

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT, SUFFOLK

Civil Action No. 20-1334G

MITCHELL MATORIN, et. al.,

Plaintiffs

v.

EXECUTIVE OFFICE OF HOUSING AND ECONOMIC
DEVELOPMENT, et. al.,

Defendants

**BRIEF OF THE AMICUS CURIAE IN SUPPORT OF THE
PLAINTIFFS' REQUEST FOR A PRELIMINARY
INJUNCTION AND DECLARATORY JUDGMENT**

**SUBMITTED BY
INSTITUTE OF REAL ESTATE MANAGEMENT**

July 24, 2020

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STATEMENT OF THE ISSUES

- A. Whether Chapter 65 of the Acts of 2020, An Act Providing for a Moratorium On Evictions and Foreclosures During the COVID-19 Emergency (the "Act") and the regulations ("EOHED Regulations") promulgated thereunder by the Massachusetts Executive Office of Housing and Economic Development ("EOHED") violate the rights of rental property owners guaranteed by the Massachusetts Declaration of Rights.
- B. Whether the Act and EOHED Regulations (collectively, the "Moratorium") are necessary and reasonable to serve the legitimate public purpose of providing safeguards for tenants in light of the COVID-19 pandemic and the protections offered by the existing regulations governing summary process actions.

INTRODUCTION

The central issues of the present matter are whether the Act and EOHED Regulations deprive real property owners of their constitutional rights with respect to enforcement of lease contracts and whether

the Act and EOHEC Regulations are reasonable or necessary to further a public interest during the COVID-19 pandemic.

INTEREST OF AMICUS

The Institute of Real Estate Management ("IREM") is the only national professional real estate management association serving both the multi-family and commercial real estate sectors. IREM provides education and advocacy services for its members, which include 80 domestic and 15 international chapters, totaling approximately 20,000 members. IREM members are directly involved in the ownership and management of residential and commercial properties throughout the Commonwealth and strenuously support the objective of affording every American the opportunity to live in safe, decent and sanitary housing. IREM believes that this objective is best served by way of a healthy housing market for all economic levels and further, that there are many opportunities for the government, property owners and managers to work together to provide adequate, affordable housing to citizens, so long as involvement in these opportunities is not mandated by any level of government. IREM also believes that existing landlord-tenant and fair housing legislation in place across the

country is designed to, and does, protect tenants from unscrupulous property owners, both large and small.

IREM fully acknowledges and supports the need to protect the public interest, particularly during a time when the Commonwealth is experiencing the various impacts of the COVID-19 pandemic, including the ongoing efforts of landlords to avail tenants of financial and other resources in order to preserve tenancies. IREM seeks to assist the Court in clarifying that, although well-intended, the Act itself, and the EOHEd Regulations promulgated to implement the Act, are unconstitutional, unreasonable, and unnecessary. This is not only based on the economic impact the Act has on private property owners, but also on the significant impact the Act has on the basic contractual rights of property owners to enforce their leases.

IREM fully concurs with the Plaintiffs' arguments in relation to the various and significant economic effects of the prohibition against legal action for non-payment of rent, especially where the Act applies to persons who have experienced no economic impact from COVID-19. However, IREM and its members, who are at the forefront of ensuring residents are afforded safe and decent housing, intends to focus on the Act's

infringement on an owner's right to enforce their lease, including recovering their homes following the expiration of lease terms or based on serious criminal activity and lease violations.

ARGUMENT

- I. The Act violates Massachusetts property owners' First Amendment right to petition the courts for redress of grievances providing no remedy for landlords and negatively impacting public health and safety.

The Act impermissibly violates Massachusetts landlords' First Amendment Right to Petition the Courts in the event of both criminal conduct and material lease violations, except in the limited cases where the alleged conduct "impacts the health and safety of other residents, health care workers, emergency personnel, persons lawfully on the subject property or the general public." St. 2020, c. 65, § 1; 3(a). Specifically, the Act provides,

"Notwithstanding chapter 186 or chapter 239 of the General Laws or any other general or special law, rule, regulation or order to the contrary, a landlord or owner of a property shall not, for the purposes of a non-essential eviction for a residential dwelling unit: (i) terminate a tenancy; or (ii) send any notice, including a notice to quit, requesting or demanding that a tenant of a residential dwelling unit vacate the premises." St. 2020, c. 65, § 3(a).

Thus, the Act prohibits not only obtaining possession of the dwelling, but also serving a notice of termination or taking any other action based on both lease violations and criminal conduct that, while material violations of the parties' contract, may not directly impact health and safety. For example, this Act would prohibit a property owner from seeking to recover their property at the end of a lease term or from exercising their right to terminate a tenancy at will. It prevents an owner from seeking to recover their property in order to sell their home or to perform necessary repairs. Likewise, material lease violations such as smoking, possession of illegal drugs, allowing unauthorized persons to reside in the apartment, failure to comply with federal regulations relating to income certification and eligibility compliance, and other material lease violations may not be addressed pursuant to the Act. The foregoing prohibition applies regardless of whether the material violation or criminal conduct arose as a result of COVID-19 and whether or not the resident has the monetary or physical ability to relocate. Rather than permitting the owner to seek redress from the Court as provided by G.L. c. 239, the Act eliminates any right

to either seek to terminate the tenancy or commence legal action.

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." The right to petition the courts is a fundamental liberty and is protected against infringement by the government at the federal, state, and local level. See NAACP v. Button, 371 U.S. 415 (1963). Further, Article XI of the Commonwealth of Massachusetts Declaration of Rights states that every Massachusetts citizen has the right to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character" and that this right should be obtained "freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." The Massachusetts Appeals Court has held that "free access to the courts . . . requires that all cases be decided by a judge and that litigants need not purchase access to justice." Ventrice v. Ventrice, 87 Mass. App. Ct. 190, 193 (2015).

Although the Defendants have argued that the Supreme Judicial Court has recognized that "societal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day . . .", the societal conditions arising from the COVID-19 pandemic reap no benefit from the provisions of the Act, and, in fact, are only exacerbated by it. See Klein v. Catalano, 386 Mass. 701, 712-713 (1982).

As noted, the Act wholly eliminates a property owner's right to seek redress for its suffered wrongs, creating significant harm not only to property owners, but more often to other residents. In the case of the expiration of fixed term leases, the Act prevents a property owner from recovering its real property if the resident fails to vacate as required. While the contract clearly requires the tenant to vacate on a specific date, an owner whose tenant fails to comply lacks any means by which to enforce their contract. Homeowners who may desire to return to their own homes at the end of the contract term have no recourse to recover their real property. Owners who may need to sell their homes when a lease ends have no means to seek judicial intervention. Owners who have another

renter anxiously waiting to move into their new apartment following the expiration of a prior lease have no ability to uphold their end of the contract with their new tenant and more alarmingly, have no right or ability to seek a determination from the court as to which party has the superior right to reside in the premises or the equitable rights of the parties. This scenario often places the "successor tenant", who has done nothing wrong other than to expect their new landlord to uphold their end of the bargain, in a precarious position based on the current tenant's breach of contract.

Prior to the Act, an owner had the right to commence an action pursuant to G.L. c. 239 to seek possession of the underlying premises, including commencing an action thirty (30) days prior to the expiration of a lease term in cases where the tenant did not appear to be vacating. See, G.L. c. 239 §1A. Most often, such cases are commenced in an attempt to ensure that the next tenant is able to take possession of the apartment for which they have a legally enforceable contract. The Act, however, eliminates this right of redress despite the fact that both parties maintain significant rights afforded

throughout the entirety of the summary process litigation. St. 2020, c. 65, § 3(b). These significant legal rights include the right to a jury trial, the right to file an Answer with counterclaims and defenses, the right to seek discovery from the opposing party, multiple opportunities to cure prior to trial, the right to request mediation, the right to engage counsel of the party's own choosing, including multiple legal aid agencies and lawyer for the day, and the right to appeal. See Id., G.L. c. 186, §11-12, Mass. Trial. Ct. R. 4, Unif. Summ. Proc. R. 1, 3, 5-8. In addition, even in cases where the tenant ultimately fails to establish any defense to the owner's claims, the Court maintains the absolute authority to issue a discretionary stay of up to one (1) year. G.L. c. 239, §9.

The Act eliminates this right of redress, and completely undermines the judiciary's role in enforcing contracts and resolving disputes. St. 2020, c. 65, § 3(b). By eliminating this right of redress the Act not only creates an unconstitutional barrier to the Courts, but also significantly impacts owners who are no longer able to rely on tenants leaving at the end of their lease terms. Additionally, successor

tenants have been impacted when prior tenants simply refuse to vacate and the owners lack any means to relocate the current tenant as required.

Similarly, the prohibition against seeking redress for material lease violations and criminal conduct violates Article XI of the Commonwealth of Massachusetts Declaration of Rights. While the Act does create a limited exemption for certain conduct, the broad restriction on access to the courts for other contractual violations is impermissible and fails to serve any legitimate purpose.

For example, the Act eliminates the ability of an owner to enforce non-smoking lease provisions. As such, where an owner is advised by other residents that a person is smoking in the building, in direct violation of the lease, the landlord lacks any means to address the violation or protect the rights of the other residents. Similarly, the Act prohibits an owner from addressing unauthorized occupants residing in apartments or persons engaged in short-term rentals, even in jurisdictions where it is illegal to engage in such use of the property. St. 2018, c. 337; City of Boston Mun. Code, Ordinance § 9-14. Thus, even though a lease and state law may prohibit short-term

rentals or require persons residing in the building to be screened for prior criminal conduct or other potential threats to the other occupants, an owner lacks the ability to seek redress with the Court to address such violations of the lease and state law. The Act goes as far as preventing an owner aware of a tenant's illegal activity on the property from removing said tenant unless the landlord can prove that there is a current impact on health and safety, even when such illegal activity is reported and causing concerns among other residents, and even if an impact on health and safety is foreseeable in the immediate future. For example, a tenant could maintain a significant quantity heroin in the apartment or engage in prostitution in the apartment. However, as long as it is not specifically affecting the health and safety of other residents, the owner would lack any means of addressing same or responding to the concerns of the other residents. Likewise, a tenant could possess illegal firearms in an apartment and the owner would lack any means to address such conduct. In fact, rather than serve public safety, eliminating an owner's right to seek the removal of a tenant who is engaged in illegal activity seems directly contrary

to the Act's stated goal of protecting health and safety. Similarly, removing an owner's right to seek the removal of tenant's harboring illegal occupants, who have not been screened for criminal backgrounds or potential COVID-19 exposures, or allowing tenants to enter into illegal short-term rentals with out-of-state persons, may actually expose other residents to the very risks which the Act purports to eliminate, or at the very least, minimize. Without the ability to address violations such as unauthorized occupants, short-term rentals, and criminal conduct through the court system, a landlord has been effectively rendered powerless to assist in the furtherance of the Act's goals; to protect the public from the spread of COVID-19. While Courts may ultimately find such conduct insufficient to terminate a tenancy, or the parties may utilize the court's mediation services to come to a resolution of such violations, eliminating an owner's right to access the courts to address such material lease violations and criminal conduct is neither constitutional nor in furtherance of the stated goals of the Act.

Finally, the Act eliminates an owner's right to seek redress through the Court when a tenant fails to

comply with federal and state subsidy regulations applicable to their tenancies. These include requirements to report changes of income and complete annual recertifications in order to determine eligibility for continued occupancy. See U.S. Department of Housing & Urban Development, HUD Multifamily Occupancy Handbook 4350.3: Recertifications, Unit Transfers, and Gross Rent Changes, at 7-1 to 7-18 (Nov. 2013). Thus, even in such cases where a resident fails, despite repeated demands, to respond to requests for recertification or report decreases in their income to lower their rent, an owner is deprived of any right to petition a court. As a result, not only does the owner risk being deemed in non-compliance with their regulatory agreements and legal obligations, but tenants are actually losing their subsidies based on their lack of response. See Id. While prior to this Act an owner could serve a notice to quit to raise the issue, and commence summary process actions to compel a resident to complete such paperwork in an effort to resolve the lease violation, remain in compliance with applicable subsidy regulations and preserve the housing and subsidy, this Act enables tenants to ignore such

requirements, resulting in their loss of subsidy, and denying both parties the right to petition the Court.

It is also important to note that commencing a summary process action does not equate to a tenant actually being evicted. Rather, such actions permit owners to work cooperatively with tenants to mitigate the risks that these lease violations are causing. Many summary process actions, particularly those based on behavioral lease violations, are addressed through mediation and result in court-reviewed and approved agreements for judgment. The Housing Courts not only provide mediation and services through the Housing Specialist Department of the Housing Court Division, but also afford access to free legal services. In addition, the Housing Courts offer disabled residents assistance through the Tenancy Preservation Program to assist with access to necessary services. These legal processes, only available through the courts, actually function in such a manner as to enable residents to preserve their housing by accessing these necessary services. The Act's denial of access to the courts not only impacts the owner's rights and ability to resolve their disputes, but denies these tenants their right to seek redress through the courts, including

access to these services. The Moratorium unreasonably allows these behavioral issues to continue and escalate, without providing any adequate or reasonable remedy, and actually results in the denial of these opportunities to the tenants.

II. The Act constitutes a taking of real property without just compensation in violation of Article 10.

Article 10 of the Commonwealth of Massachusetts Declaration of Rights provides that "whenever the public exigencies require that the property of any individual should be appropriated for public uses, he shall receive a reasonable compensation therefor." The United States Supreme Court has also held that when the government's "physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

As enacted, the Act forces landlords to provide housing to individuals who have failed to perform under the contract and has transferred the financial impact of the pandemic from tenants to landlords without just compensation. The United States Supreme Court has explained that property rights in a physical thing, such as real estate can be described as rights

to "to possess, use and dispose of it." See Id. at 435 (1982). The Court further stated that to "the extent that the government permanently occupies physical property, it effectively destroys each of these rights." Id. A property owner may also not be deprived of the ability to control the use of their real property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

While the monetary taking identified by the Plaintiffs is clear, the taking of real property by way of denying owners the use of their own real property is equally impermissible. As noted, the Act prohibits an owner from recovering their own home for any purpose. This includes their desire to assume occupancy of their home, desire to sell their home, or desire to use the home for other purposes. This is regardless of whether the lease has concluded and regardless of whether the occupants have even asserted any issues related to the pandemic. An occupant may simply deny an owner their lawful use of their own property despite their contractual obligation to vacate. The Act directly eliminates a homeowner's right to "to possess, use and dispose" of their real

property for an unlimited period. In fact, as the expiration of the Act is based solely on the decision of the Governor, who may extend the State of Emergency without end, the language of the Act expressly permits this taking to continue indefinitely. See Id. at 435 (1982). While the occupant is afforded the right to vacate at any time, at the expiration of a lease or tenancy at will, the owner is deprived of the use and occupancy of their own real property. Likewise, during the period of this unconstitutional taking, landlords are still required to honor their obligations to cover expenses related to mortgages, utilities, real estate taxes, insurance, and maintenance, but are simultaneously deprived of rent. Similarly, it should be noted that even tenants residing in subsidized housing who no longer qualify for such programs are afforded the indefinite right to remain in these units and therefore deprive the persons on the waiting lists the opportunity to avail themselves of such housing opportunities. Rather than address the impact of this pandemic on a resident's income or housing options, the Act transfers the burden to property owners without any compensation. By broadly limiting a property owner from recovering

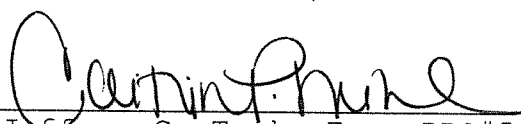
their real property, as specifically authorized by their lease and state law, the owner is effectively denied the ability to control their own property. As such, the Act constitutes an unconstitutional taking both in relation to the monetary considerations identified by the Plaintiffs, but also in the denial of a property owner's fundamental right to control their own property.

CONCLUSION

IREM remains committed to the mission of affording safe, decent and affordable housing to the residents of the Commonwealth. Its members achieve these goals on a daily basis by engaging with residents to assist them in resolving their monetary concerns and potential lease violations while also balancing the rights of all residents to safe housing and quiet enjoyment. While the Amicus respectfully submits that the Court should allow the preliminary injunction requested by the Plaintiffs and issue declaratory judgments finding the Act and Regulations violate the U.S. Constitution and the Commonwealth of Massachusetts Declaration of Rights, the Amicus recognizes the hardship many persons have suffered as a result of this pandemic and will continue to work

cooperatively with tenants, social service agencies,
and the courts to address these serious issues.
However, to permit this unconstitutional barrier to
justice to remain undisturbed is impermissible.
Rather, the Court should be permitted to exercise
their role in the administration of justice.

RESPECTFULLY SUBMITTED,
AMICUS, INSTITUTE OF REAL ESTATE
MANAGEMENT,
BY ITS ATTORNEYS,



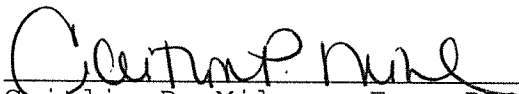
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Date: July 24, 2020

**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 17 OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I, Caitlin P. Milone, Esq., hereby certify pursuant to Mass. R. App. P. 17 that the foregoing brief complies with the applicable rules of court that pertain to the filing of amicus briefs, including, but not limited to: Mass R. App. P. 17 and Mass R. App. P. 20.

In compliance with Mass R. App. P. 17(c)(9) and Mass R. App. P. 20(a)(3)(E), I further certify that the foregoing brief uses a 12 point monospaced font, one inch top and bottom margins, and 1.5 inch left and right margins. The brief does not exceed thirty (30) non-excluded pages.



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Dated: July 24, 2020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

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AND ECONOMIC DEVELOPMENT,)
et. al.)
)
Defendants)
)

**CERTIFICATE OF SERVICE PURSUANT TO RULE 13(E) OF THE
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I, Caitlin P. Milone, Esq. do hereby certify that on July 24, 2020, a true copy of Institute of Real Estate Management's Amicus Brief, was served on all counsel of record listed below via electronic mail, in accordance with the Supreme Judicial Court's Order Concerning Email Service in cases under Rule 5(b) of the Mass Rules of Civil Procedure, effective March 30:

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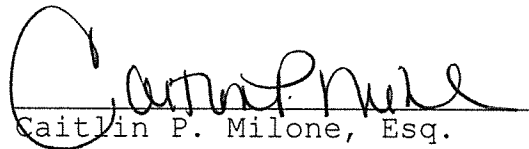
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A handwritten signature in black ink, appearing to read "Caitlin P. Milone". The signature is written in a cursive style with a large initial "C".

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