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Eviction Moratorium Litigation: What Courts Said, and What Courts Missed

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**EVICTION MORATORIUM LITIGATION: WHAT COURTS
SAID, AND WHAT COURTS MISSED**

Nino C. Monea*

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INTRODUCTION

When the coronavirus struck, state, local, and national governments closed borders, limited travel, shut down businesses, shuttered schools, and furloughed employees.¹ But that was not all. Throughout the United States, many jurisdictions tried a novel public health technique: they suspended or restricted evictions.²

This was not the first time that governments tried to keep people in their homes during a crisis. As far back as 1820, New York gave debtors a year-long redemption period before their land could be sold, and other states passed kindred laws during the nineteenth century after recessions.³ During the Great Depression, about half the states enacted foreclosure moratoriums.⁴ A few jurisdictions sporadically passed eviction moratoriums over the years, but these tended to be short, often no longer than the Christmas season.⁵ In

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1. See Emily Shapiro et al., *Coronavirus Shuts Down Major Cities, Trump Asks Americans to Avoid Groups Over 10 People*, ABC NEWS (Mar. 17, 2020, 12:18 AM), <https://abcnews.go.com/US/coronavirus-live-updates-establishments-country-begin-shutting/story?id=69615056> [perma.cc/VQ5G-DA7L].
2. See Ashraf Khalil & Michael Casey, *Ban on Renter Evictions During COVID-19 Pandemic is Extended*, ABC NEWS (Mar. 29, 2021, 7:15 PM), <https://abcnews.go.com/Politics/wireStory/ban-renter-evictions-covid-19-pandemic-extended-76747843> [perma.cc/J8VF-NJ34].
3. See Lee J. Alston, *Farm Foreclosure Moratorium Legislation: A Lesson from the Past*, 74 AM. ECON. REV. 445, 445 (1984). Courts normally struck down this sort of debtor-relief legislation. See *id.*
4. See Geoff Walsh, *The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, 44 SUFFOLK U. L. REV. 139, 139 (2011).
5. See, e.g., *Gov. Green Calls Special Session*, DAILY J. GAZETTE, July 20, 1946, at 4, <https://www.newspapers.com/image/93680985/> [perma.cc/S75C-ZDLX]; *Eviction Moratorium Declared for Holidays*, MASON CITY GLOBE-GAZETTE, Dec. 22, 1932, at 4, <https://www.newspapers.com/image/391067244> [perma.cc/7URY-DUW8]; *St. Joseph Justice of Peace May Declare Evictions Moratorium*, MOBERLY MONITOR-INDEX, July 16, 1946, at 8, <https://www.newspapers.com/image/19398514/> [perma.cc/62ND-V6K3]; *Eviction Moratorium Declared in Albany Over the Holidays*, CENT. N.J. HOME NEWS, Nov. 25, 1947, at 12, <https://www.newspapers.com/image/315000303/> [perma.cc/L6NL-DWMH]; *Twenty-five Years Ago*, BELLEVILLE TELESCOPE, Feb. 12, 1959, at 7, <https://www.newspapers.com/image/12750569/> [perma.cc/JB8V-3S2A]; Robert Davis, *Eviction Moratorium Declared*, CHI. TRIB., Dec. 22, 1970, at 3, <https://www.newspapers.com/image/377216534/> [perma.cc/J63W-6BVX]; *Evictions*

2020, policymakers all over the country adopted broad-based, extended eviction moratoriums for the first time.

What followed was a flurry of lawsuits brought by landlords, property managers, lobbyists, and developers. The stakes were very high. One landlord briefly claimed that eviction moratoriums were emblematic of government overreach that left Americans living in a “shell of their Republic.”⁶

Americans disagreed. Protections for the most vulnerable were extremely popular. One poll showed that eighty-nine percent of Americans supported banning evictions nationwide,⁷ while another found eighty percent supporting such measures.⁸ But public sentiment had little influence on public policy.⁹ Even though all fifty states declared states of emergency and forty-nine of them were still in such states by the end of 2020,¹⁰ most states abandoned their

Moratorium in Effect for Holidays, HARTFORD COURANT, Dec. 18, 1976, at 87, <https://www.newspapers.com/image/240551699> [perma.cc/Y2EB-BSDJ].

6. Brief for the New Civil Liberties Alliance et al. as Amici Curiae Supporting Plaintiff at 2, *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745 (N.D. Ohio 2021) (No. 20-cv-02407), <https://pacificlegal.org/wp-content/uploads/2020/10/12.02.2020-35-The-NCLA-et-al.-AC-Brief-ISO-MPI.pdf> [perma.cc/EHX8-SFLR]. Ironically, the Pacific Legal Foundation, which represented the landlords in many of the lawsuits challenging eviction bans, simultaneously argued that Connecticut’s business closure order should be ended because one of its clients was falling behind on rent and was facing eviction unless he could reopen. Complaint ¶ 81, *Roxy Nails Design v. Lamont*, 2020 WL 6781737 (Conn. Super. Ct. 2020), <https://pacificlegal.org/wp-content/uploads/2020/06/Ramirez-v.-Lamont-Complaint.pdf> [perma.cc/LV6Q-HY7T].
7. *Fact Sheet, Public Opinion Polling on Housing Instability During the COVID-19 Pandemic*, OPPORTUNITY STARTS AT HOME (June 1, 2020), <https://www.opportunityhome.org/wp-content/uploads/2020/05/FINAL-COVID19-Poll-Fact-Sheet-002.pdf> [perma.cc/VW2T-QTQQ].
8. See Rachel D. Godsil, *Memo: Addressing Housing Precarity in the Context of Coronavirus Crisis*, DATA FOR PROGRESS (Apr. 14, 2020), <https://www.dataforprogress.org/memos/addressing-housing-precarity-coronavirus> [perma.cc/733C-ZU4W]; see also Annie Knox, *Poll: Nearly Half of Utahns Say State Should Have Moratorium on Evictions in Pandemic*, DESERET NEWS (Feb. 20, 2021, 6:00 PM), <https://www.deseret.com/utah/2021/2/20/22289806/poll-nearly-half-of-utahns-say-the-state-should-have-a-moratorium-on-evictions-in-pandemic-covid-cox> [perma.cc/W32H-QCZ5] (showing Utahns favored an eviction moratorium by a nearly two-to-one margin).
9. See, e.g., *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *20 (D.D.C. May 5, 2021) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)) (stating that “eviction moratoria have been the subject of ‘earnest and profound debate across the country,’” wrongly implying that the nation was divided over whether the policy was a good idea).
10. See Exec. Dep’t of Minn., *Extending the COVID-19 Peacetime Emergency Declared in Executive Order 20-01*, Order No. 20-100 (Dec. 14, 2020),

eviction moratoriums long before that, if they had them at all.¹¹ Litigation, therefore, centered around the federal CDC Halt Order,¹² which lasted until the Supreme Court struck it down in August 2021,¹³ and the handful of states that kept their moratoriums going long enough to generate lawsuits and court decisions.

This Article examines thirty-three cases of eviction moratoriums challenged by landlords that resulted in written decisions, including the subsequent decisions arising from those cases¹⁴ augmented by

https://mn.gov/governor/assets/EO%202020-100%20Final%20Signed%20and%20Filed_tcm1055-458402.pdf [perma.cc/A4UC-P6ZW].

11. See Elaine S. Povich, *Eviction Looms for Millions, Despite New Federal Aid Package*, PEW (Dec. 22, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/22/eviction-looms-for-millions-despite-new-federal-aid-package> [perma.cc/6B7R-ESZB].
12. See cases cited *infra* note 14.
13. See Krishnadev Calamur & Chris Arnold, *The Supreme Court Will Allow Evictions to Resume. It Could Affect Millions of Tenants*, NPR, <https://www.npr.org/2021/08/26/1024668578/court-blocks-biden-cdc-evictions-moratorium> [perma.cc/2ED2-K2XH] (Aug. 26, 2021, 10:29 PM); see also *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2490 (2021) (Supreme Court case that struck down the federal eviction moratorium).
14. See generally *Brown v. Azar*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353 (D. Mass. 2020); *Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020); *Tiger Lily, L.L.C. v. U.S. Dep't Hous. & Urb. Dev.*, 499 F. Supp. 3d 538 (W.D. Tenn. 2020); *El Papel L.L.C. v. Inslee*, No. 20-cv-01323, 2020 U.S. Dist. LEXIS 246971 (W.D. Wash. Dec. 2, 2020); *Gregory Real Est. & Mgmt. L.L.C. v. Keegan*, No. 1 CA-CV 20-0419, 2021 Ariz. App. Unpub. LEXIS 368 (Ariz. Ct. App. Mar. 30, 2021); *Chrysafis v. James*, No. 21-CV-998, 2021 U.S. Dist. LEXIS 72602 (E.D.N.Y. Apr. 14, 2021); *JL Props. Grp. B, L.L.C. v. Pritzker*, 2021 IL 3d 200305 (Ill. App. Ct. May 21, 2021); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020); *Ala. Ass'n of Realtors*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568 (D.D.C. May 5, 2021); *Dixon Ventures, Inc. v. U.S. Dep't Health & Hum. Servs.*, No. 20-CV-01518, 2021 U.S. Dist. LEXIS 78176 (E.D. Ark. Apr. 23, 2021); *Johnson v. Murphy*, No. 20-CV-06750, 2021 U.S. Dist. LEXIS 53191 (D.N.J. Mar. 22, 2021); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337 (E.D. Pa. 2020); *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088 (C.D. Cal. 2020); *Heights Apartments, L.L.C. v. Walz*, 510 F. Supp. 3d 789 (D. Minn. 2020); *Terkel v. Ctrs. for Disease Control & Prevention*, No. 20-CV-00564, 2021 U.S. Dist. LEXIS 35570 (E.D. Tex. Feb. 25, 2021); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745 (N.D. Ohio 2021); *Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101 (W.D. La. 2020); *Borger Mgmt. v. Hernandez-Cruz*, No. 2020 LTB 006637 (D.C. Super. Dec. 16, 2020) (order granting declaratory judgment), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/c4776b1d-10a9-4f05-9430-2ce4f842fc2e/78879907-ee79-4d11-80b1-1cce2abb07e8.#page=1> [perma.cc/VQ8G-HZAZ]; *Gregory Real Est. & Mgmt. L.L.C. v. Keegan*, No. CV2020-007629 (Ariz. Super. Ct. July 22, 2020), <https://superiorcourt.maricopa.gov/>

COVID-era cases dealing with tenant protections other than eviction bans.¹⁵ A few big-picture points can be drawn from these cases:

- Until the Supreme Court became involved, the vast majority of landlord suits failed to undo moratoriums, either because courts rejected them outright, stayed decisions pending appeal, or limited their holdings to the individual landlords involved. Only one case resulted in mass evictions in its jurisdiction before the Supreme Court opened the flood gates;¹⁶
- Landlords argued that the eviction moratoriums exceeded statutory authority and that they violated the Contract Clause, Takings Clause, Due Process Clause, Equal Protection Clause, and the right of access to the courts. Of these, the only successful arguments were that the moratorium exceeded statutory authority, abridged access to

media/6390/cv2020007629-926-07222020final.pdf [perma.cc/W327-QRGL]; *Chrysafis v. Marks*, No. 21-CV-2516, 2021 U.S. Dist. LEXIS 110405 (E.D.N.Y. June 11, 2021); *see also* Complaint, *Iten v. Cnty. of Los Angeles*, No. 21-CV-00486, at 11 (C.D. Cal. Jan. 19, 2021), <https://pacificlegal.org/wp-content/uploads/2021/01/iten-v.-county-of-los-angeles-complaint.pdf> [perma.cc/8R5U-LUKQ] (an additional case with a complaint but no published decision). Appellate cases also addressed this issue. *See, e.g.*, *Tiger Lily, L.L.C. v. U.S. Dep't Hous. & Urb. Dev.*, 525 F. Supp. 3d 850 (W.D. Tenn. 2021); *Tiger Lily, L.L.C. v. U.S. Dep't Hous. & Urb. Dev.*, 992 F.3d 518 (6th Cir. 2021); *Tiger Lily, L.L.C. v. U.S. Dep't Hous. & Urb. Dev.*, 5 F.4th 666 (6th Cir. 2021); *District of Columbia v. Towers*, 250 A.3d 1048 (D.C. Ct. App. 2021); *Ala. Ass'n of Realtors v. U.S. Dep't Health & Hum. Servs.*, No. 20-CV-3377, 2021 U.S. Dist. LEXIS 92104 (D.D.C. May 14, 2021); *Ala. Ass'n of Realtors v. U.S. Dep't Health & Hum. Servs.*, No. 21-5093, 2021 U.S. App. LEXIS 16630 (D.C. Cir. June 2, 2021); *Ala. Ass'n of Realtors v. U.S. Dep't Health & Hum. Servs.*, 141 S. Ct. 2320 (2021); *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021); *Ala. Ass'n Realtors v. U.S. Dep't Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam).

15. *See Melendez v. City of New York*, 503 F. Supp. 3d 13, 18 (S.D.N.Y. 2020) (law forbidding harassment of tenants impacted by COVID-19), *appeal filed*, No. 20-4238 (2d Cir. Dec. 22, 2020); *Cmty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 38 (E.D.N.Y. 2020) (rent stabilization law); *335-7 L.L.C. v. City of New York*, No. 20-cv-1053, 2021 U.S. Dist. LEXIS 43046, at *2 (S.D.N.Y. Mar. 8, 2021) (rent control law); *ACA Int'l v. Healey*, 457 F. Supp. 3d 17, 21–22 (D. Mass. 2020) (rule to stop debt collectors during the pandemic).
16. *See Tiger Lily*, 525 F. Supp. 3d at 864 (declaring the CDC's Halt Order unenforceable), *aff'd*, 5 F.4th 666 (6th Cir. 2021); Brandon Richard, *Federal Judge Strikes Down CDC Eviction Moratorium in West Tennessee*, ACTION NEWS 5, <https://www.actionnews5.com/2021/03/17/federal-judge-strikes-down-cdc-eviction-moratorium-west-tennessee/> [perma.cc/6S8B-TSAL] (Mar. 16, 2021, 8:36 PM) (reporting that the ruling means evictions can now continue in western Tennessee).

the courts, or violated the Commerce Clause. The most consistently winning argument was that the CDC exceeded its statutory authority;

- Landlords overwhelmingly favored suing in federal court. Only six of thirty-three cases were litigated in state court; and
- In their analyses, courts repeatedly overlooked the realities of tenancy and the rental market, part of a broader pattern of second-class legal treatment for tenants.

The Article proceeds in four Parts. Part I gives a brief overview of state and federal eviction moratoriums.¹⁷ In response to the pandemic, the CDC passed a Halt Order that paused evictions nationwide for qualifying tenants.¹⁸ This order drew the lion's share of the lawsuits. Most states passed eviction moratoriums, which tended to be stronger than the CDC Halt Order, but only a few of them lasted long enough to draw court challenges and published opinions.

Part II looks at eviction moratorium litigation.¹⁹ This Part examines the issues that landlords raised in their suits and how courts responded. In short, courts rejected most government arguments that would prevent landlords from even pleading their case—such as jurisdictional issues—but ultimately ruled against landlords on the merits most of the time. Even when they theoretically might have sided with landlords, courts typically stayed judgments pending appeal or cabined their decisions to have the narrowest impact on tenants possible.

Part III discusses how courts overlooked the realities of being a tenant.²⁰ Courts held that including tenants in lawsuits was unnecessary to understand the case, applied double standards to landlords' versus tenants' cases, and painted an unrealistically rosy picture of how landlords handle evictions.

Part IV concludes that the law usually treats tenants poorly, and observes that several judges have ruled against them or ignored

17. *See infra* Part I.

18. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020).

19. *See infra* Part II.

20. *See infra* Part III.

eviction moratoriums without analysis.²¹ However, when attorneys actually litigated moratorium cases, they held up fairly well and protected a highly marginalized population at a time of dire need.

I. COVID-ERA EVICTION PROTECTION POLICIES

Even in relatively pro-tenant jurisdictions, housing courts operate like grist mills. Evictions occur “routinely and summarily” in D.C.’s courts, “under circumstances which would make any humane judge wince and grit his teeth.”²² Massachusetts’ Supreme Judicial Court has admitted that it “recognize[s] that the complexity and speed of summary process cases can present formidable challenges to individuals facing eviction, particularly where those individuals are not represented by an attorney[,]” which is to say, nearly all of them.²³ However, during the pandemic, policymakers injected a little compassion into the process.

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) imposed a 120-day moratorium on evictions for federally-backed properties in March 2020.²⁴ In September of the same year, the Centers for Disease Control and Prevention (CDC) passed a Halt Order prohibiting evictions for nonpayment of rent nationwide and extended it every time it came close to ending.²⁵ Congress, through the Consolidated Appropriations Act of 2020, extended the CDC Halt Order at one point.²⁶ Moreover, the federal government doled out tens of billions of dollars in rental assistance.²⁷ In addition to federal efforts, at least forty-three states and the District of Columbia imposed some kind of eviction moratorium.²⁸ A few dozen cities did the same.²⁹

21. *See infra* Part IV.

22. *Mahdi v. Poretsky Mgmt., Inc.*, 433 A.2d 1085, 1088 (D.C. 1981) (per curiam).

23. *Adjarney v. Cent. Div. of the Hous. Ct. Dep’t*, 120 N.E.3d 297, 302, 306 (Mass. 2019).

24. CARES Act of 2020, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 493–94 (2020).

25. Christian Britschgi, *The CDC Eviction Moratorium Is Extended for a 4th Time*, REASON (June 24, 2021, 10:40 AM), <https://reason.com/2021/06/24/the-cdc-eviction-moratorium-is-extended-for-a-4th-time/> [perma.cc/2HBC-XLMB].

26. Consolidated Appropriations Act, 2021, Pub. L. No. 116-26, § 502, 134 Stat. 1182, 2078–79 (2020).

27. *See id.* § 501(a)(1) (\$25 billion for rental assistance); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (2020) (\$21.55 billion for rental assistance).

28. *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *20 (D.D.C. May 5, 2021).

29. *See* Deidre Woollard, *Cities and States That Have Paused Evictions Due to COVID-19*, MILLION ACRES, <https://www.fool.com/millionacres/real-estate->

The CDC Halt Order was not an automatic ban on evictions. Rather, a tenant had to submit a declaration swearing that (1) they tried to get rental relief; (2) they made less than the income threshold; (3) they were unable to pay rent due to sudden hardship; (4) they are paying as much rent as they are able; and (5) an eviction would push them into an unsafe living arrangement.³⁰ The CDC based the Halt Order on studies showing that evictions would increase the prevalence of COVID-19.³¹

The federal government never tried something as far-reaching as the CDC Halt Order, but that does not mean it never tried anything of the sort. In 1919, Congress passed a law that lasted for two years, allowing tenants in Washington, D.C., to remain in a hotel or apartment beyond the expiration of the lease.³² “Housing is a necessary of life[.]” said the Supreme Court, upholding the law against a challenge by a landlord.³³ A few years later, the Supreme Court allowed a rent commission in the District of Columbia to set “reasonable rates” for apartments.³⁴ During World War II, Congress passed the Emergency Price Control Act to manage the wartime economy.³⁵ This law empowered the head of the Office of Price Administration to set prices on goods that “in his judgment will be generally fair and equitable and will effectuate the purposes of this Act[.]” and to restrain prices that “have risen or threaten to rise to an

market/articles/cities-and-states-that-have-paused-evictions-due-to-covid-19/[perma.cc/283D-3L34] (June 11, 2021).

30. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,297 (Sept. 4, 2020).
31. *Id.* at 55,294. Later studies gave further supporting evidence. See Olivia Jin et al., *Neighborhoods with Highest Eviction Filing Rates Have Lowest Levels of COVID-19 Vaccination*, EVICTION LAB (June 11, 2021), <https://evictionlab.org/filing-and-vaccination-rates/> [perma.cc/5ECB-553J] (finding that areas with the highest rates of eviction have the lowest levels of vaccination, heightening the danger of allowing more forced displacements); Bill Salisbury, *Minnesota Braces for Glut of Evictions Once Pandemic Ban Ends*, TWIN CITIES, <https://www.twincities.com/2021/03/08/minnesota-prepares-for-glut-of-evictions-once-pandemic-ban-ends/> [perma.cc/EG7T-9SJQ] (Mar. 10, 2021, 2:33 PM) (concluding the state eviction moratorium saved thousands of lives and prevented over one hundred thousand infections).
32. *Block v. Hirsh*, 256 U.S. 135, 153–54 (1921).
33. *Id.* at 156, 158. The action was based on Congress’s police power over the federal district, rather than any of the authorities at issue in 2020 moratoriums. *Id.* at 155.
34. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546, 549 (1924).
35. See *Yakus v. United States*, 321 U.S. 414, 419 (1944).

extent or in a manner inconsistent with the purposes of this Act.”³⁶ Despite the broad language, the Supreme Court upheld the law.³⁷

State and local protections were not uniform, but they tended to be more straightforward. While the CDC Halt Order had a series of hoops that tenants had to jump through, state orders were often flat bans or included only a small number of scenarios where a landlord could evict, though they only lasted for a few weeks.³⁸ Most state eviction moratoriums ended by September 2020, when the CDC stepped in to fill the breach.³⁹ As a result, most states did not have eviction moratoriums around long enough to justify a lawsuit. New York had one of the most ambitious tenant protection laws, which was pared back slightly by the Supreme Court in mid-2021.⁴⁰ The Supreme Court also signaled in early July 2021 that it would not allow the CDC eviction moratorium to continue.⁴¹

36. *Id.* at 420.

37. *See id.* at 447–48.

38. *See, e.g.*, Ky. Exec. Order 2020-257, https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf [perma.cc/2ST5-YVNB]; Exec. Dep’t of Ind., *Temporary Prohibition on Evictions and Foreclosures*, Order No. 20-06 (Mar. 19, 2020), https://www.in.gov/gov/files/EO_20-06.pdf [perma.cc/L697-WFYH]; Exec. Dep’t of Iowa, *Proclamation of Disaster Emergency* (Mar. 19, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.03.19.pdf> [perma.cc/M5PH-GKAF]; Exec. Dep’t of Nev., *Declaration of Emergency Directive No. 008* (Mar. 29, 2020), [https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-29_-_COVID-19_Declaration_of_Emergency_Directive_008_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-29_-_COVID-19_Declaration_of_Emergency_Directive_008_(Attachments)/) [perma.cc/H6E3-CSEL]; Me. Exec. Order No. 40 FY 19/20 (Apr. 16, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20Regarding%20Unlawful%20Evictions%2C%20Writs%20of%20Possession%2C%20and%20Initiation%20of%20Eviction%20Proceedings.pdf> [perma.cc/W5QY-AR46].

39. *See Changes to Rent, Mortgage, Eviction, and Foreclosure Policies in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Changes_to_rent_mortgage_eviction_and_foreclosure_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020#cite_ref-149](https://ballotpedia.org/Changes_to_rent_mortgage_eviction_and_foreclosure_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020#cite_ref-149) [perma.cc/X5DT-7NTN] (last visited Oct. 15, 2021); Annie Nova, *The CDC Banned Evictions. Tens of Thousands Have Still Occurred*, CNBC, <https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html> [perma.cc/237P-4V5Y] (Jan. 14, 2021) (noting that many state bans only lasted a few weeks).

40. *See Chrysaifis v. Marks*, 141 S. Ct. 2482 (2021). Specifically, the Court struck down a provision of the law that allowed a tenant to self-certify they had a hardship and precluded the landlord from contesting that certification. *Id.* at 2482.

41. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320–21 (2021) (Kavanaugh, J., concurring).

The CDC eviction moratorium expired on July 31, 2021.⁴² President Joe Biden called upon Congress to extend it, but Congress failed to act and instead asked Biden to do so on his own.⁴³ However, given the Supreme Court’s implied opinion that the agency needed Congressional approval, the CDC insisted that it could not act alone.⁴⁴ In addition, the White House announced on August 2 that the CDC was “unable to find legal authority for a new, targeted eviction moratorium.”⁴⁵ Nevertheless, on August 3, the CDC rolled out a new, targeted eviction moratorium that only applied to jurisdictions where eviction caseloads were spiraling, despite failing to secure additional legal authority.⁴⁶ Biden was clear-eyed about the move, saying, “[t]he bulk of the constitutional scholarship says that it’s not likely to pass constitutional muster But there are several key scholars who think that it may and it’s worth the effort.”⁴⁷

Predictably, the Supreme Court stepped in on August 26, vacating a stay on a lower court’s ruling against the moratorium, effectively ending it.⁴⁸ While Congress hesitated, fifteen million people were at risk of eviction, and less than ten percent of the forty-six billion dollars in rental assistance allocated had actually been disbursed.⁴⁹

42. See David Shepardson, *CDC Rebuffs Biden Bid to Reinstate COVID-19 Eviction Moratorium*, REUTERS (Aug. 2, 2021, 7:02 PM), <https://www.reuters.com/world/us/pelosi-urges-white-house-reinstate-expired-covid-19-eviction-moratorium-2021-08-02/>.

43. See *id.*

44. See *id.*

45. *White House Asks States to Aid Renters as CDC Can’t Extend Eviction Moratorium*, GUARDIAN (Aug. 2, 2021, 6:30 PM), <https://www.theguardian.com/us-news/2021/aug/02/us-eviction-moratorium-white-house-cdc> [perma.cc/Y57F-EKR7].

46. Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,245, 43,245 (Aug. 6, 2021). The new order only applied to counties experiencing “substantial or high” levels of community transmission. *Id.* However, this definition applied to ninety percent of the population, so it did little to narrow the order. See Josh Boak et al., *CDC Issues New Eviction Ban for Most of US Through Oct. 3*, AP NEWS (Aug. 3, 2021), <https://apnews.com/article/joe-biden-business-health-coronavirus-pandemic-65770ddb7396b08b4cb6f6a074cc5ca3> [perma.cc/C8VQ-264A].

47. Boak et al., *supra* note 46.

48. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam).

49. *Id.* at 2489.

II. EVICTION PROTECTION LITIGATION

A. *Jurisdictional Issues*

Before courts could get to the meat of legal claims, they had to deal with jurisdictional issues. Sometimes, the government raised such issues, attempting to have a suit thrown out. At other times, the court raised such issues on its own. Common jurisdictional questions included standing, joining indispensable parties, sovereign immunity, and abstention doctrine.

1. Standing

In defending the eviction moratoriums, the government frequently claimed that landlords lacked proper standing to bring suit.⁵⁰ Courts also sometimes raised this issue of their own accord.⁵¹ To have standing, a party must show that: (1) the party suffered an injury; (2) there exists a causal link between the government policy and the injury; and (3) the courts have the power to redress this injury.⁵² The injury prong may be broken down further, as the party must show that the injury is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”⁵³

The federal government tended to argue that landlords failed to show actual injury,⁵⁴ though once it argued that there was no causal link,⁵⁵ while state governments argued no redressability.⁵⁶ When arguing redressability, states contended that because of the CDC Halt Order or judicial eviction bans, striking down state moratoriums

50. See, e.g., *Brown v. Azar*, 497 F. Supp. 3d 1270, 1276 (N.D. Ga. 2020); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 755 (N.D. Ohio 2021); *Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 544 (W. D. Tenn. 2020); *Dixon Ventures v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-cv-01518, 2021 U.S. Dist. LEXIS 78176, at *5 (E.D. Ark. Apr. 23, 2021); *Heights Apartments v. Walz*, 510 F. Supp. 3d 789, 800 (D. Minn. 2020); *El Papel L.L.C. v. Inslee*, No. 20-cv-01323, 2020 U.S. Dist. LEXIS 246971, at *13 (W.D. Wash. Dec. 2, 2020).

51. *Skyworks*, 524 F. Supp. 3d at 754.

52. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

53. *Id.* at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

54. *Brown*, 497 F. Supp. 3d at 1276; *Skyworks*, 524 F. Supp. 3d at 754; *Dixon Ventures*, 2021 U.S. Dist. LEXIS 78176, at *6–7.

55. *Tiger Lily*, 499 F. Supp. 3d at 545.

56. *Heights Apartments v. Walz*, 510 F. Supp. 3d 789, 801 (D. Minn. 2020); *El Papel L.L.C. v. Inslee*, No. 20-cv-01323, 2020 U.S. Dist. LEXIS 246971, at *13 (W.D. Wash. Dec. 2, 2020); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 219 (D. Conn. 2020).

would not do anything to help landlords.⁵⁷ But courts rejected these arguments, saying that the CDC Halt Order was narrower than state policies,⁵⁸ or that because further discovery could show redressability, the court would skip analyzing the issue.⁵⁹

When analyzing the federal arguments, courts also invariably found that landlords had standing⁶⁰ because landlords asserted that they had tenants who submitted CDC Declarations saying that the Halt Order applied to them. This was enough for most courts.⁶¹ One court even found standing where tenants did not submit CDC Declarations.⁶² *Terkel v. CDC* booted several landlords from a case for lack of standing because their tenants had not submitted CDC Declarations, but this decision was an outlier.⁶³ State eviction moratoriums did not have the exact requirements as the CDC Halt Order, but landlords still had questionable standing.⁶⁴ Despite this, governmental efforts to challenge standing were largely unsuccessful.⁶⁵

2. Indispensable Parties

The federal government also argued that landlords challenging the CDC Halt Order failed to join indispensable parties: their tenants.⁶⁶ Under Rule 19 of the Federal Rules of Civil Procedure, courts *must*

57. See cases cited *supra* note 56.

58. See *Heights Apartments*, 510 F. Supp. 3d at 801–02; *El Papel*, 2020 U.S. Dist. LEXIS 246971, at *13–14.

59. See *Auracle Homes*, 478 F. Supp. 3d at 219.

60. See *Tiger Lily*, 499 F. Supp. 3d at 546; *Brown v. Azar*, 497 F. Supp. 3d 1270, 1277–78 (N.D. Ga. 2020); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 755–56 (N.D. Ohio 2021); *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *10 (D.D.C. May 5, 2021).

61. See *Tiger Lily*, 499 F. Supp. 3d at 546; *Brown*, 497 F. Supp. 3d at 1277–78; *Ala. Ass’n of Realtors*, 2021 U.S. Dist. LEXIS 85568, at *10; *Skyworks*, 524 F. Supp. 3d at 755. One court said there was standing for a landlord whose tenant had not yet submitted a Declaration, though the landlord believed they would in the future. *Id.*

62. *Tiger Lily*, 499 F. Supp. 3d at 545–46.

63. *Terkel v. Ctrs. for Disease Control & Prevention*, No. 20-cv-00564, 2021 U.S. Dist. LEXIS 35570, at *9–10 (E.D. Tex. Feb. 25, 2021).

64. Complaint, *Iten v. Cnty. of Los Angeles*, *supra* note 14 (stating the landlord did not attempt to evict based on “his understanding of the then-applicable state and local eviction moratoriums,” without clearly stating if he could have pursued an eviction, and that the tenant never actually provided documentation showing a COVID-related hardship).

65. See *Heights Apartments v. Walz*, 510 F. Supp. 3d 789, 801 (D. Minn. 2020).

66. See *Brown*, 497 F. Supp. 3d at 1278; *Tiger Lily*, 499 F. Supp. 3d at 546–47.

join parties if (1) the court cannot accord complete relief without them or (2) disposing of the case without them would practically impair the person's ability to defend their interest.⁶⁷ However, no courts have said that tenants fit this bill. Instead, they said that tenants only had a "general interest" in the litigation⁶⁸ or that government attorneys adequately protected their interests.⁶⁹

3. Sovereign Immunity

States' favorite argument to defend their eviction moratoriums was sovereign immunity.⁷⁰ The Supreme Court created this concept when it established that individuals could not sue states in federal court without their consent.⁷¹ This immunity thus bars private suits against states and state officials generally, unless the adverse party can show an exception.⁷² *Ex parte Young* was the most promising exception to try.⁷³

Under *Young*, a party may sue a state official to block an unconstitutional state law if it shows that the state official has some special connection to the enforcement of the law.⁷⁴ The logic of this exception is that in enforcing an unconstitutional law, the state official commits an illegal act and thus forfeits sovereign immunity.⁷⁵ It is not enough to sue a governor or attorney general based on their standard obligation to enforce all laws.⁷⁶ Even under *Young*, however, federal courts cannot enjoin state officials for violations of state law, according to *Pennhurst*, unless the state official is acting without any authority whatsoever (called an *ultra vires* action).⁷⁷

67. See FED. R. CIV. P. 19(a).

68. *Tiger Lily*, 499 F. Supp. 3d at 548.

69. *Brown*, 497 F. Supp. 3d at 1279.

70. See NAT'L HOUS. L. PROJECT, HOW TO SUE A STATE COURT IN U.S. DISTRICT COURT TO ENJOIN RESIDENTIAL EVICTION HEARINGS DURING THE COVID-19 PANDEMIC 14 (2020).

71. See *Hans v. Louisiana*, 134 U.S. 1, 20 (1890). The principle of sovereign immunity also protects states against suits by individuals in their own courts. See *Alden v. Maine*, 527 U.S. 706, 712 (1999).

72. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The doctrine only protects state officials when "the state is the real, substantial party in interest" and the officials are merely the ones named in the lawsuit. *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945); see also *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (indicating that the test is whether the relief sought will be borne by the state itself, or the individual officials).

73. See *Ex parte Young*, 209 U.S. 123 (1908).

74. See *id.* at 157.

75. *Id.* at 159–60.

76. See *id.* at 157.

77. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11, 106 (1984).

An attempt to show a special connection between the New York Attorney General and an eviction protection law failed, as the law was primarily enforced through the court system.⁷⁸ It was of no concern that the Attorney General might later bring suit against those who violated the law.⁷⁹ However, when landlords alleged that the Governor and Attorney General of Minnesota could be sued for enforcing a state eviction moratorium, the court said that because the Governor's executive order passed the moratorium and the Attorney General sat on the council that approved the order there was enough evidence to show a special connection to the law.⁸⁰ If this is the standard, a great many governors would be subject to *Ex parte Young*, as states almost always enacted eviction moratoriums through executive orders, as opposed to statutes.⁸¹

78. *Chrysafis v. James*, No. 21-cv-998, 2021 U.S. Dist. LEXIS 72602, at *43 (E.D.N.Y. Apr. 14, 2021).

79. *See id.* at *48–49.

80. *Heights Apartments, L.L.C. v. Walz*, 510 F. Supp. 3d 789, 803 (D. Minn. 2020).

81. Only a few statutes were passed. S.B. 241, 31st Leg., 2d. Sess. (Alaska 2020); H.B. 4647, 191st Gen. Ct. (Mass. 2020); Assemb. B. A.11181, 2020 Leg. (N.Y. 2020); H.B. 5115, 2020 Spec. Sess. I (Va. 2020); S.B. 333, 2020 Leg. (Vt. 2020). In contrast, there were many executive orders. *E.g.*, Exec. Dep't of Ill., Executive Order in Response to COVID-19, Order No. 2020-10 (Mar. 20, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx> [perma.cc/Z6EH-WPFA]; Exec. Dep't of Nev., *Declaration of Emergency Directive 008*, § 2 (Mar. 29, 2020), [https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-29_-_COVID-19_Declaration_of_Emergency_Directive_008_\(Attachments\)](https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-29_-_COVID-19_Declaration_of_Emergency_Directive_008_(Attachments)) [perma.cc/P7A5-JAZE]; Exec. Dep't of N.H., *Temporary Prohibition on Evictions and Foreclosures*, Order No. 2020-04 (Mar. 17, 2020), <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-4.pdf> [perma.cc/JYN2-A6RP]; Ky. Exec. Order 2020-257, https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf [perma.cc/Q5XB-U8U9]; Exec. Dep't of La., *Renewal of State of Emergency for Covid-19 Extension of Emergency Provisions*, Order No. 52 JBE 2020 (Apr. 30, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/52-JBE-2020-Stay-at-Home-Order.pdf> [perma.cc/FMW2-5A3E]; Exec. Dep't of Miss., Miss. Executive Order No. 1466, at 2 (Apr. 1, 2020), <https://www.sos.ms.gov/Education-Publications/ExecutiveOrders/1466.pdf> [perma.cc/W4B6-655Z]; Exec. Dep't of Ind., *Temporary Prohibition on Evictions and Foreclosures*, Order No. 20-06 (Mar. 19, 2020), https://www.in.gov/gov/files/EO_20-06.pdf [perma.cc/4VWU-NEHV]; Exec. Dep't of Conn., Conn. Executive Order No. 7X, at 3 (Apr. 10, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7X.pdf> [perma.cc/X3KB-G9JN]; Exec. Dep't of Iowa, *Proclamation of Disaster Emergency* (Mar. 19, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.03.19.pdf> [perma.cc/5DAC-ML5K].

But even if a party suing a state official could show a special connection, the *Penhurst* doctrine was fatal to federal court challenges asking for an injunction on state eviction moratoriums.⁸² Although landlords have claimed that state officials acted without any authority whatsoever, since states uncontestedly have at least some emergency power to act, courts rejected these arguments.⁸³

Sovereign immunity only applies to cases in federal court, not state court.⁸⁴ Landlords, however, demonstrated a significant preference for seeking relief in federal court. Oftentimes, they did not even file a parallel state case.⁸⁵ Perhaps plaintiffs used pandemic lawsuits as a vector for impact litigation and believed they could make more of a splash in federal court,⁸⁶ or perhaps they guessed that the political leanings of the federal judiciary increased their odds of success.⁸⁷

82. *Heights Apartments*, 510 F. Supp. 3d at 803–04; *Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148, 161–62 (S.D.N.Y. 2020); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 219 (D. Conn. 2020).

83. *See Elmsford*, 469 F. Supp. 3d at 162; *Auracle*, 478 F. Supp. 3d at 219–20; *see also* *ACA Int'l v. Healey*, 457 F. Supp. 3d 17, 25 (D. Mass. 2020) (holding that even if a state official misused her power to pass a pandemic policy, she did not act without any authority); *Johnson v. Murphy*, No. 20-cv-06750, 2021 U.S. Dist. LEXIS 53191, at *21 (D.N.J. Mar. 22, 2021) (applying sovereign immunity to state law claims challenging a pandemic security deposit law because the governor did not act with zero authority); *JL Props. Grp. B, L.L.C. v. Pritzker*, 2021 IL 200305, ¶ 38 (Ill. App. Ct. May 21, 2021), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/336f0fe1-d738-4377-9842-a24d2a4e7d84/JL%20Properties%20Group%20B,%20LLC%20v.%20Pritzker,%202021%20IL%20App%20\(3d\)%20200305.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/336f0fe1-d738-4377-9842-a24d2a4e7d84/JL%20Properties%20Group%20B,%20LLC%20v.%20Pritzker,%202021%20IL%20App%20(3d)%20200305.pdf) [perma.cc/H85Z-X6TJ] (noting the lower court found that the governor had the authority to enact an eviction moratorium); *Gregory Real Est. & Mgmt. L.L.C. v. Keegan*, No. CV2020-007629, 2021 Ariz. App. Unpub. LEXIS 368, ¶ 6 (Ariz. Super. Ct. July 22, 2020), <https://superiorcourt.maricopa.gov/media/6390/cv2020007629-926-07222020final.pdf> [perma.cc/9B6B-RDWU] (finding that the governor had the authority to pause evictions during the pandemic).

84. *See Alden v. Maine*, 527 U.S. 706, 728–29 (1999) (stating that sovereign immunity is a constitutional principle).

85. *See, e.g., Heights Apartments*, 510 F. Supp. 3d at 804 (“[T]here is no parallel proceeding in state courts[.]”).

86. Many of the lawsuits challenging tenant protections were brought by the Pacific Legal Foundation and the New Civil Liberties Alliance. *See Iten v. Cnty. of Los Angeles*, No. CV 21-00486, 2021 U.S. Dist. LEXIS 176585, at *1 (C.D. Cal. Sep. 15, 2021); *COVID-19 Legal Action*, NEW CIV. LIBERTIES ALL., <https://nclalegal.org/covid-19-legal-action/> [perma.cc/ZZ34-6E5C] (last visited June 29, 2021) (listing cases filed by the New Civil Liberties Alliance during COVID-19 pandemic). *See generally* Appellants’ Opening Brief & Appendix Vol. 1, *Johnson v. Governor of New Jersey*, No. 21-1795 (3d Cir. June 16, 2021), <https://nclalegal.org/wp-content/uploads/2021/06/ECF-17-1-Appellants-Opening-Brief.pdf> [perma.cc/92GQ-HMBV] (The New Civil Liberties Alliance appears more concerned with arguing against traditional

4. Abstention

When parties litigate state law questions in federal court, the federal court must determine if it should abstain from hearing the case.⁸⁸ There are several different breeds of abstention. The *Pullman*⁸⁹ abstention holds that federal courts should refrain from hearing a case when “difficult and unsettled” matters of state law remain that, if decided, would preclude the need to resolve questions of federal law.⁹⁰ Courts said that there was nothing unsettled about a governor’s general authority to issue executive orders in a time of emergency, just the extent of that authority.⁹¹ Therefore, the *Pullman* abstention did not apply.⁹²

Another type of abstention is the *Colorado River* abstention.⁹³ Under this doctrine, federal courts should hold back from hearing a case when there are parallel state proceedings and some “exceptional” circumstance favors abstention.⁹⁴ As noted above, parallel state litigation was scarce.⁹⁵ Thus, *Colorado River* provided no basis to abstain, even though there may have been state cases challenging COVID emergency policies in other contexts.⁹⁶

B. Injunctions

Landlords challenging tenant protection laws sought injunctions to stop the government from enforcing eviction moratoriums.⁹⁷ Sometimes, they sought preliminary injunctions, meaning that the policy would be paused while the litigation ran its course. Their track

notions of judicial deference and the Contract Clause rather than winning the narrow question of the case.).

87. See Morgan Chalfant & Harper Neidig, *Trump’s Mark on Federal Courts Could Last Decades*, THE HILL (June 30, 2020, 6:00 AM), <https://thehill.com/homenews/administration/505111-trumps-mark-on-federal-courts-could-last-decades> [perma.cc/57KN-KZWY].

88. See R.R. Comm’n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941).

89. See *id.*

90. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984).

91. See *supra* note 83 and accompanying text.

92. See Heights Apartments, L.L.C. v Walz, 510 F. Supp. 3d 789, 804 (D. Minn. 2020).

93. See Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976) (quoting Fru-Con Constr. Corp. v. Controlled Air, Inc., 574 F.3d 537, 534 (8th Cir. 2009)).

94. *Id.* at 818.

95. See *supra* note 85 and accompanying text.

96. *Heights Apartments*, 510 F. Supp. 3d at 805–06 (rejecting abstention argument where there was a state case by business owners challenging shutdowns).

97. See *infra* notes 98–108 and accompanying text.

record on this point was unsuccessful. Most applications for preliminary injunctions failed.⁹⁸ Even when courts said that an eviction moratorium was invalid, they declined to issue injunctions.⁹⁹ The United States Supreme Court had declined to review a challenge because the CDC promised to end the moratorium voluntarily in a few weeks.¹⁰⁰ One exception was in the Western District of Tennessee, which held that the CDC Halt Order was unenforceable.¹⁰¹ That jurisdiction was plunged into an eviction crisis shortly after the ruling.¹⁰² The Sixth Circuit affirmed the Tennessee ruling a week before it was set to expire on its own.¹⁰³ When the Halt

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98. *Chryasfis v. James*, No. 21-CV-998, 2021 U.S. Dist. LEXIS 72602, at *63 (E.D.N.Y. Apr. 14, 2021); *JL Props. Grp. B, L.L.C. v. Pritzker*, 2021 IL 200305, ¶ 66 (Ill. App. Ct. May 21, 2021); *Brown v. Azar*, 497 F. Supp. 3d 1270, 1300 (N.D. Ga. 2020); *Chambless Enter., L.L.C. v. Redfield*, 508 F. Supp. 3d 101, 124 (W.D. La. 2020); *Tiger Lily, L.L.C. v. U.S. Dep't of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 552 (W.D. Tenn. 2020); *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1104 (C.D. Cal. 2020).
 99. *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 762 (N.D. Ohio 2021); *Terkel v. Ctrs. for Disease Control & Prevention*, No. 20-cv-00564, 2021 U.S. Dist. LEXIS 35570, at *30–31 (E.D. Tex. Feb. 25, 2021); *Dixon Ventures, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. 20-cv-01518, 2021 U.S. Dist. LEXIS 78176, at *15 (E.D. Ark. Apr. 23, 2021); *see also Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *25–26 (D.D.C. May 5, 2021) (proscribing application of the CDC Halt Order to the individual petitioners); *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 92104, at *15 (D.D.C. May 14, 2021) (the court granted a stay on the order vacating the moratorium); *District of Columbia v. Towers*, 250 A.3d 1048, 1050 (D.C. 2021) (appellate court granting a stay pending appeal when the trial court ruled against a local eviction moratorium); *Gregory Real Est. & Mgmt. L.L.C. v. Keegan*, No. 1 CA-CV 20-0419, 2021 Ariz. App. Unpub. LEXIS 368, at *1 (Ariz. Ct. App. Mar. 30, 2021) (court dismissed an appeal as moot because the contested eviction moratorium expired).
 100. *See Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320 (2021) (holding that the application to vacate stay is denied). Four justices would have reviewed the CDC Halt Order, and a fifth opined that the agency exceeded its powers. *Id.* at 2320–21 (Kavanaugh, J., concurring) (the denial was proper because the CDC planned to end the moratorium in a few weeks anyway). The Sixth Circuit, on the other hand, rushed out an opinion condemning the CDC a week before the Halt Order was about to expire. *See generally Tiger Lily, L.L.C. v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666 (6th Cir. 2021) (condemning the CDC a week before the Halt Order was about to expire).
 101. *Tiger Lily, L.L.C. v. U.S. Dep't of Hous. & Urb. Dev.*, 525 F. Supp. 3d 850, 863–64 (W.D. Tenn. 2021).
 102. Irina Ivanova, *Memphis Faces Eviction Crisis After Court Strikes Down Federal Ban*, CBS NEWS, <https://www.cbsnews.com/news/eviction-memphis-crisis-court-cdc-ban/> [perma.cc/7JNG-EATM] (Apr. 23, 2021, 9:37 PM).
 103. *Tiger Lily*, 5 F.4th at 668.

Order briefly lapsed in August 2021, housing attorneys noticed an immediate uptick in eviction filings.¹⁰⁴

The rarity of landlords succeeding can be partially ascribed to the high standard they had to meet. A party seeking a preliminary injunction must show that (1) there is a likelihood of success on the merits; (2) they will likely suffer irreparable harm without an injunction; (3) the balance of equities is in their favor; and (4) the injunction is in the public interest.¹⁰⁵ The last two factors merge when the government is defending a policy.¹⁰⁶ In any event, such an injunction is an “extraordinary remedy.”¹⁰⁷ The standard is similar if a party seeks a non-preliminary injunction, except that they must show actual success on the merits, not just a likelihood of success.¹⁰⁸

1. Success on the Merits

Success on the merits has the broadest implications. Though the others may determine whether an injunction will issue, this prong gets at whether the underlying policy is permissible. A party must show the likelihood of success based on the usual standard for the underlying claim (i.e., if the matter implicates strict scrutiny, the movant must show they would prevail on strict scrutiny).¹⁰⁹ For the sake of organization, this section of the Article will go over all substantive challenges to the validity of eviction moratoriums in Part II.B.

2. Irreparable Injury

The Supreme Court has called irreparable injury the foundation of injunctive relief.¹¹⁰ After all, there is no urgent need to block a government policy before litigation has run its course if the aggrieved

104. Alicia Adamczyk, *The CDC Extending the Federal Eviction Moratorium is Expected to Cover About 90% of Renters*, CNBC, <https://www.cnbc.com/2021/08/03/cdc-will-extend-the-federal-eviction-moratorium-through-oct-3.html> [perma.cc/LE54-V95A] (Aug. 4, 2021, 10:05 AM).

105. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Some states have slightly different formulations, but this is more a difference of style than substance. *See, e.g.*, *JL Props. Grp. B, L.L.C. v. Pritzker*, 2021 IL 200305, ¶ 57 (Ill. App. Ct. May 21, 2021).

106. *See Nken v. Holder*, 556 U.S. 418, 434–35 (2009).

107. *Id.* at 428.

108. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987).

109. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

110. *See Amoco*, 480 U.S. at 542 (stating the bases for the equitable remedy of injunctive relief are inadequate legal remedies and irreparable injury).

party can be made whole on the backend. Loss of income is not an irreparable injury.¹¹¹ For this reason, landlords were in a tough position. If all they claimed was a loss of rental income, their hopes of showing irreparable injury would be slim.¹¹² For this reason, perhaps, landlords sometimes did not even allege money damages.¹¹³ Thus, they had to try other tactics.

First, landlords claimed that their constitutional rights had been violated and therefore they did not need to show any additional harm.¹¹⁴ But courts swatted this down, noting that case law only supports a finding of irreparable injury if a party's free speech or privacy rights were violated¹¹⁵ and that the landlords failed to show that any of their constitutional rights had been imperiled.¹¹⁶ The landlords' second claim was that their tenants were judgment-proof and thus would never be able to repay the rent they missed.¹¹⁷ This argument, too, was poorly supported by case law. Courts held that a judgment-proof debtor could cause to irreparable harm, but only under extreme circumstances.¹¹⁸ Outside of such circumstances, financial harm would not be irreparable.¹¹⁹ Third, landlords argued that the deprivation of their ability to exclude people from their property was a per se irreparable injury.¹²⁰ However, this argument

111. *Sampson v. Murray*, 415 U.S. 61, 89–90 (1974).

112. Some courts based their rejection of irreparable injury on the fact that monetary compensation could make the landlords whole. *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 762 (N.D. Ohio 2021); *Tiger Lily, L.L.C. v. U.S. Dep't of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 549 (W.D. Tenn. 2020); *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1101 (C.D. Cal. 2020); *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *9–10 (D.C. Cir. June 2, 2021).

113. *Skyworks*, 524 F. Supp. 3d at 762.

114. *See Brown v. Azar*, 497 F. Supp. 3d 1270, 1289–91 (N.D. Ga. 2020).

115. *See id.* at 1293; *Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101, 120 (W.D. La. 2020); *Tiger Lily*, 499 F. Supp. 3d at 550–51; *see also Apartment Ass'n of L.A.*, 500 F. Supp. 3d at 1100 (noting only that courts have found irreparable injury for a First Amendment violation, without foreclosing the possibility that the principle could be broadened).

116. *Auraclie Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 227 (D. Conn. 2020).

117. *E.g.*, *Dixon Ventures, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. 20-cv-01518, 2021 U.S. Dist. LEXIS 78176, at *11 (E.D. Ark. Apr. 23, 2021).

118. *Brown*, 497 F. Supp. 3d at 1293–94 (citing *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348 (11th Cir. 2019)) (noting a case where a party was unable to collect after years of trying).

119. *See Chambless*, 508 F. Supp. 3d at 121 (quoting *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012)); *Apartment Ass'n of L.A.*, 500 F. Supp. 3d at 1101 (quoting *Goldie's Bookstore, Inc. v. Superior Ct. of State of Cal.*, 739 F.2d 466, 471 (9th Cir. 1984)).

120. *See Brown*, 497 F. Supp. 3d at 1297.

fell flat because landlords had already leased their property to the tenant—the only thing that changed was that they were no longer getting paid.¹²¹ Fourth, at least one landlord claimed a loss of goodwill and reputation from being unable to evict tenants, but the court dismissed the claim almost out of hand,¹²² uniformly finding no irreparable injury.¹²³ And fifth, landlords argued that if they did not get paid by renters, they would face foreclosure themselves.¹²⁴ But cries of foreclosure were speculative at best, and the very eviction moratorium the landlords were trying to strike down would make lenders reluctant to attempt foreclosure.¹²⁵

Landlords struggled to demonstrate lasting harm. The closest thing they had to a victory on this point came from a case that did not involve a preliminary injunction. In *Borger Management*, a Washington, D.C. judge claimed landlords would suffer “irreparable” injury from the moratorium because destitute tenants might never be able to pay missed rent.¹²⁶

Irreparable injury is the cornerstone of injunctive relief, yet courts seemed to treat this factor as just another box to check. *Brown v. Azar* stated that without a showing of irreparable injury, it could decide the matter of a preliminary injunction on that basis alone.¹²⁷

121. *See id.*; *Chambless*, 508 F. Supp. 3d at 121; *Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 550 (W.D. Tenn. 2020).

122. *See Dixon*, 2021 U.S. Dist. LEXIS 78176, at *13.

123. *See id.* at *12; *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 227 (D. Conn. 2020).

124. *See Apartment Ass’n of L.A.*, 500 F. Supp. 3d at 1101.

125. *See id.* at 1101–02; *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 363–65 (E.D. Pa. 2020). Throughout the pandemic, there were lots of stories warning that landlords were at risk of foreclosure if they could not evict tenants, but none of these stories could point to any landlord who actually lost their home. *See, e.g.*, Kristin Thorne, *Long Island Small Landlords Struggling to Survive Amid Eviction Moratorium*, ABC 7 N.Y. (Mar. 30, 2021), <https://abc7ny.com/long-island-foreclosure-eviction-bankruptcy/10460209/> [perma.cc/CXT7-S9Q2]; Michael Gartland, *NYC Small Landlords Say New Eviction Moratorium Gives Tenants Excuse to Skip Rent*, NY DAILY NEWS (Jan. 10, 2021, 11:00 PM), <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-eviction-moratorium-covid-landlords-tenants-foreclosure-20210111-ubph4grdcjd65actdujugfofydu-story.html> [perma.cc/CXT7-S9Q2]; Steve Simpson, *Landlords Should Not Have to Work for Free*, THE HILL (Jan. 7, 2021, 11:00 AM), <https://thehill.com/opinion/finance/532750-landlords-should-not-have-to-work-for-free> [perma.cc/PK7G-CUQY].

126. *Borger Mgmt., Inc. v. Hernandez-Cruz*, No. 2020 LTB 006637, slip op. at *20 (D.C. Super. Ct. Dec. 16, 2020).

127. *See Brown v. Azar*, 497 F. Supp. 3d 1270, 1292 (N.D. Ga. 2020) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)).

After concluding there was no irreparable injury, the court said that “[s]olely on this ground, . . . injunctive relief [is] improper, even if Plaintiffs were able to satisfy any of the other prerequisites.”¹²⁸ *Chambless v. Redfield* concluded that irreparable injury may be “the single most important prerequisite” for a preliminary injunction.¹²⁹ These courts, however, still devoted dozens of pages to analyzing every other prong of preliminary injunction analysis.¹³⁰ Arguably, all of these statements were dicta because, by the court’s admission, they were not necessary to resolve the case. The courts’ statements are particularly odd since determining the likelihood of success on the merits can involve constitutional questions, which courts should avoid addressing if possible.¹³¹ Other courts simply found no irreparable injury and ended their analyses there.¹³²

3. Balance of the Interests

As noted above, when the government is a party, the last two factors of preliminary injunction analysis merge into essentially a balance of the public versus private interests at stake.¹³³ Rather than explicitly argue that getting paid rent was more important than avoiding mass homelessness and pestilence, landlords argued that a regulatory action could never be in the public interest if Congress does not authorize it or if it violates the Constitution.¹³⁴

The public harms need no lengthy recitation. By the time of litigation, COVID-19 had already killed hundreds of thousands of Americans and sickened millions more.¹³⁵ Adding a tidal wave of evictions would not only devastate families who had lost their homes,

128. *Id.* at 1297.

129. *Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101, 119 (W.D. La. 2020).

130. *See Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 228 (D. Conn. 2020) (declaring “the Court need not and will not address the remaining factors for issuing a preliminary injunction” before doing just that).

131. *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

132. *See Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 551–52 (W.D. Tenn. 2020); *Dixon Ventures, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-cv-01518, 2021 U.S. Dist. LEXIS 78176, at *15 (E.D. Ark. Apr. 23, 2021); *see also Tiger Lily, L.L.C. v. U.S. Dep’t Hous. & Urb. Dev.*, 992 F.3d 518, 524 (6th Cir. 2021) (determining that the government was unlikely to show success on the merits and stopping there); *JL Props. Grp. B, L.L.C. v. Pritzker*, 2021 IL 200305, ¶ 61 (Ill. App. Ct. May 21, 2021) (“Where the balance of hardships precludes a preliminary injunction, as here, it would be unnecessary and pointless to address the other elements . . .”).

133. *See, e.g., Chambless*, 508 F. Supp. 3d at 122.

134. *See id.*

135. *See Brown v. Azar*, 497 F. Supp. 3d 1270, 1299 (N.D. Ga. 2020); *Chambless*, 508 F. Supp. 3d at 107.

but would also exacerbate the public health crisis by forcing people into crowded living arrangements at a time when public health officials insisted that people isolate. Courts said that the public benefit of continuing the policy outweighed any private harm.¹³⁶ They also expressed a reluctance to second guess public health experts.¹³⁷ And so, a balance of the interests consistently favored keeping eviction moratoriums in place.¹³⁸ Eviction moratoriums were not the only context where courts upheld emergency measures despite some harm to private businesses, as courts rejected many claims by business owners that pandemic shutdown orders were unconstitutional.¹³⁹

C. Substantive Arguments

1. Exclusively Federal Arguments

Several arguments were geared exclusively towards the CDC's Halt Order: the CDC exceeded its statutory authority, violated steps of the Administrative Procedures Act, and violated the Commerce Clause of the Constitution.

136. See *Chambless*, 508 F. Supp. 3d at 123; *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1103–04 (C.D. Cal. 2020).

137. See *Chambless*, 508 F. Supp. 3d at 123 (quoting *Brown*, 497 F. Supp. 3d at 1298); *Apartment Ass'n of L.A.*, 500 F. Supp. 3d at 1091, 1103.

138. In addition to the cases in the previous few footnotes, which established that public interest demanded keeping the moratorium in place, see *District of Columbia v. Towers*, 250 A.3d 1048, 1059 (D.C. 2021); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 228 (D. Conn. 2020); *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Serv.*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *12 (D.C. Cir. June 2, 2021); *JL Props. Grp. B, L.L.C. v. Pritzker*, 2021 IL 200305, ¶ 25 (Ill. App. Ct. May 21, 2021).

139. See *Tigges v. Northam*, 473 F. Supp. 3d 559, 567–68 (E.D. Va. 2020). See generally *Lighthouse Fellowship Church v. Northam*, 462 F. Supp. 3d 635 (E.D. Va. 2020); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523 (E.D.N.C. 2020); *Lawrence v. Polis*, 505 F. Supp. 3d 1136 (D. Colo. 2020); *Stewart v. Justice*, 518 F. Supp. 3d 911 (S.D. W. Va. 2021); *ARJN #3 v. Cooper*, 517 F. Supp. 3d 732 (M.D. Tenn. 2021); *World Gym, Inc. v. Baker*, 474 F. Supp. 3d 426 (D. Mass. 2020); *TJM 64, Inc. v. Shelby Cnty. Mayor*, No. 20-cv-02498, 2021 U.S. Dist. LEXIS 42750 (W.D. Tenn. Mar. 8, 2021); *Northland Baptist Church of St. Paul v. Walz*, No. 20-cv-1100, 2021 U.S. Dist. LEXIS 60884 (D. Minn. Mar. 30, 2021); *Xponential Fitness v. Arizona*, No. CV-20-01310, 2020 U.S. Dist. LEXIS 123379 (D. Ariz. July 14, 2020).

a. *The CDC exceeded its statutory authority*

The most successful argument for courts to strike down the CDC Halt Order was that it exceeded statutory authority.¹⁴⁰ Under the Administrative Procedures Act, courts must strike down regulations that are arbitrary, unconstitutional, exceed the agency's statutory authority, were adopted without following proper procedures, were unwarranted by the facts, or lacked substantial evidence.¹⁴¹

To justify a nationwide eviction pause, the CDC relied upon 42 U.S.C. § 264, the Public Health Act, and 42 C.F.R. § 70.¹⁴² The key section of the law is titled “[r]egulations to control communicable diseases” and is divided into several subparts.¹⁴³ Regulation 42 C.F.R. § 70.2 delegates the powers in the statute to the Director of the Centers for Disease Control and Prevention but does not add any powers.¹⁴⁴ It also specifies that the CDC may only act when state efforts are insufficient.¹⁴⁵

Subpart (a) is the core of the argument within 42 U.S.C. § 264, and is therefore worth reproducing in full:

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his

140. *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 761 (N.D. Ohio 2021) (ruling against the CDC Halt Order on this basis without considering other arguments). It probably did not help that the government often did not even attempt to offer any limitation on the reach of the statute, a hard proposition for courts to swallow. *E.g.*, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *17–18 (D.D.C. May 5, 2021). In the Supreme Court, Justice Kavanaugh stated that the CDC exceeded its statutory authority too, though he declined to review for other reasons. *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J., concurring); *see also* Amended Admin. Order No. 2020-17, Mich. Sup. Ct. (Oct. 22, 2020) (Viviano, J., dissenting) (opposing a court order to enforce the CDC Halt Order because he believed the agency exceeded its statutory authority).

141. 5 U.S.C. § 706.

142. *Specific Laws and Regulations Governing the Control of Communicable Diseases*, CDC, <https://www.cdc.gov/quarantine/specificlawsregulations.html> [perma.cc/MX7R-LCM8] (last visited Oct. 3, 2021).

143. 42 U.S.C. § 264.

144. 42 C.F.R. § 70.2 (2020).

145. *Id.* As for 42 C.F.R. § 70.2, which forbids the CDC from acting unless local efforts are insufficient, there was relatively little time spent debating this provision. By the Halt Order's own terms, it does not apply in jurisdictions where there is a strong moratorium in place, nor did it apply in American Samoa, which reported zero infections. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (effective Sept. 4, 2020, through Dec. 31, 2020). So, there was understandably little room to argue that that the CDC ran afoul of the regulation.

judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.¹⁴⁶

Subpart (b) states that “[r]egulations prescribed under this [statute may apprehend or detain people] for the purpose of preventing the introduction, transmission, or spread of such communicable diseases.”¹⁴⁷ Subpart (d) further fleshes out the apprehension and detention powers.¹⁴⁸ Subpart (c) sets limits on subpart (d).¹⁴⁹

For many months, courts were split on whether the statute authorized the CDC’s actions. Courts that found the eviction moratorium was within the CDC’s power pointed to the phrase that such regulations “as in [its] judgment are necessary” to fight communicable diseases.¹⁵⁰ Precedent also supports the idea of giving a wider berth to policies in the realm of public health or medical science.¹⁵¹ The Halt Order itself was replete with evidence for why the chosen policy was necessary to mitigate the spread of the coronavirus.¹⁵² Additionally, subpart (a) begins with “including” and ends with a catchall, suggesting it is broad.¹⁵³ Subparts (b) through (d) refer to the power to apprehend or detain individuals, which indicates that the CDC’s capabilities go beyond the enumerated list set out in subpart (a).¹⁵⁴ Finally, Congress explicitly extended the

146. 42 U.S.C. § 264(a).

147. *Id.* § 264(b).

148. *Id.* § 264(d).

149. *Id.* § 264(c).

150. *Brown v. Azar*, 497 F. Supp. 3d 1270, 1281 (N.D. Ga. 2020); *Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101, 110–11 (W.D. La. 2020); *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *3–4 (D.C. Cir. June 2, 2021) (alteration in original).

151. *Marshall v. United States*, 414 U.S. 417, 427 (1974).

152. *Brown*, 497 F. Supp. 3d at 1286.

153. *Id.* at 1282; *Chambless*, 508 F. Supp. 3d at 112.

154. *See Brown*, 497 F. Supp. 3d at 1281–82; *Chambless*, 508 F. Supp. 3d at 112–13; *Ala. Ass’n of Realtors*, 2021 U.S. Dist. LEXIS 16630, at *6–7.

Halt Order, implying it believed the agency acted within its authority.¹⁵⁵ Pro-CDC courts said that none of the canons of interpretation applied because the statutory language was unambiguous, so there was no need to resort to them.¹⁵⁶

Anti-CDC courts said that the “other measures” catchall was limited by the preceding list that deals with things like fumigation, disinfection, or destruction of animals—and thus, “other measures” cannot be read to encompass an eviction moratorium.¹⁵⁷ Otherwise, there would be no point in listing specific examples at all.¹⁵⁸ Second, the courts said subpart (a) was directed toward “animals and articles,” not evictions.¹⁵⁹ Anti-CDC courts argued that, if read more broadly, the statute would create a federal police power.¹⁶⁰ The fact that Congress explicitly extended the Halt Order did not change this analysis. These courts waved the extension as nothing more than “mere acquiescence[,]”¹⁶¹ though authority cited in support was relatively thin.¹⁶² Once that extension expired, courts noted that the

155. *Ala. Ass’n of Realtors*, 2021 U.S. Dist. LEXIS 16630, at *5.

156. *See, e.g., Brown*, 497 F. Supp. 3d at 1283; *Chambless*, 508 F. Supp. 3d at 114. The FDA’s authority under the same statute has been previously upheld as it applied to ban the sale of baby turtles, an action not explicitly listed in subsection (a). *See Indep. Turtle Farmers of L.A., Inc. v. United States*, 703 F. Supp. 2d 604, 621 (W.D. La. 2010). The court noted that the Public Health Act was “remedial legislation” and thus “entitled to liberal construction.” *Id.* at 630 n.19.

157. *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 758 (N.D. Ohio 2021); *Ala. Ass’n of Realtors v. U.S. Health & Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *16 (D.D.C. May 5, 2021); *Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 671 (6th Cir. 2021).

158. *Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 525 F. Supp. 3d 850, 860 (W.D. Tenn. 2021); *Tiger Lily*, 5 F.4th at 670–71.

159. *Skyworks*, 524 F. Supp. 3d at 758; *Ala. Ass’n of Realtors*, 2021 U.S. Dist. LEXIS 85568, at *16.

160. *Skyworks*, 524 F. Supp. 3d at 758.

161. *Id.* at 761 (quoting *Hannah v. Larche*, 363 U.S. 420, 439 (1960)).

162. The cases cited by courts were less than on-point. *See, e.g., Hannah*, 363 U.S. at 439 (holding that Congress’ choice of one bill over another was “substantially more” than acquiescence, without explaining what acquiescence was, or whether a Congressional extension qualified); *Greene v. McElroy*, 360 U.S. 474, 506 (1959) (finding that acquiescence was shown where Congress “has not enacted specific legislation” on the topic at issue, but there was no Congressional extension of a law in the case); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169–70 (2001) (stating that inferring acquiescence from a failed legislative proposal was a dicey proposition, and saying nothing about Congressional extensions); *United States v. Heinszen*, 206 U.S. 370, 390 (1907) (commenting on the value of explicit ratification by Congress, without saying this was required in all cases); *Lincoln v. United States*, 202 U.S. 484, 496 (1906) (commenting on the value of explicit ratification by Congress, without saying this was required in all cases). *Skyworks* said the extension was nothing more than an attempt by Congress to “facilitate[] the

extension only applied until January 31, 2021.¹⁶³ In reaching their conclusions, these courts relied on canons of interpretation such as anti-surplusage, constitutional avoidance, and such catchall terms are defined by proceeding specific terms.¹⁶⁴ At least one court said that Congress needed to show unequivocal textual evidence that it meant to interfere with the landlord-tenant relationship, which was lacking.¹⁶⁵

After months of differing lower court opinions, the Supreme Court landed in the anti-CDC camp. It echoed the argument that by listing out actions like inspection or fumigation, the statute limited the CDC's authority and was vastly different from an eviction moratorium.¹⁶⁶ Evictions had too tenuous of a connection to the interstate spread of disease, according to the Court.¹⁶⁷ The government asking for such far-reaching power also weighed against the landlord-tenant relationship said to be the province of state law.¹⁶⁸ The government's counter-arguments were not responded to.

The discussion of this point shows the dominance of textualism on the judiciary. Although different courts reached diametrically opposed conclusions on the statute's meaning, they agreed that it was unambiguous.¹⁶⁹ By holding that the statute was clear, the courts

transition between presidential administrations" to justify disregarding it, without citing any evidence to show Congressional intent, or to show why this was legally relevant. 524 F. Supp. 3d at 761. *Tiger Lily* did not cite examples of an extension being insufficient but held this was the case. *See generally* 5 F.4th at 672.

Note that courts have not required much in order to find acquiesce in other contexts. The Judicial Conference of the United States, which is made up of federal judges from every circuit, has said that failure to file a formal misconduct complaint about how the Conference has handled a matter—without more—is enough to show contentment with how the Conference acted. *In re* Complaint of Judicial Misconduct, 591 F.3d. 638, 644 (U.S. Jud. Conf. 2009).

163. *See Tiger Lily*, 5 F.4th at 668; *Tiger Lily*, 525 F. Supp. 3d at 863.

164. *See Tiger Lily*, 525 F. Supp. 3d at 860–61; *Ala. Ass'n of Realtors*, 2021 U.S. Dist. LEXIS 85568, at *18–20.

165. *See Tiger Lily, L.L.C. v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 523 (6th Cir. 2021).

166. *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021).

167. *Id.* at 2488.

168. *Id.* at 2489.

169. *Compare Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101, 111 (W.D. La. 2020), *with Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 759 (N.D. Ohio 2021). Several courts said the statute clearly authorized the CDC's actions. *See, e.g., Brown v. Azar*, 497 F. Supp. 3d 1270, 1281 (N.D. Ga. 2020); *Chambless*, 508 F. Supp. 3d at 113; *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 U.S. Dist. LEXIS 16630, at *3–4 (D.C.

relieved themselves of any obligation to undertake further analysis.¹⁷⁰ No judge was willing to admit that the statute might be confusing. Rather, they seemed to channel the view of Justice Clarence Thomas: “A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.”¹⁷¹ One judge, for instance, criticized judges that ruled differently from him as “adopting strained or forced readings of the statute, stretching to rationalize the governmental policy at issue.”¹⁷²

The government cited the legislative history of the statute in its briefs,¹⁷³ but the judges were so confident that they had read the text’s meaning correctly that they did not even deign to crack open the congressional record.¹⁷⁴ If they had, they would have seen that the stated purpose of the law was to set out the government’s basic authority to make regulations to prevent the spread of disease into this country or between the States.¹⁷⁵ Congress eliminated “confusing limitations” found in previous statutes, and noted that because of the “impossibility of foreseeing what preventative measures may become necessary, the provisions of this subsection are written broadly enough to apply to any disease.”¹⁷⁶ These passages suggest that Congress intended the power to go beyond treatment and disposal of infected animals, yet they were largely ignored.

b. Arbitrary and capricious

Under the Administrative Procedures Act (APA), regulations cannot be “arbitrary” or “capricious.”¹⁷⁷ Landlords claimed that the

Cir. June 2, 2021). Another set of judges argued the statute clearly *did not* authorize the CDC’s actions. *See, e.g., Skyworks*, 524 F. Supp. 3d at 759; *Tiger Lily*, 525 F. Supp. 3d at 859.

170. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (noting analysis “begins and ends with” textual ambiguity).

171. *Bank of Am. Nat’l Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring).

172. *See Skyworks*, 524 F. Supp. 3d at 759.

173. *See* Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 33, *Brown*, 497 F. Supp. 3d 1270 (No. 20-cv-3702), https://storage.courtlistener.com/recap/gov.uscourts.gand.280996/gov.uscourts.gand.280996.22.0_2.pdf [perma.cc/H3YR-MHLT].

174. Justice Breyer, in dissent, did point out the expansive legislative history, but to no avail. *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490–94 (2021) (Breyer, J., dissenting).

175. *See id.*

176. H.R. REP. NO. 78-1364, at 24–25 (1944).

177. 5 U.S.C. § 706.

eviction moratoriums met this description.¹⁷⁸ For courts, this means asking whether the agency considered “relevant factors” or made a “clear error of judgment.”¹⁷⁹ Given this deferential standard and the voluminous evidence the CDC had to explain why it was pausing evictions to contain the disease, it is no surprise that the courts rejected the argument that the Halt Order was arbitrary or capricious.¹⁸⁰ It probably did not help that the landlords claimed that eviction moratoriums lacked evidence but failed to provide their own.¹⁸¹

c. Notice-and-Comment

Rules governed by the Administrative Procedures Act must undergo a notice-and-comment period of at least thirty days where the public can provide feedback on the proposed regulation.¹⁸² The failure of the CDC to follow these procedures led to challenges in lawsuits.¹⁸³ But the government determined that the requirement only applies to “rules” and can be waived for good cause.¹⁸⁴ The government argued that this was an “emergency action,” not an

178. *See, e.g.*, Complaint at 17–18, *Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101 (W.D. La. 2020) (No. 20-cv-01455), <https://pacificlegal.org/wp-content/uploads/2020/10/Chambless-Enterprises-v-Centers-for-Disease-Control.pdf> [perma.cc/MDQ8-SECK].

179. *See* Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (citations omitted).

180. *Brown v. Azar*, 497 F. Supp. 3d 1270, 1285–86 (2020); *see also* *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 753 (N.D. Ohio 2021) (indicating an arbitrary and capricious claim was not persuasive); *Ala. Ass’n of Realtors v. U.S. Dep’t of Health and Hum. Servs.*, No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *7 (D.D.C. May 5, 2021). Although not an APA claim, a state court said that a governor’s executive action to block evictions was not arbitrary or capricious. *Gregory Real Est. & Mgmt. L.L.C. v. Keegan*, No. 1 CA-CV 20-0419, 2021 Ariz. App. Unpub. LEXIS 368, at *4 (Ariz. Ct. App. Mar. 30, 2021).

181. *See* Complaint at 16–17, *Chambless*, 508 F. Supp. 3d 101 (No. 20-cv-01455), <https://pacificlegal.org/wp-content/uploads/2020/10/Chambless-Enterprises-v-Centers-for-Disease-Control.pdf> [perma.cc/XN2Y-LC72]; Complaint at 18, *Skyworks*, 524 F. Supp. 3d (No. 20-cv-2407), <https://pacificlegal.org/wp-content/uploads/2020/10/Skyworks-Ltd.-v.-Centers-for-DiseaseControl-Complaint.pdf> [perma.cc/QGG5-N2ZX].

182. 5 U.S.C. § 553(c)–(d).

183. *See, e.g.*, Complaint at 16, *Chambless*, 508 F. Supp. 3d 101 (No. 20-cv-01455), <https://pacificlegal.org/wp-content/uploads/2020/10/Chambless-Enterprises-v-Centers-for-Disease-Control.pdf> [perma.cc/Q85B-PXDE].

184. *See* 5 U.S.C. § 553(d)(3); *Chambless*, 508 F. Supp. 3d at 117–18.

ordinary rule, and there was good cause to waive the normal procedure given the need to stem the flow of the virus quickly.¹⁸⁵

Courts tended to agree. They said it was an emergency action because it was designed to take advantage of existing authority that authorized the CDC to respond to a crisis rapidly.¹⁸⁶ Plus, serious harm could result from delay, so there was good cause to waive the procedure.¹⁸⁷

d. Commerce Clause

Congress has the power to regulate interstate commerce.¹⁸⁸ This power includes activities having a substantial relation to interstate commerce.¹⁸⁹ To show a relation, Congress must have a rational basis for concluding that the activity sufficiently affected interstate commerce.¹⁹⁰

Terkel was the only case to examine whether the CDC Halt Order could be justified under the Commerce Clause power.¹⁹¹ The court considered four factors, beginning with whether the regulated activity was economic in nature.¹⁹² The court said that the issue was merely a matter of using real estate, which is “inherently local,” and likened the Halt Order to a law that criminalized possession of a handgun in a school zone.¹⁹³ It admitted that the rental market “consists of economic relationships” but still was not economic.¹⁹⁴ Second, it noted the Halt Order lacked any kind of “jurisdictional element,” meaning the application was not limited to instances where a connection to interstate commerce was shown—a shortcoming the government did not deny.¹⁹⁵ Third, the court said there were no findings by the government that the regulation would affect interstate

185. See *Chambless*, 508 F. Supp. 3d at 118.

186. See *id.* at 118–19.

187. *Id.*

188. U.S. CONST. art. I, § 8, cl. 3.

189. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

190. *Id.* at 557.

191. *Terkel v. Ctrs. for Disease Control & Prevention*, No. 20-cv-00564, 2021 U.S. Dist. LEXIS 35570, at *1–3 (E.D. Tex. Feb. 25, 2021). Though not a Commerce Clause case, one other court said that the CDC was acting within its authority to issue the Halt Order because the rental industry substantially affects interstate commerce. *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *7–8 (D.C. Cir. June 2, 2021).

192. *Terkel*, 2021 U.S. Dist. LEXIS 35570, at *13–14.

193. *Id.* at *17–18.

194. *Id.* at *18–19, *24.

195. *Id.* at *20 (quoting *United States v. Morrison*, 529 U.S. 598, 612 (2000)).

commerce.¹⁹⁶ And fourth, the court said the connection between evictions and interstate commerce was attenuated because evicting a single person from their home had no broader impact on the national economy.¹⁹⁷ After finding the Halt Order failed on each of these factors, the court declared it unconstitutional.¹⁹⁸ As of September 2021, this decision has had no appeal, so it remains an outlier opinion.

2. General Arguments Against Eviction Moratoriums

A majority of arguments were made against both federal and state eviction moratoriums: that the policies violated the Contract Clause, the Takings Clause, Due Process, the Equal Protection Clause, the Privileges and Immunities Clause, and the non-delegation doctrine/separation of powers, denied access to the courts, and that the moratoriums were preempted.

a. *Contract Clause*

Article I, section 10 of the Constitution states that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”¹⁹⁹ Incidentally, one of the defining Contract Clause cases, *Home Building & Loan Ass’n v. Blaisdell*, involved a foreclosure moratorium adopted nearly a century ago in Minnesota in the throes of the Great Depression.²⁰⁰ The Court articulated an expansive view of legislative power in times of crisis. Writing for the Court, Chief Justice Hughes observed a “growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.”²⁰¹ He continued, saying that “[i]t is no answer to say that this public need [of a foreclosure moratorium] was not apprehended a century ago,” since the country needed it at present.²⁰² The Court held that a law could survive a Contract Clause challenge so long as it was a reasonable solution to the problem it was trying to address.²⁰³

When later confronted by a challenge to a New York foreclosure moratorium, the Court again upheld the law because it was deemed

196. *Id.* at *21–22.

197. *Id.* at *23–24.

198. *Id.* at *30–31.

199. U.S. CONST. art. I, § 10, cl. 1.

200. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 415–16, 420–23 (1934).

201. *Id.* at 442.

202. *Id.*

203. *See id.* at 447.

necessary for the welfare of the state after due consideration by policymakers.²⁰⁴ The Court praised the law as “the empiric process of legislation at its fairest[.]” and declared it was not the judiciary’s place to say that the legislature had miscalculated the societal interests at stake.²⁰⁵

In the forty years following *Blaisdell*, the Supreme Court struck down a state law only twice on Contract Clause grounds.²⁰⁶ Today, the reasonableness question at the core of *Blaisdell* lives on, but it has been dressed up in a two-part test. A law survives a Contract Clause challenge if it (1) does not cause a “substantial impairment of a contractual relationship,” and (2) even if it does, the law survives if it is an “appropriate” and “reasonable” way to advance “a significant and legitimate public purpose.”²⁰⁷ As a result, the Court has confessed, the Contract Clause “is not . . . the Draconian provision that its words might seem to imply[.]”²⁰⁸ and “literalism in the construction of the contract clause . . . would make it destructive of the public interest”²⁰⁹

Landlords argued the moratoriums were unconstitutional because they were forced to go months without payment.²¹⁰ However, given the relatively lenient standard, courts generally rejected Contract Clause arguments. Considering the first prong, courts said there was no substantial impairment because all that was affected was a temporary bar to eviction—not any other term of the lease or obligation to pay rent²¹¹—and alternatively, that the industry was

204. *E.N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 234–35 (1945).

205. *Id.*

206. Note, *A Process-Oriented Approach to the Contract Clause*, 89 *YALE L.J.* 1623, 1623 (1980).

207. *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018) (quoting *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983)).

208. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978).

209. *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934).

210. See, e.g., Complaint at 11, *Iten v. County of Los Angeles*, No. 21-cv-00486, 2021 U.S. Dist. LEXIS 176585 (C.D. Cal. Jan. 19, 2021), <https://pacificlegal.org/wp-content/uploads/2021/01/iten-v.-county-of-los-angeles-complaint.pdf> [perma.cc/2MSF-FLDV]; First Amended Complaint at 12, *El Papel L.L.C. v. Ferguson*, No. 20-cv-01323 (W.D. Wash. Jan. 14, 2021), <https://pacificlegal.org/wp-content/uploads/2020/09/01.14.2021-81-PLF-Corrected-First-Amended-Complaint.pdf> [perma.cc/H8DU-K5Y5].

211. See *Heights Apartments, L.L.C. v. Walz*, 510 F. Supp. 3d 789, 809 (2020); *Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148, 172 (S.D.N.Y. 2020); *Apartment Ass’n of L.A. Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1094–95 (C.D. Cal. 2020); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 224 (D. Conn. 2020); see also *Johnson v. Murphy*, No. 20-cv-06750, 2021 U.S. Dist. LEXIS 53191, at *27 (D.N.J. Mar. 22, 2021). Cf. *Baptiste v. Kennealy*, 490 F. Supp.

already heavily regulated, so more regulation was foreseeable.²¹² One court concluded otherwise, calling the eviction moratorium a “virtually unprecedented” action that dramatically changed the remedy.²¹³

If courts moved on to the second prong, it was an easy win for the government. Landlords admitted fighting COVID was a valid public purpose, and they questioned the efficacy of eviction bans.²¹⁴ But this still gave away much of the game. Courts concluded that eviction moratoriums were a reasonable way to advance legitimate public policy because they staunched the flow of COVID-19,²¹⁵ and at least once, has combatted the housing crisis.²¹⁶ The courts gave extra deference to the government because it did not directly benefit from the impairment of the contracts.²¹⁷

b. Access to the courts

The Supreme Court has been clear that the right to access the courts is fundamental.²¹⁸ But the Court has been less clear on where exactly the right comes from. At various times, the Court has cited Article IV’s Privileges and Immunities Clause, the First Amendment’s Petition Clause, the Fifth Amendment’s Due Process Clause, the Fourteenth Amendment’s Equal Protection Clause, and

3d 353, 383, 385 (D. Mass. 2020) (stating that breach of contract claims were illusory if the tenant is unable to pay rent, but also conceding that the temporary nature of the moratorium made it less burdensome).

212. See *Auracle Homes*, 478 F. Supp. 3d at 224; *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 351–53 (E.D. Pa. 2020); *Apartment Ass’n of L.A.*, 500 F. Supp. 3d at 1095–96; *Baptiste*, 490 F. Supp. 3d at 384; see also *Johnson*, 2021 U.S. Dist. LEXIS 53191, at *24.

213. *Apartment Ass’n of L.A.*, 500 F. Supp. 3d at 1096.

214. See *Auracle Homes*, 478 F. Supp. 3d at 225; *Baptiste*, 490 F. Supp. 3d at 385; *Apartment Ass’n of L.A.*, 500 F. Supp. 3d at 1096; Complaint at 12–13, *Iten*, 2021 U.S. Dist. LEXIS 176585 (No. 21-cv-00486), <https://pacificlegal.org/wp-content/uploads/2021/01/iten-v.-county-of-los-angeles-complaint.pdf> [perma.cc/2VYE-NWP3] (arguing that a *commercial* tenant eviction ban did not enhance public health because it would not make the tenant homeless).

215. See *Heights Apartments*, 510 F. Supp. 3d at 798; *Apartment Ass’n of L.A.*, 500 F. Supp. 3d at 1098.

216. *HAPCO*, 482 F. Supp. 3d at 353.

217. *Baptiste*, 490 F. Supp. 3d at 386; *El Papel L.L.C. v. Inslee*, No. 20-cv-01323, 2020 U.S. Dist. LEXIS 246971, at *27–28 (W.D. Wash. Dec. 2, 2020); see also *Johnson*, 2021 U.S. Dist. LEXIS 53191, at *23.

218. *Tennessee v. Lane*, 541 U.S. 509, 532–34 (2004); *United Mine Workers, Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

the Fourteenth Amendment's Due Process Clause.²¹⁹ Digging into these cases does little to illuminate the matter.²²⁰

As murky as the basis for the right to access the courts may be, the courts still argued the question. Landlords sometimes used the First Amendment's Petition Clause,²²¹ and sometimes declined to clearly articulate which provision they were relying on.²²² Courts tended to reject access to courts claims for several reasons. First, many eviction moratoriums only stopped the final execution of an eviction, rather than stopping the filing of an eviction suit altogether,²²³ including the

219. *See, e.g.*, Christopher v. Harbury, 536 U.S. 403, 423 n.12 (2002).

220. *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) (finding that the right is inherent in the Privileges and Immunities Clause). The cases cited in *Chambers* either provide no citations themselves or cite to treatises for support. *See, e.g.*, *Corfield v. Coryell*, 6 F. Cas. 546, 552 (1823); *Cole v. Cunningham*, 133 U.S. 107, 114 (1890); *Ward v. Maryland*, 79 U.S. 418, 433 n.12 (1870); *Blake v. McClung*, 172 U.S. 239, 252 (1898); *Brown v. Maryland*, 25 U.S. 419, 449 (1827). Likewise, the First Amendment's right to petition the government has been said to guarantee the right to file in court. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). Case law traces this idea to *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). "Certainly, the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *Id.* To back up this claim, the Court cited two cases, both of which were about habeas corpus rights, and do not so much as mention the First Amendment. *See Johnson v. Avery*, 393 U.S. 483, 485 (1969) (stating "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed," without mentioning the origin of this right); *Ex parte Hull*, 312 U.S. 546, 549 (1941) ("[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.").

221. *See, e.g.*, *Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148, 173 (S.D.N.Y. 2020); *Baptiste*, 490 F. Supp. 3d at 392.

222. *See, e.g.*, Complaint at 12, *Brown v. Azar*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020) (No. 20-cv-03702), https://nclalegal.org/wp-content/uploads/2020/09/Rick-Brown-v.-Secretary-Alex-Azar-et-al._2020.09.08-Complaint.pdf [perma.cc/Q5MJ-TDHP]; Brief for the New Civil Liberties Alliance et al., as Amici Curiae Supporting Plaintiff, *supra* note 6, at 9.

223. *E.g.*, Exec. Dep't of Ariz., Postponement of Eviction Actions, Executive Order 2020-14, at 2 (Mar. 24, 2020), https://azgovernor.gov/sites/default/files/eo_2020-14_0.pdf [perma.cc/KE64-UH32]; Exec. Dep't of Ill., Stay at Home, Executive Order 2020-10, § 2 (Mar. 20, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/Executive-Order2020-10.aspx> [perma.cc/6SZQ-BRU3]; Exec. Dep't of N.J., Moratorium on Removals of Individuals Due to Evictions or Foreclosures, Executive Order No. 106, at 3 (Mar. 19, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-106.pdf> [perma.cc/8T7C-NBC6]; Exec. Dep't of Fla., Limited Extension of Mortgage Foreclosure and Eviction Relief, Executive Order No. 20-180, at 2 (July 29, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-180.pdf [perma.cc/WDQ6-6JYY].

CDC Halt Order.²²⁴ This matters because it meant landlords could start the eviction process right away, and assuming the Court granted it, effectuate the eviction as soon as the moratorium expired.²²⁵ Second, landlords could still sue tenants for breach of contract to recover unpaid rent, including any fees, penalties, or interest resulting from nonpayment.²²⁶ Third, the Halt Order did not apply to every tenant or reason for evicting them; it only applied a subset of down-on-their-luck tenants who failed to pay rent.²²⁷ Fourth, the moratorium was only temporary, not a permanent abrogation of landlords' power to evict.²²⁸ A one-year residency requirement to file for divorce is a delay, for example, but does not violate the courts' right of access.²²⁹ Fifth, because there are already procedural hurdles to filing an eviction, adding one more does not deny access to the courts.²³⁰ And sixth, one court said that because all of the other claims were rejected, they were not being denied access to courts, so much as having their arguments heard and declined.²³¹

Only one case held that an eviction moratorium denied landlords' right to access the courts: *Borger Management, Inc. v. Hernandez-Cruz*.²³² The court cited the First Amendment's Petition Clause and the Fifth Amendment's Due Process clause to frame the access to the

224. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,296 (Sept. 4, 2020) (stating landlords "shall not evict" tenants but saying nothing about initiating a court filing).

225. See *Brown*, 497 F. Supp. 3d at 1291–92.

226. *Id.* at 1289–90; *Heights Apartments, L.L.C. v. Walz*, 510 F. Supp. 3d 789, 811 (D. Minn. 2020); *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 174.

227. *Brown*, 497 F. Supp. 3d at 1289; *Heights Apartments*, 510 F. Supp. 3d at 811.

228. *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 389–90 (D. Mass. 2020); *Heights Apartments*, 510 F. Supp. 3d at 811; *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 174. For non-eviction cases with a similar principle, see *Jermosen v. Coughlin*, 877 F. Supp. 864, 871 (S.D.N.Y. 1995) ("A delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation.") and *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (holding no constitutional violation when prisoner had their legal mail delayed, but was still able to file their lawsuit).

229. See *Sosna v. Iowa*, 419 U.S. 393, 410 (1975). Courts have also approved waiting periods in other contexts. See *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (affirming six-month residency requirement for students to attend public schools for free).

230. *District of Columbia v. Towers*, 250 A.3d 1048, 1054–55 (D.C. 2021).

231. See *Baptiste*, 490 F. Supp. 3d at 393.

232. *Borger Mgmt., Inc. v. Hernandez-Cruz*, No. 2020 LTB 006637 (D.C. Super. Ct. Dec. 16, 2020), <https://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/order-re-filing-moratorium-for-eviction-cases-12-16-20.pdf> [perma.cc/HN57-P374].

court's claim and applied intermediate scrutiny.²³³ However, the opinion admitted "the precise standard is unsettled" for how to analyze access to court claims.²³⁴ *Borger* involved a D.C. ordinance that "categorically prohibit[ed]" the filing of evictions which applied regardless of the basis for the eviction.²³⁵ The judge viewed these features harshly.²³⁶ Because landlords could not even initiate evictions, they could not ask the court to order tenants to pay rent during the pendency of the litigation, and they could not acquire an effective eviction date that was delayed until after the emergency ended.²³⁷ But this victory for landlords proved short-lived, as an appellate court froze the decision pending appeal.²³⁸

c. *Takings Clause*

The Fifth Amendment says no "private property [shall] be taken for public use, without just compensation."²³⁹ Almost every state constitution has a similar protection.²⁴⁰ The Supreme Court divided Takings Clause claims into two types: physical taking (sometimes called *per se* takings), where the government occupies a property or takes ownership of it, and regulatory taking, where the government regulates a property so heavily that it unfairly singles out the property owner.²⁴¹ A regulatory taking certainly occurs where a regulation nullifies all economically beneficial use of the land (often known as a categorical taking),²⁴² but in less severe circumstances (sometimes called a non-categorical taking), there is no hard and fast rule. Instead, courts perform case-by-case analysis to determine if a particular regulation is a compensable taking.²⁴³ To aid this quest, courts look at (1) the economic impact of the regulation, (2) the investment-backed expectations of the property owners, and (3) the

233. *Id.* at 10, 14.

234. *Id.* at 30.

235. *Id.* at 1, 15.

236. *See id.* at 15–16.

237. *Id.* at 19–20, 23.

238. *See* District of Columbia v. Towers, 250 A.3d 1048, 1060 (D.C. 2021).

239. U.S. CONST. amend. V.

240. Donna M. Nakagiri, *Takings Provisions in State Constitutions: Do They Provide Greater Protections of Private Property than the Federal Takings Clause?*, 19 (1999) (MICH. STATE UNIV. SCH. OF L. STUDENT SCHOLARSHIP COLLECTION), available at <http://dx.doi.org/10.17613/wjk5-8p03> [perma.cc/XEJ6-29RT].

241. *Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992).

242. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

243. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224–25 (1986).

character of the governmental action, known as the *Penn Central* factors.²⁴⁴

Landlords were not always clear what kind of taking they alleged but made clear they believed the government violated the Takings Clause.²⁴⁵ In no jurisdiction did the government attempt to take physical control or ownership of property as part of an eviction moratorium, so it stands to reason that courts held no physical taking occurred.²⁴⁶

Regarding regulatory taking, courts were united that there was no categorical taking since apartments were not stripped of all economic potential.²⁴⁷ But courts were divided on the *Penn Central* factors used to determine if a non-categorical taking occurred. The policies economically impacted the landlords, which was enough for some to find the first *Penn Central* factor.²⁴⁸ But others noted that plaintiffs only alleged a small number of tenants had stopped paying—too few to demonstrate any significant economic harm²⁴⁹—or that there was no actual reduction in the property value of the rental units.²⁵⁰ There was also disagreement on whether landlords' investment-backed expectations had been upset. A majority of courts said that the apartment industry was already publicly regulated, so more regulation should have been predictable.²⁵¹ Others said that even if

244. *Id.* (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

245. *See, e.g.*, First Amended Complaint at 13–14, *El Papel L.L.C. v. Ferguson*, No. 20-cv-01323 (W.D. Wash. Jan. 14, 2021), <https://pacificlegal.org/wp-content/uploads/2020/09/01.14.2021-81-PLF-Corrected-First-Amended-Complaint.pdf> [perma.cc/XEJ6-29RT]; *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 387 (D. Mass. 2020).

246. *See* *Heights Apartments, L.L.C. v. Walz*, 510 F. Supp. 3d 789, 812 (D. Minn. 2020); *Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148, 162–64 (S.D.N.Y. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 220–21 (D. Conn. 2020); *Under Advisement Ruling Verdict* at 8–9, *Gregory Real Est. & Mgmt. L.L.C. v. Keegan*, No. CV2020-007629 (Ariz. Super. Ct. July 22, 2020), <https://superiorcourt.maricopa.gov/media/6390/cv2020007629-926-07222020final.pdf> [perma.cc/2D99-NWQT]; *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 358 (E.D. Pa. 2020) (ruling on the Takings Clause without providing an analysis of the issue).

247. *See Auracle Homes*, 478 F. Supp. 3d at 221–23; *Under Advisement Ruling Verdict*, *supra* note 246, at 9.

248. *See Heights Apartments*, 510 F. Supp. 3d at 813.

249. *See Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 165–66; *Auracle Homes*, 478 F. Supp. 3d at 222.

250. *See Baptiste*, 490 F. Supp. 3d at 389.

251. *See Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 166–68; *Heights Apartments*, 510 F. Supp. 3d at 813–14; *Auracle Homes*, 478 F. Supp. 3d at 222–23.

regulations exist, no reasonable landlord could have foreseen sweeping prohibitions on evictions.²⁵² On the third factor, because eviction moratoriums were a public program designed to promote the common good—and only modest encroachment on the landlord’s free use of their property—there was no regulatory taking.²⁵³ The courts had a consensus on this final factor, at least. No court vindicated a Taking Clause claim.²⁵⁴

d. Non-Delegation Doctrine

The Delegation Doctrine contends that Congress may not subcontract its lawmaking function to an agency.²⁵⁵ But Congress may delegate powers so long as it specifies some “intelligible principle” to guide the agency’s hand.²⁵⁶ This argument has only succeeded twice in history.²⁵⁷ Some courts found no violation of the non-delegation doctrine, as past cases have said that public health and safety protection is enough of an intelligible principle to pass muster.²⁵⁸ But other judges did argue that if the statute were as broad as the government argued, it would violate the non-delegation doctrine, though they did not explain why restricting the agency to protecting public health was not an intelligible principle.²⁵⁹

252. *See Heights Apartments*, 510 F. Supp. 3d at 813–14; *Baptiste*, 490 F. Supp. 3d at 389–90.

253. *Heights Apartments*, 510 F. Supp. 3d at 814; *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 168; *Baptiste*, 490 F. Supp. 3d at 390; *Auracle Homes*, 478 F. Supp. 3d at 223.

254. In addition to the cases in the previous few footnotes, all of which rejected Takings Clause claims, one court also rejected a claim because the right speaks of “just compensation,” but the landlords were seeking injunctive relief, not monetary damages. *El Papel L.L.C. v. Inslee*, No. 20-cv-01323, 2020 U.S. Dist. LEXIS 246971, at *33–35 (W.D. Wash. Dec. 2, 2020); *see also* *JL Props. Grp. B, L.L.C. v. Pritzker*, Nos. 3-20-0304 & 3-20-0305, 2021 IL 200305, at ¶¶ 52–53 (Ill. App. Ct. May 21, 2021) (refusing to review trial court’s dismissal of Takings arguments).

255. *Loving v. United States*, 517 U.S. 748, 758 (1996).

256. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

257. *See Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019).

258. *Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101, 116–17 (W.D. La. 2020); *see also* *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *8 (D.C. Cir. June 2, 2021). Relatedly, a state court found that Arizona’s eviction ban did not violate separation of powers. *See Under Advisement Ruling Verdict*, *supra* note 246, at 5–8.

259. *See Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021); *Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 525 F. Supp. 3d 850, 863 (W.D. Tenn. 2021); *Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 992 F.3d 518, 523 (6th Cir. Mar. 29, 2021); *see also* *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745, 758–59 (N.D. Ohio 2021) (stating that the

e. Due Process

In addition to the myriad of specific constitutional challenges that landlords brought against eviction bans, some attempted a pell-mell substantive due process argument. The theory was that all of the individual constitutional violations—like the Contract Clause or Takings Clause—combine to give rise to a substantive due process violation.²⁶⁰ Courts rejected this kitchen-sink-style argument almost out of hand.²⁶¹ Alternatively, landlords argued that eviction bans were so “harsh and oppressive” that they violated their substantive due process rights, but this too fared poorly, as a law need only pass rational basis to surmount this argument.²⁶²

f. Equal Protection

The Fourteenth Amendment guarantees the equal protection of the laws for those who are similarly situated.²⁶³ Residential landlords argued that they were discriminated against, as compared to commercial landlords, through laws that gave additional protections to residential tenants.²⁶⁴ Since landlords are not members of a suspect class, the courts analyzed their Equal Protection claims under the rational basis test.²⁶⁵ This alone made it difficult for landlords to prevail, but courts also found a valid reason to give more protections to residential tenants. Hence, they were not similarly situated to commercial tenants.²⁶⁶ Thus, landlords could not even meet the threshold question showing that the Fourteenth Amendment applied.²⁶⁷

statute would create a federal police power if it was as broad as the government argued, as a reason to rule against the government).

260. *See* Heights Apartments, L.L.C. v. Walz, 510 F. Supp. 3d 789, 815 (D. Minn. 2020); Elmsford Apartment Assocs., L.L.C. v. Cuomo, 469 F. Supp. 3d 148, 173 (S.D.N.Y. 2020).

261. *See* Heights Apartments, 510 F. Supp. 3d at 815; *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 173. Similarly, courts said that if every other theory failed, due process arguments alone could not carry the day. *See* Auracle Homes, L.L.C. v. Lamont, 478 F. Supp. 3d 199, 226–27; *Johnson v. Murphy*, No. 20-cv-06750, 2021 U.S. Dist. LEXIS 53191, at *30 (D.N.J. Mar. 22, 2021).

262. *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 356 (E.D. Pa. 2020).

263. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

264. *See Johnson*, 2021 U.S. Dist. LEXIS 53191, at *32.

265. *Id.* at *33–35.

266. *See id.* at *35.

267. *Id.*

g. Privileges or Immunities Clause

Beyond equal protection, the Fourteenth Amendment declares that states may not abridge the “privileges or immunities of citizens[.]”²⁶⁸ On occasions that landlords raised this argument, it was done so briefly. A lawsuit alleged that a tenant protection law denied the landlord the “right to freely contract and protect his property” without providing any citations, analogies, or authorities.²⁶⁹ In the same vein, courts quickly denied this claim.²⁷⁰

h. Preemption

If the challenged eviction moratorium resulted from a local ordinance, as happened in Philadelphia, then landlords could argue preemption.²⁷¹ They said that because the State of Pennsylvania had a law that governed landlord-tenant relations, the municipality could not pass a law that touched on it as well.²⁷²

There are three different types of preemption, but the relevant breed is “conflict” preemption.²⁷³ Conflict preemption occurs when a lower-authority law is inconsistent with a higher-authority law, such as a local law clashing with a state law on the same topic.²⁷⁴ Philadelphia landlords claimed that the local eviction ban conflicted with, and was therefore preempted by, state landlord-tenant law.²⁷⁵ But the court rejected this argument, noting that the state law sets up eviction procedures when a landlord has the right to remove a tenant but does not lay out when a landlord may evict, which the local policy covered.²⁷⁶

268. U.S. CONST. amend. XIV, § 1.

269. See Complaint at ¶ 148, *Johnson*, 2021 U.S. Dist. LEXIS 53191 (No. 20-cv-06750), https://nclalegal.org/wp-content/uploads/2020/06/Mathew-Johnson-v-Gov-Murphy-of-NJ_complaint-6-2-2020.pdf [perma.cc/2D99-NWQT].

270. See *Johnson*, 2021 U.S. Dist. LEXIS 53191, at *37–39.

271. See *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 358 (E.D. Pa. 2020).

272. *Id.*

273. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1480 (2018).

274. See *id.*

275. *HAPCO*, 482 F. Supp. 3d at 358.

276. *Id.* at 359–60.

III. WHAT COURTS MISSED

A. *Misunderstanding the Rental Market*

1. The Rental Market is Only Heavily Regulated on Paper

As part of the regulatory takings analysis, courts consider the extent to which eviction moratoriums interfere with the landlord's investment-backed expectations.²⁷⁷ Multiple courts have said that the rental market is "heavily regulated" in order to explain that landlords could reasonably anticipate more regulation blocking evictions.²⁷⁸ While this finding helps tenants by rebuffing challenges to moratoriums, it wrongly implies that evictions are difficult or closely monitored by the government. The finding thus overlooks glaring inequities that exist.

The housing market is indeed heavily regulated. Professionals handle every aspect of the mortgage process,²⁷⁹ and the "vast majority" of mortgages on the market today are backed by the federal government.²⁸⁰ This means that the vast majority of mortgages are subject to federal rules requiring lenders to attempt reconciliation with homeowners before foreclosing, along with many other protections.²⁸¹

277. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224–25 (1986) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

278. *Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148, 167 (S.D.N.Y. 2020); *Heights Apartments, L.L.C. v. Walz*, 510 F. Supp. 3d 789, 813 (D. Minn. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 384 (D. Mass. 2020); *HAPCO*, 482 F. Supp. 3d at 351–52; *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 224 (D. Conn. 2020); *Johnson v. Murphy*, No. 20-cv-06750, 2021 U.S. Dist. LEXIS 53191, at *24–26 (D. N.J. Mar. 22, 2021). See also *Apartment Ass'n of L.A. Cnty. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1095–96 (C.D. Cal. 2020) (stating that an eviction moratorium did not interfere with landlords' reasonable expectations as much as it could have because of "extensive regulation" in the rental market as part of a Contract Clause analysis).

279. See generally 12 C.F.R. § 1026 (2020).

280. Nicole Friedman, *The Pandemic Ignited a Housing Boom—but it's Different from the Last One*, WALL ST. J. (Mar. 15, 2021, 12:09 PM), https://www.wsj.com/articles/the-pandemic-ignited-a-housing-boombut-its-different-from-the-last-one-11615824558?mod=series_housingmarket [perma.cc/68NM-6MNZ].

281. E.g., 12 C.F.R. § 1024.41 (2021). As a testament to this fact, foreclosure protections did not expire until much later than eviction rates, due to much stronger protections for homeowners compared to tenants. Diana Olick, *Foreclosures Are Surging Now That Covid Mortgage Bailouts Are Ending, but They're Still at Low Levels*, CNBC, <https://www.cnbc.com/2021/10/14/foreclosures-surge-67percent-as-covid-mortgage-bailouts-expire.html> [https://perma.cc/94T6-2WEB] (Oct. 14, 2021, 2:19 PM).

In sharp contrast, a landlord may not even need to hire an attorney to complete an eviction. Some states allow property managers to file evictions on behalf of landlords,²⁸² and the process is simple enough that a landlord may not need much.²⁸³ Half of all evictions in some cities occur without involving the legal system at all.²⁸⁴ Countless self-help books for non-lawyers have been written explaining how to file an eviction.²⁸⁵ There's no such thing as a do-it-yourself foreclosure book—the process is too complex.

Yet, the federal government offers relatively little protection for renters.²⁸⁶ Even protections that do exist are weak. The most recent, permanent law on the topic is the Protecting Tenants at Foreclosure Act, which allows renters to remain a little longer in foreclosed homes, perhaps as little as thirty days.²⁸⁷ But even a law as modest as this was permitted to lapse for years before being made permanent in 2018.²⁸⁸

True, many states have laws that cover aspects of the landlord-tenant relationship. But for all the pages of legislation, there are still gaping holes. No transgression is too small for tenants to lose everything. One tenant had eviction proceedings initiated for a thirty-nine dollar debt; another lost their home over forty-eight dollars.²⁸⁹

282. *E.g.*, Fla. Bar re Advisory Op. – Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions, 627 So. 2d 485, 486 (Fla. 1993).

283. *E.g.*, Stephen Michael White, *What Happens in Eviction Court? Preparing for Your Hearing*, RENT PREP, <https://rentprep.com/evictions/how-to-prepare-for-an- eviction-court-hearing/> [perma.cc/73WD-YKYS] (Feb. 2021) (“Landlords typically do not need to have any type of legal representation for an eviction hearing.”).

284. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 4 (2016).

285. *See generally* CAROLYN GIBSON, *SECRETS TO A SUCCESSFUL EVICTION FOR LANDLORDS AND RENTAL PROPERTY MANAGERS: THE COMPLETE GUIDE TO EVICTING TENANTS LEGALLY AND QUICKLY* (2008); JAMES A. LANDON, *THE WEEKEND LANDLORD: FROM CREDIT CHECKS TO EVICTIONS AND EVERYTHING IN BETWEEN* (2d. ed. 2006).

286. *See* 42 U.S.C. § 3604 (federally barring discrimination against tenants on the basis of race, color, religion, sex, familial status, or national origin). *See also* 42 U.S.C. § 4852(d) (requiring activities reducing risk of lead-based paint to children in order to receive federal grants); 40 C.F.R. § 745.107 (2020) (requiring mandatory disclosure of known lead paint for sellers and lessors).

287. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §702(2)(A) and (B), 123 Stat. 1660, 1661 (2009).

288. *Congress Permanently Authorizes the Protecting Tenants at Foreclosure Act*, NAT'L LOW INCOME HOUS. COAL. (May 29, 2018), <https://nlihc.org/resource/congress-permanently-authorizes-protecting-tenants-foreclosure-act> [perma.cc/2RDC-E6KU].

289. Joel Auringer et al., *Advancing Housing Justice in Tulsa: An Examination of the FED Docket*, TERRY WEST CIV. L. CLINIC 1, 12 (June 8, 2020), <https://law.utulsa.edu/wp->

States often fail to place any limits on the size of a security deposit that landlords can charge.²⁹⁰ Roughly half of the states did not have any protections upon foreclosure for tenants residing in a rental home that was being foreclosed.²⁹¹ Only a quarter of states gave tenants a right of redemption, or the ability to block an eviction by paying off missed rent.²⁹² Delaware, for example, has an Office of Foreclosure Prevention but no counterpart for evictions.²⁹³ Hawaii law does not protect renters who rely on government subsidies, so it is common to see rental ads with “No Section 8,” and tenants can spend hours searching rental ads for a place that accepts the subsidies.²⁹⁴ A study of Massachusetts residential leases revealed that three-quarters contained illegal terms, and nine-tenths included misleading terms,²⁹⁵ illustrating how underenforced tenant protections are.

Additionally, most evictions are easily carried out. Maryland only charges a landlord fifteen dollars to file an eviction, and it is not even the cheapest state, or the second.²⁹⁶ Maryland also allows landlords to file for eviction immediately upon a tenant missing rent.²⁹⁷ Other

content/uploads/sites/3/2020/06/TWC-Eviction-Court-Report-FINAL.pdf
[perma.cc/DA8U-K9TY].

290. E.g., IND. CODE § 32-31-3-9 (West 2021); KY. REV. STAT. ANN. § 383.580 (West 2021); TEX. PROP. CODE ANN. § 92.102 (West 2021).
291. Shambhavi Manglik, *Renters in Foreclosure: A Fresh Look at an Ongoing Problem*, NAT'L LOW INCOME HOUS. COAL. 10 (Sept. 2012), <https://nlihc.org/sites/default/files/rentersinforeclosure2012.pdf> [perma.cc/NBP4-3TMF].
292. *Renters' Right to Redemption Bill Moves Forward*, TENANTS TOGETHER (May 2, 2011), <http://www.tenantstogether.org/updates/renters%E2%80%99-right-redemption-bill-moves-forward> [perma.cc/P7HW-NQ9P].
293. DEL. CODE ANN. tit. 29, § 2518 (West 2021).
294. Anita Hofschneider, *Gaps in Hawaii Eviction Moratorium Leave Some Renters Scrambling for Housing*, HONOLULU CIV. BEAT (Jan. 11, 2021), <https://www.civilbeat.org/2021/01/gaps-in-hawaii-eviction-moratorium-leave-some-renters-scrambling-for-housing/> [perma.cc/2ZWC-GRBR]; Anita Hofschneider, *Section 8 Waiting Game: Even with Vouchers in Hand, There May Be No Place to Rent*, HONOLULU CIV. BEAT (Aug. 26, 2015), <https://www.civilbeat.org/2015/08/section-8-waiting-game-even-with-vouchers-in-hand-there-may-be-no-place-to-rent/> [perma.cc/42W5-4HWT].
295. Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. OF LEGAL ANALYSIS 1, 24 (2017).
296. Kate Ryan, *Maryland Lawmakers to Focus on Eviction Challenges in Upcoming General Assembly*, WTOP NEWS (Dec. 28, 2020, 7:55 PM), <https://wtop.com/maryland/2020/12/maryland-lawmakers-focus-eviction-challenges-upcoming-general-assembly/> [perma.cc/663E-PCGS].
297. MD. CODE ANN., REAL PROP. § 8-401(a) (West 2021).

states give only a few days.²⁹⁸ Iowa, for example, requires that a court hearing be scheduled no later than eight days after a landlord files for an eviction.²⁹⁹ When tenants arrive at court, it is a brusque process. Traditionally, eviction courts operate in a “cattle call” fashion, where huge numbers of tenants facing eviction are packed into a courtroom.³⁰⁰ Tulsa, Oklahoma’s eviction court is representative of this structure. As many as 258 people are scheduled for a single court session.³⁰¹ The schedule is built around the convenience of the judge, not the citizenry. Rather than giving tenants an appointment time, court simply starts at 2:00 p.m. and court staff begin calling out names.³⁰² Many tenants cannot appear because of work or family obligations in the middle of a weekday, so they lose automatically and instantaneously.³⁰³ In some jurisdictions, the magistrates determining whether an eviction is legally sufficient need only a high school diploma.³⁰⁴

Many states can complete the entire eviction process, from missed rent to homeless, in a matter of days.³⁰⁵ A study conducted in Arkansas revealed that during the COVID-19 pandemic, landlords frequently filed for eviction after a single missed rent payment, even during the holiday season when COVID-19 cases were at their

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298. See Eman Hamed, *The Top 7 Landlord Friendly States of 2020*, ROOFSTOCK, <https://learn.roofstock.com/blog/landlord-friendly-states> [perma.cc/7SSN-GH76] (July 20, 2021); see also Courtney Libon, *Glendale Associates, LP v. Harris: Due Process Rights of Disabled Tenants Under the Massachusetts’ Common Nuisance Statute*, G.L. c. 139, § 19, 64 BOS. BAR J., 22, 22 (2020) (“Over 60,000 cases are filed in housing courts each year, the vast majority of which are evictions involving a dizzying array of procedural technicalities administered at lightning speed.”).
299. IOWA CODE ANN. § 648.5(1) (West 2021).
300. *Eviction and Foreclosure Moratorium Bill Introduced by Reps. Leland, Crossman*, OHIO HOUSE REP. (Jan. 12, 2021), <https://ohiohouse.gov/members/jeffrey-a-crossman/news/eviction-and-foreclosure-moratorium-bill-introduced-by-reps-leland-crossman-105009> [perma.cc/K7QR-RJC5].
301. Auringer et al., *supra* note 289, at 3.
302. *Id.* at 2, 4.
303. *Id.*
304. Miriam Axel-Lute & Brandon Duong, *Fixing the Harms of Our Eviction System: An Interview with Emily Benfer*, SHELTERFORCE (Mar. 4, 2021), <https://shelterforce.org/2021/03/04/fixing-the-harms-of-our-eviction-system-an-interview-with-emily-benfer/> [perma.cc/SL75-847G].
305. E.g., Eric S. Peterson et al., *Landlords Evict Hundreds of Utah Renters Each Month Despite a Ban During the Pandemic*, SALT LAKE TRIB., <https://www.sltrib.com/news/2020/912/12/landlords-evict-hundreds/> [perma.cc/F8U7-E9BL] (Dec. 13, 2020, 12:43 PM); IDAHO CODE § 6-303(2) (LexisNexis 2021); ALA. CODE § 35-9A-421(b) (West 2021).

apex.³⁰⁶ Massachusetts, a relatively tenant-friendly state, can still complete the eviction process in under seven weeks.³⁰⁷ For comparison, it can take years for a foreclosure to be perfected.³⁰⁸ Also, if legal strictures prove too burdensome for landlords, they frequently resort to illegal evictions, cutting power, changing locks, or throwing a tenants' belongings onto the curb.³⁰⁹ Calling this process "heavily regulated" ignores reality.³¹⁰

2. The Rental Market Does Affect Interstate Commerce

The *Terkel* court gave the most expansive Commerce Clause analysis and concluded that the eviction moratorium did not have a substantial impact on interstate commerce.³¹¹ However, this analysis overlooks the realities of evictions. First, to know that evictions are about money, not the use of property, one need only look at the lawsuits' complaints.³¹² The plaintiff-landlords were not seeking to move, sell, or renovate their apartments.³¹³ Rather, they were renting them for profit.³¹⁴ Courts recognized these facts by repeatedly ruling the injury to landlords from eviction bans were strictly financial.³¹⁵

Second, evictions have profound effects on the broader economy. The CDC noted that one-sixth of changes in residence occurs between states.³¹⁶ But evictions go beyond that. People who are evicted are more likely to move to worse neighborhoods, and eviction corresponds to a sharp increase in neighborhood poverty and

306. Lynn Foster, *December Eviction Report*, ARK. FOR STRONGER CMTYS. (Jan. 13, 2021), <https://www.arkstrongcommunities.com/december-eviction-report/> [perma.cc/F8U7-E9BL].

307. *Adjartey v. Cent. Div. Hous. Ct. Dep't.*, 120 N.E.3d 297, 306 (Mass. 2019).

308. AMY LOFTSGORDON, *THE FORECLOSURE SURVIVAL GUIDE 201* (Cara O'Neil ed., 7th ed. 2019).

309. Eric Graves, *Two Local Lawyers Agree, Landlord-Tenant Laws Are a Mess*, WAFF 48 (Sept. 16, 2020, 1:26 PM), <https://www.waff.com/2020/09/16/two-local-lawyers-agree-landlord-tenant-laws-are-mess/> [perma.cc/3SWV-PTB5]. Some jurisdictions have strong tenant protections, but they are uncommon. *See, e.g.*, *Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148, 158 (S.D.N.Y. 2020).

310. *See supra* note 277 and accompanying text.

311. *See supra* Part II.C.1.iv.

312. Brief for the New Civil Liberties All. et al., as Amici Curiae Supporting Plaintiff, *supra* note 6, at 10–11.

313. *Id.* at 12.

314. *Id.* at 14.

315. *Prop. Mgmt. Connection, L.L.C. v. Acting Uejio*, No. 21-cv-00359, 2021 U.S. Dist. LEXIS 92340, at *22 (M.D. Tenn. May 14, 2021).

316. *Terkel v. Ctrs. for Disease Control & Prevention*, No. 20-cv-00564, 2021 U.S. Dist. LEXIS 35570, at *28 (E.D. Tex. Feb. 25, 2021).

crime.³¹⁷ Relatedly, studies show that foreclosures reduce property values across the neighborhood—reducing values by over hundreds of thousands of dollars per home, and one trillion dollars across the entire nation.³¹⁸ Eviction moratoriums kept an estimated 1.55 million families from losing their homes.³¹⁹ It is inconceivable that throwing over a million people onto the streets would not have roiled the economy.

Third, the modern rental market is not local in nature. Though the Supreme Court did not go as far as *Terkel*, the court also noted that the landlord-tenant relationship was a matter of state law and that many landlords had “modest means.”³²⁰ This paints a misleading picture. A majority of rental units are owned by businesses, not what may be thought of as “mom and pop” landlords.³²¹ Furthermore, a majority of all rental units are part of large buildings with over fifty tenants living in them, as opposed to single-family homes or small apartment buildings.³²² Many of these large businesses operate across state lines. Every one of the top fifty largest apartment management companies in the country operates in more than one state, with many managing units in every state.³²³ As of 2018, these management companies controlled 3.28 million units.³²⁴ The largest, Greystar Real Estate Partners, controls over 400,000 units alone and operates in

317. Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1752 (2015).

318. Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 7, 22 (2010).

319. Peter Hepburn et al., *U.S. Eviction Filing Patterns in 2020*, 7 SOCIUS 1, 1 (2021).

320. Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

321. Todd M. Richardson, *Landlords*, DEP’T HOUS. & URB. DEV. (June 11, 2018), <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-061118.html> [perma.cc/C2KA-EQH9].

322. U.S. Dep’t of Hous. & Urb. Dev., *The Rental Housing Finance Survey, 2012*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/visualizations/2012/econ/2012-rhfs-infographic.pdf> [perma.cc/7HV4-DNF5] (last visited Sep. 9, 2021).

323. *NMHC 50 Largest Apartment Managers*, NAT’L MULTIFAMILY HOUS. COUNCIL, <https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2018-manager-list/> [perma.cc/9DN2-E5F7] (last visited Sep. 19, 2021).

324. *Id.*

every state.³²⁵ Collectively, the fifty largest apartment companies own ten percent of the nation's rental stock.³²⁶

Outside of the top fifty, many other companies operate across state lines—sometimes dubiously. For example, Invitation Homes Inc. owns 80,000 single-family houses around the country and filed over one hundred evictions around the country during the pandemic.³²⁷ In September 2020, large corporate landlords in twenty-three states, some of which are owned by hedge funds, filed 10,000 evictions.³²⁸ On Christmas Eve, a Texas company, Little Rock Enclave Apartments, L.P., filed an eviction lawsuit for tenants in Arkansas.³²⁹ Some cities are plagued by mega-landlords who use so many layers of shell companies and limited liability companies so that tenants do not even know who their landlords are.³³⁰ Corporate landlords like this drive evictions in many communities.³³¹

Incidentally, the pandemic and eviction moratoriums have only accelerated these trends. Local landlords started selling off non-revenue generating properties to large investors.³³² New York landlord Richard Tyson, for instance, sold fifteen single-family homes to an out-of-state corporate investor.³³³ The Tricon Residential, a Canadian corporation, announced it would spend five

325. *Id.*

326. *Top 50 Apartment Companies in 2019 Multifamily Industry*, RENTAL HOUS. J. (Apr. 17, 2020), <https://rentalhousingjournal.com/top-50-apartment-companies-in-2019-multifamily-industry/> [perma.cc/A29U-WF79].

327. Gretchen Morgenson, *Large Corporate Landlords Have Filed 10,000 Eviction Actions in Five States Since September*, NBC NEWS (Oct. 26, 2020, 5:00 AM), <https://www.nbcnews.com/business/personal-finance/large-corporate-landlords-have-filed-10-000-eviction-actions-five-n1244711> [perma.cc/2VJX-WLN7].

328. *Id.*

329. Foster, *supra* note 306.

330. Thomas Breen, *Tenant "Right to Counsel" Advances*, NEW HAVEN INDEP. (Mar. 11, 2021, 6:02 PM), https://www.newhavenindependent.org/index.php/archives/entry/right_to_counsel1/ [perma.cc/7Z8E-VYN3].

331. Michelle Conlin, *Special Report Giant U.S. Landlords Pursue Evictions Despite CDC Ban*, REUTERS (Apr. 23, 2021, 7:23 AM), <https://www.reuters.com/world/us/special-report-giant-us-landlords-pursue-evictions-despite-cdc-ban-2021-04-23/> [perma.cc/6TNM-TL8E].

332. Michelle Conlin, *Selling Out: America's Local Landlords. Moving in: Big Investors*, REUTERS (July 29, 2021, 1:12 PM), <https://www.reuters.com/business/finance/selling-out-americas-local-landlords-moving-big-investors-2021-07-29/> [perma.cc/V4WV-GW8T].

333. *Id.*

billion dollars to buy 18,000 homes.³³⁴ This is not a sleepy, local industry.

Washington's Attorney General's Office sued Whitewater Creek, Inc., an Idaho-based company, for illegally threatening eviction against tenants in Spokane County, Washington.³³⁵ Maryland's Attorney General's Office sued a bevy of rental companies for unfair and deceptive practices.³³⁶ Several of the companies have a principal place of business outside of Maryland, yet still owned rental properties in the Old Line State.³³⁷ Most of these ostensibly local companies all share the exact same address: Suite 300, 9658 Baltimore Avenue, College Park, Maryland 20740.³³⁸ This address traces back to Southern Management Companies, which holds properties in Maryland and Virginia.³³⁹

Even some of the landlords contesting the eviction bans were engaged in interstate commerce. In *Skyworks v. CDC*, the majority of the plaintiff-landlords were businesses headquartered outside of the state they were suing in.³⁴⁰

Besides the rental companies themselves, many landlords have banded together to form national trade organizations. For example, the National Apartment Association has over 82,000 members who

334. *Id.*

335. Megan Carroll, *North Idaho Company Will Pay \$50K to Resolve Eviction Moratorium Lawsuit*, KHOU 11 (Jan. 19, 2021, 7:55 PM), <https://www.khou.com/article/news/local/north-idaho-company-pays-50k-resolve-eviction-moratorium-lawsuit/293-9ab5260b-6605-486a-95be-8d79e1ec527c> [perma.cc/B2EP-XQKP].

336. Statement of Charges, Consumer Prot. Div. Off. of the Att'y Gen. v. Westminster Mgmt., No. 19-048-317165 (Oct. 23, 2019), https://www.marylandattorneygeneral.gov/News%20Documents/102319_WM_SOC.pdf [perma.cc/4CFG-DLQP].

337. *Id.* at 7–11; Jonathan O'Connell et al., *Management Company Owned by Jared Kushner Files to Evict Hundreds of Families as Moratoriums Expire*, WASH. POST (Nov. 5, 2020, 6:00 AM), <https://www.washingtonpost.com/business/2020/11/05/kushner-evictions-pandemic-westminster-management/> [perma.cc/H82G-ZMMK] (One of the out-of-state companies the Maryland Attorney General sued, Westminster Management, was owned by Jared Kushner and accused of evicting people in contravention of federal law—at a time while Kushner was on the White House's coronavirus task force.).

338. See Statement of Charges, *supra* note 336, at 7–11.

339. 9658 Baltimore Avenue, S. MGMT. COS., <https://www.southernmanagement.com/commercial/9658-baltimore-avenue/> [perma.cc/FH5T-FPK3] (last visited Sept. 20, 2021).

340. Complaint at 4, *Skyworks Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d (N.D. Ohio 2021) (No. 20-cv-02407), <https://pacificlegal.org/wp-content/uploads/2020/10/Skyworks-Ltd.-v.-Centers-for-Disease-Control-Complaint.pdf> [perma.cc/7HL5-CN94].

operate ten million rental housing units globally;³⁴¹ the National Association of Residential Property Managers has over 6,000 members;³⁴² and the National Multifamily Housing Council represents over 1,000 property owners, managers, financiers, and developers.³⁴³ These groups waded into congressional races,³⁴⁴ lobby against eviction protections,³⁴⁵ and provide legal updates to their members.³⁴⁶ They also were involved in the moratorium litigation.³⁴⁷ Landlords from various states also joined the lawsuits.³⁴⁸

The rental industry is awash in federal money. Kansas alone received \$200 million in federal rental aid.³⁴⁹ The National Multifamily Housing Council (NMHC) trade group bragged that the landlord industry secured rental funding in the CARES Act as the result of a “hard-fought campaign.”³⁵⁰ Unsatisfied with one law, the group got 5,000 members to sign a letter to Congress begging for more aid, and called the \$25 billion in the December 2020 Appropriations Act a “major win for the industry.”³⁵¹ With rent payment dried up during the pandemic, landlords often could only rely on federal aid for income.³⁵² As one government attorney told the Eleventh Circuit, “[i]t’s not clear you would have much of a

341. *About Us*, NAT’L APARTMENT ASS’N, <https://www.naahq.org/about> [perma.cc/7MDE-MZ6P] (last visited Sept. 20, 2021).

342. *About NARPM*, NAT’L ASS’N OF RESIDENTIAL PROP. MANAGERS, <https://www.narpm.org/about/> [perma.cc/S36D-X6GQ] (last visited Sept. 20, 2021).

343. Complaint at 2, Nat’l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425 (D.D.C. 2008) (No. 07-cv-00815), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.125454.1.0.pdf> [perma.cc/S36D-X6GQ].

344. *Defining Moments of the Last Year*, NAT’L MULTIFAMILY HOUS. COUNCIL, <https://www.nmhc.org/about/year-in-review/> [perma.cc/2B4T-ZH8Y] (last visited Sept. 21, 2021).

345. *Issues*, NAT’L ASS’N OF RESIDENTIAL PROP. MANAGERS, <https://www.narpm.org/legislative/issues-2/> [perma.cc/3DUD-ESRV] (last visited Sept. 23, 2021).

346. *Membership Benefits*, NAT’L MULTIFAMILY HOUS. COUNCIL, <https://www.nmhc.org/membership/membership-benefits/> [perma.cc/5KN2-PVT6] (last visited Sept. 23, 2021).

347. Amended Complaint, *Brown v. Azar*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020) (No. 20-CV-03702), https://storage.courtlistener.com/recap/gov.uscourts.gand.280996/gov.uscourts.gand.280996.12.0_1.pdf [perma.cc/PT5K-2N89].

348. *Id.* at 5–6.

349. Heather Hollingsworth, *Kansas Judge Finds CDC Eviction Moratorium Unenforceable*, ABC NEWS (June 18, 2021, 6:36 PM), <https://abcnews.go.com/US/wireStory/kansas-judge-finds-cdc-eviction-moratorium-unenforceable-78365398> [perma.cc/47RJ-QC2P].

350. *See Defining Moments*, *supra* note 344.

351. *Id.*

352. *The Rental Housing Finance Survey, 2012*, *supra* note 322.

market for rental properties if not for the federal government's extraordinary intervention."³⁵³

In sum, the lawsuits filed by the gargantuan multi-state businesses engaging in national political lobbying and propped up by federal government money are considered parochial. Adding injury to insult, while the *Terkel* court used the supposed absence of far-reaching economic effects to justify striking down the CDC Halt Order, other courts emphasized the economic impact of the policy to justify striking it down on other grounds.³⁵⁴

B. *Second Class Legal Treatment for Tenants*

1. Double Standards for Tenants and Landlords to Prove Their Claims

Courts universally held that the plaintiff-landlords demonstrated concrete injury from the CDC Halt Order, often based on nothing more than an allegation that at least one tenant submitted a CDC Hardship Declaration.³⁵⁵ But the mere fact that a tenant submits a CDC Declaration is not enough to invoke the protections of the Halt Order.³⁵⁶ Rather, a tenant must meet the five eligibility hurdles.³⁵⁷ In guidance published about the Halt Order, the CDC explicitly said it “does not preclude a landlord from challenging the truthfulness of a tenant’s declaration in any state or municipal court.”³⁵⁸ Though tenants swear their declarations are truthful, courts do not take them on faith.³⁵⁹ Tenants who claimed the CDC Halt Order protected them

353. Brendan Pierson, *11th Circuit Weighs Latest Challenge to CDC Eviction Freeze*, REUTERS (May 17, 2021, 6:50 AM), <https://www.reuters.com/business/legal/11th-circuit-weighs-latest-challenge-cdc- eviction-freeze-2021-05-19/> [perma.cc/99LU-ZB8R].

354. Ala. Ass’n of Realtors v. U.S. Dep’t of Health and Human Servs., No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *20 (D.D.C. May 5, 2021) (noting that it would have expected Congress to speak more clearly before empowering an agency to do something of such “vast economic and political significance”) (cleaned up).

355. See *supra* Section II.A.1.

356. See *infra* notes 357–69 and accompanying text.

357. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

358. HHS/CDC *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION 6 (2020), <https://www.hud.gov/sites/dfiles/Main/documents/EvictionMoratoriaOrderFAQs.pdf> [perma.cc/72MA-A2EC].

359. See Nova, *supra* note 39.

routinely had courts scrutinize their claims and evict them anyway.³⁶⁰ In some jurisdictions, tenants essentially stand trial for perjury when they submit a Declaration, getting grilled on their spending habits and having their bank records subpoenaed.³⁶¹

Yet no court paused to consider whether the landlords were truly unable to evict due to the CDC Halt Order. Rather, courts simply accepted the fact that a Declaration was submitted as the end of the matter.³⁶² One landlord claimed that her tenants lied on their sworn Declarations, but the court still found standing rather than telling her she was free to evict them under the CDC Halt Order.³⁶³ Landlords were given the benefit of the doubt—tenants were not.

Moreover, even if a tenant submits a CDC Declaration and meets the requisite criteria, there may be other reasons why the eviction can still go forward. The CDC Halt Order does not protect tenants who violate lease terms other than for payment of rent, and explicitly allows for eviction of tenants who engage in criminal activity, threaten the health or safety of other residents, damage property, or violate building codes.³⁶⁴ Local judges may refuse to acknowledge the Halt Order.³⁶⁵ Courts have ruled that eviction protection orders

360. *Williams v. Ladera Apartments*, No. 21-cv-154, 2021 U.S. Dist. Lexis 81934, at *6 (E.D. Tex. Apr. 29, 2021) (court determined tenant would not end up homeless if evicted); *Thompson v. Bromall*, No. 21-0281, 2021 U.S. Dist. Lexis 76241, at *4 (W.D. Pa. Apr. 21, 2021) (court determined that tenant failed to prove she used her best efforts to get rent assistance, that her income was low enough, that she was unable to pay rent, that she used her best effort to pay, or that it would render her homeless if evicted); *Edwards v. Colon*, No. NNICV205012335S, 2021 Conn. Super. Lexis 519, at *8 (Conn. Super. Ct. Apr. 21, 2021) (court determined there was no evidence that tenants tried to get rental assistance).

361. *Nova*, *supra* note 39.

362. Occasionally, the mere existence of a CDC Declaration would be enough. Akron, Ohio's court announced that any eviction where a Declaration was served would be dismissed. Complaint at 10, *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d (N.D. Ohio 2020) (No. 20-cv-02407). But this was not the case everywhere. Another complaint said the landlord "has not attempted to evict" a tenant who submitted a Declaration without any further inquiry. Complaint at 10, *Chambless Enters., L.L.C. v. Ctrs. for Disease Control & Prevention*, 508 F. Supp. 3d 101 (W.D. La. 2020) (No. 20-cv-01455).

363. *Dixon Ventures, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 2021 U.S. Dist. Lexis 78176, at *4, *8 (E.D. Ark. Apr. 23, 2021).

364. See CDC, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020); *Saso v. Genho*, 2021 U.S. Dist. Lexis 78588, at *5–6 (N.D. Cal. Apr. 19, 2021) (landlord sought to kick out a tenant because they sold the house, rather than because of nonpayment of rent).

365. See, e.g., Leticia Miranda, *Mobile Home Dwellers Hit Even Harder When Facing Eviction*, NBC NEWS (Feb. 14, 2021, 6:00 AM), <https://www.nbcnews.com/business/>

are inapplicable,³⁶⁶ and landlords have exploited every loophole imaginable to evict tenants despite legal protections.³⁶⁷ The Utah Apartment Association, a landlord group, urged its members to evict tenants for nonpayment, apparently undeterred by the CDC Halt Order.³⁶⁸ One Milwaukee landlord went so far as to claim they were evicting nonpaying tenants because their dog was barking, not because of the missed rent.³⁶⁹ Landlords had no scruples cooking up pretexts to evict people, but when challenging eviction bans, they could simply claim that the CDC Halt Order was an absolute bar without first demonstrating they had no other recourse.³⁷⁰

Standing is supposed to require a “factual showing of perceptible harm[.]” not an “academic exercise in the conceivable[.]”³⁷¹ The Supreme Court recently restricted standing for consumers who had

business-news/mobile-home-dwellers-hit-even-harder-when-facing-eviction-n1257497 [perma.cc/QU7J-5R4T].

366. Katie Wilson, *King County Courts Continue Ordering Evictions, Despite Moratoriums*, CROSSCUT (Mar. 25, 2021), <https://crosscut.com/opinion/2021/03/king-county-courts-continue-ordering-evictions-despite-moratoriums> [perma.cc/QU7J-5R4T] (noting court held CDC Halt Order did not apply because Washington State had its own policy); *In re Machevsky*, 2021 Bankr. LEXIS 31, *8–9 (Cal. Cen. Bankr. Ct. 2021) (CDC Halt Order found to have no effect in Bankruptcy Court); *Marino v. Fusco*, No. CV205012843S, 2020 Conn. Super. LEXIS 1614, at *2 (Conn. Super. Ct. Jan. 8, 2021) (noting that a person could be evicted notwithstanding a state eviction moratorium because they caused a serious nuisance).
367. *E.g.*, Nick Penzenstadler & Josh Salman, *Landlords Skirt COVID-19 Eviction Bans, Using Intimidation and Tricks to Boot Tenants*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2020/11/20/landlords-use-intimidation-tricks-push-renters-out-amid-pandemic/6284752002/> [perma.cc/QAA7-8NMG] (Jan. 26, 2021, 5:53 PM) (detailing various loopholes employed); Ally Schweitzer, *Maryland Landlords Are Exploiting A Loophole To Evict Renters, Advocates Say*, NPR (Mar. 12, 2021), <https://www.npr.org/local/305/2021/03/12/976116006/maryland-landlords-are-exploiting-a-loophole-to-evict-renters-advocates-say> [perma.cc/8P2G-A8K2] (noting a sharp, suspicious increase in landlords claiming expiration of the lease as the reason for eviction when they could not claim nonpayment).
368. Annie Knox, *Fearful of Getting Evicted, Utahns Innovate to Make Ends Meet*, DESERET NEWS (Jan. 10, 2021, 6:33 PM), <https://www.deseret.com/utah/2021/1/10/22216074/coronavirus-eviction-fearful-pandemic-federal-aid-scrape-together-rent-housing-salt-lake-valley> [perma.cc/D3NM-7DZK].
369. Cary Spivak, *There’s a Federal Moratorium on Evictions. So Why Have More Than 200 Families in Milwaukee Been Evicted Since Then?*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/news/2020/11/30/least-244-families-milwaukee-county-evicted-since-moratorium/6331504002/> [perma.cc/D3NM-7DZK] (Dec. 2, 2020, 7:49 AM).
370. *See supra* Section II.B.2. (describing how landlords alleged irreparable harm because of the CDC eviction moratorium).
371. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (citations omitted).

errors in their credit reports, holding that people whose credit files had false information, but had not yet been shared with creditors, suffered no concrete harm.³⁷² Until a landlord files an eviction and would prevail in court, but for the CDC Halt Order, it is an open question whether they have actually suffered an injury.³⁷³ Indeed, several landlords withdrew from lawsuits because they puzzled out a way to evict their tenants despite a moratorium.³⁷⁴

The CDC Halt Order only blocks the final execution of an eviction, the act of a sheriff removing someone from their home, not the court proceedings that lead up to it.³⁷⁵ Local sheriff offices, however, might not enforce eviction orders during the pandemic, meaning the CDC Halt Order would not be the only reason a landlord could not evict.³⁷⁶ There was also no evidence that the Department of Justice enforced the Halt Order.³⁷⁷ Over the lifespan of the Halt Order, the author was unable to locate a single prosecution for noncompliance. Ordinarily, parties do not have standing to challenge laws that lie dormant on the shelf.³⁷⁸ Case in point, a week after preemptively

372. *Transunion v. Ramirez*, 141 S. Ct. 2190, 2213 (2021).

373. The CDC guidance on the Halt Order even says that its protections only apply until “the court decides the issue.” *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions*, *supra* note 358.

374. Kriston Capps, *Landlords Challenge U.S. Eviction Ban and Continue to Oust Renters*, BLOOMBERG: CITYLAB (Oct. 22, 2020, 2:11 PM), <https://www.bloomberg.com/news/articles/2020-10-22/landlords-launch-legal-attack-on-cdc-eviction-ban> [perma.cc/U29Y-YSDS].

375. Defendants Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 42, *Brown v. Azar*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020) (No. 20-cv-3702), https://storage.courtlistener.com/recap/gov.uscourts.gand.280996/gov.uscourts.gand.280996.22.0_2.pdf [perma.cc/MYR9-EUUZ] (The defendant argues that “the Order does not bar a landlord from commencing a state court eviction proceeding, provided that that actual eviction does not occur while the Order remains in place.”).

376. *What’s Next for Eviction Cases in Alabama?*, CLOUD WILLIS & ELLIS (Sept. 2, 2020), <http://www.cloudwillis.com/2020/09/02/whats-next-for-eviction-cases-in-alabama/> [perma.cc/2VPV-FC4Z]; Matt Levin et al., *Thousands Forced From Their Homes Despite California’s Eviction Moratorium*, CALMATTERS, <https://calmatters.org/housing/2020/08/californians-evicted-coronavirus-pandemic/> [perma.cc/W4FS-NFX8] (Sept. 16, 2020).

377. Penzenstadler & Salman, *supra* note 367.

378. *Poe v. Ullman*, 367 U.S. 497, 507 (1961) (Regarding a case challenging a state ban on contraceptives that had been enforced, the Court said, “[i]t is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court’s adjudication of its constitutionality in proceedings brought against the State’s prosecuting officials if real threat of enforcement is wanting.”); *accord* *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Younger v. Harris*, 401 U.S. 37, 42 (1971);

invalidating the unenforced eviction moratorium, the Supreme Court refused to intervene to block a near-total ban on abortions, stating “it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention.”³⁷⁹

Presumably, the CDC Halt Order was larded down with exceptions, loopholes, and concessions—and went under enforced—as a means of appeasing landlords and skeptical judges. But landlords sued anyway, and courts did not seem to care about it as far as standing went.

2. Tenants Kept Out of the Conversation

Although protecting tenants was the heart of why eviction moratoriums exist, one might not know that looking at specific parts of courts’ analyses. When the government argued that tenants were indispensable parties to eviction moratorium litigation, one judge stated that tenants, who might be homeless if courts struck eviction bans down, had no more than a “general interest” in the litigation with no citations to explain why.³⁸⁰ Another judge said that tenants had their interests adequately protected by the government attorneys, though it provided only one negative inference citation for this claim.³⁸¹ In any event, though the government’s interests may be similar to the tenants’ interests, they are not identical. The federal government tries to ensure that it maintains a consistent position in its various legal actions, even when doing so raises eyebrows.³⁸² Individual tenants would not be so constrained.

Additionally, the presence of tenants would be necessary to assess the balance of equities properly. In lawsuits asking for preliminary injunctions, like the eviction moratorium cases, courts are supposed to balance the equities in favor of a policy at the outset of litigation.³⁸³ However, in striking down the CDC Halt Order, the Supreme Court specified the harm to landlords but did not mention

O’Shea v. Littleton, 414 U.S. 488, 497 (1974); Babbitt v. UFW Nat’l Union, 442 U.S. 289, 298 (1979).

379. Whole Women’s Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021).

380. Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev., 499 F. Supp. 3d 538, 548 (W.D. Tenn. 2020), *aff’d*, 5 F.4th 666 (6th Cir. 2021).

381. Brown v. Azar, 497 F. Supp. 3d 1270, 1279 (N.D. Ga. 2020).

382. See Luke Barr & Alexander Mallin, *AG Garland Defends DOJ Decision to Continue to Back Trump in E. Jean Carroll Defamation Case*, ABC NEWS (June 9, 2021, 5:17 PM), <https://abcnews.go.com/Politics/ag-garland-defends-doj-decision-continue-back-trump/story?id=78179675> [perma.cc/SL5U-B36X].

383. Winter v. Nat’l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

the interests of tenants.³⁸⁴ When courts analyzed the interests in favor of preserving eviction moratoriums, they focused on macroscale public health impacts.³⁸⁵ Missing from the picture, however, was the individual tenants whose lives would be torn asunder if forced from their homes. Consequences of eviction can last for years, as future landlords may demand higher security deposits or advanced rent if they see a past eviction on a prospective tenant's record.³⁸⁶ Tenants' plight could be made worse by high unemployment throughout the pandemic.³⁸⁷ Some tenants even fear death if evicted.³⁸⁸ Removing tenants' voices from this discussion is another way excluding them from lawsuits impairs their ability to defend their rights.

Allowing tenants to join the suit would also make it harder for courts to maintain the illusion that their decisions were primarily academic. Courts that ruled against the eviction moratoriums tried to minimize what they were doing. They said the case was a "limited question" of statutory authority,³⁸⁹ "a narrow one,"³⁹⁰ or a matter

384. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Serv., 141 S. Ct. 2485, 2487 (2021) (per curiam) (The closest the Court comes is a single sentence about "the public [having] a strong interest in combating the spread of the COVID-19 Delta variant.").

385. *E.g.*, *Brown*, 497 F. Supp. 3d at 1299; Ala. Ass'n of Relators v. U.S. Dep't of Health & Hum. Servs., No. 20-CV-3377, 2021 U.S. Dist. LEXIS 92104, at *11–12 (D.D.C. May 14, 2021), *aff'd*, 2021 U.S. App. LEXIS 16630 (D.C. Cir. June 2, 2021). *But see* District of Columbia v. Towers, 250 A.3d 1048, 1056–58 (D.C. 2021) (considering the harm to tenants who would be prematurely evicted, rather than just to the public writ large); Auracle Homes, L.L.C. v. Lamont, 478 F. Supp. 3d 199, 228 (D. Conn. 2020) (mentioning the potential increase in homelessness briefly).

386. Will Parker, *Struggling Rental Market Could Usher in Next American Housing Crisis*, WALL ST. J. (Oct. 27, 2020, 7:15 PM), <https://www.wsj.com/articles/struggling-rental-market-could-usher-in-next-american-housing-crisis-11603791000> [perma.cc/SL5U-B36X].

387. *Civilian Unemployment Rate*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> [perma.cc/H94K-GMTQ] (last visited June 13, 2021).

388. Frankel v. Kessler, No. 21-CV-0093, 2021 U.S. Dist. LEXIS 11736, at *1 (E.D. Pa. Jan. 22, 2021).

389. Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention, 524 F. Supp. 3d 745, 751 (N.D. Ohio 2021), *order clarified*, 2021 U.S. Dist. LEXIS 103928 (N.D. Ohio June 3, 2021); *see also* Terkel v. Ctrs. for Disease Control & Prevention, No. 20-CV-00564, 2021 WL 742877, at *1 (E.D. Tex. Feb. 25, 2021).

390. Ala. Ass'n of Relators v. U.S. Dep't of Health & Hum. Servs., No. 20-CV-3377, 2021 U.S. Dist. LEXIS 85568, at *26 (D.D.C. May 5, 2021), *stay granted by* 2021 U.S. Dist. LEXIS 92104 (D.D.C. May 14, 2021), *and motion denied as moot*, 2021 U.S. Dist. LEXIS 152343 (D.D.C. Aug. 13, 2021).

“primarily [about] statutory construction.”³⁹¹ Regardless of the legality of the CDC Halt Order, the question was anything but narrow or arcane for the tenants affected. For them, it could be the difference between spending the night in a bed or on a bench, at home or in the hospital.

C. Giving Judges More Power than Elected Officials to Manage an Emergency

Though opinions pay homage to the idea that political branches should determine how to weather the crisis,³⁹² judges often invest more faith in their kin. Many courts analyzed whether eviction moratoriums violated landlords’ right to access the courts, and at least one said that they did.³⁹³ No reviewing court adequately considered that the judiciary shuttered courts far more expansively than anything the executive branch did.³⁹⁴ Some state high courts, such as in Texas³⁹⁵ and Michigan,³⁹⁶ directed lower courts to apply the protections of the CDC Halt Order. The Ohio Supreme Court released guidance to lower courts, recommending they consider postponing evictions as a way to minimize physical appearance at court.³⁹⁷ South Dakota authorized local courts to suspend or modify rules to address COVID.³⁹⁸ In the federal Western District of Texas,

391. *Tiger Lily, L.L.C. v. U.S. Dep’t of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 542 (W.D. Tenn. 2020).

392. *E.g., Borger Mgmt. Inc. v. Hernandez-Cruz*, No. 2020 LTB 006637, at *2 (D.C. Super. Ct. Dec. 16, 2020) (stating that “[t]he Court hopes that the legislative and executive branches of government will find ways to enable the families to keep or find affordable housing after the current public health emergency ends” while overturning an eviction ban).

393. *See supra* Section II.C.2.ii.

394. The closest anyone came was Judge Epstein in *Borger*, but even he brushed over the fact that the court system shut down for four months—which means the courts were responsible for stopping landlords from filing suit for about as long as the eviction moratorium was. *Borger*, 2020 WL 9720202, at *8.

395. Juan Pablo Garnham, *Despite Federal Moratorium, More Texas Renters Face Eviction as State Protection Lapses*, TEX. TRIB. (Apr. 2, 2021, 3:00 PM), <https://www.texastribune.org/2021/04/02/texas-eviction-moratorium/> [perma.cc/H94K-GMTQ].

396. Order 2020-17. [COVID-19] Procedure for Landlord/Tenant Cases at §§ 11–12, No. 2020-17 (Mich. Oct. 22, 2020).

397. *Guidance to Local Courts COVID-19 Public Health Emergency*, SUP. CT. OF OHIO (Mar. 30, 2020), <https://www.supremecourt.ohio.gov/coronavirus/resources/localCourtGuidance03.20.20.pdf> [perma.cc/HH2R-3RK8].

398. Order Declaring Judicial Emergency COVID-19 Disease at ¶ 2 (S.D. Mar. 13, 2020), <https://ujs.sd.gov/uploads/news/OrderDeclaringJudicialEmergency.pdf> [perma.cc/2UME-7VJ8].

Judge Mark Norris struck down the CDC's eviction moratorium,³⁹⁹ while another judge in the same district delayed all jury trials for months.⁴⁰⁰ Apparently, it was too dangerous to risk spreading disease in a courthouse but safe enough to kick tenants to the curb.

Pennsylvania's courts declared a judicial emergency and closed themselves to the public.⁴⁰¹ West Virginia's high court shut everything down for a few months.⁴⁰² Judicial shutdowns like this were the rule, not the exception. According to the National Center for State Courts, the most common approaches courts took in response to the pandemic were ending or restricting jury trials, restricting entrance into courthouses, and moving online.⁴⁰³

Jury trials are essential to let ordinary people have a hand in defining justice in their local communities. Yet the right to trial by jury was treated as a luxury. Rhode Island's Supreme Court halted all trial juries and grand juries for weeks.⁴⁰⁴ Tennessee courts canceled jury trials for months.⁴⁰⁵ Utah suspended criminal jury trials even if the defendant was confined pending trial.⁴⁰⁶ Some jurisdictions

399. *Tiger Lily, L.L.C. v. U.S. Dep't of Hous. & Urb. Dev.*, 525 F. Supp. 3d 850, 855–56 (W.D. Tenn. 2021), *aff'd*, 5 F.4th 666 (6th Cir. 2021).

400. Fourteenth Supplemental Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic at ¶ 1 (W.D. Tex. Mar. 17, 2021), <https://www.law360.com/articles/1366305/attachments/0> [perma.cc/2UME-7VJ8].

401. *In re Gen. Statewide Jud. Emergency*, 228 A.3d 1283, 1283 (Pa. 2020), *supplemented*, 228 A.3d 253 (Pa. 2020), *and supplemented*, 229 A.3d 229 (Pa. 2020).

402. Fred Pace, *Despite Federal Moratorium, Evictions Continue in Cabell County*, HERALD-DISPATCH (Apr. 11, 2021), https://www.herald-dispatch.com/news/despite-federal-moratorium-evictions-continue-in-cabell-county/article_3800de04-9d85-5227-b69f-151365749549.html [perma.cc/2UME-7VJ8].

403. *Evictions: Report & Recommendations*, SUP. CT. OF OHIO 8 (July 2020), <http://www.supremecourt.ohio.gov/Publications/JCS/evictionsReport.pdf> [perma.cc/L9KW-L8PA].

404. Executive Order No. 2020-09, *COVID-19 Pandemic Response – Continuation of Emergency Measures*, R.I. SUP. CT. at 1 (Apr. 8, 2020), <https://www.courts.ri.gov/Courts/SupremeCourt/SupremeExecOrders/20-09.pdf> [perma.cc/8RCG-FHHW].

405. Sup. Ct. of Tenn., *Order Modifying Suspension of In-person Court Proceedings & Further Extension of Deadlines*, No. ADM2020-00428, at 1 (Tenn. Apr. 24, 2020), https://www.tncourts.gov/sites/default/files/docs/sct_covid-19_order_4-24-2020_2.pdf [https://perma.cc/Q98X-J9G6].

406. Utah Sup. Ct. & Utah Jud. Council, *Administrative Order for Court Operations During Pandemic*, UTAH CTS. at 2 (Mar. 21, 2021), <https://www.utcourts.gov/alerts/docs/20200320%20-%20Pandemic%20Administrative%20Order.pdf> [perma.cc/8RCG-FHHW].

allowed grand juries to resume before jury trials.⁴⁰⁷ This led to a perverse system where the government could indict people (potentially subjecting them to pretrial confinement), but defense attorneys could not impanel a trial jury to acquit them.⁴⁰⁸

These policies were not limited to the first few hectic days of the pandemic. In July 2020, Vermont suspended civil jury trials until January 1, 2021.⁴⁰⁹ In November 2020, Wyoming's Supreme Court postponed all civil matters to an unspecified date.⁴¹⁰ Rhode Island shut down courthouses "until further notice."⁴¹¹ Yet challenges to these kinds of policies were extraordinarily rare.⁴¹² These orders were entered without any analysis of whether anyone's rights were being violated. Why not hold judges to the same standards as other government officials?

IV. CONCLUSION

The law mightily disfavors tenants. Plenty of states have cruel policies that apply to tenants but not similarly situated legal actors. Arkansas is unique among the states in criminalizing the failure to pay rent, meaning potential jail time.⁴¹³ Elsewhere in the Arkansas

407. *E.g.*, Sup. Ct. of W. Va., Administrative Order Re: *Resumption of Operations*, W. VA. JUDICIARY (May 6, 2020), <http://www.courts.wv.gov/covid19/ResumptionOfOperations-ProtocolsandMap5-6-20.pdf> [perma.cc/54JB-GGGQ].

408. Matt Taibbi, *S-t Public Defenders See: The Great Covid-19 Jury Charade*, TK NEWS (Feb. 16, 2021), <https://taibbi.substack.com/p/s-t-public-defenders-see-the-great> [perma.cc/54JB-GGGQ].

409. Vt. Sup. Ct., *Declaration of Judicial Emergency and Changes to Court Procedures*, VT. JUDICIARY at 1, https://www.vermontjudiciary.org/sites/default/files/documents/AO%2049%20-%20Declaration%20of%20Judicial%20Emergency%20and%20Changes%20to%20Court%20Procedures%20with%20amendments%20through%208-20-20_0.pdf [perma.cc/WC79-NZWR] (Aug. 20, 2020).

410. Wyoming Supreme Court, *Seventh Order Amending March 18, 2020 Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic*, WY. JUD. BRANCH (Nov. 13, 2020), <https://www.courts.state.wy.us/wp-content/uploads/2020/11/Covid19-SeventhOrder.11.13.20.pdf> [perma.cc/PVC4-6M5G].

411. Exec. Order No. 2020-09, *COVID-19 Pandemic Response – Continuation of Emergency Measures*, R.I. SUP. CT. at 1 (Apr. 8, 2020), <https://www.courts.ri.gov/Courts/SupremeCourt/SupremeExecOrders/20-09.pdf> [perma.cc/PVC4-6M5G].

412. The author was only able to locate one such case: Verified Petition for Peremptory Writ of Mandate at 2, 15, *Christensen v. Cal. Judi. Council*, No. BCV-20-101361 (Cal. Sup. Ct. June 15, 2020). Semi-relatedly, a North Carolina legal aid group sued the court system for allegedly *refusing* to follow the CDC Halt Order. Complaint for Declaratory Judgment and Injunctive Relief at 1, *Capell v. Smith*, No. 20CV012856 (N.C. Super. Ct. Nov. 9, 2020).

413. ARK. CODE ANN. § 18-16-101 (West 2021). This policy means that landlords can use taxpayer funded prosecutors to evict tenants in a civil dispute. Maya Miller & Ellis

Code, breach of contract is, at worst, punishable by a fine.⁴¹⁴ A tenant in Florida who wishes to contest an eviction must first put up all of the money that the landlord claims is owed in rent.⁴¹⁵ There is no general requirement that civil defendants in the Sunshine State hand over all of the money that plaintiffs allege is owed.⁴¹⁶ Once rent is due, Idaho residential tenants have three days to pay up or move out before an eviction can be filed; commercial tenants get seven.⁴¹⁷ Maryland charges thirty-four dollars to file a normal breach of contract claim, but only \$15 if that contract happens to be a residential lease.⁴¹⁸ In South Dakota, if the *tenant* fails to make repairs they are bound to make, the landlord can evict them, end of story.⁴¹⁹ But if the *landlord* fails to make obligated repairs, the tenant must notify them in writing, withhold rent and put it in a separate bank account, document this transaction, and release that money to the landlord if they fix it.⁴²⁰ Utah allows landlords to get triple damages against tenants who miss rent, even if they cannot afford it; for other cases, a plaintiff must show *willful* misconduct to get triple damages.⁴²¹

Eviction moratoriums represented a rare moment when policymakers placed tenants above landlords. There were several other courtroom victories for tenants during the pandemic. A federal court in New York upheld a law that forbade landlords from harassing tenants impacted by COVID-19,⁴²² and a different New

Simani, *When Falling Behind on Rent Leads to Jail Time*, PROPUBLICA (Oct. 26, 2020, 11:30 AM), <https://www.propublica.org/article/when-falling-behind-on-rent-leads-to-jail-time> [perma.cc/EH9T-VK46].

414. ARK. CODE ANN. § 2-2-420 (West 2021); § 2-2-118.

415. FLA. STAT. ANN. § 83.232(1) (West 2021).

416. Fla. R. Civ. P. 1.110(c).

417. IDAHO CODE ANN. § 6-303 (West 2021).

418. *District Court of Maryland Cost Schedule*, MD. CTS. (2017), <https://www.courts.state.md.us/sites/default/files/court-forms/district/forms/acct/dca109.pdf/dca109.pdf> [perma.cc/D9A7-CKT6].

419. S.D. CODIFIED LAW § 43-32-18 (West 2021).

420. *Id.* at § 43-32-9.

421. JUST. LAB, ON THE SAME PAGE: REINFORCING RIGHTS & PROTECTIONS FOR UTAH RENTERS 19 (Nov. 2020), https://uploads-ssl.webflow.com/5ec6f4304c427e2b15352763/603527cd1157c3aae53380e2_Justice%20Lab%20Report_On%20the%20Same%20Page.pdf [perma.cc/V4Z5-9HZ4].

422. *Melendez v. City of New York*, 503 F. Supp. 3d 13, 27–28 (S.D.N.Y. 2020).

York federal court upheld a rent stabilization law.⁴²³ Many court systems adopted their own eviction protection measures.⁴²⁴

This is not to say that courts were wholly pro-tenant. Of course, the Supreme Court ultimately shut down the CDC moratorium.⁴²⁵ In addition, *Baptiste v. Kennealy* upheld an eviction moratorium but struck down a portion of the law that required landlords to inform people they were evicting about tenants' rights groups.⁴²⁶ Some cases challenging eviction bans have been filed but not resolved.⁴²⁷ Nebraska's Supreme Court released a statement saying it lacked the power to halt evictions.⁴²⁸ Mississippi's high court rejected a petition to suspend evictions without analysis.⁴²⁹ Many local judges determined on their own that the CDC had no authority. Johnson County, Kansas magistrate Daniel Vokins said he did not think the Halt Order was enforceable a couple of weeks before it was set to expire, started evicting people early, and prejudged any future CDC eviction orders as invalid too.⁴³⁰ The judge, who resides within the 10th Federal Circuit, based his decision on an anti-CDC decision in the 6th Circuit.⁴³¹

Some anti-tenant judges spoke with unusual harshness. Arkansas Circuit Judge Holly Meyer said that a decision upholding the CDC Halt Order was an "affront to liberty."⁴³² Federal Judge Mark L. Wolf hinted that a state law preventing homelessness was akin to

423. *Cnty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 53–54 (E.D.N.Y. 2020).

424. Amended Admin. Order No. 2020-17, Mich. Sup. Ct. (Oct. 22, 2020).

425. Amended Admin. Order No. 2020-17, Mich. Sup. Ct. (July 2, 2021).

426. *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 409–10 (D. Mass. 2020).

427. *E.g., Small Commercial Landlord Fights Los Angeles County Eviction Ban: Iten v. County of Los Angeles*, PAC. L. FOUND., https://pacificlegal.org/case/la_commercial_eviction_ban/ [perma.cc/2338-YPXD] (last visited July 2, 2021) (showing that a complaint has been filed challenging Los Angeles' eviction ban, but nothing about a disposition).

428. *Statement of the Nebraska Supreme Court: Statutes Govern Eviction Hearings in Nebraska*, NEB. JUD. BRANCH (Mar. 23, 2020), <https://supremecourt.nebraska.gov/statement-nebraska-supreme-court-statutes-govern-eviction-hearings-nebraska> [perma.cc/UB9B-5ZC2].

429. *In re Administrative Order of the Supreme Court of Mississippi*, No. 2020-AD-00001-SCT (Miss. Apr. 30, 2020), <https://mjc.olemiss.edu/wp-content/uploads/sites/134/2020/04/2020-04-30-COVID-Order-Re-Residential-Evictions.pdf> [perma.cc/JN7G-BBJH].

430. Hollingsworth, *supra* note 349.

431. *Id.*

432. Max Brantley, *Arkansas Judge Declares CDC Eviction Moratorium Unconstitutional*, ARK. TIMES (Dec. 16, 2020, 5:38 PM), <https://arktimes.com/arkansas-blog/2020/12/16/arkansas-judge-declares-cdc-eviction-moratorium-unconstitutional> [perma.cc/JN7G-BBJH].

President George W. Bush's decision to hold an American citizen in incommunicado detention as part of the War on Terror and the internment of Japanese citizens during World War II.⁴³³ Countless other judges did not make splashy comments or publish opinions but booted tenants without regard to eviction moratoriums.⁴³⁴

Though the eviction moratoriums took some hits in court, and the CDC Halt Order, these policies still managed to achieve most of their purposes. If one was trying to determine how long emergency measures should last in an epidemic, one logical point would be until vaccines are widely available to the population. President Joe Biden told states to make vaccine appointments open to the general public on April 19, 2021.⁴³⁵ Allowing some time to schedule an appointment, three weeks before the second shot, and two weeks for antibodies to form, everyone who wanted a vaccine should have had one by around summer 2021—which was as long as the CDC Halt Order lasted.⁴³⁶ Most courts had not yet issued definitive rulings on the matter when vaccines became widely available, or else had declined preliminary injunction. Together, state, local, and federal policies prevented an estimated 1.55 million evictions from occurring in 2020.⁴³⁷ That is a significant step towards protecting tenants when they needed it most.

433. *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 374 (D. Mass. 2020).

434. *E.g.*, Conlin, *supra* note 331; Nova, *supra* note 39.

435. Berkeley Lovelace Jr., *Biden Moves Deadline for States to Open Covid Vaccines to All U.S. Adults to April 19*, CNBC (Apr. 6, 2021, 4:33 PM), <https://www.cnbc.com/2021/04/06/covid-vaccine-biden-to-move-deadline-for-states-to-open-shots-to-all-us-adults-to-april-19.html> [perma.cc/HP8Y-Z5LE].

436. *Id.* It should be noted, however, that the presence of vaccines did not slay the COVID dragon at once. Florida registered its highest COVID hospitalization numbers in August 2021, by way of example. Matt Dixon & Bruce Ritchie, *Florida Covid Hospitalizations Shatter Record as DeSantis Downplays Threat*, POLITICO (Aug. 2, 2021, 4:14 PM), <https://www.politico.com/states/florida/story/2021/08/02/florida-covid-hospitalizations-shatter-record-as-desantis-downplays-threat-1389356> [perma.cc/5ZKW-C4DQ].

437. Hepburn et al., *supra* note 319, at 1.

