

TAKINGS IN THE COVID-19 WORLD: WOULD LANDLORDS HAVE A
COLORABLE CLAIM FOR “JUST COMPENSATION” UNDER THE 5TH
AMENDMENT?

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INTRODUCTION

In early 2020, the world was impacted by the spread of the coronavirus, after an outbreak originated in China in late 2019.¹ The coronavirus, which is known scientifically as “severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)” or “Covid-19” can cause an array of symptoms, from coughing and sneezing, to headache, nausea, vomiting, chest pains and respiratory problems.²

Covid-19 spreads easily among people in close contact with those infected.³ In the United States alone, there has been over 42 million cases reported, with over 600,000 deaths due to Covid-19.⁴ Due to the deadliness of the disease and the ease in which it spreads, many local, state and federal governments passed laws, entered health orders and issued executive orders to help curb the effects from Covid-19.⁵

Specifically, many health orders and executive orders focused on stopping the spread of the coronavirus by halting evictions.⁶ The two main orders issued within the United States were the Coronavirus Aid Relief and Economic Security (“CARES”) Act⁷ and the Center for Disease Control (“CDC”) moratorium.⁸

¹MAYO CLINIC, *Coronavirus Disease 2019 (COVID-19)*, <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>.

² *Id.*

³ *Id.*

⁴ The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, THE NEW YORK TIMES (September 26, 2021), <https://www.nytimes.com/interactive/2021/us/covid-cases.html>.

⁵ The Council of State Governments, *Covid-19 Resources for State Leaders*, <https://web.csg.org/covid19/executive-orders/>.

⁶ *Id.*

⁷ The Coronavirus Aid, Relief, and Economic Security Act (2020).

⁸ 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).

This article examines whether the CDC moratorium, which halted evictions of tenants affected by the Covid-19 pandemic, was a temporary taking under the 5th Amendment to the United States Constitution without just compensation to property owners.⁹

Section I will examine the CARES Act and its provisions affecting landlords, while Section II will examine the Eviction Moratorium instituted by the CDC and its impacts on landlords and tenants. Section III will examine the non-takings challenges made against the Eviction Moratorium, while Section IV will discuss Fifth Amendment Takings and the differences between regulatory takings and temporary takings. Section V will examine the CDC moratorium under the Fifth Amendment Takings law. Section VI will analyze a Fifth Amendment Takings claim after the end of the CDC moratorium and finally, Section VII will discuss whether just compensation has already been paid to landlords under the Consolidated Appropriations Act.

I. CORONAVIRUS AID RELIEF AND ECONOMIC SECURITY ACT

The Coronavirus Aid Relief and Economic Security Act (“CARES Act”) was signed into law on March 27, 2020, by then-president Donald Trump.¹⁰ The CARES Act was first introduced in the House on January 24, 2019.¹¹ The CARES Act passed the House, and proceeded to the Senate on July 18, 2019, with 419 votes for the Act and 6 votes against the Act.¹² The Senate proposed numerous amendments to the CARES Act.¹³ After including the proposed amendments to the CARES Act, the bill passed the Senate with 96

⁹ U.S. CONST. amend. V.

¹⁰ Leon LaBrecque, *The CARES Act Has Passed: Here Are The Highlights*, FORBES (Mar. 29, 2020, 7:00 AM), <https://www.forbes.com/sites/leonlabrecque/2020/03/29/the-cares-act-has-passed-here-are-the-highlights/?sh=5cc0ea8768cd>.

¹¹ H.R. 748, 116th Congress, 1st Session (2019-2020), available at <https://www.congress.gov/bill/116th-congress/house-bill/748/all-actions?overview=closed>.

¹² Clerk United States House of Representatives, *Roll Call 493 Bill Number: H.R. 748*, <https://clerk.house.gov/Votes/2019493>.

¹³ *Id.* (the Senate proposed amendments included amending the Internal Revenue Code of 1986 to “repeal the excise tax on high-cost employer-sponsored health coverage” and “providing emergency assistance and health care response for individuals, families and businesses affected by the 2020 coronavirus pandemic”. However, the proposed amendment to ensure that “additional unemployment benefits do not result in an individual receiving unemployment compensation that is more than the amount of wages the individual was earning prior to becoming unemployed”, did not pass the Senate vote).

votes.¹⁴ After some debate, the House approved the Senate amendments before presenting the CARES Act to the President for signature.¹⁵

Section 4024 of the CARES Act outlined a 120-day period, prohibiting landlords from filing an eviction action against a tenant for the nonpayment of rent, charging fees to the tenant based on the nonpayment of rent, or issuing a notice to vacate to the tenant for nonpayment of rent, for renters that participated in federal housing assistance programs or lived in a property with a federally-backed mortgage.¹⁶ The CARES Act eviction moratorium expired on July 24, 2020.¹⁷

II. CENTER FOR DISEASE CONTROL EVICTION MORATORIUM

To further assist in halting the spread of COVID-19, after the expiration of The CARES Act, the CDC issued an agency order on September 4, 2020.¹⁸ Under Section 361 of the Public Health Service Act, the CDC moratorium order temporarily paused all nationwide residential evictions through December 31, 2020.¹⁹ On December 27, 2020, President Donald Trump signed into law the Consolidated Appropriations Act 2021, which extended the CDC eviction moratorium until January 31, 2021.²⁰ On January 29, 2021, the CDC extended the eviction moratorium through March 31, 2021.²¹ The CDC extended the eviction moratorium again, beginning April 1, 2021

¹⁴ *Id.* (four senators did not participate in the vote, Lee (R-UT), Paul (R-KY), Romney (R-UT) and Thune (R-SD)).

¹⁵ *Id.* (after the debate on the Senate proposed Amendments, the House Chair took a voice vote and announced that the Cares Act had passed. However, Mr. Massie, a representative of Kentucky's 4th District, requested a recorded vote, which was refused. Mr. Massie then raised a point indicating that a quorum was not present, to which the Chair counted for a quorum and announced that a quorum was in fact present).

¹⁶ The Coronavirus Aid, Relief, and Economic Security Act (2020).

¹⁷ Sonya Acosta, Anna Bailey & Peggy Bailey, *Extend CARES Act Eviction Moratorium, Combine With Rental Assistance to Promote Housing Stability*, Center on Budget and Policy Priorities (July 27, 2020), <https://www.cbpp.org/research/housing/extend-cares-act-eviction-moratorium-combine-with-rental-assistance-to-promote>.

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

¹⁹ Public Health Service Act (2021), available at <https://www.govinfo.gov/content/pkg/COMPS-8773/pdf/COMPS-8773.pdf>.

²⁰ Consolidated Appropriations Act (2021).

²¹ CDC Newsroom, *Media Statement from CDC Director Rochelle P. Walensky, MD, MPH, on Extending the Eviction Moratorium*, Center for Disease Control and Prevention (Jan. 29, 2021), <https://www.cdc.gov/media/releases/2021/s0129-extending-eviction-moratorium.html>.

through June 30, 2021.²² On June 24, 2021, the CDC extended the eviction moratorium for thirty days, through July 31, 2021, which was intended to be the final extension.²³

The CDC eviction moratorium outlined certain “covered persons” that were protected from eviction.²⁴ The “covered persons” included any tenant or lessee of a residential property that produced a signed declaration to their landlord.²⁵ The declaration needed to include certain statements such as, (1) the tenant attempted to obtain all available government assistance to pay their rent; (2) the tenant earned less than \$99,000.00 in 2020 (less than \$198,000 if filing jointly); (3) the tenant is unable to pay the full rent due to loss of work or wages; (4) the tenant is using best efforts to make partial rental payments; and (5) eviction of the tenant would force the tenant to become homeless.²⁶

Moreover, the CDC eviction moratorium agency order did not prohibit evictions of tenants engaging in criminal activity on the leased premises, nor did it prohibit evictions based on other lease violations other than the failure to pay rent by the tenant.²⁷

The agency order was released by the CDC as a public health measure, stating that the moratorium could stop the spread of COVID-19 by: (1) facilitating self-isolation by people who contract COVID-19; (2) assist state and local governments in implementing stay at home orders; and (3) prevent people from ending up on the street or in homeless shelters, where COVID-19 is spread easier.²⁸

²² Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19, 86 Fed. Reg. 60 (March 31, 2021).

²³ CDC Newsroom, *CDC Director Extends the Eviction Moratorium for 30 Days*, Centers for Disease Control and Prevention (June 24, 2021), <https://www.cdc.gov/media/releases/2021/s0624-eviction-moratorium.html#:~:text=The%20moratorium%20that%20was%20scheduled,to%20the%20nation's%20public%20health>.

²⁴ 85 Fed. Reg., *supra* note 18.

²⁵ 85 Fed. Reg., *supra* note 18.

²⁶ 85 Fed. Reg., *supra* note 18.

²⁷ 85 Fed. Reg., *supra* note 18.

²⁸ Richard H. Seamon, *How the U.S. Constitution Connects with Covid-19*, 64-Sep ADVOC 20 (2021).

III. CHALLENGES TO THE CDC MORATORIUM

Upon issuance of the agency order by the CDC in September 2020, legal challenges to its constitutionality arose. In *Brown et al. v. Azar et al.*, filed in the Northern District Court of Georgia, plaintiffs argued for a preliminary injunction to stop the enforcement of the eviction moratorium.²⁹ Ultimately, the District Court of Georgia denied plaintiff's motion for preliminary injunction, finding that plaintiffs were not likely to succeed on the merits, and upheld the CDC eviction moratorium.³⁰

Contrastingly, the Eastern District of Ohio Court found that the CDC exceeded its statutory authority by issuing the eviction moratorium with its opinion in *Skyworks, Ltd. v. Centers for Disease Control and Prevention*.³¹ Similarly, the United States Court of Appeals for the Sixth Circuit found that the CDC exceeded its statutory authority in *Tiger Lily, LLC v. United States Department of Housing and Urban Development*.³²

Due to the confusion among the courts, the United States Supreme Court issued a ruling on August 26, 2021, concluding that the CDC did in fact exceed its authority by implementing the eviction moratorium.³³ In *Alabama Association of Realtors v. HHS*, a group of realtor associations and rental property managers in Alabama and Georgia sued to stop the CDC's moratorium initially in the U.S. District Court of the District of Columbia.³⁴ Upon the second appeal to the Supreme Court, the CDC moratorium was found to be unconstitutional. The Supreme Court reasoned that, to allow the

²⁹ 497 F.Supp.3d 1270 (11th Cir. 2020).

³⁰ *Id.* (specifically, the Eleventh Circuit Court of Appeals affirmed the district court's denial of preliminary injunction on the grounds that the landlords failed to show that they had suffered irreparable harm.).

³¹ *Skyworks, Ltd. v. Ctr. for Disease Control & Prevention*, 524 F.Supp. 3d 745 (N.D. Ohio 2021).

³² 992 F.3d 518 (6th Cir. 2021).

³³ *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (holding, "[i]f a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.>").

³⁴ *Alabama Assn. of Realtors v. United States HHS*, (U.S. Dist. 2021) (May 5, 2021) (holding that CDC lacked statutory authority to impose the moratorium, however the District Court stayed the order pending appeal. On appeal, the Supreme Court declined to vacate the stayed order with Justice Kavanaugh concurring, but explaining that he agreed with the District Court, that the CDC exceeded its statutory authority, but since the CDC planned to end the moratorium in a few weeks (at that time the moratorium was set to expire on July 31, 2021) Justice Kavanaugh concluded that the balance of equities justified leaving the stay in place).

CDC to extend the moratorium would exceed its authority under 42 U.S.C. § 264, the statutory basis for the Moratorium.³⁵

IV. FIFTH AMENDMENT TAKINGS LAW

The Fifth Amendment to the U.S. Constitution provides in part: “[N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”³⁶ The purpose of the Takings Clause is “not to keep the government from doing something improper, but to keep the government from burdening others when it does proper things.”³⁷ A takings analysis is only implicated when the acts of the government are lawful.³⁸

Many of the cases challenging the CDC eviction moratorium argued some form of deprivation of property, a taking of the landlord’s property essentially, since landlords were unable to evict their tenants occupying their property without paying rent during the prohibition period.³⁹

A. Physical Takings

A physical taking occurs where the government occupies a property or takes ownership of it.⁴⁰ This is also called a *per se* taking and thus, automatically requires compensation be paid.⁴¹ The Court found that when there is a permanent physical occupation of real property, “there is a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the

³⁵ *Ala. Ass’n of Realtors*, 141 S. Ct. 2485 (“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”).

³⁶ U.S. Const. amend. V.

³⁷ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005) (“[I]f a government action is found to be impermissible – for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.”).

³⁸ *Id.* at 543 (“[A]ny inquiry [into a regulation’s ‘underlying validity’] is logically prior to and distinct from the question whether a regulation affects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”).

³⁹ *See* cases cited *supra* notes 29-33.

⁴⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁴¹ *Id.*

owner.”⁴² Furthermore, the *Loretto* rule applies when the permanent occupation takes place on part of the relevant parcel.⁴³ Finally, *Loretto* explained that the, “permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude.”⁴⁴ It is the permanency that interferes with the property owner’s rights by preventing the property owner from possessing, using and disposing of the property completely.⁴⁵ It is this reason why the court concluded that a permanent physical occupation “is perhaps the most serious form of invasion of an owner’s property interests.”⁴⁶

A permanent physical occupation of property was again distinguished from a temporary invasion in *Arkansas Game and Fish Comm’n v. United States*.⁴⁷ The Court stated that temporary invasions [of property] are not *per se* takings, but “are subject to a more complex balancing process to determine whether they are a taking.”⁴⁸

More recently, however, the Supreme Court has ruled in *Cedar Point Nursery v. Hassid*, that, “[w]henver a regulation results in a physical appropriation of property, a *per se* taking has occurred.”⁴⁹ The *Cedar* case involved a California regulation that gave union organizers limited access to agricultural worksites, which the Supreme Court concluded amounted to a *per se* taking, by appropriating a right to invade the grower’s property.⁵⁰ Moreover, the *Cedar* court explained that a physical appropriation is a taking whether it is permanent or temporary.⁵¹ By categorizing *Cedar* as a physical

⁴² *Id.* at 434.

⁴³ *Id.*; See also, Amnon Lehavi, *Temporary Eminent Domain*, Buff. L. Rev. 683 (2021) (explaining that the physical occupation of the cable installation was only on portions of Ms. Loretto’s roof and building).

⁴⁴ *Id.* at 435.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 568 U.S. 23, 133 S. Ct. 511 (2012) (this case involved flooding of private property by the government which was deemed to be a temporary physical taking).

⁴⁸ *Id.*; See also, Amnon Lehavi, *Temporary Eminent Domain*, Buff. L. Rev. 683, 711 (2021) (outlining a different balancing test used when a regulation or temporary physical invasion by government interferes with private property).

⁴⁹ 141 S. Ct. 2063 (2021).

⁵⁰ Lee Ann Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, Duke J. Con. L. & Pub. Pol’y draft (2021) (arguing that *Cedar Point* created a new “per se” rule for any governmental grant of physical access that includes multiple exceptions to the “per se” rule that has been created, thus dubbing the case an “escape room” filled with “traps and puzzles” due to the lack of guidance in takings analysis.).

⁵¹ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

taking and not a regulatory taking, the case was analyzed under *Loretto* and not the Penn Central Factors, as outlined below, requiring automatic compensation.⁵²

In cases where there is no physical appropriation, but a regulation deprives the property owner of all economically viable use of the property, compensation is required under the Takings Clause.⁵³ In *Lucas*, the landowner originally purchased two residential lots to build homes.⁵⁴ However, after purchasing the lots, South Carolina enacted a statute which prevented the landowner from building a permanent structure on his parcels of land.⁵⁵

According to the total deprivation test found in *Lucas*, the U.S. Supreme Court held that, “a regulation that denies all economically beneficial or productive use of land will require compensation under the Takings Clause unless the regulation is consistent with background principles of nuisance and property law.”⁵⁶

Although the taking that occurred in *Lucas* is technically a regulatory taking, the Court defined the taking as “categorical” explaining that from the landowner’s point of view, “the total deprivation of beneficial use is the equivalent of a physical appropriation.”⁵⁷ However, there is ambiguity in

⁵² *Id.* (per the dissent, the California statute was not an appropriation of property but a statute which regulated the employee’s rights to exclude others. The dissent goes on to explain there are only two categories of per se takings, which is when, “the government appropriates private property for its own use.” *Horne v. Department of Agriculture*, 576 U.S. 351, 357, 135 S. Ct. 2419, 192 L.Ed.2d 388 (2015), or when the government “causes a permanent physical occupation of private property.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L.Ed.2d 876 (2005). Ultimately, the dissent closes by stating that a nonpermanent right is not an automatic, *per se* taking and thus falls within the scope of *Penn Central*).

⁵³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1029 (the Court explained that the “principle of nuisance” referred to State’s private nuisance laws, or State’s complementary power to abate nuisances that effect the public generally, such as the “destruction of real and personal property, in cases of actual necessity, to prevent the spreading of fire, or to forestall other grave threats to lives and property of others.”).

⁵⁷ *Id.* at 1019 (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking.”); *Id.* at 1027 (“Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist

what exactly this means, whether categorical takings require automatic compensation similar to a physical *per se* taking, or whether *Lucas* can be read more narrowly, only applying to one factor of the *Penn Central Test*, as defined in the next section.⁵⁸

B. Regulatory Takings

A regulatory taking requires that the government action destroy the owner's use and enjoyment of their property in full or in part.⁵⁹ The Fifth Amendment takings analysis for regulatory takings stem from *Penn Central Transportation Co. v. City of New York*.⁶⁰ In this case, the U.S. Supreme Court instituted a three-part test to determine whether a taking has occurred.⁶¹ The Court stated that:

“[W]hen a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found on a ‘complex of factors’, including: (1) the economic impact on the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.” (“Penn Central Factors”).

The Penn Central Factors apply in cases where a regulation did not deprive the property owner of “all economically viable use of the property.”⁶² The first prong of the test, economic impact, is usually measured by comparing the market value of the claimant's property “without” the restriction with the estimated value of the property “with” the restriction.⁶³

compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.”).

⁵⁸ John D. Echeverria, *What is a Physical Taking?*, 54 U.S. Davis L. Rev 731 (2020) (arguing that if *Lucas* is read narrowly, the decision does not preclude consideration of the other Penn Central Factors in evaluating “total” takings claims.).

⁵⁹ *Yuba Natural Res., Inc. v. United States*, 821 F.2d 638 (1987).

⁶⁰ 438 U.S. 104 (1978) (this case arose after Grand Central Station in New York City was deemed a “landmark” and thus the owner of the building could not construct a multi-story office building in the space above the terminal. The Supreme Court concluded that the New York regulation that established Grand Central Station as a landmark did not deny the owner the ability to exploit the property, and thus the regulation did not effect a taking in which compensation was due.).

⁶¹ *Id.* at 124.

⁶² *Id.*

⁶³ See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Pol'y 171, 180 (2005).

The Court in *Penn Central* delineated that the economic impact should be measured relative to the “parcel as whole” to determine whether a taking has occurred.⁶⁴ For example, the economic impact of a restriction barring development of an area of wetlands within a larger land parcel is calculated by reference to the entire parcel, not the wetland area alone.⁶⁵

The expectation factor of the Penn Central Test has been explained in various ways. One way is to question whether the restriction was in place when the claimant acquired the property, and therefore it can be presumed that the claimant paid the price for the property which included the restriction.⁶⁶ The Supreme Court has held that the existence of the restriction prior to the acquisition of the property is relevant, but not a determinative factor in the analysis.⁶⁷ Another consideration for the expectation prong of the Penn Central Factors, is to determine if the restrictions were “foreseeable,” either due to the fact that the claimant is operating in a “highly regulated environment” or whether the proposed property use evidently raises public concerns that a reasonable investor could anticipate a possible regulatory response?⁶⁸ Ultimately, the expectations prong reflects the notion that government routinely affects property interests, and dealing with such impacts is one price of “living in a civilized community.”⁶⁹

The character factor was described by the Penn Central Court, as “a taking [that] may more readily be found when a government action has the character of a physical invasion.”⁷⁰ The Court has further explained that the

⁶⁴ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and the nature and extent of the interference with rights in the parcel as a whole...”).

⁶⁵ *Walcek v. United States*, 303 F.3d 1349, 1356 (Fed. Cir. 2002).

⁶⁶ John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Pol’y 171, 180 (2005).

⁶⁷ *Palazzolo v. Rhode Island*, 533 U.S. 606, 627, 121 S. Ct. 2448 (2001); *id.* at 633 (O’Connor, J., concurring) (“[I]nterference with investment-backed expectations is one of a number of factors that a court must examine . . . [T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.”); *see also* Echeverria, *supra* note 58, at 183-86.

⁶⁸ Echeverria, *supra* note 63, at 184.

⁶⁹ *Andrus v. Allard*, 444 U.S. 51, 67, 100 S. Ct. 318 (1979) (“...[T]he effects of regulation on private property interests are, “within limits part of the burden borne to secure the advantage of living and doing business in a civilized community.”).

⁷⁰ *Penn. Cent.*, 438 U.S. at 124.

character factor calls for an inquiry into the purpose of the governmental action, specifically, whether it was designed to prevent public harm.⁷¹ Finally, the character factor considers whether the government action is designed to confer benefits on the taking claimant.⁷²

The Penn Central Test has been reaffirmed by the Supreme Court as the standard analysis for a regulatory taking.⁷³

C. Temporary Takings

A temporary taking is a subset of regulatory takings and is defined where a regulation is not a permanent taking of property. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Supreme Court stated, “temporary takings, which deny a landowner all use of his property, are not different from permanent takings, for which the Constitution clearly requires compensation.”⁷⁴ However, the Court went further in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* to state that, “a permanent deprivation of the owner’s use of the entire area is a taking of the ‘parcel as a whole’, whereas a temporary restriction that merely causes a diminution in value is not.”⁷⁵ Moreover, the Court stated that, “a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.”⁷⁶

Thus, under *Tahoe-Sierra*, a temporary taking will not be a “total deprivation” of property as outlined in *Lucas*, but there is a possibility that a temporary taking can be found under the Penn Central test.⁷⁷

⁷¹ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 488, 107 S. Ct. 1232 (1987) (rejecting taking claim based on a state law designed “to protect the public interest in health, the environment, and the fiscal integrity of the area”).

⁷² *Id.* at 491 (“[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.”).

⁷³ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 336, 122 S. Ct. 1465 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001)) (O’Connor, J., concurring).

⁷⁴ 482 U.S. 304 (1987).

⁷⁵ 535 U.S. 302, 122 S. Ct. 1465 (2002) (real estate owners within the Lake Tahoe Basin brought suit after a moratoria totaling 32 months was imposed preventing any development in the Lake Tahoe area. Balancing the Penn Central Factors, the Court concluded that the moratoria was temporary and thus did not effect a taking.).

⁷⁶ *Id.* at 332.

⁷⁷ *Id.* at 334.

Finally, in *Seiber v. United States*, the United States Court of Appeals for the Federal Circuit indicated that a temporary taking may arise in one of two ways.⁷⁸ The first way is, “a temporary taking occurs when what would otherwise be a permanent taking is temporally cut short.”⁷⁹ The second way a temporary taking may arise is when, “by reason of extraordinary delay in [the] governmental decision-making process.”⁸⁰ However, “mere fluctuations in value during the process of governmental decision making, absent extraordinary delay” are not subject to compensation under the Takings Clause, since these losses are considered, “incidents of ownership.”⁸¹

To determine whether landlords could challenge the CDC Moratorium under the Takings Clause of the Fifth Amendment, this Note will evaluate the CDC Moratorium as a regulatory taking, subject to the Penn Central Factors.

V. CDC EVICTION MORATORIUM AND THE TAKINGS CLAUSE

As discussed earlier, the CDC Moratorium was in place from September 4, 2020, through July 31, 2021, and prevented landlords nationwide from evicting their tenants for non-payment of rent. The U.S. Supreme Court ruled on August 26, 2021, that the CDC exceeded its authority by implementing the eviction moratorium.⁸²

However, before the eviction moratorium was finally lifted, many landlords filed suit against the CDC and the Department of Homeland Security claiming, among other things, that the eviction moratorium constituted a taking without just compensation under the Fifth Amendment.⁸³

In *Brown v. Azar*, the Northern District Court of Georgia declined to award a preliminary injunction as requested by plaintiffs, finding that

⁷⁸ 364 F.3d 1356 (Fed. Cir. 2004).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* (it has previously been decided that the length of delay is not the primary factor to be considered when determining if there has been extraordinary government delay. *Wyatt v. U.S.*, 271 F.3d 1090 (2001). Other factors include the reasons for the delay and whether there is a showing of bath faith.).

⁸² *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

⁸³ *Brown v. Azar*, 497 F.Supp.3d 1270 (11th Cir. 2020); *El Papel, LLC v. Inslee*, No. 2:20-CV-01323-RAJ-JRC, 2020 WL 8024348 (W.D. Wash. Dec. 2, 2020); *Alabama Ass’n of Realtors v. United States HHS*, No. 20-CV-3377-DLF, 2021 WL 1779282 (D.C. Cir. May 5, 2021).

landlord plaintiffs would not succeed on the merits of their case.⁸⁴ Specifically, for the claim of deprivation of residential property, the District Court found that the position that the landlord plaintiffs were in, was inapposite to the case law cited, in that landlord plaintiffs were not permanently deprived of their property, nor were landlord plaintiffs' property destroyed.⁸⁵

Therefore, the Georgia District Court concluded that the landlord plaintiffs were ultimately unlikely to succeed on any of their claims, not just the deprivation claim, and consequently denied preliminary injunction to enjoin the CDC moratorium.⁸⁶

As outlined in *Baptiste v. Kennealy*, which analyzed the CDC eviction moratorium under the Penn Central Factors, the Massachusetts District Court reasoned that the landlord plaintiffs would be unlikely to be successful on their claims for both a physical taking and a regulatory taking.⁸⁷ The court reasoned that the eviction moratorium ordered by the CDC was not a physical taking since, "the government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land."⁸⁸ The Court further reasoned that the moratorium did not "compel plaintiffs to rent their properties," and therefore a physical taking had not occurred.⁸⁹ Furthermore, the Court did not find a regulatory taking under the Penn Central Factors.⁹⁰

⁸⁴ *Brown*, 497 F.Supp.3d (holding that landlord plaintiffs did not meet their burden to clearly show an irreparable injury.).

⁸⁵ *Id.* at 1297.

⁸⁶ *Id.*

⁸⁷ 490 F.Supp.3d 353 (D. Mass. 2020).

⁸⁸ *Id.* Citing *Yee v. City of Escondido*, 503 U.S. 519 (1992) and *Loretto*, 458 U.S. at 440, 102 S. Ct. 3164 ("[S]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.").

⁸⁹ *Id.* at 388 (as in *Yee*, the District Court found that the landlord plaintiffs were not compelled by the CDC moratorium to rent their properties, rather the properties were voluntarily rented prior to the initiation of the moratorium).

⁹⁰ *Id.* at 388-89 (reasoning that because the landlord plaintiffs did not complain that their properties had been rendered valueless due to the CDC moratorium, the analysis for a takings was thus proper under the Penn Central framework and not subject to a total deprivation test as found in *Lucas*).

Under the first factor, the court found that the moratorium did not have a “significant impact on the value of plaintiffs’ property.”⁹¹ The District Court reasoned that the CDC moratorium was only temporary and thus not sufficient to constitute a taking.⁹²

Interestingly, for the second factor, the District Court in *Baptiste* found that the moratorium “significantly interfered with plaintiffs’ reasonable investment backed expectations.”⁹³ The District Court explained that even a reasonable landlord could not have predicted an event such as COVID-19 pandemic and the ensuing eviction ban.⁹⁴

Finally, for the last factor, the Court held that the character of the government action supported the conclusion that, “the moratorium is a public program adjusting the benefits and burdens of economic life to promote the common good.”⁹⁵ The District Court concluded that the public benefit of curbing the spread of COVID-19 outweighed the landlords’ burden of temporarily being prevented from removing the tenants.⁹⁶

After balancing the Penn Central factors, the District Court concluded that the landlord plaintiffs were not likely to prove a non-categorical regulatory taking of their properties due to the CDC moratorium.⁹⁷

Given that these previous cases highlight a takings analysis, while the CDC moratorium was still in effect, it is important to analyze the same contentions considering the U.S. Supreme Court’s decision in *Alabama Association of Realtors v. HHS*.

⁹¹ *Id.* (it is important to note, that at the time that *Baptiste* was decided, the CDC moratorium had only been in effect for a couple of weeks. The CDC eviction moratorium went into effect on September 4, 2020, and the *Baptiste* case was decided on September 25, 2020.).

⁹² *Id.* at 389 (citing *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004), “[d]elay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary.”).

⁹³ *Id.* at 390.

⁹⁴ *Id.* (this point has been cited as well in *S. Cal. Rental Hous. Ass’n v. Cty of San Diego*, No. 3:21cv912-L-DEB, 2021 U.S. Dist. LEXIS 139970 (S.D. Cal. 2021)).

⁹⁵ *Id.* (citing *Penn Central Transportation Co. v. The City of New York*, 438 U.S. 104 (1978)).

⁹⁶ *Id.* at 390.

⁹⁷ *Id.*

VI. TAKINGS ANALYSIS AFTER THE END OF THE MORATORIUM

To determine whether the CDC moratorium violated the Takings Clause, it is most likely that the Penn Central Factors will be utilized. It is unlikely that a potential plaintiff would prevail on a claim for a physical *per se* taking since the tenants occupying the properties were not forced upon the landlords by the government.⁹⁸ However, in the Supreme Court's recent decision in *Alabama Ass'n of Realtors v. HHS*, the Court observed that, "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership---the right to exclude."⁹⁹ An argument can be made that even though the landlord initially volunteered to have tenants occupy their properties, the moratorium forced the landlords to keep unwanted tenants in their properties, thus, denying landlords the right to exclude the tenants.¹⁰⁰

Ultimately, the Court concluded that the CDC exceeded its statutory authority under section 361 of the Public Health and Safety Act and did not render any decision regarding a Takings analysis.¹⁰¹ However, the Court

⁹⁸ *Yee v. City of Escondido*, 503 U.S. 519 (1992) (the owners of a mobile park sued challenging the city's rent control ordinance arguing that it was a physical occupation of their property. In part, the ordinance limited the landlord's ability to terminate the tenant's rent of space within the mobile park under certain circumstances. The Court held that because the ordinance did not compel the landlords to suffer a physical occupation of their property because the landlord voluntarily rented their land to mobile homeowners, the regulation did not effect a taking.).

⁹⁹ *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021); *see also* Lee Ann Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, Duke J. Con. L. & Pub. Pol'y draft (2021), (stating that the Supreme Court could be changing direction in its takings analysis as it pertains to the treatment of exclusion rights in landlord-tenant contexts since the Supreme Court cited *Loretto*, a physical takings case rather than *Yee*, which was analyzed as a use restriction.); *see also*, David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U.J.L. & Pol'y 39, 42-44 (2000) (outlining the case law that emphasizes the importance of the right to exclude).

¹⁰⁰ *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) ("The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. Despite the CDC's determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership – the right to exclude." *citing* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)).

¹⁰¹ *Id.* at 2488.

mentions that the moratorium intrudes on other areas of law, specifically state landlord-tenant relationships.¹⁰²

A distinction has been made between “a permanent physical occupation, a physical invasion short of an occupation and a regulation that merely restricts the use of property.”¹⁰³ The Federal Circuit Court of Appeals defined a physical occupation as permanent and exclusive occupation by the government that destroys the owner’s right to possession, use and disposal.¹⁰⁴ The Federal Circuit Court of Appeals went on to outline that, “... temporary limitations are subject to more complex balancing process to determine whether they are a taking.”¹⁰⁵ The rationale is evident: “[temporary limitations] do not absolutely dispossess the owner of his rights to use and exclude others from his property.”¹⁰⁶ Out of the three types, only a permanent physical occupation is a *per se* taking and subject to automatic compensation.¹⁰⁷ Therefore, since the CDC eviction moratorium did not constitute a permanent physical occupation by the government, a takings analysis under this theory is most likely foreclosed.

Yet, considering the recent decision in *Cedar* and the comments in *Alabama Ass’n of Realtors*, the Supreme Court may entertain a physical appropriation argument. The landlord’s argument would have to be that the CDC eviction moratorium appropriated the landlord’s right to exclude a non-paying tenant. Thus, making the question posed similar to the question analyzed in *Cedar*, whether the government (CDC eviction moratorium) has physically taken property for itself or someone else (the tenant), or has instead restricted a property owner’s (landlord) ability to use his own property (right to exclude)?¹⁰⁸ Nevertheless, if the Supreme Court were to entertain this argument, it would also need to re-examine *Yee*.¹⁰⁹

¹⁰² *Id.* at 2489 (“Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”).

¹⁰³ *Boise Cascade Corp. v. U.S.*, 296 F.3d 1339 (Fed. Cir. 2002).

¹⁰⁴ *Id.* at 1353.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Amnon Lehavi, *Temporary Eminent Domain*, Buff. L. Rev. 683 (2021).

¹⁰⁹ Lee Ann Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, Duke J. Con. L. & Pub. Pol’y draft (2021) (arguing that there is a possibility that the Court may revisit *Yee* in a future case and impose some limits on its holding that there was no physical occupation since the landlords in *Yee* voluntarily rented their land and that the “tenants were invited by petitioners, not forced upon them by the government.”).

It is also unlikely that a potential plaintiff would prevail on a claim for a total deprivation of property since landlords are able to file evictions against non-paying tenants with the CDC eviction moratorium lifted.¹¹⁰ Although, there may be a subset of landlords who arguably have a claim for deprivation of property: landlords whose properties were lost due to foreclosures for non-payment of the mortgage, stemming from the non-payment of rent by tenants. This subset of landlords is small due to the halt of foreclosures with federal-backed mortgages.¹¹¹ Although foreclosures were down from .36% to .16% for 2020, private lenders were able to foreclose.¹¹² Arguably, under *Lucas*, a landlord whose rental property was foreclosed on is deprived of all economically beneficial use of land due to the CDC eviction moratorium.

It is more likely that the CDC eviction moratorium is found to be a temporary regulatory taking, where a regulation did not deprive the property owner of all economically viable use of the property, and thus would be subject to the Penn Central Factors.

The regulation's economic impact is seemingly significant since landlords were deprived of evicting non-paying tenants for more than a ten-month period. Under *Seiber*, a "delay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary."¹¹³ Although the *Seiber* Court did not define what would constitute an "extraordinary delay," it is likely that a ten-month delay, in which the CDC eviction moratorium was in effect before it was lifted, does not fit into such category.¹¹⁴ In addition, besides a showing of an extraordinary delay in the regulatory process, the landlord would also need to show a diminution in value of the property by the moratorium.¹¹⁵ This may prove difficult since the Ninth Circuit has held

¹¹⁰ 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>.

¹¹¹ The Coronavirus Aid, Relief, and Economic Security Act (2020)(outlining provisions for loan forgiveness; and allowing borrowers of federally backed mortgage loans on multifamily properties to request forbearance).

¹¹² Jeff Ostrowski, *Foreclosures Fell to Record Low in 2020 – With a Huge Asterisk*, Bankrate (Jan. 22, 2021), <https://www.bankrate.com/mortgages/foreclosures-fell-to-record-low-in-2020/>.

¹¹³ *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004).

¹¹⁴ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (holding that a temporary development moratorium of up to forty months did not constitute a temporary taking); *Dufau v. United States*, 22 Cl.Ct. 156, 163 (Cl.Ct. 1990) (holding that permit delay of sixteen months did not constitute a temporary taking).

¹¹⁵ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

that, “the mere loss of some income because of regulation does not itself establish a taking.”¹¹⁶ Thus, a landlord would be unable to show an extraordinary delay caused by the CDC moratorium and would be unable to show more than a mere loss of some income due to the non-payment of rent during the time the CDC moratorium was in effect. If a landlord showed a complete loss of a rental business due to the CDC moratorium, it could weigh in favor for compensation under the economic impact prong of the Penn Central Factors.¹¹⁷ But, as noted, due to the temporary nature of the CDC moratorium, landlords eventually can recoup rental fees, tipping the economic impact prong of the Penn Central Factors away from landlords’ favor.¹¹⁸

Regarding the second factor, following the *Baptiste* court, it is most likely that the moratorium does significantly interfere with the landlord's reasonable investment backed expectations.¹¹⁹ No reasonable landlord could have foreseen that they would be unable to evict a non-paying tenant for upwards of ten months due to COVID-19. Contrastingly, other courts have stated that the apartment industry was already publicly regulated, so more regulation should have been predictable.¹²⁰ However, according to *Eviction Moratorium Litigation: What Courts Said, And What Courts Missed*, these courts misunderstand the rental market.¹²¹ Furthermore, due to the fact that a federal agency issued the CDC Moratorium, it is not likely that landlords could predict such regulation since landlord-tenant relationships are usually

¹¹⁶ *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948 (11th Cir. 2011); *See also* *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’”).

¹¹⁷ Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 William & Mary Bill of Rights Journal 1145 (2020) (arguing the larger the loss compared to the property’s “denominator,” (usually the rental property in question) the greater the likelihood of a compensable taking).

¹¹⁸ *Tahoe-Sierra Preservation Council*, at 388 (“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 Apartments Assocs. v. Cuomo*, 469 F. Supp. 3d 148, 164 (S.D.N.Y. 2020) (stating that, “due to the temporary nature of the state moratorium, landlords only experienced temporary financial setbacks that can be recovered”).

¹¹⁹ *Baptiste v. Keneally*, 490 F.Supp.3d 353 (D. Mass. 2020).

¹²⁰ *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp.3d 148, 172 (S.D.N.Y. 2020); *Heights Apartments, LLC v. Walz*, 510 F.Supp.3d 789 (D. Minn. 2020); *Auracle Homes, LLC v. Lamont*, 478 F. Supp.3d 199, 224 (D. Conn. 2020).

¹²¹ Nino C. Monea, *Eviction Moratorium Litigation: What Courts Said, And What Courts Missed*, Balt. L. Rev. (2022) (arguing that inequities exist and that evictions are not closely monitored by the government as foreclosures are, and thus are less regulated).

regulated by state laws.¹²² Due to the unpredictability of the CDC Moratorium, the second prong of the Penn Central Factors does weigh in favor of landlords.

The final factor, regarding the character of the governmental action, may be concluded to be a taking. However, pursuant to the Supreme Court in *Connolly v. Pension Ben. Guar. Corp.*, “governmental action does not constitute a taking where interference with property rights ... arises from a public program that adjusts the benefits and burdens of economic life to promote the common good.”¹²³ The CDC moratorium sought to stop the spread of COVID-19 by benefitting tenants by protecting them from evictions and subsequently benefitting the public who may have been at a higher risk of infection if the tenants were to be evicted by their landlords, thus “promoting the common good.”¹²⁴

However, this view is contrasted with that of the view in *Youngstown Sheet & Tube Co. v. Sawyer*, where the court concluded that, “even the government’s belief that its action was necessary to avert a national catastrophe, could not overcome a lack of congressional authorization.”¹²⁵ The CDC eviction moratorium was vacated on the ground that it was unlawful and thwarted governmental action interfering with property rights for the public good.¹²⁶ Due to this, it may be argued that the governmental action-the CDC eviction moratorium-was unlawful and cannot be recognized as a public program that promoted a common good, thus tipping this prong of the Penn Central Factors in favor of the landlord.

Additionally, it is necessary to highlight that a takings analysis is implicated only when the acts of the government are lawful.. Hence, “[t]aking claims are not proper vehicle by which to seek relief for impermissible interference with property rights.”¹²⁷ Pursuant to the court in *Lingle*, if a government action is found to be impermissible, such as not for the public use or is “so arbitrary as to violate due process,” then a takings analysis will

¹²² Meredith Bradshaw, *Going, Going, Gone: Takings Clause Challenges to the CDC’s Eviction Moratorium*, GA. L. Rev. 56 (2022) (arguing that state legislatures usually determine landlord-tenant law, landlords likely would not have expected the CDC’s Moratorium.).

¹²³ 475 U.S. 211, 106 S. Ct. 1018 (1986).

¹²⁴ Richard H. Seamon, *How the U.S. Constitution Connects with Covid-19*, 64-Sep ADVOC 20 (Sep. 2021).

¹²⁵ 343 U.S. 579, 72 S. Ct. 863 (1952).

¹²⁶ Ala. Ass’n of Realtors v. HHS, 141 S. Ct. 2485 (2021).

¹²⁷ *Lingle*, 544 U.S. at 543.

not be used.¹²⁸ Arguably, since the Supreme Court vacated the CDC moratorium on the ground that it was unlawful, the CDC moratorium would thus be an impermissible government interference with property rights, that would not be analyzed under a takings analysis.

Although, if the CDC moratorium is analyzed under a takings analysis, it is most likely be considered a temporary, regulatory taking subject to the Penn Central Factors. Ultimately, balancing these three factors, landlords are not likely to prove that there was a temporary taking of their properties when the CDC moratorium was enacted.

VII. HAS JUST COMPENSATION ALREADY BEEN PAID?

On December 27, 2020, President Trump signed the Consolidated Appropriations Act of 2021.¹²⁹ Within the Act, there was a portion labeled “Emergency Rental Assistance” which provided every state a minimum of \$200 million in rental assistance.¹³⁰ The funds are available to both tenants and landlords who apply and meet a minimum set of requirements.¹³¹

The landlord can apply for the assistance; however, the landlord’s tenant needs to meet the requirements outlined in the Act.¹³² If the landlord’s tenant does meet the requirements, the landlord is entitled to past months rental arrears as well as future rent in 3-month increments.¹³³ After three months, the tenant needs to verify that the tenant still meets the requirements.¹³⁴

¹²⁸ *Id.*; see also *Garcia-Rubiera v. Fortuño*, 665 F.3d 261, 277 (1st Cir. 2011) (explaining that where Plaintiffs complained of the allegedly illegitimate purpose to which the government put their funds, they were making a substantive due process argument, not a takings argument).

¹²⁹ The Consolidation Appropriation Act of 2021.

¹³⁰ Joseph Edgar, *Understanding Emergency Rental Assistance for Landlords and Tenants*, *Forbes* (Jan. 27, 2021, 7:40 AM), <https://www.forbes.com/sites/forbesrealestatecouncil/2021/01/27/understanding-emergency-rental-assistance-for-landlords-and-tenants/?sh=3e09a2597826>.

¹³¹ *Id.* (some requirements include the household income can be no more than 80% upper limit, applicants must prove that someone in the household has been directly or indirectly affected by Covid-19, and the applicant must re-apply for assistance every three months).

¹³² See *supra* note 129.

¹³³ *Supra* note 129.

¹³⁴ *Supra* note 130. (“An applicant can utilize the program to pay rent in arrears and potentially future rent totaling a maximum of 15 months, however State and local governments have a limited amount of time to dispense the funds or lose them altogether.”).

Although rental assistance has been allocated to the states by the federal government, states have been slow to distribute the funds.¹³⁵ As of July 31, 2021, only \$4.7 billion out of \$46.6 billion has been distributed.¹³⁶

Although the funds are slow moving, the potential for landlords to be compensated for the months of unpaid rent by tenants due to the CDC eviction moratorium is arguably compensation for the temporary halt on the landlords' right to exclude, although the rental assistance would not technically be classified as such. Just compensation cannot be paid, until a court determines that a claimant has proven a taking has occurred thus allowing for just compensation.¹³⁷

The Supreme Court has indicated that the purpose of paying just compensation is to make the takee "whole"¹³⁸, and this will usually be accomplished by paying fair market value.¹³⁹ Nevertheless, there are some instances where the fair market value will not make the takee "whole".¹⁴⁰ Based on this reasoning, it could be argued that the rental assistance allocated by the Consolidated Appropriations Act of 2021 attempts to place landlords back in a position, had they been able to evict non-paying tenants and collect rent from paying tenants, essentially attempting to make the landlords (the takee) "whole."

¹³⁵ Andrew Ackerman & Will Parker, *Only a Fraction of Covid-19 Rental Assistance Has Been Distributed*, The Wall Street Journal (Aug. 25, 2021, 9:00 AM), <https://www.wsj.com/articles/covid-19-rental-assistance-distribution-continues-at-slow-pace-11629896401>.

¹³⁶ *Id.*

¹³⁷ *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) (stating "property owners do not have justiciable takings claims until they are denied just compensation in state proceedings." and "... no constitutional violation occurs until just compensation has been denied."); *see also*, Stuart Minor Benjamin, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 Yale L.J. 2667 (1990-1991) (stating that "property owners must perfect their takings claims by pursuing them in state court before entering federal court.").

¹³⁸ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

¹³⁹ *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 81 (1913).

¹⁴⁰ Christopher Serkin, *The Meaning of Value: Assessing Just Compensation For Regulatory Takings*, 99 NW. U. L. Rev. 677, 683 n.24 (2005) ("Fair market value does not apply where it would be too difficult to measure or where manifest injustice would result."); *see also*, Amnon Lehari, *Temporary Eminent Domain*, 69 BFLR 683 (2021) (explaining that a different measure of compensation is due for temporary physical takings such as the "fair rental value" which includes some consequential damages that the property owner may face, such as reasonable cost of moving out of the property, costs associated with preparing the space and depreciation in value.)

Alternatively, due to the guidelines to receive rental assistance, the Consolidated Appropriations Act of 2021 will not cover all the landlords who were unable to evict non-paying tenants, especially if the tenant did not apply, or fit the requirements.¹⁴¹ It could also be argued that landlords have a viable remedy to collect unpaid rent from their tenants without being compensated by the government, through the court system via a lawsuit. Conversely, even after obtaining a judgment it could prove difficult to collect money from tenants who do not have the funds.¹⁴²

Therefore, while the Emergency Rental Assistance allocated by the Consolidated Appropriation Act of 2021 has possibly made some landlords “whole”, for the vast majority this is not the case, and would not be seen as any type of compensation, let alone “just” for the months the CDC moratorium was in effect.

VIII. CONCLUSION

Many landlords were burdened by the CDC eviction moratorium, due to the inability to exclude non-paying tenants from their properties. Landlords continue to be burdened with the ongoing efforts to evict their non-paying tenants even after the CDC moratorium was declared unconstitutional on August 26, 2021. Coupled with the lack of funds being distributed from the Emergency Rental Assistance program, landlords are financially devastated by the effects of the CDC moratorium.

Unfortunately, due to the temporary nature of the moratorium, landlords are unable to show a taking based on Fifth Amendment takings jurisprudence. Without a showing of a permanent physical occupation or a total deprivation of economic use, landlords are without an avenue to receive just compensation for bearing the burden of the Covid-19 pandemic through a Fifth Amendment takings claim.

¹⁴¹ Chris Arnold, *They Didn't Pay Rent and Stole the Fridge. Pandemic Spawns Nightmare Tenants*, NPR, October 22, 2021, 5:08 AM, <https://www.npr.org/2021/10/22/1046154251/they-refused-to-pay-rent-and-stole-the-fridge-landlords-deal-with-pandemic-squat> (this article outlines a couple's struggle to receive rental assistance after their tenants stop paying the rent due to Covid-19 pandemic. Due to the failure of the tenants to participate, the landlords were unable to receive any funds from the Consolidate Appropriation Action of 2021.).

¹⁴² Nino C. Monea, *Eviction Moratorium Litigation: What Courts Said, And What Courts Missed*, Balt. L. Rev. (2022).