



12-2021

Going, Going, Gone: Takings Clause Challenges to the CDC's Eviction Moratorium

Meredith Bradshaw

University of Georgia School of Law, mab90484@uga.edu

Follow this and additional works at: <https://digitalcommons.law.uga.edu/blr>



Part of the [Law and Society Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Bradshaw, Meredith (2021) "Going, Going, Gone: Takings Clause Challenges to the CDC's Eviction Moratorium," *Georgia Law Review*: Vol. 56 : Iss. 1 , Article 10.

Available at: <https://digitalcommons.law.uga.edu/blr/vol56/iss1/10>

This Note is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Georgia Law Review by an authorized editor of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact tstriepe@uga.edu.

Going, Going, Gone: Takings Clause Challenges to the CDC's Eviction Moratorium

Cover Page Footnote

* J.D. Candidate, 2022, University of Georgia School of Law; B.A. 2017, Vanderbilt University. I would like to thank Professor Randy Beck and Professor Jean Mangan for their insight and guidance on this Note. I would also like to thank my parents, Robert and Amy Bradshaw, for their continual support of my academic endeavors.

GOING, GOING, GONE: TAKINGS CLAUSE CHALLENGES TO THE CDC'S EVICTION MORATORIUM

*Meredith Bradshaw**

In September 2020, in response to the COVID-19 pandemic, the Centers for Disease Control and Prevention (CDC) and the Department of Health and Human Services issued a residential eviction moratorium to prevent the further spread of COVID-19. One year later, the U.S. Supreme Court terminated the moratorium. During the year that the moratorium was in effect, landlords across the country filed lawsuits against the CDC because they were unable to evict tenants who did not satisfy their rental obligations. Because the moratorium allowed tenants to remain on the property without paying rent, some landlords argued that the regulation effected an unconstitutional taking under the Fifth Amendment. This Note evaluates arguments that landlords could still raise under the Fifth Amendment Takings Clause and concludes that landlords will not be able to prevail with takings claims to challenge the moratorium based on current takings jurisprudence.

* J.D. Candidate, 2022, University of Georgia School of Law; B.A. 2017, Vanderbilt University. I would like to thank Professor Randy Beck and Professor Jean Mangan for their insight and guidance on this Note. I would also like to thank my parents, Robert and Amy Bradshaw, for their continual support of my academic endeavors.

TABLE OF CONTENTS

I. INTRODUCTION.....	459
II. BACKGROUND	463
A. THE COVID-19 PANDEMIC	463
B. INITIAL STATE, LEGISLATIVE, AND EXECUTIVE MEASURES TO ADDRESS THE RISK OF MASS EVICTIONS	465
C. THE CDC’S EVICTION MORATORIUM	468
III. TAKINGS CLAUSE JURISPRUDENCE & THE CDC’S MORATORIUM	474
A. PHYSICAL TAKINGS: THE MORATORIUM WAS NOT A GOVERNMENT OCCUPATION OF PROPERTY.....	476
B. REGULATORY TAKINGS.....	481
1. <i>Categorical Regulatory Takings: The Moratorium Did Not Deny Landlords of All Economically Viable Use</i>	482
2. <i>Noncategorical Regulatory Takings: The Penn Central Analysis Would Not Provide Takings Relief for Landlords</i>	484
IV. CONCLUSION	493

I. INTRODUCTION

For seven consecutive years, a mother renewed her lease at the same suburban Atlanta apartment complex.¹ To make her rental payments, which consumed half of her income, she worked two jobs while she finished her teaching degree.² Despite annual rent increases, the cost was worth it; as a single mother, she wanted her two children to be comfortable and safe.³ But when she lost her jobs at the onset of the COVID-19 pandemic, she fell behind on her rent, and the specter of eviction loomed over her family as her landlord added fees to the unpaid back rent.⁴ With no family in the Atlanta area, she would either become homeless or she would have to move back in with her family in Illinois.⁵

This story is not unique. The pandemic's major economic impacts caused many people to lose their jobs, making it harder for renters—especially low-income renters—to make timely rental payments.⁶ By August 2021, more than fifteen million people in the United States were behind on rental payments, putting them at risk of eviction.⁷

¹ This discussion is based on the real story of Yolanda Jackson. For her story, see *The Daily: Evicted During the Pandemic*, N.Y. TIMES, at 03:15 (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/podcasts/the-daily/pandemic-evictions-federal-assistance.html?>

² *Id.* at 03:36–04:04.

³ *Id.* at 02:44–03:44.

⁴ *Id.* at 05:37–06:40.

⁵ *Id.* at 06:38, 10:05.

⁶ See Kim Parker, Rachel Minkin & Jesse Bennett, *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/> (“Among lower-income adults, 46% say they have had trouble paying their bills since the pandemic started and roughly one third (32%) say it’s been hard for them to make rent or mortgage payments.”); *id.* (“25% of U.S. adults say they or someone in their household was laid off or lost their job because of the coronavirus outbreak . . .”); see also News Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., The Employment Situation—August 2021 (Sept. 3, 2021), https://www.bls.gov/news.release/archives/empsit_09032021.pdf (noting that the unemployment rate and the number of unemployed persons both remained well above their levels prior to the COVID-19 pandemic as of August 2021, almost eighteen months into the pandemic in the United States).

⁷ SAM GILMAN, JACQUELINE WOO, KATHERINE LUCAS MCKAY, ZACH NEUMANN & TIM SHAW, WITH FEDERAL MORATORIUM EXPIRING, 15 MILLION PEOPLE AT RISK OF EVICTION 1 (2021),

Evictions are lose-lose situations for both landlords and tenants: tenants lose their homes, and landlords may not earn the money they anticipated from the rental terms agreed to under the lease agreement.⁸ Still, evictions are an important tool for landlords because they gain the opportunity to rent the property to someone else. Landlords may lose some rent from an initial tenant at the time of eviction, but they can potentially mitigate that loss by gaining a new, paying tenant.⁹ Unsurprisingly, when Congress, state governments, and the Centers for Disease Control and Prevention (CDC) issued temporary residential eviction moratoria, citing public health concerns as the reason for their necessity,¹⁰ many landlords were angry because these moratoria prevented them from evicting tenants who could not make rent payments.¹¹

Despite the public health reasons behind the CDC's moratorium (the Moratorium), the CDC's order issuing the Moratorium (the Order) left many questions unresolved for landlords and tenants alike. The Order did not relieve tenants of their obligation to pay

https://www.aspeninstitute.org/wp-content/uploads/2021/07/AI-017-FSP-Report_Eviction-Report_r4.pdf.

⁸ See FRANCES C. AMENDOLA ET AL., 52A CORPUS JURIS SECUNDUM LANDLORD & TENANT § 1043, Westlaw (database updated Nov. 2021) (“In order to constitute an eviction by a landlord, the tenant must cease to retain possession of the premises and either the tenant must be dispossessed or he or she must abandon the premises because of the landlord’s acts or omissions.” (footnote omitted)); RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1 (AM. L. INST. 1977) (“[T]here is a breach of the tenant’s obligation if he fails to pay the rent reserved in the lease on or before the date the rent is due.”).

⁹ See RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.6 (AM. L. INST. 1977) (“When the landlord . . . is faced, because of the prior tenant’s improper holding over, with loss of profit or additional costs of procuring substitute premises for his contemplated use, he is under a duty to adopt that course of conduct that is reasonably available and will most effectively minimize or eliminate his loss.”).

¹⁰ See, e.g., Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020) (containing the CDC’s Moratorium, a temporary measure “to prevent the further spread of COVID-19”); *infra* notes 64–69 and accompanying text (explaining the CARES Act residential eviction moratorium and state moratoria).

¹¹ See Katy O’Donnell, *Suffering Landlords Are Washington’s New Eviction Problem*, POLITICO (Aug. 14, 2021, 7:00 AM), <https://www.politico.com/news/2021/08/14/landlords-covid-eviction-ban-504472> (“Many [landlords] are growing increasingly angry with the government’s handling of housing safeguards, as they continue to pay utilities and mortgages but face state and local bottlenecks when trying to tap into \$46.5 billion in rental aid allocated by Congress to offset losses from the eviction ban imposed last September.”).

rent,¹² so once the Moratorium expired in August 2021, the Order bound tenants to pay all accrued back rent.¹³ However, over seven million renters were behind on rent as of July 2021,¹⁴ and over four million renters had “no confidence” in their ability to make the next month’s rental payment,¹⁵ raising questions as to whether landlords will actually receive the accrued back rent. The absence of a few months’ rental income could pose further problems for landlords—especially small “mom-and-pop landlords”—who find it increasingly hard to repair their rental properties and pay their mortgages without rental income.¹⁶ The Moratorium effectively shifted the

¹² See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292 (“This Order does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract. Nothing in this Order precludes the charging or collecting of fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis . . .”).

¹³ See Emily Badger, *Why an Eviction Ban Alone Won't Prevent a Housing Crisis*, N.Y. TIMES: THE UPSHOT (Oct. 1, 2020), <https://www.nytimes.com/2020/09/03/upshot/eviction-moratorium-rent-crisis.html?searchResultPosition=20> (noting that tenants will “be on the hook for all” unpaid rent accrued before December 31, 2020); see also Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,294 (“This Order does not relieve any individual of any obligation to pay rent . . .”).

¹⁴ U.S. CENSUS BUREAU, WEEK 33 HOUSEHOLD PULSE SURVEY: JUNE 23–JULY 5, HOUSING tbl.1b (2021), <https://www.census.gov/data/tables/2021/demo/hhp/hhp33.html>. In November 2020, almost nine million renters were behind on rent. U.S. CENSUS BUREAU, WEEK 19 HOUSEHOLD PULSE SURVEY: NOVEMBER 11–NOVEMBER 23, HOUSING tbl.1b (Dec. 2, 2020), <https://www.census.gov/data/tables/2020/demo/hhp/hhp19.html#techdoc>.

¹⁵ U.S. CENSUS BUREAU, WEEK 33 HOUSEHOLD PULSE SURVEY, *supra* note 14, at HOUSING tbl.2b. In November 2020, as many as 6.3 million renters claimed that they had “no confidence” that they could make their next rent payment. U.S. CENSUS BUREAU, WEEK 19 HOUSEHOLD PULSE SURVEY, *supra* note 14, at HOUSING tbl.2b.

¹⁶ See Badger, *supra* note 13 (“Researchers warn that the strain [on landlords from the Moratorium] will build, particularly on the small mom-and-pop landlords who own a few units and count on that income for their retirement.”); NAT’L ASS’N OF HISP. REAL EST. PROS. & TERNER CTR. FOR HOUS. INNOVATION, HOW ARE SMALLER LANDLORDS WEATHERING THE COVID-19 PANDEMIC? (2020), <https://turnercenter.berkeley.edu/wp-content/uploads/pdfs/NAHREP-Terner-Center-Survey-Factsheet-July-2020.pdf> (providing statistics on small landlords and rental income from July 2020, including the fact that “57% of landlords reported that rent collections [were] down from the first quarter” of 2020, with the larger impact falling on “smaller landlords”); Complaint for Declaratory Judgement and Injunctive Relief ¶ 31, *Tiger Lily LLC v. U.S. Dep’t of Hous. & Urb. Dev.*, 525 F. Supp. 3d 850 (W.D. Tenn. 2021) (No. 2:20-cv-2692-MSN-atc), 2020 WL 5576687 ¶ 31 (“Plaintiffs rely upon the rental income received from the tenants to provide services needed by the tenants and to pay expenses such as upkeep and maintenance of the Units, applicable real estate, franchise,

costs and responsibilities to maintain the property onto the landlords while renters were temporarily alleviated of the responsibility to pay rent.¹⁷ Under ordinary circumstances, landlords would be able to evict tenants who failed to meet their rental agreement obligations, but the CDC's Moratorium placed a temporary halt on all residential eviction proceedings.¹⁸ Unable to resort to eviction proceedings, some landlords turned to litigation to challenge the validity of the Moratorium and to receive injunctive relief from the courts.¹⁹

While the Moratorium posed a number of legal questions that resulted in a flurry of litigation,²⁰ this Note will evaluate only arguments that landlords could raise to challenge the Moratorium under the Takings Clause of the Fifth Amendment. Because the Takings Clause provides that the federal government shall not take property without just compensation,²¹ landlords may argue that the government, through the Moratorium, “took” their property by permitting tenants to remain on the property without paying rent. This Note relies on current Takings Clause jurisprudence and failed eviction moratoria claims in lower courts to explain why landlords likely cannot successfully challenge the Moratorium under the Takings Clause.

and excise taxes, mortgage obligations, and to provide income and livelihood to the individual Plaintiff owners, members, shareholders, and employees.”).

¹⁷ See Badger, *supra* note 13 (noting that there will be strain on “small-scale rental properties [that are] older and [have] higher maintenance costs”).

¹⁸ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,296.

¹⁹ See, e.g., *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021) (per curiam) (describing the procedural history of a case brought by “[r]ealtor associations and rental property managers in Alabama and Georgia [who] sued to enjoin the CDC’s eviction moratorium”); *Brown v. Sec’y, U.S. Dep’t of Health & Hum. Servs.*, 4 F.4th 1220, 1224 (11th Cir. 2021) (describing the “several landlords seeking to evict their tenants for nonpayment of rent” who challenged the CDC’s eviction moratorium and moved for a preliminary injunction to block the moratorium); *Chambless Enters., LLC v. Redfield*, 508 F. Supp. 3d 101, 108 (W.D. La. 2020) (“Plaintiffs are a residential landlord and an association of residential landlords who seek to invalidate the [CDC’s] Order.”).

²⁰ See, e.g., *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490 (determining that the Order exceeded the CDC’s statutory authority); *Brown*, 4 F.4th at 1228–29 (affirming the district court’s denial of the plaintiff-landlords’ motion for a preliminary injunction to block the Moratorium).

²¹ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

Part II briefly describes the COVID-19 pandemic context relevant to this Note and then examines governmental efforts to prevent evictions during the pandemic, including both the CDC's Moratorium and challenges to state moratoria that provide important parallels to a potential federal Moratorium takings challenge. Part III evaluates Takings Clause jurisprudence to determine whether the Moratorium constituted a taking under the Fifth Amendment. Part IV concludes that landlords likely will not prevail on Takings Clause claims, pursuant to current takings jurisprudence and caselaw concerning state moratoria.

II. BACKGROUND

A. THE COVID-19 PANDEMIC

Many will undoubtedly remember the year 2020 as the beginning of the COVID-19 pandemic in the United States.²² Even as people adjusted to new health precautions like wearing masks and social distancing to curb the COVID-19 virus's spread, the virus continued to ravage the country.²³ Nationwide vaccination efforts in early 2021 helped decrease the number of COVID-19-related cases and deaths.²⁴ At the end of summer 2021, however, the Delta variant ran rampant through the country, negatively affecting

²² See Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html> (tracing the emergence and spread of the first nine months of the COVID-19 pandemic worldwide).

²³ See Bill Chappell & Rob Stein, *U.S. Hits 2 Million Coronavirus Cases As Many States See A Surge Of Patients*, NPR (June 10, 2020, 11:40 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/06/10/873473805/u-s-hits-2-million-coronavirus-cases-as-many-states-see-a-surge-of-patients> (“As states continue to loosen limits, health experts are urging people not to become complacent — to follow habits that help to slow the coronavirus, such as washing hands, maintaining a physical distance of at least 6 feet from others, and wearing a face mask when in close contact. . . . The national tally of 2 million cases includes nearly 525,000 people who have recovered from the disease. But the U.S. total represents more than 25% of the world's cases . . .”).

²⁴ See Christina Morales & Isabella Grullón Paz, *Coronavirus Cases and Deaths in the United States Drop to Lowest Levels in Nearly a Year*, N.Y. TIMES (May 23, 2021), <https://www.nytimes.com/2021/05/23/us/covid-cases-vaccinations-united-states.html> (describing decreases in COVID-19 cases and deaths in May 2021, after “[n]early 50 percent of Americans” had at least one vaccine dose).

unvaccinated populations in particular.²⁵ By fall 2021, the United States had experienced over forty million COVID-19 infections²⁶ and 700,000 COVID-19-related deaths.²⁷

The pandemic fundamentally altered many aspects of life across the country, particularly jobs.²⁸ Many people transitioned to working remotely, relying on new video technologies to stay virtually connected to other professionals.²⁹ People in fields that could not be moved to an online platform, however, especially in service industries, suffered from the reduced activity.³⁰ Consequently, as those businesses shuttered, many workers lost

²⁵ Athalia Christie et al., *Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage*, 70 MORBIDITY & MORTALITY WKLY. REP. 1044, 1044–46 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7030e2-H.pdf> (making public health recommendations in light of the Delta variant and based on differing vaccine rates in different regions of the United States to stop the uptick in COVID-19 cases during summer 2021).

²⁶ Ernie Mundell, *U.S. COVID-19 Cases Now Top 40 Million*, U.S. NEWS & WORLD REP. (Sept. 8, 2021, 8:39 AM), <https://www.usnews.com/news/health-news/articles/2021-09-08/us-covid-19-cases-now-top-40-million> (“There have now been more than 40 million cases of COVID-19 recorded among Americans . . .”).

²⁷ Shaina Ahluwalia & Lasya Priya M., *U.S. COVID-19 Death Toll Hits 700,000*, REUTERS (Oct. 2, 2021, 12:00 AM), <https://www.reuters.com/world/us/us-covid-19-death-toll-hits-700000-2021-10-01/> (“The United States surpassed 700,000 coronavirus-related deaths.”).

²⁸ *Coronavirus: How the World of Work May Change Forever*, BBC: WORKLIFE, <https://www.bbc.com/worklife/article/20201023-coronavirus-how-will-the-pandemic-change-the-way-we-work> (last visited Nov. 19, 2021) (statement of Indranil Roy, Exec. Dir., Hum. Cap. Prac., Deloitte) (“More than half of the global workforce is working remotely and as the pandemic continues to threaten health, we are looking at a prolonged period of hybrid work[] . . .”).

²⁹ See Megan Brenan, *COVID-19 and Remote Work: An Update*, GALLUP (Oct. 13, 2020), <https://news.gallup.com/poll/321800/covid-remote-work-update.aspx> (noting that 51% of people in the United States worked from home in April 2020, at the height of COVID-19 restrictions); *Coronavirus: How the World of Work May Change Forever*, *supra* note 28 (statement of Eric S. Yuan, Founder & Chief Exec. Officer, Zoom) (stating that during the pandemic “hundreds of thousands of small business owners . . . maintained and even grew businesses using video to connect with customers” and predicting that video calls will continue to be influential in business after the pandemic).

³⁰ See Alan Berube & Nicole Bateman, *Who Are the Workers Already Impacted by the COVID-19 Recession?*, BROOKINGS (Apr. 3, 2020), <https://www.brookings.edu/research/who-are-the-workers-already-impacted-by-the-covid-19-recession/> (providing information about vulnerable workers affected by the COVID-19 pandemic early in the U.S. outbreak, including restaurant, hotel, and retail store workers).

their jobs.³¹ Without this income, renters were placed in a difficult position: pay their rent or risk eviction.

B. INITIAL STATE, LEGISLATIVE, AND EXECUTIVE MEASURES TO ADDRESS THE RISK OF MASS EVICTIONS

Many states recognized the impending risk of mass evictions at the outset of the COVID-19 pandemic because significant job losses would result in many people not being able to make their monthly rental payments.³² In response, some states issued moratoria on residential evictions in an effort to reduce the number of residents who could become homeless.³³ But eviction moratoria lacked uniformity across states that implemented them.³⁴ The stringency of moratorium provisions varied by state, and most measures expired at the end of summer 2020.³⁵ As a result, tenants who no longer (or never) had protection under state moratoria could only apply for eviction protection under the federal Moratorium.³⁶

³¹ See, e.g., Matthew Haag, *40% of N.Y. Tenants May Not Pay Rent This Month. What Happens Then?*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/03/31/nyregion/coronavirus-landlords-eviction-tenants.html> (“In just a month’s time, the lives of millions of New Yorkers have been turned upside down, many of them losing their jobs and now worrying about paying their bills.”).

³² See, e.g., Cal. Exec. Order N-37-20 (Mar. 27, 2020) (“[M]any Californians are experiencing or will experience substantial losses of income as a result of business closures, the loss of hours or wages, or layoffs related to COVID-19, hindering their ability to keep up with their rent, and leaving them vulnerable to eviction . . .”).

³³ In addition to, or in lieu of, passing eviction moratoria, some states implemented programs to assist struggling renters. See Sophia Waterfield, *Eviction Moratoriums Update for Each State*, NEWSWEEK (Oct. 8, 2020, 4:10 AM), <https://www.newsweek.com/eviction-moratoriums-update-each-state-1536436> (compiling legal responses from all fifty states to provide renters with an overview of what support they could seek in their states).

³⁴ See *id.* (demonstrating the varying approaches of state moratoria measures). Some states did not issue moratoriums, meaning that renters there would be protected solely under the CDC’s Moratorium. See *id.* (noting that Arkansas, Georgia, and Nebraska were among several states without residential eviction moratoria).

³⁵ Compare Ariz. Exec. Order 2020-14 (Mar. 24, 2020) (temporarily delaying the enforcement of eviction actions), with Cal. Exec. Order N-37-20 (giving tenants an extra sixty days after being served with an eviction notice to respond to a summons through May 2020).

³⁶ See, e.g., Waterfield, *supra* note 33 (“There are no state-wide eviction protection orders currently in place in [Alabama] . . . [T]hose concerned about being evicted during the pandemic can look to the order issued by the CDC.”).

In response to state moratoria, various groups of landlords filed federal lawsuits to challenge their states' measures.³⁷ For example, in *Baptiste v. Kennealy*³⁸ the U.S. District Court for the District of Massachusetts found that the state's residential rental moratorium enacted in response to the COVID-19 pandemic likely did not violate the Takings Clause.³⁹ In its reasoning, the court highlighted that the landlords voluntarily rented to their tenants; they were not compelled by the state to do so.⁴⁰ The court also reasoned that the diminution in value of a landlord's property is insufficient to establish a taking.⁴¹ Likewise, in *Elmsford Apartment Associates v. Cuomo*⁴² and *Auracle Homes, LLC v. Lamont*,⁴³ the U.S. District Court for the Southern District of New York and U.S. District Court for the District of Connecticut each held that a taking did not occur under the states' respective residential eviction moratoria.⁴⁴ Both courts' takings analyses began with a discussion of physical takings and then continued with a discussion of regulatory takings.⁴⁵ These state moratoria cases provide the basis for analysis in Part III.⁴⁶

On the federal level, in its initial response to COVID-19 in March of 2020, Congress included a 120-day moratorium on residential evictions in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).⁴⁷ While the CARES Act provided financial relief to

³⁷ Many of these cases serve as the bases of analysis in this Note and are cited extensively in following sections. For the state moratorium challenges relied upon, see *Baptiste v. Kennealy*, 490 F. Supp. 3d 353 (D. Mass. 2020); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App'x 215 (2d Cir. 2021); and *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020).

³⁸ 490 F. Supp. 3d 353 (D. Mass. 2020).

³⁹ *Id.* at 387–90.

⁴⁰ *Id.* at 388.

⁴¹ *See id.* at 389 (“Plaintiffs have not alleged . . . any diminution in the value of their properties as a whole caused by the Moratorium.”).

⁴² 469 F. Supp. 3d 148.

⁴³ 478 F. Supp. 3d 199 (D. Conn. 2020).

⁴⁴ *Id.* at 223; *Elmsford*, 469 F. Supp. 3d at 164.

⁴⁵ *Auracle Homes*, 478 F. Supp. 3d at 220–23; *Elmsford*, 469 F. Supp. 3d at 162–68.

⁴⁶ *See infra* notes 120, 126, 168–173, 196, 208–212 and accompanying text.

⁴⁷ Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–80; *see id.* § 9058 (prohibiting a “lessor of a covered dwelling” from initiating eviction proceedings for 120 days).

landlords through loan forgiveness,⁴⁸ mortgage forbearance,⁴⁹ and a moratorium on foreclosures,⁵⁰ tenants received markedly less protection. Indeed, the CARES Act moratorium only applied to tenants who rented from qualifying landlords,⁵¹ thereby covering only 28% of renters in the United States.⁵²

Two weeks after the CARES Act moratorium ended, President Trump issued an Executive Order ostensibly to help vulnerable populations remain in their homes during the pandemic.⁵³ The Executive Order purported to address concerns about evicted individuals being left to live in shelters, join crowded family homes, or cross state lines to find shelter in the wake of the lapsed CARES Act moratorium.⁵⁴ In effect, the Executive Order did little apart from issuing vague marching orders to various agencies, asking them to evaluate whether a moratorium would be reasonably necessary without providing the specifics, timelines, guidelines, or funding needed to actualize its stated purpose.⁵⁵ More specifically, two of these agencies—the Department of Health and Human Services (HHS) and the CDC—were tasked with “consider[ing] whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19.”⁵⁶

⁴⁸ *Id.* § 9005.

⁴⁹ *Id.* § 9057.

⁵⁰ *Id.* § 9056.

⁵¹ *See id.* § 9058 (defining “covered property” as “any property that . . . participates in . . . a covered housing program . . . or rural housing voucher program” or that has a “[f]ederally backed mortgage loan” or “multifamily mortgage loan”); *see also* Sarah Schindler & Kellen Zale, *How the Law Fails Tenants (And Not Just During a Pandemic)*, 68 UCLA L. REV. DISCOURSE 146, 150 (2020) (explaining that the CARES Act only protects tenants who live in a jurisdiction that adopted a moratorium or who “rent from a qualifying landlord”).

⁵² Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,294–95 (Sept. 4, 2020).

⁵³ *See* Exec. Order No. 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020) (promising to “take all lawful measures to prevent residential evictions and foreclosures resulting from financial hardships caused by COVID-19”).

⁵⁴ *Id.* at 49,935.

⁵⁵ *See id.* at 49,936 (“The Secretary of Health and Human Services and the Director of CDC shall consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession.”).

⁵⁶ *Id.* at 49,935.

C. THE CDC'S EVICTION MORATORIUM

Shortly thereafter, and seemingly in response to President Trump's Executive Order, the HHS and CDC presented their findings in an order and set a temporary moratorium on residential evictions in place for the remainder of the 2020 calendar year "to prevent the further spread of COVID-19."⁵⁷ While the CARES Act moratorium prevented tenant evictions in limited circumstances,⁵⁸ the CDC's Moratorium was considerably broader in scope: landlords could not evict "any covered person from any residential property in any jurisdiction."⁵⁹ To apply for protection under the Moratorium, renters needed to complete and submit a declaration form to their landlords.⁶⁰ For the declaration form to effectively prevent eviction, the renters needed to indicate that they could not remit the full amount for rental payments due to financial hardship despite using "best efforts" to seek government assistance and to make partial

⁵⁷ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292.

⁵⁸ See *supra* note 51 and accompanying text.

⁵⁹ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292. A "covered person" refers to tenants, lessees, or residential property residents who provide their landlord, the property owner, or other person with a right to pursue a possessory or eviction action with a declaration form stating that

- (1) The individual has used best efforts to obtain all available government assistance for rent or housing;
- (2) The individual either (i) expects to earn no more than \$99,000 in annual income for Calendar Year 2020 (or no more than \$198,000 if filing a joint tax return), (ii) was not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;
- (3) the individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;
- (4) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses; and
- (5) eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options.

Id. at 55,293 (footnotes omitted).

⁶⁰ *Id.* at 55,292.

payments.⁶¹ People seeking coverage also needed to meet certain income requirements⁶² and state that eviction would result in homelessness or “force the individual to move into and live in close quarters in a new congregate or shared living setting” due to lack of alternative housing options.⁶³

In its Order, the CDC justified the Moratorium on the grounds that halting residential evictions would prevent the spread of COVID-19 in three ways: First, temporarily ending evictions and thereby allowing residents to remain in their rental homes would “facilitate self-isolation” of individuals who contract the virus without fear of losing their homes if they could not go to work to earn income.⁶⁴ Second, with individuals remaining in their rental homes, the Moratorium would also allow state and local governments to issue stay-at-home orders without worrying that portions of their populations would become homeless.⁶⁵ Third, a moratorium on residential evictions would keep people from moving into “congregate settings,” such as shared houses or homeless shelters, which would increase the likelihood of COVID-19 transmission.⁶⁶

In support of the Moratorium, the CDC cited two potential negative consequences of increased evictions: First, homeless shelters would face increased numbers of occupants, which could lead to an increased risk of exposure to COVID-19.⁶⁷ Second, homeless shelters could turn away individuals who have recently become homeless, and thus further the spread of the virus outside of the shelter.⁶⁸ Both of these scenarios would be detrimental to

⁶¹ *Id.* at 55,293. The person must be unable to pay rent due to “substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses.” *Id.* (footnote omitted).

⁶² The person must not make more than \$99,000 per year, or \$198,000 per year if filing a joint tax return. *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 55,294.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 55,295.

⁶⁸ *See id.* (“While outdoor settings may allow people to increase physical distance between themselves and others, they may also involve exposure to the elements and inadequate access to hygiene, sanitation facilities, health care, and therapeutics. The latter factors contribute to the further spread of COVID-19.”).

public health because they could contribute to the further spread of COVID-19.⁶⁹

Before the Moratorium expired on December 31, 2020, Congress approved a second stimulus bill that extended the Moratorium through January 31, 2021.⁷⁰ As this deadline approached, the CDC again stepped in to extend the Moratorium through March,⁷¹ then through June,⁷² and again through July.⁷³ By the end of July 2021, though, neither the CDC nor Congress stepped in to renew the Moratorium.⁷⁴ On August 3, following a surge in Delta variant cases, the CDC extended the Moratorium through October 3, 2021.⁷⁵ Unlike prior iterations, the CDC slightly limited this updated Moratorium's scope by making it only applicable "[i]n areas of substantial or high transmission" of COVID-19.⁷⁶

Meanwhile, Congress did act to provide additional emergency assistance to renters.⁷⁷ More specifically, Congress recognized that the Moratorium would not solve the problem of unpaid back rent and took steps to provide rental assistance to households that were

⁶⁹ *Id.* The CDC also noted that people experiencing homelessness often have underlying conditions that would "increase their risk of severe outcomes of COVID-19." *Id.* at 55,295–96.

⁷⁰ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078–79 (2020).

⁷¹ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020, 8021 (Feb. 3, 2021).

⁷² Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,734 (Mar. 31, 2021).

⁷³ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010, 34,013 (June 28, 2021).

⁷⁴ See David Shepardson, *U.S. Lawmakers Fail to Renew Pandemic-Related Residential Eviction Ban*, REUTERS (Aug. 2, 2021, 5:09 AM), <https://www.reuters.com/legal/government/us-house-take-up-residential-eviction-moratorium-extension-2021-07-30/> (describing the failed congressional attempt to extend the Moratorium and explaining that President Biden would not have the CDC extend it without congressional approval).

⁷⁵ Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,247 (Aug. 6, 2021).

⁷⁶ *Id.* at 43,246.

⁷⁷ For the two most significant legislative responses, see Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 501, 134 Stat. 1182, 2069–78 (2020); and American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201, 135 Stat. 4, 54–58.

unable to pay rent.⁷⁸ Under the Consolidated Appropriations Act, enacted in December 2020, Congress set aside up to \$25 billion in funding for rental assistance.⁷⁹ In May 2021, Congress passed the American Rescue Plan Act, which further allocated \$21.5 billion toward emergency rental assistance.⁸⁰

The goal of these legislative efforts, President Trump's executive order, and the CDC's Moratorium was to prevent the transmission of COVID-19, and sudden increases in transient populations across the United States with nowhere to turn would thwart this goal. At the same time, these federal legal efforts may have frustrated landlords' need to turn a profit from their rental properties.⁸¹ This is why many landlords invoked the Takings Clause when filing lawsuits to challenge the Moratorium.⁸²

For example, two separate groups of residential landlords filed claims against the CDC and HHS seeking to enjoin the enforcement of the Moratorium in *Brown v. Secretary, U.S. Department of Health & Human Services*⁸³ and *Chambless Enterprises, LLC v. Redfield*⁸⁴ respectively. In *Brown*, the Eleventh Circuit Court of Appeals affirmed the district court's denial of a preliminary injunction on the grounds that the landlords failed to show that they had suffered irreparable harm.⁸⁵ In *Chambless*, a Louisiana district court also denied the landlords' request for a preliminary injunction, stating that the landlords had not shown irreparable injury, and even if

⁷⁸ See Consolidated Appropriations Act, 2021, § 501 (providing the appropriation and procedure for tenant-based rental assistance); American Rescue Plan Act of 2021 § 3201 (providing over \$21 billion for additional emergency rental assistance).

⁷⁹ See Consolidated Appropriations Act, 2021, § 501 (detailing how the \$25 billion in emergency rental assistance would be distributed).

⁸⁰ American Rescue Plan Act of 2021 § 3201.

⁸¹ See Badger, *supra* note 13 ("Many property owners are accustomed to vacancies and occasional months without rent payments But researchers warn that the strain [of the Moratorium] will build").

⁸² See, e.g., *Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220 (11th Cir. 2021) (concerning a group of residential landlords who filed a suit against the CDC and HHS to enjoin the Moratorium); *Chambless Enters., LLC v. Redfield*, 508 F. Supp. 3d 101 (W.D. La. 2020) (concerning residential landlords who brought an action against the CDC and HHS for a preliminary injunction to enjoin the Moratorium).

⁸³ 4 F.4th 1220 (11th Cir. 2021).

⁸⁴ 508 F. Supp. 3d 101 (W.D. La. 2020).

⁸⁵ *Brown*, 4 F.4th at 1229.

they had, the balance of harms and public interest “tilt[ed] decisively in favor of the government.”⁸⁶

Another pivotal case, *Alabama Ass’n of Realtors v. Department of Health & Human Services*,⁸⁷ reached the U.S. Supreme Court. In *Alabama Ass’n*, a group of realtors sought to enjoin HHS from enforcing the Moratorium.⁸⁸ The district court granted the realtors’ motion for summary judgment on the grounds that the CDC did not have the statutory authority to issue the Moratorium,⁸⁹ but the court stayed its order pending appeal so that the CDC could continue to enforce the Moratorium.⁹⁰ Because the U.S. Court of Appeals for the District of Columbia agreed with the district court,⁹¹ the realtors then petitioned the U.S. Supreme Court, which declined to vacate the stay.⁹² In effect, the CDC could continue to enforce the Moratorium.⁹³

In the aftermath of the U.S. Supreme Court’s stay denial, the CDC extended the Moratorium without congressional authorization.⁹⁴ The realtor-plaintiffs returned to the district court, requesting that the court lift the stay from its earlier opinion, but

⁸⁶ *Chambless*, 508 F. Supp. 3d at 123.

⁸⁷ 141 S. Ct. 2485 (2021).

⁸⁸ *Id.* at 2487.

⁸⁹ See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, No. 20-cv-3377, 2021 WL 1779282, at *9 (D.D.C. May 5, 2021) (“When Congress granted a temporary extension of the eviction moratorium by enacting § 502, it acknowledged that the CDC issued its order pursuant to the Public Health Service Act. It did not, however, expressly approve of the agency’s interpretation of 42 U.S.C. § 264(a) or provide the agency with any additional statutory authority.”).

⁹⁰ See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, No. 20-cv-3377, 2021 WL 1946376, at *5 (D.D.C. May 14, 2021) (“[T]he [HHS] Department’s Emergency Motion for Stay Pending Appeal is granted.”).

⁹¹ See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646, at *4 (D.C. Cir. June 2, 2021) (“[T]he district court did not abuse its discretion in staying its order pending appeal.”).

⁹² See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320 (2021) (“The application to vacate stay . . . is denied.”).

⁹³ See *id.* at 2321 (Kavanaugh, J., concurring) (acknowledging that the Moratorium would stay in place for a few additional weeks).

⁹⁴ See *Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 43,244, 43,247 (Aug. 6, 2021) (extending the Moratorium through October 3, 2021).

the court refused, citing the U.S. Supreme Court's earlier opinion.⁹⁵ The U.S. Court of Appeals for the District of Columbia again declined to vacate the stay.⁹⁶ The case then returned to the U.S. Supreme Court, and in a per curiam decision delivered in August 2021, the Court vacated the district court's stay, holding that "[i]f a federally imposed eviction moratorium is to continue, Congress must specifically authorize it."⁹⁷ According to the Court, to allow the CDC to extend the Moratorium would exceed its authority under 42 U.S.C. § 264, the statutory basis for the Moratorium.⁹⁸ The Court's ruling thus terminated the Moratorium because the CDC, and not Congress, had extended the Moratorium through the beginning of October.⁹⁹

In light of the Court's holding, many landlords are likely to file eviction suits against nonpaying tenants.¹⁰⁰ But filing suits against their tenants might not be the answer for some landlords; even if landlords obtain favorable judgments, some landlords still may not

⁹⁵ See *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-cv-3377 (DLF), 2021 WL 3577367, at *6 (D.D.C. Aug. 13, 2021) ("[T]he Court's hands are tied. The Supreme Court did not issue a controlling opinion in this case, and circuit precedent provides that the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law." (citing *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013))).

⁹⁶ See *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 3721431, at *1 (D.C. Cir. Aug 20, 2021) (per curiam) ("[W]e likewise deny the emergency motion directed to this court.").

⁹⁷ *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam).

⁹⁸ See *id.* at 2489 ("Section 361(a) [of 42 U.S.C. 264] is a wafer-thin reed on which to rest such sweeping power."); see also *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292, 55,297 (Sept. 4, 2020) ("The authority for this Order is Section 361 of the Public Health Service Act (42 U.S.C. § 264) and 42 CFR 70.2.").

⁹⁹ See *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 ("It is up to Congress, not the CDC, to decide whether the public interest merits further action here.").

¹⁰⁰ See, e.g., Michael E. Kanell, Matt Bruce & Tyler Wilkins, *Rental Eviction Filings Rise in Metro Atlanta After Moratorium Ends*, ATLANTA J.-CONST. (Sept. 29, 2021), <https://www.ajc.com/news/georgia-news/rental-eviction-filings-rise-in-metro-atlanta-after-moratorium-ends/IS3R6DYJ2NH3XNGNUHDCCQLB4/> ("In the four weeks after the Supreme Court struck down the moratorium against evictions, landlords in the five core [Georgia] counties filed for nearly 11,000 evictions, more than in the same period last year . . .").

receive payment from their tenants.¹⁰¹ Further complicating their situation, landlords cannot file suits to enjoin the CDC or HHS regarding the enforcement of the Moratorium now that it is no longer in effect.¹⁰² Instead, they may choose to sue these agencies under a different cause of action—namely, a takings claim arguing that the Moratorium constituted the government taking their private property for the period of a year, thus requiring just compensation for the loss in rental income.¹⁰³ A takings claim can be brought under two different theories: a physical taking or a regulatory taking.¹⁰⁴ This Note examines each of these approaches in relation to the Moratorium and ultimately concludes that neither of these two theories will allow landlords to successfully recover any money lost as a result of the Moratorium.

III. TAKINGS CLAUSE JURISPRUDENCE & THE CDC'S MORATORIUM

The Takings Clause of the Fifth Amendment states that “private property [shall not] be taken for public use, without just compensation.”¹⁰⁵ The aim of the Takings Clause is “to bar [the] Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole.”¹⁰⁶ There are “two species of takings: physical takings and regulatory takings.”¹⁰⁷ The first type, physical takings, occur when the government’s action

¹⁰¹ See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (“The moratorium has put . . . millions of landlords across the country[] at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery.”).

¹⁰² See *id.* at 2489–90 (terminating the Moratorium, thereby rendering moot any future injunction claims).

¹⁰³ U.S. CONST. amend V (“[N]or shall private property be taken for public use, without just compensation.”); see *infra* Part III.

¹⁰⁴ See *Buffalo Tchrs. Fed’n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006) (distinguishing between physical and regulatory takings).

¹⁰⁵ U.S. CONST. amend. V.

¹⁰⁶ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹⁰⁷ *Buffalo Tchrs. Fed’n*, 464 F.3d at 374 (citing *Meriden Tr. & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir. 1995)). For a concise but comprehensive overview of current takings jurisprudence and the distinctions between regulatory and physical takings, see John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 738–49 (2020).

results in a physical invasion of the property.¹⁰⁸ The second type, regulatory takings, occur when a government action “amounts to unreasonable governmental restriction on the use of private land.”¹⁰⁹ A regulatory taking can “be either categorical or non-categorical.”¹¹⁰ Categorical regulatory takings deny the landlord all of the property’s economically viable use;¹¹¹ noncategorical takings involve “[a]nything less than a ‘complete elimination of value,’ or a ‘total loss.’”¹¹² Noncategorical takings are analyzed under the three factors established in the landmark case *Penn Central Transportation Co. v. City of New York*¹¹³: (1) the economic impact of the regulation, (2) whether the regulation interferes with the landlord’s reasonable investment-backed expectations, and (3) the character of the government action.¹¹⁴ The consequences of *Penn Central* have been far-reaching, as the case has provided a framework for subsequent regulatory takings cases.¹¹⁵ The following sections delve deeper into these doctrines, framed by a Takings Clause analysis of the Moratorium.

¹⁰⁸ See Christopher L. Harris & Daniel J. Lowenberg, *Kelo v. City of New London, Tulare Lake Basin Water Storage District v. United States, and Washoe County v. United States: A Fifth Amendment Takings Primer*, 36 ST. MARY’S L.J. 669, 686–87 (“A physical taking requires actual governmental occupation or invasion of private land.”); see also *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 162 (S.D.N.Y. 2020) (noting that physical takings are “a direct government appropriation or physical invasion of private property” (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005))), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App’x 215 (2d Cir. 2021).

¹⁰⁹ Harris & Lowenberg, *supra* note 108, at 691.

¹¹⁰ *Elmsford*, 469 F. Supp. 3d at 164 (citing *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 n.2 (Fed. Cir. 2008)).

¹¹¹ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 303 (2002) (explaining that a categorical taking “require[es] compensation when a regulation permanently deprives an owner of ‘all economically beneficial uses’ of his land” (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992))).

¹¹² *Id.* at 330 (quoting *Lucas*, 505 U.S. at 1019, n.8).

¹¹³ 438 U.S. 104, 124 (1978); *accord Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 221–23 (D. Conn. 2020).

¹¹⁴ *Penn Central*, 438 U.S. at 124.

¹¹⁵ See, e.g., *Tahoe-Sierra Pres. Council*, 535 U.S. at 331 (concluding that if a court determines a categorical regulatory taking does not exist, then the court should look to the factors established under *Penn Central*); *Auracle Homes*, 478 F. Supp. 3d at 221–23 (applying the *Penn Central* factors in a regulatory takings analysis).

A. PHYSICAL TAKINGS: THE MORATORIUM WAS NOT A GOVERNMENT OCCUPATION OF PROPERTY

Landlords challenging the Moratorium under a physical takings argument will likely fail because their properties were not subjected to permanent physical occupation by the government. In *Yee v. City of Escondido*,¹¹⁶ the U.S. Supreme Court established the current rule governing physical takings: “The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.”¹¹⁷ The *Yee* Court found that a local rent control ordinance did not amount to the government’s physical occupation of mobile home park owners’ property.¹¹⁸ In its reasoning, the Court emphasized the voluntary nature of the landlord-tenant rental agreement, finding that because landowners “invited” tenants onto their property through their rental agreements, the tenants were “not forced upon [landowners] by the government.”¹¹⁹

This voluntariness factor is key to analyzing a physical takings claim in a Moratorium challenge.¹²⁰ Like the local rent control ordinance in *Yee*,¹²¹ the Moratorium restricted the circumstances in which the tenant could be evicted,¹²² but it did not alter the fact that the landlord voluntarily entered into a rental agreement with the tenant.¹²³ By renting to a tenant, a “landlord voluntarily yield[s]

¹¹⁶ 503 U.S. 519 (1992).

¹¹⁷ *Id.* at 527.

¹¹⁸ *See id.* at 523, 539 (“Because the Escondido rent control ordinance [imposed on plaintiffs] does not compel a landowner to suffer the physical occupation of his property, it does not effect a *per se* taking . . .”).

¹¹⁹ *Id.* at 528.

¹²⁰ *See Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388 (D. Mass. 2020) (“This element of required acquiescence is at the heart of the concept of occupation.” (quoting *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987))). In *Baptiste*, landlords asserted a takings claim against the Massachusetts governor to challenge a state moratorium. *Id.* at 369. The takings framework used in state moratoria cases may be used in an analysis of the CDC’s Moratorium as well because the claims arose out of the U.S. Constitution’s Fifth Amendment Takings Clause.

¹²¹ *See Yee*, 503 U.S. at 524–25 (explaining how the ordinance limited landlords’ ability to raise rent and supplemented a California law that limited landlords’ ability to evict residents).

¹²² *See supra* notes 58–63 and accompanying text.

¹²³ *See Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 163 (S.D.N.Y. 2020) (“The Supreme Court has ruled that a state does not commit a physical taking when it

certain rights, notably those associated with possession.”¹²⁴ So, for the duration of the lease, the tenant is not considered a trespasser because of the landlord’s invitation to stay on the property.¹²⁵ By enacting the Moratorium, the CDC did not force tenants onto the landlords’ property.¹²⁶ Rather, prior to the Moratorium, the landlords invited their tenants to take up residence on the property through their rental agreements.¹²⁷ Thus, by renting their properties, the landlords voluntarily submitted to the tenants’ physical occupation of the land.¹²⁸ Because landlords acquiesced to having their properties occupied by tenants, landlords will be unlikely to prevail on a claim that the government physically invaded their property.

Second, for a physical taking to occur, the physical invasion need not occur over the entirety of the property; it can instead merely restrict access to some portion of the property.¹²⁹ In the seminal case *Loretto v. Teleprompter Manhattan CATV Corp.*,¹³⁰ a company installed cables on the landlord’s roof in compliance with a state law

restricts the circumstances in which tenants may be evicted.”), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App’x 215 (2d Cir. 2021). Like *Baptiste*, 490 F. Supp. 3d at 387–88, *Elmsford* involved landlords’ takings challenges to a state moratorium. 469 F. Supp. 3d at 155.

¹²⁴ Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 996.

¹²⁵ *See id.* at 997 (“[A] tenant’s presence does not constitute ‘occupation’ of property because it is, or was, by invitation.”).

¹²⁶ In response to litigation following the CARES Act moratorium and various state moratoria, several courts ruled in favor of government moratoria, citing *Yee* in support of their rulings. For example, in *Baptiste*, the U.S. District Court for the District of Massachusetts found that the state’s residential rental moratorium enacted in response to the COVID-19 pandemic likely did not violate the Takings Clause. 490 F. Supp. 3d at 387–90. In its reasoning, the court highlighted that the landowners’ renting to tenants was voluntary, rather than being compelled by the state. *Id.* at 388.

¹²⁷ *Id.* at 388 (noting that landlords “voluntarily chose to rent to their tenants prior to the Act” and that “the Moratorium did not compel plaintiffs to rent their properties”).

¹²⁸ *See Yee v. City of Escondido*, 503 U.S. 519, 531 (1992) (“Because they voluntarily open their property to occupation by others, [landlords] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.”).

¹²⁹ *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (“The [cable] installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building’s exterior wall . . . Accordingly, [this] installation is a taking.”).

¹³⁰ *Id.*

requiring landlords to permit cable companies to come onto their properties to install cables on their structures.¹³¹ The U.S. Supreme Court held that this law effected a categorical taking because the act was a physical intrusion that reached the level of a permanent physical occupation.¹³² In its reasoning, the Court emphasized that a physical occupation occurs when the government intrudes in a way that destroys a landlord's ability "to possess, use and dispose of" the property.¹³³

Based on this precedent, landlords could argue that, like the law in *Loretto*,¹³⁴ the Moratorium essentially allowed tenants to "intrude" onto their property because the landlords were not able to evict tenants when they would otherwise be entitled to do so as a result of rent nonpayment. By allowing nonpaying tenants to remain on the property, the Moratorium restricted landowners from using their property, thereby leaving their property in the hands of their tenants.¹³⁵

Still, this is not enough alone for landlords to prevail. The Moratorium is distinct from the circumstances in *Loretto* because under the Moratorium, people, rather than objects like cables, occupied the property.¹³⁶ This factual distinction means that *Loretto* does not provide certainty that the Moratorium was an unconstitutional physical taking of private property. Moreover, unlike in *Loretto*, where the Court likened the cable company to a

¹³¹ *Id.* at 421–22.

¹³² *Id.*

¹³³ *Id.* at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

¹³⁴ *Id.* at 423 ("[The law] provides that a landlord may not 'interfere with the installation of cable television facilities upon his property or premises,' and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company 'in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable.'" (second alteration in original) (quoting N.Y. Exec. Law § 828 (McKinney 1981–82) (repealed 2012))).

¹³⁵ While tenants may physically possess the property, their possession would still be considered "public use" under the Fifth Amendment because the reason for the CDC's issuance of the Moratorium was to prevent the spread and transmission of the COVID-19 virus. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020) (explaining how the residential moratorium "can be an effective public health measure").

¹³⁶ *See* Manheim, *supra* note 124, at 990 (noting that "occupation [under an indefinite eviction law] is by persons, rather than objects as in *Loretto*").

“stranger,”¹³⁷ existing tenants generally are not strangers. On the contrary, the landlord-tenant relationship is established when the property owner grants someone “the right to possess and enjoy the use of the property and the other person accepts.”¹³⁸ Because the landlord granted the tenant rights to use the property, this voluntary entry into a contractual relationship with a tenant refutes any notion of intrusion or invasion of the landlord’s property, further distinguishing a Moratorium argument from *Loretto*.

Although the physical takings argument generally fails, some facts could possibly result in a court finding that the Moratorium constituted a physical taking. In *Brown v. Azar*,¹³⁹ for example, the plaintiff-landlords sought to evict their tenants who fell behind on rent, but they were unable to do so because their tenants filed (or planned to file) declarations stating that they were covered under the Moratorium.¹⁴⁰ The landlords then brought an action against the CDC and HHS to enjoin the Moratorium.¹⁴¹ The district court in *Brown* concluded that the landlords did not sufficiently demonstrate that the Moratorium deprived them of their property.¹⁴² In its reasoning, the court emphasized that the landlords presented no evidence showing that they either resided at the property or were in danger of losing their property.¹⁴³ Therefore, the court held that the landlords did not meet the burden of showing

¹³⁷ See *Loretto*, 458 U.S. at 436 (“[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property.”).

¹³⁸ *Williams v. State*, 583 S.E.2d 172, 174 (Ga. Ct. App. 2003). Property laws are state-specific, so while this rule is limited to Georgia, other states follow similar rules. See, e.g., MICHAEL B. VINCENTI, 4 KENTUCKY FORMS & TRANSACTIONS § 27:1, Westlaw (database updated Dec. 2020) (stating the Kentucky rule that a landlord-tenant relationship occurs when “one party intends to dispossess itself of the premises and give the other party some definite control and possession of the premises pursuant to an agreement between them”); ROBERT F. DOLAN, RASCH’S LANDLORD & TENANT INCLUDING SUMMARY PROCEEDINGS § 2:1, Westlaw (5th ed. database updated June 2021) (stating the New York rule that “no particular words are necessary to constitute a lease . . . where it appears that it was the intention of one party to dispossess himself of the premises, and of the other to enter and occupy as the former himself had the right to do”).

¹³⁹ 497 F. Supp. 3d 1270 (N.D. Ga. 2020).

¹⁴⁰ *Id.* at 1275.

¹⁴¹ *Id.* at 1275–76.

¹⁴² *Id.* at 1297.

¹⁴³ *Id.*

irreparable injury¹⁴⁴ and denied the landlords' request for a preliminary injunction.¹⁴⁵ On appeal, the Eleventh Circuit affirmed the district court's decision, holding that a temporary interference with an interest in real property does not constitute irreparable injury.¹⁴⁶

Despite the conclusion in *Brown* that a taking did not occur,¹⁴⁷ the court's finding that a temporary interference does not cause irreparable injury supports the argument that a small window could be open for landlords to succeed with a physical takings claim. For example, a landlord could argue that due to a tenant's nonpayment of rent, the landlord would be unable to pay the mortgage on the property. And if the landlord defaults on mortgage payments, leading to a property foreclosure, the landlord would effectively "lose" the property due to the government's regulation, thereby strengthening a takings claim. This series of events, if they occurred, would go beyond the "temporary interference" that the *Brown* court introduced because the landlord would permanently lose the property.

Still, this series of events likely will not be common enough for frequent takings claims, especially now that the Moratorium has ended, and landlords may proceed to evict their tenants and lease their properties to new tenants.¹⁴⁸ Support to landlords available under the CARES Act makes it even less likely that landlords will

¹⁴⁴ For a court to grant injunctive relief, a plaintiff must show

(1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

Id. at 1276. (quoting *Sofarelli v. Pinellas Cnty.*, 931 F.2d 718, 723–24 (11th Cir. 1991)).

¹⁴⁵ *Id.* at 1297.

¹⁴⁶ See *Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220, 1226 (11th Cir. 2021) ("[W]e fail to see how the temporary inability to reclaim rental properties constitutes an irreparable injury.").

¹⁴⁷ *Id.*

¹⁴⁸ See Krishnadev Calamur & Chris Arnold, *The Supreme Court Will Allow Evictions to Resume. It Could Affect Millions of Tenants*, NPR: MORNING EDITION (Aug. 26, 2021, 10:29 PM), <https://www.npr.org/2021/08/26/1024668578/court-blocks-biden-cdc-evictions-moratorium> (stating that the U.S. Supreme Court blocked the Moratorium and that landlords may decide to evict their tenants).

permanently lose their property.¹⁴⁹ The CARES Act provided assistance to landlords through loan forgiveness¹⁵⁰ and forbearance of residential mortgage loan payments,¹⁵¹ which would mitigate a landlord's risk of losing a property to foreclosure, further undercutting a takings claim because the landlords could receive some compensation for their properties during the Moratorium.

Because landlords voluntarily entered into lease agreements with their tenants, and because landlords had federal assistance available to them, any physical takings claim that landlords bring will likely fail.

B. REGULATORY TAKINGS

The second type of taking is a regulatory taking, which occurs when the government acts in a regulatory capacity to “take” a landlord's property.¹⁵² Regulatory takings can be categorical or noncategorical.¹⁵³ Courts will typically begin with a categorical takings analysis to determine whether a regulation denied a landlord all economically viable use of the property.¹⁵⁴ If a court finds that the regulation did not deny the landlord of all economically viable use, it will then turn to a noncategorical takings analysis under *Penn Central Transportation Co. v. City of New York*.¹⁵⁵ The framework established in *Penn Central* guides courts through three factors to consider when the regulation takes less than all of the property's value: economic impact, interference with reasonable investment-backed expectations, and character of the

¹⁴⁹ See 15 U.S.C. §§ 9005, 9056–57 (detailing loan forgiveness up to the amount that a landlord would pay for payroll costs, payment on interest on a covered mortgage obligation, payment on a covered rent obligation, and covered utility payments; preventing servicers of federally backed mortgage loans from foreclosing on properties; and allowing borrowers of federally backed mortgage loans on multifamily properties to request forbearance).

¹⁵⁰ *Id.* § 9005.

¹⁵¹ *Id.* § 9057.

¹⁵² See *supra* note 109 and accompanying text.

¹⁵³ *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 164 (S.D.N.Y. 2020) (citing *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 n.2 (Fed. Cir. 2008)), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App'x 215 (2d Cir. 2021).

¹⁵⁴ See *supra* note 111 and accompanying text.

¹⁵⁵ 438 U.S. 104 (1978); see *supra* note 114 and accompanying text.

government action.¹⁵⁶ Based on this analysis, landlords' claims will likely fail because landlords cannot show that the economic impact of the Moratorium deprived them of all economically viable use of their property, and they cannot combat the fact that the character of the governmental action was for the public good, as explained below.

1. *Categorical Regulatory Takings: The Moratorium Did Not Deny Landlords of All Economically Viable Use.* Landlords will likely fail on regulatory takings claims because the Moratorium did not deny landlords all economically viable use of their properties. Categorical regulatory takings occur "where regulation denies *all* economically beneficial or productive use of land."¹⁵⁷ In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹⁵⁸ the Tahoe Regional Planning Agency, a bi-state agency operating in California and Nevada, issued temporary moratoria on land development for thirty-two months while the agency created a land-use plan for the area.¹⁵⁹ The U.S. Supreme Court rejected a takings claim that real estate owners raised to challenge the temporary moratoria and concluded that a taking did not occur.¹⁶⁰ To support that conclusion, the Court reasoned that a piece of property cannot be wholly valueless due to "a temporary prohibition on economic use" because the property can recover its economic value once the prohibition is lifted.¹⁶¹ Therefore, the temporary moratoria did not constitute a regulatory taking.¹⁶²

Applying this reasoning to a Moratorium challenge, once the property owners resumed collecting rent on their properties to make income, they were presumably able to recover the property's economic value, indicating that a categorical taking did not occur.¹⁶³ This temporal factor is central to the categorical regulatory takings

¹⁵⁶ *Penn Central*, 438 U.S. at 124.

¹⁵⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (emphasis added).

¹⁵⁸ 535 U.S. 302 (2002).

¹⁵⁹ *Id.* at 309–11.

¹⁶⁰ *Id.* at 337–42.

¹⁶¹ *Id.* at 332.

¹⁶² *Id.* at 337–42.

¹⁶³ See *id.* at 332 ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980))).

analysis of the Moratorium.¹⁶⁴ As Professor Karl Manheim explained, “even where a moratorium prohibits all viable *use* for a prescribed period of time, its *value* remains largely intact. This is not true, however, of government action that *permanently* takes all value”¹⁶⁵ Like the moratorium in *Tahoe-Sierra Preservation Council*,¹⁶⁶ the CDC’s Moratorium was designed to expire on a set date.¹⁶⁷ Because Congress enacted the Moratorium as a temporary measure—and because the CDC extensions were all limited—landowners would not be able to contend that their properties were wholly valueless, causing their categorical takings claims to fail.¹⁶⁸

According to court decisions in cases involving state moratoria, landlords will be able to recover any temporarily lost value in their property in two ways.¹⁶⁹ First, because the CDC’s Order does not stipulate otherwise, tenants will continue to accrue rent arrearages.¹⁷⁰ Now that the Moratorium has been lifted, landlords

¹⁶⁴ See *id.* at 342 (“[T]he duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim”).

¹⁶⁵ Karl Manheim, *Rent Control in the New Lochner Era*, 23 UCLA J. ENV’T L. & POL’Y 211, 261 (2005).

¹⁶⁶ 535 U.S. 302.

¹⁶⁷ See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020) (noting that the Moratorium would be effective through December 31, 2020). Every time the CDC extended the Moratorium, it included an end date. See *supra* notes 70–73 and accompanying text.

¹⁶⁸ See *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388–89 (D. Mass. 2020) (“As the [Massachusetts] Moratorium, and any prohibition on economically beneficial use it imposes, was when enacted only temporary, and plaintiffs do not contend the [Moratorium] has rendered their properties valueless, no categorical regulatory taking has occurred.”).

¹⁶⁹ See *id.* at 388 (emphasizing the temporary nature of the state moratorium in that it does not prevent the landlord “in perpetuity from terminating a tenancy” (quoting *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992))); *Elmsford Apartment Assocs. v. Cuomo*, 469 F. Supp. 3d 148, 164 (S.D.N.Y. 2020) (emphasizing that, due to the temporary nature of the state moratorium, landlords only experienced temporary financial setbacks that can be recovered), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App’x 215 (2d Cir. 2021).

¹⁷⁰ See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292 (including no provision that reduces or forgives tenants’ rent arrearages); see also *Elmsford*, 469 F. Supp. 3d at 164 (“[T]he Order [issuing the state moratorium] neither reduces the amount a tenant must pay their landlord for occupying the apartments, nor forgives the tenant’s rental obligations altogether, thereby allowing them to live on the landlord’s property rent free.”).

can attempt to collect this unpaid rent with interest.¹⁷¹ Second, if tenants do not remit payment for the unpaid rent, landlords now may obtain a warrant for eviction or sue their tenants for back rent without the Moratorium.¹⁷² Because landlords could continue to earn rent from other tenants, and now can recover unpaid rents because the Moratorium is no longer in effect, the CDC's action did not permanently take all value from the landlords.¹⁷³ Because the government will only compensate property owners when a taking has occurred,¹⁷⁴ which is not likely here,¹⁷⁵ landlords' eventual recovery on the economic value of their property means that they are not entitled to "just compensation"¹⁷⁶ under the Takings Clause.

2. *Noncategorical Regulatory Takings: The Penn Central Analysis Would Not Provide Takings Relief for Landlords.* Because the Moratorium does not constitute a per se categorical regulatory taking, the next step in the analysis is to look to *Penn Central Transportation Co. v. City of New York* to determine whether the Moratorium represents a noncategorical regulatory taking.¹⁷⁷ While categorical takings require courts to apply a "clear rule," noncategorical takings invoke more "complex factual assessments of the purposes and economic effects of government actions."¹⁷⁸ A noncategorical regulatory taking occurs when the regulation takes

¹⁷¹ See *Elmsford*, 469 F. Supp. 3d at 164 ("[T]he landlord will be able to collect [arrearages] with interest once the [moratorium] has expired."). In *Brown v. Azar*, however, the landlord-plaintiffs argued that their tenants' insolvency indicated that any judgment against them for unpaid back rent would be uncollectible. 497 F. Supp. 3d 1270, 1275 (N.D. Ga. 2020), *aff'd sub nom.* *Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220 (11th Cir. 2021). The court rejected this argument, emphasizing that the tenants' failure to pay their rent was not "pervasive" enough because it only extended back a few months. *Id.* at 1295.

¹⁷² See *Elmsford*, 469 F. Supp. 3d at 164 ("[L]andlords will regain their ability to evict tenants once the [moratorium] expires.").

¹⁷³ See *id.* ("[L]andlords can continue to accept rental payments from tenants not facing financial hardship . . .").

¹⁷⁴ U.S. CONST. amend. V.

¹⁷⁵ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 334 (2002) ("[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.").

¹⁷⁶ U.S. CONST. amend. V.

¹⁷⁷ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 331 ("The starting point for the court's analysis should [be] to ask whether there [is] a total taking of the entire parcel; if not, then *Penn Central* [is] the proper framework.").

¹⁷⁸ *Id.* at 323 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992)).

“[a]nything less than a ‘complete elimination of value,’ or a ‘total loss.’”¹⁷⁹ Consequently, the government’s action would be scrutinized under the noncategorical factors established in *Penn Central*.¹⁸⁰ When courts use the *Penn Central* factors, they “apply a three-part ‘ad hoc, factual inquiry’ to evaluate whether a [noncategorical] regulatory taking has occurred.”¹⁸¹ The three factors in this inquiry are “(1) what is the economic impact of the regulation; (2) whether the government action interferes with reasonable investment-backed expectations; and (3) what is the character of the government action.”¹⁸²

The first *Penn Central* factor requires courts to examine the economic impact of the regulation.¹⁸³ To evaluate economic impact, courts determine “the unit of property ‘whose value is to furnish the denominator of the fraction.’”¹⁸⁴ This concept is also known as “conceptual severance,” which, in a regulatory takings analysis, would separate “the portion of . . . property impacted by a regulation from the remaining portion that is unaffected by the challenged regulation.”¹⁸⁵ In other words, courts would compare the value of the property lost with the value of the property prior to the government action.¹⁸⁶ In *Keystone Bituminous Coal Ass’n v.*

¹⁷⁹ *Id.* at 330 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992)).

¹⁸⁰ *See id.* at 342 (“We conclude, therefore, that the interest in ‘fairness and justice’ will be best served by relying on the familiar *Penn Central* approach when deciding cases like this . . .”).

¹⁸¹ *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

¹⁸² *Id.*

¹⁸³ *See Penn Central*, 438 U.S. at 124 (identifying “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” as the first factor to consider).

¹⁸⁴ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

¹⁸⁵ Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2017 CATO SUP. CT. REV. 131, 137.

¹⁸⁶ *See Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 165 (S.D.N.Y. 2020) (“To compare the value that the property has lost with the value it held prior to the Order [issuing the state moratorium], the court must first determine the ‘unit of property whose value is to furnish the denominator of the fraction.’” (citing *Keystone*, 480 U.S. at 497)), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App’x 215 (2d Cir. 2021).

DeBenedictis,¹⁸⁷ the U.S. Supreme Court rejected a takings claim brought by a mining company challenging a Pennsylvania law that had prevented the mining company from extracting two percent of the company's underground coal.¹⁸⁸ The Court reasoned that two percent of the company's total raw materials "d[id] not constitute a separate segment of property for takings law purposes."¹⁸⁹ Rather, that fragment of property constituted part of the property as a whole.¹⁹⁰ Thus, whenever property claims are examined, the property cannot be conceptually severed by dividing it into separate parts and analyzing each part independently.¹⁹¹

Relating this concept to cases concerning the CDC's Moratorium, courts would begin analyzing a landowner's claim under the first factor, which means that courts would examine "*the parcel as a whole*,"¹⁹² instead of focusing on a set of rental units. Like the mining company that could not use two percent of coal to show economic loss in *Keystone*,¹⁹³ landlords likely cannot point to a portion of unpaid rents, nor to their inability to evict those tenants to re-rent those spaces to paying tenants, to prevail on a takings claim. Rather, landowners would need to provide evidence that the Moratorium made it "commercially impracticable" for the landowners to operate the buildings as a whole.¹⁹⁴ Although the

¹⁸⁷ 480 U.S. 470 (1987).

¹⁸⁸ *See id.* at 476–77, 502 (explaining the law and that the company's "facial attack under the Takings Clause must surely fail").

¹⁸⁹ *Id.* at 498.

¹⁹⁰ *See id.* at 497 ("[T]his Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole* . . ." (quoting *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978))).

¹⁹¹ *See id.* ("[T]he destruction of one 'strand' of the bundle [of property rights] is not a taking because the aggregate must be viewed in its entirety." (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979))). There are a few cases in which the Supreme Court found a taking based on what it viewed as a particularly egregious interference with a property right. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987) (finding a taking where Congress had limited the ability to transfer small interests in Native American land by will or intestate succession). Considering that the property right in *Hodel* concerned the conveyance of property interests, the degree of interference with a singular property fragment must be severe. *Id.* at 717.

¹⁹² *Keystone*, 480 U.S. at 497 (quoting *Penn. Central*, 438 U.S. at 130–31).

¹⁹³ *See id.* at 499 ("[I]t is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.").

¹⁹⁴ *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 165 (S.D.N.Y. 2020) ("As was true in *Keystone*, [the landlords] provide no basis for treating the subset of their rented apartments occupied by tenants facing financial hardship as a separate parcel; nor do

COVID-19 pandemic created certain economic hardships that prevented landlords from earning rents that they may have become accustomed to, this does not mean that the Moratorium equates to a government taking.¹⁹⁵

Furthermore, in evaluating the economic impact of the Massachusetts state moratorium, the U.S. District Court for the District of Massachusetts in *Baptiste v. Kennealy* looked to the U.S. Supreme Court’s view of a property’s diminution in value—it stated that the U.S. “Supreme Court has held that the ‘mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.’”¹⁹⁶ Even if landlords asserted that their property decreased in value due to the lack of rental income over the twelve-month period of the Moratorium, the diminution in value rule would prevent them from asserting a taking; decreased property value alone would not be sufficient to establish that a taking occurred.¹⁹⁷ Moreover, the temporal factor noted in Section III.B.1 becomes relevant again here: the Moratorium only temporarily prevented the landlords from evicting their tenants and collecting rent.¹⁹⁸ After the Moratorium ended, landlords could attempt to collect unpaid rents in arrears and evict tenants as they wished.¹⁹⁹ Thus, the “temporary delay in [landlords’] ability to make

they claim that [the state moratorium] makes it ‘commercially impracticable’ for them to operate their buildings as a whole—let alone every building impacted by the [state moratorium], as they must to prevail on a facial challenge.” (citing *Keystone*, 480 U.S. at 495–98), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App’x 215 (2d Cir. 2021).

¹⁹⁵ See *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 223 (D. Conn. 2020) (“Just because Plaintiffs cannot derive as much ‘profit [from their properties] . . . as . . . under a market-based system’ does not mean the loss of value equates to a taking.” (alterations in original) (quoting *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996))).

¹⁹⁶ *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 389 (D. Mass. 2020) (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993)).

¹⁹⁷ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978) (noting that courts “uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking’”).

¹⁹⁸ See *supra* notes 167–168 and accompanying text.

¹⁹⁹ See Michelle Singletary & Jonathan O’Connell, *The Eviction Moratorium Has Been Extended for Many Renters, But Not for All. Here’s What You Need to Know.*, WASH. POST (Aug. 4, 2021, 2:50 PM), <https://www.washingtonpost.com/business/2021/08/02/faq-eviction-moratorium-ending/> (“The federal eviction ban prevents courts from processing certain

economic use of their property [was] not sufficient to constitute a taking,” which holds true for both categorical and noncategorical regulatory takings analyses.²⁰⁰

Even if a court did find a potential taking, rental assistance that the federal government provided under the Consolidated Appropriations Act²⁰¹ and the American Rescue Plan Act²⁰² factors into the economic impact of the Moratorium by essentially providing the “just compensation” required under the Fifth Amendment.²⁰³ The U.S. Supreme Court explained the current rule concerning takings compensation in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.²⁰⁴ There, the Court held that if a regulation results in a taking, the government must compensate the party for the period of the regulation.²⁰⁵ Applying this rule to potential Moratorium compensation, the court might take into account whether tenants have applied for rental assistance that, if awarded, would allow the tenants to pay part or all of their rent as part of the economic impact analysis. If a landlord files a takings claim after the tenant has received rental assistance and presumably paid their landlord, the rent payments would therefore reduce the economic impact of the Moratorium on the landlord. If a tenant is not eligible for rental assistance or never applied for assistance, then the rental assistance program would not affect the economic impact of the Moratorium in connection with that tenant. Because of these potential forms of just compensation,

eviction cases but it did not cancel rent or any late fees, penalties, or interest charges. Courts in parts of the country not covered by the ban are going to begin evictions again.”).

²⁰⁰ *Baptiste*, 490 F. Supp. 3d at 389. While *Baptiste* is a federal case concerning a state moratorium, this reasoning could still apply to the CDC’s Moratorium, which likewise temporarily delayed landlords of their ability to use their property. See notes 139–145 and accompanying text.

²⁰¹ Pub. L. No. 116-260, § 501, 134 Stat. 1182, 2069–78 (2020).

²⁰² Pub. L. No. 117-2, § 3201, 135 Stat. 4, 54–58 (2021).

²⁰³ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); see also *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 321 (1987) (explaining that once a court finds that a regulation has resulted in a taking, the government must compensate the party for the period of the regulation).

²⁰⁴ 482 U.S. 304 (1987).

²⁰⁵ See *id.* at 321 (“We merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).

the Moratorium's temporary force, and remedies available to landlords, the economic impact of the regulation under the first *Penn Central* factor will likely not help landlords in a takings claim.

Next, the second *Penn Central* factor requires courts to examine landlords' investment-backed interests at the time that they purchased their respective properties.²⁰⁶ The purpose of this factor is to limit recovery to landlords who can demonstrate that they relied on current, established law when embarking on their business pursuits.²⁰⁷ This factor likely presents the most compelling argument for landlords to assert in a takings challenge.

For example, the U.S. District Court for the Southern District of New York in *Elmsford Apartment Associates LLC v. Cuomo*²⁰⁸ found that, as a result of the COVID-19 pandemic, the defendant-governor adjusted existing New York state landlord-tenant law to include its state moratorium on residential evictions.²⁰⁹ Because landlords' right to collect rent is conditioned on their compliance with relevant state landlord-tenant law, landlords should also expect to comply with any changes to those laws.²¹⁰ Consequently, landlords could have reasonably expected to comply with state law concerning rental regulations despite the unexpected circumstances of the COVID-19 pandemic.²¹¹ Thus, the landlord's investment-backed expectations supported a finding that the New York moratorium did

²⁰⁶ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (stating that "the extent to which the regulation has interfered with distinct investment-backed expectations" must be examined in relation to the economic impact of the regulation).

²⁰⁷ See *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 166 (S.D.N.Y. 2020) (stating that the purpose of the second *Penn Central* factor is "to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime" (quoting *Allen v. Cuomo*, 100 F.3d 253, 262 (2d Cir. 1996))), *appeal dismissed sub nom.* *36 Apartment Assocs., LLC v. Cuomo*, 869 F. App'x 215 (2d Cir. 2021).

²⁰⁸ *Id.*

²⁰⁹ See *id.* at 166 ("To analyze the effect of the Order on Plaintiff's expectations, this Court must acknowledge that the Governor did not act on a blank slate, but, rather, made temporary adjustments to a statutory scheme that has governed landlord-tenant relations in the state for some time.").

²¹⁰ See *id.* (indicating that landlords are not absolved from following changes to state tenant-landlord laws just because they claim that their investment-backed expectations may be affected).

²¹¹ See *id.* at 166–67 ("[L]andlords understand that the contractual right to collect rent is conditioned on compliance with a variety of state laws . . .").

not violate the landlords' rights under the Takings Clause in *Elmsford*.²¹²

Notably, the CDC's Moratorium can be distinguished from state moratoria in one key aspect: a federal agency issued the CDC's Moratorium.²¹³ From an angle of compliance with state laws, landowners would not have been able to reasonably anticipate that, in response to a pandemic, a federal agency would issue a nationwide halt on residential evictions. Because state legislatures usually determine landlord-tenant laws,²¹⁴ and many of the state moratoria that involved altering landlord-tenant laws were passed by state legislatures, landlords likely would not have expected the CDC's Moratorium.

In fact, the authority giving rise to the CDC's Order supports the notion that landlords would *not* expect the CDC to issue a halt on residential evictions.²¹⁵ The statute from which the CDC derived its authority to issue the Moratorium provides that 42 U.S.C. § 264(a) and 42 C.F.R. § 70.2—which contain the underlying support for the CDC's actions—cannot “be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States).”²¹⁶ Landlords raised this argument in earlier Moratorium challenges: based on this language, the plaintiffs in *Brown* who challenged the Moratorium argued that “the CDC is statutorily expressly deauthorized from

²¹² See *id.* at 168 (“The Order’s temporary adjustment . . . does not disrupt the landlords’ investment-backed expectations.”).

²¹³ See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020) (stating that the CDC and HHS issued the Order containing the Moratorium).

²¹⁴ See *Landlord Tenant Laws*, AM. APARTMENT OWNERS ASS’N, <https://www.american-apartment-owners-association.org/landlord-tenant-laws/> (last visited Nov. 21, 2021) (cataloguing landlord tenant laws in each of the 50 states, often based on statutes with similar language); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (“This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular . . .”).

²¹⁵ See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,297 (stating that the CDC’s Order relies on 42 U.S.C. § 264 and 42 C.F.R. § 70.2); see also 42 U.S.C. § 264(a) (authorizing the Surgeon General to enforce regulations “necessary to prevent the introduction, transmission, or spread of communicable diseases”); 42 C.F.R. § 70.2 (authorizing the CDC Director to “take such measures to prevent such spread of the diseases as he/she deems reasonably necessary”).

²¹⁶ 42 U.S.C. § 264(e).

issuing orders such as the eviction-moratorium order that would supersede state landlord-tenant law.”²¹⁷ Because a reasonable landlord could not have anticipated this series of events, including the issuance of the Moratorium, the second *Penn Central* factor concerning a landlord’s investment-backed expectations may weigh more heavily in a landlord’s favor. Nevertheless, it likely would not be enough to prevail when considered alongside the first and third factors.

Finally, the third *Penn Central* factor concerns the character of the government’s action in enacting the regulation.²¹⁸ In *Penn Central*, the U.S. Supreme Court found that a taking is less likely to occur “when interference [with property rights] arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”²¹⁹ This adjustment must be reasonable, and the promotion of the “common good” must benefit either the public welfare or the public convenience.²²⁰

Where economic benefits and burdens are concerned, the Moratorium in effect created an economic burden on landlords to the benefit of both their tenants and the greater public.²²¹ The Moratorium burdened landlords by temporarily preventing them from evicting tenants who were unable to pay rent due to the circumstances created by COVID-19.²²² On the other hand, the

²¹⁷ Complaint ¶ 80, *Brown v. Azar*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020) (No. 1:20-cv-03702-JPB), 2020 WL 5366097, ¶ 80; *see also* Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (stating in dicta that the Moratorium “intrudes into an area that is the particular domain of state law: the landlord-tenant relationship”).

²¹⁸ *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (stating that a “relevant consideration[]” is “the character of the governmental action”).

²¹⁹ *Id.*

²²⁰ *See id.* at 125 (“[I]n instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.”); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 223 (D. Conn. 2020) (reasoning that the government can regulate for the “public welfare or the public convenience” (quoting *Greater New Haven Prop. Owners Ass’n v. City of New Haven*, 951 A.2d 551, 557 (Conn. 2008))).

²²¹ *See Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 390 (D. Mass. 2020) (“The [Massachusetts moratorium] has burdened [landlords] by temporarily preventing them from removing tenants for failure to pay rent.”).

²²² *Id.*

Moratorium benefitted tenants by protecting them from evictions and also benefitted members of the public who might be at a greater risk of infection, should the tenants become homeless.²²³ Furthermore, courts deciding cases involving COVID-19-related state moratoria found that reallocating economic hardships between landlords and tenants does not violate the Takings Clause; because the Moratorium was only temporary, landlords could still recover the full sum of the rent, plus interest.²²⁴

Moreover, the Moratorium's adjustment of economic burdens and benefits was not intended for the government's use.²²⁵ Rather, the CDC enacted the Moratorium as part of its efforts to reduce the spread of COVID-19.²²⁶ Because the CDC's Order requires landlords to use their assets for the benefit of others,²²⁷ the Moratorium can be said "to promote the common good."²²⁸ Also, the Moratorium's goal of reducing the spread of COVID-19 promotes social welfare,²²⁹ making it easy for a court to find that the Moratorium was a "reasonable" effort to contain the pandemic. The public nature of the Moratorium's purpose therefore weakens the third *Penn Central* factor in a court's analysis of a landlord's takings claim.

²²³ See *id.* ("It has benefitted those tenants, who are now temporarily protected from eviction, and members of the public, who elected officials found would be at greater risk of COVID-19 infection if displaced tenants caused or contributed to the overcrowding of other dwellings and homeless shelters, or were required to live on the streets.")

²²⁴ See, e.g., *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 164 (S.D.N.Y. 2020) ("As long as the order is in place, tenants will continue to accrue arrearages, which the landlord will be able to collect with interest once the Order has expired."), *appeal dismissed sub nom.* *36 Apartment Assocs. v. Cuomo*, 860 F. App'x 215 (2d Cir. 2021); *Auracle Homes*, 478 F. Supp. 3d at 223 (explaining that the state moratorium did not relieve tenants of paying rent and instead only "defer[red] the ability of residential landlords . . . to collect" the full amount from their tenants).

²²⁵ See *Baptiste*, 490 F. Supp. 3d at 390 (finding that "the state has not 'appropriate[d] any of [plaintiffs' property] for its own use" (alterations in original) (quoting *Connolly v. Pension v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986))).

²²⁶ See *supra* note 57 and accompanying text.

²²⁷ See *Elmsford*, 469 F. Supp. 3d at 168 ("Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." (quoting *Connolly*, 475 U.S. at 223)).

²²⁸ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²²⁹ See *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020) (stating that the purpose of the Moratorium was "to prevent the further spread of COVID-19," ostensibly for the public good).

Because each takings claim turns on the specific facts of a given case, a court would evaluate all three *Penn Central* factors to determine whether a taking occurred.²³⁰ The nature of noncategorical takings allows landlords greater breadth to underscore the investment-backed expectations factor from *Penn Central*, but the other two factors will cut against landlords' takings claims. The Moratorium's temporary scope allows landlords to subsequently resume economic activities on their property, thereby lessening the economic impact under the first factor, and the Moratorium was enacted for the public welfare during the COVID-19 pandemic, thereby justifying the nature of the government's action under the third factor. Based on the limited state moratoria caselaw in which courts applied a *Penn Central* analysis and found against plaintiff-landlords in their takings claims,²³¹ it seems unlikely that a landlord could prevail on a noncategorical regulatory takings claim to challenge the CDC's Moratorium.

IV. CONCLUSION

Although the CDC's Moratorium already expired, landlords likely will continue to feel its effects for the foreseeable future.²³² Now that landlords are again free to evict their tenants and sue for unpaid back rent, landlords may discover that many former tenants will be unable to make those payments. Should landlords choose to file another set of lawsuits against the CDC and HHS, they may claim that the federal government imposed a taking on their

²³⁰ See, e.g., *Elmsford*, 469 F. Supp. 3d at 165–68 (conducting a *Penn Central* analysis of all three factors).

²³¹ See *id.* at 168 (“[S]tate governments may, in times of emergency or otherwise, reallocate economic hardships between private parties, including landlords and their tenants, without violating the Takings Clause.”); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 390 (2020) (“[T]he court finds that plaintiffs are not likely to prove that there was a non-categorical regulatory taking of their properties when the Moratorium was enacted in April 2020.”); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 223 (D. Conn. 2020) (“Because Plaintiffs fail to establish that the Executive Orders inflict ‘any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking,’ they have failed to establish a likelihood of the success on the merits of their takings claim.” (quoting *Keystone Bituminous Coal Ass’n v. Benedictis*, 480 U.S. 470, 493 (1987))).

²³² See, e.g., O’Donnell *supra* note 11 (“The Biden administration has yet to find a way to accelerate the release of federal rental aid, meaning property owners will continue to be squeezed until the eviction moratorium expires Oct. 3 or is struck down in court.”).

property, requiring that the government provide them with just compensation in return.

Courts will likely reject landlords' claims that the Moratorium violated the Takings Clause pursuant to existing takings caselaw. Analyzed under physical takings jurisprudence, courts will likely determine that the Moratorium did not rise to the level of permanent physical occupation because landlords voluntarily allowed tenants onto their property. Nor did the Moratorium constitute a categorical regulatory taking, as landlords were not denied *all* economic use of their respective properties due to the Moratorium's temporary scope. Finally, analyzed under the *Penn Central* factors for noncategorical regulatory takings, landlords' claims largely will depend upon the facts of the case, but the government likely will still prevail because the limited economic impact and benevolent government nature of the Moratorium will outweigh the landlords' claims of frustration of their investment-backed interests. Landlords, therefore, will likely be unsuccessful in raising Takings Clause arguments to challenge the Moratorium.