DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon St. Colorado Springs, CO 80903 Telephone: (719) 452-5000 Plaintiffs: VVVV, WWWW, XXXX, YYYY, AND ZZZZ v. Defendant: JARED POLIS in his capacity as Governor of the State of Colorado	COURT USE ONLY
Attorney for Plaintiff: John Finger #20647 John Finger, LLC 226 ½ S. Union Ave., Suite 201, Pueblo, CO 81003 Phone Number: (719) 499-8056 E-mail: ifoughtthelawandwon@gmail.com	Case Number: Division Courtroom

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND DAMAGES

Plaintiffs, by and through counsel, state and allege as follows:

GENERAL ALLEGATIONS

1. In March 2020, Colorado's Governor, Jared Polis, began issuing a series of executive orders as his way of responding to the coronavirus pandemic (COVID-19). Four of those executive orders have banned or restricted evictions and writs of restitution under C.R.S. § 13-40-101, *et seq*. All four of those executive orders cited Article IV, Section 2 of the Colorado Constitution and C.R.S. §24-33.5-701 *et seq* as the Governor's authority to issue said orders. All four orders are invalid.

2. The first executive order, D 2020 012, was issued on March 20, 2020 (**Exhibit "A"**). In that order, Gov. Polis stated, inter alia, *"I am temporarily limiting evictions, foreclosures…until April 30, 2020." The same order banned landlords from imposing "…late fees or penalties for the late payment or nonpayment of rent until April 30, 2020 (Part II A)*." Under Part II B, Gov. Polis *"direct[ed] the Executive Director of the Department of Public Safety (DPS) to work with all Sheriffs, Mayors, and other local leaders to take similar formal actions with their law enforcement agencies to suspend residential eviction activity in the State until April 30, 2020 unless such actions are necessary to protect public health and safety."* These actions effectively eliminated any landlord's ability to initiate or continue with any

eviction proceeding for nonpayment of rent or any physical eviction by any sheriff resulting therefrom.

3. The second executive order, D 2020 051, issued April 30, 2020 (**Exhibit "B"**), used more blatant language than that of the first executive order. Under Part L, *"No individual shall file or initiate actions for forcible entry and detainer (i.e. eviction) involving a premises based upon a tenant's default of any contractual obligation imposed by a rental agreement under C.R.S. § 13-40-101, et seq."* Parts M and N of that executive order prohibited judgments for possession and removal of a tenant or exclusion of a tenant from property based on a writ of restitution. Part P continued the prohibition of the charging of late fees due to nonpayment of rent. That order was due to expire 30 days from April 30, 2020.

4. The third executive order, D 2020 088, issued May 29, 2020 (**Exhibit "C"**), extended the eviction limitation by using language which was only slightly different from the second, namely, banning *evictions "if the default is caused by financial hardship due to COVID-19 (Part II)."* The bans on enforcing judgments for possession and writs of restitution were likewise extended if the tenant was experiencing financial hardship due to COVID-19. That order was due to expire 15 days from May 29, 2020.

5. The Colorado Legislature, which was suspended from March 14, 2020, returned to work on May 26, 2020. Proponents of a continued eviction pause introduced the "*Relief for Residential and Small Business Tenants in Response to COVID-19 Disaster Emergency Act of 2020."* This bill would have continued the ban on evictions past the end of the prohibition stated in executive order E 2020 088. After consideration, the Legislature refused to pass the bill before the end of the last day of the legislative calendar, June 12, 2020.

6. The next day, a Saturday, Gov. Polis disregarded the role and will of the Legislature and rewrote the law himself, signing the fourth executive order, D 2020 101 (**Exhibit "D"**). This order *"suspend[s] C.R.S. § 38-12-204(1), 38-12-204.3(2), and 13-40-104(1)(d) requiring landlords to provide tenants ten (10) days' notice of any default for non payment of rent during which time the tenant has the opportunity to cure the default. Landlords must provide tenants with thirty (30) days' notice of any default for non payment before initiating or filing action for forcible entry and detainer. Such 30-day notice may extend beyond the expiration of this Executive Order. During this thirty (30) day period, tenants shall have the opportunity to cure any default for nonpayment (Part II)."* The order does not state whether landlords who had previously posted a 10-day demand had to re-start the process. It also doesn't state whether his order applies to cases where a 5-day demand is required under C.R.S. §13-40-104 or commercial leases, where a 3-day demand is required. Once again, Gov. Polis prohibited late fees, this time from May 1, 2020 through June 13, 2020. Having signed the order on a Saturday, Gov. Polis did not give any landlords in non-payment cases, some of whom had been waiting over three months to file eviction, a chance to do so. The order is due to expire 30 days from June 13, 2020, but the 30-day notice may extend beyond the term of the executive order. The order is so broad that it even allows millionaires and billionaires who have not been affected by COVID-19 the ability to defer payment of rent to a struggling landlord and not pay late fees.

7. Plaintiff VVVV, owns real property in El Paso County, Colorado. Plaintiff has a contract with the tenant at that location, requiring the tenant to make monthly rent payments. The tenant has failed to pay rent for the past six months and owes, at the date of this filing, over $8,000.00 in rent, late fees and other damages. Damages continue to accrue. The Plaintiff has posted a 10-day demand for compliance notice and has made numerous attempts to collect rent from the tenant. The tenant continues in possession, is well aware of the continuous set of executive orders issued by Gov. Polis. and refuses to pay rent. The Plaintiff must nonetheless continue to make payments on the underlying debt, taxes, insurance and maintenance. The Plaintiff has been harmed irreparably by the orders of Gov. Polis, which have effectively barred Plaintiff from seeking an adequate remedy in court. Damages continue to accrue.

8. Plaintiff WWWW owns real property in Teller County, Colorado. Plaintiff has a contract with the tenant at that location to pay monthly rent of $1,200.00. With one exception, Plaintiff's tenant has refused to pay rent since April 15, 2020, when Plaintiff posted the 10-day demand for compliance notice. Plaintiff has attempted on numerous occasions to obtain the rent from the tenant, without success. The tenant continues in possession, is well aware of Gov. Polis' orders and also caused property destruction, changed locks, refuses to allow maintenance or inspection at the property, discharges firearms, refuses to reimburse Plaintiff for propane charges, accumulates trash and causes other nuisances. Plaintiff has been irreparably harmed financially by the orders of Gov. Polis, whose orders have effectively barred Plaintiff from seeking an adequate remedy in court. As of the date of this filing, the tenant owes $2,900.00, late fees plus other damages. Damages continue to accrue.

9. Plaintiff XXXX owns real property in El Paso County, Colorado and has a contract with the tenant at that location for the tenant to pay a monthly rent of $1,600.00. Due to the governor's continuing executive orders, Plaintiff was unable to collect rent and must instead turn to starting eviction based on a notice to quit. That tenant refuses to pay the monthly rent. She continues to reside in the property now. As of the date of this filing, the tenant owes $6,400.00, late fees plus other damages. Her non-payment of rent has resulted in irreparable financial hardship for Mr. XXXX. Damages continue to accrue.

10. Plaintiff YYYY owns property in El Paso County, Colorado and has a contract with the tenant at that location, obligating the tenant to pay monthly rent of $2,700.00. Plaintiff has sought rent from his tenant, but that tenant refuses to pay, knowing of Gov. Polis' continuing executive orders. They continue to reside in that property now. As of the date of this filing, those tenants owe $5,400.00, late fees plus other damages. Damages continue to accrue.

11. Plaintiff ZZZZ owns property in El Paso County, Colorado and has a contract with the tenant at that location, obligating the tenant to pay monthly rent of $1,000.00. Plaintiff has sought rent from his tenant, but that tenant does not pay and refuses all communication with Plaintiff. That tenant has allowed unauthorized persons and animals to occupy the unit. The occupants' use has caused water damage to the unit underneath that of the Plaintiff. The occupants flush unsuitable items down the toilet, causing sewage backups and damage to both

Plaintiff's unit and the unit below. Neither the local health department nor the local police will assist. The nonpayment and damages by the occupants, combined by Gov. Polis' prohibitions of evictions for non-payment of rent, have caused irreparable harm to ZZZZ. As of the date of this filing, the tenants owe in excess of $7,649.18, not including late fees or the physical damages caused by the occupants. Plaintiff filed an eviction case in March 2020. The return of service was scheduled for March 24, 2020 but was continued due to Gov. Polis' executive orders. That return of service has still not occurred, and Plaintiff's damages continue to accrue. Plaintiff has no indication as to whether his case must be re-filed, he must post a new demand notice or, if so, the duration thereof. None of the Plaintiffs in this case is able market his or her respective property to a replacement tenant or mitigate their damages.

12. All of these Plaintiffs have standing, as they have suffered an injury to a legally-protected interest as a result of Gov. Polis' actions. Colorado Medical Society v. Hickenlooper, 349 P.3d 1133 (2015).

JURISDICTION AND VENUE

13. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

14. This Court has jurisdiction over the parties and the subject matter of this case, and venue is appropriate in this Court, because this Complaint concerns a party whose property is in El Paso County, Colorado, and the Defendant, as chief executive officer of the State of Colorado, can be sued anywhere therein. Plaintiff XXXX has agreed to consolidate her Teller County case with the other cases in El Paso County. See International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny.

15. Upon information and belief, no party to this litigation is in the military service of the United States, and all are engaged in a civilian occupation.

First Claim for Relief
(Violation of the Separation of Powers Doctrine, *Ultra Vires*)

16. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

17. The judicial, executive and legislative powers are separate and are established as a system of checks and balances on each other. No one power is superior to the others.

18. Judicial review has been well-established since the decision of Marbury v. Madison, 5 U.S. 137 (1803). Article III of the Colorado Constitution prohibits one branch of government from exercising powers that the constitution vests in another branch. See Dee Enterprises v. Indus. Claim Appeals Office of State of Colo., 89 P.3d 430, 433 (Colo. App. 2003). The Governor's authority when it comes to issuing executive orders that go beyond the

administration of government and call for actions that affect private citizens by force of law is limited by enabling legislation. See *e.g.* Colo. Polytechnic College v. State Board, 476 P.2d 38 (Colo. 1970). It is the province of the Legislature to enact legislation and the province of the executive to see that the laws are faithfully executed. Colorado General Assembly v. Lamm, 704 P.2d 1371, 1380 (Colo. 1985). As such, and concluded by the Office of Legislative Legal Services, *"the Governor lacks authority to formulate policy or impose requirements beyond regulating the internal workings of the executive branch."* See Office of Legislative Legal Services, Memorandum, September 7, 2018 (**Exhibit E**).

19. In each of the executive orders in this litigation, Gov. Polis cites Article IV, Section 2 of the Colorado Constitution and C.R.S. §24-33.5-701 *et seq* as his authority.

20. Article IV, Section 2 of the Colorado Constitution reads as follows: *"Governor supreme executive. The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."* Note that the language of that section says that the laws will be faithfully executed, not promulgated by his own whim.

21. C.R.S. §24-33.5-701 *et seq* is the Colorado Disaster Emergency Relief Act (hereinafter "Act"). The Act was passed before the current pandemic and established the framework under which the Governor could operate in the event of a disaster, including disease epidemics. The Act provides that the Governor may declare by executive order that *"a disaster has occurred or that this occurrence thereof is imminent. The state of disaster emergency shall continue until the governor finds that the threat of danger has passed or that the disaster has been dealt with to the extent that emergency conditions no longer exist and the governor terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty days unless renewed by the governor."* C.R.S. §24-33.5-704(4).

22. The specific powers granted to the Governor to respond to the declared emergency are enumerated under C.R.S. §24-33.5-704(7):

(7) In addition to any other powers conferred upon the governor by law, the governor may:

(a) Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency;

(b) Utilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency;

(c) Transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services;

(d) Subject to any applicable requirements for compensation under section 24-33.5-711,

commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency;

(e) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

(f) Prescribe routes, modes of transportation, and destinations in connection with evacuation;

(g) Control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises therein;

(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, or combustibles;

(i) Make provision for the availability and use of temporary emergency housing; and

(j) Determine the percentage at which the state and a local government will contribute moneys to cover the nonfederal cost share required by the federal "Robert T. Stafford Disaster Relief and Emergency Assistance Act", as amended, 42 U.S.C. sec. 5121 et seq., required by the federal highway administration pursuant to 23 U.S.C. sec. 125, or required by any other federal law in order to receive federal disaster relief funds. After making such a determination, the governor may amend the percentage at which the state and local government will contribute moneys to the nonfederal cost share based on the needs of the individual local governments. As soon as practicable after making or amending such a determination, the governor shall notify the joint budget committee of the source and amount of state moneys that will be contributed to cover a nonfederal cost share pursuant to this paragraph (j).

23. None of the powers conferred under either Article IV Part 2 or C.R.S. §24-33.5-701 *et seq* even comes close to conferring a power upon the Governor to suspend evictions or the writs of restitution resulting therefrom. Evictions and writs of restitution are within the purview of the judicial branch. Since Gov. Polis cited only these two laws as his authority for suspending evictions and writs of restitution, the argument above alone is sufficient for the Court to declare that Gov. Polis acted *Ultra Vires* and to nullify the executive orders.

24. The executive orders shut down another branch of government, namely, the judicial branch. Landlords such as the Plaintiffs who would pursue rent from their tenants have been unable to use the only lawful system available to them in order to preserve their rights, namely, the court system. Under the order, judges have lost the ability to use their discretion and consider the facts of each case. Therefore, Judicial discretion has been replaced by executive order. The executive orders are in clear violation of the authorities cited *infra*.

25. All of the executive orders usurped the powers of the Legislature, in that only the Legislature has the authority to enact legislation affecting landlord-tenant law. The fourth executive order is especially egregious: by *"suspend[ing] C.R.S. § 38-12-204(1), 38-12-204.3(2), and 13-40-104(1)(d),"* Gov. Polis unlawfully nullified statutes which were duly passed by the Legislature and signed into law, then invented his own, arbitrary 30-day notice

requirement. Interestingly enough, Gov. Polis himself signed the latest versions of those statutes into law.

WHEREFORE, Plaintiffs move that the executive orders be declared null and void, for fees and costs, and for other relief as the Court may deem appropriate.

Second Claim for Relief
(Abuse of Power, *Ultra Vires*)

26. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

27. On March 25, 2020, Gov. Polis issued Executive Order D 20 017, the so-called "*Stay-At Home*" order, citing the same authorities stated *infra.* This order mandated that Coloradans stay at home, with certain limited exceptions. Gov. Polis issued this order under the guise that *"…we must take additional action to minimize the duration of this epidemic and of the disruption to our daily lives. The virus that causes COVID-19 is spread primarily by close contact between people and through respiratory droplets when an infected person coughs or sneezes."* At the time, Gov. Polis concluded that COVID-19 was such a threat that people must be ordered to stay home.

28. Executive Order D 20 017 expired on April 11, 2020 and was not renewed. In the *"Safer At Home"* order which followed, Executive Order D 2020 044, Gov. Polis admitted, *"we have seen indications that our efforts to 'flatten the curve' are working."* The purpose of that executive order was to "*allow many Coloradans to return to work while we maintain a sustainable level of social distancing."*

29. Indeed, the numbers have shown that there has not been a spike in the number of COVID-19 cases in Colorado since the "Safer At Home" order was issued. The seven-day average of cases, based on the reporting date, has not returned to the levels seen in mid-May 2020, and death rates from COVID-19 have continued to decline.

30. Under the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act, Public Law 116-136, most Americans have received a check or deposit in the amount of $1,200.00 from the U.S. Treasury. Those who have lost their employment due to the pandemic have received an extra $600.00 over and above their weekly unemployment benefits. This strengthens tenants' ability to pay their financial obligations such as rent.

31. Gov. Polis himself has authorized the reopening of places of worship, restaurants, pools, theaters, store fronts and other businesses. Most businesses which have not shut down permanently as a result of Gov. Polis' orders have been free to reopen with certain restrictions. Yet landlords are still expected to carry the burden for those who don't pay their rent.

32. Gov. Polis likewise has no power to prohibit late fees under the authorities he

cites. Late fees are important to ensure that tenants punctually comply with their lease obligations. The landlord's obligations don't wait for a tenant to casually decide when to pay his/her rent. Landlords such as the Plaintiffs have expenses such as mortgages, taxes, insurance, utilities and maintenance which don't wait because tenants don't pay their rent. The Defendant's proscription of late fees is arbitrary and unlawful.

33. Alternatively, if Gov. Polis did have authority to halt or limit evictions, late fees and writs of restitution by way of executive authority, and Plaintiffs do not concede such authority ever existed, his authority expired with the expiration of his *"Stay at Home"* order on April 11, 2020, and any action taken by the Defendant subsequent to that date should be declared *Ultra Vires.* People were no longer confined to their homes and could go about their business, allowing them to work and pay their rent. Any emergency authority Gov. Polis had at the beginning of this crisis expired with his *"Stay at Home"* order, and he no longer has any authority to act under the authorities he cites in his executive orders. As a result, the second executive order should have expired by law on April 11, 2020, and the third and fourth orders should never have been issued. All of the executive orders, and especially the third and fourth, are an abuse of the power vested in the Governor.

WHEREFORE, Plaintiffs move that the executive orders be declared null and void, for fees and costs, and for other relief as the Court may deem appropriate.

Third Claim for Relief
(Unconstitutional Vagueness)

34. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

35. Gov. Polis' third executive order is unconstitutionally vague. If the default was caused by financial hardship due to COVID-19, how is the landlord to know, at the time of filing, whether the tenant fails to pay rent due to a financial hardship? How is the landlord to know if a tenant with financial hardship has suffered such hardship due to COVID-19? And whose responsibility is it to put such information in his/her pleading?

36. Gov. Polis' fourth executive order is unconstitutionally vague. For example, the order replaces 10-day eviction notices with 30-day notices, a number arbitrarily chosen by Defendant. It is unclear if a 30-day notice is now required in a commercial eviction, where a 3-day notice is currently required, or an Exempt Residential Eviction, where a 5-day notice is required. It is unclear whether landlords who served a demand notice before the date of the fourth executive order must re-start with a new 30-day notice and whether they would be allowed to file evictions if they actually waited 30 days from serving the demand notice to file their lawsuit. It is unclear whether cases filed before the date of the fourth executive order must restart, whether they must restart with a new notice of some kind, or whether they must be refiled. It is unclear what is to happen with cases which were filed before any one of the executive orders, with a return date scheduled, but were repeatedly continued due to Gov. Polis' continuing executive orders banning or limiting evictions. Finally, the 30-day notice required in

the fourth executive order has no end date, merely stating that it *"may extend beyond the expiration of this Executive Order,"* leaving the population to guess when it might end. That provision alone means that the population must accept something as a "law" which has neither been passed into law, nor has even the backing of an existing executive order, nor has a certain end date.

37. The constant renewing of executive orders impacting evictions leaves landlords with no foreseeable end that would allow small landlords such as Plaintiffs to properly plan and organize their affairs. Plaintiffs remain in a continual state of limbo and uncertainty. While Gov. Polis has maintained in each executive order that these restrictions are temporary, the restrictions have in reality been renewed three times and counting, with no end in sight. The orders challenged by Plaintiffs are too uncertain in duration to be fully litigated prior to cessation or expiration, and there is a reasonable expectation that the Plaintiffs and other landlords will be subject to these or similar orders ad infinitum, at the start of the next flu season, or if there is a "*second surge*" in COVID-19 cases. For these reasons and for the other claims stated in this Complaint, the allegations in this Complaint should not be mooted and should be resolved now, even if the current order changes or ends. See generally Spencer v. Kemna, 523 U.S. 1 (1998).

38. *"The essential inquiry in addressing a void for vagueness challenge is whether the statute 'forbids or requires the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application.' "* People ex rel. Rein v. Meagher (Colo. 2020). People v. Gross, 830 P.2d 933, 937 (Colo. 1992) (quoting People v. Becker, 759 P.2d 26, 31 (Colo. 1988)). Gov. Polis' fourth executive order isn't even a statute. It should should therefore be subject to a higher standard of scrutiny than a statute, as it is the will of one person. It has courts and litigants guessing as to its meaning and application.

WHEREFORE, Plaintiffs move that the third and fourth executive orders be declared null and void for vagueness, for fees and costs, and for other relief as the Court may deem appropriate.

Fourth Claim for Relief
(Violation of the First Amendment of the U.S. Constitution)

39. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

40. The First Amendment of the United State Constitution provides, *"Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."* The First Amendment applies to the states through the Fourteenth Amendment of the U.S. Constitution. DeJonge v. Oregon, 299 U.S. 353 (1937). This right has its roots in the Magna Carta and has long been viewed as a fundamental and inviolate right. See Adam Newton, *"Freedom of Petition Overview,"* Freedom Forum Institute (Oct. 10, 2002) (available online at https://is.gd/FOPOFFI) (viewed Apr. 15, 2020). Since at least 1876, the

Supreme Court has considered the right to petition *"implicit in '[t]he very idea of government,"* observing that *"[t]he historical roots of the Petition Clause long antedate the Constitution."* McDonald v. Smith, 472 U.S. 479, 482 (1985) (quoting United States v. Cruikshank, 2 Otto 542 (1876)). In United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967), the Court exalted the right to petition as *"among the most precious of the liberties safeguarded by the Bill of Rights."* It is a fundamental liberty, protected against encroachment by federal, state, and local governments alike. See NAACP v. Button, 371 U.S. 415 (1963).

41. All of Gov. Polis' executive orders prevent or delay the Plaintiffs from redressing their grievances in the only system where they can effectively do so: the courts.

42. WHEREFORE, Plaintiffs move that the executive orders be declared null and void, for fees and costs, and for other relief as the Court may deem appropriate.

Sixth Claim for Relief
(Violation of the Fifth Amendment of the U.S. Constitution)

43. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

44. The Fifth Amendment, Takings Clause, of the U.S. Constitution provides: *"...private property [shall not] be taken for public use, without just compensation."* The Takings Clause applies to the states through the Fourteenth Amendment. See Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

45. While most restrictions on the use of private property do not constitute a taking, when a governor's executive order substantially restricts the owner's use of the property, so that the regulation "goes too far," it may be deemed a regulatory taking of that property for a public use.

46. The operation of the Defendant's executive orders, fairly read, is that rental property owners have no legal recourse or enforcement remedies to remove and collect amounts due from a non-paying tenant while the executive order is in effect. It cannot be reasonably disputed that an eviction is one of, if not the most, effective methods of converting a non-performing rental property into a performing one. The executive orders stop this usual economic system. Accordingly, every Colorado rental property owner with a nonpaying tenant is faced with the prospect of being forced by the state to quarter a non-paying tenant for a long time. In Colorado, it's over three months and counting. The fourth executive order requires a 30-day notice before eviction can be commenced, so even those cases could not be commenced yet, as the 30-day notice period has not yet expired. Moreover, there is nothing to stop Gov. Polis from issuing further orders, changing the rules yet again. We are at a point where the Defendant's orders have indeed gone too far, amounting to a taking under the Fifth Amendment. Millions, if not, billions of dollars' worth of lost rent, and many months of state-forced occupation of real estate, are a direct result of the executive orders. The fact that the orders contain a fig leaf

provision that tenants remain responsible for paying rent does not alter this analysis. The critical issue is how the orders operate as applied. Tenants who have chosen not to pay rent due to the COVID-19 crisis are unlikely to suddenly have the funds to pay months of accrued rent. So most rental property owners will likely choose not to pursue monetary recovery given the cost, expense, and unlikelihood of recoupment in court.

47. What the orders really do is forcibly impose an unfair economic policy of transferring the financial burden of the COVID-19 crisis from tenants to private property owners, without providing any state financial aid to compensate rental property owners for those losses. In the words of the U.S. Supreme Court, the Moratorium seeks to *"forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."* Armstrong v. United States, 364 U.S. 40, 49 (1960). For these reasons, the orders operate as an unconstitutional regulatory taking in violation of the Fifth Amendment of the U.S. Constitution. The state cannot constitutionally eviscerate the core foundation of a lease without providing reasonable compensation to affected owners.

48. *"Just compensation"* would amount to the State of Colorado reimbursing landlords of non-paying tenants for the lost rents and late fees that such landlords will never see.

WHEREFORE, Plaintiffs move that the executive orders be declared null and void, for just compensation from the State of Colorado for lost rent and late fees from their non-paying tenants, for fees and costs, and for other relief as the Court may deem appropriate.

Sixth Claim for Relief
(Violation of the Fourteenth Amendment of the U.S. Constitution)

49. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

50. All of Gov. Polis' executive orders abridge the privileges and immunities of the Plaintiffs, who are citizens of the United States. As citizens, Plaintiffs have the right to go court to enforce their rights as one of their privileges. Gov. Polis' executive orders abridge those privileges under the Fourteenth Amendment of the U.S. Constitution.

51. Gov. Polis has opened up the state economy, as mentioned *infra*. Yet landlords with non-paying tenants, per the Defendant's executive orders, are deprived of equal protection of the laws. The only remedy available to a landlord when a tenant refuses to pay his/her rent is to go to court. The executive orders deprive landlords of that ability. Landlords are treated less than equally.

52. In his first executive order, Gov. Polis encouraged (but did not require) financial institutions to provide a 90-day deferment of mortgages (para. F). In subsequent executive orders, Gov. Polis didn't even bother to encourage such cooperation. It was left for landlords to fend for themselves, to hope and pray that they will remain solvent, without a legal remedy to

deal with non-paying tenants or to manage their own expenses. Moreover, landlords who were lucky enough to receive deferments from their lenders would have the deferred payments added, with interest, to the end of their mortgages. By that time, the non-paying tenants would be long gone. Landlords with non-paying tenants have received unequal protection compared to their tenants or other landlords. In fact, they have received no protection, in violation of the equal protection clause of the Fourteenth Amendment.

53. Gov. Polis' orders have suspended one side of contract law as it applies to the landlord-tenant relationship. While the landlord's rights have been drastically impeded, the landlord's obligations have not diminished: they are still liable under the warranty of habitability; for repairs; for pest control; for utility payments (in many cases); for cleaning; for trash removal; and for security deposit accounting, to name a few. Nothing in Gov. Polis' orders stops a tenant from taking the landlord to court to enforce the landlord's obligations, yet landlords cannot take the tenant to court to enforce one of the tenant's biggest obligations. This is another example of unequal protection.

54. Prospective tenants who are ready, willing and able to pay rent have been supplanted by those current tenants who do not pay rent. Such prospective tenants likewise receive unequal protection due to Gov. Polis' orders, as they cannot find suitable housing due to that housing being occupied by non-complying tenants. Due to a chronic housing shortage in Colorado, and especially on the Front Range, this unequal protection is even more acute.

55. *"[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

WHEREFORE, Plaintiffs move that the executive orders be declared null and void, for fees and costs, and for other relief as the Court may deem appropriate.

Seventh Claim for Relief
(Declaratory Relief)

56. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

57. Plaintiffs are *"person[s]"* whose *"rights, status, or other legal relations"* are affected by the executive orders described above. Plaintiffs are entitled to have this Court determine the validity or invalidity of the executive orders and their construction; and Plaintiffs are entitled to obtain a declaration of their rights, status and other legal relations thereunder, pursuant to Colorado Revised Statutes §13-51-101 *et seq.* and Colorado Rule of Civil Procedure 57.

58. If the Court strikes down the Defendant's executive orders, or if they were to

expire, the same questions posed in the claim for vagueness would have to be addressed here. Defendant's interference in the area of landlord-tenant law has had profound, far-reaching yet confusing consequences for our state.

WHEREFORE, Plaintiffs request that the Court adjudicate the meaning and validity of each of the executive orders pursuant to Colorado Revised Statutes §13-51-101 *et seq.* and Colorado Rule of Civil Procedure 57. Plaintiffs also request such other and further relief as the Court may deem appropriate.

Eighth Claim for Relief
(Interference With Contractual Relationships and the Contracts Clause of the U.S. Constitution)

59. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

60. The contracts between Plaintiffs and their tenants were lawful and supported by sufficient consideration. Plaintiffs performed all conditions precedent to their enforcement.

61. Defendant was aware during the times that he issued all of all executive orders that there were contracts between landlords such as Plaintiffs and their tenants, contracts which obligated those tenants to pay rent on a punctual basis.

62. Defendant's unlawful interference resulted in irreparable financial harm to all Plaintiffs.

63. Article 1, Section 10, Clause 1 of the U.S. Constitution states: *"No State shall. . . pass any. . . . Law impairing the Obligation of Contracts."* This is commonly referred to as the Contracts Clause. The governing principles on the Contracts Clause are stated in <u>United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).</u>

64. As the Supreme Court has stated, *"[n]othing can be more material to the obligation than the means of enforcement . . . The ideas of validity and enforcement are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion."* <u>Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 429-30 (1934).</u>

65. Defendant intentionally and unlawfully interfered with the contracts between landlords and tenants, negating the obligation for those tenants to punctually pay rent and resulting in the tenants not paying rent at all. The executive orders do so by unconditionally and indefinitely delaying a rental property owner's otherwise established right to timely pursue an eviction against a breaching tenant.

66. The rights to evict and to declare a contractual default are core to every residential

lease contract, and any material interference with those rights and remedies is a substantial impairment of that contract. Indeed, interfering with the right to evict for non-payment of rent is arguably the most substantial impairment of any lease agreement from a rental property owner's point of view. The payment of rent goes to the very heart and most basic purpose of the legal relationship between rental property owner and tenant.

WHEREFORE, Plaintiffs request that the Court enter judgment against Defendant in an amount to be determined at trial, plus interest, costs, and (if and to the extent permitted by law) attorney fees, together with such other and further relief as the Court may deem proper.

Ninth Claim for Relief
(Injunctive Relief)

67. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

68. Defendants' actions have caused Plaintiffs to incur immediate and irreparable injury for which they have no adequate remedy at law. The Defendant has committed Constitutional and other violations as cited above, and those violations continue now. The issuance of a preliminary injunction is necessary in this case. Since the issuance of the first executive order, Plaintiffs have had no legal remedy to receive payments and cover their own mortgages, taxes, insurance, utilities and maintenance, a period of three months and counting. They will never be able to cover their expenses from their tenants, as those tenants will simply move out whenever the courts adjudicate their cases and the writs of restitution are finally issued and executed. The writs of restitution will face a delay in execution, as the backlog of cases caused by Gov. Polis' orders will mean many months until Sheriff deputies can force non-paying tenants out of the Plaintiffs' properties, causing Plaintiffs further expense in those delays and forcing prospective tenants to wait unnecessarily for a place to live. Plaintiffs will incur additional damages in cleaning up their properties, whenever the writs of restitution are executed. The lifting of Gov. Polis' fourth executive order, the only one extant at the time of this filing, would allow Plaintiffs a legal remedy to partially redress the harm caused by their free-loading tenants until the Court hears this case on the merits. The public interest and balance of equities favor the issuance of a preliminary injunction, as shown by the constitutional interests asserted here. Further, Plaintiffs are likely to prevail on the merits of this case, warranting the issuance of a temporary injunction.

69. Gov. Polis has issued four consecutive executive orders overlapping each other, showing a propensity for him to continue issuing them absent an injunction from this honorable Court. Even at a time when COVID-19 cases in Colorado are nowhere near the levels we saw in April 2020, at the height of the pandemic, the Defendant has shown no interest in stopping his interference in evictions for non-payment. The Courts will have to step in. The public interest and balance of equities favor the issuance of a permanent injunction.

70. Whenever the courts do open up for evictions of non-paying tenants, a tidal wave

of evictions will start. The courts, which have not dealt with non-payment eviction cases during the COVID-19 crisis, will suddenly be overwhelmed, meaning months of delays until landlord-tenant cases can be heard. The problem will be even worse as courts deal with social distancing. The same tidal wave will eventually make its way to the writ of restitution step, where months will go by and writs of restitution will have to be continually reissued upon expiration before non-paying tenants are finally evicted, as Sheriff offices throughout the state won't have the personnel to manage physical evictions expediently. All of this benefits non-paying tenants while hurting landlords and prospective tenants. The lifting of the Defendant's executive orders will at least allow the eviction process to start before the tidal wave is even more profound.

71. As the Court can see from the summaries of the Plaintiffs' stories, these are real people with real problems, exacerbated by real acts of the governor. Most landlords are willing to work with good tenants in times of financial difficulty, as so many now experience. Plaintiffs realize that tenants are likewise real people, and most of them pay their rent despite the many difficulties they face in their own lives. The counsel below sometimes represents tenants and hears their stories. But those tenants who don't make an effort to pay are being rewarded by the Defendant for thumbing their noses at their landlords; this has gone on for far too long.

WHEREFORE, Plaintiffs request that the court issue a temporary injunction against implementation of the fourth executive order and any subsequent executive orders regarding landlord-tenant law issued before a hearing on the merits; that a permanent injunction against implementation of the fourth executive order and any subsequent executive orders regarding landlord-tenant law be made at the hearing on the merits of this case; that Gov. Polis be permanently enjoined from issuing any executive order pertaining to landlord-tenant law unless and until the Colorado Legislature passes constitutional legislation authorizing the Defendant to do so; and for such other and further relief as may the Court may deem appropriate.

Tenth Claim for Relief
(Attorneys' Fees Pursuant to 42 U.S.C. §1983 & 1988)

72. Plaintiffs incorporate by reference the above allegations as if fully set forth herein.

73. The Plaintiffs are United States citizens and have rights, privileges and immunities as granted under the United States Constitution and the laws of the United States. They have used real estate as a way of building long-term growth. They are entitled to rents from the tenants who reside at their properties. Defendant has deprived them of those rights.

74. 42 U.S.C. §1983 provides, *"[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit or in equity, or other proper proceeding for redress…"*

75. 42 U.S.C. §1988(b) provides, *"[i]n any action or proceeding to enforce a provision of [Section 1983 of this title]…the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee as part of the costs…"*

76. The Defendant, acting under color of state law, has deprived the Plaintiffs of constitutional rights as set forth in this Complaint. Plaintiffs are seeking relief under 42 U.S.C. §1983.

77. Plaintiffs are entitled to reasonable attorney's fees, costs and expenses for prosecuting these claims.

WHEREFORE, Plaintiffs request reasonable attorney's fees, costs and expenses for prosecuting these claims.

78. Judge Michael McHaney of Clay County, Illinois recently ruled against Illinois Gov. JB Pritzker's "*Stay-At-Home*" order in Mainer v. Pritzker, stating, "*Make no mistake, these executive orders are not laws. They are royal decrees. Illinois citizens are not being governed, they are being ruled. The last time I checked, Illinois citizens are also Americans and Americans don't get ruled. The last time a monarch tried to rule Americans, a shot was fired that was heard around the world. That day led to the birth of a nation consensually governed based upon a document which ensures that on this day in this, any American courtroom tyrannical despotism will always lose and liberty, freedom and the constitution will always win*."

Respectfully submitted,

s/ *John Finger*

The original of the foregoing document is signed and on file at the office of John Finger, counsel for Plaintiffs.

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