

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 19th day of January, 2021.*

**IN RE: SIXTEENTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court unanimously EXTENDS the Declaration of Judicial Emergency through February 14, 2021, and ORDERS that the provisions of the *Fifteenth Order Extending Declaration of Judicial Emergency In Response To Covid-19 Emergency*, entered December 18, 2020 (Fifteenth Order), shall continue to apply in all courts of the Commonwealth for the duration of this Order unless amended by future order.

This Order shall be in effect from January 25, 2021, through February 14, 2021. Accordingly, the Period of Judicial Emergency now extends from March 16, 2020, through February 14, 2021. The Declaration of Judicial Emergency may be extended for additional periods as provided in Va. Code § 17.1-330(E). It is so ORDERED.



(SEAL)

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Chief Justice of the Supreme Court of Virginia

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 18<sup>th</sup> day of December, 2020.*

**IN RE: FIFTEENTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court unanimously EXTENDS the Declaration of Judicial Emergency through January 24, 2021, and ORDERS that the provisions of the *Fourteenth Order Extending Declaration of Judicial Emergency In Response To Covid-19 Emergency*, entered December 3, 2020 (Fourteenth Order), shall continue to apply in all courts of the Commonwealth for the duration of this Order except as provided herein.

All courts and security personnel shall continue to take reasonable measures to prohibit individuals from entering the courthouse if they answer “Yes” to any of the following questions, as currently recommended by the Virginia Department of Health:

- a. Are you experiencing:
  - i. A new fever (100.4°F or higher) or a sense of having a fever
  - ii. A new cough that you cannot attribute to another health condition
  - iii. New shortness of breath or difficulty breathing that you cannot attribute to another health condition
  - iv. New chills that you cannot attribute to another health condition
  - v. A new sore throat that you cannot attribute to another health condition
  - vi. New muscle aches (myalgia) that you cannot attribute to another health condition, or that may have been caused by a specific activity (such as physical exercise)
  - vii. A new loss of taste or smell
  
- b. Have you had a positive test for the virus that causes COVID-19 disease within the past 10 days?
  
- c. In the past 14 days, have you had close contact (being within six feet for a total of 15 minutes or more over a 24-hour period, or having direct exposure to respiratory secretions) with someone with suspected or confirmed COVID-19?

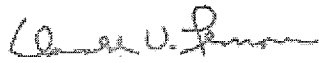
The court and security personnel shall direct such individuals to contact the clerk’s office by telephone or other remote means to inform the clerk of their business before the court so they may receive further instruction regarding alternate arrangements for court access.

In addition to continued social and physical distancing to minimize the risk of the spread of COVID-19, all persons aged five years or over entering the courthouse must wear a face covering that covers the nose and mouth. This includes judges, attorneys, deputy sheriffs, court reporters, employees, members of the public, contractors, and all others who work in or visit the courthouse. Within a courtroom, the presiding judge may authorize removal of a face mask to facilitate a proceeding. The requirement to wear a face mask shall not apply to: (i) judges or magistrates to the extent they determine it inhibits their ability to effectively communicate, (ii) individuals who have difficulty breathing, who cannot remove a face mask without help, or have other medical issues that make wearing a face mask unsafe, or (iii) any person whom the presiding judge determines should be excused from the requirement to wear a face mask. In any circumstances where a person is unable to wear a face mask, the presiding judge may impose reasonable restrictions on that person's entry to and circulation within the courthouse, including but not limited to, providing remote access, setting a time for entry to and exit from the courthouse, requiring the wearing of a face shield, requiring that person to maintain at least 10 feet of social distance from others, and/or limiting the space that person may occupy while in the courthouse. Face coverings should be compliant with current guidance from the Centers for Disease Control and Prevention (CDC). As of the date of this order that guidance may be found online at: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>

Unless and until a plan for restarting jury trials, described in the Sixth and Seventh Orders Extending the Declaration of Judicial Emergency, has been approved by a panel of three Justices in consultation with the Office of the Executive Secretary, no jury trials shall occur in any locality in the Commonwealth for the duration of this Order. Jury trials may be held as soon as the plan has been approved, provided that the chief judge and presiding judge determine it is safe to do so. In conducting a jury trial, the presiding judge shall ensure that provisions are made to enable the public to observe all aspects of the trial, including *voir dire*, whether in person or by electronic means. Consistent with constitutional and statutory requirements, access to the courtroom must be provided to the press, and to victims of crimes pursuant to Virginia Code § 19.2-11.01 and Rule 2:615 of the Rules of the Supreme Court of Virginia. Notwithstanding the suspension of jury trials pending approval of a plan for restarting them, upon notice to the parties or their counsel courts may impose discovery

deadlines, and other pre-trial deadlines in jury trial cases that are currently suspended.

This Order shall be in effect from January 4, 2021, through January 24, 2021. The Declaration of Judicial Emergency may be extended for additional periods as provided in Va. Code § 17.1-330(E). It is so ORDERED.



(SEAL)

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Chief Justice of the Supreme Court of Virginia

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 3<sup>rd</sup> day of December, 2020.*

**IN RE: FOURTEENTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court unanimously EXTENDS the Declaration of Judicial Emergency through January 3, 2021, and ORDERS that the provisions of the *Thirteenth Order Extending Declaration of Judicial Emergency In Response To Covid-19 Emergency*, entered November 9, 2020 (Thirteenth Order), shall continue to apply in all courts of the Commonwealth for the duration of this Order unless amended by future order.

This Order shall be in effect from, December 14, 2020, through January 3, 2021. Accordingly, the Period of Judicial Emergency now extends from March 16, 2020, through January 3, 2021. The Declaration of Judicial Emergency may be extended for additional periods

so ORDERED.

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\_\_\_\_\_(SEAL)

Supreme Court of Virginia

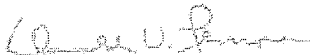
**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of November, 2020.*

**IN RE: THIRTEENTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court unanimously EXTENDS the Declaration of Judicial Emergency through December 13, 2020, and ORDERS that the provisions of the *Twelfth Order Extending Declaration of Judicial Emergency In Response To Covid-19 Emergency*, entered October 19, 2020 (Twelfth Order), shall continue to apply in all courts of the Commonwealth for the duration of this Order unless amended by future order.

This Order shall be in effect from November 23, 2020, through December 13, 2020. Accordingly, the Period of Judicial Emergency now extends from March 16, 2020, through December 13, 2020. The Declaration of Judicial Emergency may be extended for additional periods as provided in Va. Code § 17.1-330(E). It is so ORDERED.



(SEAL)

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Chief Justice of the Supreme Court of Virginia

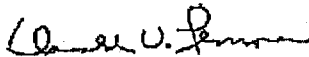
**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 19th day of October, 2020.*

**IN RE: TWELFTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court unanimously EXTENDS the Declaration of Judicial Emergency through November 22, 2020, and ORDERS that the provisions of the *Eleventh Order Extending Declaration of Judicial Emergency In Response To Covid-19 Emergency*, entered September 28, 2020 (Eleventh Order), shall continue to apply in all courts of the Commonwealth for the duration of this Order unless amended by future order.

This Order shall be in effect from November 2, 2020, through November 22, 2020. Accordingly, the Period of Judicial Emergency now extends from March 16, 2020, through November 22, 2020. The Declaration of Judicial Emergency may be extended for additional periods as provided in Va. Code § 17.1-330(E). It is so ORDERED.



(SEAL)

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Chief Justice of the Supreme Court of Virginia

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 28<sup>th</sup> day of September, 2020.*

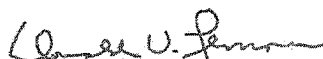
**IN RE: ELEVENTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court unanimously EXTENDS the Declaration of Judicial Emergency through November 1, 2020, and ORDERS that the provisions of the *Tenth Order Extending Declaration of Judicial Emergency In Response To Covid-19 Emergency*, entered September 4, 2020 (Tenth Order), as clarified herein to emphasize that all clerks should accept filings submitted by facsimile or e-mail, shall continue to apply in all courts of the Commonwealth for the duration of this Order unless amended by future order.

Pursuant to Va. Code § 17.1-330, all courts continue to be authorized to accept pleadings, orders and other documents that are electronically signed, including those where the electronic signature is accomplished by scanning, to include acceptance of pleadings, motions, and other case-related filings submitted by facsimile or email by litigants and attorneys in order to help reduce the potential for transmission of the COVID-19 virus.

All courts should continue to conduct as much business as possible by means other than in-person court proceedings. In all civil and criminal matters, courts are encouraged to use video conferencing, telephone, teleconferencing, email, or other means that do not involve in-person contact. These methods are preferred over in-person court proceedings.

This Order shall be in effect from October 12, 2020, through November 1, 2020. Accordingly, the Period of Judicial Emergency now extends from March 16, 2020, through November 1, 2020. The Declaration of Judicial Emergency may be extended for additional periods as provided in Va. Code § 17.1-330(E). It is so ORDERED.



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(SEAL)

Chief Justice of the Supreme Court of Virginia



**VIRGINIA:**

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*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 11th day of September, 2020.*

**IN RE: SECOND CLARIFICATION ORDER CONCERNING TOLLING OF  
STATUTORY SPEEDY TRIAL DEADLINES DURING THE JUDICIAL EMERGENCY  
IN RESPONSE TO COVID-19 CRISIS**


On March 16, 2020, the Court declared a “judicial emergency” on several grounds, including the fact that the COVID-19 crisis “substantially endangers or impedes . . . 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,” Code § 17.1-330(A). Subsection D of Code § 17.1-330 provides the Court with broad power to suspend various court-related deadlines: “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.” The Speedy Trial Act, Code § 19.2-243, imposes statutory time deadlines on criminal prosecutions subject to various exceptions and tolling provisions.

In its Clarification Order entered on May 1, 2020, this Court unanimously ordered that the tolling provisions of the March 16, March 27, and April 22 emergency orders, as clarified therein, “toll the running of any statutory speedy trial period applicable to criminal prosecutions in the courts of the Commonwealth of Virginia from March 16 until May 17 or later if further extended by this Court.”

This tolling of the running of any statutory speedy trial period applicable to criminal prosecutions in the courts of the Commonwealth of Virginia has been continued by this Court’s subsequent judicial emergency orders, up to and including the Ninth Order, in effect through September 20, 2020, and the Tenth Order which becomes effective September 21, 2020. This Court unanimously orders that the tolling of the running of any statutory speedy trial period applicable to criminal prosecutions in the courts of the Commonwealth of Virginia is not affected by approval by

a panel of three Justices of this Court of any plan to restart jury trials, and this tolling of the statutory speedy trial period shall continue to be unaffected by approval of such plans, unless amended by future order.

It is so ORDERED.



\_\_\_\_\_(SEAL)

Chief Justice Donald W. Lemons

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 4th day of September, 2020.*

**IN RE: TENTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court EXTENDS the Declaration of Judicial Emergency through October 11, 2020, and ORDERS that the provisions of the *Ninth Order Extending Declaration of Judicial Emergency in Response to Covid-19 Emergency*, entered August 20, 2020 (Ninth Order), shall continue to apply in all courts of the Commonwealth for the duration of this Order unless amended by future order.

This Order shall be in effect from September 21, 2020, through October 11, 2020. Accordingly, the Period of Judicial Emergency now extends from March 16, 2020, through October 11, 2020. The Declaration of Judicial Emergency may be extended for additional periods as provided in Va. Code § 17.1-330(E). It is so ORDERED.



(SEAL)

Chief Justice Donald W. Lemons

Justice S. Bernard Goodwyn

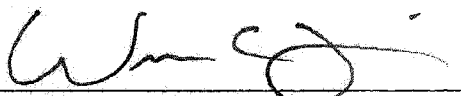
Justice D. Arthur Kelsey

Justice Stephen R. McCullough

Justice Teresa M. Chafin

JUSTICE WILLIAM C. MIMS, with whom JUSTICE CLEO E. POWELL joins, dissenting in part.

I would grant the request of Governor Northam in part, to extend the current moratorium on certain writs of eviction until October 1, 2020.



Justice William C. Mims

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 20th day of August, 2020.*

**IN RE: NINTH ORDER EXTENDING DECLARATION OF JUDICIAL EMERGENCY IN RESPONSE TO COVID-19 EMERGENCY**

Under the constitutional, statutory, and inherent authority of the Supreme Court of Virginia, the Court unanimously EXTENDS the Declaration of Judicial Emergency through September 20, 2020, and ORDERS that the provisions of the *Eighth Order Extending Declaration of Judicial Emergency In Response To Covid-19 Emergency*, entered July 29, 2020 (Eighth Order), shall continue to apply in all courts of the Commonwealth for the duration of this Order unless amended by future order.

The Court further ORDERS that the provisions of the *Amendment of Eighth Order* entered on August 7, 2020, are not extended by this Order, and remain in effect only through September 7, 2020. This Court's order that the issuance of writs of eviction pursuant to unlawful detainer actions related to the failure to pay rent be suspended and continued therefore shall cease to have effect after September 7, 2020, unless amended by future Order.

This Order shall be in effect from August 31, 2020, through September 20, 2020. Accordingly, the Period of Judicial Emergency now extends from March 16, 2020, through September 20, 2020. The Declaration of Judicial Emergency may be extended for additional periods as provided in Va. Code § 17.1-330(E). It is so ORDERED.



(SEAL)

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Chief Justice of the Supreme Court of Virginia

**PRESS RELEASE**  
**FOR IMMEDIATE RELEASE**

March 16, 2020

Effective March 17, 2020, all state courts in Roanoke City, Roanoke County, and Salem City are to remain open, but will reduce operations and restrict access to courthouses, pending further Order.

In response to concerns about the health and safety of court personnel and the public arising out of potential exposure to the Coronavirus (COVID-19), the Chief Judges of all state courts in Roanoke City, Roanoke County, and Salem City announced today that while the courts will remain open, operations will be reduced and access to the courthouses will be restricted. As more particularly described in the attached Order, these Courts have suspended many in-court proceedings. The Courts have further encouraged restricted access to the courthouse for litigants, involved attorneys, material witnesses, and necessary court personnel. These restrictions will remain in place through at least April 10, 2020. For the duration of any such restrictions, all courts will have a liberal continuance policy for any cases otherwise scheduled for trial.

*For the most current information about the schedules for Courts in the 23<sup>rd</sup> Judicial Circuit and District, please check the individual Court websites, which can be accessed through the Virginia Judicial System website at <http://www.courts.state.va.us/main.htm>.*

**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

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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.

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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)).

