No. 100992-5

SUPREME COURT OF THE STATE OF WASHINGTON

No. 55915-3-II

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION II

Gene Gonzales and Susan Gonzales, Horwath Family Two, LLC, and the Washington Landlord Association,

Appellants

v.

Governor Jay Inslee and State of Washington,

Respondents.

Appellants' Petition for Review

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Introduction

The Covid-19 pandemic shocked the world like nothing before it in modern history. Yet, it is "under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees." *Kennedy v. Mendoza—Martinez*, 372 U.S. 144, 165 (1963).

In the pandemic's wake, Governor Inslee issued a series of emergency proclamations numbered as Proclamation 20-19 through 20-19.6 (A-32-40), and 21-09 (the "Proclamations"), each of which prohibit housing providers from exercising their statutory and contractual remedies to evict tenants (or even squatters) who have no right to remain in the owners' property. The Proclamations took away all recourse against the few "bad actor" tenants who refuse to pay rent solely because they know they cannot be evicted or be charged late fees for nonpayment

or ever have their unpaid rent be treated as an enforceable debt.

Appellants ("Housing Providers") are sympathetic to tenants who have suffered from the pandemic and are willing to work in good faith with those tenants who do not have the financial means to pay all their rent. However, the Proclamations actively undermined such cooperation and allowed tenants with the ability to pay their rent to ignore and ultimately escape their obligations indefinitely, regardless of whether they have been financially harmed by the pandemic.

While many businesses have suffered as a result of the pandemic, landlords are the only ones required by any of the proclamations to provide a good or service for free. Retail store and restaurant owners lost business, but they were not required to continue to provide clothing, goods or food to customers for free. Hotels suffered losses, but they were not required to allow guests to stay for free.

In contrast, the Proclamations' prohibition on evictions required Housing Providers to provide free rental housing without an ability to insist that tenants honor their most basic statutory obligations to pay rent or comply with rules that protect property and the safety and comfort of other tenants or the community.

The Supreme Court has warned about the potential problems with the use of governmental power during an emergency:

> Emergency does not create power.
>
> …
>
> What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-26 (1934).

Here, close examination of the Governor's exercise of power in response to the pandemic reveals the violation of

Housing Providers' constitutional rights by forcing them alone to bear the burden of meeting a public need that should be borne by the public as a whole.

Identity of Petitioners

Petitioners are Plaintiffs and Appellants below, Gene and Susan Gonzales, Horwath Family Two, LLC and the Washington Landlord Association.

Citation to Court of Appeals Decision

Housing Providers seek review of a decision of Division Two filed on February 23, 2022 (Appendix A-1), and of an order denying a motion for reconsideration filed on March 22, 2022 (A-30). Because the Court of Appeals failed to give notice to Petitioners of the order on the reconsideration motion, the Court of Appeals recalled the mandate and set a due date for a Petition for Review of June 3, 2022. A-31.

Issues Presented for Review

1. Whether a prohibition on seeking resolution of disputes interferes with the constitutional right to

access justice and the judiciary's power to administer justice?

2. Whether the Proclamations regarding landlord-tenant relations were authorized by RCW 43.06.220(1)(h) in light of the statute as a whole?

3. If the Legislature authorized the Proclamations, was such authorization a lawful delegation of pure legislative power to suspend statutes?

4. Whether the requirement that Housing Providers continue to provide housing to tenants who do not pay rent or who violate other conditions of the tenancy causes a taking of property that requires payment of just compensation under Article I, Section 16 of the constitution?

5. Whether the prohibitions on evicting rule-breaking tenants coupled with the restriction on treating unpaid rent as a collectible debt together unconstitutionally impairs contracts?

6. Whether the public officer statute trumps all other venue statutes?

Statement of the Case

A. The pandemic and the proclamations.

On March 18, 2020, Governor Inslee issued Proclamation 20-19, which suspended express provisions of state law that would allow residential rental housing

providers to evict tenants for non-payment of rent and other violations of statutory and contractual provisions governing the landlord-tenant relationship. This Proclamation lasted to a particular date, only to be extended by subsequent Proclamations. *See, e.g.,* A-32.

These Proclamations in the 20-19 series, each with minor variations and limited exceptions, prohibit Housing Providers from accessing the courts to seek any judicial determination of their rights regardless of whether a tenant can pay rent or has suffered any pandemic-related hardship. Housing Providers have been prohibited from seeking evictions and treating unpaid rent as enforceable debt.

Under the Proclamations, tenants may continue to occupy their respective premises indefinitely at no charge, utilizing the water, power, trash, sewage, and other services that Housing Providers must continue to provide. By stripping all remedies away from Housing Providers– without even minimally requiring tenants *to communicate*

with their Housing Providers–the Proclamations created a legal disincentive for tenants who can pay rent because there is no recourse for going silent and refusing to do so.

While the state and federal governments have purported to make funds theoretically available to help with unpaid rent, it is only available at the *tenant's* request. CP 253, 248. Because paying was not a top priority for the "bad actor" tenants, Housing Providers did not receive rent or rental assistance. *Id.*

Further, the Proclamations directly prohibit access to the courts to resolve landlord/tenant disputes and prohibit law enforcement from serving or carrying out anything eviction-related unless a narrow exception applies. *See* A-36-37.

B. The Housing Providers' circumstances.

The Gonzales family, Horwath Family Two, a family-owned LLC, and the Washington Landlord Association all own (or, in regard to the Association, represent people who own) rental housing in Lewis County. Their tenants

have not paid rent for many months and refuse to communicate, frustrating the ability to offer a reasonable repayment plan tailored to the tenants' individual financial and health circumstances—key to ever being allowed to treat unpaid rent as an enforceable debt.

The Gonzales tenant, identified as Tenant X to protect privacy, who had not paid the $1,000 per month rent since June, 2020. CP 251. Because Tenant X receives income from government disability payments, Tenant X likely has not suffered any reduction in income due to Covid-19. *Id*. Tenant X didn't reimburse the Gonzales for utilities as required by the lease.

Tenant X is also hard on the property—having broken cupboards, cracked a ceramic top stove, removed smoke alarms (contrary to RCW 59.18.130(7)) and pulled out a ceiling light. *Id.* Neighbors to the property occupied by Tenant X have complained about Tenant X's yelling and setting off fireworks between 1:00 and 2:00 in the morning. *Id.*

They have a mortgage on the property and pay property taxes and insurance. Unlike Tenant X, they have had Covid-19-related loss of income. Susan Gonzales taught for the Centralia School District and was laid off because of Covid-19. *Id.* They struggled to pay the mortgage, taxes, insurance and upkeep and repairs for property occupied by Tenant X who has no loss in income. *Id.* Neither have they received compensation from the State for the deprivation of their right to evict or the deprivation of their contractual right to receive rent. CP 253.

Similarly, Horwath Family Two, LLC (the Horwath Family) owns a single-family home leased to Tenant Y, who has not made a rental payment since March of 2020. CP 246. The rental properties constitute the Horwath's retirement income. CP 245. Under the lease agreement, Tenant Y is obligated to pay rent in the amount of $1,175 per month, and the unpaid rent totaled $12,915 as of January 2021. CP 246. Tenant Y is also obligated under

the lease agreement to pay for utilities, but like Tenant X, Tenant Y has not paid for utilities for many months. *Id.*

The Horwath Family made many attempts to find an equitable solution for tenants impacted by the pandemic. . Inquiries were made about the tenant's ability to pay any part of the rent owed—numerous emails, texts, voice mail messages and postings on the door of the rental unit. *Id.* Despite all these efforts, Tenant Y never responded. *Id*.

The lack of response made it impossible to know any of Tenant Y's financial or health circumstances. As a result of Tenant Y's silence, the Horwath Family had not been able to offer a repayment plan that would be reasonable based on the tenant's financial, health, and other circumstances as the Proclamations require. The Horwath Family can't conduct surveillance on Tenant Y to determine Tenant Y's financial, health or other circumstances. The only lawful way to learn of Tenant Y's circumstances would be to file suit, but that was prohibited by the Proclamations. *See* A-36-37.

Like the Gonzales family, the Horwath Family has received no compensation from the State for the deprivation of the contractual and statutory right to evict Tenant Y or the deprivation of the right to receive rent. CP 248.

C. Procedural history.

Housing Providers filed this action against Governor Inslee and the State (hereinafter "State") in Lewis County Superior Court. CP 194, *et seq*. In response, the State filed a motion to change venue to Thurston County which the Court granted. CP 2-3, 178.

Thereafter, the Thurston County Superior Court considered cross-motions for summary judgment. The Court granted the State's motion and denied Housing Providers' motion. CP 1370. Housing Providers filed an appeal and Division Two affirmed.

Statement of Grounds, Supporting Argument and Reference to the Record

I

The Governor's prohibition on seeking relief in courts interferes with the independent power of the judiciary and the constitutional right of access to the courts because only the courts should decide how to administer justice during a pandemic.

The Proclamations deny access to the judiciary for the resolution of disputes and infringe on the courts' inherent powers by shutting the courthouse doors and not allowing the courts to deal with the pandemic. Division Two recognizes the right to access the courts constitutes a "bedrock foundation," shaken when there is delay or blockage of the ability to file suit. A-17 (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780 (1991)).

However, Division Two then treats the ability to have courts resolve disputes as something flimsier than "bedrock." It concludes that access can be regulated, or even banned (by an entity other than the courts

themselves), if the regulation "rationally serves a legitimate end." A-18 (quoting *In re Marriage of Giordano*, 57 Wn.App. 74, 77 (1990)).

Division Two misappropriates the rational basis test as if no specific right, like the access to courts, were involved. The rational basis test applies to review of *any* government action when there is no other constitutional right involved. *See, e.g., Amunrud v. Board of Appeals*, 124 Wn.App. 884, 888 (2004) (revocation of a driver's license); *American Network, Inc. v. Wash. Util. and Transp. Com'n,* 113 Wn.2d 59 (1989) ("purely economic regulation"); *Weikal v. Wash. Dep't of Fisheries,* 37 Wn.App. 322 (1984) (fishing licenses).

By applying the rational basis test here, Division Two suggests that the access to the courts is no more important than the right to make choices about driving, charging utility rates or fishing. The role of the courts as established in the constitution as the civilized method for

resolving disputes is far more important—the pursuit of justice and equity.

Division Two improperly relies on Division One's decision in *Giordano,* 57 Wn.App. 74. The key point is that *Giordano* is a completely different type of case. There was no outside body telling the court that it could not continue its historical functions. The party in *Giordano* argued that a court-imposed restriction on filing unlimited motions on whatever and whenever they wanted constituted a deprivation of access to the court. *Id.* at 78. The argument failed because there was access to the court—the dispute was being handled by the judiciary. The right to be in court did not entitle a litigant to be free from court-imposed restrictions, which naturally were subject to a rational basis test.

But here, Housing Providers were not allowed to file anything in court to present their legal issues with tenants—not because the court decided to handle matters

differently in the pandemic—but because the Governor did. It is the courts' role to determine when cases may be filed, when matters will be heard, what changes to normal routines should be made during extenuating circumstances like a pandemic. A court could have stayed proceedings, or stayed enforcement, if a party was particularly impacted by the pandemic. But the Proclamations' one-size-fits-all approach prohibited the judiciary from exercising any discretion whatsoever.

Division Two's conclusion that the proclamations "did not completely restrict access to the courts," ignores that Housing Providers were prohibited from taking their disputes to the judiciary. A-18. That others could have sought eviction under other circumstances is no answer to the issue.

Finally, Division Two asserts that the ability to bring eviction proceedings was only delayed, as if shutting the courthouse doors for a year and a half is inconsequential.

The delay is significant and only courts should decide when their doors are shut, to whom and under what circumstances. The judiciary is the entity to administer justice so that all are treated fairly. The courts, not the Governor, are best equipped to make those decisions and the judiciary is the entity the constitution entrusts that responsibility. This Court should grant review to safeguard its own independence and central role in providing access to justice.

II

Requiring property owners to house people whose right to occupy has ended constitutes a temporary taking of property.

The Proclamations' mandate that Housing Providers allow others to remain in physical occupation of property constitutes a classic taking of property, requiring payment of just compensation. Washington follows federal law on the state takings clause. *See Yim v. Seattle,* 194 Wn.2d 651 (2019). Federal law is clear that mandated physical

occupations of property constitute *per se* takings. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). Laws preventing landlords "from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs*., 141 S.Ct. 2485, 2489 (2021) (per curiam).

Division Two relies heavily on *Yee v. City of Escondido,* 503 U.S. 519 (1992), but misses the key difference—*Yee* did not involve a prohibition on eviction. Division II concludes that Housing Providers' argument is

> inconsistent with the United States Supreme Court's analysis in *Yee*. In that case, mobile park owners who rented pads to the owners of mobile homes challenged a state statute that among other things
>
> (1) limited their ability to terminate a mobile homeowner's tenancy, (2) did not allow them to remove a mobile home if it was sold, and (3) required them to continue renting to a mobile home purchaser as long as the purchaser had the ability to pay rent.

A-21 (citing *Yee*, 503 U.S. at 524) (emphasis and spacing added)).

The error of Division Two's conclusion is evident from the *Yee* decision itself. The owners of mobile home sites in *Yee* mounted a facial challenge to the city ordinance, not to a state statute; they argued the ordinance should be "viewed against the backdrop" of state law. *Id.* at 523. However, the *Yee* landlords did not sue the state, nor challenge the state law. The Court's focus was on the city ordinance, which did not govern eviction. *Id*. at 528. "[W]e do not find that right [to exclude] to have been taken from petitioners on the *mere face of the Escondido ordinance*.") *Id.* (emphasis added).

Division Two capitalizes on an prior sentence in *Yee* that "Petitioners voluntarily rented their land to mobile homeowners." A-22 (citing *Yee*, 503 U.S. at 527). But

Division Two completely ignores the very next sentence in *Yee* addressing the ordinance and state law:

> At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue to do so.

Id. (noting the owners' right to evict); *see also id.* at 524 (termination for "nonpayment of rent").

Unlike a restriction on rents, the Proclamations directly cause an unwanted physical occupation. Housing Providers were not allowed to evict tenants when there was nonpayment of rent. Nonetheless, Division Two ignores that the Court in *Yee* concluded there was no physical taking—no mandatory occupation by others—as a result of a city ordinance that limited rent increases. *Yee* does not stand for the proposition that requiring an owner to allow tenants to physically occupy property, even though permission has expired, does not constitute a physical occupation of the property.

The conclusion that landlords once invited tenants (for a limited time period) does not logically demand that there is no unwanted physical occupation when landlords must extend the invited occupation far beyond the agreed upon time. It is ludicrous to suggest that inviting someone into one's home when the visitor's intention is to take up residence permanently somehow cannot be considered a physical occupation of one's property. Yet, that is what Division Two establishes—a "once invited, you can stay forever" exception to the rule that physical occupations are *per se* takings requiring just compensation. *Yee* does not compel that result.

Importantly, to conclude there is a physical taking does not prohibit any Proclamation or make it impossible to ensure that tenants may remain in their tenancies until the pandemic is over. The takings clause simply means, if the eviction moratoria caused a taking of an interest in property, it means the State must pay for it. *See Knick v.*

Township of Scott, Pennsylvania, ___ U.S. ___, 139 S.Ct. 2162, 2170 (2019).

Given the significant amount of money appropriated for relief caused by the eviction moratoria, Brief of Respondents at 13-15 (billions of dollars), a ruling that Housing Providers should be paid with public dollars for what they lost to accommodate a public need simply ensures that the funds go to the persons whose property interests were in fact taken.

Housing Providers contend this principle should apply to whomever is required to give up their property for the public good. If grocery stores were required to provide food at no cost to customers during the pandemic, they should be reimbursed with public funds. But groceries stores were not so burdened; no business except landlords were required by the Proclamations to continue to provide without payment what they sell to their customers.

Forcing one group of people to bear the cost of addressing a public need simply because it is convenient is what the constitution's takings clause was designed to avoid.

> The talisman of a taking is government action which *forces some private persons alone to shoulder affirmative public burdens, "which, in all fairness and justice, should be borne by the public as a whole*."

Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 964 (1998) (emphasis added) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). This Court should grant review to address this foundational principle.

III

The Governor's authority under RCW 43.06.220(1)(h) does not extend to suspending statutory rights or obligations.

The Proclamations were expressly issued under RCW 43.06.220(1)(h), but that subsection affords the Governor insufficient authority to suspend, or put "on hold," the operation of statutory rights and obligations. The

Legislature remains available to alter or suspend statutes, but Subsection (1)(h)'s authorization of the Governor to prohibit "actions" during an emergency does not extend to the suspension of statutes.

Division Two concludes Subsection (1)(h)'s authorization to prohibit "activities" is sufficient. A-13-14 (citing *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466 (1982)). However, *Cougar* is not definitive on Subsection (1)(h). In response to the eruption of Mt. Saint Helens, the Governor closed roads, thereby depriving businesses of access. The *Cougar* Court, however, relied on the specific authority in RCW 43.06.220(1)(g) to prohibit the "use of certain streets, highways or public ways by the public," rather than relying solely on an open-ended authority to prohibit "activities."

As addressed below, the wording of the statute as a whole suggests that the Legislature was not intending the

reference to "activities" in Subsection (1)(h) to include suspending statutory rights or obligations.

A. The Proclamations suspend statutory rights and obligations.

The Proclamations suspend the right to evict and suspend the obligation to pay rent. In response, Division Two concludes that the Proclamations did not suspend statutory rights or obligations—they merely delayed them. A-15. That conclusion completely ignores the meaning of these words.

Division Two's conclusion that there is no suspension of duties—just delays—is pure semantics. The common definition of "suspend" is to "delay." "Suspend" means "to stop temporarily" or "to set aside or make temporarily inoperative" or "to defer to a later time on specified conditions, or "to hold in an undetermined or undecided state awaiting further information." https://www.merriam-webster.com/dictionary/suspend. The required deferral or

delay of the duty to pay rent or the right to bring evictions meets every definition of the word “suspend.” The statutory rights and obligations at issue include the obligation in RCW 59.18.080 and RCW 59.18.130 to pay rent timely.

B. To read Subsection (1)(h)’s authorization to prohibit “activities” as broad enough to include suspending statutory rights and obligations violates the well-established canon of statutory construction to not render other provisions superfluous.

Division Two also plainly ignores rules of statutory construction. The reference to “activities” in Subsection (1)(h) cannot be so broad as to include the suspension of statutory rights or obligations because Subsection (2) deals with suspensions and is limited to subjects not at issue here. Moreover, Subsection (4) imposes a 30-day time limit for Subsection (2) and requires the involvement of leadership of the Legislature for situations involving suspension of statutes.

If the reference to prohibiting "activities" in Subsection (1)(h) includes suspension of statutory obligations, then Subsections (2) and (4) are superfluous, a result contrary to standard rules of statutory interpretation. *In re Detention of Strand,*167 Wn.2d 180, 189 (2009).

There's no point to having a restriction on the subject matter for suspending statutes in Subsection (2) and limiting the time and requiring notice to the Legislature in Subsection (4), if the Governor can simply suspend statutory provisions under his authority to prohibit "activities" in Subsection (1)(h).

Division Two's conclusion is alarming. The restrictions in Subsections (2) and (4) would not exist if the Legislature intended to give the Governor a blank check to suspend statutory rights and duties under the term "activities."

IV

To the extent RCW 43.06.220(1)(h) authorizes suspension of statutory rights and obligations, such authorization unconstitutionally violates the prohibition on delegation of legislative powers.

A. The suspension of statutory rights and obligations is a quintessential legislative power not delegable to anyone.

Suspension of statutes is a quintessential legislative power. *See Diversified Inv. P'ship. v. Dep't of Social and Health Services*, 113 Wn.2d 19, 24 (1989). As a pure legislative function, it cannot be delegated to anyone—including another branch of government. *Id.*

B. Subsection (1)(h) fails basic rulemaking criteria because there are no clear standards or procedural safeguards.

While this case involves the Governor suspending statutory rights and obligations, unlawful delegation cases typically involve delegated rule-making authority to state agencies. Nevertheless, no agency is free to adopt rules

inconsistent with statutes. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19 (2002).

If the rulemaking rubric applied, the analysis in *Barry & Barry, Inc. v. State Dept. of Motor Vehicles,* 81 Wn.2d 155, 159 (1972), governs, but Division Two doesn't address *Barry*. The test from *Barry* requires clear standards to the entity given lawmaking power and procedural safeguards. *Id.* A delegation to allow the Governor to suspend statutory rights or obligations with the word "activities" is no standard at all. Granting authority to prohibit "activities" is simply too broad; it is not based on standards or guidelines established by the Legislature, especially where the principle of *ejusdem generis* was not applied to limit "activities" to those associated with other specifically listed items, suggesting riots or insurrections.

Procedural safeguards for state agency rules exist because rules are reviewable under the Administrative Procedures Act (APA). *State v. Crown Zellerbach*, 92

Wn.2d 894, 901 (1979). The Proclamations are not governed by the APA.

In re Powell, 92 Wn.2d 882, 893 (1979)) is also instructive. An unlawful delegation occurred because there were no "notice and public comment procedures which are normally afforded in the rulemaking process" and the ability to institute a challenge after the fact was inadequate. *Id.* at 893. Similarly, "[t]he legislature cannot delegate wholesale its obligation to declare public policy within a legislative process containing important procedural safeguards." *Brown v. Vail,* 169 Wn.2d 318, 331 (2010).

Crown Zellerbach, Powell and *Brown* apply here. No rulemaking procedures existed for the development of the Governor's Proclamations. The Proclamations were simply imposed for over a year and a half. To the extent this was authorized by the Legislature, it was an unlawful delegation.

V

The Proclamations unconstitutionally impair Housing Providers' contracts.

Regarding the impairment of contracts claim, Division Two recognizes *Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), *cited in* A-24-25, is controlling. In *Blaisdell*, a legislature responded to the Great Depression by suspending the right to remove people from their homes upon foreclosures of mortgages by extending the redemption period. *Id.* at 439, 445.

While Division Two recognizes that the party possessing the home in *Blaisdell* "was required to pay the rental value of the home during the extended possession," the Decision ignores the significance of that fact. A-25 (citing *Blaisdell*, 290 U.S. at 445). Payment of rental value during possession was not merely an interesting historical fact. The Court in *Blaisdell*, 290 U.S. at 440, specifically relied upon three eviction cases, each of which required

tenants to pay rent: *Block v. Hirsh*, 256 U.S. 135 (1921), *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) and *Edgar A. Levy Leasing Co. v. Siegal*, 258 U.S. 242 (1922).

Blaisdell, and the cases on which it is based, require the conclusion that contractual rights are impaired when the government bans evictions and no rent is paid. *Blaisdell,* 290 U.S. at 441-42. While the eviction moratorium did not provide reasonable compensation to the Housing Providers while they were prevented from regaining possession. With this fundamental point of the *Blaisdell* opinion missing, Division Two's decision is out of step with federal law.

VI

Thurston County is not the only permissible venue.

The Superior Court granted the motion to change venue from Lewis County under the public officer statute, RCW 4.12.020(2), because the Proclamations were

drafted or issued in Thurston County. Division Two affirms based on this Court's October 11, 2021, order granting an emergency motion for discretionary and accelerated review in *Johnson v. Inslee*, 198 Wn.2d 492 (2021). *Johnson* is not controlling.

A. *Johnson* is not controlling because different venue statutes apply.

In *Johnson,* a state employee challenged the Governor's requirement that employees be vaccinated. The trial court refused to change venue to Thurston County under the public officer statute. *Id.* This Court granted discretionary review and reversed. *Id.*

While at an initial glance the decision in *Johnson* may appear to be controlling, it is not because this Court was basing its decision on the arguments made to it, none of which are the same as those made here. *See* A-41-54. For instance, *Johnson* did not involve a taking or damaging of property which would authorize venue under RCW 4.12.020. *Id.* As addressed below, the public officer

statute should not be controlling to require venue wherever the officer happens to be at the time of issuing a decision.

B. Under traditional venue principles, venue is not mandatory in Thurston County because there are several applicable venues.

Where there is more than one proper venue under the statutes, parties are "not entitled to a change of venue as a matter of right pursuant to RCW 4.12.030(1)." *Ralph v. Weyerhaeuser Co.*, 187 Wn.2d 326, 342 (2016). Choice of venue lies with the plaintiff. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 314 (2011).

Venue in cases against the State may be in:

> (1) The county of the residence or principal place of business of one or more of the plaintiffs;
> (2) The county where the cause of action arose;
> (3) The county in which the real property that is the subject of the action is situated.

RCW 4.92.010 (emphasis added). The county of residence of Appellants is Lewis County, which is also where "the real property that is the subject of the action is situated." RCW 4.92.010(3). CP 29-32.

RCW 4.12.010(1) similarly places venue where the property is located for cases involving questions of title or damage to property. Injury to property in violation of Article I, Section 16 of the Washington Constitution should be resolved where the property is located.

Additionally, even the public officer statute allows venue where any part of the cause of action arose. RCW 4.12.020. “Part of a cause of action is the injury to the Plaintiff.” *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 757 (1988) (footnote and citations omitted). The injury in the present case arose in Lewis County. Housing Providers’ venue choice was not erroneous because part of the cause of action arose in Lewis County.

Conclusion

For the foregoing reasons, Housing Providers urge the Court to grant this Petition for Review.

The undersigned certifies that this brief has 4993 words in compliance with RAP 18.17.

Respectfully submitted this 3rd day of June 2022,

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Certificate of Service

I, Richard M. Stephens, hereby certify that counsel for Respondents was served through the Court of Appeals' electronic filing portal on June 3, 2022.

Executed this 3rd day of June 2022 at Woodinville, Washington,

/s/ Richard M. Stephens____

Appendix

Filed
Washington State
Court of Appeals
Division Two

February 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GENE GONZALES and SUSAN GONZALES, HORWATH FAMILY TWO, LLC, and THE WASHINGTON LANDLORD ASSOCIATION, Appellant, v. GOVERNOR JAY INSLEE and STATE OF WASHINGTON, Respondent.	No. 55915-3-II PUBLISHED OPINION

MAXA, J. – Gene and Susan Gonzales, Horwath Family Two, LLC, and the Washington Landlord Association (collectively, the appellants) appeal the trial court's grant of summary judgment in favor of Governor Jay Inslee and the State (collectively, the State), dismissing their declaratory judgment action challenging Governor Inslee's proclamations ordering a temporary eviction moratorium related to COVID-19.

In February 2020, Governor Inslee declared a state of emergency in Washington because of COVID-19. In March 2020, he issued a proclamation placing a temporary moratorium on most evictions. The moratorium was amended and extended by several subsequent proclamations until the last version expired on June 30, 2021. The governor then issued an eviction bridge proclamation, which expired on October 31, 2021.

Gonzales and Horwath provided rental housing in Lewis County, and their tenants had not paid rent since the governor's proclamation was issued. The appellants filed this action in Lewis County, seeking a declaration that the governor had no statutory authority to issue the eviction moratorium and the moratorium violated several constitutional provisions. The State then filed a motion to transfer venue to Thurston County, which the Lewis County trial court granted.

We hold that (1) this appeal is not moot because the case presents issues of substantial public interest, (2) the Lewis County trial court did nor err in transferring venue to Thurston County, (3) the Governor had authority to issue the proclamations under RCW 43.06.220(1)(h), (4) RCW 43.06.220(1)(h) did not violate the constitutional prohibition against the delegation of legislative authority, (5) the proclamations did not violate the separation of powers doctrine or deny access to the courts, (6) the proclamations did not constitute a taking of the appellants' property, and (7) the proclamations did not constitute an unconstitutional impairment of the appellants' contracts with their tenants.

Accordingly, we affirm the trial court's grant of summary judgment in favor of the State.

FACTS

Background

In response to the COVID-19 pandemic, on February 29, 2020 Governor Inslee declared a state of emergency in Washington. On March 18, 2020, the governor issued Proclamation 20-19,[1] which prohibited certain activities related to residential evictions under the authority of RCW 43.06.220(1)(h). The effect was to put a temporary moratorium on most residential

[1] Proclamation of Governor Jay Inslee, No. 20-19 (Wash. March 18, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-19%20-%20COVID-19%20Moratorium%20on%20Evictions%20%28tmp%29.pdf [https://perma.cc/BBN9-QEM8].

evictions. The moratorium aimed to protect those with the inability to pay rent from being evicted from their homes in the midst of the pandemic. The purpose of the moratorium was to prevent increasing risks to life, health, and safety from the pandemic.

The governor issued subsequent proclamations that extended the eviction moratorium several times and provided much more detailed provisions: Proclamations 20-19.1[2], 20-19.2[3], 20-19.3[4], 20-19.4[5], and 20-19.5.[6] The final proclamation regarding the eviction moratorium, Proclamation 20-19.6[7], expired on June 30, 2021 and was not renewed. These proclamations prohibited landlords and related persons from engaging in a number of activities regarding evictions, which essentially prevented most evictions. One exception was if eviction was necessary because the tenant was creating a "significant and immediate risk to the health or

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[2] Proclamation of Governor Jay Inslee, No. 20-19.1 (Wash. Apr. 16, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-19.1%20-%20COVID-19%20Moratorium%20on%20Evictions%20Extension%20%28tmp%29.pdf [https://perma.cc/G9YP-7HYP].

[3] Proclamation of Governor Jay Inslee, No. 20-19.2 (Wash. June 2, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-19.2%20Coronavirus%20Evictions%20%28tmp%29.pdf [https://perma.cc/8VTV-9HK9].

[4] Proclamation of Governor Jay Inslee, No. 20-19.3 (Wash. July 24, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-19.3%20Coronavirus%20Evictions%20%28tmp%29.pdf [https://perma.cc/7GB3-MJKT].

[5] Proclamation of Governor Jay Inslee, No. 20-19.4 (Wash. Oct. 14, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-19.4.pdf [https://perma.cc/L2AS-CX23].

[6] Proclamation of Governor Jay Inslee, No. 20-19.5 (Wash. Dec. 31, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-19.5.pdf [https://perma.cc/CZ98-WPHB].

[7]Proclamation of Governor Jay Inslee, No. 20-19.6 (Wash. March 18, 2021), https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-19.6.pdf [https://perma.cc/X9AS-5MTR].

safety of others." Proclamation 20-19.1 at 3. An exception later was added for when the landlord planned to personally occupy or sell the rented premises.

The proclamations also prohibited landlords from treating unpaid rent resulting from COVID-19 as an enforceable debt, unless the landlord offered and the tenant refused a reasonable repayment plan.

In April 2021, the legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5160. LAWS of 2021, ch.115. Section 1 of E2SSB 5160 noted the governor's temporary moratorium on evictions "to reduce housing instability and enable tenants to stay in their homes." LAWS of 2021, ch. 115, sec. 1. E2SSB stated that the Governor's eviction moratorium would end on June 30, 2021. RCW 59.18.630.

E2SSB 5160 provided a number of protections for tenants, including that landlords must offer tenants a reasonable schedule for repayment of unpaid rent accruing between March 1, 2020 and six months after expiration of the eviction moratorium. RCW 59.18.630. In addition, the legislation provided for the development of court-based eviction pilot programs to facilitate the resolution of nonpayment of rent cases between landlords and tenants. LAWS OF 2021, ch. 115, sec. 7. E2SSB 5160 also allowed landlords to recover up to $15,000 from the State in unpaid rent if the tenant voluntary vacated a tenancy or if a tenant defaulted on a payment plan. RCW 43.31.605 (1)(d)(i). And it was required that landlords be given the opportunity to apply for certain rental assistance programs. LAWS OF 2021, ch. 115, sec. 12.

On June 29, 2021, the governor issued Proclamation 21-09[8] as a temporary bridge between the expired eviction moratorium and the implementation of E2SSB 5160. This

[8] Proclamation by Governor Jay Inslee, No. 21-09 (Wash. June 29, 2021), https://www.governor.wa.gov/sites/default/files/proclamations/proc_21-09.pdf [https://perma.cc/5FLT-5THF].

proclamation continued to prohibit evictions until certain provisions of E2SSB 5160 were implemented. Proclamation 21-09 was extended once, Proclamation 21-09.1[9], and expired on October 31, 2021.

Lawsuit and Summary Judgment

Gonzales and Horwath provided rental housing in Lewis County. Tenant X had been with the Gonzales' since 2019. Tenant X had not paid rent or utilities since June 2020. The Gonzales' asked tenant X if they planned to pay utilities and tenant X reportedly responded with "[w]hy should I pay them anything; they can't shut me off due to the Pandemic." CP at 252.

Tenant Y rented with Horwath. Tenant Y had not paid rent since February 2020 or utilities since March 2020. A rental management company attempted to contact tenant Y about finding a solution for paying and to inquire about tenant Y's plans or ability to pay. Tenant Y did not respond to the inquiries. No repayment plan was offered because tenant Y would not respond to any communications.

In December 2020, Gonzales and Horwath, joined by the Washington Landlord Association, filed a declaratory judgment action in Lewis County against Governor Inslee and the State. They sought an order declaring that the governor's proclamations ordering an eviction moratorium were void as being without statutory authority and unconstitutional under various provisions, and an order declaring that the proclamations had caused an unconstitutional taking without compensation.

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[9] Proclamation by Governor Jay Inslee, No. 21-09.1 (Wash. Sept. 24, 2021), https://www.governor.wa.gov/sites/default/files/proclamations/proc_21-09.1.pdf [https://perma.cc/H2LM-KFZ3].

The State filed a motion to change venue from Lewis County to Thurston County. The Lewis County trial court granted the motion under RCW 4.12.020(2) because the case involved a lawsuit against a public officer for an act done by the governor in virtue of his office.

Both parties subsequently filed summary judgment motions. The parties submitted declarations supporting the facts stated above. The trial court granted the State's motion on all claims and denied the appellants' motion.

The appellants appeal the trial court's summary judgment order.

ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Where the parties do not dispute the material facts of the case, we will affirm a grant of summary judgment if the moving party is entitled to judgment as a matter of law. *Wash. State Legislature v. Inslee*, 198 Wn.2d 561, 569, 498 P.3d 496 (2021).

B. LANGUAGE OF PROCLAMATIONS

1. Preamble

Proclamation 20-19 and subsequent versions all contained similar preamble language explaining the basis of the eviction moratorium:

> WHEREAS, the COVID-19 pandemic is expected to cause a sustained global economic slowdown, which is anticipated to cause an economic downturn throughout Washington State with layoffs and reduced work hours for a significant percentage of our workforce due to substantial reductions in business activity. . . ; and
>
> WHEREAS, many in our workforce expect to be impacted by these layoffs and substantially reduced work hours are anticipated to suffer economic hardship that will disproportionately affect low and moderate income workers resulting in lost wages and potentially the inability to pay for basic household expenses, including rent; and

> WHEREAS, the inability to pay rent by these members of our workforce increases the likelihood of eviction from their homes, increasing the life, health and safety risks to a significant percentage of our people from the COVID-19 pandemic; and
> . . . .
>
> WHEREAS, a temporary moratorium on evictions throughout Washington State at this time will help reduce economic hardship and related life, health, and safety risks to those members of our workforce impacted by layoffs and substantially reduced work hours or who are otherwise unable to pay rent as a result of the COVID-19 pandemic.

Proclamation 20-19 at 1-2.

Proclamation 20-19.1 and subsequent versions added the following to the preamble:

> WHEREAS, tenants, residents, and renters who are not materially affected by COVID-19 should and must continue to pay rent, to avoid unnecessary and avoidable economic hardship to landlords, property owners, and property managers who are economically impacted by the COVID-19 pandemic;
> . . . .
>
> WHEREAS, it is critical to protect tenants and residents of traditional dwellings from homelessness. . . . ;
> . . . .
>
> WHEREAS, a temporary moratorium on evictions and related actions will reduce housing instability, enable residents to stay in their homes unless conducting essential activities or employment in essential business services, and promote public health and safety by reducing the progression of COVID-19 in Washington State.

Proclamation 20-19.1 at 1-2.

Proclamation 20-19.4 added the following: "WHEREAS, hundreds of thousands of tenants in Washington are unable to pay their rent, reflecting the continued financial precariousness of many in the state." Proclamation 20-19.4 at 3. Proclamation 20-19.5 stated, "WHEREAS, as of November 2020, current information suggests that at least 165,000 tenants in Washington will be unable to pay their rent in the near future, reflecting the continued financial precariousness of many in the state." Proclamation 20-19.5 at 2. Proclamation 20-19.6 stated, "WHEREAS, as of March 2021, current information suggests that at least 76,000 tenants in

Washington will be unable to pay their rent in the near future, reflecting the continued financial precariousness of many in the state." Proclamation 20-19.6 at 3.

2. Eviction Moratorium

Proclamation 20-19 stated that landlords generally were prohibited under RCW 43.06.220(1)(h) from engaging in the following activities: (1) "serving a notice of unlawful detainer for default payment of rent," (2) "issuing a 20-day notice for unlawful detainer," and (3) "initiating judicial action seeking a writ of restitution involving a dwelling unit if the alleged basis for the writ is the failure of the tenant or tenants to timely pay rent." Proclamation 20-19 at 2-3.

Proclamation 20-19.1 adopted different and expanded language, generally prohibiting, under RCW 43.06.220(1)(h), landlords from engaging in a number of activities, including: (1) "serving or enforcing, or threatening to serve or enforce, any notice requiring a resident to vacate any 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"; and (2) "seeking or enforcing, or threatening to seek or enforce, judicial eviction orders." Proclamation 20-19.1 at 3-4. All the subsequent proclamations contained these prohibitions.

Proclamation 20-19.1 and subsequent proclamations contained an exception if the prohibited eviction activities were "necessary to respond to a significant and immediate risk to the health or safety of others created by the resident." Proclamation 20-19.1 at 3. Proclamation 20-19.2 and subsequent proclamations added an exception for when the property owner planned to personally occupy or sell the rental property. Proclamation 20-19.2 at 3.

Proclamation 20-19.1 also contained the following provision:

> 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.

Proclamation 20-19.1 at 4. However, this prohibition contained the following exception:

> 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 re-payment plan that was reasonable based on the individual financial, health, and other circumstances of that resident.

Proclamation 20-19.1 at 4 (emphasis omitted). All the subsequent proclamations contained these provisions.

3. Conclusion Language

Proclamation 20-19.1 contained the following conclusion language: "FURTHERMORE, it is the intent of this order to prevent a potential new devastating impact of the COVID-19 outbreak – that is, a wave of statewide homelessness that will impact every community in our state." Proclamation 20-19.1 at 5 (emphasis omitted). All the subsequent proclamations contained this provision.

Beginning with Proclamation 20-19.3 in July 2020, all the proclamations contained the following provision:

> MOREOVER, as Washington State begins to emerge from the current public health and economic crises, I recognize that courts, tenants, landlords, property owners, and property managers may desire additional direction concerning the specific parameters for reasonable repayment plans related to outstanding rent or fees. This is best addressed by legislation, and I invite the state Legislature to produce legislation as early as possible during their next session to address this issue. I stand ready to partner with our legislators as necessary and appropriate to ensure that the needed framework is passed into law.

Proclamation 20-19.3 at 7 (emphasis omitted).

C. MOOTNESS OF APPEAL

The State argues that the issue is moot because the moratorium has expired. The appellants argue that even if the case is moot, it should be resolved because there are matters of substantial public interest. We agree with the appellants.

An appeal is moot if we no longer can provide effective relief. *Dzaman v. Gowman*, 18 Wn. App. 2d 469, 476, 491 P.3d 1012 (2021). However, we may exercise our discretion to review a moot appeal when it involves issues of continuing and substantial public interest. *Id.* Three factors determine whether we will exercise our discretion: " '(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination to provide future guidance to public officers, and (3) the likelihood that the question will recur.' " *Id.* (quoting *Thomas v. Lehman*, 138 Wn. App. 618, 622, 158 P.3d 86 (2007)).

These three factors support considering this appeal. At first glance, this appeal appears to be moot because the eviction moratorium expired in June 2021 and the bridge moratorium expired in October 2021. But the COVID-19 pandemic is not over. And because the pandemic persists, it is possible that the governor may institute another, similar eviction moratorium in the future. Therefore, this case presents issues of continuing and substantial public interest.

D. CHANGE OF VENUE

The appellants argue that the Lewis County trial court improperly transferred venue to Thurston County. We disagree.

The venue of an action is determined by statute. *Clark County v. Portland Vancouver Junction R.R., LLC*, 17 Wn. App. 2d 289, 292, 485 P.3d 985 (2021). When two different venue statutes apply to a lawsuit, we will apply " 'mandatory statutes to the exclusion of permissive

ones and specific statutes to the exclusion of general ones.' " *Id.* at 293 (quoting *Ralph v. Weyerhaeuser Co.*, 187 Wn.2d 326, 338, 386 P.3d 721 (2016)).

RCW 4.12.010(1) states that venue shall be in the county where the subject of the action is located "for any injuries to real property." RCW 4.92.010 states that the venue of lawsuits against the State shall be in one of several places, including the county of the residence of one or more plaintiffs and "[t]he county in which the real property that is the subject of the action is situated." The appellants rely on these statutes to argue that venue was proper in Lewis County, where they resided and where their rental properties were located.

However, RCW 4.12.020(2) states that for actions "against a public officer . . . for an act done by him or her in virtue of his or her office," venue shall be "in the county where the cause of action, or some part thereof, arose." The State relies on this statute to argue that venue was proper only in Thurston County, where the governor issued the proclamations.

The Supreme Court has stated that when RCW 4.12.020(2) applies, "venue in the specified county is mandatory." *Johnson v. Inslee*, 198 Wn.2d 492, 496, 496 P.3d 1191 (2021). Therefore, the only question here is whether RCW 4.12.020(2) applies to this action.

The Supreme Court's decision in *Johnson* resolves this issue. In that case, a State employee filed a lawsuit against Governor Inslee and other State entities in Franklin County, challenging the governor's proclamation requiring all State employees to be vaccinated against COVID-19. 198 Wn.2d at 494-95.

Regarding where the cause of action arose, the court relied on cases from other states to conclude that "it is the official act itself – the act for which redress is sought – that 'gives rise' to the cause of action, and thus venue is proper in the county where the act is made." *Id.* at 496-97. Therefore, the court held that the cause of action regarding the governor's proclamation arose

only in Thurston County, where he performed the act of issuing it. *Id.* at 498-99. The court stated, "To conclude otherwise would mean a statewide public official such as the governor could be haled into superior courts throughout the state to defend similar suits challenging a single act having statewide effect, as this case itself exemplifies." *Id.* at 497.

Regarding the "in virtue of office" requirement, the court stated, "[R]egardless of whether the governor exceeded his constitutional authority, which has not yet been determined, he plainly acted 'in virtue of his . . . office' in issuing emergency proclamations pursuant to his statutory authority under RCW 43.06.220." *Id.* at 498. The court concluded, "The governor issued his proclamations 'in virtue' of his 'office' within the meaning of RCW 4.12.020(2)." *Id.*

Based on this analysis, the court held that Thurston County was the mandatory venue for the action challenging the governor's vaccine proclamation. *Id.* at 498-99.

The appellants argue that *Johnson* is distinguishable because that case did not involve real property. They claim that RCW 4.12.020(2) cannot trump RCW 4.12.010(1) and RCW 4.92.010. But the court in *Johnson* expressly stated that RCW 4.12.020(2) is mandatory if that statute applies. 198 Wn.2d at 496. Therefore, it *does* trump other venue statutes. *See Portland Vancouver Junction R.R*, 17 Wn. App. 2d at 293.

The appellants also argue under RCW 4.12.020 that "some part" of their cause of action arose in Lewis County because their injuries occurred in Lewis County. But the same was true in *Johnson*, and the court in that case rejected a similar argument. 198 Wn.2d at 497 n.6. The court expressly held that the "cause of action challenging the lawfulness of the proclamations 'arose' *only* in Thurston County." *Id.* at 498-99 (emphasis added).

We hold that the Lewis County trial court did not err in transferring venue to Thurston County.

E. GOVERNOR'S AUTHORITY UNDER RCW 43.06.220(1)(h) TO ISSUE PROCLAMATIONS

Appellants argue that the governor did not have authority under RCW 43.06.220(1)(h) to issue Proclamation 20-19 and the subsequent proclamations. We disagree.

1. Legal Principles

"The executive branch has historically led Washington's response to emergencies." *Colvin v. Inslee*, 195 Wn.2d 879, 895, 467 P.3d 953 (2020). RCW 43.06.010(12) states, "The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected." A declaration of a state of emergency activates the governor's broad powers in emergencies. *Colvin*, 195 Wn.2d at 895. Various statutes "evidence a clear intent by the legislature to delegate requisite police power to the governor in times of emergency. The necessity for such delegation is readily apparent." *Cougar Bus. Owners' Assoc. v. State*, 97 Wn.2d 466, 474, 647 P.2d 481 (1982), *overruled in part by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

RCW 43.06.220(1) provides:

> The governor after proclaiming a state of emergency and prior to terminating such, may, in the area described by the proclamation issue an order prohibiting:
> . . . .
>
> (h) *Such other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace.*

(Emphasis added.)

RCW 43.06.220(2) states, "The governor after proclaiming a state of emergency and prior to terminating such may, in the area described by the proclamation, issue an order or orders concerning waiver or suspension of statutory obligations or limitations" in certain specified

areas. A waiver or suspension of statutory obligations or limitations under subsection (2) may not continue for longer than 30 days unless extended by the legislature. RCW 43.06.220(4).

We review de novo issues of statutory interpretation. *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 722, 406 P.3d 1149 (2017). The goal in interpreting a statute is to determine and give effect to the legislature's intent. *Id.* The court considers the language of the statute, the context of the statute, related statutes, and the statutory scheme as a whole. *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). The interpretation ends if the plain language is unambiguous. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). But if more than one reasonable interpretation exists, the court will resolve it by turning to other sources of legislative intent, including statutory construction, legislative history, and case law. *Id.*

2. Analysis

Here, the plain language of RCW 43.06.220(1)(h) is unambiguous. The governor may issue an order prohibiting *any* activities the governor reasonably believes should be prohibited "to help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). The term "activities" is extremely broad, and is broad enough to include the actions the proclamations prohibited regarding evictions and unpaid rent. And the proclamation preambles made it clear that the governor reasonably believed that prohibiting those activities was necessary to preserve life, health, and property.

The appellants argue that the proclamations suspended rights and obligations established by various statutes, including the obligation of tenants to pay rent and the right of landlords to evict tenants who do not pay rent. They emphasize that RCW 43.06.220(1)(h) does not authorize the governor to suspend the operation of statutes. And they claim that if RCW 43.06.220(1)(h) is interpreted to allow the suspension of statutes, subsection (2) – which does expressly authorize

the suspension of statutory obligations or limitations in certain areas – would be rendered superfluous.

However, none of the proclamations stated that the governor was suspending any statutes. Tenants still were subject to the statutory obligation to pay rent set forth in RCW 59.18.110; they simply could not be evicted for failing to pay rent. The moratorium may have delayed the ability of landlords to exercise the statutory remedy of eviction stated in RCW 59.12.030 in many cases, but the operation of that statute was not suspended. The wrongful detainer statute still could be invoked if "necessary to respond to a significant and immediate risk to the health and safety of others created by the resident," Proclamation 20-19.1 at 3, or if the property owner planned to personally occupy or sell the rental property.

Instead of suspending any statutes, the governor prohibited certain specific activities, as RCW 43.06.220(1)(h) expressly authorized. Nothing in RCW 43.06.220(1)(h) suggests that the governor is not authorized to prohibit activities that may involve statutory rights and obligations.

We hold that RCW 43.06.220(1)(h) authorized the governor to issue the proclamations providing for an eviction moratorium.[10]

F. DELEGATION OF LEGISLATIVE AUTHORITY

Appellants argue that if RCW 43.06.220(1)(h) authorized the issuance of an eviction moratorium, it violated the constitutional prohibition of delegation of legislative authority. We disagree.

[10] The State argues that even if the proclamations exceeded the governor's authority under RCW 43.06.220(1)(h), the legislature's enactment of E2SSB 5160 ratified the governor's reliance on that statute to issue the eviction moratorium. Because we hold that the governor did have authority, we do not address this issue.

Article 2, section 1 (amendment 72) of the Washington Constitution states that "[t]he legislative authority of the state of Washington shall be vested in the legislature." As a result, the legislature cannot delegate purely legislative functions to other branches of government. *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 859, 357 P.3d 615 (2015). "These nondelegable powers include the power to enact, suspend, and repeal laws." *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989).

As noted above, none of the proclamations stated that the governor was suspending any statutes. And the proclamations did not suspend the operation of any statutes. Instead, the governor prohibited certain specific activities as RCW 43.06.220(1)(h) expressly authorized.

We hold that RCW 43.06.220(1)(h) did not violate the constitutional prohibition of delegation of legislative authority.

G. SEPARATION OF POWERS AND DENIAL OF ACCESS TO COURTS

Appellants argue that the proclamations violated the separation of powers doctrine and denied them access to the courts for judicial relief. We disagree.

1. Separation of Powers

The Washington Constitution does not contain a formal separation of powers clause, but " 'the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.' " *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The doctrine ensures "that the fundamental functions of each branch remain inviolate." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009). A branch violates the separation of powers doctrine when an action "threatens the independence or

integrity or invades the prerogatives of another." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006).

Here, the proclamations do not interfere with a court's authority in any way. None of the proclamation provisions are directed to the courts, and the proclamations do not purport to prevent the courts from taking any actions. For example, the proclamations do not prohibit courts from issuing eviction orders or otherwise resolving disputes between landlords and tenants. Instead, the proclamations' prohibitions are directed at landlords and related persons. Preventing a person from requesting or enforcing eviction orders does not invade the prerogatives of the judicial branch. Therefore, we hold that the proclamations did not violate the separation of powers doctrine.

2. Access to Courts

a. Legal Principles

"The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.' " *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). The right of access to courts derives in part from the First Amendment to the United States Constitution and article I, section 4 of the Washington Constitution. *Leishman v. Ogden Murphy Wallace, PLLC*, 196 Wn.2d 898, 914, 479 P.3d 688 (2021). There also is a due process component. *In re Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.2d 51 (1990). The right of access is implicated where there is a delay or total blockage of a person's ability to file suit. *Musso-Escude v. Edwards*, 101 Wn. App. 560, 566, 4 P.3d 151 (2000).

However, " '[t]here is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access – a reasonable opportunity to be heard.' " *Giordano*, 57 Wn. App. at 77 (quoting *Ciccarelli v. Carey Can. Mines, Ltd.*, 757 F.2d 548, 554 (3d Cir.1985)). "[W]hen access to the courts is not essential to advance a fundamental right . . . access may be regulated if the regulation rationally serves a legitimate end." *Giordano*, 57 Wn. App. at 77; *see also Yurtis v. Phipps*, 143 Wn. App. 680, 694, 181 P.3d 849 (2008). And access to the courts itself is not a fundamental right. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 562, 800 P.2d 367 (1990).

b. Analysis

Here, the governor's proclamations did not completely restrict access to the courts. There were exceptions to the eviction moratorium if the tenant created health and safety risks to others, and if the property owner planned to personally occupy or sell the rental property. Landlords could treat unpaid rent as an enforceable obligation and could sue on that obligation if the tenant refused or failed to comply with a reasonable repayment plan. And a landlord's ability to bring eviction proceedings only was delayed until the expiration of the final proclamation, not extinguished completely.

Because the proclamations regulated but did not completely deny access to the courts, we analyze the appellants' access to courts claim under a rational basis approach. *See Giordano*, 57 Wn. App. at 77. Under this approach, the question is whether the eviction moratorium "rationally serves a legitimate end." *Id.*

The State's purpose in preventing the spread and transmission of COVID-19 undoubtedly is significant and important. *See*, *e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S. Ct. 63, 67, 208 L. Ed.2d 206 (2020) (stating that "[s]temming the spread of COVID-

19 is unquestionably a compelling interest."). So is preventing widespread homelessness caused by economic distress related to the COVID-19 pandemic.

In addition, the eviction moratorium was a rational means to achieve this important purpose. As the governor noted in his proclamations, the COVID-19 pandemic was causing adverse economic consequences for a large number of people, potentially resulting in a widespread inability to pay rent and evictions. Evictions would increase the health and safety risks from the pandemic for people forced into homelessness. Conversely, a moratorium on evictions would allow people to stay in their homes, thereby promoting health and safety and helping to prevent the progression of the pandemic.

Several federal cases have rejected access to courts challenges to restrictions on evictions related to COVID-19. *Heights Apts., LLC v. Walz*, 510 F. Supp. 3d 789, 810-11 (D. Minn. 2020), *appeal filed*, No. 21-1278 (8th Cir. Feb. 5, 2021); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 393-96 (D. Mass. 2020); *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 174-75 (S.D.N.Y. 2020), *appeal dismissed*, 860 F. App'x 215 (2d Cir. 2021).

The appellants rely on a trial court decision from the District of Columbia in which the court ruled that an eviction moratorium violated the constitutional right to access using an intermediate scrutiny analysis. However, the D.C. Court of Appeals reversed this decision and held that the moratorium did not violate the right to access. *Dist. of Columbia v. Towers*, 260 A.3d 690, 693-96 (D.C. App. 2021).

We hold that the eviction moratorium did not violate the appellants' right of access to the courts.

H. TAKING PROPERTY WITHOUT COMPENSATION

The appellants argue that the temporary eviction moratorium constituted a per se physical taking of their property because the moratorium deprived them of the right to evict tenants from their property. We disagree.[11]

1. Legal Principles

The Fifth Amendment to the United States Constitution states that private property shall not be "taken for public use, without just compensation." Article I, section 16 of the Washington Constitution provides, "No private property shall be taken or damaged for public or private use without just compensation having been first made." Washington courts generally apply the federal takings analysis. *See Chong Yim*, 194 Wn.2d at 658-59.

There are two general types of takings: (1) a physical taking, where "the government authorizes a physical occupation of property"; and (2) a regulatory taking, "where the government merely regulates the use of property." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 112 S. Ct. 1522, 118 L. Ed.2d 153 (1992). The first type is subject to a per se rule: if a physical taking has occurred, the government must pay compensation. *Cedar Point Nursery v. Hassid*, ___ U.S. ___, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021). "Whenever a regulation results in a physical appropriation of property, a per se taking has occurred." *Id.* at 2072. In addition, "a physical appropriation is a taking whether it is permanent or temporary." *Id.* at 2074.

[11] There is some question whether the appellants are entitled to an equitable remedy – a declaratory judgment – on their takings claim. The remedy for a government taking is compensation through a damages award, but the appellants' complaint does not request damages. However, the State does not argue that we should decline to address the takings claim, and therefore we do not address this issue.

The second type of taking is analyzed using a flexible, balancing test adopted in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). *Cedar Point Nursery*, 141 S. Ct. at 2072.

The appellants allege only that the temporary eviction moratorium constituted a physical, per se taking. They do not argue that the moratorium was a regulatory taking under *Penn Central*.

2. Analysis

The appellants argue that the eviction moratorium constituted a physical, per se taking because it required them to allow tenants to reside in their property without the payment of rent. Relying on *Cedar Point Nursery*, they claim that precluding evictions essentially forced them to submit to a physical occupation of their property.

This argument is inconsistent with the United States Supreme Court's analysis in *Yee*. In that case, mobile park owners who rented pads to the owners of mobile homes challenged a state statute that among other things (1) limited their ability to terminate a mobile home owner's tenancy, (2) did not allow them to remove a mobile home if it was sold, and (3) required them to continue renting to a mobile home purchaser as long as the purchaser had the ability to pay rent. *Yee*, 503 U.S. at 524. The City of Escondido subsequently adopted a rent control ordinance that dictated the rent the mobile park owners could charge. *Id.* at 524-25. The mobile park owners argued that the statute and ordinance resulted in a physical, per se taking because they were precluded from fully using and occupying their property. *Id.* at 525. Instead, the right to physically occupy their property – at submarket rent – essentially had been transferred indefinitely to the mobile home owners and their successors. *Id.* at 527.

The Court stated that this argument was inconsistent with the law of physical takings. *Id.* The court stated, "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.' " *Id.* (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252, 107 S. Ct. 1107, 1112, 94 L. Ed. 2d 282 (1987)). However, the Court emphasized that the statute and the ordinance had not *required* the occupation of the mobile park – the mobile park owners had voluntarily rented their property to the mobile home owners. *Yee*, 503 U.S. at 527. "Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id.* at 528.

The Court concluded:

> On their face, the state and local laws at issue here merely regulate petitioners' 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 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)).

The appellants rely on *Cedar Point Nursery*. In that case, a labor regulation required agricultural employers to permit union organizers on their property for three hours a day, 120 days per year, for the purpose of soliciting employees to join or form a union. *Cedar Point Nursery*, 141 S. Ct. at 2069. The court emphasized that the regulation allowed union organizers to physically enter and occupy the property. *Id.* at 2072. "The regulation appropriates a right to physically invade the growers' property – to literally 'take access,' as the regulation provides." *Id.* at 2074. Therefore, the court held that the regulation was a per se physical taking. *Id.*

This case is similar to *Yee* and is dissimilar to *Cedar Point Nursery*. As in *Yee*, the eviction moratorium did not require the appellants to submit to the physical occupation of their property. Instead, the appellants were the ones who invited their tenants to occupy their rental property. And unlike in *Cedar Point Nursery*, the moratorium did not require that the appellants allow third parties to enter and take access to their property. The proclamations merely operated to "regulate [appellants'] use of their land by regulating the relationship between landlord and tenant." *Yee*, 503 U.S. at 528. Therefore, we conclude that the eviction moratorium did not constitute a physical per se taking.

This conclusion is supported by federal courts in Washington and in other jurisdictions that have ruled that eviction moratoriums do not constitute an unconstitutional physical taking without compensation. *E.g.*, *Jevons v. Inslee*, 2021 WL 4443084, *11-15 (E.D. Wash. 2021), *appeal filed,* No. 22-35050 (9th Cir Jan. 18, 2022); *El Papel, LLC v. Durkan*, No. 2:20-cv-01323-RAJ-JRC, 2021 WL 4272323, at *15-17 (Sept. 15, 2021) (Magistrate's report and recommendation), *adopted by court*, 2021 WL 71678 (W.D. Wash. Jan. 8, 2022); *Heights Apts.*, 510 F. Supp. 3d at 812; *Baptiste*, 490 F. Supp. 3d at 388; *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 220-21 (D. Conn. 2020); *Elmsford Apt. Assocs.*, 469 F. Supp. 3d at 162-64.

We hold that the eviction moratorium did not constitute an unconstitutional taking without compensation.[12]

[12] The appellants also briefly argue that the eviction moratorium took the rental income to which they were entitled. But it is undisputed that the moratorium did not eliminate the appellants' ability to collect the full amount of past rent due, as long as they offered a reasonable repayment plan to their tenants.

I. IMPAIRMENT OF CONTRACTUAL RELATIONSHIP

The appellants argue that the temporary eviction moratorium unconstitutionally impaired their contractual relationship with their tenants. We disagree.

1. Legal Standard

Article I, section 10 of the United States Constitution states, "No State shall . . . pass any . . . law impairing the obligation of contracts." Article I, section 23 of the Washington Constitution provides that "[n]o . . . law impairing the obligations of contracts shall ever be passed." The standards under the two provisions are the same. *Lenander v. Dept. of Ret. Sys.*, 186 Wn.2d 393, 414, 377 P.3d 199 (2016).

"[A] constitutional violation will be found only if the challenged action substantially impairs an existing contract and, even then, only if the action was not reasonable and necessary to serve a legitimate public purpose." *Id.* We apply a three-part test: "(1) Does a contractual relationship exist; (2) does the legislation substantially impair the relationship; and (3) if there is a substantial impairment, is the impairment reasonable and necessary to serve a legitimate public purpose?" *Id.*

If the government is not one of the contracting parties, as here, the court must " 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977)).

Both parties discuss *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934). In that Great Depression-era case, the United States Supreme Court upheld a mortgage moratorium law that, among other things, extended mortgagors'

redemption period following a foreclosure sale for up to two years. *Id.* at 416-18. The Court stated that a law may not release or extinguish contractual obligations without violating the contract clause. *Id.* at 431. As a result, the contract clause may not be interpreted to "permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Id.* at 439. However, the Court stated that the constitutional prohibition against the impairment of contracts should be not be construed to prevent "*limited and temporary interpositions* with respect to the enforcement of contracts if made necessary by a great public calamity," including urgent public need related to economic causes. *Id.* (emphasis added).

Regarding the statute at issue, the Court noted that the mortgage debt was not impaired, the validity of the foreclosure sale and the mortgagee's ability to obtain a deficiency judgment were not affected, and the mortgagor was required to pay the rental value of the home during the extended possession. *Id.* at 445. "The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession." *Id.* Therefore, the Court held that the statute did not violate the contracts clause. *Id.* at 447.

2. Analysis

a. Substantial Impairment

To determine whether there is a substantial impairment of a contractual relationship, we consider "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin*, ___ U.S. ___, 138 S. Ct. 1815, 1822, 201 L. Ed. 2d 180 (2018). All three considerations support the conclusion that the eviction moratorium does not substantially impair the appellants' contracts with their tenants.

First, the eviction moratorium did not undermine landlords' contractual bargain. The moratorium did not extinguish the contractual obligations of tenants to pay rent. Instead, the moratorium temporarily delayed landlords' ability to exercise the remedy of eviction for nonpayment of rent.

The appellants claim that the moratorium imposed a permanent prohibition against landlords treating any unpaid rent as an enforceable debt. However, this claim is inaccurate. The proclamations state that unpaid rent would not be an enforceable debt only if (1) nonpayment occurred after February 29, 2020, (2) "non-payment was as a result of the COVID-19 outbreak," and (3) the landlord failed to offer the tenant a reasonable repayment plan. Proclamation 20-19.1 at 4. Assuming a landlord offered a reasonable repayment plan, all unpaid rent would be an enforceable debt.

The appellants argue that allowing landlords to treat unpaid rent as an enforceable debt only if they offer a reasonable payment plan was illusory for landlords, like Horwath, whose tenants refused to communicate with them. They emphasize that the repayment plan condition required that the offered plan be "reasonable based on the individual financial, health, and other circumstances of that resident." Proclamation 20-19.1 at 4. According to the appellants, it would be impossible for landlords to offer the required repayment plan if they had no information regarding their tenants' "financial, health, and other circumstances" and no way of forcing tenants to provide such information.

However, a trial court assessing whether a prepayment plan was reasonable undoubtedly would base its assessment on the information available to the landlord. For example, the landlord could make assumptions based on the financial information about the tenants obtained at the inception of the lease. A trial court would not penalize a landlord by rendering unpaid rent

an unenforceable debt when the landlord made a good faith effort to design a reasonable repayment plan despite the tenant's failure to cooperate.

Second, the moratorium did not completely interfere with landlords' reasonable expectations. There is no question that the rental housing industry generally has been regulated heavily, such as in the Residential Landlord-Tenant Act, chapter 59.18 RCW, and the forcible entry and unlawful detainer statute, chapter 59.12 RCW. This pervasive regulation put landlords on notice that the government might intervene further in the landlord-tenant relationship.

Third, the eviction moratorium gave landlords the ability to safeguard and reinstate their rights. The moratorium was temporary, and following its expiration landlords retained all available remedies for nonpayment of rent. The moratorium merely delayed the exercise of those remedies. And as noted above, even during the moratorium landlords could treat unpaid rent as an enforceable obligation if they offered tenants a reasonable repayment plan.

Federal courts in Washington and in other jurisdictions have ruled that eviction moratoriums do not substantially impair contractual relationships between landlords and tenants. *E.g.*, *Jevons*, 2021 WL 4443084, at *8-9; *Heights Apts.*, 510 F. Supp. 3d at 808-09; *Auracle Homes*, 478 F. Supp. 3d at 224-25; *Elmsford Apt. Assocs.*, 469 F. Supp. 3d at 171-72.

We conclude that the eviction moratorium did not substantially impair the appellants' rental contracts.

b. Reasonable and Necessary Means

Even if we were to assume that the eviction moratorium substantially impaired the appellants' contractual relationship with their tenants, the moratorium did not violate the contracts clause because it was "reasonable and necessary to serve a legitimate public purpose." *Lenander*, 186 Wn.2d at 414.

The appellants do not dispute that the eviction moratorium served a legitimate public purpose: to prevent widespread homelessness and the further spread of COVID-19. They argue only that the moratorium did not advance this purpose in an appropriate and reasonable manner. And they focus only on the fact that the eviction moratorium applied to all tenants, including those who suffered no economic hardship or inability to pay as a result of the COVID-19 pandemic.

However, this case does not involve government contracts, so we must defer to the governor's judgment as to the best way to achieve the compelling government purpose. *See Energy Reserves Grp.*, 459 U.S. at 413. Requiring tenants to prove financial hardship in order to stop eviction proceedings would create further uncertainty and would force tenants to expend limited personal and financial resources to maintain their homes. And some tenants may not have the ability to gather sufficient evidence to prove an inability to pay, and therefore would lose their homes despite suffering pandemic-related economic distress. Finally, requiring proof of financial hardship potentially would have created the need for thousands of tenants to appear in court, further risking exposure to and spread of COVID-19.

In addition, the governor's proclamations required tenants to pay rent if they had the financial resources to pay. Proclamation 20-19.1 and all subsequent proclamations contained the statement that "Tenants, residents, and renters who are not materially affected by COVID-19 should and must continue to pay rent, to avoid unnecessary and avoidable economic hardship to landlords, property owners, and property managers who are economically impacted by the COVID-19 pandemic." Proclamation 20-19.1 at 2.

We conclude that the temporary eviction moratorium was reasonable and necessary to serve the legitimate public purpose of preventing homelessness and the spread of COVID-19.

Accordingly, we hold that the eviction moratorium did not unconstitutionally impair the appellants' contractual relationship with their tenants.

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of the State.

MAXA, J.

We concur:

WORSWICK, P.J.

HULL, J.P.T.*

* Judge Kevin Hull is serving as a judge pro tempore of the court pursuant to RCW 2.06.150(1).

Filed
Washington State
Court of Appeals
Division Two

March 22, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GENE GONZALES and SUSAN GONZALES, HORWATH FAMILY TWO, LLC, and THE WASHINGTON LANDLORD ASSOCIATION, Appellant, v. GOVERNOR JAY INSLEE and STATE OF WASHINGTON, Respondent.	No. 55915-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellants move for reconsideration of the court's February 23, 2022 published opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Hull

FOR THE COURT:

MAXA, J.

Washington State Court of Appeals
Division Two

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General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

May 5, 2022

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CASE #: 55915-3-II: Gene & Susan Gonzales v. Jay Inslee & State of WA
Case Manager: Jodie

Dear Counsel:

This Court is in receipt of a Motion for Superseding Order on Motion for Reconsideration that requests that this Court reissue an Order on Reconsideration to give Appellants time to file a Petition for Review and remedy the inadvertent mistake by the Court in not giving proper notice to Appellants' counsel when the Order Denying their Motion for Reconsideration was issued. This Court does not reissue orders, and therefore your motion is being placed in the file with no action taken. However, this Court recalled the Mandate and created a due date of June 3, 2022 to file a Petition for Review or a Mandate will be reissued. If that is not enough time to file a Petition for Review, you may file a Motion for Extension of Time to do so.

Sincerely,

Derek M. Byrne
Court Clerk

DMB:jlt

STATE OF WASHINGTON
OFFICE OF GOVERNOR JAY INSLEE

PROCLAMATION BY THE GOVERNOR
EXTENDING AND AMENDING 20-05 AND 20-19, et seq.

20-19.6

Evictions and Related Housing Practices

WHEREAS, on February 29, 2020, I issued Proclamation 20-05, proclaiming a State of Emergency for all counties throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and confirmed person-to-person spread of COVID-19 in Washington State; and

WHEREAS, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued several amendatory proclamations, exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and

WHEREAS, the COVID-19 disease, caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic, continues to broadly spread throughout Washington State; and

WHEREAS, the COVID-19 pandemic is causing a sustained global economic slowdown, and an economic downturn throughout Washington State with unprecedented numbers of layoffs and reduced work hours for a significant percentage of our workforce due to substantial reductions in business activity impacting our commercial sectors that support our State's economic vitality, including severe impacts to the large number of small businesses that make Washington State's economy thrive; and

WHEREAS, many of our workforce expected to be impacted by these layoffs and substantially reduced work hours are anticipated to suffer economic hardship that will disproportionately affect low and moderate income workers resulting in lost wages and potentially the inability to pay for basic household expenses, including rent; and

WHEREAS, the inability to pay rent by these members of our workforce increases the likelihood of eviction from their homes, increasing the life, health and safety risks to a significant percentage of our people from the COVID-19 pandemic; and

WHEREAS, tenants, residents, and renters who are not materially affected by COVID-19 should and must continue to pay rent, to avoid unnecessary and avoidable economic hardship to landlords, property owners, and property managers who are economically impacted by the COVID-19 pandemic; and

WHEREAS, under RCW 59.12 (Unlawful Detainer), RCW 59.18 (Residential Landlord-Tenant Act), and RCW 59.20 (Manufactured/Mobile Home Landlord-Tenant Act) residents seeking to avoid default judgment in eviction hearings need to appear in court in order to avoid losing substantial rights to assert defenses or access legal and economic assistance; and

WHEREAS, on May 29, 2020, in response to the COVID-19 pandemic, the Washington Supreme Court issued Amended Order No. 25700-B-626, and ordered that courts should begin to hear non-emergency civil matters. While appropriate and essential to the operation of our state justice system, the reopening of courts could lead to a wave of new eviction filings, hearings, and trials that risk overwhelming courts and resulting in a surge in eviction orders and corresponding housing loss statewide; and

WHEREAS, the Washington State Legislature has established a housing assistance program in RCW 43.185 pursuant to its findings in RCW 43.185.010 "that it is in the public interest to establish a continuously renewable resource known as the housing trust fund and housing assistance program to assist low and very low-income citizens in meeting their basic housing needs;" and

WHEREAS, it is critical to protect tenants and residents of traditional dwellings from homelessness, as well as those who have lawfully occupied or resided in less traditional dwelling situations for 14 days or more, whether or not documented in a lease, including but not limited to roommates who share a home; long-term care facilities; transient housing in hotels and motels; "Airbnb's"; motor homes; RVs; and camping areas; and

WHEREAS, due to the impacts of the pandemic, individuals and families have had to move in with friends or family, and college students have had to return to their parents' home, for example, and such residents should be protected from eviction even though they are not documented in a lease. However, this order is not intended to permit occupants introduced into a dwelling who are not listed on the lease to remain or hold over after the tenant(s) of record permanently vacate the dwelling ("holdover occupant"), unless the landlord, property owner, or property manager (collectively, "landlord") has accepted partial or full payment of rent, including payment in the form of labor, from the holdover occupant, or has formally or informally acknowledged the existence of a landlord-tenant relationship with the holdover occupant; and

WHEREAS, a temporary moratorium on evictions and related actions throughout Washington State at this time will help reduce economic hardship and related life, health, and safety risks to those members of our workforce impacted by layoffs and substantially reduced work hours or who are otherwise unable to pay rent as a result of the COVID-19 pandemic; and

WHEREAS, as of March 2021, current information suggests that at least 76,000 tenants in Washington will be unable to pay their rent in the near future, reflecting the continued financial precariousness of many in the state. According to the state's unemployment information, significantly more people are claiming unemployment benefits in Washington now versus a year ago. This does not account for the many thousands of others who are filing claims with separate programs such as Pandemic Unemployment Assistance and Pandemic Emergency Unemployment Compensation: in December 2020, nearly 275,000 new and ongoing claims for unemployment-related assistance were filed; and

WHEREAS, a temporary moratorium on evictions and related actions will reduce housing instability, enable residents to stay in their homes unless conducting essential activities, employment in essential business services, or otherwise engaged in permissible activities, and will promote public health and safety by reducing the progression of COVID-19 in Washington State; and

WHEREAS, I issued Proclamations 20-25, 20-25.1, 20-25.2,and 20 25.3 (Stay Home – Stay Healthy), and I subsequently issued Proclamation 20-25.4 ("Safe Start – Stay Healthy" County-By-County Phased Reopening), wherein I amended and transitioned the previous proclamations' "Stay Home – Stay Healthy" requirements to "Safe Start – Stay Healthy" requirements, prohibiting all people in Washington State from leaving their homes except under certain circumstances and limitations based on a phased reopening of counties as established in Proclamation 20-25.4, et seq., and according to the phase each county was subsequently assigned by the Secretary of Health; and

WHEREAS, when I issued Proclamation 20-25.4 on May 31, 2020, I ordered that, beginning on June 1, 2020, counties would be allowed to apply to the Department of Health to move forward to the next phase of reopening more business and other activities; and by July 2, 2020, a total of five counties were approved to move to a modified version of Phase 1, 17 counties were in Phase 2, and 17 counties were in Phase 3; and

WHEREAS, on July 2, 2020, due to the increased COVID-19 infection rates across the state, I ordered a freeze on all counties moving forward to a subsequent phase, and that freeze remained in place while I worked with the Department of Health and other epidemiological experts to determine appropriate strategies to mitigate the increased spread of the virus, and those strategies included dialing back business and other activities; and

WHEREAS, on July 23, 2020, in response to the statewide increased rates of infection, hospitalizations, and deaths, I announced an expansion of the Department of Health's face covering requirements and several restrictions on activities where people tend to congregate; and

WHEREAS, on October 6, 2020, due to the increased COVID-19 infection rates across the state, I announced that all counties would remain in their current reopening phases as a result of the continuing surge in COVID-19 cases across the state; and

WHEREAS, positive COVID-19-related cases and hospitalizations steadily rose from early September 2020, through early January, 2021, and the number of COVID-19 cases and COVID-19-related hospitalizations continue to put our people, our health system, and our economy in a precarious position; and

WHEREAS, when I issued Proclamation 20-19.3 on July 24, 2020, the Washington State Department of Health reported at least 51,849 confirmed cases of COVID-19 with 1,494 associated deaths; and as of March 15, 2020, there are at least 330,367 confirmed cases with 5,149 associated deaths; and

WHEREAS, the worldwide COVID-19 pandemic and its progression in Washington State continues to threaten the life and health of our people as well as the economy of Washington State, and remains a public disaster affecting life, health, property or the public peace; and

WHEREAS, the Washington State Department of Health continues to maintain a Public Health Incident Management Team in coordination with the State Emergency Operations Center and other supporting state agencies to manage the public health aspects of the incident; and

WHEREAS, the Washington State Military Department Emergency Management Division, through the State Emergency Operations Center, continues coordinating resources across state government to support the Washington State Department of Health and local health officials in alleviating the impacts to people, property, and infrastructure, and continues coordinating with the Department of Health in assessing the impacts and long-term effects of the incident on Washington State and its people.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency continues to exist in all counties of Washington State, that Proclamation 20-05 and all amendments thereto remain in effect, and that Proclamations 20-05 and 20-19, et seq., are amended to temporarily prohibit residential evictions and temporarily impose other related prohibitions statewide until 11:59 p.m. on June 30, 2021, as provided herein.

I again direct that the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented throughout State government. State agencies and departments are directed to continue utilizing state resources and doing everything reasonably possible to support implementation of the *Washington State Comprehensive Emergency Management Plan* and to assist affected political subdivisions in an effort to respond to and recover from the COVID-19 pandemic.

I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I continue to direct the Washington State Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to

identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

ACCORDINGLY, based on the above noted situation and under the provisions of RCW 43.06.220(1)(h), and to help preserve and maintain life, health, property or the public peace, except where federal law requires otherwise, effective immediately and until 11:59 p.m. on June 30, 2021, I hereby prohibit the following activities related to residential dwellings and commercial rental properties in Washington State:

- 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 does not apply to emergency shelters where length of stay is conditioned upon a resident's participation in, and compliance with, a supportive services program. Emergency shelters should make every effort to work with shelter clients to find alternate housing solutions. This prohibition applies unless the landlord, property owner, or property manager (a) attaches an affidavit to the eviction or termination of tenancy notice 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 the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Such a 60-day notice of intent to sell or personally occupy shall be in the form of an affidavit signed under penalty of perjury, and does not dispense landlords, property owners, or property managers from their notice obligations prior to entering the property, or from wearing face coverings, social distancing, and complying with all other COVID-19 safety measures upon entry, together with their guests and agents. Any eviction or termination of tenancy notice served under one of the above exceptions must independently comply with all applicable requirements under Washington law, and nothing in this paragraph waives those requirements.

- Landlords, property owners, and property managers are prohibited from seeking or enforcing, or threatening to seek or enforce, judicial eviction orders involving any dwelling or parcel of land occupied as a dwelling, unless the landlord, property owner, or property manager (a) attaches an affidavit to the eviction or termination of tenancy notice 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) shows that at least 60 days' written notice were provided of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Such a 60-day notice of intent to sell or personally occupy shall be in the form of an affidavit signed under penalty of perjury.

- Local law enforcement are prohibited from serving, threatening to serve, or otherwise acting on eviction orders affecting any dwelling or parcel of land occupied as a dwelling, unless the eviction order clearly states that it was issued based on a court's finding that (a) the individual(s) named in the eviction order is creating a significant and immediate risk to the health, safety, or property of others; or (b) at least 60 days' written notice were provided of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Local law enforcement may serve or otherwise act on eviction orders, including writs of restitution that contain the findings required by this paragraph.

- 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, the date when a State of Emergency was proclaimed in all counties in Washington State.

- Landlords, property owners, and property managers are prohibited from assessing, or threatening to assess, rent or other charges related to a dwelling or parcel of land occupied as a dwelling for any period during which the resident's access to, or occupancy of, such dwelling was prevented as a result of the COVID-19 outbreak.

- 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 re-payment plan that was reasonable based on the individual financial, health, and other circumstances of that resident; failure to provide a reasonable re-payment plan shall be a defense to any lawsuit or other attempts to collect.**

- Nothing in this order precludes a landlord, property owner, or property manager from engaging in customary and routine communications with residents of a dwelling or parcel of land occupied as a dwelling. "Customary and routine" means communication practices that were in place prior to the issuance of Proclamation 20-19 on March 18, 2020, but only to the extent that those communications reasonably notify a resident of upcoming rent that is due; provide notice of community events, news, or updates; document a lease violation without threatening eviction; or are otherwise consistent with

this order. Within these communications and parameters, it is permissible for landlords, property owners and property managers to provide information to residents regarding financial resources, including coordinating with residents in applying for rent assistance through the state's Emergency Rent Assistance Program (ERAP) or an alternative state rent assistance program, and to provide residents with information on how to engage with them in discussions regarding reasonable repayment plans as described in this order.

- Except as provided in this paragraph, landlords, property owners, and property managers are prohibited from increasing, or threatening to increase, the rate of rent for any dwelling or parcel of land occupied as a dwelling. This prohibition does not apply to a landlord, property owner, or property manager who provides (a) advance notice of a rent increase required by RCW 59.20.090(2) (Manufactured/Mobile Home Landlord-Tenant Act), or (b) notice of a rent increase specified by the terms of the existing lease, provided that (i) the noticed rent increase does not take effect until after the expiration of Proclamation 20-19, et seq., and any modification or extension thereof, and (ii) the notice is restricted to its limited purpose and does not contain any threatening or coercive language, including any language threatening eviction or describing unpaid rent or other charges. Unless expressly permitted in this or a subsequent order, under no circumstances may a rent increase go into effect while this Proclamation, or any extension thereof, is in effect. Except as provided below, this prohibition also applies to commercial rental property if the commercial tenant has been materially impacted by the COVID-19, whether personally impacted and is unable to work or whether the business itself was deemed non-essential pursuant to Proclamation 20-25 or otherwise lost staff or customers due to the COVID-19 outbreak. This prohibition does not apply to commercial rental property if rent increases were included in an existing lease agreement that was executed prior to February 29, 2020 (pre-COVID-19 state of emergency).

- Landlords, property owners, and property managers are prohibited from retaliating against individuals for invoking their rights or protections under Proclamations 20-19 et seq., or any other state or federal law providing rights or protections for residential dwellings. Nothing in this order prevents a landlord from seeking to engage in reasonable communications with tenants to explore re-payment plans in accordance with this order.

- The preceding prohibitions do not apply to operators of long-term care facilities licensed or certified by the Department of Social and Health Services to prevent them from taking action to appropriately, safely, and lawfully transfer or discharge a resident for health or safety reasons, or a change in payer source that the facility is unable to accept, in accordance with the laws and rules that apply to those facilities. Additionally, the above prohibition against increasing, or threatening to increase, the rate of rent for any dwelling does not apply to customary changes in the charges or fees for cost of care (such as charges for personal care, utilities, and other reasonable and customary operating expenses), or reasonable charges or fees related to COVID-19 (such as the costs of PPE and testing), as long as these charges or fees are outlined in the long-term care facility's

notice of services and are applied in accordance with the laws and rules that apply to those facilities, including any advance notice requirement.

Terminology used in these prohibitions shall be understood by reference to Washington law, including but not limited to RCW 49.60, RCW 59.12, RCW 59.18, and RCW 59.20. For purposes of this Proclamation, a "significant and immediate risk to the health, safety, or property of others created by the resident" (a) is one that is described with particularity; (b) as it relates to "significant and immediate" risk to the health and safety of others, includes any behavior by a resident which is imminently hazardous to the physical safety of other persons on the premises (RCW 59.18.130 (8)(a)); (c) cannot be established on the basis of the resident's own health condition or disability; (d) excludes the situation in which a resident who may have been exposed to, or contracted, the COVID-19, or is following Department of Health guidelines regarding isolation or quarantine; and (e) excludes circumstances that are not urgent in nature, such as conditions that were known or knowable to the landlord, property owner, or property manager pre-COVID-19 but regarding which that entity took no action.

FURTHERMORE, it is the intent of this order to prevent a potential new devastating impact of the COVID-19 outbreak – that is, a wave of statewide homelessness that will impact every community in our state. To that end, this order further acknowledges, applauds, and reflects gratitude to the immeasurable contribution to the health and well-being of our communities and families made by the landlords, property owners, and property managers subject to this order.

ADDITIONALLY, it is also the intent of this order to extend state emergency rent assistance programs and to incorporate the newly approved federal rental assistance funding. The goal is to continue to provide a path for eligible tenants to seek rental assistance, but to now also allow landlords, property owners, and property managers to initiate an application for rental assistance. This process should be collaborative, and I encourage the nonprofit and philanthropic communities to continue their support of programs that help educate and inform both parties of the benefits of these rental assistance programs. Although a new program may need to be created for the newly approved federal rental assistance, all counties should consider the existing program in King County as a model for creating this path for landlords and property owners and property managers.

ADDITIONALLY, I want to thank the vast majority of tenants who have continued to pay what they can, as soon as they can, to help support the people and the system that are supporting them through this crisis. The intent of Proclamation 20-19, et seq., is to provide relief to those individuals who have been impacted by the COVID-19 crisis. Landlords and tenants are expected to communicate in good faith with one another, and to work together, on the timing and terms of payment and repayment solutions that all parties will need in order to overcome the severe challenges that COVID-19 has imposed for landlords and tenants alike. I strongly encourage landlords and tenants to avail themselves of the services offered at existing dispute resolution centers to come to agreement on payment and repayment solutions.

MOREOVER, as Washington State begins to emerge from the current public health and economic crises, I recognize that courts, tenants, landlords, property owners, and property

managers may desire additional direction concerning the specific parameters for reasonable re-payment plans related to outstanding rent or fees. This is best addressed by legislation, and I invite the state Legislature to produce legislation as early as possible during their next session to address this issue. I stand ready to partner with our legislators as necessary and appropriate to ensure that the needed framework is passed into law.

Violators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5).

Signed and sealed with the official seal of the state of Washington on this 18th day of March, A.D., Two Thousand and Twenty-One at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

No. 100255-6

SUPREME COURT OF THE STATE OF WASHINGTON

JEFFREY JOHNSON,
Respondent,

v.

JAY INSLEE, Governor, in his official capacity; WASHINGTON STATE DEPARTMENT OF CORRECTIONS; CHERYL STRANGE, Secretary of the Department of Corrections, in her official capacity; and the STATE OF WASHINGTON,
Petitioners.

RESPONDENT'S ANSWER TO PETITIONERS' STATEMENT OF GROUNDS FOR DIECT REVIEW

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I. INTRODUCTION

Petitioners challenge the Franklin County Superior Court Judge's discretion to disagree with his co-equal branches of the judiciary by citing several other County Superior Courts as though they are absolute. Petitioners note that one of the several Superior Court cases was an outlier as it, too, was unfriendly to the Governor's mandate. *Cuevas v. Inslee*, No. 20-2-00352- 04. The reader needn't worry as the Superior Court rectified it by immediately staying further proceedings and certifying the issue for discretionary review pursuant to RAP 2.3. Pet'r Statement for Grounds of Direct Review, 13.

Each Superior Court has the right to so decide cases. The Franklin County superior court has jurisdiction over this matter as the "superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." Article 4 Section 6 of the Constitution of the State of Washington and *Shoop v. Kittitas,* 149 Wn.2d 29, 34, 65 P.3d 1994 (Wash. 2003).

Equally important to this matter, appellate courts may exercise discretion to review the correctness of a decision from a lower court. RAP 4.2(a)(3) and (5), noting that this is a matter involving conflicting opinions (amongst the courts) and that this is a matter against a public official. Since RAP 4.2(a)(3) applies to conflicts between courts of Appeals, it does not apply; neither does RAP 4.2(a)(5) as the "State Officer" statute, RCW 4.12.020 does not apply to this matter, as held by the Franklin County Superior Court Judge.

II. NATURE OF THE CASE AND DECISION

The decision below is not the type of ruling that warrants review under RAP 4.2(a)(3), (4), or (5) as neither types of review applies. Respondent filed for a religious accommodation form Governor Inslee's Proclamation 21.14 requirement to become "fully vaccinated" against COVID-19 or risk "prohibition" from continued employment. App. At 26-34. The Proclamation applies to several types of persons, including state employees working in the Washington State Department of

Corrections, as did Respondent. *Id.,* App at 7. As Petitioners note, RAP 4.2(a)(3) applies to courts of appeals, not superior courts. Respondent filed a challenge to Proclamation 21.14 in Franklin County, where he works and resides, and Respondents challenged the venue, asserting that Revised Code of Washington ("RCW") 4.12.020(2), the so-called "public officer" statute, mandates venue for a challenge against a public officer of the State acting "in virtue of his or her office" in Thurston County. Appx. 74-80. The Franklin County Superior Court held that RCW 4.12.020(2) is **not** mandatory, and, therefore, venue is appropriate in Franklin County, concluding that "venue is not dispositive in any way, shape, or form…" Transcript of Verbatim Proceedings, Johnson v. Inslee, et. al., Franklin County Superior Court No. 21-1-50510-11 at 22-26. Petitioners immediately appealed that ruling,

Petitioners simply state that "the spirit of this consideration applies with equal force to conflicts among

the superior courts on the unique issue of the public officer venue statute." *Id.* Rather than make a serious attempt to identify an error of that nature such a nature, Petitioners simply note the need for "clear and consistent" answers to questions surrounding the pandemic and assume that only by transferring the case to Thurston County will result in such uniformity. Pet'rs. Motion at 1. Petitioners do not, and cannot make such an affirmative statement with certainty. Simply placing the matter in front of an Inslee-friendly court does not mean that the Petitioners will have the result they so please as Petitioners could end up with two different judges that render different opinions, or, in an even wilder scenario, a single judge could be assigned the two cases and find discrete, distinct issues, that results in a different opinion. Likewise, Petitioners have done nothing to seek consolidation for such answers or to seek "judicial efficiency." Pet'rs. Motion at 2.

III. ISSUE ON REVIEW

1. Direct review under RAP 4.2 is not appropriate under these circumstances as an appeal of the Superior

Court's decision on the (in)applicability of RCW 4.12.020(2) venue is not a matter that necessitates review under RAP 4.2.

2. Direct review under RAP 4.2 is not warranted under RCW 4.12.030(3) as Petitioners have failed to demonstrate inconvenience of the witnesses.

IV. ARGUMENT

There is a COVID-19 Pandemic, but does not justify Direct Review in this Court.

The COVID-19 pandemic is; nonetheless, that does not necessitate removal of venue to Thurston County. Petitioners claim that removal to Thurston County will result in a more efficient review of the case, yet they fail to recognize that justice has already been delayed for Respondent and anyone else hoping that the Franklin County Superior Court would issue injunctive or declaratory relief against Proclamation 21.14, which was slated to be heard by the Franklin County Superior Court on September 27, 2021 (stricken from the docket for failure to properly confirm notice), then October 4, 2021.

More specifically, the present delay in hearing the matter has resulted in Plaintiff's

A. RAP 4.2(a)(3) does not apply as the only potential conflicting decision would be between the various superior courts of the State.

RAP 4.2(a)(3) provides direct Supreme Court review when matters "involving an issue in which there is a conflict among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court." RAP 4.2(a)(3). That is not the case in this matter, as the only decision has been made by the Franklin County Superior Court, acting properly within its own statutory authority.

Each Superior Court has the right to so decide cases. The Franklin County superior court has jurisdiction over this matter as the "superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." Article 4 Section 6 of the Constitution of the State of Washington and *Shoop v. Kittitas,* 149 Wn.2d 29, 34, 65 P.3d 1994 (Wash. 2003).

Equally important to this matter, appellate courts may exercise discretion to review the correctness of a decision from a lower court; however the clear statutory language provides the Supreme Court with review of Appellate decisions.

Any attempt to claim this authority amongst the Superior Courts has been outrightly rejected (even for Appellate Courts), in Washington. "We reject any kind of 'horizontal stare decisis' between or among the divisions of the Court of Appeals. Statutes, court rules, prior case law of the Court of Appeals, and prior decisions of this court all compel a contrary conclusion." *In re Arnold*, 190 Wash. 2d 136, 148-49, 410 P.3d 1133 (Wash. 2018) Thus, such an appeal under RAP 4.2(a)(3) is premature and constitutes an attempt by the State to impose "horizontal stare decisis in this matter.

B. Petitioners fail to justify the need for discretionary review under RAP 4.2(a)(4).

The overarching issue of the COVID-19 pandemic is a public issue that requires meaningful and expeditions treatment; however, the issue at heart is not COVID-19, but is whether or not venue is appropriate in Franklin or Thurston County. Were this the matter of the appropriateness of injunctive relief on the Governor's Proclamation, the issue would be timely and appropriate. However, the issue, which Petitioners appealed, is a question of venue, where to hear the matter, not how or what to hear. While courts have taken expansive readings of statutory construction into consideration on RAP 4.2(a)(4) analyses, it is not clear that a question of venue is such a matter.

C. Petitioners fail to justify the need for discretionary review under RAP 4.2(a)(5).

Respondent notes that the Franklin County Superior Court held that the acts complained of were outside the scope of Governor Inslee's duties as the constitutionality of such actions is called into question. This is akin to *State ex rel. Robinson*, a claim was brought against the Director

of Agriculture for the State of Washington. A preliminary injunction was issued from Spokane County. The State Officer moved to quash, claiming the case must be move to Thurston County pursuant to statute. This Court denied the motion to quash and change of venue, upholding the Spokane County decision, stating that the Director had acted without his authority and therefore could not avail himself of the officer venue statute. 181 Wash. 541, 543, 43 P.2d 993, 994 (1935)

Robinson has also been reaffirmed by the Supreme Court more than once. "We have held that when the constitutionality of a statute is challenged the action is not one against the state; rather, it is one against the named defendant individually and therefore need not be brought in Thurston County." *Hanson v. Hutt*, 83 Wn.2d 195, 202, 517 P.2d 599, 604 (1973) (citing *Robinson*, *supra*; and citing *Wiegardt v. Brennan*, 192 Wash. 529, 73 P.2d 1330 (1937)).

In light of *Robinson*, Petitioners' interpretation of

"arose in" is irrelevant, even if they had addressed *Pratt*. Similarly, a hospital's injunctive action against the State Highway Commission and director of state department of highways could be maintained in county in which hospital was located and was not required to be brought under statutory and constitutional provisions relating to venue of actions against state. *Id*. This case, which cites *Robinson*, completely undercuts Petitioners' position. *Deaconess Hosp. v. State Highway Comm'n*, 66 Wn.2d 378, 391, 403 P.2d 54 (1965). Under these circumstances, it is not clear that RAP 4.2(a)(5) applies.

V. CONCLUSION

RAP 4.2(a)(3) requires a showing of conflicting decisions between appellate courts; no such showing has been made. RAP 4.2(a)(4) requires a showing of a public issue. While COVID-19 is such an issue, where to hear the matter, venue, is not. Finally, RAP 4.2(a)(5) requires a showing of a challenge against a public officer acting

within his authority. Since the Governor's actions exceed his statutory authority, RAP 4.2(a)(5) does not apply.

This document contains 1,646 words, excluding parts of the document exempted from the word count by RAP 18.17.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

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Dated this 5th Day of October, 2021

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