, 2020), <https://www.bostonmagazine.com/property/2020/07/08/boston-eviction-moratorium-august/>.

<sup>35</sup> Katherine Lucas McKay et. al., *20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship*, Aspen Inst. (June 19, 2020), <https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/>.

workers.<sup>36</sup> If left unaddressed, these intersecting crises will only accelerate the economic downturn.

*Amici* have particularly strong economic interests in keeping people housed during this crisis. Stable housing is associated with maintaining stable employment, which is especially important during a time when so many people are already at risk of losing their jobs.<sup>37</sup> Job loss and evictions compromise family savings, which in turn “put[s] pressure on city budgets” by increasing the likelihood that people turn to public benefits.<sup>38</sup> Cities will simultaneously lose revenue from unpaid utility bills and other revenue streams.<sup>39</sup> Temporary eviction moratoriums ensure local governments can direct limited resources toward the most vulnerable populations.

Confronted with this potential economic devastation, the General Court’s decision to impose an eviction moratorium is a reasonable – and even necessary – regulation to ensure the economic stability and health and safety of the public. Numerous studies have found that evictions cause severe and negative health and safety impacts on affected households and their communities, with particularly pernicious effects on low-income communities and communities

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<sup>36</sup> Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 *Social Problems* 54, 59 (2016) (finding that forced moves, including evictions, increase the likelihood of job loss among low-income workers by 15 to 22 percentage points.)

<sup>37</sup> See *Schwartz Aff.*, ¶ 5 (explaining the impact of job loss on evictions for people in Western Massachusetts).

<sup>38</sup> See, e.g., Signe-Mary McKernan, et al, *Thriving Residents, Thriving Cities: Family Financial Security Matters for Cities*, Urban Institute (Apr. 21, 2016), <https://www.urban.org/research/publication/thriving-residents-thriving-cities-family-financial-security-matters-cities>; see also *Bartosch Aff.*, ¶¶ 24-25 (stating that applications for cash housing assistance have increased since the pandemic began).

<sup>39</sup> *Id.* In 2019, the City of Chicago lost between \$68 million and \$157 million on evictions, unpaid property taxes, and unpaid utility bills. Diana Elliot and Kassandra Martincheck, *Chicago: The Cost of Eviction and Unpaid Bills of Financially Insecure Families for City Budgets*, Urban Institute (Nov. 2019), <https://www.urban.org/sites/default/files/publication/101301/cost-eviction-chicago.pdf>.

of color.<sup>40</sup> Evictions increase the likelihood of contact with the criminal justice system,<sup>41</sup> employment instability,<sup>42</sup> maternal hardship and depression,<sup>43</sup> relocation to higher-poverty and higher-crime neighborhoods,<sup>44</sup> drug use,<sup>45</sup> and poor health, particularly for children exposed to toxins, stress, and other dangerous conditions resulting from homelessness or substandard, overcrowded housing.<sup>46</sup>

\* \* \* \*

Given the extensive public health and economic welfare impacts of a potential wave of mass evictions, and given the centrality of housing stability to the Commonwealth’s public health response to COVID-19, the Massachusetts Legislature’s decision to temporarily halt nonpayment evictions was not only reasonable, but it was also the correct choice.<sup>47</sup>

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<sup>40</sup> See Schwartz Aff., ¶¶ 6-7, 16 (explaining the impact of evictions and homelessness on Black and Latinx people in Western Massachusetts).

<sup>41</sup> Aaron Gottlieb & Jessica W. Moose, *The Effect of Eviction on Maternal Criminal Justice Involvement*, 4 Socius: Sociological Research for a Dynamic World 6-10 (2018).

<sup>42</sup> Matthew Desmond & Carl Gershenson, *supra* note 36, at 54–61.

<sup>43</sup> Matthew Desmond & Rachel T. Kimbro, *Eviction’s Fallout: Housing, Hardship, and Health*, 94 Social Forces 310-19 (2015).

<sup>44</sup> Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 Demography 1760–69 (2015).

<sup>45</sup> See, e.g., William Damon et. al., *Residential eviction predicts initiation of or relapse into crystal methamphetamine use among people who inject drugs: a prospective cohort study*, 41 J. of Pub. Health 38-43 (2018); see also Ashley C. Bradford & W. David Bradford, *The effect of evictions on accidental drug and alcohol mortality*, 55 Health Serv. Res. 15-16 (2020).

<sup>46</sup> Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity among Low-Income and Minority Tenants*, 24 Geo. J. on Poverty L. & Pol’y 70-73 (2016).

<sup>47</sup> In doing so, the Massachusetts legislature lawfully relied on the findings of the Governor in his executive orders. Executive Order No. 591, Declaration of a State of Emergency to Respond to COVID-19 (March 10, 2020). See also *Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986) (finding that when addressing an issue already addressed by other jurisdictions or authorities, states and local governments are granted the deference to rely on evidence generated by other jurisdictions or authorities, so long as it is reasonably relevant to the instant problem).

## II. THE EVICTION MORATORIUM IS NOT A REGULATORY TAKING

Plaintiffs' claim that the eviction moratorium constitutes a taking under the Massachusetts Constitution is erroneous. Because the eviction moratorium does not constitute a categorical taking,<sup>48</sup> the three-part test established in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978),<sup>49</sup> to evaluate regulatory takings applies. Courts are required to engage in a "factual inquiry" as to the following factors: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Id.* at 124. All of these factors demonstrate that the eviction moratorium is not a regulatory taking.

### A. The Eviction Moratorium's Economic Impact on Landlords Is *De Minimis*

The economic impact of the eviction moratorium on Plaintiffs is *de minimis*, because the moratorium is temporary and only affects a limited set of the "bundle" of property rights. The Supreme Court has repeatedly held that "time is a factor" in determining whether a regulation constitutes a compensable taking. *See, e.g., Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34 (2012) (government-induced flooding of limited duration may be compensable under the Takings Clause); *Tahoe-Sierra Preserv. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 331 (2002) (reversing district court decision to divide "petitioners' property into temporal segments corresponding to the regulations at issue and then analyze[] whether

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<sup>48</sup> A categorical taking only occurs when the state physically invades the property or "deprives the landowner of all economically beneficial use of land," *Steinbergh v. City of Cambridge*, 413 Mass. 736 (1992) (citing *Penn Central*, 438 U.S. at 124-25), and there has been no physical invasion here. *Accord Elmsford Apartment Assocs.*, 2020 WL 3498456, at \*8-9 (holding that an eviction moratorium is not a physical taking and holding, per *Penn Central*, that the moratorium is not a "deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking.").

<sup>49</sup> Federal case law is pertinent because Massachusetts state law affords property owners the same degree of protection as the Fifth Amendment to the U.S. Constitution. *See Blair v. Dep't of Conservation & Recreation*, 457 Mass. 634, 642-43 (2010).

petitioners were deprived of all economically viable use during each period”). In *Tahoe-Sierra*, for example, the Court declined to find a taking when a regional planning agency instituted a 32-month moratorium on development on land. *Id.* at 333, 318, 343. The Court held that property “cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” *Id.* at 332. Precisely as in *Tahoe-Sierra*, the time-restricted nature of the eviction moratorium dooms Plaintiffs’ takings claim. The moratorium has not relieved tenants of their duty to pay rent; it has merely limited the landlord’s access to immediate remedies for nonpayment. Act of Apr. 20, 2020, §§ 3,6. This temporary limitation does not amount to a compensable economic harm.

Moreover, “the denial of one traditional property right does not always amount to a taking.” *Andrus v. Allard*, 444 U.S. 51, 65 (1979). In *Andrus*, owners contested a regulation restricting the sale of a protected species of eagle after they had legally acquired the eagles. *Id.* at 54. The *Andrus* Court explained that the aspiring eagle vendors had many alternatives, including displaying the birds and charging admission. *Id.* at 66. Assessing economic harm cannot be limited to a “strand” of the bundle that comprises property rights. *See id.* Here, Plaintiffs cannot demonstrate a taking based solely on the asserted loss of rental income. Petition at 57. Instead, that asserted loss must be assessed in the context of the aggregate of their property rights. For example, Plaintiffs retain the right to improve their property, sell their property, and seek payment of rent after the moratorium is lifted. Act of Apr. 20, 2020, § 3(f). Viewed properly within the context of their bundle of property rights, the loss of temporary rental income alone does not constitute a taking.

## **B. The Eviction Moratorium Does Not Interfere with Reasonable Investment-Backed Expectations**

The eviction moratorium does not interfere with Plaintiffs' reasonable investment-backed expectations. Landlord-tenant relationships are already highly regulated, the moratorium has not extinguished Plaintiffs' future stream of rental income, and any expectation that ousting tenants in the midst of a pandemic and economic downturn will automatically result in substitute rental income is far from reasonable.

To begin this analysis, reasonable investment-backed expectations "must acknowledge legitimate restrictions affecting... [the] use and dispensation of the property" that predated ownership. *Murr v. Wisconsin*, 137 S. Ct 1933, 1945 (2017). "The takings clause was never intended to compensate property owners for property rights they never had." *Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 765 (2005). To be reasonable, an owner's expectations must incorporate "existing rules or understandings." *Id.* at 766. In Massachusetts and throughout *Amici's* jurisdictions, landlord-tenant relationships are highly regulated. *See, e.g., Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 737 (7th Cir. 1987) (denying a higher standard of scrutiny to a landlord because the landlord-tenant relationship is highly regulated); *Steinbergh*, 413 Mass. at 745-47 (denying takings claim against ordinance preventing landlords from removing rent-controlled tenants in order to convert units into condominiums). Landlords are subject to myriad state and local regulations such as limits on initial payments, restrictions on fees for late payments, and habitability standards.<sup>50</sup> Landlords expect regulation, and in light of

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<sup>50</sup> *Tenant Rights*, Commonwealth of Mass. (2020), <https://www.mass.gov/info-details/tenant-rights>; *see also* Baltimore, Md., Mun. Code § 9-14.1 (requiring landlords provide apartments fit for human habitation); Chicago, Ill., Mun. Code § 5-12-140 (limiting late fees and contractual waivers of city rental requirements); Cincinnati, Ohio, Mun. Code § 871-9 (limiting late fees and requiring compliance with health and safety codes); *S.A.F.E. Housing*, St. Paul, Minn. (2020) (limiting security deposit to one month's rent and requiring just evictions in St. Paul),



an international public health emergency with new laws and regulations from federal, state, and local governments impacting all business owners, landlords should reasonably expect new regulations, too.

Moreover, the moratorium has not extinguished Plaintiffs' ability to "generate a future stream of rental income." *Anaheim Gardens LP v. United States*, 953 F.3d 1344, 1354 (Fed. Cir. 2020) (holding that when Takings Clause cases concern rental properties, interference with investment-backed expectations should be measured by interference with future rental income, since "that's what the government actually took from them"). Plaintiffs retain their rights to past, current, and future income that the property may generate. When the moratorium ends, the tenants must pay the full amount owed, because the moratorium did not end the assessment of rent, but only limited the tools available for its collection. Act of Apr. 20, 2020, § 3(f); *see, e.g., Elmsford Apartment Assocs.*, 2020 WL 3498456, at \*10 ("Because landlords understand that the contractual right to collect rent is conditioned on compliance with a variety of state laws, their reasonable investment-backed expectations cannot extend to absolute freedom from "public program[s] adjusting the benefits and burdens of economic life to promote the common good.") (quoting *Penn Central*, 438 U.S. at 124).

In addition, Plaintiffs' expectation that they may convert a "non-performing rental property into a performing one" during a pandemic is not reasonable. Petition at 56. "A property owner's expectations must be reasonable and predicated on existing conditions." *Leonard v. Town of Brimfield*, 423 Mass. 152, 155 (1996). Here, Plaintiffs' implication that they would be able to immediately find substitute tenants from whom to collect rent is unreasonable. The

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<https://www.stpaul.gov/sites/default/files/Media%20Root/Mayor%27s%20Office/SAFE%20HOUSING%20SAINT%20PAUL.pdf>

pandemic and its economic fallout have reduced work hours and resulted in high unemployment in Massachusetts, *Amici*'s jurisdictions, and throughout the country.<sup>51</sup> Due to reduced incomes, rental rates have fallen as landlords are unable to find tenants who can afford prior monthly rents.<sup>52</sup> Even absent these market changes though, similarly regulated landlords in New York simply “do not enjoy a constitutional right to realize a profit from their rental properties – let alone all the profits contemplated in each of their individual rental agreements.” *Elmsford Apartment Assocs.*, 2020 WL 3498456, at \*10 (citation omitted). Neither do Massachusetts landlords.

### C. The Character of the Eviction Moratorium Does Not Constitute a Taking

The third prong of the *Penn Central* test asks this Court to consider “the character of the governmental action.” 438 U.S. at 124. Public programs that adjust “the benefits and burdens of economic life to promote the common good” like the eviction moratorium are less readily deemed takings. *Id.* The Supreme Court has “consistently affirmed” that renter protections serve the common good. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)). In *Yee*, the Supreme Court rejected a mobile-home park owner’s claims that a rent control regulation amounted to a physical

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<sup>51</sup> *See, e.g.,* Kim Parker, Juliana M. Horowitz, & Anna Brown, *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*, Pew Rsch. Ctr. (Apr. 21, 2020), <https://www.pewsocialtrends.org/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/>; Matthieu Despard et al., *COVID-19 Job and Income Loss Leading to More Hunger and Financial Hardship*, Brookings Inst. (July 13, 2020), <https://www.brookings.edu/blog/up-front/2020/07/13/covid-19-job-and-income-loss-leading-to-more-hunger-and-financial-hardship/>; *see also* Acosta Aff. ¶¶ 5-9 (Secretary of Labor and Workforce Development for the Commonwealth of Massachusetts, attesting to the high unemployment figures in Massachusetts due to the pandemic).

<sup>52</sup> *See, e.g.,* Tim Logan, *Boston Area’s Apartment-Rental Market Stuck in Limbo*, Boston Globe (May 31, 2020), <https://www.bostonglobe.com/2020/05/31/business/boston-areas-apartment-rental-market-stuck-limbo/>; Anna Bahney, *Pandemic Pricing is Here - Rents Are Dropping Across the US*, CNN Business (June 17, 2020), <https://www.cnn.com/2020/06/16/success/rents-are-dropping-us-cities-coronavirus/index.html>.

taking and affirmed the “broad power” of states “to regulate housing conditions in general and the landlord-tenant relationship in particular.” *Id.* at 528-30.

Massachusetts law is in accord. In *Flynn v. City of Cambridge*, there was no dispute that a rent and eviction regulation that restricted the ability of landlords to evict rent-controlled tenants when buildings were converted into condominiums served a legitimate public purpose. 383 Mass. 152, 160-61 (1981). That regulation responded to “a serious public housing emergency” that resulted from the practice of landlords converting affordable units into luxury condominiums, *id.* at 156-57, and the Court concluded that such a regulation was not a taking. *Id.* at 160-61. The eviction moratorium serves many important public purposes, including protecting the broader community from the uncontrolled spread of COVID-19 that could be induced by mass evictions and a subsequent result of homelessness and overcrowding.<sup>53</sup>

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Accordingly, all of the *Penn Central* factors militate against a conclusion that the moratorium is a taking.

### **III. THE EVICTION MORATORIUM DOES NOT VIOLATE THE CONTRACTS CLAUSE<sup>54</sup>**

Contracts Clause jurisprudence allows states to use police powers to impair private contractual obligations if the three-part test set forth in *Energy Reserves Group v. Kansas Power & Light Company* is met. 459 U.S. 400, 411-12 (1983); *see also Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434 (1934) (holding that states could use their police powers to protect citizens from economic harms by modifying private contracts). Under *Energy Reserves*, a court

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<sup>53</sup> *See also* Part I.A-B, *supra*. Another risk of housing loss is food insecurity. *See Maxwell Aff.*, ¶¶ 13-16 (Director of Programs for the Food Bank of Western Massachusetts).

<sup>54</sup> *Amici* acknowledge that Plaintiffs dropped all federal constitutional claims from the current case. We nonetheless include the subsequent analysis, because of its pertinence to other remaining claims.

must (1) determine if a law substantially impairs private contractual rights. If it does, such a restriction can be upheld if (2) the state has a “significant and legitimate public purpose behind the regulation;” and (3) the adjustments of contractual rights and responsibilities were based on reasonable conditions and tailored to the public purpose supporting the legislation. 459 U.S. at 411-13; *see also Sveen v. Melin*, 138 S.Ct. 1815, 1822 (2018) (collapsing parts two and three above into an inquiry about “the means and ends of the legislation”). “The law affords States a wide berth to infringe upon private contractual rights when they do so in the public interest.” *Elmsford Apartment Assocs.*, 2020 WL 3498456, at \*12 (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 16 (1977)). The eviction moratorium does not meet the threshold requirements of a substantial impairment, but even if it did, the regulation has several significant purposes and is tailored to the purposes for the legislation.

**A. The Eviction Moratorium Does Not Substantially Impair Private Contractual Rights.**

The eviction moratorium does not substantially impair landlords’ contractual rights. Among other things, past regulation of the industry is relevant as to whether the regulation in question constitutes a substantial impairment. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 n.13 (citing *Veix v. Sixth Ward Bldg. & Loan Ass’n.*, 310 U.S. 32, 38 (1940)); *see also Elmsford Apartment Ass’ns.*, 2020 WL 3498456 at \*12 (“[T]he extent to which such impairment qualifies as substantial, ‘is affected by whether the relevant party operates in a heavily regulated industry.’”) (quoting *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54, 64 (2d Cir. 2020)). As noted above in Part II.B, “the landlord-tenant relationship is, if nothing else, heavily regulated.” *Chicago Bd. of Realtors, Inc. v. Chicago*, 819 F.2d 732, 736-37 (7th Cir. 1987) (explaining that tenant-protective measures, such as limits on late fees and maintenance requirements, were subject to lesser scrutiny under the substantial impairment standard); *see also*

*Troy, Ltd. v. Renna*, 727 F.2d 287, 297 (3d Cir. 1984) (concluding that prolonging the length of time a landlord was barred from evicting a tenant was not a substantial impairment because the tenancy was already regulated by the state), *Elmsford Apartment Ass'ns.*, 2020 WL 3498456, at \*12-13.

In determining substantial impairment, Supreme Court precedent has “considered the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights.” *Sveen*, 136 S. Ct. at 1822 (internal citations omitted). Even laws that make a “significant change” do not necessarily constitute a “substantial impairment.” *Id.* (concluding that Minnesota revocation-on-divorce statute did not substantially impair pre-existing contractual arrangements). The eviction moratorium imposes a temporary restraint on a landlord’s ability to take action for nonpayment. It does not extinguish the right to collect future rent from tenants or extinguish payments that are due. Accordingly, it is not a substantial impairment and the analysis could stop here.

#### **B. The Eviction Moratorium Fulfills a Significant and Legitimate Public Purpose**

Even if the eviction moratorium substantially impairs the private contractual rights of landlords, it is permitted to do because it serves a significant public purpose. The “remedying of a broad and general social or economic problem” constitutes a significant and legitimate public purpose that justifies impairing private contracts. *Energy Reserves*, 459 U.S. at 411-12. This “authority retained by the state over contracts to safeguard the vital interests of its people . . . extends to economic needs . . . .” *Veix*, 310 U.S. at 38-39 (upholding state restriction on withdrawal of funds).

During prior crises, the Supreme Court has held that protecting the stability of the nation’s economy constituted a significant and legitimate public purpose that justified the

impairment of contractual rights. *See id.*; *see also U.S. Tr. Co.*, 431 U.S. at 22 n.19 (1977) (citations omitted) (explaining that the existence of an emergency and limited duration of a policy are factors to be assessed but are not dispositive when determining the existence of a legitimate public purpose). In *Veix*, “the weakness in the financial system” after the Great Depression justified substantial impairment of building and loan associations’ contracts because it protected the public from widespread harm resulting from further depression of real estate values. 310 U.S. at 38-39. In *Block v. Hirsh*, the Supreme Court upheld a temporary rent control law in the District of Columbia that was implemented because of a national housing shortage after World War I. 256 U.S. 135 (1921). Here, the Massachusetts Legislature has acted to protect tenants from the similarly massive social and economic problems, on top of a public health crisis.<sup>55</sup> As discussed above, the eviction moratorium serves to limit the spread of COVID-19 and protect the public health of the state. Because losing access to stable housing is associated with an increased likelihood of job loss,<sup>56</sup> keeping people housed is also critical during the current economic crisis where so many have lost their jobs.

### **C. The Eviction Moratorium is Reasonably Tailored to Protect the Public Health and Economic Welfare of Tenants During the COVID-19 Pandemic**

Under the third prong of the Contracts Clause analysis, any substantial impairment to contractual relationships must be reasonable and tailored to the public purpose supporting the legislation. *Energy Reserves*, 459 U.S. at 412-13. Relevant factors include whether the state has declared an emergency, if the law is temporary in nature, and if the law is limited in its purpose, although no single factor an “absolute requirement[.]” *U.S. Tr. Co.*, 431 U.S. at 22 n.19; *see also*

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<sup>55</sup> *See Williams Aff.*, ¶ 16 (Deputy Director of Boston’s Office of Housing Stability stating, “What began as a public health crisis turned quickly into an economic crisis.”).

<sup>56</sup> Matthew Desmond & Carl Gershenson, *supra* note 36, at 54. *See Schwartz Aff.*, ¶ 5 (explaining the impact of job loss on evictions for people in Western Massachusetts).

*Veix*, 310 U.S. at 39-40 (finding no Contracts Clause violation when an emergency had passed but its effects remained even though the relief was not temporary), *Blaisdell*, 290 U.S. at 447-48 (finding no Contracts Clause violation for a two-year moratorium on foreclosures). Here, the eviction moratorium meets this test handily.

The impact of the moratorium on rental contracts is reasonable and appropriately tailored in light of the state of emergency declared in response to the COVID-19 pandemic. The Massachusetts Governor declared a state of emergency on March 10, 2020 “to support the Commonwealth’s response to the outbreak of Coronavirus.”<sup>57</sup> The eviction moratorium is a temporary extension of the emergency declaration and only lasts 120 days or for 45 days after the emergency declaration has been lifted. While the Governor can postpone the expiration, contrary to Plaintiffs’ assertions that the Act “*unconditionally and indefinitely* delay[s]” landlords’ ability to evict, Petition at 60 (emphasis in original), this postponement is limited and may not be extended past 45 days after the emergency declaration has been lifted.<sup>58</sup> After the eviction moratorium is lifted, landlords remain free to file eviction suits in court or pursue back rent in small claims court. Indeed, the moratorium explicitly preserves the tenants’ obligations to pay rent to landlords. Act of Apr. 20, 2020, § 3(f).

Finally, the purpose of the regulations is to protect renters during an unprecedented public health and economic crisis. An eviction moratorium is an effective means to promote public health and economic welfare during the ongoing global pandemic both because keeping people inside and housed curbs the spread of the virus, and because ensuring housing stability

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<sup>57</sup> Office of Governor Charlie Baker and Lt. Governor Karyn Polito, *Governor Baker Declares State of Emergency to Support Commonwealth’s Response to Coronavirus*, Mass.Gov (Mar. 10, 2020), <https://www.mass.gov/news/governor-baker-declares-state-of-emergency-to-support-commonwealths-response-to-coronavirus>.

<sup>58</sup> *Id.*

contributes to job retention and strengthens local economies. Given the substantial public interest state and local governments have in maintaining both local public health and economic stability, temporary and limited regulations are a justified measure to take to support the public good. Accordingly, the eviction moratorium is reasonably tailored in duration and reach to support this crucial public purpose.

### **CONCLUSION**

For all the foregoing reasons and for the reasons provided in opposition by Defendants the Commonwealth of Massachusetts and the Executive Office of Community and Housing Development, *Amici* Cities and Counties respectfully request that the motion for preliminary injunction be denied.

Respectfully submitted,

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Dated: July 24, 2020



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