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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EL PAPEL, LLC; BERMAN 2, LLC, Plaintiffs-Appellants, v. CITY OF SEATTLE, a municipal corporation; et al., Defendants-Appellees, and JAY R. INSLEE, in his official capacity as Governor of the State of Washington; JENNY A. DURKAN, in her official capacity as the Mayor of the City of Seattle, Defendants.	No. 22-35656 D.C. No. 2:20-cv-01323-RAJ MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued and Submitted April 10, 2023
Seattle, Washington

Before: BYBEE and FORREST, Circuit Judges, and GORDON,† District Judge.

Seattle landlords, El Papel, LLC and Berman 2, LLC (collectively, Landlords), appeal the district court's dismissal of their as-applied Fifth Amendment Takings Clause claims, challenging Washington State's and the City of Seattle's (collectively, Defendants) COVID-19 pandemic eviction moratoria and related regulations.[1] We affirm.

1. *Jurisdiction*. Because all the challenged eviction restrictions have now expired, we first assure ourselves that this case is not moot and that we continue to have jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (instructing that federal courts have an independent obligation to ensure they have jurisdiction regardless of whether jurisdiction is questioned by the parties); *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1112 (9th Cir. 2012) (same). "[A] case is moot on

† The Honorable Andrew P. Gordon, United States District Judge for the District of Nevada, sitting by designation.

[1] On appeal, the Landlords abandoned their claims for declaratory and injunctive relief, facial challenges, Contracts Clause claim, and challenge to Seattle's repayment plan requirement.

appeal only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Ctr. for Biological Diversity v. Export-Import Bank of the United States*, 894 F.3d 1005, 1011 (9th Cir. 2018) (internal quotation marks and citation omitted).

Here, there is effectual relief that we could grant to the Landlords if they were to prevail because they seek nominal damages to remedy the unconstitutional takings that they allege. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) ("[F]or the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right."); *see also Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 871 n.7 (9th Cir. 2017) ("A claim for nominal damages that seeks to vindicate a constitutional right is not moot.").

Moreover, the Eleventh Amendment does not shield the Defendants from this relief. Municipalities generally do not have immunity under the Eleventh Amendment because they are not arms of the state. *See Ray v. County of Los Angeles*, 935 F.3d 703, 708–09 (9th Cir. 2019). And Washington State waived its Eleventh Amendment immunity here, both through its conduct and expressly at oral argument. *See Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002). Having concluded that we continue to have jurisdiction, we address the merits.

2. *Fifth Amendment Takings.* We conclude that summary judgment in favor of Washington State on the Landlords' 42 U.S.C. § 1983 Takings claim was appropriate, albeit for a different reason than that relied on by the district court. "[Section] 1983 actions do not lie against a State." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 69 (1997) (citing *Will v. Mich.*

Dept. of State Police, 491 U.S. 58, 71 (1989)). This rule applies to "[s]tate officers in their official capacities, like States themselves[.]" *Id.* at 69 n.24. Here, the Landlords asserted their § 1983 claim challenging Washington State's COVID-19 eviction moratorium against Washington Attorney General Robert Ferguson in his official capacity. Thus, this claim necessarily fails. *See id.*

We likewise conclude that the district court did not err by granting summary judgment in favor of Seattle. We agree with Seattle that the Supreme Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), controls here and forecloses the Landlords' per se physical-taking claim. The Landlords argue under *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), that, as applied, Seattle's eviction restrictions constituted a physical taking. While the Landlords make some compelling points, *Cedar Point Nursery* does not support their claim.

Unlike in *Cedar Point Nursery*, where a state regulation required agricultural employers to grant entry onto their property to union organizers for up to three hours a day so that the organizers could solicit support for unionization , *see* 141 S. Ct. at 2069–70, Seattle's eviction restrictions did not impose a physical occupation on the Landlords, *see Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."). Nor did Seattle's restrictions compel the Landlords to use their property for a specific purpose. The Landlords here chose to use their property as residential rentals; the tenants' occupancy was not imposed over the Landlords' objection in the first instance. *Cf. Yee*, 503

U.S. at 528 (finding that the government had not "required any physical invasion of [the owners'] property" by the park owners' existing tenants). And the challenged regulations allowed the Landlords to evict their tenants for some specified purposes. *See* Civil Emergency Order – Moratorium on Evictions, City of Seattle (2020), https://seattle.legistar.com/View.ashx?M=F&ID=8200808&GUID=10C3E639-6641-42EC-88C9-C1201BED327C. Although the Landlords assert that Seattle's eviction restrictions deprived them of their right to exclude, this right is not absolute in the landlord/tenant context. *See Yee*, 503 U.S. at 528; *see also Silver v. Rudeen Mgmt. Co.*, 484 P.3d 1251, 1254–57 (Wash. 2021) (discussing the evolution and scope of state and federal landlord-tenant regulation).

Finally, the Supreme Court's decision in *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), striking down the Center for Disease Control's (CDC) federal eviction moratorium, does not affect our analysis. *Alabama Association of Realtors* did not address a takings claim. The issue presented was whether the CDC had statutory authority to impose a federal eviction moratorium by administrative regulation. *Id.* at 2488. The Court held that the CDC did not have such authority, and so the moratorium could not stand without specific congressional authorization. *Id.* at 2488–89. The Court did not mention or call *Yee* into doubt. The similar question here—whether Defendants' eviction restrictions were a valid exercise of power—is not before us and has no bearing on the Landlords' taking claim. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) ("It is a separate question . . . whether an

otherwise valid regulation so frustrates property rights that compensation must be paid.").

AFFIRMED.

Filed 07/20/22

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EL PAPEL LLC, *et al.*, Plaintiffs, v. JENNY DURKIN, *et al.*, Defendants.	CASE NO. 20-cv-01323-RAJ ORDER ADOPTING IN PART REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

The Court, having reviewed Plaintiffs' complaint, the Report and Recommendation of the Honorable J. Richard Creatura, United States Magistrate Judge, and the objections of the parties and the remaining record, finds and **ORDERS**:

(1) The Report and Recommendation (Dkt. # 141) is approved and adopted in part and modified as per this order.

(2) Defendants' cross motions for summary judgment (Dkt. ## 103, 104; *see also* 110) are granted.

(3) Defendant City of Seattle's supplemental motion for summary judgment (Dkt. # 162) is granted. Based on changed circumstances since the report and recommendation was issued, the Court modifies the

report and recommendation to provide that Plaintiffs' requests for injunctive and declaratory relief as to the eviction moratorium is [sic] moot. Courts presume that the repeal, amendment, or expiration of legislation or ordinance will render an action challenging it moot, unless there is a reasonable expectation that the government actor will reenact the challenged provision or one similar to it. *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019); *Cummings v. DeSantis*, 2020 WL 4815816 (M.D. Fla. Aug. 19, 2020). The challenged eviction moratorium expired on February 28, 2022. There is no evidence in the record indicating a reasonable expectation that the City of Seattle is likely to enact the same or substantially similar moratorium in the future. Given the rebuttable presumption that the alleged wrongful conduct will not occur, and no evidence sufficiently rebutting that presumption, no live controversy remains regarding the City's eviction moratorium.

(4) Plaintiffs' motion for summary judgment (Dkt. # 93) is denied, and this matter is dismissed with prejudice.

(3) The Clerk is directed to send a copy of this Order to the Hon. J. Richard Creatura.

DATED this 20th day of July, 2022.

s/ Richard A. Jones
The Honorable Richard A. Jones
United States District Judge

Filed 07/20/22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EL PAPEL LLC, *et al.*, Plaintiffs, v. JENNY DURKAN, *et al.*, Defendants.	**JUDGMENT IN A CIVIL CASE** CASE NO. 2:20-cv-01323-RAJ-JRC

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT defendants' cross-motions for summary judgment (Dkts. 103, 104, 110) are granted, Defendant's City of Seattle's supplemental motion for summary judgment (Dkt. 162) is granted, plaintiffs' motion for summary judgment (Dkt. 93) is denied, and the matter is dismissed with prejudice. The case is closed. Judgment is for defendants.

Dated July 20, 2022.

Ravi Subramanian
Clerk of the Court

Sandra Rawski
Deputy Clerk

Filed 09/15/21

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EL PAPEL LLC, *et al.*, Plaintiffs, v. JENNY DURKAN, *et al.*, Defendants.	CASE NO. 20-cv-01323-RAJ-JRC REPORT AND RECOMMENDATION NOTED FOR: October 1, 2021

The District Court has referred this matter to the undersigned pursuant to 28 U.S.C. § 17 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3, and MJR4.

In 2020, in the throes of a worldwide pandemic and corresponding economic downturn, local governments imposed measures including restrictions on landlords' ability to evict tenants for nonpayment and to collect overdue rent. At issue in this lawsuit is the constitutionality of such eviction restrictions imposed by Washington State and the City of Seattle. Two landlords bring suit against the City's Mayor (Jenny Durkan), the City, and the State Attorney General (Robert Ferguson), alleging that the State's moratorium on most residential evictions and the City's eviction moratorium, rent repayment plan requirement, and additional six-month defense

against eviction[1] violate their civil rights—specifically, their rights to be free from impairment of contract and from physical takings of their properties.

The parties have now filed cross-motions for summary judgment, which are ripe for decision. Dkts. 93, 103, 104. The parties request oral argument, but oral argument is not necessary for resolution of the issues presented.

This Court—and the District Court—previously found that plaintiffs were unlikely to succeed on the merits of their claims. *See* Dkt. 78; *see also Apartment Ass'n of L.A. Cty., Inc. v. City of L.A.* ("AALAC"), No. 20-56251, 2021 WL 3745777, at *9 (9th Cir. Aug. 25, 2021) (citing with approval this Court's report and recommendation on the preliminary injunction related to the Contracts Clause issue and the order adopting that report and recommendation).

The Court has now taken a hard look at plaintiffs' renewed arguments, including the supplemental authority provided by all parties, but finds that plaintiffs have failed to provide evidence from which a trier of fact could conclude that the restrictions violate the Contracts Clause or the Takings Clause.

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[1] Although the restrictions at issue are three distinct measures enacted by City of Seattle authorities (including a moratorium on evictions) and one eviction moratorium enacted by the State, the Court will collectively refer to all measures as "eviction restrictions" in this Report and Recommendation, for ease of reference. Moreover, the Court will refer to the restrictions individually as the "State's moratorium," the "City's moratorium," the City's "six month defense," and the City's "repayment plan requirement." *See infra*, Background (explaining the particulars of each restriction).

Specifically, plaintiffs have failed to provide evidence from which a factfinder would conclude that the State or City restrictions were not appropriate and reasonable ways to advance significant and legitimate goals of preventing disease transmission, housing displacement, and homelessness. And plaintiffs have failed to provide evidence from which a factfinder would conclude that a physical taking occurred. Finally, plaintiffs' claims for injunctive relief related to the State's moratorium are now moot. Therefore, defendants' motions for summary judgment dismissal should be granted, plaintiffs' summary judgment motion should be denied, and this matter should be dismissed with prejudice.

BACKGROUND[2]

I. The COVID-19 Pandemic

Over the last year and a half, the novel coronavirus ("COVID-19"), first identified as a cluster of pneumonia cases in late 2019, has grown to a pandemic of unprecedented proportions. *See Timeline: WHO's COVID-19 Response*, World Health Organization (last visited Sept. 10, 2021).[3] On January 21, 2020, Washington State reported the United States' first COVID-19 case. Dkt. 107, at 2. Within approximately a month, officials recognized community spread of the disease within Washington State, and by the end of February, COVID-19 had

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[2] Except as otherwise cited, the facts in this section are taken from the parties' evidence on summary judgment. The Court takes judicial notice of several official sources for various background facts.

[3] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#

claimed its first victim in Washington State. *See* Dkt. 107, at 3.

It is now known that COVID-19 spreads easily from person to person, transmitted primarily by respiratory droplets or small particles; that the population had little to no pre-existing immunity to the virus; that pre-symptomatic and asymptomatic infections occur and cause unknowing spread of the virus; and that the risk of transmission is significantly greater indoors. Dkt. 107, at 3, 5. Some patients suffer severe or critical illness or even death—and some survivors appear to experience long-term health complications. Dkt. 107, at 3–4. Outbreaks threaten to overwhelm the healthcare system. Dkt. 107, at 5.

Due to the ease of transmission and lack of approved drugs, therapeutics, or vaccines (at the time) to treat or prevent COVID-19 *(see* Dkt. 107, at 6), the COVID-19 outbreak exploded, becoming a leading cause of global death in 2020. *See World Health Statistics 2021*, WHO (2021), at viii (estimating that at least 3 million global excess deaths in 2020 were attributable to COVID-19), 7 (reporting that COVID-19 was one of the top 10 causes of death in the world in 2020).[4]

Washington State is no exception from the devastation the COVID-19 pandemic has wrought. According to the State Department of Health, at the time of this writing, there have been nearly 600,000 reported COVID-19 cases in Washington State, 32,662 hospitalizations, and 6,605 deaths. *COVID-19*

[4] *Available at* https://www.who.int/data/gho/publications/world-health-statistics

Data Dashboard, Wash. State Dep't of Health (last visited September 10, 2021).[5]

II. Washington State's COVID-19 Response

On February 29, 2020, the Governor of Washington State declared a State of Emergency. Dkt. 107, at 6. The Governor instituted a number of measures to mitigate the spread and impact of COVID-19 in the State, including prohibiting large or public gatherings and closing schools, colleges, and universities. Dkt. 107, at 6.

According to a State epidemiologist, by mid-March 2020—and despite these measures—Washington had the highest absolute number and among the highest number per capita of COVID-19 cases in the country. Dkt. 107, at 7. "From a public health standpoint, [the] transmission rate was unsustainable[.]" Dkt. 107, at 8. Therefore, the Governor issued restrictions including a stay-at-home order, the moratorium at issue in this lawsuit, and, later, a mask mandate for public settings. *See* Dkt. 107, at 9, 12.

The first iteration of the State's moratorium, Proclamation 20-19, prohibited serving a notice of unlawful detainer for default payment of rent, issuing a 20-day notice of unlawful detainer unless the landlord attested that the action was necessary for health and safety, and initiating judicial actions for writs of restitution for failure to pay rent. *See* Dkt. 106-1, at 6–7.

Throughout 2020, cases continued to ebb and surge, with corresponding implementation,

[5] https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard

modifications, and pauses of the Governor's phased reopening plan. *See* Dkt. 107, at 10–14. Although Proclamation 20-19 was set to expire April 17, 2020 (Dkt. 106-1, at 6), the Governor amended and extended the State's moratorium repeatedly, through June 30, 2021. *See* Dkt. 106, at 6–10.

As amended, the State's moratorium stated, in pertinent part—

> Landlords, property owners, and property managers are prohibited from serving or enforcing, or threatening to serve or enforce, any notice requiring a resident to vacate any dwelling or parcel of land occupied as a dwelling, including but not limited to an eviction notice, notice to pay or vacate, notice of unlawful detainer, notice of termination of rental, or notice to comply or vacate. This prohibition applies to tenancies or other housing arrangements that have expired or that will expire during the effective period of this Proclamation. This prohibition applies unless the landlord, property owner, or property manager (a) attaches an affidavit attesting that the action is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident; or (b) provides at least 60 days' written notice of intent to (i) personally occupy the premises as a primary residence, or (ii) sell the property.
>
> [Similar provision applicable to judicial eviction orders or agreements to vacate omitted.]

…

Landlords, property owners, and property managers are prohibited from assessing, or threatening to assess, late fees for the non-payment or late payment of rent or other charges related to a dwelling or parcel of land occupied as a dwelling, and where such non-payment or late payment occurred on or after February 29, 2020[.]

…

Except as provided in this paragraph, landlords, property owners, and property managers are prohibited from treating any unpaid rent or other charges related to a dwelling or parcel of land occupied as a dwelling as an enforceable debt or obligation that is owing or collectable, where such non-payment was as a result of the COVID-19 outbreak and occurred on or after February 29, 2020, and during the State of Emergency proclaimed in all counties in Washington State. This includes attempts to collect, or threats to collect, through a collection agency, by filing an unlawful detainer or other judicial action, withholding any portion of a security deposit, billing or invoicing, reporting to credit bureaus, or by any other means. **This prohibition does not apply to a landlord, property owner, or property manager who demonstrates by a preponderance of the evidence to a court that the resident was offered, and refused or failed to comply with, a repayment plan that was reasonable based on the**

> **individual financial, health, and other circumstances of that resident; failure to provide a reasonable repayment plan shall be a defense to any lawsuit or other attempts to collect.**

Dkt. 106-1, at 46–47 (bullet points omitted) (emphasis in original). Landlords who violated these prohibitions faced criminal penalties. Dkt. 106-1, at 48.

By early 2021, the State transitioned to a county-by-county phased reopening plan. Dkt. 107, at 16. And in June 30, 2021, corresponding with the end of the State's moratorium, Washington State lifted many other COVID-19 restrictions. *See Inslee announces statewide reopening date of June 30 and short-term statewide move to Phase 3*, Washington Governor Jay Inslee (May 13, 2021).[6]

In the meantime, the State legislature also acted, submitting Engrossed Second Substitute Senate Bill ("E2SSB") 5160 for the Governor's signature on April 20, 2021. Dkt. 106, at 11. As enacted, that bill provides a variety of protections to tenants and ends the eviction moratorium on June 30, 2021. *See* Dkt. 106, at 11–12. Among those protections are the creation of an eviction resolution pilot program, a right to counsel program, and a rental assistance program in Washington State. *See* Dkt. 126-1, at 23, 25. E2SSB 5160 became effective April 22, 2021. Dkt. 106, at 11.

Between the expiration of the State's moratorium on June 30, 2021, and the "full implementation of Senate Bill 5160," the Governor has passed a "bridge"

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[6] https://www.governor.wa.gov/news-media/inslee-announces-statewide-reopening-date-june-30-and-short-term-statewide-move-phase%C2%A03.

measure that expires September 30, 2021. Dkt. 126-1, at 24. Under the bridge measure, eviction is not allowed for unpaid rent that accrued between February 2020 and July 2021 due to COVID-19, until—

> both (1) a rental assistance program and an eviction resolution pilot program as contemplated by Section 7 of E2SSB 5160 have been implemented and are operational in the county in which the rental property is located; and (2) a tenant has been provided with, and has, since the effective date of this order, rejected or failed to respond within 14 days of receipt of such notice to an opportunity to participate in an operational rental assistance program and an operational eviction resolution pilot program provided by E2SSB 5160.

Dkt. 126-1, at 25. Moreover, such unpaid rent cannot be treated as a currently owing or collectable, enforceable debt or obligation "where such non-payment was, in whole or in part, a result of the COVID-19 crisis, until such time as the landlord and tenant have been provided with an opportunity to resolve nonpayment of rent through a rental assistance program and an eviction resolution pilot program as provided by Section 7 of E2SSB 5160." Dkt. 126, at 29.

In addition, related to rent that accrues between August 1, 2021, and September 30, 2021—

> landlords are prohibited from serving or enforcing, or threatening to serve or enforce, any notice requiring a tenant to vacate any

> dwelling, including but not limited to an eviction notice, notice to pay or vacate, unlawful detainer summons or complaint, notice of termination of rental, or notice to comply or vacate, if, unless otherwise permitted by this order or under state law, a tenant has (1) made full payment of rent; or (2) made a partial payment of rent based on their individual economic circumstances as negotiated with the landlord; or (3) has a pending application for rental assistance that has not been fully processed; or (4) resides in a jurisdiction in which the rental assistance program is anticipating receipt of additional rental assistance resources but has not yet started their program or the rental assistance program is not yet accepting new applications for assistance.

Dkt. 126-1, at 26. Late fees are also disallowed. *See* Dkt. 126-1, at 26. And landlords cannot evict tenants for unpaid rent from February 29, 2020, through September 30, 2021, "if the landlord has made no attempt to establish a reasonable repayment plan with the tenant per E2SSB 5160, or if they cannot agree on a plan and no local eviction resolution pilot program per E2SSB 5160 exists." Dkt. 126-1, at 6.

III. The City's Restrictions

The City of Seattle also took measures to respond to the COVID-19 crisis, including in the context of residential tenancies. On March 3, 2020, defendant Durkan proclaimed a civil emergency. Dkt. 17-6, at 5. On March 16, defendant Durkan placed a temporary moratorium on residential evictions. *See* Dkt. 124, at 6. That moratorium is set to expire September 30,

2021. Dkt. 124, at 6. The City's moratorium forbids eviction unless the eviction is "due to actions by the tenant constituting an imminent threat to the health or safety of neighbors, the landlord, or the tenant's or landlord's household members." Dkt. 17-7, at 4. A landlord cannot collect late fees or other charges due to late payment of rent during the moratorium, either. Dkt. 17-7, at 4.

On September 30, 2021, the City Council also passed an ordinance providing a six-month defense against evictions due to hardship, which will go into effect September 30, 2021. Dkt. 124, at 6. This six month defense applies where eviction would result from nonpayment that results in having to vacate the housing unit within six months of the end of the mayor's moratorium. Dkt. 17-11, at 20. A tenant may invoke the six month defense only by self-certifying financial hardship preventing payment of rent. Dkt. 17-11, at 20.

In addition, on May 11, 2020, the City Council adopted an ordinance governing failure to pay rent "when due during, or within six months after the termination of, the civil emergency proclaimed by Mayor Durkan on March 3, 2020[.]" Dkt. 17-12, at 8. Under the repayment plan requirement, a tenant may elect to pay eligible, overdue rent in installments over three to six months, and failure of a landlord to accept payment under the installment schedule is a defense to eviction. Dkt. 17-12, at 8–9. Moreover, landlords may not collect late fees, interest, or other charges during or within one year after the termination of the mayor's civil emergency. Dkt. 17-12, at 9.

IV. Plaintiffs

Plaintiffs, who brought suit in this Court in September 2020, are two residential landlords whose tenants are (or were) not paying rent. *See* Dkts. 95, 97. El Papel, LLC, has provided evidence that certain tenants owe thousands of dollars of unpaid rent and (for one tenant) against whom, "[b]ut for the Defendants' eviction moratoria," El Papel would initiate eviction proceedings. Dkt. 95, at 2. The relevant leases, according to plaintiffs, provide for eviction as a remedy for nonpayment and $75 monthly late fees. Dkt. 95, at 2. In addition, certain of Berman 2, LLC's tenants are not paying rent and have not responded to repeated efforts to reach them to set up a payment plan. Dkt. 97, at 2. At the time plaintiffs moved for summary judgment, the Berman 2 tenants owed $16,479 in back rent. Dkt. 97, at 2. Plaintiffs assert that "[b]ut for the Defendants' eviction moratoria," Berman 2 would evict its nonpaying tenants. Dkt. 97, at 2.

V. Current Circumstances

Before delving into the parties' arguments, the Court would be remiss not to note the drastic surge in COVID-19 cases currently ongoing and occurring after the parties submitted their briefing.

Three vaccines were authorized for emergency use by the FDA (Dkt. 107, at 6), and as of September 7, 2021, 67% of people over 11 years old in Washington have been fully vaccinated against COVID-19. *COVID-19 Data Dashboard*, Wash. State Dep't of Health (last visited Sept. 10, 2021).[7] Nevertheless,

[7] https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard

there has been a dramatic increase in COVID-19 cases since summer 2021, with current case counts near or exceeding those from the previous height of the pandemic. *See id.* (Epidemiologic Curves). This surge is attributable to the spread of a COVID-19 variant (the "Delta variant"), which is highly contagious, more transmissible than prior strains, and now the dominant strain of the virus in Washington State. *See* DOH Communications, *Delta variant drives sharp increase in COVID-19 cases, hospitalizations*, Wash. State Coronavirus Response (COVID-19) (Aug. 3, 2021).[8] This surge in cases has led the Governor to re-impose the statewide mask mandate and to require vaccinations for certain groups. *See Inslee announces educator vaccination requirement and statewide indoor mask mandate*, Wash. Governor Jay Inslee (Aug. 18, 2021).[9]

DISCUSSION

I. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Where there is a complete failure of proof concerning an essential element of the non-moving party's case on which the nonmoving party has the burden of proof, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of

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[8] https://coronavirus.wa.gov/news/delta-variant-drives-sharp-increase-covid-19-cases-hospitalizations

[9] https://www.governor.wa.gov/news-media/inslee-announces-educator-vaccination-requirement-and-statewide-indoor-mask-mandate

law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). And when presented with a motion for summary judgment, the court shall review the pleadings and evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted).

Once the moving party has carried its burden under Fed. R. Civ. P. 56, the party opposing the motion must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The opposing party cannot rest solely on its pleadings but must produce significant, probative evidence in the form of affidavits, and/or admissible discovery material that would allow a reasonable jury to find in his favor. *Id.* at n.11; *Anderson*, 477 U.S. at 249–50. However, weighing of evidence and drawing legitimate inferences from facts are jury functions, and not the function of the court. *See United Steel Workers of Am. v. Phelps Dodge Corps.*, 865 F.2d 1539, 1542 (9th Cir. 1989).

II. Standing

The Court begins by addressing the parties' arguments concerning standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (holding that a federal court cannot assume standing in order to address the merits).

A. CDC Eviction Moratorium

According to defendants, because the CDC has imposed an eviction moratorium, plaintiffs are not able to evict their tenants regardless of the outcome of this suit, so that plaintiffs lack standing. *See* Dkt. 103, at 11–12; Dkt. 104, at 20. However, on August 26,

2021, the United States Supreme Court vacated a District Court's stay of an order vacating the CDC eviction moratorium, so that the CDC eviction moratorium is no longer in effect. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *4 (U.S. Aug. 26, 2021) (per curiam); *see also Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-CV-3377 (DLF), 2021 WL 1779282, at *10 (D.D.C. May 5, 2021) (setting aside the CDC moratorium and rejecting arguments that the order should be limited to parties before the Court because "when 'regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed.'" (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). Thus, defendants' argument fails.

B. The City's Repayment Plan Requirement

Next, the City argues that plaintiffs lack standing to challenge the City's repayment plan requirement because they have failed to make a showing that any of their tenants are electing to use a repayment plan. Dkt. 103, at 12.

As noted, the repayment plan prevents eviction of tenants who are electing to repay rent that became overdue during or within six months after the end of Seattle's state of emergency. *See* Dkt. 17-12, at 8–9. Plaintiffs appear to concede that their tenants are not currently partially repaying overdue rent under eviction repayment plans. *See* Dkt. 111, at 13. However, as plaintiffs point out, they, too, are currently bound by the City's ordinance. Specifically, plaintiffs cannot evict their tenants until they issue a

notice to terminate tenancy that includes a statement that informs the tenants of their right to pay overdue rent in installments. *See* Dkt. 17-12, at 9. And plaintiffs are unable to impose late fees, interest, or other charges due to "late payment of rent[.]" Dkt. 17-12, at 9. Based on these provisions, plaintiffs have shown that they have standing to challenge the repayment plan requirement.

III. Mootness

The State argues that any challenge to the State's moratorium is now moot, as that moratorium ended June 30, 2021. Dkt. 104, at 21. Plaintiffs acknowledge that the earlier State moratorium expired but argue that the bridge measure harms plaintiffs in a similar enough manner that they need not amend their complaint to bring new claims challenging that moratorium. Dkt. 130, at 5. Focusing solely on the issue of injunctive relief, the Court agrees that the challenge to the State's moratorium (even if it encompasses the bridge measure) is moot, as the bridge moratorium expires by its own terms on September 30, 2021. This will occur before this Report and Recommendation will be ripe for decision by the District Court. And plaintiffs make no argument that E2SSB 5160 re-enacts the same provisions that they challenge in this lawsuit. *See* Dkt. 130.

The Court briefly notes that plaintiffs claim that the bridge moratorium does not expire in September 2021 but continues indefinitely. Dkt. 130, at 4. Contrary to plaintiffs' claims, the bridge moratorium has a clear end date of September 30, 2021—the bridge moratorium repeatedly states as much. Dkt. 131-1, at 4; 6, 7.

Even though the claim for injunctive relief against the State must be dismissed as moot, the Court will nevertheless address the merits of the claims because plaintiffs are claiming nominal damages and declaratory relief. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (standing is to be determined separately for injunctive relief and damages). Should the District Court disagree that the injunctive relief claims pertinent to the State are moot, it should nevertheless reject those claims for the same reasons discussed below.

IV. Contracts Clause

A. State's Moratorium

Article I, section 10, clause 1 of the U.S. Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" Plaintiffs argue that the State's moratorium violated the Contracts Clause, justifying an award of nominal damages. *See* Dkt. 93, at 12; Dkt. 130, at 5.

"[N]ot all state regulation of contracts gives rise to a Contracts Clause claim. Instead, '[t]he threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship.'" *LL Liquor, Inc. v. Montana*, 912 F.3d 533, 537 (9th Cir. 2018) (quoting *Sveen*, 138 S. Ct. at 1821–22). Here, the Court assumes that the State's restriction substantially impaired the contractual relationship.[10] *See AALAC*, 2021 WL 3745777, at *6 ("We need not decide whether the eviction

[10] Therefore, the Court does not address the parties' arguments regarding whether the leases are a substantial impairment to contracts. *E.g.*, Dkt. 93, at 13–18.

moratorium is a substantial impairment of contractual relations because even assuming it is, given the challenges that COVID-19 presents, the moratorium's provisions constitute an 'appropriate and reasonable way to advance a significant and legitimate public purpose.'" (Internal citation omitted.)).

"If there is a substantial impairment, the inquiry turns to the means and ends of the legislation." *Sveen v. Melin,* 138 S. Ct. 1815, 1822 (2018). The Supreme Court "has asked whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* (quoting *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983)). A court should also look to whether "'the State, in justification, [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem,' to guarantee that 'the State is exercising its police power, rather than providing a benefit to special interests.'" *RUI One Corp. v. City of Berkeley,* 371 F.3d 1137, 1147 (9th Cir. 2004) (quoting Energy Rsrvs. *Grp., Inc.*, 459 U.S. at 411–12)).

Finally, courts must "defer to legislative judgment as to the necessity and reasonableness of a particular measure," where, as here, neither the state nor city are contracting parties. *Energy Rsrvs. Grp., Inc.*, 459 U.S. at 413 (internal citation and quotation omitted); *see also AALAC*, 2021 WL 3745777, at *5 (characterizing modern Contracts Clause jurisprudence as inquiring into whether the "adjustment of the rights and responsibilities of contracting parties is based upon reasonable

conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." (internal citation and quotations omitted)).

The Court turns to plaintiffs' arguments.

1. Failure to Ensure Compensation

Plaintiffs argue that the State's moratorium provided no enforcement mechanism to ensure continuing payment—or "just compensation"—for occupation of the premises. Dkt. 93, at 18. Characterized as such, plaintiffs assert that Supreme Court case law holds that such a law violates the Contracts Clause. Dkt. 93, at 18.

For approximately 15 months, the State's moratorium prohibited landlords from "serving or enforcing, or threatening to serve or enforce" a notice of eviction, similar notice, or judicial eviction for tenancies that expired during the relevant period. *See* Dkt. 106-1, at 46–47, 80. Although this prohibition had certain exceptions, those exceptions were for tenants creating risks or for sale or the landlord's occupancy of the residence. *See* Dkt. 106-1, at 80; *see also* Dkt. 106 (describing differences between the proclamations). Moreover, landlords could not treat unpaid rent as an enforceable debt or obligation that was then owing or collectable, if the nonpayment was due to COVID-19 and occurred after February 29, 2020. Dkt. 106-1, at 81. The moratorium included an exception from the prohibition against treating unpaid rent as owing or collectable, but only if the landlord could demonstrate that the resident was offered and refused a reasonable repayment plan. *See* Dkt. l06-1, at 81. This moratorium was in effect

between March 2020 (Dkt. 17-2, at 4) and June 2021. Dkt. 106-1, at 79.

Thus, the State moratorium effectively prevented plaintiffs from evicting tenants for nonpayment for nearly a year-and-a-half in most situations and from collecting unpaid rent through other means, unless they first attempted to negotiate a repayment plan. However, as the State points out, the moratorium did not forgive or cancel unpaid rent-instead, it delayed the ability to collect unpaid rent or evict tenants for nonpayment. This distinction—between the *delay* in the ability to obtain compensation for the occupancy of the property and the *cancellation* of amounts owed to compensate the landlord for the occupancy—owed is important.

Citing a series of Supreme Court cases from as early as 1843, plaintiffs argue that delaying the right to foreclosure (and by extension, the right to eviction) coupled with failing to provide for compensation for possession of the property in the meantime is unconstitutional. *See* Dkt. 93, at 18–19 (citing authorities). But as this Court has already concluded, and as the Ninth Circuit has recently confirmed, plaintiffs' interpretation of Supreme Court precedent is flawed:

> [Plaintiff] correctly observes that the Court in those [cited] Contracts Clause cases often appears to have referenced in its discussion whether the law provided for some sort of reasonable rental value to be paid to the property owner during the moratoria's interim. In [*Home Building & Loan Association v. Blaisdell*], for example, the Court upheld a moratorium on foreclosures,

at least in part because it "secure[d] to the mortgagee the rental value of the property" during the emergency period. 290 U.S. [398, 403 (1934).] The other cases [plaintiff] discusses appear to have viewed reasonable rent as a relevant consideration as well.

But [plaintiff's] assertion that, as a matter of constitutional law, eviction moratoria require fair rental compensation in the interim fails for two main reasons. *First,* even in the more Contracts Clause-friendly era in which some of these cases were decided, the authorities [plaintiff] cites do not clearly impose [plaintiff's] preferred inflexible rent payment rule. While these cases treated reasonable rent as a relevant criterion in the analysis, they do not purport to impose such a requirement as a categorical matter. Indeed, even [plaintiff] in its opening brief acknowledges that its desired contemporaneous rent requirement "may not have been elevated to a hard and fast 'rule' in every case."

In other words, there is no apparent ironclad constitutional rule that eviction moratoria pass Contracts Clause scrutiny only if rent is paid during the period of the moratoria. Instead, each of the cases [plaintiff] cites turned on its own facts and circumstances. That reasonable rent may have been a relevant consideration in some cases thus does not make it a constitutional floor in all cases. And it does not thereby create a Contracts Clause constitutional

> baseline in a case involving a public health situation like COVID-19 . . . .
>
> In claiming that any eviction moratorium is constitutional only if rent is contemporaneously paid, [plaintiff] relies most heavily on *Blaisdell*. But *Blaisdell* shows why [plaintiff's] attempt to divine a bright-line "reasonable rent" rule is unpersuasive. *Blaisdell* identified several factors that supported the state law's constitutionality. As the Court later explained, these included that the law contained a declaration of emergency, "protect[ed] a basic societal interest," was "appropriately tailored," and imposed "reasonable" conditions "limited to the duration of the emergency." *Allied Structural* [*Steel Co. v. Spannaus*], 438 U.S. [234, 242 (1978)]; *see also Blaisdell*, 290 U.S. at 444–47[]. Nothing in *Blaisdell* suggests that a "reasonable rent" requirement was dispositive. Indeed, *Blaisdell* specifically rejected the notion that Contracts Clause analysis should proceed with a "literal exactness like a mathematical formula." 290 U.S. at 428[]. Instead, "[e]very case must be determined upon its own circumstances." *Id.* at 430[] (quotations omitted).

AALAC, 2021 WL 3745777, at *7–8; *see also* Dkt. 63, at 14 ("*Blaisdell* and subsequent cases make clear that there is no precise formula or factor-based test to be applied in every case but that the overarching consideration must be the reasonableness of the impairment based on the facts of the case.").

Here, too (and as the Court has previously ruled), *Blaisdell* undermines, rather than supports, plaintiffs' claims. The State moratorium was analogous to *Blaisdell* in material respects. As explained above, the State moratorium was temporary in operation, it was tied to the duration of a civil emergency and a related economic crisis, and it was addressed toward undisputedly legitimate societal goals. This is also unlike plaintiffs' cited authority of *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935), where a law that eased restrictions on mortgagors in a variety of ways effectively took "from the mortgage the quality of an acceptable investment for a rationale investor." *Id.* at 61.

Although plaintiffs make much of the provision in the *Blaisdell* legislation providing for compensation to the property owner in the meantime, as noted, it was the totality of the circumstances and not a single factor that led the Supreme Court to uphold the law. *See also Allied Structural Steel,* 438 U.S. at 242. Moreover, even if the Court read the case law cited in plaintiffs' briefing as requiring compensation to the landlord for the period of occupancy, none of the eviction restrictions forgave or waived the obligation of paying rent. The State moratorium never *cancelled* overdue rent obligations but *delayed* the ability to collect unpaid rent (due to COVID-19) if the landlord could not demonstrate attempts to negotiate a reasonable repayment plan and prevented eviction during the 15-month period in most circumstances. This is similar to the *Blaisdell* legislation's provision for mortgagors to pay the rental value of the premises in a manner set by a court. *See* 290 U.S. at 416–17. Plaintiffs make much of the "flexible" nature of the compensation provision in *Blaisdell,* but the State's

restriction was also flexible—landlords could treat unpaid rent as immediately due and payable if the tenant failed to adhere to a reasonable repayment plan or if the non-payment was not "as a result of the COVID-19 outbreak." *See* Dkt. 106-1, at 47.

2. Connection between the Moratorium's Purpose and Means

Plaintiffs next challenge whether the eviction moratorium was sufficiently "'tailored to the emergency that it was designed to meet.'" Dkt. 93, at 20 (quoting *Allied Structural Steel Co.*, 438 U.S. at 242).

The Court observes that because the government is not a party to the contract being impaired, "'courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *AALAC*, 2021 WL 3745777, at *5 (quoting *Energy Reserves,* 459 U.S. at 413). The Supreme Court has not required a "precise[]" or perfect fit between the legislation and the objective but instead that the relief be "appropriately tailored to the emergency that it was designed to meet." *See* Dkt. 93, at 13; *Allied Structural Steel Co.*, 438 U.S. at 242.

Plaintiffs argue that although the State's moratorium was meant to mitigate the effects of imminent unemployment caused by shutdowns and a resulting eviction crisis caused by inability to pay rent, it unreasonably extended to "all tenants, regardless of financial circumstance or likelihood of finding alternative housing." Dkt. 93, at 21. But as the Court previously found, the State had an "undisputedly legitimate purpose[]" in "avoid[ing] the transmission of the disease by reducing housing

instability[.]" Dkt. 63, at 20; *see also* Dkt. 107, at 2 (State's evidence that "[i]n the absence of the moratorium, renters evicted from their homes would, at minimum, increase their mobility to find a new home to rent, thus increasing their in-person contacts with those outside their household" and would "likely move in" to "crowded shared living environments[.]"); *accord AALAC*, 2021 WL 3745777, at *6 ("The City fairly ties the moratorium to its stated goal of preventing displacement from homes, which the City reasonably explains can exacerbate the public health-related problems stemming from the COVID-19 pandemic."). The State has provided statistic modelling estimating that mass evictions would result in Washington State sustaining up to 59,008 more eviction-attributable COVID-19 cases, up to 5,623 more hospitalizations, and up to 621 more deaths. *See* Dkt. 108-1, at 64. While this conclusion may be implausibly precise, it is nevertheless reasonable to conclude that a significant increase in hospitalizations and deaths would likely occur if tenants had been evicted from their homes during a massive pandemic such as the one we are still confronting.

Moreover, in support of their summary judgment motion, the State has come forward with evidence that the State considered but declined to incorporate a hardship requirement:

> In many cases, tenants in genuine economic distress due to the pandemic are unable to provide adequate proof of their distress. Many tenants have informal employment or non-traditional sources of income. For these tenants, proving distress is not as simple as

> submitting a copy of a termination letter from an employer. And even if a tenant did not lose their job, they could be facing pandemic-related economic distress anyway, such as the burden of caring for family members who lost their jobs or are unable to provide for themselves. Not all tenants in need of protection are able to submit a declaration of hardship, much less provide proof of their circumstances. In light of that, we considered it best to not put the burden of proof on tenants, but to impose a simple moratorium on evictions with certain exceptions . . . .
>
> We also considered that housing court is often crowded, and it would be difficult for tenants facing eviction to defend themselves without endangering their health. If the eviction moratorium were to expire, be lifted, or otherwise end, mass unlawful detainer filings would flood the state courts, which are experiencing record backlogs of stayed civil, criminal, juvenile, child welfare, and other proceedings . . . .

Dkt. 105, at 9–10.

In response, plaintiffs argue that the State is "quite capable of parsing messy facts" and adjusting evidentiary requirements for a hardship exception. Dkt. 111, at 24. This is not responsive to the State's secondary rationale that forcing tenants to defend themselves in eviction court would likely endanger their health and the overall goal of avoiding housing instability regardless of the availability of alternative housing. Moreover, it is not the function of the Court

to invalidate government action because it was not, in the Court's view, a perfect match to the Government's objective. The Court is only charged with determining if the state's action was "adequately tailored" to meet the emergency, as required by *Allied Structural Steel*. It is not required, as essentially argued by plaintiffs, to determine the "least restrictive means" of achieving that goal. *See* Dkt. 111, at 24 ("If other less severe methods of achieving the Defendants' interests exist, then the eviction bans are not adequately 'tailored to the emergency. . . .'"); *accord Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 386 n.10 (D. Mass. 2020) ("In any event, the court must determine whether there was a rational basis for the Moratorium when it was enacted, not whether it was necessary because there was no less burdensome way to address the impact of evictions during the pandemic.").

Plaintiffs also assert that the State's restriction on treating unpaid rent as an immediately enforceable debt lacks a connection to preventing disease transmission and homelessness. Dkt. 93, at 22. But plaintiffs do not show any reason to depart from the Court's previous finding that—

> this provision was added specifically based on input from property owners and in order to strike a balance between alleviating stress on tenants and providing an avenue for lessors to be made whole. . . . The State's balance of the interests of tenants and lessors by requiring rejection of a reasonable repayment plan before treating unpaid rent as collectible is an appropriate and reasonable measure, particularly where it is

> tied directly to nonpayment that is caused by the COVID-19 outbreak.

Dkt. 63, at 21–22 (internal quotation marks and citation omitted); *compare Blaisdell*, 290 U.S. at 446 ("It does not matter that there are, or may be, individual cases of another aspect. The Legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.").

Plaintiffs further argue that a number of more moderate means could have accomplished the same ends. *See* Dkt. 93, at 23–24. They propose managing or capping eviction filings, providing compensation to landlords, commandeering housing, and providing hygiene kits to homeless persons. Most of these proposals are, again, nonresponsive to alleviating disease transmission caused by housing displacement and avoiding tenants having to go to court. Moreover, the State has come forward with evidence that although it considered other alternatives, "[a] mere cap on evictions would be too difficult to implement across the state and through various institutions, and it would not be effective in halting a rise in evictions." Dkt. 105, at 8. And the State points out that it has, essentially, managed evictions by allowing only certain evictions—that is, those for sale or occupancy of the property by the landlord or where tenants pose a risk to others.

As for the proposal to compensate landlords instead of restricting evictions, the State has also come forward with evidence that although funding

has, in fact, been made available, "those funds have been inadequate to avert the wave of evictions that would result in the absence of the moratorium." Dkt. 105, at 6–7. The State provides evidence of Eviction Rental Assistance Program funding (over $100 million distributed by the State to local organizations), Emergency Solutions Grants (about $120 million spent in the State in 2020), local tax revenues for certain cities, and over $400 million for Washington State renters in 2021 under the American Rescue Plan. Dkt. 105, at 7. But, according to the State, all this covered "only a fraction of the anticipated need for rental assistance, which is in the billions of dollars." Dkt. 105, at 7. The State also points out that it has continued to appropriate and propose funds for rental assistance programs, including working with the State legislature to transition from eviction restrictions to rental assistance and other tenancy supports. Dkt. 105, at 7.

As the Ninth Circuit also discussed in *AALAC*, these efforts support the constitutionality of the eviction restriction by showing that the State has used the restrictions coupled with other measures as part of a broad remedial framework:

> Further weakening [the plaintiff's] challenge is the fact that the eviction moratorium is but one aspect of a broader remedial framework applicable to landlords during the pandemic. In response to [the plaintiff's] concerns, [the City] fairly argue[s] that the City's creation of an Emergency Rental Assistance Program supports the eviction moratorium's reasonableness. . . .

> . . . .
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> . . . Although the interaction between these various programs is a matter of some complexity, the availability of such relief, while not dispositive, remains relevant in assessing the overall reasonableness of the City's actions. *See Energy Reserves*, 459 U.S. at 418[.] That other government programs provide some relief to landlords thus further undermines [plaintiff's] Contracts Clause challenge.

AALAC, 2021 WL 3745777, at *8.

Plaintiffs assert that purposes such as avoiding disease transmission lack legitimacy where circumstances have improved over the last six months, since the Order denying the motion for preliminary injunction. *See* Dkt. 111, at 21–22. But, as discussed in the background section of this Report and Recommendation, the picture is not as rosy as plaintiffs paint it. A State epidemiologist opines that "while mitigation efforts in Washington State helped reduce the spread of COVID-19 in mid-March through April 2021, cases have started to rebound" and that continued mitigation efforts (including the eviction restrictions) have been crucial to avoiding overwhelming hospitals and attempting to control the public health emergency. *See* Dkt. 107, at 18; *see also* Dkt. 107, at 23–24. Plaintiffs fail to provide evidence to contradict the State's evidence that restrictions remained necessary throughout the relevant time period to control the spread of COVID-19, instead simply citing reduced cases and increased vaccination results in May 2021. *See* Dkt. 111, at 22; *but see* Dkt. 109-1, at 131 (State's materials stating that as of May

2021, herd immunity was unlikely until at least 70% of the population was fully vaccinated).

For all these reasons, the Court finds that plaintiffs have failed to raise a genuine issue of material fact that the state law was not drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose. The State's moratorium passes muster under the Contracts Clause.

B. City Restrictions

Plaintiffs also assert that the City's restrictions violate the Contracts Clause. *See* Dkt. 93, at 22. They challenge the Mayor's eviction moratorium, currently set to expire September 30, 2021. *See* Dkt. 124, at 6. Although it appears that the City moratorium will not be renewed ("the Emergency Moratorium on Residential Evictions will sunset and Ordinance 126075, which provides a defense against evictions due to hardship from COVID-19 for six months, goes into effect" (Dkt. 124, at 6)), the Court observes that plaintiffs also seek nominal damages related to their claim against the City. *See* Dkt. 80, at 18.

Similar to the State moratorium, the City moratorium forbids eviction unless the tenant poses a risk to others—although the City moratorium does not include an exception for occupancy or sale of the property by the landlord. *See* Dkt. 17-7, at 4. For the same reasons that the Court finds that the State moratorium does not violate the Contracts Clause, the Court finds that the City moratorium is constitutional. *See supra*, Discussion part III(A).

Separately, plaintiffs challenge the City's six-month defense against eviction, which will go into

effect September 30, 2021. Dkt. 124, at 6. Essentially, this defense applies to evictions within six months of the end of the City eviction moratorium and where the eviction is for unpaid rent during the period including that covered by the City's eviction moratorium or for a habitual failure to pay rent "resulting in four or more pay-or-vacate notices in a 12-month period." Dkt. 17-11, at 20. A tenant may invoke the defense only by self-certifying financial hardship preventing payment of rent. Dkt. 17-11, at 20.

Plaintiffs argue that this defense "unnecessarily extends six months beyond the termination of the Mayor's emergency order" so that by the time the defense is in effect, "the City's interest in taking such measures will have come to an end." Dkt. 93, at 22. But plaintiffs previously raised this argument in their preliminary injunction motion, and the Court found that the City had supported this six-month extension by explaining that "economic impacts from the COVID-19 emergency are likely to last much longer than the civil emergency itself[.]" Dkt. 63, at 21 (internal citation and quotation marks omitted).

So too, on summary judgment: defendants have come forward with evidence that the pandemic has exacerbated Washington's pre-existing rental issues and that—despite over a year of relief efforts-loss of income, inability to pay rent, and risk of eviction continue to plague tenants—as the City predicted when it enacted these measures. Even before the pandemic, there was a "significant lack of affordable housing across the state" (Dkt. 105, at 2) and "46% of Washington households were rent burdened (contributing more than 30% of [their] income to rent) with about half of those households contributing more

than 50% of their income to rent." Dkt. 100-5, at 3. In April 2020, as the pandemic took hold, Washington State unemployment reached its highest rate in decades. *See* Dkt. 25-1, at 4.

A year later, Washington monthly unemployment claims continued to outpace those from the prior year (Dkt. 105, at 3; Dkt. 109-1) and nearly 11% of Washington households were behind on rent (Dkt. 100-6, at 2, 4). Surveys indicated that job loss and hours reductions had declined some since the beginning of the pandemic, yet renter financial distress remained high. Dkt. 115-1, at 24; *see also* Dkt. 106-1, at 96 (Washington legislative findings that the COVID-19 pandemic had caused a "economic downturn throughout Washington state" that disproportionately affected low and moderate-income workers). According to one source, as of March 2021, the country is facing a "rental crisis, with over 8 million rental households behind on their rent." Dkt. 115-3, at 4; *see also* Dkt. 106, at 5 ("over 300,000 renters need or will need assistance by May 2021"). The King County unemployment rate in March 2021 was 5.4%—well above the 3.0% rate two years prior—the average rent debt per household was $4,903, and nearly 45,000 households were behind on rent. Dkt. 100-7, at 2–3; Dkt. 100-11, at 2. The CDC has stated that when eviction moratoria lift and based on March 2021 reports of tenants behind on rent, there will be a "wave of evictions" on a scale "unprecedented in modern times." Dkt. 100-2, at 7. The City has also provided evidence that an eviction crisis would result in homelessness and an increased risk of disease transmission. *See* Dkt. 25-4, at 6 (finding that most evicted persons in Seattle became homeless, many moved in with family or friends, and only 12.5% found

another apartment or home to move into); Dkt. 25-5, at 2, 4 (CDC findings that homelessness increases the likelihood of COVID-19 transmission and severity of disease and that eviction moratoria assist in reducing the community spread of COVID-19).

Underpinning the City's defense is the rationale that the "economic impacts from the COVID-19 emergency are likely to last much longer than the civil emergency itself' (Dkt. 17-11, at 3)—a rationale borne out by the undisputed evidence cited above. *But see* Dkt. 93, at 22 (plaintiffs' brief, claiming that there is no need to extend the eviction ban because "the City's interest in taking such measures will have come to an end"). Allowing defaulted tenants additional time to repay amounts due is adequately tailored to the City's goal of preventing evictions and homelessness, as well as corresponding potential to cause a spike in the COVID-19 pandemic. And for similar reasons as discussed above in the context of the eviction moratoria, this defense does not violate the Contracts Clause, either.

Plaintiffs take issue with the self-certification of hardship, which they state is "left undefined in the ordinance, making it difficult for landlords to challenge a tenant's certification." Dkt. 93, at 22.[11]

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[11] The Supreme Court recently temporarily enjoined a New York law pertaining to evictions during COVID-19. *Chrysafis v. Marks*, No. 21A8, 2021 WL 3560766, at *1 (U.S. Aug. 12, 2021). "If a tenant self-certifies financial hardship" due to COVID-19, the law "generally precludes a landlord from contesting that certification and denies the landlord a hearing." *Id.* The Supreme Court concluded that "[t]his scheme violates the Court's longstanding teaching that ordinarily, 'no man can be a judge in his own case' consistent with the Due Process Clause." *Id.*

This argument appears to be entirely speculative, as no landlord complains in a declaration that it has been unable to challenge or realistically suspect it will not be able to challenge whether a tenant is truly in financial hardship. In any event, "difficulty" challenging a hardship certification does not transform the six-month defense into a violation of the Contracts Clause.

Similarly, plaintiffs' challenge to the City's repayment plan requirement also fails. The City allows tenants to elect to pay eligible, overdue rent installments over a period of three to six months, with failure of the landlord to accept such payment being a defense to eviction. Dkt. 17-12, at 8–9. Landlords also cannot collect late fees or interest on unpaid rent accrued during or six months after the civil emergency. Dkt. 17-12, at 8.

Again, and as the Court has also previously found, it is eminently reasonable for the City to attempt to strike a balance between the landlords' entitlement to unpaid rent and the likelihood of a wave of evictions and homelessness by providing for delayed repayment of unpaid rent under a mandated schedule. This provision does not violate the Contracts Clause, either. Indeed, contrary to plaintiffs' claims that the City's restrictions collectively "creat[e] an incentive for renters not to pay and take advantage of the mandated repayment plan" (Dkt. 93, at 20), the City

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(internal citation omitted). Here, no due process claim is before the Court. And, in any event, there is no evidence that the ordinance implementing the six month defense prevents a landlord from contesting or having a hearing regarding hardship rather than simply leaving the definition and method of establishing of hardship open.

is attempting to facilitate the repayment of delinquent rent by encouraging renters to repay under a mandatory repayment plan.

In sum, plaintiffs fail to come forward with evidence from which a factfinder could find in their favor on the Contracts Clause claims or to show that they are entitled to judgment as a matter of law. Defendants are entitled to summary judgment dismissal of the Contracts Clause claims, and the Court turns to the Takings Clause arguments.

V. Takings Clause

The Fifth Amendment's Takings Clause prohibits the government from taking private property unless it is for a "public use" and "just compensation" is paid to the owner. U.S. Const. amend. V. A "physical taking," occurs when the government "authorizes a physical occupation of property." *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). Plaintiffs argue that the eviction restrictions constitute a physical taking "by compelling landlords to house tenants who no longer satisfy lease terms, including tenants whose leases have already expired." Dkt. 93, at 26.

As the Court previously concluded, generally, injunctive relief is barred for Takings Clause claims. *See* Dkt. 63, at 23–25. However, because plaintiffs also bring claims for declaratory relief and nominal damages, the Court now addresses the merits of the Takings Clause arguments.

"The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee*, 503 U.S. at 527; *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) ("This element of required acquiescence is at

the heart of the concept of occupation."). *Yee* supplies the rule that is dispositive of the physical taking arguments in this matter.

Yee holds that a government can restrict the circumstances in which a tenant may be evicted without committing a physical taking. In *Yee*, mobile home park owners challenged a combination of municipal ordinance and state statute that effectively limited the bases upon which the owners could evict their tenants. *See* 503 U.S. at 524–25. The owners argued that this amounted to a physical taking because the right to occupancy of their land had been restricted. But, the Supreme Court disagreed:

> [The park owners] voluntarily rented their land to mobile homeowners. . . . Put bluntly, no government has required any physical invasion of petitioners' property. [The] tenants were invited by [the owners], not forced upon them by the government. . . .
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> . . .
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> On their face, the state and local laws at issue here merely regulate [the owners'] *use* of their land by regulating the relationship between landlord and tenant. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.

Id. at 528–29 (internal citations and quotation marks omitted).

Here, too, the government has not required a physical invasion of plaintiffs' property. Instead, plaintiffs have voluntarily rented their land to residential tenants and temporarily lost the ability to evict tenants in certain situations during the COVID-19 crisis and for six months after September 30, 2021. Contrary to plaintiffs' arguments, none of the restrictions are permanent. Plaintiffs retained the ability to sue their tenants for unpaid rent due to COVID-19 under the State moratorium, except where the resident had not been offered or was complying with a repayment plan. *See* Dkt. 106-1, at 47. The City allows tenants to take advantage of a repayment plan, but neither the City nor the State has forgiven or cancelled unpaid rent.

Notably, other District Courts faced with similar challenges have reached the same conclusion-finding that various eviction restrictions related to the COVID-19 pandemic did not violate the Takings Clause. *See Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789, 812 (D. Minn. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 220–21 (D. Conn. 2020); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 162–64 (S.D.N.Y. 2020).

Plaintiffs argue that *Yee* is distinguishable because here, they must allow tenants who would otherwise be evicted to remain. *See* Dkt. 111, at 32. This is not a persuasive reason to depart from *Yee*: the state law at issue in *Yee* also only permitted eviction in a narrow circumstance—where the park owner wanted to change the use of the land—and required that the owner give six to twelve months' notice. *Yee*,

503 U.S. at 528. Under the relevant eviction restrictions here, landlords could still evict tenants for creating risks to others or their property or for personal occupation or sale of the property (State moratorium); for tenants' actions threatening others' or their own health or safety (City moratorium) or where the eviction was for something other than financial hardship caused by COVID-19 (six month defense).

In supplemental briefing before this Court, plaintiffs argue that a recently decided Takings Clause case, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), supports their physical takings claim. *See* Dkt. 130, at 9. However, this case involves materially different circumstances: the landowners in *Cedar Point Nursery* were forced to allow unionizing activity by third persons for a specified amount of time (141 S. Ct. at 2069), whereas here, the landlords invited the renters to their units when they formed rental agreements and remain free to evict tenants under the circumstances enumerated above.

Plaintiffs do not bring an alternative claim for a regulatory taking, so that based on the analysis above, their Takings Clause claims should be dismissed with prejudice.

CONCLUSION

The undersigned recommends that defendants' motions for summary judgment (Dkts. 103, 104, 110) be granted, that plaintiffs' motion for summary judgment (Dkt. 93) be denied, that all claims be dismissed with prejudice, and that the case be closed.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from

service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(l)(C), and can result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **October 1, 2021,** as noted in the caption.

Dated this 15th day of September, 2021.

s/ J. Richard Creatura
J. Richard Creatura
Chief United States Magistrate Judge

CIVIL EMERGENCY ORDER

CITY OF SEATTLE

MORATORIUM ON RESIDENTIAL EVICTIONS

WHEREAS, in my capacity as Mayor, I proclaimed a civil emergency exists in the City of Seattle in the Mayoral Proclamation of Civil Emergency dated March 3, 2020; and

WHEREAS, the facts stated in that proclamation continue to exist, as well as the following additional facts:

WHEREAS, the World Health Organization (WHO) has declared that COVID-19 disease is a global pandemic, which is particularly severe in high risk populations such as people with underlying medical conditions and the elderly, and the WHO has raised the health emergency to the highest level requiring dramatic interventions to disrupt the spread of this disease; and

WHEREAS, as of March 13, 2020, Public Health — Seattle & King County announced 58 new cases of COVID-19 in King County residents, for a total of 328 cases, including 32 deaths; and

WHEREAS, on March 13, 2020, the Governor of Washington state issued an emergency order announcing all K-12 schools in Washington to be closed from March 17, 2020 through April 24, 2020 to combat the spread of the disease; and

WHEREAS, on March 13, 2020, the President of the United States declared a national emergency to allow the government to marshal additional resources to combat the virus; and

WHEREAS, on March 11, 2020, the Governor of Washington state and the Local Health Officer for Public Health — Seattle & King County issued parallel orders prohibiting gatherings of 250 people or more for social, spiritual and recreational activities in King County; and

WHEREAS, the COVID-19 crisis has had a significant impact on the local economy impacting the retail, restaurant and other industries resulting in layoffs and reduced work hours for a significant percentage of this workforce and loss of income for small businesses; and

WHEREAS, layoffs and substantially reduced work hours will lead to widespread economic hardship that will disproportionately impact low- and moderate-income workers resulting in lost wages and the inability to pay for basic household expenses, including rent; and

WHEREAS, in the last two weeks there has been a significant 50% drop in the number of tenants appearing in court for their eviction hearings in King County resulting in default judgments being entered and tenants losing substantial rights to assert defenses or access legal and economic assistance; and

WHEREAS, evictions result in a loss of housing and create housing instability, potentially increasing the number of people experiencing homelessness and creating a heightened risk of disease transmission; and

WHEREAS, the City invests in eviction prevention programs, but resources are not sufficient to address housing stability needs of dislocated workers during this unprecedented public health epidemic; and

WHEREAS, jurisdictions across the nation are considering or have implemented eviction prevention to provide housing stability to dislocated workers during this unprecedented public health emergency; and

WHEREAS, Art. XI, Sec. 11 of the Washington State Constitution grants cities like The City of Seattle broad police powers to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with the general laws"; and

WHEREAS, the Washington State Legislature has declared a state policy to help residents who are experiencing a temporary crisis in retaining stable housing to avoid eviction from their homes, as expressed in Laws of 2019 c 356 section 1; and

WHEREAS, a temporary moratorium on residential evictions during the COVID-19 outbreak will protect the public health, safety, and welfare by reducing the number of individuals and families entering into homelessness during this epidemic, which means lowering the number of people who may develop the disease or spread the disease; and

WHEREAS, the civil emergency necessitates the utilization of emergency powers granted to the Mayor pursuant to: the Charter of the City of Seattle, Article V, Section 2; Seattle Municipal Code (SMC) Chapter 10.02; and chapter 38.52 RCW; and

WHEREAS, SMC 10.02.020.A.15 authorizes the Mayor to proclaim "such other orders as are imminently necessary for the protection of life and property" and take extraordinary measures to protect the public peace, safety and welfare; and

WHEREAS, the COVID-19 civil emergency requires the issuance of an order that is specifically aimed at a moratorium on residential evictions during the civil emergency in order to keep people housed and protect the public safety, health and welfare as set forth in this Civil Emergency Order; therefore,

WHEREAS, the conditions of this Civil Emergency Order are designed to provide the least necessary restriction on the rights of the public per SMC 10.02.025.C and

WHEREAS, pursuant to SMC 10.02.025.B, I believe it is in the best interest of the public safety, rescue and recovery efforts, and the protection of property that the exercise of certain rights be temporarily limited as set forth in this Civil Emergency Order; therefore,

BE IT PROCLAIMED BY THE MAYOR OF THE CITY OF SEATTLE, THAT:

I, **JENNY A. DURKAN**, MAYOR OF THE CITY OF SEATTLE, ACTING UNDER THE AUTHORITY OF SEATTLE MUNICIPAL CODE SECTIONS 10.02.020.A.15, AND MY MAYORAL PROCLAMATION OF CIVIL EMERGENCY, DATED MARCH 3, 2020, HEREBY ORDER:

SECTION 1:

A. Effective immediately, a moratorium on residential evictions ~~for non-payment~~ is hereby ordered until the earlier of the termination of the civil emergency declared in the Proclamation of Civil Emergency dated March 3, 2020 or ~~30~~ 60 days from the effective date of this Emergency Order. The decision to extend the moratorium shall be evaluated

and determined by the Mayor based on public health necessity;

B. A~~n owner of a housing unit~~ residential landlord shall not initiate an unlawful detainer action, issue a notice of termination, or otherwise act on any termination notice, including any action or notice related to a rental agreement that has expired or will expire during the effective date of this Emergency Order, unless the unlawful detainer action or action on a termination notice is due to actions by the tenant constituting an imminent threat to the health or safety of neighbors, the landlord, or the tenant's or landlord's household members ~~issue a notice of termination or initiate an eviction action for non-payment of rent or otherwise act on a termination notice for nonpayment of rent during this moratorium~~. Further, no late fees or other charges due to late payment of rent shall accrue during the moratorium; and

C. It shall be a defense to any eviction action that the eviction of the tenant will occur during the moratorium, unless the eviction action is due to actions by the tenant constituting an imminent threat to the health or safety of neighbors, the landlord, or the tenant's or landlord's household members. For any pending eviction action, regardless if the tenant has appeared, ~~for the non-payment of rent, it shall be a defense to any eviction action that the eviction of the tenant would occur during the moratorium. Given the public health emergency and public safety issues, a court may grant a continuance for a future hearing date in order for the eviction action to be heard after the moratorium~~ a court may grant a continuance for a

future court date in order for the matter to heard at a time after the moratorium is terminated; and

D. Effective immediately, the Sheriff of King County is requested to cease execution of eviction orders during the moratorium.

SECTION 2:

All mayoral proclamations and orders presently in effect shall remain in full force and effect except that, insofar as any provision of any such prior proclamation is inconsistent with any provision of this proclamation, then the provision of this proclamation shall control.

SECTION 3:

A copy of this Civil Emergency Order shall be delivered to the Governor of the State of Washington and to the County Executive of King County. To the extent practicable, a copy of this Civil Emergency Order shall be made available to all news media within the City and to the general public. In order to give the widest dissemination of this Civil Emergency Order to the public, as many other available means as may be practical shall be used, including but not limited to posting on public facilities and public address systems. SMC 10.02.100.

SECTION 4:

This Civil Emergency Order shall immediately, or as soon as practical, be filed with the City Clerk for presentation to the City Council for ratification and confirmation, modification or rejection, and if rejected this Civil Emergency Order shall be void; however, any such rejection or modification shall not affect any actions previously taken. The Council may, by

resolution, ratify, modify or reject the order. If the City Council modifies or rejects this Civil Emergency Order, said modification or rejection shall be prospective only, and shall not affect any actions taken prior to the modification or rejection of this Civil Emergency Order, including the City's responsibility for the actual costs incurred by those who were ordered by or entered into contracts with the City, as set forth in Seattle Municipal Code subsection 10.02.020.B. The Council shall endeavor to act on any order within 48 hours of its being presented to the Council by the Mayor.

Dated this __ day of ____, 2020, at _____am/pm.

_____
Jenny A. Durkan
Mayor of the City of Seattle

FILED 01/14/2021

HON. RICHARD A. JONES
HON. J. RICHARD CREATURA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON
AT SEATTLE

EL PAPEL, LLC; BERMAN, 2 LLC; and KARVELL LI, an individual,
Plaintiffs,
v.
ROBERT W. FERGUSON, in his official capacity as Attorney General of the State of Washington; JENNY A. DURKAN, in her official capacity as the Mayor of the City of Seattle; and THE CITY OF SEATTLE, a municipal Corporation,
Defendants.

Civil Action No. 2:20-cv-01323-RAJ-JRC

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (CORRECTED)

Plaintiffs, El Papel, LLC, Berman 2, LLC, and Karvell Li, by and through undersigned counsel, hereby file this Complaint against Defendants Robert W. Ferguson, in his official capacity as Attorney General of the State of Washington (hereinafter "Washington State"), Jenny A. Durkan, in her official capacity as Mayor of the City of Seattle (hereinafter

"the Mayor"), and the City of Seattle (hereinafter "Seattle") and allege as follows:

INTRODUCTION

1. In early 2020, the COVID-19 pandemic struck the United States, prompting governments nationwide to shut down substantial parts of the economy for several months, creating widespread financial hardship.

2. In response, the Washington Governor and the City of Seattle, encompassing both the Mayor and City Council, suspended the right of property owners to evict tenants for nonpayment of rent, among other reasons. Plaintiffs recognize and are themselves affected by the economic hardship of the ongoing pandemic. They have in the past and continue to work effectively with tenants who fall behind on their rent, whether due to the pandemic or for other reasons. But as Plaintiffs' experiences show, the blanket eviction ban puts landlords at the mercy of tenants who do not pay rent or violate other lease terms, whether they face financial hardship or not, and deprives them not only of their income, but the ability to recover and re-let their property to tenants in need of new homes.

3. The eviction bans have upended lease obligations and stripped landlords of one of their most basic of property rights—the right of possession—leaving them with no bargaining power and no remedy against nonpaying tenants or tenants in breach of other material lease obligations. Meanwhile, tenants remain able to enforce all the landlords' lease obligations.

4. The eviction bans violate federal constitutional protections against the impairment of contracts by

State and municipal governments and evade the government's constitutional duties to pay just compensation when private property is taken for public use.

5. The eviction bans go well beyond even the foreclosure moratoria discussed in the Great Depression-era case of *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), widely regarded as establishing the apex of the state's power to impair contracts during an economic crisis. Moreover, by requiring private landlords to forgo their right of possession without even the recompense of fair rent, the eviction bans lay the burden of emergency housing costs at the feet of private landlords to avoid imposing the true cost on the public. This is precisely what the Takings Clause of the Federal Constitution does not allow. That clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

JURISDICTION AND VENUE

6. This action arises under the Contract Clause of Article I, Section 10, of the United States Constitution and the Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment. This Court has jurisdiction through 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

7. Under *Ex parte Young*, 209 U.S. 123 (1908), actions against state officials seeking prospective

injunctive relief are not barred by sovereign immunity.

8. As explained below, Seattle and Washington State's eviction bans and Seattle's related ordinance establishing terms of future potential repayment of rents impair a landlord's contractual ability to evict nonpaying tenants and tenants violating other lease obligations, or otherwise seek to collect overdue rent. All Plaintiffs currently have nonpaying tenants, some of whom have the means to pay but have chosen not to; thus, absent the eviction ban, the Plaintiffs would have a right to evict their tenants. Consequently, a present and concrete controversy between the parties exists.

9. Venue is proper in this District under 28 U.S.C. § 1391(b)(2). Plaintiffs reside within this District and the rental properties subject to this action are situated here.

PARTIES

Plaintiffs

10. Plaintiffs El Papel, LLC, Berman 2, LLC, and Karvell Li are the fee simple owners of several rental properties, including rental properties that have at all relevant times been located within Seattle City limits. All Plaintiffs currently have nonpaying tenants or tenants violating their rental agreements. Under the Defendants' eviction bans, the Plaintiffs are prohibited from regaining possession of their property or enforcing contractual obligations, such as payment of rent.

Defendants

11. Defendant Robert W. Ferguson is the Attorney General of the State of Washington. He is sued in his official capacity. Mr. Ferguson has enforced and continues to enforce the Governor's eviction ban.

12. Defendant Jenny A. Durkan is the Mayor of the City of Seattle. As Mayor, she is empowered to enforce the laws of Seattle and to perform such other duties and exercise such other authority as may be prescribed by law. Seattle, Washington, Municipal Charter, Art. V, § 2. She is sued in her official capacity.

12. The City of Seattle is a municipality created under the laws of the State of Washington. The Seattle City Council is its governing body.

14. Each Defendant is a "person" within the meaning of 42 U.S.C. § 1983. The acts of the Defendants set forth below were performed under color of law. The acts alleged herein occurred and took place in Washington State and the City of Seattle.

GENERAL ALLEGATIONS

Washington State Eviction Ban

15. Typically, in Washington State a landlord can bring an unlawful detainer action when a tenant: (1) in a fixed-term lease holds over or retains possession after the lease's expiration, (2) in a month-to-month lease, refuses to leave the rental property after the landlord provides twenty-day notice requiring the tenant to vacate the premises at the end of a given month, (3) defaults on his rent payments under the lease after the landlord serves the tenant notice to either pay or vacate, (4) continues in

possession after neglect or failure to keep or perform a lease condition, (5) permits waste on the demised premises, (6) resides on the land without having color of title, or (7) permits any gang-related activity on the premises. Wash. Rev. Code § 59.12.030 (2020).

16. By proclamation, the Governor has suspended these causes for eviction. The proclamation states: "Landlords, property owners, and property managers are prohibited from serving or enforcing, or threatening to serve or enforce, any notice requiring a resident to vacate any dwelling or parcel of land occupied as a dwelling, including but not limited to an eviction notice, notice to pay or vacate, notice of unlawful detainer, notice of termination of rental, or notice to comply or vacate. This prohibition applies to tenancies or other housing arrangements that have expired or that will expire during the effective period of this Proclamation. This prohibition applies unless the landlord, property owner, or property manager (a) attaches an affidavit attesting that the action is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident; or (b) provides at least 60 days' written notice of intent to (i) personally occupy the premises as a primary residence, or (ii) sell the property." Proclamation 20-19.3, July 24, 2020, Exh. B.

17. Additionally, under the eviction ban, landlords are prohibited from seeking or enforcing judicial eviction orders, assessing or threatening to assess late fees, and treating any unpaid rent as an enforceable debt. Exh. B.

18. Notably, the eviction ban is not limited only to tenants facing hardship due to the COVID-19 pandemic. Exh. B.

19. Originally issued on March 18, 2020, Washington's eviction ban was only intended to last a few months. Exh. A. However, Governor Inslee has continually extended it. Exhs. B–D. Currently, the moratorium is in effect through October 15, 2020. Exh. B at 4.

Seattle Mayor's Eviction Ban

20. Similarly, Seattle typically allows landlords to evict tenants for the nonpayment of rent. *See* Seattle, Washington, Municipal Code (SMC) § 22.206.160 (2020).

21. However, in March of this year, Seattle's Mayor issued a civil emergency order preventing all landlords from initiating unlawful detainer actions during her emergency order. SMC § 10.02.020.A.15; Mayor's Eviction Moratorium, March 14, 2020; Exh. E. The Mayor's order creates an affirmative defense to evictions unless the tenant is an imminent threat to their neighbors' health or safety. Exh. E at 3. The Mayor's order also prevents landlords from issuing late fees or other charges due to the late payment of rent. Exh. E at 3.

22. Originally issued on March 14, 2020, the Mayor's ban on evictions has been extended through December 31, 2020, or until the end of the Mayor's Proclamation of Civil Emergency, whichever is earliest. Exh. E at 3; Mayor's Extension of Moratorium, May 2, 2020, Exh. F; Mayor's Extension of Moratorium, July 31, 2020, Exhibit G.

23. Notably, the Mayor's ban is written to prevent all evictions, not just those causally related to the pandemic. Exhs. E–G.

Seattle City Council's Eviction Ban

24. As mentioned above, Seattle typically allows landlords to evict tenants for the nonpayment of rent. *See* SMC § 22.206.160 (2020).

25. However, Seattle's City Council supplemented the Mayor's eviction ban with its own, amending the City's just-cause-eviction ordinance to create an affirmative defense to evictions. Seattle Ordinance 126075, Exh. H. The affirmative defense states: "[I]t is a defense to eviction if the eviction would result in the tenant having to vacate the housing unit within six months after the termination of the Mayor's eviction moratorium, and if the reason for terminating the tenancy is: 1) The tenant fails to comply with a 14-day notice to pay rent or vacate pursuant to RCW 59.12.030(3) for rent due during, or within six months after the termination of, the Mayor's residential eviction moratorium; or 2) The tenant habitually fails to pay rent resulting in four or more pay-or-vacate notices in a 12-month period." Exh. H at 19.

26. The City Council's eviction ban allows the tenant to invoke the affirmative defense if he/she submits a "declaration or self-certification asserting [he/she] has suffered a financial hardship[.]" Exh. H at 19. The ban does not require the financial hardship to be related to the pandemic. Exh. H.

27. Originally enacted on May 6, 2020, the City Council's eviction ban will remain in effect until six months after the Mayor's separate eviction ban ends. Exh. H at 1.

Seattle City Council's Rent Repayment Ordinance

28. Seattle's City Council also adopted a "rent repayment" ordinance, Ordinance 126081, which limits Plaintiffs' ability to collect rent according to their lease agreements. Seattle Ordinance 126081, Exh. I. The repayment ordinance restricts a landlord from timely collecting rent from tenants for unpaid rent that came due during the Mayor's civil emergency or six months after the civil emergency ends. *Id.*

29. If a tenant owes less than one month of overdue rent, the tenant may pay the overdue rent in three consecutive, monthly installments. Seattle Ordinance 126081, Exh. I at 7–8. If the tenant is between one and two months overdue, the tenant may pay the balance in five consecutive, monthly installments. *Id.* For overdue rent exceeding two months, the tenant may pay in six monthly payments. *Id.*

30. A tenant who declines to pay rent for the full length of the period under the ordinance (the civil emergency plus six months) will not have to pay the landlord in full until a full year after the civil emergency has ended. Exh. I.

31. A landlord's rejection of the city-mandated repayment schedule constitutes a defense to eviction under the ordinance. Exh. I at 8.

Plaintiffs and the Homes They Rent

A. El Papel's Rental Homes

32. Plaintiff El Papel, LLC, has two governors: Mark Travers and Michele Ruess. El Papel, LLC, owns several small rental properties.

33. One such rental property—located in Seattle city limits—is currently occupied by two holdover tenants whose lease expired on July 31 and who have refused to pay rent since April of this year.

34. The lease agreement expressly provides that the tenancy does not roll into a month-to-month tenancy after the termination of the fixed term.

35. El Papel is currently unable to enforce the lease provisions requiring the tenants to vacate the rental property at the end of their lease term.

36. At least one of these tenants actively encouraged the other tenants in the building and neighborhood to engage in a "rent strike" by refusing to pay rent.

37. The tenants collectively owe El Papel $14,408 as of August 2020. El Papel has sought to negotiate with its tenants, who have been unresponsive.

38. The lease agreement between El Papel and the tenants establishes that the tenants shall pay monthly rent on the first day of each calendar month of the lease term. The lease agreement states that any rent received after the third day of any month is considered late and subject to a late fee of $75.00.

B. Berman 2, LLC, and its Rental Properties

39. Berman 2, LLC, is owned and managed by Osho Berman. Berman 2 owns and manages over twenty rental units within Seattle city limits.

40. Mr. Berman has historically rented and continues to rent these units to low-income tenants, many of whom were previously homeless, at below-market rates.

41. Berman 2 relies on the availability of eviction as a remedy to maintain a safe and comfortable environment for tenants and to keep rates low.

42. Berman 2 has tenants occupying a total of six units who are currently declining to pay rent in response to the pandemic. Mr. Berman has sought to negotiate with his tenants, and is willing to accept partial payment or repayment, but they have been unresponsive. Berman 2's nonpaying tenants continue to occupy the units. To date, Berman 2's tenants owe in total about $10,818 in overdue rent accrued since the eviction bans became law, not including late fees.

43. Berman 2's lease agreements are for fixed terms and do not roll into month-to-month tenancies upon expiration. His lease agreements state that his tenants agree to "pay all rent and other charges promptly when due or assessed, including utilities for which [the tenant] is responsible and to provide proof of payment." It also provides: "Any rent unpaid by the due date is termed delinquent." The lease provides that late rent will result in a late payment charge of $75 plus $5 each additional day thereafter that rent has not been paid in full.

C. Karvell Li and his Rental Property

44. Karvell Li owns one residential rental property in Seattle city limits. Mr. Li entered into a month-to-month lease with his current tenant on January 15, 2017.

45. Mr. Li's tenant has remained employed throughout the tenancy.

46. Mr. Li's tenant, however, began to neglect consistent rent payments beginning in June 2019.

47. Mr. Li has issued six separate fourteen-day notices to pay or vacate in the last twelve months, on August 10, 2019, September 2, 2019, October 2, 2019, November 2, 2019, December 18, 2019, and February 14, 2020.

48. Mr. Li has gone above and beyond his duties as a landlord by trying to negotiate payment plans, offering to waive rent and certain rental fees, pay utility expenses, and pay all of his tenant's moving expenses. Mr. Li's tenant has denied or refused to respond to all such offers. Consequently, but for Seattle and Washington State's eviction ban, Mr. Li would initiate an unlawful detainer action to recover his property.

49. As of the filing of this complaint, the tenant remains in possession of the rental unit.

50. The lease states that rent is to be paid monthly, on or before the first day of each month. If rent is not paid on or before the due date, the lease provides that the tenant shall pay a $25 late charge for each day that the rent is delinquent, up to a maximum of ten percent of one month's rent. As of the filing of this complaint, the tenant owes $27,059.55 in accumulated rent and late fees.

Injury to Plaintiffs from the Eviction Bans and Rent Repayment Ordinance

51. Because of the eviction bans and the repayment ordinance, Plaintiffs are prohibited from evicting, attempting to evict, or trying to recover any overdue rent. As a result, the Plaintiffs are deprived

of their right to possess their own properties and the obligations (and related remedies) of their lease contracts have been impaired.

52. Simply put, in an effort to mitigate the financial hardships individuals face because of the pandemic, Seattle and Washington State have shifted the financial burden of its emergency housing policies from renters or the public to landlords.

53. But for the eviction bans and the rent repayment ordinance, Plaintiffs would immediately initiate eviction proceedings to gain re-entry to their properties or seek other remedies available to collect rents from tenants occupying their properties in breach of, or without, valid leases.

INJUNCTIVE RELIEF ALLEGATIONS

54. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

55. If Seattle and Washington State are not enjoined from enforcing their eviction ban and repayment ordinance, the Plaintiffs will be irreparably harmed. Under Seattle and Washington State's eviction ban, the Plaintiffs are now suffering a continuous and compounding injury because they are unable to recover overdue rent or evict nonpaying tenants and re-let their properties. As a result, the Plaintiffs and other similarly situated landlords, who must continue paying mortgages, taxes, insurance, and maintenance costs, face an ever-increasing financial injury with no certain end date in sight. Seattle and Washington State's actions deprive the Plaintiffs of their constitutionally protected property interests and unconstitutionally impair their ability

to enforce the obligations created under their rental contracts.

56. Additionally, the Plaintiffs are informed and believe, and on that basis allege, that if not enjoined by this Court, Seattle and Washington State will continue to extend their respective bans and thereby continue to violate the Takings Clause of the Fifth Amendment by requiring the physical occupation of Plaintiffs' properties in breach of, or without, valid leases.

57. The Plaintiffs have no plain, speedy, and adequate remedy at law. Damages are compounding monthly and, in any event, would not fully redress the Plaintiffs' harm because under the Defendants' eviction bans the Plaintiffs still cannot make repairs and re-let their properties. Additionally, under the Defendants' eviction bans, the Plaintiffs will not recover any damages for a year after the pandemic emergency ends. Such delay necessitates an injunction.

58. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

59. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

60. An actual and substantial controversy exists between the Plaintiffs and Defendants over the constitutionality of the Defendants' eviction ban and the rent repayment ordinance. The Plaintiffs contend, pursuant to 42 U.S.C. § 1983, that both on its face and as applied to the Plaintiffs, the Defendants' eviction ban and Seattle's rent repayment ordinance violate

the Contract Clause of Article I, Section 10, of the U.S. Constitution, and the Takings Clause of the Fifth Amendment. The Plaintiffs are informed and believe, and on that basis allege, that the Defendants contend that their eviction ban and rent repayment ordinance are constitutional.

61. This case is justiciable now because Seattle and Washington State's eviction ban and Seattle City Council's separate rent repayment ordinance have caused and will continue to cause injury to the Plaintiffs by preventing them from enforcing their rental contracts and forcing Plaintiffs to submit to the physical occupation of their property by others with no legal right to remain there. But for Seattle and Washington State's eviction ban and repayment ordinance, the Plaintiffs would be able to evict their nonpaying tenants or other unlawful occupants, recover any overdue rent, and make reasonable use of their rental properties by renting them to future tenants willing to abide by lease terms.

62. Declaratory relief is therefore appropriate to resolve this controversy.

FIRST CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF – CITY OF SEATTLE'S CITY COUNCIL'S EVICTION BAN'S UNCONSTITUTIONAL IMPAIRMENT OF A CONTRACT

(Pursuant to U.S. Const. art. I, § 10, cl. 1 & 42 U.S.C. § 1983)

63. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

64. Article I, Section 10, Clause 1, of the United States Constitution states: "No State shall . . . make any . . . law impairing the obligation of contracts[.]" U.S. Const. art. I, § 10, cl. 1. However, this is exactly what Seattle's eviction ban does. Exh. H.

65. Plaintiffs' lease contracts with their tenants condition tenancy on the obligation to pay rent and maintain other terms of the lease. Those contracts also provide Plaintiffs with a right to evict tenants for nonpayment of rent or other breaches of lease terms.

66. Plaintiffs have a constitutionally protected right to the possession of their properties.

67. As discussed above, *supra* ¶¶ 24–27, Seattle's City Council's eviction ban creates an affirmative defense to its just-cause eviction ordinance. Seattle Ordinance 126075, Exh. H. To invoke this affirmative defense, a tenant is only required to submit a declaration or self-certify financial hardship. Exh. H at 19. The hardship does not have to be related to the pandemic. Exh. H.

68. Once the affirmative defense is invoked, a landlord cannot evict or attempt to evict as a remedy for a breach of a lease. *Id.* at 19–20. A landlord also cannot seek to evict a nonpaying tenant for six months after the Mayor's eviction ban is terminated. *Id.*

69. Due to the eviction ban, Plaintiffs can no longer enforce the central obligation to pay rent in monthly installments through an unlawful detainer action. The eviction ban's impairment on Plaintiffs' residential lease agreements is therefore substantial.

70. By enforcing its eviction ban, Seattle, acting under color of state law, has unconstitutionally impaired the obligation of Plaintiffs' contracts.

71. An actual controversy exists between the parties, in that the Plaintiffs are suffering an ongoing and irreparable harm by Seattle's treatment, and the harm will continue unless Seattle's eviction ban is declared unconstitutional and enjoined by this Court.

SECOND CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF – CITY OF SEATTLE'S CITY COUNCIL'S REPAYMENT ORDINANCE'S UNCONSTITUTIONAL IMPAIRMENT OF A CONTRACT

(Pursuant to U.S. Const. art. I, § 10, cl. 1 & 42 U.S.C. § 1983)

72. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

73. Under Seattle's repayment ordinance, a tenant who fails to pay rent during or within six months after the emergency order's termination do not have to repay the full balance of unpaid rent for up to a full year after the civil emergency ends (currently January 1, 2022). Exh. I. The repayment order also prohibits landlords from collecting late fees, interest, or other charges related to the late payment of rent. *Id.*

74. The repayment ordinance directly impairs the contractual obligation to pay late fees and interest on overdue rent. Exh. I. Since the timeliness of payment is a central feature of a residential lease agreement,

interference that removes enforcement of timely payment is substantial.

75. Additionally, Seattle's repayment ordinance imposes an unreasonable delay on a landlords' ability to recover overdue rent and late fees. Exh. I. The City Council's repayment ordinance would prohibit the Plaintiffs, and other similarly situated landlords, from recovering their lost earnings up to a year after the emergency order ends. Such a delay is an impermissible impairment of the rental agreements.

76. By enforcing the fundamentally unfair repayment ordinance, the City of Seattle, acting under color of state law, has unconstitutionally impaired the obligation of Plaintiffs' contracts.

77. An actual controversy exists between the parties, in that the Plaintiffs are suffering ongoing and irreparable harm by Seattle's impairment of their contracts, and the harm will continue unless Seattle's repayment ordinance is declared unconstitutional and enjoined by this Court.

THIRD CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF – CITY OF SEATTLE'S CITY COUNCIL'S UNCONSTITUTIONAL TAKING OF THE PLAINTIFFS' RENTAL PROPERTIES

(Pursuant to U.S. Const. amend. V & 42 U.S.C. § 1983)

78. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

79. The Fifth Amendment to the United States Constitution states: "[N]or shall private property be

taken for public use, without just compensation." U.S. Const. amend. V. This provision is also known as the Takings Clause.

80. A physical occupation of property authorized by the government is a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012).

81. Plaintiffs have a constitutionally protected right to the possession of their property.

82. Plaintiffs are suffering the unwanted and unauthorized occupation of their property as a result of the eviction ban.

83. Defendants may not constitutionally compel Plaintiffs to rent their property, deprive plaintiffs of their right to re-enter their property, or refrain from terminating a tenancy pursuant to valid lease contracts.

84. The eviction ban forces Plaintiffs to bear the costs of providing tenant public assistance in violation of the Takings Clause, which was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong*, 364 U.S. at 48–49.

85. An actual controversy exists between the parties, in that the Plaintiffs are suffering an ongoing and irreparable harm by Seattle's taking of their property, and the harm will continue unless Seattle's eviction ban is declared unconstitutional and enjoined by this Court.

FOURTH CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF – MAYOR OF SEATTLE'S EVICTION BAN'S UNCONSTITUTIONAL IMPAIRMENT OF A CONTRACT

(Pursuant to U.S. Const. art. I, § 10, cl. 1 & 42 U.S.C. § 1983)

86. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

87. Under the Seattle Mayor's eviction ban, landlords are prevented from initiating unlawful detainer actions during the Mayor's emergency order. Exh. E. Landlords are also not allowed to impose late fees or other charges due to the late payment of rent. Exh. E. This is an unlawful impairment on the obligations of contract.

88. The Mayor and the City of Seattle will likely argue they can impair the Plaintiffs' rental contracts because of the pandemic and to ensure individuals have adequate housing; however, like Seattle's City Council's eviction ban and Washington State's eviction ban, the Mayor's ban is justified by or adequately tailored to the pandemic. Exh. E. Instead, the eviction ban prevents all evictions regardless of the circumstances surrounding a tenant's refusal to pay rent. Exh. E. Additionally, to the extent the Mayor's eviction ban does relate to the pandemic, it still eliminates the crux of the rental business model, which is an individual's ability to collect rent in a timely manner and enforce that obligation through eviction proceedings if necessary. Exh. E.

89. Consequently, because the Mayor's eviction ban substantially impairs the Plaintiffs' ability to enforce their rental contracts, the Mayor's eviction ban cannot stand.

90. By enforcing the eviction ban, Seattle's Mayor, acting under color of state law, has unconstitutionally impaired the obligation of Plaintiffs contracts.

91. An actual controversy exists between the parties, in that the Plaintiffs are suffering an ongoing and irreparable harm by Seattle's Mayor's treatment, and the harm will continue unless the Mayor's eviction ban is declared unconstitutional and enjoined by this Court.

FIFTH CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF – MAYOR OF SEATTLE'S EVICTION BAN'S UNCONSTITUTIONAL TAKING OF THE PLAINTIFFS' RENTAL PROPERTIES

(Pursuant to U.S. Const. amend. V & 42 U.S.C. § 1983)

92. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

93. Seattle's Mayor's eviction ban impermissibly allows tenants to indefinitely physically occupy the Plaintiffs' rental properties without any compensation. Exh. E.

94. By enforcing the eviction ban, Seattle's Mayor, acting under color of state law, is imposing a physical occupation of Plaintiffs' property in violation of the Takings Clause.

95. An actual controversy exists between the parties, in that the Plaintiffs are suffering an ongoing and irreparable harm by the Mayor physically taking their property, and the harm will continue unless Seattle's Mayor's eviction ban is declared unconstitutional and enjoined by this Court.

SIXTH CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF – WASHINGTON STATE'S EVICTION BAN'S UNCONSTITUTIONAL IMPAIRMENT OF A CONTRACT

(Pursuant to U.S. Const. art. I, § 10, cl. 1 & 42 U.S.C. § 1983)

96. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

97. Under Washington State's eviction ban, all landlords are prohibited from serving or enforcing any notice requiring a tenant to vacate any dwelling or parcel of land occupied as a dwelling. Exh. A at 2. This ban applies in all cases unless: (1) the tenant is an immediate risk to the health, safety, or property of others or (2) the landlord plans to personally occupy the premises or sell the property. Exh. A at 2. This is an unconstitutional impairment of contractual obligations.

98. Similar to the other Defendants, it is likely Washington State will argue it can impair the Plaintiffs' rental contracts because of the pandemic and to ensure individuals have adequate housing; however, like Seattle's various eviction ban, Washington State's eviction ban is neither justified by nor adequately tailored to the pandemic. Exh. A.

Instead, the eviction ban prevents all evictions regardless of the circumstances surrounding a tenant's refusal to pay rent. Exh. A at 2–3. Additionally, to the extent Washington State's eviction ban does relate to the pandemic, it still eliminates the crux of the rental business model, which is an individual's ability to collect rent in a timely manner and enforce that obligation through eviction proceedings if necessary. Exh. A.

99. Consequently, because Washington State's eviction ban substantially impairs the Plaintiffs' ability to enforce their rental contracts, Washington State's eviction ban cannot stand.

100. By enforcing the eviction ban, Washington State, acting under color of state law, has unconstitutionally impaired the obligation of Plaintiffs' contracts.

101. An actual controversy exists between the parties, in that the Plaintiffs are suffering an ongoing and irreparable harm by Washington State's treatment, and the harm will continue unless Washington State's eviction ban is declared unconstitutional and enjoined by this Court.

SEVENTH CLAIM FOR DECLARATORY RELIEF – TAKING OF PROPERTY

(Pursuant to U.S. Const. amend. V & 42 U.S.C. § 1983)

102. The Plaintiffs hereby incorporate by reference and reallege the allegations contained in the foregoing paragraphs.

103. Washington State's eviction ban impermissibly allows tenants to indefinitely

physically occupy the Plaintiffs' rental properties without any compensation. Exh. A at 2–3.

104. By enforcing the eviction ban, Washington State, acting under color of state law, is allowing and will continue to allow tenants to physically occupy premises that do not belong to them, violating the Takings Clause.

105. An actual controversy exists between the parties, in that the Plaintiffs are suffering an ongoing and irreparable harm by Washington State's physical taking of their property, and the harm will continue unless Washington State's eviction ban is declared unconstitutional and enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for relief as follows:

1. For a declaration that Seattle's City Council's eviction ban on its face, and as applied to the Plaintiffs and similarly situated property owners, violates the Contracts Clause by impermissibly preventing them from enforcing the eviction provisions in their rental contracts;

2. For a declaration that Seattle's City Council's rent repayment ordinance on its face, and as applied to the Plaintiffs, violates the Contracts Clause by impermissibly delaying the Plaintiffs', and other similarly situated landlords', ability to recover overdue rent and late fees, which they are contractually allowed to do through their rental contracts with their tenants;

3. For a declaration that Seattle's City Council's eviction ban on its face, and as applied to the Plaintiffs

and similarly situated property owners, violates the Takings Clause of the Fifth Amendment by forcing landlords to accept the physical occupation of their property without just compensation;

4. For a declaration that the Mayor's eviction ban on its face, and as applied to the Plaintiffs and other similarly situated property owners, violates the Contracts Clause by impermissibly preventing them from enforcing the eviction provisions in their rental contracts;

5. For a declaration that the Mayor's eviction ban on its face, and as applied to the Plaintiffs and similarly situated property owners, violates the Takings Clause of the Fifth Amendment by forcing landlords to accept the physical occupation of their property without just compensation;

6. For a declaration that Washington State's eviction ban on its face, and as applied to the Plaintiffs and other similarly situated property owners, violates the Contracts Clause by impermissibly preventing them from enforcing the eviction provisions in their rental contracts;

7. For a declaration that Washington State's eviction ban on its face, and as applied to the Plaintiffs and other similarly situated property owners, violates the Takings Clause of the Fifth Amendment by forcing landlords to accept the physical occupation of their property without just compensation;

8. To permanently enjoin the Defendants, their agents, representatives, and employees, from enforcing their respective eviction bans and the rent repayment ordinance;

9. For an award, pursuant to 42 U.S.C. § 1988(b), of reasonable attorney fees, expenses, and costs; and

10. For nominal damages and such other relief as the Court deems just and proper.

DATED: January 14, 2021.

Respectfully submitted:

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