Circuit Court for Anne Arundel County
Case No. C-02-CV-23-002025

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1802

September Term, 2023

Sandel Investments, L.L.C, *et al*.

v.

State of Maryland, *et al.*

Friedman,
Kehoe, S.,
Kenney, James A.
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: May 1, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal arises out of the denial of a request for preliminary injunction of the enforcement of a provision requiring ground lease holders to send billing to ground rent lessees and tenants billing by first-class mail and by certified mail, return receipt requested. Appellants, Sandel Investments, LLC and M & E Investments, LLC, contend that the trial court erred in denying the motion based on its finding that they failed to show a likelihood of success on the merits. Appellees, the State of Maryland and Wes Moore in his Official Capacity as Governor of Maryland, contest these arguments and assert sovereign immunity and non-justiciability.

The basic question presented is whether the court erred in denying preliminary injunctive relief.[1] To answer this question, we must address, first, the nature of our review of a grant or denial of a preliminary injunction, second, whether the appellants have shown that they are likely to succeed on their claims that the statutes at issue retroactively abrogate their vested rights, effect a regulatory taking, and violate the contract, due process, and

[1] Appellants presented the following question:

> When Appellants provided unchallenged testimony that the new statute would destroy their vested contract and property rights and may put them out of business, did the Circuit Court err when it denied Appellants' request for a preliminary injunction?

Appellees frame the question as:

> Did the circuit court properly exercise its discretion in declining to grant preliminary injunctive relief where (1) sovereign immunity precludes any relief against the State of Maryland as a party; (2) any claim against Governor Moore is nonjusticiable because he plays no role in the enforcement of the challenged law; (3) appellants' laundry list of constitutional claims are unlikely to succeed on the merits; and (4) appellants failed to satisfy any of the other factors governing preliminary injunctive relief?

equal protection clauses, and third, whether their challenge is precluded by sovereign immunity and is justiciable.

BACKGROUND

Ground Rents

The ground rent species of leasehold interest, a creature of Maryland property law since at least 1750, is familiar to our Courts as a lease by a landowner to a lessee, most commonly for a period of 99 years, of land on top of which improvements may be made, in exchange for a relatively small rent paid annually or semi-annually. *See Moran v. Hammersla*, 188 Md. 378, 381-82 (1947); *Heritage Realty, Inc. v. City of Baltimore*, 252 Md. 1, 3-4 (1969); *Muskin v. State Dep't of Assessments and Tax'n*, 422 Md. 544, 550-51 (2011); *Kolker v. Biggs*, 203 Md. 137, 141 (1953). The ground lessee has "absolute control and management of the property" and "the exclusive right to improve it," and as long as they pay rent and renew the lease, "the reversioner can never, under any circumstances, obtain possession of the demised premises." *Beehler v. Ijams*, 72 Md. 193, 195 (1890); *cf. Crowe v. Wilson*, 65 Md. 479, 481-82 (1886) (permitting ground rent holder to enjoin certain waste, *i.e.*, conditioning lessee's exercise of absolute control that activity does not jeopardize value of leasehold interest). But "[i]f a homeowner fails to pay the ground rent, [ ] the ground-rent holder has the right to eject the homeowner from the property; in doing so, the ground-rent holder takes possession of the house as well as the land." *Kreisler v. Goldberg*, 478 F.3d 209, 211 n.2 (4th Cir. 2007). This right of reentry generally becomes available to the lessor "in the event that the rent [is] six months in arears," meaning that

the ground rent holder may eject a tenant who has missed one payment. *Heritage Realty, Inc.*, 252 Md. at 3 (citations omitted). Peculiar to the ground lease is its capacity for perpetuity, which lies in the covenants for renewal by the lessee, *State v. Goldberg*, 437 Md. 191, 200-01 (2014), and statutes which make that renewal automatic. Real Prop. § 9-109 ("Uninterrupted possession for 12 months after the expiration of the lease containing a covenant for perpetual renewal . . . operates as a renewal with respect to the entire premises. . . ."). "[I]n practical effect the relation of the lessee to the property is that of owner of the land and improvements thereon, subject to the payment of the annual rent and all taxes on the property." *Moran*, 188 Md. at 381-82 (citations omitted). Our Supreme Court recognized that ground rents and corresponding reversionary interests, due to the strength of their interconnection, comprise "unitary objects," interests which are traded on speculative markets as investment vehicles. *Goldberg*, 437 Md. at 210. The final unusual feature of ground leases is their potential for "redemption," whereby the property is unencumbered of the ground lease: § 8-804(b)(2) permits a lessee to pay at any time a lump sum calculated by multiplying the annual rent by a statutory or contractual capitalization rate to "redeem" his leasehold into a fee simple interest.

Maryland has regulated ground rents since at least 1884. The General Assembly initially prohibited the creation of "irredeemable" ground rents, and in later years tinkered with the statutory system for ground rent redemption. *See Stewart v. Gorter*, 70 Md. 242 (1889). Recently, since *The Baltimore Sun* documented ground rent abuses in the years prior to the Great Recession, the General Assembly has sought to limit the perceived harms

of ground rents. *See Goldberg*, 437 Md. at 195-96. In 2007, it prohibited the creation of new residential ground rents, *see* Real Prop. § 8-803, and created a mandatory ground rent registry. *See* Real Prop. § 8-701 *et seq.* Our Supreme Court invalidated portions of these statutes in *Muskin* and *Goldberg*, but the registry remained generally viable, and the General Assembly further amended these provisions in 2009, 2012, 2015, 2020, 2022, and 2023; the latest amendments catalyzed today's suit. *See* Acts 2009, Chapter 60; Acts 2012, Chapters 464 and 464; Acts 2015, Chapter 428; Acts 2020, Chapter 97, 124 and 125; Acts 2022, Chapter 326; Acts 2023, Chapters 184 and 185.

Procedural History

On September 28, 2023, Appellants filed a complaint in the Circuit Court for Anne Arundel County suing the State of Maryland and Governor Wes Moore in his Official Capacity as Governor of Maryland on three counts and requesting declaratory judgment and injunction among other appropriate relief. They stated that "three duplicate bills," Chapters 180 & 181, Chapters 182 & 183, and Chapters 184 & 185 of the Laws of 2023, adversely affect their rights as owners of ground rent leases and challenged them as unconstitutional.

Count I[2] concerns billing requirements imposed by Chapters 184 & 185, which amend § 8-809 of the Real Property Article to set as a condition the collection of ground

[2] Counts II and III are not at issue at this stage. Count II involves a challenge to amendments preventing ground lease holders from enforcing their rights against ground lessees until the State has processed their registrations, on grounds that the State's delay in posting and processing registration forms violates the constitution. Count III involves challenges to statutory redemption.

rent on the ground lease holders' sending a bill to the last known address of the leaseholder and, if different, to the premises address of the property subject to the ground lease, by first-class mail and certified mail, return receipt requested, where before, solely first-class mail was satisfactory. *See* Real Prop. § 8-809(a). The amendments further prevent a ground lease holder from passing these costs onto the leasehold tenant. § 8-809(a)(4). Appellants alleged that "[t]he cost of conforming to these new billing requirements will be extensive, exceeding the actual rent owed in many cases and being greater that 50% of the rent owed in a substantial number of cases," that the cost of this regulation to all of the ground lease holders in Maryland, who together own "approximately 100,000 to 150,000 ground rent leases," would be at least $4 million and as much as $30 million, and that over time, the cost could be as much as $500 million. These calculations include costs not to be paid by Appellants. Arguing that Chapters 184 and 185 violate the takings, contract, due process, and equal protection clauses of the United States Constitution and impermissibly abrogate vested rights in violation of the Maryland Constitution and Declaration of Rights, Appellants requested that the circuit court declare the provisions unconstitutional and unenforceable, and award attorney's fees as well as "other and further relief as the nature of their cause may require."

On October 6, 2023, Appellants requested a temporary restraining order enjoining, and preliminary and permanent injunction of, enforcement of § 8-809(a) and provisions relating to Counts II and III. The hearing scheduled for October 23, 2023, was postponed, but on October 25, Judge Michael Malone granted the temporary restraining order.

Preliminary Injunction Hearing

On November 2, 2023, the parties appeared in the Circuit Court for Anne Arundel County before Judge Elizabeth S. Morris on the motion for preliminary injunction. The State began by challenging the justiciability of the case and the evidence that Appellants had presented. Regarding justiciability, it argued that § 8-809(a) could not be enjoined by a traditional preliminary injunction because the law affords a role to neither the State nor the Attorney General to enforce it. Rather, this controversy could only be ripe in the context of litigation between a ground rent owner who sued to collect rent or eject a tenant who failed to pay. The State compared the law to a rule of decision or to a change in the Rules of Evidence, where suit to simply prevent an amendment would not be appropriate. Appellants responded that in two recent ground rent cases, *Goldberg* and *Muskin*, plaintiffs successfully brought suit to enjoin certain laws against the State and its agencies in similar contexts. They cited *Cassell v. City of Baltimore*, 195 Md. 348, 353 (1950) for the proposition that a court of equity has the power to restrain the enforcement of a void statute or ordinance at the suit of a person affected, § 172 to the effect that "Injunctions are available in an action challenging the constitutionality of legislation,"[3] and the Uniform Declaratory Judgments Act for the concept that a court has the power to declare the rights of parties in a dispute as to those rights. The State distinguished the laws from *Muskin* and *Goldberg*, arguing that the Acts of the former required the State to extinguish ground rents if the ground rents were not registered and the Acts of the latter replaced the right of

[3] We could identify no § 172 to this effect.

ejectment with a foreclosure scheme, so both involved enjoinable state action. Appellants responded that in those cases, as well as the case at bar, the statute operated to change the legal relationship between parties, which made the issues justiciable. The State concluded by comparing the instant law to one extending the statute of limitations, which could not be challenged by a person who "thought they were in the clear"; rather, that person would be required to wait until a suit was brought against them and challenge the law at that time.

The State then made its argument about the proper framing of the case and the relevancy of the evidence. It argued that the analyses for each constitutional argument must align coherently and accurately, in that the regulatory takings challenge, which is typically brought as applied, should remain such, and not be conflated with facial challenges or with analysis for a retrospective abrogation of vested rights. This would entail viewing only the proper evidence, and analyzing whether the regulation does go "too far"—the fundamental question of a regulatory takings case—with regard not to all ground rents in Maryland, and not to each of the "thousands of ground rents with varying amounts," but to only the ground rents owned by Appellants themselves. The State pointed out that a successful facial takings challenge would render this law unconstitutional even for ground rents of $100,000 a year, where the cost of certified mail would certainly not constitute a taking. Appellants countered that such a hypothetical high-value ground rent does not exist, and that even if the law affects different values of ground rent differently, the court cannot parcel out the applicability of the statute as the State suggested. The court took these matters under advisement.

Appellants presented three witnesses at the motions hearing. The first was Katherine Howard, the general counsel for Regional Management, Inc, a Baltimore City property management firm whose assets include, among other things, 2,922 ground rents exclusively in Baltimore City and Baltimore County. Howard testified that the rents, which run from $96 per year to $180, were created in the 1950s by Regional Management, Inc., to sell affordable homes; that under the old laws, the cost of billing was roughly seven to eight dollars per bill; that the cost of billing under the new laws, including the cost of paying an employee to keep records related to the mailings, was about $40 per year per ground rent; and that this would impact the income of the owners of the ground rents they manage.

The second witness was ground-rent real estate lawyer Ron Marc Goldberg, who owns a title company, belongs to an LLC that owns about 1,000 ground rents, and as a trustee manages about 1,300 ground rents, some of which lie in Anne Arundel County. Goldberg provided charts to explain the cost of sending bills under the different billing laws. He explained that the old law was satisfied by sending regular mail to the address of the leaseholder shown on SDAT's website, and to the property address, if different from the address of the leaseholder. About half the ground rents required two mailings, and the cost per year was either about $3.80 per ground rent or about $7.50. Under the new laws, not only is billing more expensive, there are three potential recipients of billing: the property address, the property owner, and "another address that we've been advised or that we know of." The cost would be $26.05 per mailing, or $104.20 per year for a property

with multiple addresses. His charts showed that rents would suffer greater diminutions depending on their value and how many mailings were required: For the four percent of his ground rents worth $30 or less, the cost of sending two mailings per year would, at $52.10, completely eclipse the income. Overall, under the new requirements, his "income stream" would be "devastated" because "for almost all of them, it's taking at least half and in some cases double the annual income." Goldberg related further purported new costs: the 10 minutes preparing the certified mail, consisting of updating billing records, preparing a bill, folding it, putting it in the envelope, addressing the envelope and return receipt, organizing the documents the post office needs to track the mail, and finally, sealing, stamping, and sending the mail; the 10 minutes for storing and filing the mailing, which consist of copying, filing, and recording the official receipt; and 1.8 minutes for "matching RRR," which consists of storing and filing a copy of the return receipt. He conceded that some of the labor appeared duplicative and that he would only incur costs for this process because he paid someone else to do it.

The State objected to the testimony of Katherine Howard and Ron Marc Goldberg on the grounds that the Appellants failed to provide a foundation for the relevance of the testimony to the ground rents owned by Appellants. Appellants responded that they were presenting evidence that "this is a universal problem" so that the court could issue a "universal order." The State responded that such an argument was inappropriate because the challenge at issue was a regulatory takings challenge to be evaluated on the specific ground rents at issue. The court reserved judgment.

The third witness, Michael Dackman, is the managing member of Sandel Investments and M & E Investments. He testified that of the roughly 12,000 ground rents he participates in owning or managing, Appellants owned about 3,200. All but a couple "very old and small" ground rents require semi-annual mailings. The median ground rent he sees is approximately $100, and about twenty percent require multiple billings. Compliance with the old law cost about $10 per year per ground rent, but under the new regulations, "we have to . . . stuff them, put the certified mailing on, stamp them, [and] have somebody physically take them to the post office, and the post office only accepts so many at a time," which would drastically impact his and his investors' income to the tune of one or two hundred thousand dollars per year—or about 30-50 percent of the income. On cross examination, Mr. Dackman stated that of his ground rents, which range from $9 a year to probably $350, about 10-15 percent had $60 or less per year in annual income, roughly 80 percent were between the $60-$240 mark, and 5 percent were above $240.

At the hearing, Judge Morris extended the temporary restraining order, but a week later, she denied the request for a preliminary injunction, finding, "based on the testimony before the court, that" Appellants had "failed to show a likelihood of success on the merits of Count 1 of their complaint" and "based on the evidence and testimony before the court, that" Appellants had "failed to show a likelihood of success on their claim that the requirements of Real Property Article, Section 8-809(a)(1) amount to a regulatory taking." She did not specifically address the issues on which she had reserved judgment. We note that Count I includes the litany of constitutional challenges to 8-809(a).

On November 8, 2023, the State and Governor Wes Moore filed a motion to dismiss. A week after oral argument, the circuit court denied it without prejudice and ordered the Appellants to supplement their complaint with either an amended complaint or a Bill of Particulars highlighting "specific entities adversely affected by the challenged legislation." That supplement has not been filed.

Appellants timely noted their appeal of the denial of the request for preliminary injunction on November 13, 2023, and on November 1, 2024, we heard argument.

ANALYSIS

Upon request for injunctive relief, the trial court examines (1) the likelihood that the plaintiff will succeed on the merits; (2) the "balance of convenience," *i.e.*, the harm to the defendant upon grant of the injunction versus the harm to the plaintiff upon denial; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest. *Lamone v. Lewin*, 460 Md. 450, 466 (2018) (citing *Ehrlich v. Perez*, 394 Md. 691, 708 (2006)). "The party seeking the preliminary injunction has the burden of adducing facts necessary to satisfy these factors." *Ehrlich v. Perez*, 394 Md. 691, 708 (2006) (citing *Fogle v. H & G Restaurant*, 337 Md. 441, 456 (1995)). "[F]ailure to prove the existence of even one of the four factors" precludes the grant of injunctive relief. *Id.*; *Lamone*, 460 Md. at 466 ("Unless a court concludes that all four factors weigh in the plaintiff's favor, the court may not grant the injunction.").

We review the denial of an interlocutory injunction for abuse of discretion, except where a question is one of pure law to be reviewed *de novo*. *Eastside Vend Distribs., Inc.*

v. Pepsi Bottling Grp., Inc., 396 Md. 219, 239-40 (2006). In this case, the trial court's determination of the whether Appellant is likely to prevail on the merits is a constitutional question which is a question of law, so we apply the *de novo* standard to that factor, but the remaining factors receive the more deferential abuse of discretion treatment. *See Ehrlich*, 394 Md. at 708 (citing *Davis v. Slater*, 383 Md. 599, 604 (2004)). Our review is "limited because we do not now finally determine the merits of the parties' arguments." *Id.* at 707.

Our affirmation of the circuit court's finding that Appellants failed to show a likelihood of success on the merits is sufficient to decide this appeal. "With regard to the factor of likelihood of success on the merits, 'the party seeking the interlocutory injunction must establish that it has a real *probability* of prevailing on the merits, not merely a remote *possibility* of doing so.'" *Id*. at 708 (citing *Fogle*, 337 Md. at 456).

Appellants aver they are likely to prevail on their constitutional challenges against the new billing requirements. First, they argue the requirements violate Maryland's constitutional protections for vested rights. Second, they argue that the new billing requirements constitute a regulatory taking. Third, they argue that the new requirements violate the Contracts Clause. And fourth, they argue that the statute violates due process and the equal protection clause, being both arbitrary and capricious and failing strict scrutiny. The State contests each of these averments, and raises its own issues, namely, that Appellants are unlikely to prevail against the State because, fifth, it has not waived sovereign immunity, and sixth, that the case is not justiciable. We address each contention in turn.

1. Retrospective abrogation

Article 24 of the Declaration of Rights, guaranteeing due process,[4] and Article III, § 40 of our Constitution, prohibiting the taking of property without just compensation,[5] read in concert "have been shown, through a long line of Maryland cases, to prohibit the retrospective reach of statutes that would result in the taking of vested property rights." *Muskin*, 422 Md. at 555 (citing *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 630 n. 9 (2002)). The retrospective abrogation analysis proceeds in two parts: we determine first whether the statute operates retrospectively, and second, whether the statute abrogates a vested right or takes property without just compensation. *Goldberg*, 437 Md. at 205.

i. *Chapters 184 and 185 do not operate retrospectively*

Retrospective statutes are "acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act." *Goldberg*, 437 Md. at 205 (citing *Muskin*, 422 Md. at 557). Though there is "limited analysis of what constitutes a retrospective application of a statute" and "no bright line rule for determining what constitutes retrospective application," examples of "retrospective statutes are those that 'would impair rights a party possessed when he acted, increase a party's liability for past

[4] Article 24 declares, "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Md. Const. Decl. of Rts. art. 24.

[5] Article III, § 40 states that "The General Assembly shall enact no law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." Md. Const. art. III, § 40.

conduct, or impose new duties with respect to transactions already completed.'" *Muskin*, 422 Md. at 557-58 (quoting *John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 147 (2008)). Maryland has adopted the *Landgraf* test for retrospectivity, which "evaluates 'fair notice, reasonable reliance, and settled expectations' to determine 'the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event.'" *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). Importantly, "a statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *John Deere*, 406 Md. at 147 (quoting *Landgraf*, 511 U.S. at 269).

In *Muskin*, the law at issue required ground rent holders to register their leases within three years or suffer a penalty of extinguishment and transfer of the reversion to the ground rent lessee. 422 Md. at 558. The Court found the three-year period to satisfy fair notice but determined that the extinguishment provision "impact[ed] impermissibly the reasonable reliance and settled expectations of ground rent owners by virtue of its extinguishment and transfer features as the consequences for non-registration (or untimely registration) of ground rents." *Id*. This was because ground rent owners, *inter alia*, "rel[ied] reasonably on the future income from ground rents or the ability to sell the fee simple interest on the open market or in the future, if necessary." *Id.*

In *Goldberg*, the statute at issue invalidated the right of a residential ground lease holder to re-enter on default and instead provided "a right to a lien against the real property on default, if the ground rent is unpaid six months after its due date." 437 Md. at 203.

Discussing fair notice, the Court noted that statute "was passed on 2 April 2007, and made effective three months later on 1 July 2007," effecting in some cases the elimination of "the ground lease holder's present right to seek a judicial remedy . . . in but three months." *Id.* at 206. Not only was three months insufficient for fair notice, the penalty suffered from the same reliance and expectation defects as that of *Muskin*. *Id.*

Here, Chapters 184 and 185 were signed into law on April 24, 2023, and became effective on October 1, 2023, more than five months later. This notice period appears like that of *Goldberg*, but unlike *Goldberg*, the operative effect of Chapters 184 and 185 is not to eliminate a judicial remedy for even one ground rent holder upon the effective date. Rather, the statute creates a defense for a ground rent tenant in a collection case that they have not received proper notice. This notice requirement presents a hurdle to the exercise of the reversionary interest. However, it does not extinguish the reversionary interest or the rent. *See* RP § 8-804(f)(17). The statute's impact on the reasonable reliance and settled expectations of the ground rent owners is minimal, considering that Chapters 184 and 185 merely amend existing requirements and do not change the consequences of failure to comply.[6] A similar effect could be had through government action increasing the cost of first-class mail.

Further, Chapters 184 and 185 are distinct from the statutes in *Goldberg* and *Muskin*, which were found to be unconstitutional because they reached back in time and divested

[6] The billing requirement and the consequences of failure to comply were originally encoded in RP § 14-116.1(c) by Chapter 464 of the Acts of 2012, approved on May 22, 2012, and effective July 1, 2012, now codified at RP § 8-809.

the owner of the reversionary interest in real property. Here, the initial *transaction* of the transfer of the reversionary interest bears no new burden, nor do any *transactions* of installment payments that occurred before the passage of the law. We have said that a statue is not retrospective just because it affects a contract which antedates its passage. *John Deere*, 406 Md. at 147 (quoting *Landgraf*, 511 U.S. at 269). The ruling on retrospectivity in *Muskin* on a statute which would "impose new duties with respect to transactions already completed" is inapposite because the transactions to which the new billing requirements apply to have yet to occur. Given the effect of Chapters 184 and 185 in the context of the ground rent regulatory scheme, and considering they impose billing requirements only on prospective rental payments, they afford fair notice to ground rent holders and do not impact the reasonable reliance and settled expectations of ground rent owners in a manner suggesting retrospectivity.

ii. *Chapters 184 and 185 do not abrogate vested rights*

Muskin and *Goldberg* turned on whether the rights at issue were vested.[7] The constitutionality of Chapters 184 and 185 turns on whether they abrogate a vested right. To abrogate is to "abolish (a law or custom) by formal or authoritative action" or to "annul or repeal." Black's Law Dictionary, 9th ed. The law in *Muskin* mandated that if a ground lease

[7] We need not "struggle[] with the difficulty of determining a precise definition of vested rights," because our Supreme Court has established that "the reversionary interest to real property and the contractual right to receive ground rent are vested rights under Maryland law." *Muskin*, 422 Md. at 560 (citing *Heritage Realty, Inc. v. City of Baltimore*, 252 Md. 1, 11 (1969)).

holder failed to register, SDAT should "issue an extinguishment certificate transferring the reversionary interest from the ground lease holder to the ground rent tenant." 422 Md. at 549. The statute unambiguously required the State to annul the reversionary interest, so the Court held the extinguishment and transfer provisions unconstitutional. *Id.* at 553. Similarly, in *Goldberg*, the challenged law's effect, upon its effective date, was that "residential ground lease holders lost the right to re-enter on default" and were "given a right to a lien against the real property on default." 437 Md. at 203. Since "the right of re-entry is vested," the law, which voided that right, "impinge[d] unconstitutionally" on it. *Id.*

Chapters 184 and 185 do not abrogate the vested right to collect rent because they do not abolish that right. The challenged laws merely modify existing billing requirements. They impose no new penalties, nor do they remove any judicial remedies. Moreover, the consequence of non-compliance is not the automatic permanent extinguishment of the right to collect rent. *See Harvey v. Sines*, 228 Md. App. 283, 296 (2016) (finding act permitting termination of dormant mineral rights by surface owners constitutional in part because the interest is not automatically extinguished). Nothing in the statute prohibits the non-compliant ground rent holder from satisfying the billing requirements and extending the period in which a tenant may pay the ground rent to a day outside of the 60-day period or complying with the rule for future installments.

Further, "[s]tatutes which do not destroy a substantial right, but simply affect a remedy, are not considered as destroying or impairing vested rights." *Muskin*, 422 Md. at

561 (citing *Allen v. Dovell*, 193 Md. 359, 363-364 (1949)). In *Kelch v. Keehn*, the Court explained:

> Where the effect of the statute is not to obliterate existing substantial rights but affects only the procedure and remedies for the enforcement of those rights, it applies to all actions whether accrued, pending or future, unless a contrary intention is expressed. Statutes which do not destroy a substantial right, but simply affect procedure or remedies, are not considered as destroying or impairing vested rights for there is no vested right in any particular mode of procedure for the enforcement or defense of the right.

183 Md. 140, 144 (1944); *see also Muskin*, 422 Md. at 561 ("[T]he Legislature has the power to alter the rules of evidence and remedies, which in turn allows statutes of limitations and evidentiary statutes to affect vested property rights."); *Safe Deposit & Trust Co. of Baltimore v. Marburg*, 110 Md. 410 (1909) (upholding statute creating conclusive presumption that rent is extinguished when there has been no demand for or payment of rent for twenty years). In *Kelch*, regarding a law which created a statute of limitations for certain actions against insurance companies, it was said that the act "did not affect vested rights, but only the mode of procedure for the enforcement of those vested rights[.]" 183 Md. at 147. Likewise, the laws here do not impact the substance of the vested right, *i.e.*, the ground rent itself or the ability to receive installments, nor do they impose new consequences or obligations on ground lease holders. Instead, they modify the procedures for collecting rent. Moreover, those procedures are essentially evidentiary in nature, because the requirement that billing be sent by certified mail, return receipt requested, is a requirement that a ground rent owner create a paper trail showing that they notified the

lessee and tenant of their obligations. The rule relates directly to the evidence that will be proffered to resolve disputes and increases judicial efficiency in ground rent cases.

Appellants propose we follow *Muskin* and *Goldberg*, where though the challenged laws seemed to affect only remedies and procedures, they were invalidated, on ground that:

> a statute that "divests a right through instrumentality of the remedy, and under the preten[s]e of regulating it, is as objectionable as if [aimed] directly at the right itself." . . . [T]he "abrogation or suspension of a remedy, necessary to enforce the obligation of an existing contract . . . is . . . void.

422 Md. at 563 (citations omitted). The law in *Muskin* "purport[ed] to regulate vested rights, but in effect remove[d] all remedies and extinguishe[d] those rights completely." *Muskin*, 422 Md. at 563. And in *Goldberg*, the Court determined regarding the substitution of foreclosure-and-lien for ejectment that the foreclosure-and-lien did not provide the same safeguards for leaseholders, the Act's effect went beyond the limits of the remedy exception and impinged the vested right. 437 Md. at 214. Unlike the law in *Muskin*, Chapters 184 and 185 do not remove all remedies or extinguish a right completely, and unlike the law in *Goldberg*, Chapters 184 and 185 do not substitute one remedy for another; rather, they adjust already existing procedural requirements for collecting ground rent. Per *Kelch*, such an act which does not "obliterate existing substantial rights but affects only the procedure and remedies for the enforcement of those rights" does not implicate the prohibition on abrogation of vested rights of the Maryland Declaration of Rights and the Maryland Constitution. 183 Md. at 144.

2. Regulatory Taking

Our review of this regulatory takings challenge begins like many before it:

> It is axiomatic that private property may not be taken for public use without just compensation. U.S. Const. Amend. V. The Takings clause of the Fifth Amendment to the United States Constitution does not prohibit regulation of property, but if a regulation goes too far, it will be recognized as a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Neifert v. Dep't of Env't, 395 Md. 486, 516 (2006) (footnotes omitted). The Supreme Court of Maryland cautioned that "[b]ecause every governmental action underlying an asserted takings claim is not the same, it is critical that we analyze the takings claim within our jurisprudence specific to the type of government action that is alleged to create a constitutional taking." *Md. Reclamation Assocs., Inc. v. Harford Cnty.*, 468 Md. 339, 389 (2020). A regulatory taking challenge[8] may proceed under four theories: "by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan*[9] and *Dolan*[10]." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). It bears repeating that the Court has "generally eschewed any 'set formula' for determining how far is too far, 'preferring to engag[e] in . . . essentially ad hoc, factual inquiries.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978)); *see also Litz v. Md. Dep't of Env't*, 446 Md. 254, 267 (2016) ("Defining a 'taking' for purposes of an inverse condemnation claim is a 'fact-intensive' inquiry.").

[8] Our Supreme Court reaffirmed in *Neifert* that "the Fifth and Fourteenth Amendments to the United States Constitution and Article III, § 40, of the Maryland Constitution have the same meaning and effect, and 'it is well establish that "the decisions of the Supreme Court are practically direct authorities"' for both provisions[.]" 395 Md. at n. 33 (quoting *Green Party v. Bd. of Elections*, 377 Md. 127, 166 (2003)).
[9] *Nollan v. Cal. Coastal Commission*, 483 U.S. 825 (1987).
[10] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

i. Lucas-*type 'total regulatory taking'*

The United States Supreme Court has recognized "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle*, 544 U.S. at 538. First is "where the government requires an owner to suffer a permanent physical invasion of her property[.]" *Id.* (citing *Loretto v. Teleprompppter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Second, and for our purposes, when a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property, . . . the government must pay just compensation for such 'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property." *Id.* (quoting *Lucas*, 505 U.S. at 1019, 1026-32).

In "considering a ground lease, we review the estate of the lessor as a unitary object because of the strength of the interconnection between the rents and the reversionary interests." *Goldberg*, 437 Md. at 210. Our Supreme Court explained:

> The underlying purpose of the ground rent, from the viewpoint of the ground rent leaseholder, has never been limited to securing the payment, in perpetuity, of rent. The origins of the ground lease system in this State stemmed from the idea that "[t]here was thus a speculation in these peculiar leases, which, no doubt, added zest to the bargain on both sides." [Lewis Mayer, *Ground Rents in Maryland*, 45 (Cushings & Bailey ed., 1883)].

Id. at 209.[11] Beyond the "security and receipt of a clear annual rent and the fine for renewal," and even the "full recognition of the reversionary estate," a main object of the

[11] In *Heritage Realty, Inc.*, 252 Md. at 6-7, the Supreme Court of Maryland reproduced its observation in *Mayor & C. C. of Balt. v. Latrobe*, 101 Md. 621, 629 (1905):

ground lessor in making the lease was "the inducement thereby offered to improvement." *Id.* Any analysis of whether a "total regulatory taking" has occurred must consider the impact of the regulation on both the rent and the reversionary interest.

Accepting *arguendo* Appellant's proposition that the modified billing requirements subsume the entire profit from the rent payments, the reversionary interest remains unimpaired under the new statute, meaning that Chapters 184 and 185 do not constitute a total regulatory taking. This interest retains its entire value, *i.e.*, the value of the underlying property, often including the improvements, despite the fact that the ground rent holder retains an interest in only the ground. The speculative element that a ground rent holder may have the opportunity to exercise their right of reentry upon a default remains hearty and hale. Further, considering that the risk of losing the property is lessened under the modified requirements, the "inducement thereby offered to improvement" by the ground tenant is reinforced under the new statute, resulting in the possibility of a greater windfall to a ground rent lessor who realizes their right to reenter a further-improved property. At this stage of the litigation, it appears that the "unitary object" of the rent and the reversion retains significant value under the modified billing requirements, so we cannot find that

> We cannot close our eyes to the fact, which is frequently before us, that ground rents, especially in Baltimore city, are constantly being sold and have market values (resembling somewhat those of bonds and stocks), depending upon the manner in which they are secured and the length of time they are to continue. As under our system the taxes are paid by the owner of the leasehold interest, when well secured they are in demand and frequently realize prices far beyond what they could have been capitalized at when the leases were originally made.

Appellants are likely to succeed in showing that Chapters 184 and 185 constitute a total regulatory taking.

The conclusion we have reached here renders unnecessary consideration of whether the trial court erred by, as Appellants allege, rejecting the unchallenged testimony of the witnesses proffered by Appellants to support their contention that the Chapters 184 and 185 effected a total regulatory taking of the rent payments.

ii. *Penn Central* taking

The majority of regulatory takings challenges are not *per se* cases. *Lingle*, 544 U.S. at 538. We resolve these challenges by balancing the public and private interests at stake, considering the *Penn Central* factors: "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action." *Neifert*, 395 Md. at 517. "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' *Pa. Coal Co.*, 260 U.S. [at 413], and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Central*, 438 U.S. at 124.

a. *Economic impact of the regulation on the claimant*

Appellants argue that the economic impact of Chapters 184 and 185 is "huge, even destructive," since the "new requirements impose an additional cost of $40 - $52" per address, which could wipe out the entire value of the ground rent. Appellants arrive at this

conclusion by summing the price of the certified mail with myriad putative costs, including paper, envelopes, and labor, arguing that we must take as fact the uncontroverted testimony to these costs. We take judicial notice that certified mail costs $4.85 and a return receipt request is $4.10 for a hard copy and $2.62 for electronic.[12] *See* Price List, Notice 123, Postal Explorer, pe.usps.com, published Oct. 6, 2024, last accessed Dec. 3, 2024**.**

"[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 625 (1993). The Fourth Circuit has upheld regulations effecting diminutions between 75 and 83 percent, *see Pulte Home Corp. v. Montgomery Cnty.*, 909 F.3d 685, 696 (4th Cir. 2018), and relied on cases where other circuit courts declined to strike down statutes effecting even greater diminutions. *See Clayland Farm Enters., LLC v. Talbot Cnty., Md.*, 987 F.3d 346, 354 (4th Cir. 2021) (citing *Henry v. Jefferson Cnty. Comm'n*, 637 F.3d 269, 277 (4th Cir. 2011)). Further, "[a] regulation is not a taking merely because it prohibit[s] the most beneficial use of the property." *Id.* (quoting *Quinn v. Bd. of Cnty. Comm'rs*, 862 F.3d 422, 442 (4th Cir. 2017)). "There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, . . . it is by no means conclusive, see *Hadacheck v. Sebastian*,

[12] Rule 5-201(b) permits judicial notice of a fact "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably questioned." "A court may take judicial notice, whether requested or not * * * at any stage of the proceeding." Rule 5-201(c), (f). "[A]n appellate court may take judicial notice." *Lerner v. Lerner Corp.*, 132 Md. App. 32, 40 (2000) (citations omitted); *see also Matter of AutoFlex Fleet, Inc.*, 261 Md. App. 627, 677-78 (2024).

[239 U.S. 394 (1915),] where a diminution in value from $800,000 to $60,000 was upheld." *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962).

We do not view these Acts as a borderline case reflecting an extreme diminution of property value that is justified by resorting to other factors and to the public interest. The ground rent holder's property consists of more than just the rent—a great part of the value of the ground rent item stems from the reversionary interest. The ground rent holder is a speculator and investor whose chosen financial device encourages the accrual of value to his underlying property, and may result in large windfalls to him. The cost of certified mail, even combined with the cost of labor needed to comply with the modified billing requirements, does not effect a significant adverse economic impact on the value of the "unitary object" of the rent and the reversionary interest in a manner implicating the Takings Clause.

b. *Interference with investment-backed expectations*

Appellants contend that Chapters 184 and 185 interfere with the expectation that they will continue to receive income from ground rents and be able to sell their interest on the open market. The State contends that the Appellants failed to present any evidence of the expectation that their pursuit of profits from ground rent would not involve increasing costs and that considering the "static nature" of the ground rent, whose value is permanently secured, in the contexts of increased costs and inflation, ground rent owners could anticipate that their "investments would one day lose their viability."

In *Concrete Pipe*, the Supreme Court wrote: "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 508 U.S. at 645 (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)). It elaborated,

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts.

Fed. Hous. Admin. v. Darlin, 358 U.S. 84, 91 (quoting *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947)).

This regulation does not unjustly interfere with investment-backed expectations. Given that the dollar value of the ground rent payments remains static forever, it is a fact of life that the real value of the payments will decrease as the purchasing power of the dollar falls. Increases in the price of stamps, the minimum wage, or any other regulated cost related to sending bills may eat into the expected return of the ground rent investment, yet none of those regulations could be considered a taking. This regulation does not preclude the Appellants from continuing to trade or sell their reversionary interests in speculative markets. Parties who do business in this regulated field cannot sustain an objection to a modest regulatory amendment on ground that it was not anticipatable, because, as discussed *supra*, ground rents have been heavily regulated since 1884.

c. *Character of government action*

Appellants claim that the modified billing requirements are "unique and unprecedented" because "no other creditor is required to send regular bills by mail" and cite *Griffin v. Bierman*, 403 Md. 186 Md, 203-04 (208), for the proposition that "under most circumstances, notice sent by ordinary mail is deemed reasonably calculated to inform interested parties that their property rights are in jeopardy."

The requirement that bills be sent by certified mail is not unique or unprecedented. Although it is unusual, our statutes impose this requirement where proceedings might significantly affect the rights of the parties. *See e.g.*, Corps. & Ass'ns § 3-207(b) (communications regarding demand by stockholder of fair value of stock); Transp. § 25-504(a)(1) (notice that vehicle is in police custody); Transp. § 21-10A-04(a)(3)(i) (notice that vehicle has been towed); Fam. L. § 10-132(1)(i), -131(a)(1)(i) (change of address or place of employment of obligor or recipient of child and spousal support); RP § 8-402.2 (ejectment action); RP § 7-105.18(b)(2) (foreclosure on vacant or abandoned residential property); RP § 8A-202(h)(1)(i) (notice to mobile home park tenant of sale by owner). The consequence for failing to pay a ground rent bill is unlike almost any other bill. A typical misstep in the bill context results in fines and fees proportional to the value of the missed payment, with the potential for escalation after a pattern of defaults. Here, failure to pay a single bill could result in ejectment and resembles situations where the General Assembly imposed notice by certified mail. The modified requirements also protect against the hazard that arises when a lessee has further leased a property to a tenant in possession. In such a

case, the tenant would not owe the ground rent, but if an absentee ground rent lessee failed to pay rent, they would suffer from the ground rent holder's exercise of their right of reentry, despite their incidental relationship to the ground lease.

More importantly, Appellant's argument mischaracterizes the character-of-the-government-action inquiry. "[R]egulatory takings doctrine seeks to 'identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain.'" *Clayland Farm Enters., LLC.*, 987 F.3d at 355 (quoting *Lingle*, 544 U.S. at 539). "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124 (citations omitted). Section 8-809(a)'s operation in no way resembles a "classic taking." It merely heightens already-existing billing requirements, thereby adjusting the benefits and burdens of economic life.

D . ***Conclusion in light of the private and public interests***

We agree with the Appellees' contention that the modified billing requirements serve the public interest:

> ground rents are anachronisms that, through the opaque nature of the process, ensnare unsophisticated and low-income homeowners who are often unaware of their ground rent obligations or the implications of failing to honor them. Adding additional protections that ensure that leasehold tenants are aware of their ground rent obligations—and clearly identifying to whom payment should be made—directly addresses those concerns.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the challenged law did not "merely involve a balancing of the private economic interests" of the parties; "the nature of the State's interest in the regulation [was] a critical factor in determining whether a taking has occurred, and thus whether compensation is required." 480 U.S. 470, 488 (1987). The preceding discussion revealed a range of public interests served by Chapters 184 and 185, including preventing unjust ejectment, ensuring judicial efficiency, and notifying tenants of their rights, and there are others, as well: the elimination of property encumbrances suppressing property values[13] and the removal of impediments to prosperity in Baltimore.[14] We acknowledge that in Maryland, ground rent agreements provided low-cost high-risk financing tools to developers and renters, and ultimately, leasing options to those in need of housing, which may have spurred the development of Baltimore's constituency of row homes. But the General Assembly has determined that ground rents, at least in the residential context, no longer serve the purpose that they once did, and after prohibiting

[13] It was "well known, from cases in this court and otherwise, that the complex system of ground rents in this state often rendered titles unmarketable, although in some instances the rents had not been collected for many years, and some of them were for such a nominal sum, and were owned by so many persons, that it was difficult to obtain the reversions for anything like a reasonable amount as compared with the rent reserved." *Safe Deposit & Tr. Co. v. Marburg*, 110 Md. 410, 413-14 (1909); *see also Kolker v. Biggs*, 203 Md. 137, 141-42 (1953); *Hoffman v. Stamper*, 385 Md. 1, 19 n. 10 (2005) ("[H]ad the property not been subject to the $90 ground rent, it would be worth $1,500 more.")

[14] Earlier ground rent legislation "was the result of a well-grounded belief that these long leases, with their covenants of renewal, were injurious to the prosperity of the city of Baltimore . . . . It was the system of these long leases, irredeemable until the end of the term, that the legislature wished to break up, rather than for any special consideration for the lessees." *Walker v. Wash. Grove Ass'n*, 127 Md. 564, 568 (1916) (citing *Stewart v. Gorter*, 70 Md. 242, 245 (1889)).

their creation, has sought to mitigate the harm attendant to already-existing ground rents. We are persuaded this effort will likely prove well within the constitutional limit.

3. Contracts clause claims

Article I, § 10 of the U.S. Constitution provides that no State shall pass any law impairing the obligation of contracts. This prohibition, though cast in strong terms, "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Allstate v. Kim*, 376 Md. 276, 298-99 (2003) (quoting *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983)). The Court explained:

> [T]he Contract Clause does not operate to obliterate the police power of the States. "It is settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and its paramount to any rights under contracts between individuals."

Allstate, 376 Md. at 299 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978)). Police power exercise is justified when remedying a "broad and general social or economic problem." *Willowbrook Apartment Assocs, LLC v. Mayor & City Council of Balt.*, 563 F. Supp. 3d 428, 451 (D. Md. 2021) (quoting *Energy Rsvrs. Grp.*, 459 U.S. at 411-12).

Analysis of a violation *vel non* of the Contract Clause by a legislative act consists of two steps. *Willowbrook*, 563 F. Supp. 3d at 450. First, we ask "whether the state law has 'operated as a substantial impairment of a contractual relationship.'" *Id.* (quoting *Sveen v.*

Melin, 584 U.S. 811, 819 (2018)); *see also Allstate*, 376 Md. at 299 (determining "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial"). The inquiry proceeds in light of "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*, 584 U.S. at 819 (citing *Allied Structural Steel Co.*, 438 U.S. at 246), as well as "whether the industry the complaining party has entered has been regulated in the past." *Allstate*, 376 Md. at 300 (citing *Energy Rsrvs. Grp., Inc.*, 459 U.S. at 411). Second, a law shown to substantially impair a contractual right may still stand if it is "an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Sveen*, 584 U.S. at 819 (quoting *Energy Rsvrs. Grp., Inc.*, 459 U.S. at 411-12). At this step:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel Co., 438 U.S. at 245.

Regarding the first step, a ground lease agreement is a contractual relationship between a landlord and a lessee, *see Arthur Treacher's Fish & Chips of Fairfax, Inc. v. Chillum Terrace L.P.*, 272 Md. 720, 727 (1974) (holding a lease is "both an executory contract and a present conveyance" creating "both privity of contract and estate"), and there is some impairment of the contract: although the modified billing requirements do not directly modify the dollar figure the lessee is obligated to pay in each installment, the lessor

must pay, for each lease, the cost of complying with the modified billing requirements and is not allowed to pass the cost onto the lessee, resulting in a diminution of the value received per the contract. But the impairment is not substantial. The extent to which the law undermines the contractual bargain and interferes with the lessors' reasonable expectations is minimal, especially given that the legislature is not reaching into a new regulatory area but amending existing law. Notably, rather than preventing ground rent holders from safeguarding their rights under contract, in the event that ground rent holders comply with the regulations, their rights are insulated because of the complete and decisive record they are required to keep under the new statutes. Nor is a ground rent holder prevented from reinstating their rights if they do not initially comply with the statute. We thus cannot hold that Chapters 184 and 185 substantially impair the Appellants' contractual relationship.

As to the second step: Were we to hold that Chapters 184 and 185 substantially impair the Appellants' contractual relationship, we could not find that these Chapters are not appropriate and reasonable methods of furthering significant and legitimate public purposes. The police power "extends to economic needs" and justifies consumer protection statutes like the one at bar. *See Willowbrook*, 563 F. Supp. 3d at 451 (quoting *Veix v. Sixth Ward Ass'n*, 310 U.S. 32, 39 (1940)). Considering that Appellants themselves contend that there are over 100,000 properties subject to ground rents in Maryland, on which over 100,000 families reside, it cannot be said that the target of this legislation is too narrow. Chapters 184 and 185 seek to ensure that these families are not ejected from their homes upon the failure to pay a ground rent for which they had no notice and achieve this

legitimate end through the modest and appropriate means of requiring bills be sent by certified mail, return receipt requested. We need not recite the litany of second-order harms averted by legislation of this kind, because considering the low bar these laws must hurdle, this is sufficient to justify Chapters 184 and 185 as a constitutional exercise of the police power in the context of the Contract Clause.

4. Due process and equal protection claims

"Article 24 and the Due Process Clause of the Fourteenth Amendment protect an individual's interests in substantive and procedural due process."[15] *Samuels v. Tschechtelin*, 135 Md. App. 483, 522-23 (2000) (citations omitted). Substantive due process "bar[s] certain government actions regardless of the procedures used to implement them." *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). "Substantive due process is a far narrower concept than procedural; it is an absolute check on certain governmental actions notwithstanding 'the fairness of the procedures used to implement them.'" *Higginbotham v. Pub. Serv. Com'n of Md.*, 171 Md. App. 254, 269 (2006) (quoting *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995)).

The rights protected by substantive due process and the discrimination prevented under the equal protection clause are broad and differentiated; which of our four levels of

[15] We have long equated these clauses and, "[c]onsequently, United States Supreme Court decisions interpreting the Due Process Clause "are practically direct authority for the meaning of the Maryland provision." *Samuels*, 135 Md. App. at 523 (quoting *Garnett v. State*, 332 Md. 57, 613 n. 20 (1993)).

review we apply depends on a statute's operation, and was explained by Justice Jonathan Biran in *Pizza di Joey v. Mayor and City Council of Baltimore*:

> When a statute creates a distinction based upon "clearly suspect" criteria (such as race, gender, religion, or national origin), or when it infringes on a "fundamental" right, we apply strict scrutiny when considering a substantive due process or equal protection challenge to it. . . . We will invalidate a statute that is subject to strict scrutiny unless it "is necessary to promote a compelling governmental interest." * * *
>
> On the other end of the spectrum are statutes that do not discriminate on the basis of an inherently suspect classification and do not burden any fundamental constitutional right. We assess whether such a statute is "rationally related to a legitimate governmental interest." . . . Under this standard, we presume that the challenged statute is constitutional, and will uphold it "unless the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that [we] can only conclude that the [State's] actions were irrational." . . . Put another way, we will uphold a statute under this form of review if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." * * *
>
> Between these poles are statutes that burden "important personal rights, not yet held to merit strict scrutiny but deserving of more protection than a perfunctory review would accord." . . . Our prior cases suggest that these statutes in the middle can, themselves, be divided into two groups that receive different levels of review. First, when a statute makes a distinction based on a "quasi-suspect" classification, such as illegitimacy, a court reviews the statute under what the Supreme Court and this Court have referred to as "intermediate scrutiny." . . . To withstand this level of review, a statute must "serve important governmental objectives and must be substantially related to the achievement of those objectives." . . .
>
> Second, an economic regulation that prohibits an individual from practicing his or her chosen trade, or that, on its face, discriminates based on a factor that is unrelated to the state purpose of the regulation, is reviewed under a "heightened rational basis" test. . . . When such a regulation is reviewed under Article 24, courts will not accept "any reasonably conceivable state of facts that could provide a rational basis for the challenged legislation, . . . but rather will consider only "those purposes that are obvious from the text or legislative history of the enactment, those plausibly identified by the

> litigants, or those provided by some other authoritative source." . . . To survive heightened rational basis review, the statute in question must bear "a real and substantial relation to the problem addressed by the statute." . . .

470 Md. 308, 346-48 (2020) (citations omitted). Vital to this case is the historical review Justice Biran provided regarding economic regulations:

> During . . . the "*Lochner* era," . . . the Supreme Court invalidated a number federal and state statutes that sought to regulate economic conditions. The Supreme Court was skeptical during that era of legislative enactments that interfered with the right to contract. So was this Court, which stated that "[t]he legislative authority to abridge [freedom of contract] can be justified only by exceptional circumstances." The guarantee of due process simply demands that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." . . . [W]e abandoned this line of "real and substantial relation" cases in 1977, when we decided *Governor of Md. v. Exxon*, 279 Md. 410, 370 A.2d 1102 (1977), and applied the more deferential form of rational basis review to an economic regulation.

470 Md. at 348-49 (citations omitted). Our Supreme Court explained that the ruling in *Exxon* had

> returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems. . . . We refuse to sit as a superlegislature to weigh the wisdom of legislation. . . . [I]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Id. at 349 (citing *Exxon*, 279 Md. at 425-26).

"The identification of those rights that implicate substantive due process 'has not been reduced to any formula,'" *D.B. v. Cardall*, 826 F.3d at 740 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 663-64 (2015)), and the Supreme Court has "long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government

regulation." *Lingle*, 544 U.S. at 545 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124-25 (1978)). Justice Lewis F. Powell, Jr. observed, concurring, in *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985):

> Even if one assumes the existence of a property right . . ., not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution.
>
> The history of substantive due process "counsels caution and restraint." The determination that a substantive due process right exists is a judgment that "certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." In the context of liberty interests, this Court has been careful to examine each asserted interest to determine whether it "merits" the protection of substantive due process. "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed."

Samuels, 135 Md. App. at 534-35 (citing *Ewing*, 474 U.S. at 229-30).

For the purposes of substantive due process, the right to receive ground rent resembles a right under a contract reviewed for rational basis, and such a right may be burdened subject to the "State's authority 'to legislate against what are found to be injurious practices in their internal commercial and business affairs.'" *Exxon Corp.*, 437 U.S. at 124 (quoting *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).[16] "[L]egislative Acts adjusting the burdens and benefits of economic life come

[16] State constitutional provisions, "under some circumstances, . . . may impose greater limitations (or extend greater protections) than those prescribed by the United States Constitution's analog provisions." *Muskin*, 422 Md. at 556 (citing *Dua*, 370 Md. at 621). Since the Court in *Muskin* "assume[d], for the sake of discussion, that [the challenged law]

to the Court with a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see also Off. of People's Couns. v. Md. Pub. Serv. Com'n*, 355 Md. 1, 26 (1999) (rejecting substantive due process challenge to economic regulatory legislation because "'[t]he wisdom or expediency of a law adopted' by a legislative body 'is not subject to judicial review, and the law will not be held void if there are any considerations relating to the public welfare by which it can be supported'") (quoting *Bowie Inn v. City of Bowie*, 274 Md. 230, 236 (1975)). Were we to consider the right to receive ground rent payments a property right, we would still review Chapters 184 and 185 for a rational basis, because they regulate the procedure by which a right may be exercised, and "[e]ven with respect to vested property rights, a legislature has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on the performance of certain affirmative duties." *United States v. Locke*, 471 U.S. 84, 104 (1985).

Regarding equal protection, our Supreme Court has said: "The state [is] not bound to deal alike with all [ ] classes, or to strike at all evils at the same time or in the same way. It can deal with the different professions according to the needs of the public in relation to each." *Davis v. State*, 183 Md. 385, 398-99 (1944) (rejecting equal protection challenge to law "limited to physicians and surgeons and . . . not extended to other classes"). The statute

would pass analytical muster according to the United State Constitution and relevant federal cases," we cannot apply their holdings in this substantive due process and equal protection analysis. *See Muskin*, 422 Md. at 550.

before us contains no reference to a suspect or quasi suspect class. Appellants' contention that the new regulations treat ground rent holders differently than other property owners need not be entertained, because the equal protection clause does not protect ground rent holders from differentiated law supported by rational basis. *Id.* at 397 ("[T]he police power is broad in scope, and the Legislature is vested with large discretion to determine not only what is injurious to the health, morals or welfare of the people, but also what measures are necessary or appropriate for the protection of those interests. The exercise of the police power may inconvenience individual citizens, increase their labor, or decrease the value of their property.") Given the numerous rational bases evinced *supra* for Chapters 184 and 185, Appellants have not shown they are likely to succeed on their due process or equal protection challenges.

5. Sovereign immunity

The State argues that doctrine of sovereign immunity precludes relief against it. It cites *Davis, supra,* for the proposition that States are as immune from awards of declaratory relief as they are from awards in contract or tort, because "the immunity of the State from suit is not modified by the Uniform Declaratory Judgments Act." 183 Md. at 393 (citing *Purity Oats Co. v. Kansas*, 125 Kan. 558 (1928)). Appellants contend that the State's arguments on this point are inappropriate at this juncture because they are fundamentally those of a motion to dismiss and note that these same arguments were made in the motion to dismiss, which was denied. The State's position in its most colorable form is that the denial of the motion for preliminary injunction was proper because Appellants have not

shown a likelihood of success on the merits of their claim based on the fact that their claims are precluded by sovereign immunity, and that although their motion arguing such was denied, it is likely to be granted on its own appeal. The argument is appropriate at this time, and that the motion to dismiss was ultimately denied is not relevant to our assessment of the trial court's determination at the preliminary injunction stage before the denial. However, Appellants also aver that sovereign immunity does not bar their unconstitutional taking challenge. We agree.

Sovereign immunity precludes maintenance against the State of actions in contract or tort without the State's consent and availability of means to satisfy the judgment. *Litz*, 446 Md. at 274 (citing *Dep't of Nat. Res. v. Welsh*, 308 Md. 54, 59-60 (1986)). But a takings claim lies outside sovereign immunity's ambit. *Welsh*, 308 Md. at 60 (citing *Weyler v. Gibson*, 110 Md. 636); *Litz*, 446 Md. at 274 ("[A]gents of the State do not enjoy immunity with respect to a wrongful taking of property without just compensation."); *see also Balt. Police Dep't v. Cherkes*, 140 Md. App. 282, 308 (2001) ("[T]he doctrine of sovereign immunity did not protect the State from an ejectment action to remedy an unconstitutional taking of property."). The Court in *Welsh* explained:

> It is conceded that no suit can be brought against the State, without its consent. This immunity of the State from suit rests upon grounds of public policy, and is too firmly fixed in our law to be questioned. But it would be strange indeed, in the face of the solemn constitutional guarantees, which place private property among the fundamental and indestructible rights of the citizen, if this principle could be extended and applied so as to preclude him from prosecuting an action of ejectment against a State official unjustly and wrongfully withholding property, by the mere fact that he was holding it for the State and for State uses.

> It is easy to see the abuses to which a doctrine like that would lead. That such is not the law has been conclusively settled by *United States v. Lee*, 106 U.S. [196 (1882)]; *Tindel* [*Tindal*] *v. Wesley*, 167 U.S. 204 [(1897)]; *Smith v. Reeves*, 178 U.S. 438 [436] [(1900)]; 10 *Am and Eng. Ency. of law*, 528.

308 Md. at 61 (quoting *Weyler*, 110 Md. at 654). As a rule, then, "any taking of property alleged to have been made by an agency of the State, not done in the mode prescribed by the law, is not that act of the State, but the unlawful usurpation by the individual taking or appropriating the property." *Id.* at 62 (quoting *Dunne v. State*, 162 Md. 274, 288 (1932)). Since "a plaintiff injured by unconstitutional state action should have remedy to redress the wrong," the State is not immune from actions alleged in that vein. *Dua*, 270 Md. at 644.

Appellants challenge Chapters 184 and 185 on unconstitutional takings grounds, among others, seeking enjoinment of the enforcement of those statutes and, ultimately, declaratory judgment that these statutes are unconstitutional. The State is correct that the Uniform Declaratory Judgment Act did not modify the sovereign immunity doctrine, but sovereign immunity does not preclude action against the State under the circumstances Appellant brings suit. Certainly, there are cases where a plaintiff seeking declaratory judgment may be barred from suing the State, but where, as here, the underlying case alleges State action is an unlawful usurpation of property, or otherwise violates constitutional rights, sovereign immunity does not preclude suit.

6. Justiciability

The State contends that the issues at bar are not justiciable. It argues that, even when sovereign immunity does not preclude claims in equity from proceeding against the State or a State Official under the *Ex parte Young* exception, a precondition to the suit is that the

governmental official is responsible for enforcing the statute or regulation. *See Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001); *Jackson v. Millstone*, 369 Md. 575, 590 (2002); *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010). The State's view is that "Chapter 184 does not direct [it] to do—or not do—anything." Thus, per *Okpalobi v. Foster*, 244 F.3d 405, 421 (5th Cir. 2001), since "there is no act, or potential act, of the state official to enjoin, an injunction would be utterly meaningless." Appellants contend that cases interpreting Eleventh Amendment sovereign immunity are inapplicable in this forum; they are correct, considering the "Eleventh Amendment . . . is not applicable to actions in a Maryland trial court." *Glover v. Glendening*, 376 Md. 142, 150 n. 3 (2003); *see also Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7 (1980) ("No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States'"). They also argue that the case is justiciable because they have been directly affected by the statute and note cases they frame as requiring a state official "to do, or not do, something."

"While recognizing the remedial nature of the [Uniform Declaratory Judgments Act (DJA)] and that it should be construed liberally, [the Court has] held that a justiciable controversy is a prerequisite to the maintenance of an action for declaratory relief." *Getty v. Carroll Cnty. Bd. of Elecs.*, 399 Md. 710, 744 (2007); *see also* § 3-409(a) ("[A] court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the uncertainty or controversy giving rise to the proceeding, and if: (1) An actual controversy exists between the contending parties[.]"). A

justiciable controversy has "interested parties asserting adverse claims upon a state of facts which must have accrued and wherein a legal decision is sought or demanded." *Hatt v. Anderson*, 297 Md. 42, 45-46 (1983). The controversy "must present more than a mere difference of opinion," and "be more than a mere prayer for declaratory relief." *Id.*; *accord State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591 (2014). Our courts have long declined to render purely advisory opinions, and to address a non-justiciable issue would disrupt this pattern. *Hatt*, 297 Md. at 46. The existence of a justiciable issue in a declaratory judgment action is especially important when adjudicating constitutional rights, and "in such instances we ordinarily require concrete and specific issues to be raised in actual cases, rather than theoretical or abstract propositions." *Id.*

In *Davis v. State*, which involved a challenge to a law that proscribed a physician or surgeon from advertising except by certain limited means, the Supreme Court of Maryland addressed whether a complainant "could use a declaratory judgment proceeding to test the constitutionality of the statute." 183 Md. 385, 388 (1944). The Court first related that the DJA serves primarily to "relieve litigants of the rule of the common law that no declaration of rights may be judicially adjudged unless a right has been violated, and to render practical help in ending controversies which have not reached the stage where other legal relief is immediately available." *Id*. at 388-89. It explained, "if a person is directly affected by a statute, there is no reason why he should not be permitted to obtain a judicial declaration that the statute is unconstitutional." *Id*. at 389. After noting that the appellant could have sought the statute's enjoinment, the Court held he was "entitled to apply for a declaratory

judgment . . ., rather than run the risk of being subjected to criminal prosecution, and possibly having his license revoked." *Id*. The Court conceded that it was "not empowered to decide moot questions or abstract propositions" and could "determine only actual controversies," but found it "obvious that complaint [was] not attempting to secure an abstract proposition" because the appellant was "directly affected by the challenged statute." *Id.* The resulting rule was that when a plaintiff is "directly affected by the challenged statute," his declaratory judgment action attacking the statute is not "moot" and that "the controversy presented is real and substantial." *Id*. at 390-91.

Jackson v. Millstone, which involved an action for declaratory and injunctive relief arising out of the Department of Health and Mental Hygiene's denial of Johns Hopkins University Hospital's request for preauthorization for a liver transplant, applied that rule. 369 Md. 575, 578-590 (2002). The plaintiff contended that the preauthorization requirement violated federal law, and that though the dispute had been in some sense resolved, "in light of past and present circumstances, there [was] a real possibility that the regulation may in the future be applied adversely to [him]." *Id*. at 588. The Court allowed the challenge to proceed based on a "multitude" of cases recognizing "the availability of actions for declaratory judgments or injunctions challenging the validity of statutes or regulations which may, in the future, be applied to or adversely affect the plaintiffs." *Id*.

In this instance the effect of Chapters 184 and 185 upon the Appellants is not theoretical or abstract. As owners of ground rents, presently they are required to comply with the modified billing requirements and pay the cost of certified mail, return receipt

requested, or forfeit the ability to collect ground rent they are owed under contract. Like the physician in *Davis* who was directly affected by a statute because he was prevented from advertising in his chosen method, these Appellants are directly affected because they must conform present behavior to the statutory guidelines.

But that the statute directly affects the Appellants is not determinative of the requirement of justiciability that a case contain interested parties asserting adverse claims, *i.e.*, that the State is an interested party. *See Menefee v. State*, 417 Md. 740, 748 (2011). It is true that Chapters 184 and 185 afford no actions of the State or the Governor to enjoin, but that is not dispositive of their role as interested parties. In *Menefee*, the Court adopted for the purposes of justiciability the definition of "party" as "all persons who have a direct interest in the subject matter of the suit." 417 Md. at 748 (quoting *Ugast v. La Fontaine*, 189 Md. 227, 232 (1947)). It wrote:

> Keeping in mind that the important principle of statutory interpretation is to construe statutes in a manner that is not "absurd, illogical, or incompatible with common sense," *Lockshin v. Semsker*, 412 Md. 257, 276 (2010); *see Taylor v. Mandel*, 402 Md. 109, 128-29 (2007) ("[W]henever possible, an interpretation should be given to the statutory provisions which does not lead to absurd consequences."), we think construing the MTCA—a statutory scheme in which the State waives sovereign and governmental immunity and assumes liability for Montgomery County—such as to leave the State immune from suit (*i.e.* not a proper party) for the negligent acts of the County is "absurd, illogical, [and] incompatible with common sense." *Lockshin*, 412 Md. at 276. We think it would be inconsistent to say, on one hand, that the State has assumed liability for certain County employees, yet say, on the other hand, that it has no "direct interest" in the litigation. *See Ugast*, 189 Md. at 232.

Menefee, 417 Md. at 756. Similar logic applies here. The Uniform Declaratory Judgments Act was enacted to afford plaintiffs certainty regarding their legal rights and relations. The

State passed, and the Governor signed, legislation which has a direct effect on the rights of the Appellants and a concrete effect on their coffers. Even though Chapters 184 and 185 provide as the backstop or the proverbial stick for these requirements a defense to an adverse party in a ground rent dispute, rather than a penalty or punishment that the State may levy on those not conforming with the regulation, we think it absurd to say that the State and Governor have no direct interest in the litigation. The State has a direct interest in defending the constitutionality of the General Assembly's legislative actions when they are challenged by parties who are directly affected. "[U]nder the Constitution and statutes of Maryland the Attorney General ordinarily has the duty of appearing in the courts as the defender of the validity of enactments of the General Assembly." *State ex rel, Atty. Gen. v. Burning Tree Club, Inc*., 201 Md. 9, 37 (1984). In this instance, Appellants have challenged the constitutionality of Chapters 180 & 181, Chapters 182 & 183, and Chapters 185 & 185 of the Laws of 2023, now codified as § 8-809 of the Real Property Article. To be sure, a constitutional claim could arise if, as and when a ground rent tenant asserts that they were not provided the requisite notice. Nevertheless, the Appellants' instant challenge to the statute makes it incumbent on the Attorney General to defend this legislation.

CONCLUSION

We hold that the circuit court did not err in denying the Appellants' motion for preliminary injunction. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.