VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of August, 2020.

IN RE: AMENDMENT OF EIGHTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY

Code § 17.1-330(A) provides the Court with the authority to declare a judicial emergency. The first requirement for such a declaration is the existence of a "disaster." COVID-19 qualifies as a disaster because it is a "communicable disease of public health threat" under Code § 44-146.16, which Code § 17.1-330(A) incorporates by reference.

Second, Code § 17.1-330(A) requires that the disaster "substantially endanger[] or impede[] the . . . ability of persons to avail themselves of the court, or the ability of litigants or others to have access to the court or to meet schedules or time deadlines imposed by court order, rule, or statute." An absolute bar to access, such as when the courthouse is closed or destroyed due to flooding or other natural disasters, is not required under the statute. Instead, the statute is satisfied when there exists a "substantial" "endangerment" of the ability of a litigant to avail him/herself of court, or when that ability is "impeded." Black's Law Dictionary defines "substantial" as "having actual, not fictitious, existence"; "of real worth and importance"; "considerable in amount or value"; and "having permanence or near-permanence; long lasting." *Substantial*, Black's Law Dictionary (10th ed. 2014).

The ease with which the COVID-19 virus can spread, the risks associated with traveling to and appearing in the courthouse for those acting pro se with certain health conditions that disproportionately afflict the economically disadvantaged, and the inability of many citizens to access the courts remotely or to hire lawyers who can argue on their behalf, may "substantially endanger[]" or "impede[]" the "ability of [tenants] to avail themselves of the court."

Code § 17.1-330(D) further provides that

> Notwithstanding any other provision of law, such order may suspend, toll, extend, or otherwise grant relief from deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes, rules, or court orders in any court processes and proceedings, including all appellate court time limitations.

This Court has declared a judicial emergency and previously exercised its authority, at the request of the Governor, to suspend writs of eviction and unlawful detainer proceedings.

WHEREFORE, pursuant to the authority conferred on the Court by Code § 17.1-330, and at the request of the Governor "to allow his administration the time to both work with the General Assembly to develop and pass a legislative package that will provide additional relief to those facing eviction and to expand financial assistance for tenants through [its] rent relief program," and with the agreement of a majority of the Justices of this Court, the Eighth Order Modifying and Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency, entered on July 29, 2020, is hereby amended as follows:

"Effective August 10, 2020, and through September 7, 2020, pursuant to Va. Code § 17.1-330, the issuance of writs of eviction pursuant to unlawful detainer actions is suspended and continued. However, this suspension and continuation shall not apply to writs of eviction in unlawful detainer actions that are unrelated to the failure to pay rent."

It is so ORDERED.

Justice William C. Mims
Justice S. Bernard Goodwyn
Justice Cleo E. Powell
Justice Stephen R. McCullough

CHIEF JUSTICE DONALD W. LEMONS, with whom JUSTICE D. ARTHUR KELSEY and JUSTICE TERESA M. CHAFIN join, dissenting.

Evictions for failure to pay rent have become a national crisis in these times of economic difficulties. There is not a person on this Court who does not share a deep concern for people in these circumstances. The differences expressed in this order have to do with the proper manner to address this issue.

The solution properly lies with the legislative branch and its responsibility to provide sufficient appropriations to fund rent relief efforts and with the executive branch to effectively administer such programs. The solution most assuredly does not lie with the judicial branch of government. The courts should not create a preference for one set of litigants over another. The government should not expect one group of property owners who lease their property to tenants to finance their unfortunate circumstances. If there is to be a subsidy, it is properly the responsibility of the legislative and executive branches. The judicial branch should not put a heavy thumb on the scales of justice and deny property owners access to the courts and enforcement of their long-established rights under the law.

JUSTICE D. ARTHUR KELSEY, with whom CHIEF JUSTICE DONALD W. LEMONS and JUSTICE TERESA M. CHAFIN join, dissenting.

The ex parte order temporarily — but absolutely for a specific time period — forbids landlords from exercising their common-law, statutory, and contractual rights in Virginia courts. "Legal obligations that exist but cannot be enforced," Justice Holmes once said, "are ghosts that are seen in the law but that are elusive to the grasp." *The W. Maid*, 257 U.S. 419, 433 (1922).

The ex parte order entered today places the legal rights of thousands of Virginia citizens outside the grasp of the judicial system. How long will Virginia courts be closed for the enforcement of landlords' legal rights? Will this order be extended as so many of the other judicial emergency orders have been? No one knows.

I respectfully decline to join the majority's ex parte order. Four reasons explain why I must reach this conclusion.

First, we do not have the statutory authority under Code § 17.1-330 to enter a statewide eviction moratorium. That statute was meant to preserve, not to deny, access to the courts during a crisis. The majority's reliance on Code § 17.1-330 as a basis for issuing this ex parte order rests on the thinnest of analytical grounds.

Second, the ex parte order has the effect of judicially usurping the statutory remedy specifically enacted by the General Assembly to address the housing crisis caused by the COVID-19 pandemic. The legislature has the constitutional authority and responsibility to address the housing crisis facing the Commonwealth.

Third, the ex parte order offends the due-process traditions of our Commonwealth and imprudently sidelines one of the most important features of the Virginia judiciary — the adversarial process. We have received no legal briefs and have heard no oral argument. The citizens most affected by the order, landlords seeking to assert their legal rights, have been afforded no opportunity to be heard on any of the legal issues or to contest any of the factual assumptions that the majority appears to be making.

Fourth, the ex parte order leaves unaddressed serious constitutional questions that deserve a full and mature consideration and should not be ignored. These constitutional concerns may or may not be legally dispositive, but they should not be summarily dismissed by an ex parte order.

I. STATUTORY AUTHORITY

Code § 17.1-330 does not authorize the issuance of a judicial moratorium on writs of eviction. A "judicial emergency" under Code § 17.1-330(A) authorizes judicial relief only when a disaster (in this case a communicable disease of public health threat) "substantially endangers or impedes [1] the operation of a court, [2] the ability of persons to avail themselves of the court, or [3] the ability of litigants or others to have access to the court or to meet schedules or time deadlines imposed by court order, rule, or statute."

The housing crisis is a true emergency, to be sure. But it is a socio-economic emergency — not a judicial emergency. The alleged inability of a tenant to pay rent does not affect the "operation of [any] court," the "ability of persons to avail themselves of the court," or "the ability of litigants to have access to the court or to meet schedules or time deadlines." Code § 17.1-330(A). *Exactly the opposite will be true under this ex parte order*: For a disfavored class of litigants — landlords with common-law, statutory, and contractual rights to possession of their properties and termination of their leases — the "operation of a court" for the purpose of vindicating their legal rights and their ability "to avail themselves of the court" to secure those rights would be impeded, *id.*

Even where, but not here, a pandemic "substantially endangers or impedes" access to the courts under subsection A of Code § 17.1-330, subsection D only authorizes a specific kind of emergency order: "[S]uch order may suspend, toll, extend, or otherwise grant relief from deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes, rules, or court orders in any court processes and proceedings, including all appellate court time limitations." The only authorized purpose of a subsection D order, therefore, is to provide "relief from deadlines, time schedules, or filing requirements." *Id.* This provision addressing the scope

of authorized orders implements the purpose identified in subsection A, assuring "the ability of litigants or others to have access to the court or to meet schedules or time deadlines imposed by court order, rule, or statute."

This statute is meant to ensure that access to the courts is not denied because of missing a deadline or filing requirement during a disaster. Nothing in subsections A or D authorizes closing the courthouse doors to some litigants on the ground that enforcing their legal rights would economically harm other litigants. We obviously have the inherent authority to close a courthouse if it presents a health or safety risk to those who enter it. If a courthouse is on fire, we can order everyone out. We can do the same when the close quarters of a courthouse creates a hotbed of disease. An eviction moratorium, however, has nothing to do with preventing the spread of disease by limiting social interactions in the courthouse, which is the only underlying justification for a judicial emergency order because of COVID-19.

The majority's only response is to speak vaguely about "disadvantaged" tenants who suffer from "certain health conditions." *Ante* at 1. Because of these unspecified health conditions, the majority asserts, tenants who are behind on paying their rent cannot "avail themselves of the court," *id.*, and thus need protection of Code § 17.1-330. Whatever the stated purpose of the majority order, its only effect is to prevent landlords from exercising their right to "avail themselves of the court." *Id.* The *tenants* are not clamoring to go to court to "avail" themselves of their rights or seeking "relief from deadlines, time schedules, or filing requirements," Code § 17.1-330(D). Even if they were, how can the majority so broadly generalize tenants as "disadvantaged" individuals suffering from "certain health conditions"? *Ante* at 1. Do landlords have a due process right to contest the majority's generalization in particular cases? Apparently not. For the duration of this ex parte order, it does not legally

matter that a particular tenant is not "disadvantaged" by "certain health conditions," *id.* The majority has declared them all to be so — without taking evidence, hearing from witnesses, reading legal briefs, or receiving arguments from any of the thousands of litigants (tenants or landlords) affected by the order.

II. The Legislative Remedy: House Bill 340

The ex parte order has the effect of judicially amending the very legislation enacted by the General Assembly to address the COVID-19 housing crisis, which the legislature and the Governor prudently foresaw back in April. The legislature passed the Governor's substitute of House Bill 340 during its reconvened session on April 22, 2020. *See* 2020 Acts ch. 1202 (codified in part as Code § 44-209); *see also* 2020 Op. Atty. Gen. 20-033, 2020 WL 4271714, at *4-5 (July 15, 2020), https://www.oag.state.va.us/files/Opinions/2020/20-033-Price-et-al.pdf (describing the protections afforded by House Bill 340). The law became effective on April 22 pursuant to its emergency enactment clause.

The emergency law provides that "any tenant, homeowner, or owner, respectively, affected by the novel coronavirus (COVID-19) pandemic public health crisis during the period for which the Governor has declared a state of emergency," who is a defendant in an unlawful detainer action for nonpayment of rent, "shall be granted a 60-day continuance" of an unlawful detainer action. 2020 Acts ch. 1202 at enactment cl. 2, § 1; Code § 44-209(B). "Affected by" the pandemic is defined as

> to experience a loss of income from a public or private source due to the Emergency, such that the affected party must request a stay or continuance, as applicable, by providing written proof to a court or lender, as applicable, stating that he is not currently receiving wages or payments from a public or private source as a result of the Emergency.

2020 Acts ch. 1202 at enactment cl. 2, § 5. The "written proof" may be "a paystub showing zero dollars in earnings for a pay period within the period for which the Governor has declared a state of emergency . . . in response to the novel coronavirus (COVID-19) pandemic public health crisis," "a copy of a furlough notification letter or essential employee status letter indicating the employee's status as nonessential due to the Emergency," or "any other documentation deemed appropriate by a court or lender." *Id.*

The law further provides that its provisions "shall expire 90 days following the end of a state of emergency declared by the Governor in response to the novel coronavirus (COVID-19) pandemic public health crisis." *Id.* at enactment cl. 4. House Bill 340, therefore, is still in effect, and — as a result — still governs the judiciary's handling of unlawful detainer actions during the COVID-19 pandemic. Whether this legislative response to the housing crisis is adequate or not, we have no authority under separation-of-powers principles to issue an ex parte judicial order expanding the statutory remedy.

III. Due Process & the Adversarial System

The ex parte order targets a specific subset of litigants: landlords. The rights that will be sacrificed by operation of the order are the landlords' right to possession of their property and their right to statutory remedies under the eviction statutes. It does not matter whether the landlord will eventually get paid everything that he is owed (a highly optimistic supposition at best) or whether he can collect future rents if the tenant becomes employed or starts receiving government subsidies. What the landlord wants is possession of his property. He does not want to continue in a breached lease against his will.

The majority ignores the last point. The ex parte order does not appear to absolve the landlord from any continuing legal obligations to comply with common-law, statutory, and

contractual duties imposed upon him — the very duties the landlord has a right to avoid when the lease is terminated by the tenant's breach. The order is wholly one-sided by placing a judicial moratorium on enforcing the legal rights of the landlord but not the tenant. A breaching tenant would still be free to file suit seeking damages or injunctive relief to enforce the landlord's alleged duties to provide habitable premises, to repair unsafe conditions, to maintain common areas, to provide agreed-upon security, to supply running water, and to perform any other duties required by either the common law or the Virginia Residential Landlord-Tenant Act, *see* Code §§ 55.1-1214 to -1226.

The ex parte order also rests on a wholly untested factual assumption. The judicial ban on issuing writs of eviction for failure to pay rent assumes that the pandemic has caused tenants to lose income, and *thus*, they cannot pay their rent. In other words, *but for* the pandemic, the tenants *would have* paid their rent. That may be a reasonable statistical guess. But are we to irrefutably presume that this is true of all tenants who have not paid their rent? What about tenants who were in a non-curable default prior to the pandemic? What about tenants that did not lose their jobs but still did not pay their rent? What about tenants who lost their jobs because of the pandemic but have collected unemployment insurance payments previously supplemented by the $600/week CARES Act unemployment benefit and the $1,200 CARES Act one-time payment?

Silently embedded in the ex parte order is the unproven assumption that but-for causation from the pandemic factually exists in all cases in which a tenant has not paid rent. The judiciary should not deny a landlord of his legal rights based on a wholly untested factual assumption. Our trial courts should decide on a case-by-case basis whether a tenant's failure to pay rent was caused by the pandemic. The ex parte order, however, effectively supersedes the fact-based

judgments routinely made by 120 general district court judges and 168 circuit court judges across the Commonwealth. The judiciary is at its best when the common-law adversarial system gives litigants access to the courts to adjudicate their disputes.

IV. Unaddressed Constitutional Concerns

The ex parte order does not mention, much less analyze, any of the several constitutional questions that could be asked about a judicially imposed moratorium on evictions. Three such questions in particular concern me.

A. Suspension of the Execution of Generally Applicable Laws

Article I, Section 7 of the Constitution of Virginia prohibits the suspension of laws outside of legislative action: "That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." We applied the anti-suspension principle in *Howell v. McAuliffe*, and while the application in that case centered on the suspension of law by the executive branch, *see* 292 Va. 320, 344-50 (2016), the principle appears to apply equally to the judicial branch. The "power of suspending laws, *or the execution of laws, by any authority*, without consent of the representatives of the people" is prohibited. Va. Const. art. I, § 7 (emphasis added).

In *Howell*, we described the anti-suspension provision as a "separation-of-powers principle" that can be traced back through every version of the Constitution of Virginia to when it was first recognized in the 1776 Virginia Declaration of Rights. *Howell*, 292 Va. at 345. The suspending power historically "had the effect of an 'abrogation' of a general rule of law in favor of unnamed individuals within the class affected by the law." *Id.* at 348-49 (quoting 6 W.S. Holdsworth, A History of English Law 217 (1924)).

Here, the general rule of law pursuant to Code §§ 8.01-470 and -471 provides the remedy of a writ of eviction upon a judgment for the recovery of property in an unlawful detainer action. "Writs of eviction, in case of unlawful entry and detainer, *shall be issued* within 180 days from the date of possession and shall be made returnable within 30 days from the date of issuing the writ." Code § 8.01-471 (emphasis added). While trial courts have the inherent discretion to defer the issuance of a writ of eviction for up to 180 days after entering judgment for possession for equitable, case-specific reasons, *see id.*; Code § 8.01-470 ("On a judgment for the recovery of specific property, . . . a writ of eviction for real property may issue for the specific property pursuant to an order of possession entered by a court of competent jurisdiction . . . ."), it is questionable whether we have the authority to temporarily ban the issuance of writs of eviction based upon nonpayment of rent without any consideration at all of the particular facts in each case. And even if we did have such authority, I consider it imprudent for us to issue an ex parte order that supersedes the fact-specific, discretionary judgments of 120 general district court judges and 168 circuit court judges across the Commonwealth.

The ancient equitable principle that a right does not exist without a remedy also counsels against a judicial moratorium on writs of eviction. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, 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). Chief Justice Marshall's words echo the wisdom of Blackstone and Coke. *See* 3 William Blackstone, Commentaries *23 ("[I]t is a general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded."); *id.* at *109 (recognizing the "settled and invariable principle . . . that every right when withheld must have a remedy, and every injury its

proper redress"); 2 Edward Coke, Institutes of the Laws of England 55 (1797) (stating that every statute "made against any injury, mischief, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved" and that an injured person "without exception, may take his remedy by the court of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay" (altering archaic spelling)). If a landlord can obtain a favorable judgment in an unlawful detainer action but cannot receive the remedy of a writ of eviction as provided by law, the eviction statutes have become, as Alexander Hamilton warned, "nothing more than advice or recommendation," The Federalist No. 15 ("It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience.").

B. Temporary Takings

Next, prohibiting the issuance of a writ of eviction to a landlord with an unlawful detainer judgment arguably sanctions a continuing trespass on the landlord's property. A landlord who sees it this way should have a chance to address whether the ex parte order constitutes a de facto temporary taking of his properties that is subject to the order and, if so, whether such a taking entitles that landlord to just compensation. That is a serious issue. "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. '[A] State, by ipse dixit, may not transform private property into public property without compensation.'" *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion) (emphasis in original) (citation omitted).

It is no answer to say the taking is merely temporary. "'[T]emporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings,

for which the Constitution clearly requires compensation." *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987). "Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'" *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) (citation omitted). We stated the point plainly in *Anderson v. Chesapeake Ferry Co.*, which held that "[t]he fact that the taking is temporary does not require just compensation for the taking to be based on new principles. As just compensation for a permanent taking is fair market value, so just compensation for temporary taking can only be a fair rental value." 186 Va. 481, 492 (1947). *See generally* Va. Const. art. I, § 11 ("No private property shall be damaged or taken for public use without just compensation to the owner thereof.").

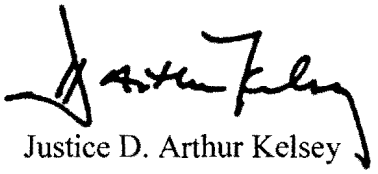
C. Impairment of Contracts

Finally, even if Code § 17.1-330 authorizes the ex parte order, the majority offers no explanation for whether such an order issued pursuant to this statute is consistent with the impairment-of-contract clause of the Virginia Constitution, *see* Va. Const. art. I, § 11, which provides that "the General Assembly shall not pass any law impairing the obligation of contracts." A lease agreement is a contract. If Virginia contract principles grant a landlord the right to terminate a breached lease and reenter his property, how can we deprive him of that contractual right — particularly while simultaneously requiring him to provide the breaching tenant with all of *that party's* rights (possession, noninterference with enjoyment, utilities, inter alia) under the lawfully terminated lease?

V. CONCLUSION

The COVID-19 pandemic and its resulting economic fallout are crises of monumental proportions. I do not question my colleagues' motives in issuing this ex parte order. But we must do the right thing, the right way, for the right reason. One out of the three is not enough.

I respectfully dissent.



Justice D. Arthur Kelsey

This order shall be published in the Virginia Reports.