SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BORGER MANAGEMENT, INC.	:	
	:	Case No. 2020 LTB 006637
v.	:	
	:	
ABEL HERNANDEZ-CRUZ, *et al.*	:	

KAREN TOWERS	:	
	:	Case No. 2020 LTB 006315
v.	:	
	:	
MATT TALLEY	:	

KRISHNA MCARTHUR	:	
	:	
v.	:	Case No. 2020 LTB 006770
	:	
KENDRA BRYANT	:	

GALLO HOLDINGS LLC – SERIES 2	:	
	:	
v.	:	Case No. 2020 LTB 008032
	:	
ANDRE HOPKINS	:	

URBAN CITY MANAGEMENT	:	
	:	
v.	:	Case No. 2020 LTB 008107
	:	
DONNA BUTLER	:	

ORDER

The District of Columbia has imposed a statutory moratorium that prohibits property owners from filing eviction cases until 60 days after the end of the current public health emergency caused by COVID-19. The United States Constitution protects the right of property owners to go to court to regain possession of their property in a summary proceeding. The filing

moratorium limits this right by denying property owners their day in court for an extended and indefinite period. The District therefore has a demanding burden to demonstrate a reasonable fit and proportionality between the legislature's goals and the means it chose to achieve these goals. Because the District has not carried its burden, the filing moratorium does not pass constitutional muster.

Ending the filing moratorium will not directly result in any evictions during the public health emergency. The District has imposed a moratorium on evictions separate from the moratorium on the filing of eviction cases, and the property owners do *not* challenge the constitutionality of the moratorium on evictions themselves. The separate eviction moratorium means that even if landlords could file an eviction case and obtain a judgment for possession, they could not use the judgment to evict the tenant from the property during the public health emergency. Fewer than 500 eviction cases filed during the moratorium are currently pending. The moratorium on actual evictions during the public health emergency means that the defendants in these cases will not face an eviction until the emergency ends, unless they fall within one of the narrow exceptions to the eviction moratorium that the Council made and that have never been invoked.

Nor will ending the filing moratorium automatically result in a flood of new eviction cases. D.C. law prohibits landlords from issuing, until 60 days after the public health emergency ends, the notices that they must provide 30 days before they file an eviction case. In addition, the District takes the position that even if landlords can issue the required pre-suit notice and then file an eviction case, they cannot serve the court papers on tenants until 60 days after the public health emergency ends. The only short-term impact of the Court's ruling is that the Court will schedule a hearing in these cases as soon as it reasonably can, property owners will have to

try to prove their case, and defendants will be able to raise any defense or seek any relief to which they are entitled.

The District and legal services providers argue that the filing moratorium advances the government interest of containing the pandemic. "Stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese v. Cuomo*, 208 L.Ed.2d 206, 209 (2020) (per curiam). The Court also agrees that the legislature could reasonably conclude that evictions increase the risk of spreading COVID-19 because a significant percentage of people who are evicted end up homeless or in more crowded conditions where the risk of infection, illness, and death are higher. The Centers for Disease Control & Prevention ("CDC") concluded that an eviction moratorium "can be an effective public health measure utilized to prevent the spread of communicable disease." CDC, *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55292, 55294 (Sep. 4, 2020); *see Amicus* Brief at 3-4.[1] The issue here, however, is whether the moratorium on the filing of eviction cases promotes this compelling interest enough to justify the substantial restriction on property owners' access to the courts during a time when evictions themselves are prohibited. The District has not shown that it does.[2]

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[1] *Amici* state that "as the CDC has recognized, a moratorium on eviction filings has a real and substantial relation to the public health, meeting the first test under Jacobson." *Amicus* Brief at 15. However, as *amici* acknowledged at the November 30 hearing, and as the CDC publication cited by *amici* and quoted in the text states, the CDC found only that eviction moratoriums (and not eviction filing moratoriums) protect the public health. When the CDC adopted a moratorium on evictions that applied only to evictions for non-payment of rent and only to tenants who would become homeless or forced to live in close quarters if they were evicted, it made clear that this limited moratorium was *not* "to prevent landlords from starting eviction proceedings, provided that the *actual eviction* of a covered person for non-payment of rent does NOT take place during the period of the Order." *See Brown v. Azar*, 2020 U.S. Dist. LEXIS 201475, at *46 (N.D. Ga. Oct. 29, 2020) (emphasis added by the court).

[2] That a moratorium furthers a compelling government interest does not necessarily resolve other constitutional issues. For example, if the filing or eviction moratorium effects a

The Court is acutely aware of the plight of thousands of families in our community who have struggled and continue to struggle economically and emotionally because they lost their jobs or their hours were reduced because of the pandemic. Because the District has a serious shortage of affordable housing, many families had a hard time making rent and mortgage payments even before the pandemic hit. These families may no longer be able to afford the payments to which they committed in different times, and they may not have a realistic prospect of coming up with the money for payments that they missed. For these families, both the eviction and filing moratoriums do not solve the underlying problem – the moratoriums only delay the day of reckoning that they face. The Court hopes that the legislative and executive branches of government will find ways to enable the families to keep or find affordable housing after the current public health emergency ends.

I. BACKGROUND

A. Statutory provisions

On March 11, 2020, Mayor Muriel Bowser declared a public health emergency in the District of Columbia due to the COVID-19 pandemic. The Mayor subsequently exercised her statutory authority to extend the emergency in stages, most recently until December 31, 2020. *See* Mayor's Order 2020-103, 67 D.C. Reg. 11802 (Oct. 7, 2020). The Mayor has legislative authority to extend the emergency past December 31, 2020.

The filing moratorium is included in a series of laws enacted during the current public health emergency that provide an array of protections for tenants.

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taking of property (an issue that the Court does not decide), the fact that the taking is for a compelling public purpose does not diminish the property owner's right to just compensation from the District under the Takings Clause.

1. The filing moratorium

On May 13, 2020, the Mayor signed the Coronavirus Omnibus Emergency Amendment Act of 2020 (D.C. Act 23-317). D.C. Code § 16-1501 provides for property owners to regain possession of their property when others occupy it without the right to do so, and § 10 of this emergency act amended § 16-1501 to add a new subsection (b), which provides:

> During a period of time for which the Mayor has declared a public health emergency pursuant to section 5a of the District of Columbia Public Emergency Act of 1980, effective October 17, 2002 (D.C. Law 14-194; D.C. Official Code 7-2304.01), and for 60 days thereafter, the person aggrieved shall not file a complaint seeking relief pursuant to this section.

Section 29 provided that the act applied as of March 11, 2020.

This filing moratorium was incorporated in subsequent emergency and temporary acts and remains in effect. *See, e.g*., Coronavirus Support Emergency Amendment Act of 2020, Act 23-326; Coronavirus Support Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-328; Coronavirus Support Temporary Amendment Act of 2020, D.C. Law 23-130.[3]

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[3] Section 303 of the Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020 amended the D.C. Code to place substantial restrictions on debt collection activities. D.C. Code § 28-3814(*l*)(2) now provides that during the public health emergency and for 60 days thereafter, any creditor may not "Initiate, file, or threaten to file any new collection lawsuit," "Visit or threaten to visit the household of a debtor at any time for the purpose of collecting a debt," or "Confront or communicate in person with a debtor regarding the collection of a debt in any public place at any time, unless initiated by the debtor." As amended by § 303, D.C. Code § 28-3814(b)(1C) defines "debt" to mean money more than 30 days past due and owing as a result of a "lease … of … real … property for personal, family, or household purposes."

Notwithstanding *amici*'s assertion that that landlords "retain access to other available avenues to assert their rights, including … contract claims for unpaid rent" (*Amicus* Brief at 25), one of the *amici* and a landlord have argued that the debt collection legislation precludes a claim for unpaid rent. *See* Plaintiff's Motion to Dismiss Counterclaim, *Borum v. Kfetoublin*, Civil Action No. 2020 CA 003571 B (filed Nov. 12, 2020); Reply Brief of Plaintiff Gallo Holdings LLC – Series 2, at 5 (filed Nov. 20, 2020). The Court is not aware that any *amici* have argued that the debt collection legislation applies to a claim for possession (as distinguished from a claim for unpaid rent).

2. Other tenant protections

Legislation enacted during the pandemic contains protections for tenants in addition to the filing moratorium.

The protection that is most relevant to the issues raised by the filing moratorium is the moratorium on evictions themselves. The COVID-19 Response Emergency Amendment Act of 2020 (Act 23-247), which became law on March 17, 2020, amended D.C. Code § 42-3505.01(k) to prohibit a housing provider from evicting a tenant "[d]uring a period of time for which the Mayor has declared a public health emergency pursuant to § 7-2304.01."[4] The eviction moratorium was included in subsequent emergency and temporary acts and remains in effect.

This COVID-19 Response Emergency Amendment Act also amended D.C. Code § 16-1502 to provide that the days during a public health emergency do not count toward the notice that a landlord must provide before a trial in an eviction case:

> The summons provided for by section 16-1501 shall be served seven days, exclusive of Sundays, legal holidays, and a period of time for which the Mayor has declared a public health emergency pursuant to [§ 7-2304.01], before the day fixed for the trial of the action.

The Eviction Notice Moratorium Emergency Amendment Act of 2020 (D.C. Act 23-415), which was enacted in October, prohibits issuance of notices to tenants to vacate. The Fairness in Renting Temporary Amendment Act of 2020 (D.C. Act 23-499), which was enacted in November, requires housing providers to provide notice of their intent to file a claim to recover possession of a rental unit in all cases and to do so at least 30 days before filing the claim. *See also* D.C. Code § 42-3208 (allowing parties to a lease the parties to waive "by agreement in writing" notice to quit).

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[4] Subsection (k-1) makes three exceptions involving illegal acts, hardship, and abandonment, but no evictions have occurred pursuant to any of these exceptions.

In addition, emergency and temporary legislation amended D.C. Code § 42-3192.01(a)(1) to require landlords to offer tenants a payment plan that gives them at least one year to make past-due payments. Subject to limits in other statutes, § 42-3192.01(g) allows a housing provider to file a collection lawsuit or eviction case for non-payment of rent if the tenant defaults on the terms of the payment plan.

B. Procedural background

The Court had no reason to reject eviction complaints that were filed in the Landlord and Tenant ("L&T") Branch between March 11 and May 13 when the filing moratorium was first enacted, nor did it dismiss on its own initiative cases filed during the moratorium before or after May 13. To give plaintiffs in these cases an opportunity to be heard, the Court ordered them to show cause within 30 days from the date of the order why the case should not be dismissed due to the filing moratorium. The Court started in late July 2020 to issue these show cause orders in each of the eviction cases that was filed on or after March 11 and that was still pending. The Court has not scheduled any hearings in any post-March 11 cases, except with respect to the pending legal challenges to the filing moratorium.

A total of 1,854 eviction cases were filed in the L&T Branch between March 11 and December 1, 2020. Over two-thirds of these cases (1,307) were filed in March (before the filing moratorium was first enacted), 388 in April (again before the filing moratorium was first enacted), and 78 in May (with the filing moratorium enacted in mid-May). Only a dozen or so cases have been filed in each subsequent month through November. 458 of these cases remain

open. The rest of these cases have been dismissed, pursuant to a settlement agreement or otherwise.[5]

On July 28, 2020, the Presiding Judge of the of the Civil Division issued a General Order Concerning Landlord and Tenant Cases Filed On or After March 11, 2020. *See* http://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/General-Order-LT-July-28-2020_0.pdf. The Presiding Judge designated the undersigned judge to adjudicate all questions of law relating to the filing moratorium that is common to any eviction case filed on or after March 11, 2020 in the L&T Branch. The General Order provided that the calendar judges would resolve case-specific questions of law and factual dispute if and when these cases proceeded.

The Court held a hearing on September 9 to discuss procedural issues relating to the filing moratorium that were specified in its August 27 order. The Court issued a scheduling order on September 10. The Court designated additional common questions of law in orders issued on September 25 and October 1.

At a scheduling hearing on September 9, the plaintiffs in these cases informed the Court that they would rely on their responses to the orders to show cause, although one landlord later filed in Case No. 2020 LTB 008032 a motion for a declaratory judgment that the filing moratorium is unconstitutional. *See* Sep. 28, 2020 Order.[6]

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[5] In almost all of the cases that have been dismissed, the parties did not inform the Court of the terms of any settlement, so the Court has no way of knowing whether these cases were dismissed because the tenant paid any past-due rent, the tenant reached an agreement with the landlord on a payment plan, the tenants agreed to move out, or for another reason.

[6] The defendants in Case Nos. 2020 LTB 008005 and 2020 LTB 8011 moved to dismiss these cases on the ground (common to all post-March 11 cases) that they were filed during the filing moratorium. For the reasons explained in this order, the Court denies these motions. The plaintiffs in Case No. 2020 LTB 6315 filed a motion for preliminary and permanent injunctive relief, including an order requiring any occupants of the property to vacate. Because this motion

Intervenor the District of Columbia filed its brief on November 6 ("D.C. Brief"). A group of *amici curiae* consisting of Bread for the City, the D.C. Bar Pro Bono Center, the Legal Aid Society of the District of Columbia, Legal Counsel for the Elderly, the Neighborhood Legal Services Program, and Rising for Justice filed their brief on November 6 ("*Amicus* Brief"). Pursuant to an extension of time, defendant Donna Butler in Case No. 2020 LTB 008107 filed her brief on November 13. Various property owners filed reply briefs on November 20.[7]

On November 30, the Court held a motion hearing.[8]

II. CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS

The constitutional right that the filing moratorium most directly affects is the right of access to the courts, and because the filing moratorium unconstitutionally infringes this right, the Court limits its analysis to this issue and does not address the property owners' other constitutional arguments. *See* Part III below.

A. Standard of review

1. General principles

The United States Constitution guarantees the "fundamental right of access to the courts." *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004). This constitutional guarantee is "among the

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goes only to the merits of plaintiffs' claim and does not raise any common issue of law concerning the applicability or validity of the filing moratorium, the calendar judge will address the motion in due course.

[7] To the extent any brief styled as a reply brief does not reply to arguments made by supporters of the filing moratorium, the Court does not consider it. For example, Shirley Proctor and other landlords filed an *amicus* brief on November 20 that contains a number of factual allegations with supporting affidavits, and the Court does address these case-specific factual issues.

[8] One of the cases identified by the Court as raising a common issue of law, *Cavalier Properties LLC v. Shelton*, Case No. 2020 LTB 006576, was dismissed with prejudice by the plaintiff pursuant to a settlement agreement. This case was not the only case that raised the common legal issues decided by the Court in this order, so its dismissal does not affect the Court's jurisdiction to resolve these issues.

most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). The importance of this right was recognized in a seminal case in the early days of the Republic: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury," and the government "will certainly cease to deserve this high appellation [as a government of laws, and not of men], if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (cleaned up). "Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner." *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

The Constitution protects this right of access under both the Petition Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).[9] "The Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) (cleaned up); *McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("filing a complaint in court is a form of petitioning activity"). The Due Process Clause requires civil litigants to be "granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case, the formality and procedural requisites of which can vary, depending upon the importance of the interests involved

[9] The right of access to the courts may also be rooted in the Privileges and Immunities Clauses of Article IV or the Fourteenth Amendment of the U.S. Constitution. *See id*. The Court need not decide whether the Privileges and Immunities Clause applies to Congress when it legislates for the District of Columbia. *See Landise v. Mauro*, 141 A.3d 1067, 1075 & n.3 (D.C. 2016).

and the nature of the subsequent proceedings." *Boddie*, 401 U.S. at 378 (cleaned up). The Petition Clause and the Due Process Clause raise "substantially the same question – whether the process allows a claimant to make a meaningful presentation." *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 335 (1985).

Lane, 541 U.S. at 533-34, *Boddie*, 401 U.S. at 374, and other cases describe the constitutional right of access to the courts as "fundamental," and courts usually apply "strict judicial scrutiny" when a law substantially interferes with a fundamental right. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988). In general, infringements on the right of access to courts are subject to "more searching judicial review." *See Lane*, 541 U.S. at 522-23.

More specifically, the right of access to the courts "call[s] for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications," *Lane*, 541 U.S. at 529, and at least intermediate scrutiny applies to sex-based classifications. *See Craig v. Boren*, 429 U.S. 190, 197 (1976).[10] Courts have used intermediate scrutiny to analyze a variety of restrictions on other First Amendment rights. *See, e.g.*, *Abney v. United States*, 616 A.2d 856, 859-61 (D.C. 1992) (applying intermediate scrutiny to restrictions on the time, place, and manner of speech); *Florida Bar v. Went for It*, 515 U.S. 618, 625-26 (1993) (applying intermediate scrutiny to restrictions on commercial speech); *Turner Broadcasting System v. FCC*, 512 U.S. 622, 661-662 (1994) (applying intermediate scrutiny to cable must-carry regulations); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (applying intermediate scrutiny to restrictions on conduct with an expressive component);

[10] *Yanakos v. UPMC*, 218 A.3d 1214, 1222-23, 1225 (Pa. 2019), applied intermediate scrutiny under a state constitutional protection to a restriction on the right of access to courts.

McCutcheon v. Federal Election Commission, 893 F. Supp. 2d 133, 137 (D.D.C. 2012) (3-judge court) (applying intermediate scrutiny to restrictions on campaign contributions and strict scrutiny restrictions on campaign expenditures "although both types of limits implicate the most fundamental First Amendment interests") (cleaned up).[11]

Courts do not apply strict or intermediate scrutiny to all restrictions on the right of access to courts. *United States v. Kras*, 409 U.S. 434, 447 (1973), found a "rational basis" sufficient to uphold a restriction on access to bankruptcy courts. *Kras* teaches that the level of scrutiny depends on the nature of the rights that the party seeks to enforce through the courts, and on the extent and impact of the restrictions. Cases involving Second Amendment rights confirm this restriction-specific approach to the level of scrutiny under the First Amendment. "In the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). "Borrowing from the [Supreme] Court's First Amendment doctrine, the rigor of this judicial review [of restrictions on Second Amendment rights] will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell v. Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (cleaned up).

When courts apply intermediate scrutiny, "the burden of justification is demanding and it rests entirely on the State." *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) (sex-

[11] The Court cites these cases not because it necessarily equates the right of access to the courts with other rights protected by the First Amendment or because these cases compel intermediate scrutiny of all restrictions on the right of access to courts or of the eviction filing moratorium at issue in this case. It cites these cases only because they establish that intermediate scrutiny may be warranted for a variety of restrictions on a range of activities protected by the First Amendment.

based classification). "To withstand intermediate scrutiny, a governmental restriction must be substantially related to an important governmental objective." *Brown v. United States*, 979 A.2d 630, 641 (D.C. 2009) (cleaned up); *see Virginia*, 518 U.S. at 533; *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc) (applying intermediate scrutiny to a curfew on juveniles). The government must establish "a 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served," and the government "must affirmatively establish the reasonable fit" that the test requires. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (cleaned up). Under intermediate scrutiny, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

"Intermediate scrutiny requires more than a mere incantation of a proper state purpose." *District of Columbia ex rel. W.J.D. v. E.M.*, 467 A.2d 457, 461 (D.C. 1983) (cleaned up). To carry its burden, the government must establish the public benefits of the restriction "by evidence, and not just asserted." *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009). The statute's proponent "can rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense, but it may not 'rely upon mere anecdote and supposition.'" *Tyler v. Hillsdale County Sheriff's Dep't*, 837 F.3d 678, 694 (6th Cir. 2016) (quoting *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012)). The

burden to justify a restriction under intermediate scrutiny "is not satisfied by mere speculation or conjecture" *Edenfield*, 507 U.S. at 770-71; *see Ezell v. Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) (the government must supply "actual, reliable evidence to justify restricting protected expression based on secondary public-safety effects"); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (evidence concerning zoning restrictions on adult bookstores "must fairly support the municipality's rationale for its ordinance"); *Annex Books, Inc. v. City of Indianapolis*, 624 F.3d 368, 369 (7th Cir. 2010) (affirming preliminary injunction where a city's "empirical support" for an ordinance limiting the hours of operation of an adult bookstore was "too weak"). "The quantum of empirical evidence necessary to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000).

2. Intermediate scrutiny

The Court applies intermediate scrutiny in evaluating the constitutionality of the filing moratorium.

As discussed below, several factors justify the application of intermediate scrutiny: the absolute nature of the filing moratorium; its lengthy and indefinite duration; property owners' right to summary proceedings in eviction cases; the constitutional protection of private property rights; property owners' inability to regain possession from an unwilling occupant without a court order; the loss of critical interim protection afforded by protective orders during the moratorium; and the substantial delay in property owners' ability to regain possession of their property until months after the public health emergency has ended. The cumulative burden on property owners' right of access to courts warrants intermediate scrutiny.

The filing moratorium categorically prohibits the filing of any case, no matter how compelling or urgent the property owner's interest in possession; it does not merely make it more difficult to file eviction cases during the public health emergency (for example, by imposing procedural prerequisites).[12] Because a prohibition on filing completely precludes the would-be plaintiff's access to the courts, the filing moratorium burdens the core of the constitutional right of access. *See Ezell*, 651 F.3d at 703.

The filing moratorium applies across the board to all cases in which property owners try to regain possession of their property. The primary impetus for the filing moratorium and the other statutory tenant protections was the crushing financial impact of the pandemic on so many D.C. residents and their resulting inability to afford rental housing in a community that already suffered from a serious shortage of affordable housing. But the filing moratorium protects people who lack the right to occupy property for reasons that are entirely unrelated to the pandemic and that even predate the pandemic. For example, the filing moratorium applies to (a) landlords who seek to evict a tenant because the tenant violated committed crimes on the premises or interfered with neighbors' rights, (b) landlords who want to exercise their right under D.C. Code § 42–3505.01(d) to terminate a tenancy so that they can occupy their property for their personal use as a dwelling, and (c) mortgage companies and purchasers of property at a pre-pandemic foreclosure sale that seek to evict a foreclosed homeowner who no longer has any right to occupy the property.[13]

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[12] As the Court explains in Section II.A.3 below, *amici* argue that the filing moratorium has limited effect because it does not apply to eviction cases that invoke the ejectment statute and that are filed in the Civil Actions Branch, but the filing moratorium does not contain this gaping loophole.

[13] *Amici* are correct that the public has an interest in not forcing such occupants into homelessness or crowded living conditions. *See Amicus* Brief at 4. Nevertheless, property owners in these cases are prejudiced by the multi-month delay produced by the filing moratorium

Furthermore, the duration of the filing moratorium is both substantial and indefinite. The filing moratorium has already lasted nine months, and it will continue for a total of at least a year – until the end of February 2021, which is 60 days after December 31, 2020, the date to which the Mayor has currently extended the period of emergency. The Mayor has the authority to extend the public health emergency into 2021, and if she does so, the filing moratorium will last even longer. As the property owners acknowledged at the November 30 hearing, approximately four months of the prior delay is not attributable to the filing moratorium because it would have occurred anyway: it took time for the Court to develop the capacity to conduct hearings remotely; so the Court was unable to hold virtually any hearings in L&T cases from mid-March until early July. Nevertheless, the delay attributable to the filing moratorium starting in July is substantial: it has already totaled over five months; and it will continue for at least almost three more months.

This substantial and indefinite delay is a significant factor warranting intermediate scrutiny of the filing moratorium because "time is of the essence" in eviction cases. *See Mahdi v. Poretsky Management, Inc.*, 433 A.2d 1085, 1088 (D.C. 1980) (per curiam). "First and foremost, the Landlord and Tenant Branch of the Civil Division of the Superior Court of the District of Columbia was intended to determine disputes between landlord and tenant in a summary fashion." *Davis v. Rental Associates*, 456 A.2d 820, 822 (D.C. 1983) (en banc). A landlord's interest in summary resolution of its claims against a tenant has a constitutional basis.[14] The Court of Appeals has stressed that the Supreme Court in *Lindsey v. Normet*, 405

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in obtaining a judgment for possession that could be enforced when the eviction moratorium ends.

[14] That is true even if the claim is styled an action for ejectment. *See* Section II.A.3 below.

U.S. 56, 74 (1972), "made a pointed allusion to the constitutional rights of the landlord: 'Nor should we forget that the Constitution, expressly protects against confiscation of private property or the income therefrom.'" *Mahdi*, 433 A.2d at 1088; *see Brown*, 2020 D.C. App. LEXIS 120 at *17 n.37 (depriving landlord of funds until an eviction case is resolved "might well constitute the kind of confiscation against which the Court warned in *Lindsey*").[15] Unconstitutional denial of access can occur when "official action is presently denying an opportunity to litigate for a class of potential plaintiffs" even "only in the short term." *Christopher*, 536 U.S. at 413 (cleaned up).

Furthermore, the only way that landlords can seek to vindicate their constitutionally protected property rights is through an action for possession, because D.C. law deprives the landlords of the self-help remedy that they had under common law. *See Mendes v. Johnson*, 389 A.2d 781, 787 (D.C. 1978). It is "the availability of a summary procedure whereby a landlord could quickly reacquire possession from a defaulting tenant with the aid of judicial process" that "justified the abrogation of the common law right of self-help and the rejection of precedents holding that such right had been preserved." *Mahdi*, 433 A.2d at 1088. The judicial process is the alternative to forcible entry and detainer, and it is precisely because "[t]he right to sue and defend in the courts is the alternative of force" that this right "is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co*., 207 U.S. 142, 148 (1907). Landlords and tenants have a private commercial relationship, and "[g]overnment's role with respect to the private commercial relationship is

[15] This factor distinguishes this case from *Kras*, where the Supreme Court applied rational-basis analysis in evaluating restriction on access to bankruptcy courts. *Kras* relied on the fact that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." *Kras*, 409 U.S. at 446. Here, in contrast, landlords have a constitutional right to use their property and to earn income from it, and that right is frustrated when, for example, tenants materially breach their lease obligations yet continue to occupy the landlord's property.

qualitatively and quantitatively different from its role in the establishment, enforcement, and dissolution of marriage." *Kras*, 409 U.S. at 445-56. Nevertheless, eviction cases provide the means for property owners to enforce their constitutional right to their property and to income from it. Moreover, "a chose in action is a constitutionally recognized property interest," *Phillips Petroleum v. Shutts*, 472 U.S. 797, 807 (1985), and choses in action generally include rights of action arising out of contract. *See Boyce v. Boyce*, 541 A.2d 614, 616 n.4 (D.C. 1988).[16]

[16] *Elmsford Apartment Associates, LLC v. Cuomo*, 2020 U.S. Dist. LEXIS 115354, 2020 WL 3498456 (S.D.N.Y. June 29, 2020), upheld a moratorium imposed by New York State on eviction filings against a constitutional challenge under the Petition Clause. However, New York's filing moratorium was substantially narrower than the District's; among other things, it lasted for only about three months (from May 7 to August 19), and it applied only to actions for non-payment of rent. *See id*., 2020 U.S. Dist. LEXIS 115354, at *5, *11. *Elmsford* distinguished *ACA International v. Healey*, 2020 U.S. Dist. LEXIS 79716, 2020 WL 2198366 (D. Mass. May 6, 2020), on the ground that the moratorium on the filing of debt collection cases "outlawed legal remedies of any kind" for the duration of the pandemic. *See id*. at *52. The District's filing moratorium precludes property owners from seeking effective equitable remedies against a whole class of tenants for at least a year – and longer if the public health emergency lasts longer.

This Court respectfully disagrees with two components of the ruling. First, *Elmsford* ruled that landlords' ability to recover damages for breach of contract meant that the moratorium on the filing of eviction actions had no actual effect on their ability to pursue a legal claim. *See id*. at *49. However, even putting aside the substantial question of whether the statutory moratorium on debt collection activities precludes the landlords from seeking payment of money due under the lease contract (*see* note 3 above), a landlord's ability to seek damages from a judgment-proof debtor is not a substitute for an action for possession, and as the Court discusses below, the serious and lasting financial impact of the pandemic means that many tenants may never be able to make their landlords whole. Second, *Elmsford* states that the filing moratorium "merely postpones the date on which landlords may commence summary proceedings against their tenants." *Id*. at *45. But if the plaintiff is not permitted to initiate a proceeding until a substantial time after its cause of action accrues, the proceeding is summary in name only, and *Elmsford* does not discuss the constitutional underpinning of a landlord's right to a summary proceeding. Nor does *Elmsford* discuss landlords' constitutional rights as property owners, or the impact of the filing moratorium on landlords' ability to obtain interim relief. Likewise, the CDC moratorium at issue in *Brown v. Azar*, 2020 U.S. Dist. LEXIS 201475, at *50-52, was substantially more limited in scope and duration than the D.C. moratorium, and like *Elmsford*, *Brown* did not consider the factors discussed in this footnote that affect the level of scrutiny.

More specifically, the filing moratorium affects the time-sensitive rights of property owners in two important and concrete ways: (a) by depriving them of their ability to obtain interim protection through a protective order or undertaking until the case is resolved; and (b) by substantially delaying their ability to regain possession.

a. Protective orders

During the extended period of the filing moratorium, landlords are completely deprived of the ability to obtain any interim protection whatsoever. This impact occurs primarily when landlords contend that tenants are behind in their rent, and these cases constitute a large majority of cases filed in the L&T Branch.[17] But the impact also occurs when property owners seek to evict foreclosed homeowners and other occupants who claim an ownership interest in the property: the filing moratorium precludes property owners from obtaining interim protection in the form of an undertaking from these defendants, and the "function and purpose" of undertakings and protective orders "is the same: to balance and protect the parties' legitimate and competing interests over the course of the litigation." *See Penny v. Penny*, 565 A.2d 587, 589-90 (D.C. 1989).[18] For the sake of simplicity, the Court focuses on protective orders even though property owners have a comparable interest in obtaining undertakings.

A protective order "is designed to maintain the status quo between the parties and ensure that the landlord will not be exposed to a prolonged period of litigation without rental income."

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[17] Protective orders are generally not entered in cases that do not involve non-payment of rent. *See* L&T Rule 12-I(a)(1)(C) ("In a case that does not include an allegation of nonpayment of rent, the court may enter a protective order over the defendant's objection only if, after inquiry by the court, the defendant declines to stipulate that the plaintiff's acceptance of rent from that date forward is without prejudice to the plaintiff's ability to prosecute the action.").

[18] An undertaking is an equitable device intended "to protect the plaintiff by providing for intervening rent and damages, including assurance that the plaintiff, if successful, will have been compensated for the cloud on the title." *Turner v. Day*, 461 A.2d 697, 699 (D.C. 1983).

Brown v. Pearson, 2020 D.C. App. LEXIS 120, at *11 (D.C. April 2, 2020) (cleaned up). Under a protective order, a tenant makes payments during the pendency of the case into the registry of the court, and at the end of the case, the court releases the money to the landlord if the landlord prevails. Because of its integral role in protecting both landlords and tenants, the protective order remedy "has become commonplace in landlord-tenant court." *Id*. at *17 (cleaned up). By precluding landlords from filing a case, the filing moratorium precludes landlords from obtaining protective orders, and it thereby exposes landlords to the precise danger against which protective orders are intended to protect: a prolonged period without rental income. Like indefinite suspension of a protective order, indefinite postponement of the ability to obtain a protective order may deprive a landlord, including a small landlord, "permanently of any rental income from her property for the entire duration" of the postponement, as well as "of her own use of that property for the same time period." *See id*. at *16.

The unavailability of protective orders during the filing moratorium directly implicates property owners' constitutionally based interest in expeditious resolution of eviction cases. "Hand in hand with the summary nature of a landlord-tenant proceeding is the mechanism created by the courts to maintain an equitable balance during litigation of the suit for possession: the so-called protective order." *Davis*, 456 A.2d at 823. The moratorium completely deprives landlords of the interim protection to which they would otherwise be entitled in order to prevent confiscation of their property and associated income.

The resulting injury to property owners during the pandemic will often be irreparable. As the District and *amici* acknowledge, the job losses and other financial hardship caused by the pandemic means that many tenants will *never* be able to pay the rent that they owe. As the District states, "Without an adequate response, the pandemic was expected to increase eviction

filings significantly as a result of precipitous losses in employment and income." D.C. Brief at 6; *id*. at 8 (quoting Council declaration that "District tenants who are impacted by decreased work hours or temporary layoffs … may have their earnings greatly reduced"). As a lawyer for one of the *amici* recently stated:

> When there's no money to pay the rent, I cannot stop the evictions, and I just see it coming – hundreds and thousands of calls from people who face evictions I don't have a legal defense against. … For a lot of these cases, it's going to be open-and-shut just because the tenants haven't paid and can't pay. And there's not going to be enough assistance to pay for them. There's going to be nothing that can be done for a lot of these people.

William Roberts, "What Lies Ahead: An Avalanche of Evictions," *Washington Lawyer* (November/December 2020) (quoting an attorney from the Neighborhood Legal Services Program). It is settled that inability to pay rent is not a defense to claim for possession: "To put it in the vernacular, if you cannot pay the rent, you cannot stay on in the landlord's apartment. It is just about as simple as that." *Brown*, 2020 D.C. App. LEXIS 120, at *21 (cleaned up).[19]

For an indigent tenant, "the likelihood that he will be able to make [protective order payments] up at some future point (after a credit for any amounts [awarded on a tenant petition or for unsafe or unsanitary conditions caused by housing code violations]) appears purely hypothetical," and postponing the landlord's ability to obtain a protective order "would be virtually equivalent to confiscation of her property." *Brown*, 2020 D.C. App. LEXIS 120, at *17. This explains why the Court of Appeals has "admonished courts to consider the landlord's need for interim protection, with a presumption that the existing rent provides the measure of a just protective order." *Id*. at *21 (cleaned up). The protection afforded to landlords by protective

[19] The COVID-19 legislation does not change this substantive law. The District and *amici* stress that the legislation does not affect tenants' obligation to pay rent under a lease. D.C. Brief at 24; *Amicus* Brief at 20.

orders is not less important to them during a public health emergency and the two months after it ends.

As the Court of Appeals recently stated:

> In fashioning an appropriate protective order, a court should consider the interests of both the landlord and the tenant and strive to balance the equities and to accommodate the competing considerations inherent in landlord-tenant controversies. The guiding principle, we have said, is to arrive at a reasonable monthly payment which will impose a fair obligation on the tenant, permit the case to be heard on the merits, and assure the landlord that if he wins he will, having been denied interim possession, at least receive reasonable intervening rent. In fulfilling that obligation, the court should consider all relevant factors, not only factors favorable to one side.

Brown, 2020 D.C. App. LEXIS 120, at *18-19 (cleaned up). A landlord's right to apply for a protective order does not necessarily mean that a tenant hard hit by the pandemic will be ordered to pay money that the tenant does not have. As the Court of Appeals has stated, the Court requires tenants to make only a monthly payment that imposes a fair obligation. *See id*. The filing moratorium precludes landlords from obtaining a protective order that requires tenants to pay even an amount that they can afford, and from a landlord's point of view, something is better than nothing.

Notably, protective orders protect tenants as well as landlords: not only does a protective order "remediate, to some extent, the landlord's exposure to a prolonged period of litigation without rental income, so as to avoid placing her at a severe disadvantage during the period of litigation," but it also "protects the tenant's ability to satisfy his housing needs, in that such payments prevented him from falling further in arrears." *Brown*, 2020 D.C. App. LEXIS 120, at *20 (cleaned up). Protective orders also benefit a "defendant's fellow tenants," who also "merit the law's consideration": "To the extent that one tenant pays no rent for the use of particular premises, he (1) may make it financially impossible for his landlord to make needed repairs, and

(2) heightens the landlord's need to increase rental charges to the paying tenants to compensate for the lost income." *See Davis*, 456 A.2d at 824.

At the November 30 hearing, *amici* contended that any financial harm to landlords may not be irreparable because of the possibility that they or their tenants will eventually get rental assistance from the District or a private organization that covers the unpaid rent owed by tenants. The record does not provide a basis for the Court to assess the probability that landlords will ultimately be made whole even though they are unable to get to a protective order.[20] In any event, before the pandemic struck, landlords were not precluded from obtaining a protective order during the pendency of a case simply because the tenant might ultimately find a way to come up with past-due rent, and the filing moratorium causes landlords to lose the opportunity for similar protection during the pandemic.[21]

b. Delay in obtaining possession

In addition to the harm to property owners caused by the loss of the ability to obtain a protective order or undertaking for a substantial period, the filing moratorium causes harm by substantially delaying their ability to obtain a judgment of possession and to execute it after the moratorium on actual evictions ends. Without the filing moratorium, a property owner with a judgment for possession could start to execute it as soon as the public health emergency ends,

[20] One organization estimated by the end of 2021, the pandemic will cause tenants to fall behind in their rent by $80-$130 million. *See* Analysis of Current and Expected Rental Shortfall and Potential Evictions in the U.S., Appendix B (prepared for the National Council of State Housing Agencies, Sep. 25, 2020) (available at https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US_Stout_FINAL.pdf). *Amici* do not represent that approximately $100 million in rental assistance will be available to tenants.

[21] Tenants may argue that no protective order is necessary, or that the payment should be lower, because they expect to get rental assistance before the case is over, and the Court can consider that argument and competing arguments on a case-by-case basis.

because the legislative branch determined that it was consistent with the public health to resume evictions at that time. With the filing moratorium, the property owner cannot even file the case until 60 days after the mayoral emergency ends. Since early July as the Court's capacity to hold remote hearings expanded, the Court has been holding hearings in eviction cases that were filed before March 11, and it has now begun to conduct trials in these cases. The Court has the capacity to hold hearings and trials in post-March 11 cases as well.

It is reasonable to expect that by the time the eviction moratorium ends simultaneously with the end of the mayoral public health emergency, cases filed on or after March 11, 2020 would either be resolved by trial or otherwise, or they would at least be substantially advanced. In 2019, the mean time from filing to disposition in L&T cases without a jury demand was 52 days. The Court resolved 70% of these cases within 45 days, 87% within 100 days, and 97% within 150 days. The Court's ability to resolve eviction cases reasonably promptly means that the filing moratorium prevented landlords from being in a position to regain possession relatively soon after the eviction moratorium ends.

Enforcement of the filing moratorium from March 11, 2020 would delay the filing of new eviction by at least a year – until March 2021, which is 60 days after December 31, 2020, when the moratorium will end unless the Mayor further extends the public health emergency. Excluding the four-month delay attributable to the Court's inability to conduct trials or even hearings between March and early July, and with a mean time to disposition of less than two months, cases that would have been resolved early in the fall of 2020 would instead not be resolved until late spring 2021.

D.C. Code § 42-3505.01a, which requires property owners to provide notice at least 21 days before the scheduled date of any eviction, allows property owners that establish their right

to possession to evict tenants, squatters, and foreclosed homeowners starting 21 days after the eviction moratorium ends. Because of the filing moratorium, property owners that would otherwise have obtained a judgment or made substantial progress toward a judgment when the eviction moratorium ends will instead be 60 days away from even filing the case that would otherwise be over or close to over. Instead of completing the relatively ministerial task of obtaining a writ of restitution as soon as the public health emergency ends, these property owners would have to wait another 60 days to file cases that ordinarily take two months to complete.[22] A delay of four months is substantial in the context of a proceeding in which time of the essence. *See Mahdi*, 433 A.2d at 1088.[23]

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[22] If D.C. Code § 16-1502 imposes a moratorium on service in eviction cases (an issue that the Court does not decide – *see* Part III below), and if property owners therefore could not proceed with new eviction cases even if they could file them, the filing moratorium still substantially delays final resolution of the several hundred cases that were filed during the moratorium and are still pending. Property owners have effected service in a number of these cases, and the Court will decide in due course any challenge to the legality of such service.

[23] Some landlords argue that the moratorium prejudices them because the delay in filing combined with the three-year statute of limitations limits the amount of back rent that they can collect. Response of Plaintiff to Order to Show Cause, *Towers v. Talley*, Case No. 2020 LTB 006315, at *10 (filed Aug. 12, 2020). However, the Chief Judge has tolled "all deadlines and time limits in statutes, … including statutes of limitations," from March 18, 2020 until at least January 15, 2021. *See, e.g.*, November 5, 2020 Order (http://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/Amended-Order-11-5-20_FINAL.PDF); Addendum to the General Order Concerning Civil Cases, at 3 (explaining the scope of the tolling of statutes of limitation) (https://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/November-30-Amended-Addendum-to-General-Order.pdf). Without citing any statute or other authority, these landlords contend that the Court does not have authority to toll statutes of limitations. *See* Plaintiff's Response to the Court's Order to Show Cause, at 4, *Alvin L Aubinoe, Inc. v. Williams*, Case No. 2020 LTB 006674 (filed Aug. 19, 2020). However, D.C. Code § 11–745(a)(1) grants the Chief Judge open-ended authority "to delay, toll, or otherwise grant relief from the time deadlines imposed by otherwise applicable laws" for the duration of any emergency situation rendering it impracticable for a class of litigants to comply with the deadline, and § 11–745(a)(1) does not contain any exception for statutes of limitations. A statute of limitation imposes a "time deadline" in the ordinary meaning of the term. As a result, the amount of back rent that landlords can try to recover in an eviction case is not affected by the filing moratorium.

3. Application of the filing moratorium to ejectment actions

As the Court discusses in the preceding section, a key factor affecting the degree of scrutiny of the filing moratorium involves the extent to which it restricts the right of access to courts. A cornerstone of *amici*'s defense of the filing moratorium is that the burden is minimal because the moratorium does not affect the ability of property owners to file ejectment actions in the Civil Actions Branch. According to the *amici*, "the filing moratorium only addresses the filing of summary claims for possession in the Landlord and Tenant Branch of this Court under D.C. Code § 16-1501, and nothing prevents a landlord from a civil action for ejectment that provides the same ultimate remedy of possession of the unit." *Amicus* Brief at 11.[24] This argument does not have any support in the language of the statute, and the moratorium on the filing of eviction cases applies to cases in the Civil Actions Branch seeking possession under the ejectment statute, D.C. Code § 16-1101. Property owners may not circumvent the filing moratorium by artful pleading.

Section 16-1501(a) covers any complaint filed by a person "for the restitution of possession" against a person who "detains possession of real property without right, or after his right to possession has ceased." Subsection (b) provides, "During a period of time for which the Mayor has declared a public health emergency pursuant to § 7-2304.01, and for 60 days thereafter, the person aggrieved shall not file a complaint seeking relief pursuant to this section."

Amici assert that if a property owner seeking possession invokes only § 16-1101 and not § 16-1501, the property owner is not – in the words of § 16-1501(b) – seeking relief "pursuant to this section," so the filing moratorium in § 16-1501(b) does not apply. *Amicus* Brief at 11.

[24] At the November 30 hearing, the District stated that it does not have a position on this issue.

However, whether or not a property owner explicitly invokes § 16-1501, its complaint is "for the restitution of possession" against a person who "detains possession of real property without right, or after his right to possession has ceased," and the property owner is in fact and in substance seeking relief "pursuant to" § 16-1501. Therefore, the filing moratorium in § 16-1501(b) applies.

Amici's interpretation would permit easy and complete avoidance of the filing moratorium by property owners, and this result would violate "one of the most basic interpretive canons," which is "that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *See Stevens v. D.C. Department of Health*, 150 A.3d 307, 315-316, (D.C. 2016) (cleaned up). The Court agrees with one of the plaintiffs that "[i]f Civil Actions is indeed an immediately viable route for all landlords to take, as *amici* contend, the Superior Court could indeed dispose of the entire constitutional challenge by immediately certifying the entire docket of the Landlord & Tenant branch to the civil actions branch." *See* Reply Brief of Plaintiff Gallo Holdings LLC – Series 2, at 11 (filed Nov. 20, 2020).

In whichever branch they are filed, eviction cases should be resolved expeditiously because the Court has the same obligation to expedite eviction cases in the Civil Actions Branch as those in the L&T Branch. As *amici* correctly acknowledged in the November 30 hearing, property owners seeking to eject occupants pursuant to § 16-1101 are subject to the same prohibition on self-evictions as property owners seeking the same remedy of possession pursuant to § 16-1501. *See Mendes*, 389 A.2d at 783. As discussed in Section II.A.2 above, "the availability of a summary procedure whereby a landlord could quickly reacquire possession from a defaulting tenant with the aid of judicial process" is the quid pro quo for "the abrogation of the

common law right of self-help and the rejection of precedents holding that such right had been preserved." *See Mahdi*, 433 A.2d at 1088. In addition, both Rule 1 of the Superior Court Rules of Civil Procedure ("Civil Rules") applicable in the Civil Actions Branch and Rule 1 of the Superior Court Rules of Procedure for the Landlord and Tenant Branch ("L&T Rules") require all rules to be construed, administered, and employed to secure the "speedy" determination of every action and proceeding.[25]

Further confirmation that the duty to expedite eviction cases does not depend on whether the case is in the L&T Branch or the Civil Actions Branch is the Court's duty under the L&T Rules to expedite cases certified from the L&T Branch to the Civil Actions Branch. L&T Rule 5(c)(2) requires an "expedited trial" of any case certified to the Civil Actions Branch because the defendant asserts a plea of title, and Rule 6(b) similarly requires an "expedited trial" in the Civil Actions Branch if the defendant properly demands a jury trial.[26] These rules corroborate that the Court has the same duty to expedite eviction cases in the Civil Actions Branch as those in the L&T Branch.

Indeed, nothing in any statute or in the L&T Rules prohibits a property owner from filing in the L&T Branch a complaint seeking possession through an ejectment action under § 16-1101.

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[25] At the November 30 hearing, amici contended that cases in the Civil Actions Branch may take longer to resolve because they involve discovery. Parties in cases subject to the Civil Rules have a right to discovery, and under L&T Rule 10(a), there is generally no discovery in cases in the L&T Branch subject to the L&T Rules. However, discovery need not significantly delay a case, and when discovery occurs in eviction cases in the Civil Actions Branch, it is usually limited. *See also* Civil Rule 26(b)(1) (incorporating the proportionality principle); Civil Rules 26(b)(2)(a) and 26(c)(1) (authorizing limitations on discovery).

[26] *Amici*'s argument involves eviction cases filed in the Civil Actions Branch without a jury demand, and the Court likewise focuses on cases without a jury demand. If the defendant makes a jury demand (in the L&T Branch or the Civil Actions Branch), the case will take substantially longer to resolve, and the Court will not be able to resume conducting jury trials in any civil cases until sometime in 2021.

The form complaint used in the Landlord and Tenant Branch does not identify the statute under which the case is brought. The Court also has the option to create a calendar that includes both eviction cases filed in the Civil Actions Branch and those filed in the L&T Branch.[27]

At the November 30 hearing, *amici* could not identify any persuasive reason why the Court could not treat all the post-March 11 eviction cases filed in the L&T Branch as cases seeking possession through ejectment under § 16-1101. *Amici* did argue that treating eviction cases filed in the Civil Actions Branch as expeditiously as eviction cases filed in the L&T Branch would violate the intent of the statute, but they did not point to anything in the language or legislative history of the filing moratorium to support this argument. The statutory provision containing the filing moratorium does not mention the L&T Branch, much less provide that this moratorium applies only to cases filed in the L&T Branch, nor does this statutory provision explicitly address how quickly or slowly the cases should be resolved. In a different context, *amici* acknowledge that the "eviction filing moratorium, an amendment to a provision of Title 16 of the D.C. Code, is not concerned with either the organization or jurisdiction of this Court." *See Amicus* Brief at 17. The Court is not willing to read into any emergency or temporary legislation an implicit directive to slow-roll eviction cases filed in the Civil Actions Branch.

Because interpreting the filing moratorium in § 16-1501(b) not to apply to ejectment actions would effectively nullify the filing moratorium, this interpretation would mean that the filing moratorium would achieve none of the purposes that *amici* and the District ascribe to it. As the Court discusses in more detail in Section II.B.2 below, the District and *amici* argue that the mere pendency of an eviction case may cause anxiety and depression and lead tenants to

[27] For example, the debt collection calendar includes both cases filed in the Civil Actions Branch because the alleged debt exceeds $10,000 and cases filed in the Small Claims Branch because the alleged debt is $10,000 or less.

move out and become homeless or move to more crowded quarters, and their focus is on tenants who do not understand the protections that they have under D.C. law – in particular, those who are unaware of the existence of the eviction moratorium. However, *amici* do not explain why the filing of an eviction case in the Civil Actions Branch would have any different impact on these vulnerable tenants who fear or distrust the legal system than the filing of an eviction case in the L&T Branch. These legally unsophisticated tenants would not have any reason identified by the District and *amici* to think that the speed with which cases filed in the Civil Actions Branch are resolved means that they need not be worried by the filing of the case. Nor do the District and *amici* demonstrate that these tenants would assume that compared to cases filed in the L&T Branch, cases filed in the Civil Actions Branch are resolved so slowly that eviction is a dim and distant prospect that need not concern them.

For these reasons, the Court concludes that the filing moratorium applies to eviction cases in which the property owner invokes § 16-1101 instead of § 16-1501, or that are filed in the Civil Actions Branch instead of the L&T Branch.

4. Summary

Identifying the appropriate level of scrutiny of the statutory moratorium restricting property owners' constitutional right of access to the courts is a critical threshold issue. The parties have not cited, and the Court has not found, any cases, and certainly no Supreme Court or District of Columbia Court of Appeals cases, that are directly on point. Consistent with cases cited in Section II.A.1 above, the Court agrees with *amici* that "[w]hile the precise standard is unsettled, courts generally have engaged in an analysis weighing the severity of the intrusion against the importance of the governmental interest that it is intended to serve." *Amicus* Brief at 21-22. Intermediate scrutiny permits the Court to conduct this type of analysis. In contrast,

rational basis review (the standard that the District and *amici* contend should apply) does not provide for consideration of the burdens imposed by the filing moratorium on the constitutional rights of property owners: under rational basis review, "it suffices if the law could be thought to further a legitimate governmental goal, *without reference to whether it does so at inordinate cost.*" *See Fox*, 492 U.S. at 480 (emphasis added).

Several factors weigh in favor of strict scrutiny, including the fundamental nature of the constitutional right of access to the courts, constitutional protection of property rights that makes times of the essence in eviction cases, the breadth of the moratorium, and its lengthy and indefinite duration. Nevertheless, strict scrutiny is not warranted because of the temporary nature of the moratorium and the government's authority to regulate private commercial relationships. Considering all the relevant factors as a whole, the Court concludes that it should apply intermediate scrutiny.

B. Application of the standard

For the reasons explained above, the filing moratorium significantly burdens the constitutional rights of property owners by substantially delaying a proceeding that is required to be summary in nature and by depriving them of interim protection for a substantial and extended period. By depriving property owners of their right to a hearing appropriate to the nature of the case "at a meaningful time," the filing moratorium limits the property owners' constitutional rights. *See Boddie*, 401 U.S. at 378.

As a result, the District has a demanding burden of justification under intermediate scrutiny that requires it to affirmatively establish a substantial relationship to an important government interest, a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, and proportionality between the scope of the filing moratorium and the

interest served. *See Virginia*, 518 U.S. at 533; *Fox*, 492 U.S. at 480; *see generally* Section II.A.1 above. The District "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *See Edenfield*, 507 U.S. at 770-71.

In defense of the filing moratorium, the District and *amici* offer two primary justifications: (1) people may move out during the public health emergency solely because they are sued in an eviction case, even though the moratorium on evictions lasts until the public health emergency ends; and (2) occupants will suffer psychological harm solely because the owner of the property in which they live sues them for possession. Neither justification is sufficient to carry the District's burden under intermediate scrutiny. The anecdotal support offered by the District and *amici* is not enough to justify the substantial restriction on property owners' constitutional right of access to the courts, and supposition is not sufficient to fill in the gaps. *See Tyler*, 837 F.3d at 694; *Edenfield*, 507 U.S. at 770-71; *Annex Books, Inc.*, 624 F.3d at 369.[28]

The Court again emphasizes that protecting our community from the ravages of COVID-19 is an important and indeed compelling government interest and that the District and *amici* have provided substantial evidence that mass evictions would significantly worsen an already serious public health crisis. However, with the moratorium on actual evictions in place, the

[28] The District and *amici* do *not* contend that the litigation process itself puts tenants or other types of defendants at risk. The Court enables parties to litigate eviction (as well as other) cases efficiently and safely notwithstanding the pandemic. During the public health emergency, the Court has conducted only remote hearings so that no one is at risk of infection, and the Court has developed procedures to conduct remote bench trials, as well as evidentiary hearings such as hearings concerning protective orders. The Court will not resume in-person hearings until litigants, lawyers, court staff, and others can participate safely, and the Court will enforce safety rules (for example, requiring the use of masks) to ensure that no one is exposed to a significant risk of infection in any in-person hearing. The Court has also implemented measures to permit tenants to make protective order payments safely during the pandemic. *See, e.g.*, Chief Judge's November 5 Order (https://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/Amended-Order-11-5-20_FINAL.PDF).

District and *amici* have not established the requisite fit between the filing moratorium and this objective or that the filing moratorium will in fact alleviate the public health risks "to a material degree" in proportion to the harm to property owners. *See Fox*, 492 U.S. at 480; *Edenfield*, 507 U.S. at 770-71.

1. Move-outs due to lack of awareness of the eviction moratorium

According to the District, one goal of the filing moratorium is to ensure that tenants who are not aware of the filing moratorium or other legal protections do not move out simply because they get sued. Citing the statement of a Councilmember, the District asserts that the purpose of the prohibition on notices to vacate was to "make sure that tenants are not moving and making themselves homeless because they are unaware of the eviction moratorium." D.C. Brief at 10-11; *see Amicus* Brief at 5 ("as the Council also has recognized, service of an eviction notice or complaint can sow fear and confusion, leading tenants to move out rather than face the court process") (citing Eviction Notice Moratorium Emergency Declaration Resolution of 2020, Res. 23-519, § 2(c), 67 D.C. Reg. 11332 (Oct. 2, 2020)). Legal services providers told the Council about tenants who were not aware of their rights under D.C. law or of the moratorium on evictions and who were prompted by the mere filing of an eviction case to consider moving. But this information is anecdotal, and "mere anecdote" is not sufficient to satisfy intermediate scrutiny. *See Tyler*, 837 F.3d at 694. Although "legislatures are not obliged to insist on scientific methodology" (*Hutchins*, 188 F.3d at 544), it is relevant that the District and *amici* do not offer any statistical or other expert testimony demonstrating that a significant number of tenants would move solely because they are sued during a moratorium on evictions. "In the realm of First Amendment questions, the legislature must base its conclusions upon substantial

evidence." *See Turner Broadcasting System*, 520 U.S. at 196 (applying intermediate scrutiny) (cleaned up).

Approximately two months passed between the enactment of the eviction moratorium and enactment of the filing moratorium, and during this time, property owners filed approximately 1,700 eviction cases. The District and *amici* do not claim that before it enacted the filing moratorium, the Council gathered data about (1) how many of these tenants moved out, (2) how many of the tenants who moved out decided to move just because they got sued and did not know there was a filing moratorium, or (3) how many of these tenants became homeless or moved into more crowded living conditions. If tenants moved into living quarters equivalent to the quarters they moved out of, the move would not jeopardize their health or safety; the District and *amici* do not contend that the process of moving is inherently unsafe during the pandemic or that moving cannot be accomplished consistent with the public health guidelines issued by the District.

The Court accepts that when property owners file eviction cases, some occupants may be unaware of the eviction moratorium and move out because of ignorance, fear, or confusion, and that some of them may end up in less safe living conditions due to the scarcity of affordable housing in the District of Columbia. However, according to the District, the evil against which the filing moratorium protects is "mass" evictions. *See* D.C. Brief at 5, 21. Nothing in the legislative record or court record suggests that the lack of a filing moratorium did cause (during the two months of the public health emergency before it was enacted) or would cause move-outs on a mass scale. On the other, the filing moratorium affects 100% of property owners that are entitled to seek possession of their property during the public health emergency. *See* Section II.A.2 above. The District does not establish a proportional fit between the filing moratorium

and the danger against which it is intended to protect: it does not show that enough occupants will end up in less safe housing solely because of the filing of an eviction case to justify this sweeping and lengthy restriction on property owners' right of access to the court. *See Fox*, 492 U.S. at 480.

The nexus between the alleged problem and solution is more attenuated because the District has taken action to inform tenants about their rights and to spread the word that it has banned evictions for the duration of the public health emergency. Although the District was unable to explain at the November 30 hearing what the Office of the Tenant Advocate ("OTA") or other agencies are doing, it did not contend that these efforts are anemic or ineffective. Moreover, *amici* confirmed at the November 30 hearing that legal services organizations are systematically and affirmatively reaching out to defendants in eviction cases to inform them of their rights and of the eviction moratorium, and that tenant organizers are likewise doing whatever they can to make sure that tenants understand their options and their rights.[29]

2. Anxiety and depression

Amici contend that the filing moratorium reduces significant emotional harm: "Even for those who choose not to move when threatened with a new eviction filing, the threat of a pending case is likely to cause anxiety, depression, and suicidal ideations, at a time when many

[29] In their brief and at the November 30 hearing, *amici* discussed the adverse effect that a prior eviction case can have on a tenant's ability to obtain affordable housing or indeed any housing at all, as well as on their creditworthiness. *Amicus* Brief at 5. The Court accepts that landlords may be less willing to rent to people who were defendants in earlier eviction cases or may charge them a higher rent, and these people may have a more difficult time obtaining credit. However, these effects would occur regardless of the pandemic. Tenants can avoid these effects by using the 30-day statutory notice period to cure any lease violation before the landlord can file an eviction case and/or by getting a payment plan. *See* Section I.A.2 above. The filing moratorium creates a perverse incentive to the extent that it encourages tenants who do not want an eviction case on their record and who cannot afford their rent to move during the public health emergency before the landlord can file the case.

Americans already are struggling with fear and anxiety related to the pandemic and the economic crisis." *Amicus* Brief at 5-6. There is no question that millions of Americans, and probably hundreds of thousands of the 700,000 District residents, are struggling emotionally as a result of the pandemic, and these difficulties are seriously compounded for those who also have to deal with the constellation of problems associated with insecure housing. However, the defenders of the filing moratorium do not show that this moratorium significantly reduces these psychological effects and thereby justifies the substantial impairment of the constitutional rights of property owners caused by the moratorium.

Whether or not a property owner files an eviction case, inability to pay rent or to make mortgage payments, or other circumstances that put occupants at risk of eviction, by themselves cause emotional distress. That is particularly so when the income loss is long-term and the tenant or borrower has no realistic prospect of earning enough money to catch up on past-due rent or mortgage payment or even not to fall further behind, and the tragic fact is that thousands of District residents are in this predicament through no fault of their own. But whether or not their landlords sue them, tenants know when they owe rent, they know that landlords know when they do not pay their rent, and they understand that falling behind on their rent and other lease violations put them at risk of eviction.[30] With respect to the constitutionality of the filing

[30] The District and *amici* do not contend that landlords are legally prohibited from discussing lease violations with tenants. Indeed, the temporary legislation requires landlords to offer payment plans to tenants who fall behind in their rent and for tenants to provide their landlords with evidence that their inability to pay is due to the pandemic, so tenants behind in their rent will be aware that their landlords see a problem. Nor does any legislation prohibit landlords from telling tenants accurately and truthfully that the legislation permits landlords to start eviction proceedings if a tenant misses a payment under a payment plan. *See* District Brief at 31 ("Indeed, property owners may still collect rent in full from tenants who are able to pay, and may even collect partial rent payments from tenants who are behind – even from those who would otherwise face eviction."). The Eviction Notice Moratorium Emergency Amendment Act of 2020 (D.C. Act 23-415) prohibits "any action that is intended to force tenants to leave their

moratorium, the issue is whether, or to what extent, the filing moratorium significantly reduces the anxiety and depression that occupants would otherwise experience. The defenders of the moratorium have not offered substantial evidence that the effect is significant – that the filing of a lawsuit significantly increases the emotional distress that tenants or other occupants at risk of eviction already experience. *See Ezell*, 651 F.3d at 709 (requiring from the government "actual, reliable evidence to justify restricting First Amendment rights based on secondary public-safety effects") (cleaned up).

The impact of the filing moratorium on levels of stress and depression is also reduced by the moratorium on evictions until the pandemic is over. As the Court discussed in the preceding section, the District does not dispute that its own efforts, combined with those of legal services organizations, tenant organizers, and others, have led to widespread awareness throughout the community that no evictions can occur as long as the pandemic lasts, and this knowledge should alleviate the anxiety or depression that the filing of a lawsuit might otherwise exacerbate. Moreover, the District does not dispute that a tenant would get less comfort from a landlord's failure to file an eviction case when the tenant knows that the only reason why the landlord held back is the filing moratorium, and that the landlord will file the case as soon as it is legally able to do so.

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housing or otherwise give up their rights under the law." This provision is aimed at constructive evictions, which are already prohibited under *Mendes*, 389 A.2d at 787. *See* 9/21/20 Memorandum from Councilmember Trayon White Sr. to Chairman Phil Mendelson ("The purpose of this amendment is to prevent landlords for using alternative means to constructively evict residents during the COVID emergency eviction prohibition," including engaging in "retaliatory acts such as decreasing services, harassment, and refusing to renew a lease or rental agreement"). The Court does not interpret this provision to prohibit truthful, non-coercive speech. *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion) (government may not constitutionally suppress "truthful, nonmisleading commercial messages").

3. The 60-day extension

One final point is equally relevant to the District's arguments concerning both move-outs due to lack of awareness of the moratorium and added emotional distress caused by the filing of an eviction case. The District does not establish that extending the filing moratorium 60 days past the end of the public health emergency advances an important governmental interest enough to justify a significant restriction on property owners' right of access to the courts to initiate a summary proceeding, even though the District determined that evictions can safely resume as soon as the public health emergency ends. The District does not explain why the reasons for ending the eviction moratorium when the public health emergency ends do not apply to the filing moratorium as well.

At the November 30 hearing, the District contended that the extra 60 days gives tenants additional time to negotiate a payment plan or to find employment that would enable them to come up with the rent that they owe. As a threshold matter, this rationale applies only to non-payment of rent cases, and it does not justify extending the filing moratorium past the end of the public health emergency for either (1) tenants who are current in their rent but violated other provisions of their lease, or (2) foreclosed homeowners, squatters, or other who have no current right to occupy the property. Even for cases involving non-payment of rent, the District does not show that the 60-day grace period justifies the significant additional delay in the landlords' ability to regain possession of the rental unit and get income from it. For example, tenants can negotiate payment plans during the pandemic, and the record does not establish that an extra 60 days will enable a substantial number of tenants to come up with the money that they could not come up with in the months between the beginning of the public health emergency on March 11, 2020 and its end on December 31, 2020 at the earliest.

III. UNRESOLVED ISSUES

Because the Court concludes that the filing moratorium violates property owners' right of access to the courts, it need not reach a number of issues raised by property owners. Specifically, the Court does not address the following issues:

- Whether the filing moratorium violates D.C. Code § 1-204, which prohibits the District from passing any law that would violate the Contracts Clause if it were passed by a state.
- Whether the filing moratorium violates separation of powers principles or Title 11 of the Home Rule Act.
- Whether the filing moratorium constitutes a taking that entitles landlords to just compensation.[31]
- Whether the repeal and expiration of the emergency acts that contained the filing moratorium and had an applicability date of March 11, 2020 means that filing moratorium is currently applicable only to eviction cases filed on or after the applicability date of the current temporary act containing the eviction moratorium, and whether the filing moratorium imposes a "penalty, forfeiture, or liability" within the meaning of the savings clauses in D.C. and federal codes (*see United States v. Stitt*, 552 F.3d 345, 353 (4th Cir. 2008); *United States v. Obermeier*, 186 F.2d 243, 254-55 (2d Cir. 1954)).[32]

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[31] If the filing moratorium effects a taking (and the Court does not decide whether or not it does), the remedy would be to order the District to pay just compensation – not to enjoin any continued taking. *See Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2179 (2019) ("As long as just compensation remedies are available – as they have been for nearly 150 years – injunctive relief will be foreclosed," and "courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim").

[32] Because several dozen eviction cases have been filed on or after June 9, the question of whether the filing moratorium is constitutional would not be moot even if the filing moratorium currently applies only to cases filed after that date.

- Whether the filing moratorium applies to drug haven or one-strike cases.
- Whether cases filed after March 11 but before May 13, 2020 when the filing moratorium was first enacted should be dismissed or stayed if the Court had upheld the constitutionality of the filing moratorium.

The Court also does not address an issue raised by the District and *amici* concerning service of process in eviction cases. They contend that even if landlords could file the cases during the period of the public health emergency, D.C. Code § 16-1502 prevents them from serving the summons during this period. *See* D.C. Brief at 7. The Court does not decide whether the provision excluding the period of the public health emergency from the time calculation constitutes an effective moratorium on service, or whether it limits only the Court's ability to conduct a trial until at least seven days after the period of the public health emergency ends.

Another question of law that the Court need not and does not resolve is whether the statutory moratorium on debt collection cases applies to claims for money judgments for unpaid rent in eviction cases or whether it applies to claims for possession in these cases. *See* note 3 above; L&T Rule 3(b)(1)(B) (allowing, in addition to a claim for possession of real property, a plaintiff include a claim for "a money judgment based on rent in arrears and late fees as permitted by law" and to the extent permitted in Rule 3(b)(1)(C)); *cf*. D.C. Code § 16-1111 ("The plaintiff in ejectment is not required to join his claim for rent or damages with his claim for the recovery of the land and his omission to do so does not prevent him from bringing his action for rent or damages separately.").[33]

[33] *Amici* ask the Court to seal all the cases filed on or after March 11, 2020 in violation of the filing moratorium. *Amicus* Brief at 45-47. The Court's ruling on the unconstitutionality of the filing moratorium makes it unnecessary to address the procedural and substantive issues raised by this request.

IV. CONCLUSION

For these reasons, the Court declares and orders that:

1. The moratorium in D.C. Code § 16-1501(b) unconstitutionally restricts the right of property owners of access to the courts to obtain possession of their property.

2. The clerk shall schedule initial hearings in any pending case filed on or after March 11, 2020 as soon as reasonably possible.

3. The motion for a declaratory judgment in Case No. 2020 LTB 008032 is granted for the reasons stated in this order.

4. The orders for plaintiffs in cases filed on or after March 11, 2020 to show cause why the cases should not be dismissed are discharged.

5. The motions to dismiss Case Nos. 2020 LTB 008005 and 2020 LTB 8011 are denied.

Anthony C. Epstein

Anthony C. Epstein
Judge

Date: December 16, 2020

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