

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JERRI LEMOND; LAVERN AND
JOSEPHINE MILLER FLP; AND
STRONG INDIANA LLC;

Plaintiffs,

v.

ERIC J. HOLCOMB, Governor of Indiana, in
his official capacity; and the STATE OF
INDIANA;

Defendants.

Case Number 1:20-cv-1968

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF,
DAMAGES, ATTORNEYS' FEES, AND JURY TRIAL**

Come now Plaintiffs, Ms. Jerri LeMond (“Plaintiff LeMond”), LaVern and Josephine Miller FLP (“Plaintiff Miller”), and Strong Indiana LLC (“Plaintiff Strong Indiana”), by counsel, and allege and state as follows:

INTRODUCTION

1. In response to the novel coronavirus (“COVID-19”) pandemic, Defendant Eric J. Holcomb, in his official capacity as Governor of the State of Indiana (the “Governor”), issued Exec. Order 20-02, declaring a public health emergency throughout the state for a period of thirty (30) days.¹ This public health emergency has been extended four (4) times, and is now set to expire on August 3, 2020, unless further renewed.² As part of his response to the pandemic, the Governor has issued

¹ [https://www.in.gov/gov/files/20-02ExecutiveOrder\(DeclarationofPublicHealthEmergencyforCOVID-19\)FINAL.pdf](https://www.in.gov/gov/files/20-02ExecutiveOrder(DeclarationofPublicHealthEmergencyforCOVID-19)FINAL.pdf)

² See Exec. Order 20-17 dated April 3, 2020, Exec. Order 20-25 dated May 1, 2020, Exec. Order 20-30 dated Jun 3, 2020, and Exec. Order 20-34 dated July 1, 2020.

a number of executive orders which substantially impact the status of real property and contracts through the State.

2. In Exec. Order 20-04, dated March 16, 2020,³ the Governor invoked the emergency management authority granted to the governor under Ind. Code § 10-14-3 *et seq.* to respond to public health emergencies. In particular, the Governor invoked the emergency management powers which authorize him to “allow for the suspension of the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules or regulations of any state agency where strict compliance with any of these provisions would in any way prevent, hinder or delay necessary action in coping with the public health emergency.” Ind. Code § 10-14-3-12(d)(1).

3. The governors of Indiana have declared emergencies before. The emergency declarations and resulting executive orders in the past are mostly related to impacts from weather and pardons, without restricting individual liberties. Since 1918 (the “Spanish Flu” pandemic), the world has experienced three additional pandemics: in 1957 an H2N2 pandemic; in 1968 an H3N2 pandemic; and in 2009 the H1N1 pandemic. With each of those four pandemics, no Indiana governor issued anywhere near the constraints that the 2020 executive orders impose. Despite the passing of the current emergency law in 2001 providing the governor with broad powers to address a statewide emergency, no Indiana governor has used the emergency power to issue any executive order that would infringe on an individual’s rights like the executive orders of 2020.

4. Subsequent to his invocation of the emergency management powers, on March 19, 2020, the Governor issued Exec. Order 20-06,⁴ ordering that “no eviction or foreclosure actions or

³ <https://www.in.gov/gov/files/ExecutiveOrder20-04FurtherOrdersforPublicHealthEmergency.pdf>

⁴ https://www.in.gov/gov/files/EO_20-06.pdf

proceedings involving residential real estate or property, whether rental or otherwise, may be initiated” between the date of the Order and the end of the public health emergency and suspending any regulatory statutes and rescinding any rules and regulations relating to said proceedings for the duration of the emergency (the “Eviction Ban”). The Order affirmed that it did not relieve individuals of their obligations to pay rent, pay mortgages, or comply with all their obligations under their leases or mortgages.

5. The Governor stated that Ind. Code § 10-14-3-12(d)(1) and Ind. Code § 10-14-3-12(d)(7), which grants him the authority to control the occupancy of premises in the disaster area, provided him the statutory authority to enact the Eviction Ban. He claimed that the Eviction Ban was imposed in order to “avoid the serious health, welfare, and safety consequences that may result if Hoosiers are evicted or removed from their homes during this emergency” and noted that it “may become medically necessary and reasonable for individuals to remain in isolation or quarantine at their homes.”

6. Despite encouraging individuals to remain in their homes in Exec. Order 20-06, it was not until Exec. Order 20-08, dated March 23, 2020,⁵ that the Governor issued a specific directive for Hoosiers to shelter at home, except for conducting essential activities as described therein. The Order’s intent was “to ensure that the maximum number of people self-isolate in their homes or residences to the maximum extent feasible.” Despite that need, Exec. Order 20-08 did outline a number of “Essential Businesses and Operations” which were encouraged to remain open, subject to social distancing requirements and recommendations. The definition of Essential Businesses and Operations was informed by an Advisory Memorandum issued by the U.S. Dept. of Homeland

⁵ https://www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf

Security's Cybersecurity & Infrastructure Security Agency ("CISA") on March 19, 2020;⁶ however, no Indiana law or regulation was cited as justifying whether industries were considered essential or not to the State's management of the present pandemic. Both CISA's Advisory Memorandum and Exec. Order 20-08, Sec. 14(t) identified real estate services as Essential Businesses and Operations.

7. Exec. Order 20-18, dated April 6, 2020, replaced Exec. Order 20-08 and extended the stay-at-home mandate until April 20, 2020.⁷ It continued to define real estate services as an essential business, but recommended that they conducted virtually or by telephone whenever reasonably possible and that "any professional services requiring face-to-face encounters should be postponed unless the failure to meet in-person will have a significant adverse impact on the client's financial or legal position." The stay-at-home order was further extended until May 1, 2020 by Exec. Order 20-22, dated on April 20, 2020.⁸

8. However, on May 1, 2020, the Governor issued Exec. Order 20-26,⁹ outlining a five (5) stage reopening process for the State of Indiana and setting requirements for Stages 1 and 2 thereof. In Stage 2, the stay-at-home directive was lifted, but individuals were still encouraged to remain at home whenever practicable. Additional general social distancing and safety requirements for all businesses as well as a number of specific restrictions for individual industries were also outlined as beginning in Stage 2 of the re-opening. In accordance with the Governor's stated goal of

⁶ Version 3.0 of the Advisory Memorandum is available at https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf

⁷ <https://www.in.gov/gov/files/Executive%20Order%2020-18%20Cont%20Stay%20at%20Home%20Restaurants%20Govt%20Ops.pdf>

⁸ <https://www.in.gov/gov/files/Executive%20Order%2020-22%20Extension%20of%20Stay%20at%20Home.pdf>

⁹ <https://www.in.gov/gov/files/Executive%20Order%2020-26%20Roadmap%20to%20Reopen%20Indiana.pdf>

protecting Hoosiers from the spread of COVID-19, the re-opening requirements were mostly related to the ability of a re-opening business to meet social distancing guidelines, provide sanitary locations for customers, and protect their employees; they included restrictions such as capacity limits, face coverings requirements; and employee screenings. In particular, with regards to real estate transactions, Sec. 11 of this Order acknowledge that real estate showings may be “necessary” but encouraged screenings for symptoms prior to any showings and the wearing of face coverings during the showings.

9. Stage 2 of the re-opening plan was expected to begin for most Indiana counties on May 4, 2020, although Sec. 2(a) of the Order acknowledged that each county will be continually assessed to determine whether that specific county is ready to move to the next stage in the reopening process or not and noted that various counties in the state may proceed through their re-openings on different timelines.

10. The re-opening plan was further refined in Exec. Order 20-28, dated May 21, 2020, which established the standards for Stage 3.¹⁰ Many businesses within Indiana were granted greater freedoms to operate their businesses, without restrictions, while individuals were allowed more freedom to travel, make retail purchases, visit restaurants, meet in limited groups, and otherwise visit and operate fitness facilities, recreational locations, and personal service providers. Despite allowing much greater movement of individuals and no longer requiring them to remain home, Sec. 3(b) of Exec. Order 20-28 continued the Eviction Ban for nonpayment of rent through June 30, 2020, but it did allow landlords to institute an emergency eviction or possessory claim in situations where there was specific immediate and serious injury, loss or damage to the property.

¹⁰ [https://www.in.gov/gov/files/Executive%20Order%2020-28%20\(Reopen%20Stage3\).pdf](https://www.in.gov/gov/files/Executive%20Order%2020-28%20(Reopen%20Stage3).pdf)

No specific reasonings behind the continuation of most of the Eviction Ban or the limited ability to conduct emergency evictions and foreclosures were provided.

11. The terms for Stage 4 in the reopening of Indiana were outlined in Exec. Order 20-32, dated June 11, 2020.¹¹ The Order continued to reference the governor's authority to take "necessary" steps to contain COVID-19 within the State and undertake those actions "reasonably necessary" to allow the state to cope with the pandemic. It also continued to recognize that not all areas of the state would progress through the reopening stages at the same time and that assessments at the level of individual counties would be needed. Stage 4 again issued both general social distancing orders and specific requirements for particular industries but did not make any acknowledgement of the real estate rental industry, nor indicate when the conditions would be such that evictions and foreclosures could resume. Due to a growing number of positive cases, pursuant to Exec. Order 20-25 dated July 1, 2020,¹² Stage 5 in the re-opening was delayed and an intermediate Stage 4.5 was enacted. In Stages 4 and 4.5, individuals have substantial freedom of movement in their daily lives, having numerous in-person interactions with businesses and other individuals, and many businesses have begun to operate a much of their full capacity.

12. Despite these greater freedoms around the state, on June 30, 2020, pursuant to Exec. Order 20-33,¹³ the prohibition on residential evictions and foreclosures, save for emergency ones was extended until July 31, 2020. This Order encouraged landlords and tenants to work together to establish payment plans for back rent but did not provide any guidance or guarantees for the parties on how to accomplish this objective. It again noted the Governor's authority to undertake those

¹¹ [https://www.in.gov/gov/files/Executive%20Order%2020-32%20\(Stage%204\).pdf](https://www.in.gov/gov/files/Executive%20Order%2020-32%20(Stage%204).pdf)

¹² https://www.in.gov/gov/files/Executive%20Order%2020-35%20Back%20on%20Track%20Indiana%20Stage%204_5.pdf

¹³ <https://www.in.gov/gov/files/Executive%20Order%2020-33%20Further%20Extensions.pdf>

actions “necessary” to respond to the public health emergency and made reference to the severe financial impact the pandemic has had on Hoosiers, but did not provide any specific connections between the necessity of the continued Eviction Ban and the state’s objectives to confront the pandemic.

PARTIES

13. Plaintiff LeMond is an individual residing in Indianapolis, Indiana. Plaintiff LeMond owns residential real property in Marion County, Indiana (the “LeMond Property”) which she leases to Stori Alan Emerson and Roshanda Emerson (together “Tenant Emersons”). A copy of the unsigned lease with Tenant Emersons is attached hereto as **Exhibit A**, as the signed original is in the possession of Tenant Emerson. Plaintiff LeMond is a 77 year old widow, and she relies on the rental income from the LeMond Property to support her.

14. The lease terms call for monthly rent of \$675.00 and the lease term began on November 1, 2019.

15. Thereafter, on January 1, 2020, Tenant Emersons were in default of the lease for non-payment of rent. Plaintiff LeMond filed her Notice of Claim for Possession of Real Estate and Summons on March 4, 2020 under Cause Number 9K08-2003-SC-1119, with court dates set for the issue of Possession on March 18, 2020 at 8:30 a.m. and damages hearing on May 19, 2020 also at 8:30 a.m. Plaintiff LeMond’s damages at that time were already \$2,025.00 and said damages continue to accrue. See **Exhibit B**. According to the Court’s CCS entry, Tenant Emersons were duly served Summons in this matter on March 7, 2020.

16. Due to the Governor’s Executive Orders, the hearing on Possession and Damages have been continued multiple times with the most current hearing date on Possession being August 12, 2020 at 8:30 a.m.

17. Tenant Emersons continue to occupy the LeMond Property while failing or refusing to pay rent due or vacate the LeMond Property voluntary.

18. Upon information and belief, Tenant Emersons have not contracted COVID-19, nor been hospitalized, nor availed themselves of any of the governmental resources such as unemployment benefits, enhanced unemployment benefits, stimulus funds (\$1,200.00 per individual, \$2,400.00 total in this situation) or CARES ACT funds made available by Defendant for rental assistance, nor sought satisfactory repayment terms with Plaintiff LeMond so that they could catch up their rental arrearage and remain in the LeMond Property.

19. Plaintiff LeMond is in the business of rental real estate and is highly incentivized to PROVIDE housing and accordingly, does not seek eviction except where absolutely necessary, and Plaintiff LeMond has made it her practice to work with tenants on payment arrangements wherever possible and avoid evictions.

20. Meanwhile, the Governor's Orders have the effect of disincentivizing workouts, cooperation and flexibility among parties to the lease by eliminating one party's rights and remedies, but not those of the other parties.

21. In Plaintiff LeMond's twenty-plus years of experience as a landlord of residential rental property, the ability to take possession of the LeMond Property is her primary means of mitigating her losses due to breaches of leases and while the trial Court may set "damages" hearings, she often agrees to vacate those hearings due to the non-collectability of tenants in general as well as the costs and time involved in pursuing money damages and/or proceedings supplemental. In short, money damages are an illusory remedy for Plaintiff LeMond.

22. Plaintiff Miller FLP is an Indiana Family Limited Partnership doing business in Indiana. Plaintiff Miller owns residential real property at 1826 Manor Haus Ct, Apt 3, Goshen, Indiana

(“Miller Property 1”) which it leases through its property manager and agent, Miller Apartments, as “Landlord” to Christopher Chambers and Shana E. Ellis (together “Tenant Chambers”). A copy of the lease is attached hereto as **Exhibit C**.

23. The lease terms call for monthly rent of \$745.00 and the lease term began on February 21, 2020.

24. Thereafter, Tenant Chambers was in default and breach of the lease for non-payment of rent. Tenant Chambers is currently in arrears a total of \$3,065.00 since the lease inception.

25. Due to the Governor’s Executive Orders, Plaintiff Miller has been unable to file for or proceed with a Notice of Claim for Possession and Damages. Tenant Chambers continues to occupy the Miller Property 1 while failing or refusing to pay rent due, or vacate the Miller Property 1 voluntarily.

26. Upon Information and belief, Tenant Chambers has not contracted COVID-19, nor been hospitalized, nor availed themselves of any of the governmental resources such as unemployment benefits, enhanced unemployment benefits, stimulus funds (\$1,200.00 per individual, \$2,400.00 total in this instance) or CARES ACT funds made available by Defendant for rental assistance, nor sought satisfactory repayment terms with Plaintiff Miller so that they could catch up their rental arrearage and remain in the Miller Property 1.

27. Plaintiff Miller is in the business of rental real estate and is highly incentivized to PROVIDE housing and accordingly, does not seek eviction except where absolutely necessary, and Plaintiff Miller has made it their practice to work with tenants on payment arrangements wherever possible to avoid evictions.

28. Meanwhile, the Governor's Orders have the effect of disincentivizing workouts, cooperation and flexibility among parties to the lease by eliminating one party's rights and remedies, but not those of the other parties.

29. In Plaintiff Miller's twenty-plus years of experience as a landlord of residential rental property, the ability to take possession of the Miller Property 1 is the primary means of mitigating its losses due to breaches of leases and that while the trial Court may set "damages" hearings, it often agrees to vacate those hearings due to the non-collectability of tenants in general as well as the costs and time involved in pursuing money damages and/or proceedings supplemental. In short, money damages are an illusory remedy for Plaintiff Miller.

30. Plaintiff Miller also owns residential real property at 1826 Manor Haus Ct, Apt 2, Goshen, Indiana ("Miller Property 2") which it leases through its property manager and agent, Miller Apartments as "Landlord" to Jacquelyn Osburn and Wesley Osburn (together "Tenant Osburns"). A copy of the lease is attached hereto as **Exhibit D**.

31. The lease terms call for monthly rent of \$775.00; the lease term began on March 13, 2020.

32. Thereafter, Tenant Osburns were in default and breach of the lease for non-payment of rent. Tenant Osburns are currently in arrears a total of \$3,425.00 since the lease inception.

33. Due to the Governor's Executive Orders, Plaintiff Miller has been unable to file for or proceed with a Notice of Claim for Possession and Damages. Tenant Osburns continue to occupy the Miller Property 2 while failing or refusing to pay rent due, or vacate the Miller Property 2 voluntarily.

34. Upon Information and belief, Tenant Chambers has not contracted COVID-19, nor been hospitalized, nor availed themselves of any of the governmental resources such as unemployment benefits, enhanced unemployment benefits, stimulus funds (\$1,200.00 per individual, \$2,400.00

total in this instance) or CARES ACT funds made available by Defendant for rental assistance, nor sought satisfactory repayment terms with Plaintiff Miller so that they could catch up their rental arrearage and remain in the Property.

35. Plaintiff Miller is in the business of rental real estate and is highly incentivized to PROVIDE housing and accordingly, does not seek eviction except where absolutely necessary, and Plaintiff Miller has made it their practice to work with tenants on payment arrangements wherever possible to avoid evictions. Meanwhile, the Governor's Orders have the effect of disincentivizing workouts, cooperation and flexibility among parties to the lease by eliminating one party's rights and remedies, but not those of the other parties.

36. In Plaintiff Miller's twenty-plus years of experience as a landlord of residential rental property, the ability to take possession of the Miller Property 2 is the primary means of mitigating its losses due to breaches of leases and that while the trial Court may set "damages" hearings, it often agrees to vacate those hearings due to the non-collectability of tenants in general as well as the costs and time involved in pursuing money damages and/or proceedings supplemental. In short, money damages are an illusory remedy for Plaintiff Miller.

37. Plaintiff Strong Indiana does business in the state of Indiana and owns residential real property at 1401 N Johnson Street, South Bend, Indiana 46628 ("Strong Indiana Property") which it leases through its property manager, and agent, SB Rental Management LLC as "Landlord" to Abigail Brown ("Tenant Brown"). A copy of the lease is attached hereto as **Exhibit E**.

38. The lease terms call for monthly rent of \$590.00; the lease term began on March 24, 2020.

39. Thereafter, Tenant Brown was in default and breach of the lease for non-payment of rent. Tenant Brown continues to make sporadic partial payments towards her rent arrearage and is currently in arrears a total of \$1,610.00 since the lease inception.

40. Plaintiff Strong Indiana has NOT charged late fees or penalties and has referred Tenant Brown for rental assistance resources to both St. Vincent de Paul Society of St. Joseph County, and the Portage Township Assistance.

41. Due to the Governor's Executive Orders, Plaintiff Strong Indiana has been unable to file for or proceed with a Notice of Claim for Possession and Damages.

42. Tenant Brown continues to occupy the Strong Indiana Property while failing or refusing to pay rent due or vacate the Strong Indiana Property voluntarily.

43. During Tenant Brown's occupation of the Strong Indiana Property, it has been designated a chronic problem by the South Bend Police Department and could incur additional fines against Plaintiff Strong Indiana based on Tenant Brown's malfeasance. See **Exhibit F**. The Governor's Orders are creating a public health and safety crisis.

44. Plaintiff Strong Indiana is in the business of rental real estate and is highly incentivized to PROVIDE housing and accordingly, does not seek eviction except where absolutely necessary, and Plaintiff Strong Indiana has made it its practice to work with tenants on payment arrangements wherever possible to avoid evictions. Meanwhile, the Governor's Orders have the effect of disincentivizing workouts, cooperation and flexibility among parties to the lease by eliminating one party's rights and remedies, but not those of the other parties.

45. Upon Information and belief, Tenant Brown has not contracted COVID-19, nor been hospitalized, nor availed herself of any of the governmental resources such as unemployment benefits, enhanced unemployment benefits, stimulus funds (\$1,200.00 per individual in this case) or CARES ACT funds made available by Defendant for rental assistance, nor sought satisfactory repayment terms with Plaintiff Strong Indiana so that she could catch up her rental arrearage and remain in the Property.

JURISDICTION

46. Subject matter jurisdiction over the claims and causes of action asserted by Plaintiffs in this action is conferred on this Court pursuant to U.S. Const. Amends, V and XIV, 42 U.S.C. § 1983, 42 U.S.C. § 1988, 28U.S.C. §1331, 28 U.S.C. § 1343, 28 U.S.C. §§ 2201 and 2202, and other applicable law. Supplemental jurisdiction is conferred by 28 U.S.C. 1367(a).

VENUE

47. Venue in this District and division is proper pursuant to 28 U.S.C. §1391(b)(1) as Defendants reside in this district and, in the alternative, 1391(b)(2) as a district in which a “substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.”

STANDING

48. Plaintiffs are owners of property in the State of Indiana who have been directly injured by the Governor’s moratorium on eviction. These injuries can only be redressed by a decision of this court.

CLAIMS FOR RELIEF

Count I

The Governor’s Executive Orders exceed His Authority under the Emergency Powers Statute, Ind. Code § 12-14-3-1 et. seq., and thus violate Separation of Powers Principles under the Indiana Constitution, Article I, section 26, and Article 3

49. The Governor’s Exec. Orders 20-02 et. seq., which establish a blanket moratorium on all evictions statewide during the period of emergency, exceed the emergency powers delegated to him by the legislature under Ind. Code § 10-14-3-12(d)(1). Consequently, the Governor is without power to issue these Orders. In issuing these orders anyway, the Governor violates principles of

separation of powers under the Constitution of the State of Indiana, Article 1, section 26 and Article 3.

50. The “emergency gubernatorial powers” statute, Ind. Code § 10-14-3-12(d), under which the Governor issued Exec. Orders 20-02, et. seq., provides, in relevant part: “In addition to the governor's other powers, the governor may do the following while the state of emergency exists: (1) 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 any of these provisions would in any way prevent, hinder, or delay necessary action in coping with the emergency*” (ital., added.). This statute was intended to give the Governor the power to lift any statutory or regulatory obstacles which would “prevent, hinder or delay necessary action in coping with the emergency.” The statute was intended, in other words, as a de-regulatory measure to permit those responding to an emergency to do so in as efficient a way as possible during an emergency.

51. Exec. Order 20-02 cites this language and then states, “No eviction or foreclosure proceedings involving residential real estate or property, whether rental or otherwise, may be initiated . . . until the state of emergency has terminated; and any applicable statute in connection therewith is hereby suspended.” The statute as plainly written does not grant the Governor *carte blanche* to lift, alter or eliminate any and all laws or regulations at his sole discretion. It certainly does not give him the power to issue a statewide and indefinite moratorium on evictions. Indeed, our research reveals *no instance in the history of Indiana* in which a Governor has issued a statewide emergency order of any kind that affects citizens in their private capacities. The Governor’s Orders are unprecedented, unwarranted and unjustifiably expansive. The Governor has exceeded his power by using a provision intended to clear away regulatory obstacles facing those

responding to an emergency to make new regulations of his own which prohibit courts from hearing eviction proceedings.

52. The principle of separation of powers is one of the first principles of republican government. As James Madison, quoting Montesquieu, wrote in Federalist 47, “When the legislative and executive powers are united in the same person or body, there can be no liberty.” The threat is greatest when the legislative power is usurped by one individual in the person of the executive. This case is remarkably parallel to the watershed case, *Youngstown Steel and Tube Co. v Sawyer* (the “Steel Seizure” case), 343 U.S. 579 (1952). As Justice Black wrote in holding that President Truman’s executive order violated basic separation of powers principles by taking over the steel mills to continue the production of steel during the Korean War, “The President’s power, if any, to issue the order, must stem either from an act of Congress or from the [state] Constitution itself.” 343 U.S. at 582.

53. Similarly, the Governor’s power to issue his order must stem either from the State Constitution or from a statute specifically delegating power to him. Neither the Constitution of the State of Indiana nor the statute invoked by the Governor, Ind. Code § 10-14-3-12(d)(1), affords him the power to issue a blanket moratorium on evictions throughout the state of Indiana. Indeed, the Indiana Constitution, if anything, clearly erects constitutional safeguards *against* the kind of action taken here. In exceeding the bounds of the statute, the Governor has acted without legal authorization in violation of separations of powers principles enshrined by Article I, Section 26 and Article 3 of the Indiana Constitution.

54. Article 1, Section 26 of the Constitution of the State of Indiana provides, “The operation of the laws shall never be suspended except by the authority of the General Assembly.” Indiana Constitution, Article 3, section 1 further provides, “The powers of the Government are divided

into three separate departments: the Legislative, the Executive including the Administrative, and the Judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another . . . “Each of these constitutional provisions is motivated by the same value: that the Governor does not make law, but should only faithfully execute it.

55. Nor does the power come from the provision of the Emergency Powers statute, Ind. Code § 10-14-3-12(d) invoked by the Governor. Ind. Code § 10-14-3-12(d) was intended to give the Governor the power to lift any statutory or regulatory obstacles which would “prevent, hinder or delay necessary action in coping with the emergency.” By its clear terms, the provision gives the Governor power to sweep away any legal or regulatory restrictions *if strict compliance with any of these provisions would in any way prevent, hinder, or delay necessary action in coping with the emergency*”.(ital. added.) The provision as written makes good sense in an emergency: It gives the Governor the limited authority to rescind restrictions that hamper the “necessary action” by those – police, fireman, state healthcare workers, or others who are “coping with the emergency.” The statute, in other words, is a de-regulatory measure delegating to the Governor the power to remove legal restrictions on those who are responding to the emergency so that they may do so in as efficient a way as possible. It does *not* delegate to the Governor a general power to unilaterally and indefinitely rescind any law, rule or procedure whatsoever. The Governor has acted way out of his lane in issuing and reissuing the statewide moratorium on evictions.

56. Accordingly, Exec. Orders 20-02 et. seq. are null and void insofar as they purport to create a moratorium on evictions.

Count II

The Governor's Executive Orders violate the Right of Access to the Courts Which is Part of the Right to Petition Government Protected under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. 1983

57. Plaintiff incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

58. The First Amendment protects “the right . . . to petition the Government for a redress of grievances.” U.S. Const. Amend. I. The right to petition government includes the right of access to the courts. The Supreme Court could not have put it more plainly: “The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” *Sure-Tan, Inc. v NLRB*, 467 U.S. 883, 896-97 (1984). “The Petition Clause ... was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble.” *McDonald v. Smith*, 472 U.S. 479, 485 (1985). The right of access to the courts is to be given the same constitutional protections as “other First Amendment expressions.” *Id.*

59. The right to petition government was incorporated against the states long ago through the Due Process clause of the Fourteenth Amendment. *DeJonge v Oregon*, 299 U.S. 353 (1937). The Governor’s moratorium on owners’ access to the courts in eviction proceedings therefore violates the First and Fourteenth Amendments of the United States Constitution.

60. Additionally, there is a related right cognized by the Supreme Court as a fundamental interest in access to the courts protected under the Due Process clause of the Fourteenth Amendment. *Boddie v Connecticut*, 401 U.S. 371 (1971). The fundamental interest in access to the courts clears away more particularized obstacles to access to the judicial process. The *Boddie* case, for example, held unconstitutional a state requirement that indigent individuals pay court costs in order to obtain a divorce. In *Little v Streater*, 452 U.S. 1 (1981), the Court unanimously

held unconstitutional a state law requiring indigents to pay costs of a paternity test. As recently as 2011, the Court ruled that the right to access to the judicial process was violated when the State did not provide counsel in a civil contempt hearing. *Turner v Rogers*, 564 U.S.431 (2011).

61. Each of these cases involve significantly less onerous obstacles than the deprivation at hand here. Plaintiffs in these other cases were not categorically barred from using the judicial process. Rather, state law required them to pay fees for paternity tests, divorce filing fees or to pay for their own counsel in a civil contempt matter. Yet the Court held that each of these lesser restrictions violated the fundamental interest in access to the judicial process recognized under the Due Process clause of the Fourteenth Amendment. In the instant case, plaintiff-landowners are absolutely barred from using the courts to process an eviction for an indefinite period of time. The deprivation in this case is significantly greater – indeed, it is categorical.

62. The First Amendment right to petition and the Fourteenth Amendment right of access to the courts are protected with the highest level of judicial scrutiny – strict scrutiny. Indeed, as the Court recognized in *Boddie*, where deprivation of the judicial process intersects with the infringement of another fundamental right, the level of scrutiny used by the court should be heightened to strict scrutiny. In *Boddie*'s case, the right infringed was the right to end a marriage. In our case, the interest is in Plaintiffs' property rights.

63. Under strict scrutiny, the State would be required to show that it has a compelling state interest in continuing the moratorium and that the moratorium is “narrowly tailored,” and that it utilizes the “least burdensome alternative” in achieving the state interest. While the Governor's motives in imposing the moratorium are murky – is it a measure designed to protect the health of Hoosiers or is it simply an economic cost-shifting mechanism to force landowners to subsidize non-rent-paying tenants? – in either event, strict scrutiny will prove fatal to the Orders.

64. If the interest claimed is only economic, the state interest is not compelling. Indeed, it may not even be legitimate under rational basis review insofar as it simply shifts costs from one class of citizens to another. And if the State's interest is purely economic, the moratorium is certainly not narrowly tailored to this interest since the moratorium applies to all evictions irrespective of the reasons for the eviction and/or the economic resources of the tenant.

65. If, on the other hand, the moratorium is motivated by health concerns, i.e., to reinforce the stay-at-home orders, then the State would clearly not meet the narrowly tailored prong of the strict scrutiny test. In fact, it would fail the narrowly tailored prong for at least four different reasons: (1) The stay-at-home orders have been lifted. There is nothing for the moratorium to reinforce. (2) The moratorium is statewide and does not take into account differing conditions in different parts of the state. (3) The moratorium is of an indefinite period of time. And (4) the moratorium is not the least burdensome alternative insofar as an individualized assessment of particular cases by the courts would be a more fine-tuned way to balance the rights of the plaintiffs against the public interest.

66. The right to petition and the right of access to the courts applies directly to the Governor's orders. The Governor's orders bar owners of property from having their cases heard in court and, therefore, from reclaiming their properties. After the initial 30-day order expired, the Governor reissued his ban on permitting the courts to hear eviction cases four times, and may do it again when the current order expires at the end of July. Owners of property have been foreclosed for nearly five months from having a court of law review their claims for repossession of their property. Given that this may go on indefinitely, owners see no light at the end of the tunnel.

67. A violation of either of these rights of access to the courts is compensable under 42 U.S.C. 1983, which provides for recovery of damages for violations of constitutional rights which occur

“under color of state law.” Section 1983 applies directly to the Governors’ orders. Moreover, if the court determines that plaintiffs are entitled to damages under section 1983, plaintiffs seek award of attorneys’ fees under 42 U.S.C. 1988.

Count III

Exec. Order 20-02 Violates Article I, Section 12 of the Indiana Constitution by Denying Plaintiffs Access to the Courts

68. Plaintiff incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

69. The same right to judicial access is also protected under the Constitution of the State of Indiana. Article 1, section 12 of the State Constitution provides as follows: “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.”

70. This state constitutional provision is even broader than the right of access to the judicial process protected under the Fourteenth Amendment to the United States Constitution. The right to access to the courts is both an individual right – Article 1, section 12 was, after all, deliberately placed in Article 1, the Bill of Rights for the Indiana Constitution -- but also plays a pivotal function in the scheme of separation of powers. Where courts are closed to claimants, there is no effective check on the other two branches of government. This is serious enough when the *Legislature* has passed the statute for which review is sought. But in this case, the infringement is the result of an *executive* order. Not one, but two branches of government have effectively been cut out of the constitutional process. An unreviewable order issued without the protection of legislative oversight which remains in effect in all parts of the state for an indefinite period of time is the very definition of what once called “tyranny.”

Count IV

**The Governor's Executive Orders Are an Unconstitutional Taking of Property
under the Takings Clause of the Fifth and Fourteenth Amendments
to the United States Constitution and 42 U.S.C. § 1983**

71. Plaintiff incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

72. The principle that Government may not take property is one of the most sacred and ancient in our tradition, literally deriving from the Magna Carta of 1215, paragraph 39. The Fifth and Fourteenth Amendments to the United States Constitution enshrines this value in both the Due Process and the Takings clauses. The Takings clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.” U.S. Const., Amend. V. This was incorporated to the states more than a century ago through the due process clause of the Fourteenth Amendment. U.S. Const. Amend XIV, *Chicago Burlington and Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

73. The eviction moratorium is a physical or “per se” taking of property. Constitutional case law recognizes two kinds of takings – physical or “per se” takings, and regulatory takings. The most obvious type of taking is where the Government physically occupies or destroys property. Yet the Supreme Court has made abundantly clear that a “per se” taking also occurs when an owner cannot use property for its intended economic use, even if the owner is not wholly excluded from this property. In *Pennsylvania Coal v Mahon*, 260 U.S. 393 (1922), the Court held that a physical taking had occurred when a mining company which owned a large swath of land in Pennsylvania, sold surface rights to third parties. The state legislature then prohibited the Company from mining

under its own land. The Supreme Court held that, by prohibiting the owner from using its own land for its intended use, a taking had occurred.

74. A physical taking can also occur even when a landowner in possession is deprived of the use and enjoyment of his property. Thus, where low-level military flights impair the owner's use of land, a "physical" taking has occurred. *United States v Causby*, 328 U.S. 256 (1946).

75. Exec. Orders 20-02 et. seq. take property in a far more obvious and direct way than in these cases. By permitting a third party to remain in possession of property without paying rent, and by prohibiting a landowner even from seeking a just adjudication from a neutral court of law, Exec. Order 20-02 is the clearest form of taking. As Justice Thurgood Marshall once wrote, "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. . . . To require that the owner permit another to exercise complete dominion literally adds insult to injury." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

76. In the alternative, the eviction moratorium constitutes a regulatory taking. Governmental regulations that "deny the landowner any economically viable use of the property" falls squarely into the category of regulatory takings. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Supreme Court had held, in a case that is particularly on all fours with our case, that a regulatory taking occurs and just compensation required *even if the taking is temporary and the property is later restored to the owner*. *First English Evangelical Lutheran Church v County of Los Angeles*, 482 U.S. 304 (1987).

77. The central purpose of the regulatory takings principle, as the Supreme Court has made clear, is to "bar . . . Government from forcing some people alone to bear the public burdens which,

in all fairness and justice, should be borne by the public as a whole.” *Lingle v. Chevron Corp.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

78. This is precisely what has occurred here: Exec. Order 20-02 deprives landowners of the right to seek redress for nonpayment of rent and forces landowners to bear the public burden for losses incurred as a result of the pandemic. Landowners remain on the hook to pay their mortgages and their property taxes and in some cases even utilities, yet are barred by the moratorium on eviction from enforcing their right to rent. Exec. Order 20-02 has effectively forced landowners “to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Lingle v. Chevron Corp.*, 544 U.S. at 537.

79. The United States Supreme Court has repeatedly acknowledged that takings liability under the Fifth and Fourteenth Amendments may be redressed under 42 U.S.C. 1983. To the extent relief is granted under section 1983, plaintiffs are entitled to attorneys’ fees under 42 U.S.C. 1988.

Count V

The Governor’s Executive Orders Are an Unconstitutional Taking of Property under the Takings clause of the Indiana Constitution

80. Plaintiff incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

81. Article 1, section 21 of the Constitution of the State of Indiana specifically provides, in relevant part, that “No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.”

82. Owners undoubtedly have a constitutionally-protected property interest in their property. A taking of property occurs when government acts in a way to deprive, even temporarily, a property owner from exercising possession and control over their property. The Governor’s Exec. Orders 20-02 et. seq. establish a moratorium on eviction proceedings. By closing the courts to

owners of property and thereby preventing them from reasserting control and possession of their property, these Orders are a “taking” of property within the ambit of the Constitution of the State of Indiana, Article 1, section 21. Plaintiffs are entitled to “just compensation” in the form of damages from the State of Indiana for the period of time they have been deprived of exercising their property rights.

Count VI

The Governor’s Executive Orders Violate Plaintiffs’ Procedural Due Process Rights under the Fourteenth Amendment of the United States Constitution; 42 U.S.C.1983

83. Plaintiff incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

84. The Due Process clause of the Fourteenth Amendment provides that “No state may make or enforce any law which shall . . . deprive any person of life, liberty or property without due process of law.” U.S. Const. Amend. XIV.

85. While procedural due process is a closely related value to the takings clause insofar as both protect property interests, where the Takings clause requires compensation, the Due Process clause requires adequate *process* before the state can deprive one of a property right. As the Supreme Court declared more than a half-century ago, “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Morchisson*, 349 U.S. 133, 136 (1955).

86. Plaintiffs unquestionably have a property interest in their rental properties. Yet they are denied by Exec. Order 20-02 et. seq. from vindicating their interest in a neutral court of law.

87. Even where there are countervailing state interests, procedural due process requires a weighing of property rights against these state interests. *Mathews v Eldridge*, 424 U.S. 519 (1976) is the canonical case defining the scope of procedural due process protections. The *Mathews* Court

ruled that the level of procedural protection – whether, for example, the plaintiff is entitled to a full hearing – depends on a balancing of three factors: (1) the extent to which property rights are infringed, (2) the risk of error likely from the use of a lesser procedure or, as in this case, no procedure at all, and (3) the costs and administrative burden of the process, and the interests of the government in efficient adjudication.

88. In this case, the Plaintiffs’ property interests are significant. They are denied the right to possess, use and enjoy their own property for an indefinite period of time. The second factor assesses the risk of error from sub-standard procedures. Here, there are no procedures at all: Plaintiffs are altogether denied access to the courts. As for the third factor --the costs of adjudication – given that the courts are ordinarily open to eviction proceedings and that the courts are now open to other cases, the “costs” are negligible at best.

89. Not only does Exec. Order 20-02 deny Plaintiffs the use of their own property, it deprives them of the most basic right of a civilized society – to seek redress in the courts for a return of that property.

90. The United States Supreme Court has confirmed that liability under the Due Process clause of the Fourteenth Amendments may be redressed under 42 U.S.C. 1983. To the extent relief is granted under section 1983, plaintiffs are entitled to attorneys’ fees under 42 U.S.C. 1988.

Court VII

The Governor’s Executive Orders violates the Contracts clause of Article I, section 10 of the United States Constitution

91. Plaintiff incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

92. The Contracts Clause, Art. 1, § 10, of the United States Constitution, provides: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” The Framers deemed the right

of contract so fundamental that it is one of the few rights-bearing provisions in the original Constitution. In fact, it applied directly to the States well before the Bill of Rights were incorporated to the States through the Fourteenth Amendment. The Contracts clause was meant to end a practice that had become customary under the Articles of Confederation – that of granting “private relief,” i.e., relieving a class of persons of their debts or other contractual obligations. Sir Henry Maine declared that the Contracts clause was “the bulwark of American individualism against democratic impatience and socialistic fantasy.” Henry Maine, *Popular Government* 247-48 (1885). Exec. Order 20-02 is a contemporary form of “private relief” which violates the Contracts clause of the United States Constitution.

93. In determining whether the Contracts clause is violated, courts consider “the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights.” *Sveen v. Melin*, 138 S.Ct. 1815, 1822 (2018). If a court determines that a law works a substantial impairment, it then considers “whether the state law is drawn in an ‘appropriate’ and ‘reasonable’ way to advance ‘a significant and legitimate public purpose.’” *Sveen*, 138 S.Ct. at 1822 (quoting *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)).

94. In this case, the impairment to the landlord-tenant agreement is substantial. The moratorium rewrites – indeed, effectively abrogates – the landlord/tenant agreement. Tenants can discontinue paying rent – whether or not they have lost their jobs or are otherwise under economic duress. In some cases, tenants ceased paying rent before the outbreak of covid-19 or for reasons that have nothing to do with the outbreak. Exec. Order 20-02 not only deprives owners of rent, it also effectively prevents them from enforcing other provisions of the rental lease agreement including provisions which prohibit pets, loud parties, use of drugs and/or smoking indoors, and

other activities injurious to other residents, neighbors and/or to the public at large. Owners are dispossessed of their property during the period of the emergency – an indefinite period which has been extended four times and counting. For landowners, there is no light at the end of the tunnel.

95. Nor is it clear that there is a “significant and legitimate public interest” in imposing the moratorium. Two possible public interests suggest themselves: first, that the moratorium was intended to reinforce the initial “stay-at-home” orders. Even if this is a significant and legitimate reason, these orders have long since ended when Stage 2 began on May 4, 2020. Thus, there is no reasonable or appropriate relation between the eviction moratorium and the public interest which motivated the moratorium. In fact, insofar as different parts of the state are in different phases of the re-opening, a blanket statewide moratorium is not “reasonably” or “appropriately” tailored to the goal of keeping tenants at home.

96. The second possible interest is purely economic – to shift onto the backs of landowners the responsibility for tenants during a time of economic uncertainty. It is doubtful that this is a legitimate interest at all. Indeed, it simply shifts economic hardship from one group to another. Even if this were a legitimate interest, however, it is not “appropriately” tailored to achieve the government interest. Indeed, the moratorium is vastly over-inclusive insofar as it prohibits landowners from evicting those for reasons that stem from causes that have nothing to do with the economic consequences of the pandemic. The moratorium bars (1) evictions commenced before the pandemic began, (2) evictions of those who are able to pay, or who have received federal assistance under the CARES Act or other federal stimulus packages but who have decided not to pay rent because of the moratorium itself, and (3) evictions for reasons other than financial, i.e., for other lease violations.

97. Violation of the Contracts clause of Article I, section 10 of the United States Constitution grounds liability under 42 U.S.C. 1983. Additionally, to the extent that relief is granted under section 1983, plaintiffs are entitled to attorneys' fees under 42 U.S.C. 1988.

GENERAL DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

98. Plaintiffs have and continue to have their fundamental constitutional rights violated by Defendants, each of whom is involved with the enforcement and/or threatened enforcement of the challenged orders. Plaintiffs will be irreparably harmed if injunctive relief is not issued. Further, the public interest is served by the vindication of constitutional rights, and the weighing of harms warrants issuing injunctive relief.

REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Issue a declaratory judgment that the Governor's Ordinances are null and void, and of no effect, as:
 - a. unconstitutional under Article 1, section 26 and Article 3 of the Constitution of the State of Indiana;
 - b. unconstitutional under the First and Fourteenth Amendments of the Constitution of the United States;
 - c. unconstitutional under Article 1, section 12 of the Constitution of the State of Indiana;
 - d. an unconstitutional taking of property under the Fifth and Fourteenth Amendments of the Constitution of the United States;
 - e. an unconstitutional taking of property under the Takings Clause of the Constitution of the State of Indiana;

- f. a violation of Plaintiffs' procedural due process rights under the Fourteenth Amendment of the Constitution of the United States; and/or
 - g. a violation of the Contracts Clause of Article I, section 10 of the Constitution of the United States.
2. Set aside and hold unlawful the Governor's Orders pertaining to the Eviction Ban;
 3. Permanently enjoin the Defendants and all persons and entities in active concert or participation with the Defendants from implementing and enforcing the Eviction Ban;
 4. Issue a preliminary injunction preventing the Defendants from enforcing or implementing the Eviction Ban until this Court decides the merits of this lawsuit;
 5. Permanently enjoin the Defendants and all persons and entities in active concert or participation with them from enforcing the Eviction Ban unless the ban is issued in accordance with all procedural and substantive due process requirements of the United States Constitution and Indiana Constitution;
 6. Award Plaintiffs damages arising out of their Section 1983 Claims, and specifically under the Fourteenth Amendment and the Fifth Amendment of the United States Constitution, and the Takings Clause of the Constitution of the State of Indiana;
 7. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action pursuant to 42 U.S.C. § 1988 and other applicable law; and
 8. Grant all other such relief to Plaintiffs as the Court may deem proper and just.

EXHIBITS INDEX

Exhibit A: Unsigned Residential Lease by and between Plaintiff LeMond and Tenant Emersons for the LeMond Property

Exhibit B: Copies of pleadings for Plaintiff LeMond's action for Possession of the LeMond Property against Tenant Emersons under Cause Number 9K08-2003-SC-1119 in the Marion County Small Claims Court, Wayne Township

Exhibit C: Lease dated February 21, 2020 by and between Miller Apartments, as the property manager and agent of Plaintiff Miller, and Tenant Chambers for the Miller Property 1

Exhibit D: Lease dated March 13, 2020 by and between Miller Apartments, as the property manager and agent of Plaintiff Miller, and Tenant Osburns for the Miller Property 2

Exhibit E: Residential Lease Agreement dated March 24, 2020 by and between SB Rental Management, LLC, as the property manager and agent of Plaintiff Strong Indiana, and Tenant Brown for the Strong Indiana Property

Exhibit F: Warning Letter from South Bend Police Department to Plaintiff Strong Indiana, dated June 19, 2020, regarding violations at the Strong Indiana Property

Dated: July 28, 2020

Respectfully submitted,

By: /s/ Jeffrey J. Jinks

Jeffrey J. Jinks

Attorney for Plaintiffs Jerri LeMond, LaVern and Josephine Miller FLP, and Strong Indiana LLC

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