

August 15, 2020

TO: The Hon. Eileen Filler-Corn, Speaker
The Hon. Charniele Herring, Majority Leader
The Hon. Todd Gilbert, Minority Leader
Virginia House of Delegates

FROM: Thomas A. Loftus, President
Equitable Housing Institute (EHI)

RE: Effective statutory protection of tenants and homeowners from eviction and
foreclosure due to effects of the COVID-19 pandemic

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It is crucial to Virginia's recovery from the pandemic that the General Assembly take effective action to protect Virginia residents from the loss of their homes due to the pandemic's impacts. For example (as documented below):

- 1) About 384,000 Virginians were unemployed as of June 2020—8.4% of its workforce—and about the same number of Virginia renter households believe they are at serious risk for eviction by year's end, due to nonpayment of rent
- 2) Before the pandemic, Virginia had extremely high eviction rates—more than twice the national average
- 3) Evictions often have devastating effects on the people affected
- 4) Virginia's statutes and regulations fail to adequately protect tenants

Eviction restrictions such as those proposed by Gov. Northam last week are appropriate and necessary.¹ Those proposals are consistent with restrictions imposed by many other states.²

¹ Specifically, Gov. Northam proposes:

- “a pause on evictions until at least April 30, 2021, tied to the requirement that landlords and tenants work together on a payment plan and seek out financial assistance, including through Virginia's statewide Rent and Mortgage Relief Program;” and
- “a moratorium on utility disconnections for electric, water and natural gas utilities until 60 days after the current state of emergency ends.”

See, e.g., Office of Governor Ralph Northam, *Governor Northam Unveils Priorities for Upcoming Special Session*, Press Release (Aug. 14, 2020), posted at <https://www.governor.virginia.gov/newsroom/all-releases/2020/august/headline-859923-en.html>.

² Eviction moratoriums in other states are summarized in, e.g., Ann O'Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus* (NOLO, Aug. 7, 2020), posted at <https://www.nolo.com/legal-encyclopedia/emergency-bans-on-evictions-and-other-tenant-protections-related-to-coronavirus.html>.

Other key parts of the solution are adequate funding such as Gov. Northam proposes, to increase access to affordable housing, reduce homelessness, and establish a pilot program to reduce problems that result in eviction actions.³ Below, we summarize how:

- 5) The General Assembly has sufficient emergency authority to prevent the impending disaster of massive evictions
- 6) Gov. Northam’s proposed eviction restrictions are consistent with Virginia contract law
- 7) The General Assembly may take many additional steps to correct the problem of excessive evictions in Virginia

The General Assembly must do everything necessary, during its Special Session this month, to protect Virginians from unnecessary evictions and foreclosures during the COVID-19 pandemic.

1. About 384,000 Virginians were unemployed as of June 2020—8.4% of its workforce—and about the same number of Virginia renter households believe they are at serious risk for eviction by year’s end, due to nonpayment of rent

Virginia’s unemployment rate more than tripled from February 2020 (2.6%) to June 2020 (8.4%).⁴ (It hit an historic high of 11.2% in April 2020.)⁵ Some 364,309 Virginians were on its unemployment rolls, as of June 2020.⁶

Virginia has experienced the same basic job and income losses as the nation as a whole.⁷ Initial unemployment insurance (UI) claims nationwide “have exceeded the prior all-time record of 695,000 (October 1982) in every week since March 21.”⁸

³ See, e.g., Office of Governor Ralph Northam, *Governor Northam Unveils Priorities for Upcoming Special Session*, Press Release (Aug. 14, 2020), posted at <https://www.governor.virginia.gov/newsroom/all-releases/2020/august/headline-859923-en.html>.

⁴ Federal Reserve Bank of St. Louis, *Unemployment Rate in Virginia*, posted at: <https://fred.stlouisfed.org/series/VAUR>.

⁵ That was the first double-digit unemployment rate in the Commonwealth for any month since federal agencies began reporting those figures in 1976. See, e.g., BLS, *Unemployment Statistics by State: Historical Highs/Lows, Seasonally Adjusted*, posted at <https://www.bls.gov/web/laus/lausthl.htm> (covering 1976-Present); Federal Reserve Bank of St. Louis, *Unemployment Rate in Virginia*, posted at: <https://fred.stlouisfed.org/series/VAUR> (Virginia unemployment rate for each month from 1976-Present).

⁶ *June 2020 Monthly Labor Force Data*, Virginia Employment Commission (July 17, 2020).

⁷ BLS, *The Employment Situation — July 2020*, posted at: <https://www.bls.gov/news.release/pdf/empsit.pdf>. Virginia actually fared a bit better than the national average, as of June, with an unemployment rate of 8.4%, versus 11.1% nationally. (That national rate dipped to 10.2% in July 2020.)

⁸ Lucas Moyon and Laura Dawson Ullrich, *Interpreting Unemployment Data in the Time of COVID-19*, Federal Reserve Bank of Richmond (Aug. 7, 2020), posted at: https://www.richmondfed.org/research/regional_economy/regional_matters/2020/rm_08_07_2020_unempl

An estimated 384,000 renter households in Virginia (38.09% of all its renter households) believe that, as likely as not, they will be unable to pay their contract rent for the rest of this year.⁹

2. Before the pandemic, Virginia had extremely high eviction rates—more than twice the national average

Virginia had 3 of the 5 large cities in America with the highest eviction rates, and 5 of the top 10 such cities, as of 2016:

- #2—Richmond (11.44%)
- #3—Hampton (10.49%)
- #4—Newport News (10.23%)
- #6—Norfolk (8.65%)
- #10—Chesapeake (7.9%)¹⁰

Virginia also had 3 of the 5 highest eviction-rate *mid-sized* cities in America, as of that time:

- #2—Petersburg (17.56%)
- #4—Hopewell (15.69%)
- #5—Portsmouth (15.07%)¹¹

Virginia’s overall eviction rate (5.12%) was more than twice the national average (2.34%), as of that time.¹² Despite a few tenant protections enacted in response to the pandemic, Virginia rates only 1 of 5 stars for tenant protections, according to Princeton University’s Eviction Lab survey.¹³

[oyment data](#) (“While the unemployment rate has declined sharply since April, the number of people receiving UI benefits has declined much less dramatically. In the age of COVID-19, a falling unemployment rate may not be synonymous with an improving labor market . . .”).

⁹ Those households express no more than 50% confidence that they can pay the rent due for the rest of 2020. *Eviction Right to Counsel Resource Center*, Stout Risius Ross, LLC (Stout), Chart 1 of 5, posted at <https://app.powerbi.com/view?r=eyJrIjoiNzRhYjg2NzAtMGE1MC00NmNjLTIOTMtYjM2NjFmOTA4ZjMyIiwidCI6Ijc5MGJmNjk2LTE3NDYtNGE4OS1hZjI0LTc4ZGE5Y2RhZGE2MSIsImMiOiN9>. (Stout is a global business advisory firm.) About 262,000 Virginia renter households express no confidence, or only slight confidence, that they will be able to pay their contract rent for the rest of the year. *Id.*

¹⁰ *Top Evicting Large Cities in the United States*, Eviction Lab, Princeton Univ, posted at <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en>.

¹¹ *Top Evicting Large Cities in the United States*, Eviction Lab, Princeton Univ, posted at <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en>.

¹² *Top Evicting Large Cities in the United States*, Eviction Lab, Princeton Univ, posted at <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en>.

¹³ *Covid-19 Housing Policy Scorecard*, Eviction Lab, Princeton Univ., posted at <https://evictionlab.org/covid-policy-scorecard/>. Virginia was given some credit for its actions to limit the shutoff of utilities, for dedicating \$50 million in CARES Act funding to tenant relief, and for its court-

Richmond: a case study in extreme eviction rates

In Richmond, One in nine renters suffered an eviction judgment in 2016, and landlords initiated eviction actions against one in five renter households there that year.¹⁴

In Richmond, most of those evicted never made it to a courtroom. They didn't appear because the process seemed inscrutable, or because they didn't have lawyers to navigate it, or because they believed there is not much to say when you simply don't have the money. The median amount owed was \$686.¹⁵

3. Evictions often have devastating effects on the people affected

The devastating toll of Virginia's permissive eviction laws must be corrected, and it must not be permitted to proceed during the pandemic. "Following eviction, a person's likelihood of experiencing homelessness increases, mental and physical health are diminished, and the probability of obtaining employment declines."¹⁶

Eviction is linked to numerous poor health outcomes, including depression, suicide and anxiety, among others. In addition, eviction is linked with respiratory disease, which could increase the risk of complications if COVID-19 is contracted, as well as mortality risk during COVID-19.¹⁷

"Instability, like eviction, is particularly damaging to children, who suffer in ways that impact their educational development and well-being for years."¹⁸

In Richmond, according to the in-depth *New York Times* article quoted above, the consequences of its extremely high eviction rate "spread across the city."¹⁹

ordered moratorium on writs of eviction (currently in effect until September 7—but it doesn't halt evictions in other stages).

¹⁴ Emily Badger and Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, New York Times, April 7, 2018.

¹⁵ *Id.*

¹⁶ Emily Benfer, et al., *The Covid-19 Eviction Crisis: An Estimated 30-40 Million People in America are at Risk*, p. 8 (Aug. 7, 2020).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Emily Badger and Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, New York Times, April 7, 2018.

The Richmond public school system reroutes buses to follow children from apartments to homeless shelters to pay-by-the-week motels. City social workers coach residents on how to fill out job applications when they have no answer for the address line. Families lose their food stamps and Medicaid benefits when they lose the permanent addresses where renewal notices are sent.²⁰

Foreclosures have important consequences for the Commonwealth, too

Renters are not the only Virginians with homes at risk. Nationwide, roughly 5% of homeowners (a total of 3 million households) will have significantly delinquent mortgages by early 2021, according to the National Consumer Law Center. Virginia homeowners are not immune from that problem. Foreclosures can have important consequences for taxpayers, by leading to “lack of maintenance, urban blight, reduced property values for neighboring properties, and erosion of neighborhood safety and stability.”²¹

Other consequences of Virginians losing their homes are far-reaching for Virginia taxpayers, too. For example:

Individuals experiencing displacement due to eviction are more likely to need emergency shelter and re-housing, use in-patient and emergency medical services, require child welfare services, and experience the criminal legal system, among other harms.²²

Taxpayers also are adversely affected by evictions because, when rental incomes decline, so do the associated property tax receipts. As a result:

communities lose resources for public services, city and state governments, schools, and infrastructure, and can expend significant resources managing or disposing of properties acquired through tax foreclosure.²³

4. Virginia’s statutes and regulations fail to protect tenants adequately

Virginia lacks tenant protections that are available in many other states. Unlike in some cities, low-income tenants in Richmond are:

²⁰ *Id.*

²¹ *Id.*

²² *Id.*, citing McKenzie Pish, *August 2020 Cost of Eviction Calculator Reports for United States*, Univ. of Arizona, posted at <https://arizona.app.box.com/s/0cgdsbf8zj7i9rakayy5ehag4n55txwp>.

²³ *Id.*

- not ensured access to legal aid—whereas landlords generally have lawyers;
- not shielded from steep rent increases;
- have no right to deduct from the rent their own necessary repair costs.”²⁴

Combined with factors such as Virginia’s low minimum wage and high poverty rates, Richmond’s extremely high eviction rate “isn’t by happenstance — this is quite intentional,” according to Richmond’s mayor, Levar Stoney.²⁵

A quarter of households here are poor, leaving many people a car repair or a hospital visit away from missing the rent check. But that poverty collides with a legal structure that responds to such moments swiftly. This is a state, Mr. Stoney and others say, that favors property owners, as it has since plantation days. And aid to the poor has been limited.²⁶

As mentioned above, most of those evicted in Richmond never make it to a courtroom. They don’t appear because the process seems inscrutable to them, or because they don’t have lawyers to navigate it, or because they believe there is not much to say if they simply don’t have the money. The median amount owed by tenants who suffered judgments of eviction in Richmond in 2016 was \$686.²⁷

“[T]his doesn’t work. As a societal way of renting housing, this doesn’t work,” according to Elora Raymond, an assistant professor at Clemson University, who has conducted a study of the basically similar eviction process in Atlanta.²⁸

5. The General Assembly has sufficient emergency authority to prevent the impending disaster of massive evictions

The General Assembly has ample legal authority to shield renters and homeowners from adverse actions based on their failure to make full rent and mortgage payments—where those payments become unduly burdensome due to a public emergency such as the Covid-19 pandemic.

For example, the U.S. Supreme Court has upheld the constitutionality of a state’s emergency housing statute that prohibited eviction of tenants for two years, in numerous

²⁴ Emily Badger and Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, New York Times, April 7, 2018. “Laura Lafayette, the chief executive of the regional realtors’ association, which has been supportive of more tenant protections, fears that this system can become a ‘churning machine’ that fails to distinguish between the tenant who made one mistake and the tenant who habitually flouts the lease. Today, both walk away from court with the same consequences.” *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

cities of the state, provided that the tenant paid “a reasonable rental, to be determined by the courts[.]” *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243 (1922). The Court found an adequate basis for the New York legislature’s declaration of a “social emergency” which constituted a serious threat to the public welfare in those cities.

In that case, the Court relied on its previous decisions that in such a temporary emergency, housing may be “clothed . . . with a public interest sufficient to justify restricting property rights” of the buildings’ owners, to the extent done in the statute. *Id.* at 247, citing *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

The same rationale has been applied to mortgage-related regulations of building-and-loan associations. *Veix v. Sixth Ward Bldg. & Loan Ass’n*, 310 U.S. 32 (1940). *See also, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (summarizing *Viex*, *Block*, *Levy*, and other relevant U.S. Supreme Court decisions).

6. Gov. Northam’s proposed eviction restrictions are consistent with Virginia contract law

Full, timely payment under a rental agreement, mortgage, or other contract may become impossible for a tenant or homeowner to make, because of a reasonably unforeseeable event occurring after the contract was made. In that event, failure to make that payment generally is excused, under the doctrine of Impossibility (or Impracticability) of Performance.

The Covid-19 pandemic is a classic example of a reasonably unforeseeable event intervening after the creation a rental contract or mortgage—a *force majeure* (“superior force”) that justifies modification of the payment terms where they have become unduly burdensome. The Impossibility or Impracticability of Performance doctrine may be invoked even if there is no provision in the contract on the subject.

Gov. Northam’s recommendation that the General Assembly pause evictions in the Commonwealth until next Spring—contingent on landlords and tenants working on a payment plan and seeking out financial assistance, including through Virginia’s statewide Rent and Mortgage Relief Program—is consistent with the Impossibility of Performance doctrine; *See, e.g., Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094, 1097-1102 (4th Cir. 1987) (discussing the history and evolution of the Impossibility and Impracticability of Performance doctrine) (citing, *inter alia, in Housing Authority, Etc. v. East Tenn. L. & P. Co.*, 183 Va. 64, 76 (1944).

In *Housing Authority*, the Virginia Supreme Court held that a party to a contract is not required to perform a provision that was made impossible by an unforeseen event that occurred after the contract was made, if the party may not reasonably be assumed to have taken the risk of that event occurring. 183 Va. at 76.

See generally, e.g., *Restatement 2d of Contracts*, §§ 261, 269, and 270 (1981) (discussing effect of total, temporary, or partial impracticability of performance by a party to a contract). The U.S. Supreme Court treated *Restatement* § 261 as authoritative in a case involving contract rights of federal savings and loan associations—whose function is to provide citizens with affordable housing funds. *U.S. v. Winstar Corp.*, 518 U.S. 839, 904-910 (1996) (plurality opinion, per Souter J.). *Id.* at 911 (Breyer, J., concurring).

7. The General Assembly may take many additional steps to correct the problem of excessive evictions in Virginia

An overview of eviction prevention laws and strategies that state and local governments, as well as the federal government, may use to prevent unjustified evictions during the pandemic was prepared in July—in draft form—for the American Bar Association’s COVID-19 Task Force Committee on Eviction.²⁹ Among the subjects covered are:

- Eviction and foreclosure moratoriums
- Housing payment and/or income assistance programs
- Building-based interventions (affordable housing development programs, etc.)
- Housing market-based interventions (rent stabilization, etc.)
- Landlord relief programs (mortgage forbearance, tax relief, loan restructuring and adjustment based on effects of pandemic (“*force majeure*”))
- Equitable tenant protections in state and/or local laws (limits on matters such as late fees, adverse credit reporting, and bases for eviction, and penalties for unlawful eviction)
- Tenants’ and homeowners’ education and counseling programs
- Court-based programs (specialized housing courts, judicial education, strong proof requirements, diversion of eviction cases to mediation, etc.)
- Legal aid and pro bono services

The General Assembly should take all prudent measures to correct its deeply flawed eviction laws, at the earliest practicable time. During its Special Session this month, the General Assembly must—at a minimum—do everything necessary to protect Virginians from unnecessary evictions and foreclosures until the economic problems caused by the COVID-19 pandemic have been overcome.

²⁹ Emily A. Benfer, *et al.*, *Approaches to Eviction Prevention* (July 28, 2020), available at SSRN: <https://ssrn.com/abstract=3662736> or <http://dx.doi.org/10.2139/ssrn.3662736>.