PUTTING A MORATORIUM ON MORATORIA: AVOIDING AN UNLAWFUL REGULATORY TAKING WHILE PRESERVING SAFE RENTAL HOUSING DURING A NATIONAL CRISIS

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I. INTRODUCTION

The COVID-19 pandemic had incredibly harmful implications on health and safety across the United States and the world. These harms, however, extended beyond the physical, mental, and emotional realms and into the economic wellbeing of wage-earning Americans. Government shutdowns and increased health measures caused many American citizens to lose their jobs, and, in turn, left many Americans unable to pay their rent. The federal government responded through an eviction moratorium ordered by the Centers for Disease Control ("CDC") that halted the eviction of residential tenants for nonpayment of rent.[1] While the order was extended multiple times, with the final extension set to expire on October 3, 2021, the Supreme Court rendered a final decision blocking the CDC's moratorium on August 26, 2021, in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, resulting in a premature stop to the moratorium on the same day.[2]

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1. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55292 (Sept. 4, 2020).

2. *See generally* 141 S. Ct. 2485 (2021) (per curiam). This ruling on the CDC's eviction moratorium only applies to the federal moratorium—various states' local moratoria will not be invalidated solely because of this order.

While the Court's decision seemed to be the final say on the matter, there are still many unanswered questions left by the Court's rather brief opinion deciding on a narrow issue. One thought-provoking point made toward the end of the per curiam opinion states 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."[3] Despite this straightforward point, the Court cited to *Loretto v. Teleprompter Manhattan CATV Corp.*, a landmark case regarding a regulatory taking by the government.[4] While the Court was merely alluding to dicta regarding the right to exclude in *Loretto*, it also seemed to open the door for a regulatory taking argument, stemming from the Fifth Amendment's Takings Clause.[5] This could have potentially explosive implications for future moratoria, particularly since *Alabama Ass'n of Realtors* only held that the executive branch cannot impose this kind of regulation via an agency, but specifically provided that this moratorium could continue if Congress authorized it.[6]

This Article explores a regulatory takings argument for future potential future moratoria that the Court declined to consider regarding the CDC's eviction moratorium. Part II of this Article reviews the background of the CDC's eviction moratorium, the ensuing litigation around the moratorium and the Supreme Court's decision halting it, and the door left open by the Court for a regulatory takings argument against future moratoria. Part III examines the Fifth Amendment's Takings Clause and explains how jurisprudence has created different categories of regulatory takings. Part IV analyzes how each type of regulatory taking would apply to a potential residential eviction moratorium in the event of a future national crisis. The analysis in Part IV demonstrates that if an eviction moratorium similar to the CDC's were to be passed by Congress, an unconstitutional regulatory taking will likely be found, particularly a per se physical invasion taking in light of the

3. *Id.* at 2489. This echoes the Court's balancing of equities portion of the opinion explaining how landlords across the country were left at risk of "irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Id.*

4. *Id.*; *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (stating that the right to exclude others from private property is one of the most treasured rights from a landowner's bundle of rights).

5. *See* U.S. CONST. amend. V, § 5 (stating "nor shall private property be taken for public use, without just compensation").

6. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

recent Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*. Finally, Part V considers alternative solutions to prevent mass residential tenant evictions during a future national crisis that do not trigger an unlawful regulatory taking by balancing landlords' rights and tenants' rights in an equitable manner. Altogether, analyzing the future of congressional moratoria during an emergency through the lens of a regulatory takings perspective will touch on recent problems facing the rights of both landowners and tenants and provide more clarity on preparation for future crises.

II. THE RISE AND FALL OF THE EVICTION MORATORIUM

The CDC's eviction moratorium banning residential evictions for nonpayment of rent had a rather rampant history. What started as a temporary means of relieving burdened tenants for a few months ended up as an almost year-long moratorium surrounded by bitter litigation; not one, but two trips to the Supreme Court; and a premature ending to the "final" extension, finding that the CDC exceeded its authority to prevent disease under the Public Health Service Act.[7] With the Court answering the question of whether future moratoria may be passed by Congress in the affirmative, the Court failed to address the issue of how a Fifth Amendment regulatory takings claim would interact with a similar moratorium.

A. COVID-19 and the CDC's Eviction Moratorium

Because of COVID-related lockdowns, many Americans lost their jobs and struggled to meet their financial obligations, such as paying rent for their homes.[8] One means of combating this difficulty came from an order by the CDC enacted on September 4, 2020, but extended multiple times since.[9] This order included an

7. *See id.* at 2488.

8. *See generally* Kim Parker et al., *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/.

9. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34010, 34012–13 (June 28, 2021).

eviction moratorium that halted residential evictions for non-payment of rent against certain covered tenants.[10]

1. Language of the Moratorium

To be a "covered person" under the CDC's moratorium, and thereby be eligible for immunity from eviction for nonpayment of rent for the covered time, one must have attested to and declared the following:

> (1) The individual [had] used best efforts to obtain all available government assistance for rent or housing;
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> (2) The individual either: (i) earned no more than $99,000 (or $198,000 if filing jointly) in Calendar Year 2020, or expect[ed] to earn no more than $99,000 in annual income for Calendar Year 2021 (or no more than $198,000 if filing a joint tax return), (ii) was not required to report any income in 20202 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check).
>
> (3) The individual [was] 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;
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> (4) The individual [was] using best efforts to make timely partial payments that [were] as close to the full payment as the individual's circumstances . . . permit[ted], taking into account other nondiscretionary expenses; and
>
> (5) Eviction would [have] likely render[ed] the individual homeless—or [would have] force[d] the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual [had] no other available housing options.[11]

For a "covered person" to take advantage of this order, he or she had to provide a completed and signed copy of a declaration affirming that he or she fit the above requirements to his or her landlord or person who has the right to evict the covered person.[12]

10. *Id.* at 34011.
11. *Id.*
12. *Id.* at 34015.

2. Extensions and Revisions to the Moratorium

While this order was originally set to expire on December 31, 2020,[13] it was periodically extended multiple times with an alleged final expiration date of July 31, 2021.[14] Three days after the expiration of that extension, the CDC reimposed the moratorium with a new end date of October 3, 2021.[15] Notwithstanding the change to this new moratorium to only apply to "communities with substantial or high transmission of COVID-19," the moratorium was essentially identical to the previous issuance.[16] After the expiration of this newly extended moratorium, residential evictions would have been allowed again and covered tenants who withheld payments from previous months during the moratorium's effective period would have to repay the balance of what they owed.[17] Additionally, rent payments for months October 2021 and beyond were not covered by any federal moratoria on evictions for nonpayment.[18]

3. Preliminary Litigation

Litigation over the legality of these moratoria quickly ensued, bringing a variety of different issues in state and federal courts. One of the earliest lawsuits against the CDC's order came from the

13. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55292 (Sept. 4, 2020).

14. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. at 34010. The moratorium was extended to July 31, 2021 "based on current and projected epidemiological context of [COVID-19] transmission throughout the United States." *Id.*

15. 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. 43244, 43252 (Aug. 6, 2021). The moratorium was revised and reinstated based on surges in the Delta variant of COVID-19. *Id.* at 43244. While the July 31, 2021 extension was supposed to be the final extension, this new order made it clear that while the new expiration was set for October 3, 2021, it was "subject to further extension, modification, or rescission based on public health circumstances." *Id.*

16. *Id.*; *see* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488 (2021) (per curiam).

17. *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. at 43250.

18. *Id.* Despite the expiration of this federal moratorium, a tenant could seek protection under a state law residential eviction moratorium if the tenant's state had enacted a state moratorium, the tenant fit the definition of a "covered person" under state law, and the tenant followed the proper procedure to take advantage of this protection.

Escambia County Court of Florida in *Spicliff, Inc. v. Cowley*.[19] In her opinion, Judge Pat Kinsey held in favor of the plaintiff-landlord who moved to evict the defendant-tenant who failed to pay rent as agreed and owed more than $5,000 in rent payments to the landlord.[20] Judge Kinsey stated that allowing tenants to avoid eviction by merely signing a pre-printed form, getting it notarized, and delivering it to their landlord deprived landlords of due process because they had no available recourse but to halt rent until the moratorium expired.[21] Furthermore, the opinion held that this moratorium met the threshold of a constitutional "taking" without "just compensation," a direct violation of the Fifth Amendment's Takings Clause.[22] Finally, Judge Kinsey noted that the federal government should have just paid the tenant-defendant's rent to the plaintiff-landlord directly to remedy the "just compensation" component of the unconstitutional "taking."[23]

Since this legal action, several federal district and appeals courts have considered various statutory and constitutional challenges to the CDC's moratoria and have sided against the CDC.[24] However, the argument that has been the most successful against the legality of the eviction moratorium comes from the interpretation of the Public Health Service Act ("PHSA").[25] Notably, the Sixth Circuit denied a motion to stay a district court decision holding that the CDC exceeded its statutory authority granted under the PHSA.[26] The relevant provision from the PHSA grants the Surgeon General power to make and enforce regulations that are necessary to his or her judgment:

> to prevent the introduction, transmission, or spread of communicable diseases from . . . one State or possession into any other State of possession. For purposes of carrying out and enforcing such regulation, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest

19. No. 2020-CC-003778, 2020 WL 7681027 (Fla. Escambia County Ct. Nov. 24, 2020).
20. *Id.* at *1, *3.
21. *Id.* at *2.
22. *Id.* at *3.
23. *Id.*
24. *See, e.g.*, Terkel v. Ctrs. for Disease Control & Prev., 521 F. Supp. 3d 662, 673–77 (E.D. Tex. 2021) (holding that the CDC, a federal agency stemming from the executive branch's power, exceeded its power under the Commerce Clause of the Constitution by issuing a national ban on residential evictions).
25. *See infra* notes 26–31 and accompanying text; *see also infra* pt. II.B.1.
26. Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev., 992 F.3d 518, 522–24 (6th Cir. 2021).

> extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infections to human beings, and *other measures*, as in his judgment may be necessary.[27]

According to the Sixth Circuit, the moratorium did not qualify as an "other measure" for disease control under § 264(a), and the CDC was not allowed to impose a moratorium under the PHSA.[28]

The case that picked up the most national attention, however, began in the United States District Court for the District of Columbia and resulted in a significant decision against the CDC's moratorium.[29] In *Alabama Ass'n of Realtors*, the district court plainly summarized the relevant issue, reasoning, and conclusion:

> The question for the Court is a narrow one: Does the Public Health Service Act grant the CDC the legal authority to impose a nationwide eviction moratorium? It does not. Because the plain language of the Public Health Service Act unambiguously forecloses the nationwide eviction moratorium, the Court must set aside the CDC Order, consistent with the Administrative Procedure Act and D.C. Circuit precedent.[30]

This decision to grant summary judgment to the plaintiffs led to much controversy, appeals, and not one, but two trips to the Supreme Court, finally resulting in a decision striking down the CDC's eviction moratorium as an overreach of power under the PHSA.[31]

B. Supreme Court Analysis and Implications

While the District Court for the District of Columbia granted summary judgment for the plaintiffs,[32] the court also granted a motion for stay pending appeal for the U.S. Department of Health and Human Services, meaning the moratorium was able to stand

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27. 42 U.S.C. § 264(a) (emphasis added).

28. *Tiger Lily, LLC*, 992 F.3d at 522. This reasoning seems to have been utilized by Supreme Court in its final opinion regarding the legality of the CDC's eviction moratorium. *See infra* pt. II.B.1.

29. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 29 (D.D.C. 2021).

30. *Id.* at 43 (citations omitted).

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

32. *See Ala. Ass'n of Realtors*, 539 F. Supp. 3d at 43.

in place while a proper appeal on the final question of legality was pending.[33] After the United States Court of Appeals for the District of Columbia Circuit denied the plaintiffs' motion to vacate the stay,[34] the decision was appealed to the Supreme Court.[35] In an incredibly brief memorandum opinion, the Supreme Court affirmed the decision to not disturb the granted motion for stay regarding the moratorium, while noting that Justices Thomas, Alito, Gorsuch, and Barrett would grant the application to vacate stay.[36] However, Justice Kavanaugh left a three-sentence concurrence stating that the CDC did indeed exceed its statutory authority under the PHSA by enacting the eviction moratorium, but opining that allowing the moratorium to end on July 31, 2021 (the current expiration date at the time) would provide for a more orderly distribution of rental assistance funds.[37] His third and final sentence stated that "specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31."[38]

This anticlimactic, unexplained decision, however, was not the end. Despite the premonitions of Justice Kavanaugh's concurrence casting doubt over the legality of a similar future moratorium, the CDC, acting without the express authorization from Congress, reinstated the moratorium with a new expiration date of October 3, 2021.[39] This prompted the Alabama Association of Realtors to refile suit to vacate the stay of eviction protection, which was denied by the United States District Court for the District of Columbia.[40] After analyzing and discussing the new moratorium, the district court found that the most recent moratorium was a mere extension of the previous moratorium because of the almost

33. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 211, 218 (D.D.C. 2021).

34. *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646, at *4 (D.C. Cir. June 2, 2021).

35. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320, 2320 (2021) (mem.).

36. *Id.*

37. *Id.* at 2320–21. (Kavanaugh, J., concurring). Justice Kavanaugh's policy argument makes sense since the time between the opinion (June 29, 2021) and the end of the moratorium at the time (July 31, 2021) was "only a few weeks." *Id.* at 2321.

38. *Id.*

39. 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. 43244, 43252 (Aug. 6, 2021).

40. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 557 F. Supp. 3d 1, 4–5 (D.D.C. 2021).

identical nature between the two.[41] While the district court conceded that the government's case was very likely to be unsuccessful (in light of the dissenters and Justice Kavanaugh's concurrence in the first Supreme Court opinion[42]), the court held that it had to deny the motion to vacate stay under the law-of-the-case doctrine.[43] Using this doctrine, the court reasoned that because the Supreme Court issued no controlling precedent at the time, it was not able to account for how a future Supreme Court decision would result.[44] Rather, because the Court of Appeals for the District of Columbia Circuit had already ruled for the government on this issue and denied the application to vacate stay,[45] the district court was forced to follow this binding precedent to deny the application to vacate stay despite its suspicions that the government would lose on the merits.[46]

Unsurprisingly, the district court's decision was swiftly appealed and affirmed by the Court of Appeals for the District of Columbia Circuit.[47] The Alabama Association of Realtors then turned to the highest court in the land for a second time with hopes of reaching a favorable decision to defeat the moratorium.[48]

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41. *Id.* at 5–6.

42. *See generally Ala. Ass'n of Realtors*, 141 S. Ct. at 2320–21.

43. *Ala. Ass'n of Realtors*, 557 F. Supp. 3d at 6–10. Generally, "the law-of-the-case doctrine provides that 'a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases.'" *Id.* at 7 (citing Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir. 1995)). In other words, the doctrine provides that "the *same* issue presented a second time in the *same* case in the *same* court should lead to the same result." *Id.* (quoting LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996)).

44. *Id.* at 9–10.

45. *Id.*; *see* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021).

46. *Ala. Ass'n of Realtors*, 557 F. Supp. 3d at 8–10. Judge Friedrich of the United States District Court of the District of Columbia expressed doubts so strong over the CDC winning on the merits that she even declared in the opinion "the Court's hands [were] tied," alluding to the fact that the court would have ruled otherwise if they had not been bound by controlling precedent and a lack of agreement on the Supreme Court's last decision. *Id.* at 9–10.

47. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5903, 2021 WL 3721431, at *1 (D.C. Cir. Aug. 20, 2021). The court noted that it had recently denied a previous motion to vacate stay on June 2, 2021, after the district court originally denied it; the same situation was before them in this case, and the court decided to follow the district court's and its own precedent. *Id.*

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

1. Second Time is the Charm

In a brief per curiam opinion, the Supreme Court heeded Justice Kavanaugh's concurrence from the last appeal to reverse the decision of the lower courts and, in result, vacated the stay of eviction.[49] The Supreme Court agreed with the District Court for the District of Columbia that the applicants had a substantial likelihood of success on the merits of its case; in fact, the Court stated that "it is difficult to imagine them losing."[50] In its reasoning, the Court first analyzed the statutory interpretation of section 361 of the PHSA, finding that the CDC's explicitly granted powers (such as inspection, fumigation, pest extermination, etc.) directly relate to preventing interstate spread of disease by finding, isolating, and destroying the disease itself.[51] However, the eviction moratorium related to an indirect means of preventing residential evictions so people do not move from one state to another and spread COVID-19, which the Court found to be extremely different than the powers granted to the CDC under the PHSA.[52] In the Court's view, if this were allowed, the CDC could create almost any measure it deems "necessary" to prevent the spread of diseases without regard to the legislative process.[53]

The Court continued its analysis by balancing the equities between landlords/landowners and tenants, finding in favor of the landlords.[54] In its opinion, the Court found that millions of landlords nationwide, most of whom live by modest means, were "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery" as a result of the moratorium.[55] Additionally, the government's interests in sustaining the moratorium decreased by the time the suit reached the Court since the government had more opportunities to distribute rental-assistance funding through new programs.[56]

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49. *Id.* at 2488.

50. *Id.*

51. *Id.* Section 361 of the PHSA is codified at 42 U.S.C. § 264; this Article will use these two sections interchangeably, but they both refer to the same provision.

52. *Id.* Therefore, the moratorium did not fit as an "other measure" under section 361 of the PHSA. *See* 42 U.S.C. § 264(a).

53. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488. Furthermore, the Court explained that its own precedent requires very clear authorization from Congress for the federal government to intrude on landlord-tenant law, which is typically dealt with by the States. *Id.* at 2489.

54. *See id.* at 2489–90.

55. *Id.* at 2489.

56. *Id.* at 2489–90.

Furthermore, Congress had the time to pass a democratically-enacted eviction moratorium, but failed to do so.[57] One of the more striking points of the Court's equity balancing analysis regards the CDC's violation of the landowner's right to exclude—one of the most sacred rights of property ownership.[58] Because of both the CDC's overreach of power granted under the PHSA and the strong equitable interests in favor of landlords nationwide, the Court granted the Alabama Association of Realtors' application to vacate stay of eviction, essentially rendering the CDC's eviction moratorium moot.[59]

2. Dicta Suggesting a Regulatory Takings Claim?

Despite this brief, straightforward opinion, the Court's reasoning regarding the right to exclude was supported by a citation to dicta from *Loretto v. Teleprompter Manhattan CATV Corp.*,[60] a Supreme Court case hallowed by property rights advocates.[61] While the Court in *Alabama Ass'n of Realtors* cited to *Loretto*'s dicta, *Loretto* is one of the leading Supreme Court decisions regarding regulatory takings.[62] Perhaps this seemingly innocent citation is not so harmless—perhaps this allusion opens the door to a regulatory takings argument against a future moratorium, which would be triggered regardless of what branch of government promulgates it. This idea is not completely foreign to the CDC's eviction moratorium, as some of the earliest litigation surrounding the moratorium regarded unconstitutional takings

57. *Id.* at 2490. A congressional action halting evictions for nonpayment would have likely resulted in a different outcome, as noted by Justice Kavanaugh's concurrence in this suit's first trip to the Supreme Court. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J., concurring) (mem.). This is further affirmed by the Court's straightforward closing to its opinion for the second trip to the Supreme Court: "If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

58. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

59. *Id.* at 2490.

60. 458 U.S. 419 (1982).

61. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

62. *See generally Loretto*, 458 U.S. 419. *Loretto* held that a local law requiring landlords to permit a television cable company to install cables into their apartment buildings constituted a regulatory taking of the plaintiff-landlord's apartment buildings because the cables and installation materials constituted a permanent physical occupation to which the landowner was owed just compensation. *Id.* at 421–22, 438. While this was a minor invasion of property, it still amounted to a permanent physical occupation of property in violation of the Fifth Amendment's Takings Clause. *Id.* at 421.

arguments.[63] While the Supreme Court provided guidance in its opinion that if a federal eviction moratorium were to be enacted again it must be authorized by Congress,[64] it failed to examine the implications of a congressionally-authorized federal moratorium, particularly the implications of a potential regulatory takings argument against a new moratorium.

III. THE TAKINGS CLAUSE

The Takings Clause is the closing phrase of the Fifth Amendment, declaring "nor shall private property be taken for public use, without just compensation."[65] Before analyzing whether the Takings Clause is implicated in a future moratorium, this Clause must be broken down and defined by its main terms: (1) "taking," (2) "public use," and (3) "just compensation."

A. Defining the Takings Clause

A "taking" comes in two different varieties: (1) physical[66] and (2) constructive.[67] A physical taking occurs when the government physically seizes property for public use,[68] such as the government taking a strip of land from a landowner's property adjacent to a small highway for road expansion. On the other hand, a constructive taking occurs when the government passes a law that restricts a landowner's rights to the point that the law functionally acts as a physical seizure.[69]

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63. *See* Spicliff, Inc. v. Cowley, No. 2020-CC-003778, 2020 WL 7681027, at *2 (Fla. Escambia County Ct. Nov. 24, 2020) (noting that the CDC's eviction moratorium created a "taking" from landlords without "just compensation," thereby violating the Fifth Amendment's Takings Clause).

64. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

65. U.S. CONST. amend. V, § 5.

66. *See, e.g.*, Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403 (1878); *Takings*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/takings (last visited Feb. 8, 2023).

67. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); *Takings*, *supra* note 66.

68. *See Patterson*, 98 U.S. at 406 (holding that the right to take private property for a public use is an attribute of sovereignty that is recognized and limited in the Constitution). A physical taking is often referred to as "eminent domain." *See id.*

69. *See Mahon*, 260 U.S. at 415 (finding that a regulation may amount to a taking if it "goes too far"). A constructive taking is often referred to as a "regulatory taking" or "inverse condemnation." *See* Carl K. Newton & Jeffrey D. Slattery, *The Changing Areas in Condemnation Law: Committee on Condemnation Law*, 15 URB. LAW. 791, 794 (1983) (stating that regulatory takings are often raised within the inverse condemnation context); *Takings*, *supra* note 66 (stating that a constructive taking is also referred to as a regulatory taking).

The definition of "public use" has had a more complex and evolving history than the other terms used in the Takings Clause. While courts originally used the "use by the public" test to determine the "public use" requirement under the Fifth Amendment,[70] this test was deemed to be an inadequate means of interpreting "public use" as it was too narrow to administer and an impractical way to meet the needs of an evolving America.[71] Therefore, the Court now determines that the public use requirement is met "where the exercise of eminent domain power is *rationally related to a conceivable public purpose*."[72] Using this new test, land may be seized by the government and transferred to private parties so long as the reason for doing so is rationally related to a conceivable public purpose.[73] In other words, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[74]

This test has been interpreted very broadly, even to the point where the government was allowed to use eminent domain to seize private property and transfer it to a private developer so long as the developer's plans serve to further a conceivable public purpose.[75] This holding comes from the one of the most divisive and controversial Supreme Court decisions regarding the "public use"—*Kelo*.[76] In *Kelo v. City of New London*, the city council of New London, Connecticut, authorized the New London Development Corporation to use the city's eminent domain power to seize privately-owned land for the purpose of economic revitalization of the town, primarily through attracting Pfizer to build a new

70. A classic example of "use by the public" would be the government seizing private land for a railroad with a duty as a common carrier. *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005).

71. *See id.* at 477–79.

72. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (emphasis added).

73. *Id.* In *Midkiff*, the Hawaiian legislature enacted the Land Reform Act of 1967, which created a system enabling the government to seize residential land from wealthy landowning families and transfer title to the lessees renting the land from the landowning families. *Id.* at 233–34. The Court found that breaking up this "oligopoly and the evils associated with it," considering that seventy-two families owned forty-nine percent of the land of the State of Hawaii, was a rational exercise of eminent domain and that redistributing fee simples to the lessees of the land fit with public use requirement. *Id.* at 232, 242.

74. *Id.* at 244.

75. *Kelo*, 545 U.S. at 483–84.

76. For a discussion on the controversial 5-4 decision in *Kelo* and the resulting backlash from Americans, see *Kelo Eminent Domain*, INST. FOR JUST., https://ij.org/case/kelo/ (last visited Feb. 8, 2023).

facility in New London.[77] Ms. Kelo and a group of other hold-outs who refused to give up their properties brought a takings claim against the city, in which the Supreme Court decided that the City of New London was justified in its use of its eminent domain power.[78] Despite conferring some benefit on the private developer, the overarching public use requirement was satisfied because the plan for the city would serve the public through increased tax revenue, new jobs, and a variety of land uses that would revitalize the city economically.[79] Remember, it is the taking's purpose which is important and subject to scrutiny, not its mechanics.[80]

While often confusing and case-specific, so long as the government's taking of private property is "rationally related to a conceivable public purpose,"[81] the "public use" requirement of the Takings Clause is met.[82]

Finally, "just compensation" is defined as the fair market value of the property that was seized by the government at the time of the taking.[83] This gets trickier when only a portion of a landowner's land is taken; here, the compensation owed is often determined by the difference between the fair market value of the landowner's property before the government's seizure and the fair market value of the landowner's property after the government's seizure.[84] While many disputes arise as to the fair market value of a given piece of property, the concept governing "just compensation" is generally as simple as finding the fair market value.

B. Different Types of Regulatory Takings

Because a future eviction moratorium would not physically seize property, but rather cause effects allegedly "taking" property, the proper takings analysis would necessitate a regulatory takings

77. *Kelo*, 545 U.S. at 473–75.
78. *Id.* at 475, 490.
79. *Id.* at 483–84.
80. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).
81. *Id.* at 241.
82. *Id.* at 241, 244–45.
83. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)); *see Takings*, *supra* note 66.
84. United States v. Miller, 317 U.S. 369, 376 (1943); United States v. 2.33 Acres of Land, 704 F.2d 728, 730 (4th Cir. 1983) (stating the "before and after method of valuation" is properly done when "the fair market value of the property after the taking is subtracted from its fair market value before the taking").

argument, not a classic eminent domain argument.[85] The complex precedent and interpretations of regulatory takings are guided by the general principle that a taking occurs "if [a] regulation goes too far."[86] There are two main categories of regulatory takings: (1) per se regulatory takings[87] and (2) partial regulatory takings.[88]

1. Per Se Regulatory Takings

A per se regulatory taking occurs "where the act itself demonstrates the taking;"[89] the simple rule here is that "[t]he government must pay for what it takes."[90] These scenarios are more cut-and-dry analyses that do not require as many steps as partial takings claims do.[91] Importantly, if a per se taking is found, just compensation is owed and the partial takings analysis must not be considered—the analysis stops here.[92] Per se regulatory takings include both (1) physical invasion takings and (2) total takings.[93]

85. *See supra* pt. III.A.

86. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Despite the extensive interpretation on regulatory takings throughout the Supreme Court's history, this statement remains good law that guides the following analysis on regulatory takings.

87. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (the original leading case for physical invasion per se takings); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (the leading case for total per se takings); *see also* Practical Law Government Practice, *Inverse Condemnation: Overview*, WESTLAW, https://1.next.westlaw.com/Browse/Home/PracticalLaw?transitionType=Default&contextData=(sc.Default)&tabName=Practice%20Areas (last visited Feb. 8, 2023) (type "inverse condemnation" in the search bar and hit the orange magnifying glass to search; then click on "Inverse Condemnation: Overview").

88. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (the leading case for partial regulatory takings); *see also* Practical Law Government Practice, *supra* note 87.

89. Practical Law Government Practice, *supra* note 87.

90. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).

91. *See Lucas*, 505 U.S.at 1015–16 (explaining that the Court's regulatory takings jurisprudence is a fact-intensive, ad hoc framework with no set formula, except for the two straightforward per se takings rules not requiring not case-specific inquiry: physical invasion takings and total takings); Practical Law Government Practice, *supra* note 87.

92. *See Cedar Point Nursery*, 141 S. Ct. at 2072.

93. *See Lucas*, 505 U.S. at 1015–16; Practical Law Government Practice, *supra* note 87.

a. Physical Invasion Takings

The first kind of per se taking is a taking that constitutes a physical invasion.[94] Traditionally, this taking was fairly straightforward—if a law requires something to permanently and physically invade a landowner's property, no matter how small, the affected land has been per se taken and just compensation is owed.[95] This process is analyzed without any regard to the public interests that the law causing permanent occupation of the property intended to serve.[96] For short, this taking, which was formally defined and recognized in *Loretto*, is called a "permanent physical occupation" that automatically requires just compensation be paid to the affected landowner.[97]

While a seemingly simple rule came from the landmark decision in *Loretto*, its facts are perplexing with regard to how minimal the invasion really was. In *Loretto*, the New York statute that violated the Fifth Amendment's Takings Clause provided that a landlord must permit a cable company to install cable lines on the property for the occupants' ability to have television access.[98] The total amount of installation work conducted by Teleprompter, the cable company, included thirty-four to thirty-six feet of cable along the length of the building, power directional couplers (each being four inches in length, width, and height) on the front and back of the roof, two large silver boxes along the roof cables, a second cable line dropping to the first floor of the building, and screws and nails to hold the cables in place.[99]

Despite these minimal alterations to the landowner's property (alterations that perhaps even increased the property's value), the Court found for the landowner holding that when the "character of the governmental action" permanently and physically occupies the property, a taking has occurred without other consideration.[100] The

94. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); *Cedar Point Nursery*, 141 S. Ct. at 2076.

95. *See Loretto*, 458 U.S. at 426.

96. *Id.*

97. *Id.*

98. *Id.* at 421.

99. *Id.* at 421–22.

100. *Id.* at 434–35 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). This quote is very important to the Court's reasoning because it is adding in an exemption to its own regulatory takings framework from *Penn Central*, specifically by saying that when the governmental action in question is permanently and physically

Court reasoned that this type of taking is "perhaps the most serious form of invasion of an owner's property interests" as a permanent physical invasion by the government destroys the owner's right to possess, use, exclude, and destroy property—the entire bundle of property rights.[101] Despite the nominal damages awarded for the invasion suffered by Loretto, this decision created a landmark rule for property rights advocates that a permanent physical occupation of property without just compensation violates the Takings Clause—a decision the 2021 Supreme Court was certainly aware of.[102]

Almost forty years after *Loretto*, the Supreme Court recently held that a per se physical invasion taking has been expanded to include a "physical appropriation" of property that is either "permanent or temporary."[103] This came as a shock to the longstanding precedent from *Loretto* with unknown implications as to how this affects modern regulatory takings analysis. In *Cedar Point Nursery*, a California regulation created a "right to take access" for unions to be allowed onto agricultural property for up to three hours per day over 120 days per year without permission from, and even against the will of, the agricultural property owner.[104] Despite the access to property being "time-limited [and] functionally constrained,"[105] as well as not "permanent and continuous,"[106] the Court found that the "regulation appropriate[d] a right to physically invade the growers' property—to literally 'take access,' as the regulation provide[d]."[107] Therefore, a per se physical invasion taking was found and compensation was owed for the invasion of property.[108]

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occupying property, the rest of the traditional *Penn Central* test does not need to be analyzed, and the process may stop here as a taking has per se been found. *See infra* pt. III.B.2.

101. *Loretto*, 458 U.S. at 435–36.

102. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

103. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021). Notably, this case was a 6-3 decision. *Id.* at 2068.

104. *Id.* at 2069.

105. Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 3 (2022).

106. *Cedar Point Nursery*, 141 S. Ct. at 2074. "[P]ermanent and continuous access" to property is regarded as access that is "24 hours a day, 365 days a year." *Id.* (citations omitted).

107. *Id.*

108. *Id.*

While the old rule was that a per se physical taking required a "permanent physical occupation,"[109] the Court now holds that "government-authorized invasions of property . . . are physical takings requiring just compensation."[110] The permanency factor from *Loretto* has seemingly been washed away, as Chief Justice Roberts opined that a "physical appropriation is a taking whether it is permanent or temporary."[111] Even intermittent physical invasions may fit under this rule—the interference does not even need to be continuous.[112] While the Court laid out three exceptions to this new physical taking rule, including isolated trespasses,[113] background restrictions,[114] and exactions,[115] the Court made it clear that a regulation giving express permission to others to physically invade another's property amounts to appropriation of private property, thereby triggering a per se physical taking.[116]

b. Total Takings

The second kind of per se taking is a total taking.[117] In this scenario, if the government enacts a regulation that deprives one's land of "*all economically beneficial use*," then a total taking has occurred and the government must compensate the landowner for his or her land.[118] The government may rebut this finding by showing that the regulation's proscriptions were already part of

109. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

110. *Cedar Point Nursery*, 141 S. Ct. at 2074.

111. *Id.*

112. *Id.* at 2075. In the Court's eyes, "[t]here is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364." *Id.* at 2074.

113. *Id.* at 2078 (explaining that individual, isolated trespasses are individual torts, not appropriations of property).

114. *Id.* at 2079 (explaining that background restrictions on property rights that are a part of a property owner's title or are common-law principles do not amount to a taking, such as requiring a landowner to remove a nuisance, allowing individuals to enter the property out of public or private necessity, and entrance of law enforcement individuals in the course of an arrest or lawful search).

115. *Id.* (explaining that the government may still utilize exactions to seize a right of access in exchange for the landowner receiving certain benefits).

116. *Id.* at 2080.

117. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

118. *Id.* at 1027–28 (emphasis added). Justice Scalia opines in a footnote within his majority opinion that a landowner must lose one hundred percent of his or her property's value to fall under this rule—a ninety-five percent loss will not do. *Id.* at 1019 n.8. This sets a very high threshold that is extremely difficult to meet, forcing most regulatory takings arguments to fall under the *Penn Central* analysis. *See id.* at 1015 (illustrating the Court's preference to engage in case-specific, factual analysis in its regulatory takings framework); Practical Law Government Practice, *supra* note 87; *infra* pt. III.B.2.

the title to the land (prior to the regulation being enacted) through common-law property and nuisance law.[119]

While the holding from *Lucas* is important, facts creating a scenario warranting a finding of a total taking are very rare. For instance, in *Lucas*, petitioner David Lucas paid $975,000 for two waterfront lots in a South Carolina coastal neighborhood.[120] But two years later, the Beachfront Management Act was passed by the South Carolina legislature, which effectively halted Lucas from building structures on his land because of erosion concerns.[121] The Court concluded that because the trial court found that the land was rendered "valueless,"[122] Lucas had suffered a total taking where the property was stripped of "all economically beneficial uses,"[123] thereby automatically entitling Lucas to just compensation.[124]

Importantly, a temporary moratorium on new construction does not constitute a total taking on affected properties.[125] This principle was illustrated in *Tahoe-Sierra*, where the Supreme Court held that moratoria halting nearly all development in the Lake Tahoe area for thirty-two months did not constitute a per se total taking.[126] Allowing a temporary halt on new construction to amount to a complete diminution of value would violate the no-segmentation rule[127] since it would be isolating the halted period from the duration of a fee simple estate (which is, essentially,

119. *Lucas*, 505 U.S. at 1027, 1029–32. Despite the Court's direction for the government in how to rebut Lucas's argument, this seems very difficult to prove. In fact, on remand, the Supreme Court of South Carolina only needed three sentences to explain that Coastal Council tried and failed to prove a rebuttal through common-law property and nuisance law. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

120. *Lucas*, 505 U.S. at 1006–07.

121. *Id.* at 1007–08.

122. *Id.* at 1009.

123. *Id.* at 1019.

124. *Id.* at 1007. The trial court originally ordered just compensation to be paid in the amount of $1,232,387.50. *Id.* at 1009.

125. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 330–31 (2002).

126. *Id.* at 342–43. However, Justice Stevens noted in his majority opinion for the Court that moratoria lasting longer than one year "should be viewed with special skepticism." *Id.* at 341. A moratorium lasting longer than one year would most likely not place the alleged taking within the scope of a per se taking but may be given serious weight in a *Penn Central* regulatory takings case, particularly in analyzing the interference with the landowner's investment-backed expectations. *See id.* at 341–42; *infra* pt. III.B.2.

127. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978) (explaining that the no-segmentation rule is a rule used by courts to look at the effect of a governmental action has on an entire parcel of property, rather than how an action affected merely a portion of the property); *infra* notes 165–70 and accompanying text.

forever).[128] Therefore, temporary moratoria are an example of something that traditionally does not fit under a total takings analysis because of the remaining unburdened period of time the property is able to take advantage of, and retain, at least some of its value.[129]

2. Partial Regulatory Takings

Because of the high threshold to meet a per se regulatory takings test, most regulatory takings arguments are analyzed under a partial regulatory takings framework where only a partial taking has occurred without rendering the land valueless or encroaching upon the land via physical occupation.[130] The prominent factors for deciding a partial regulatory takings dispute are laid out in *Penn Central Transportation Co. v. City of New York*, which include: (1) "[t]he economic impact of the regulation on the [landowner]"; (2) whether the regulation has interfered with the landowner's "investment-backed expectations"; and (3) the "character of the governmental action," specifically if the government action was a physical invasion of private property rather than a public program attempting to promote the common good in relation to economic life.[131] These factors are not necessarily a concrete, predictable test; rather, they are factors that must be factually inquired into on a case-by-case basis.[132]

The legalese from *Penn Central* is best illustrated through the facts of the case. The regulation in question was a historical landmark preservation law enacted in New York City requiring owners of historical landmarks to keep the exterior features of their building "in good repair" and receive approval from the Landmarks Preservation Commission ("Commission") to alter or improve the exterior of the building.[133] While burdening the landowner of a covered landmark site with certain restrictions, this law functioned as a means of improving the public welfare in general (specifically civic pride, tourism, industry, economy,

128. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 331.
129. *Id.*
130. Remember, if a per se taking has occurred, the partial takings framework does not apply. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).
131. 438 U.S. at 124.
132. *See id.*
133. *Id.* at 110–12.

education, and aesthetics[134]) and was enacted with an eye toward also ensuring affected landowners were able to attain a "reasonable return" on their property.[135]

The original lawsuit resulted from Penn Central Transportation Company's property (the Grand Central Terminal) being deemed a historical landmark.[136] A few months after the property was declared a landmark, Penn Central entered into a fifty-year lease with a corporation that was going to significantly alter the building to create office space, proposing to either construct fifty-five stories of offices above the building, or tear down a portion of the building, strip off some of the building's facade, and construct a fifty-three story office building.[137] Unsurprisingly, these proposals were denied by the Commission,[138] and after exhausting the appeals process, the case reached the Supreme Court, where the question of whether the historic landmark preservation law triggered a taking of Penn Central's property was analyzed by the Supreme Court under the above factors.[139]

The first factor governing this partial taking is the economic impact on the landowner.[140] The economic impact alleged by the landowner must amount to a serious financial loss resulting from the regulation in question.[141] There is no threshold measure of the impact on the landowner to automatically sway a court in favor of the landowner on this factor, but it is highly unlikely for a landowner to win a regulatory takings argument on this factor alone, even if able to show a serious financial loss.[142] In fact, the Supreme Court has further held in its takings jurisprudence that

134. *Id.* at 108–09.
135. *Id.* at 110.
136. *Id.* at 115–16.
137. *Id.* at 116–17.
138. *Id.* at 117.
139. *Id.* at 107.
140. *Id.* at 124.
141. *See id.* at 124–25 (explaining that many laws impact landowners' property values as a natural consequence, which does not usually amount to a taking); Practical Law Government Practice, *supra* note 87.
142. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (seventy-five percent diminution caused by zoning law did not constitute a taking); Hadacheck v. Sebastian, 239 U.S. 394, 405, 413–14 (1915) (eighty-seven percent property value loss caused by zoning law requiring landowner to cease industrial operations did not constitute a taking); Haas v. San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979) (ninety-five percent diminution of property value did not constitute a taking); *see also* Practical Law Government Practice, *supra* note 87.

the government may regulate property usage without compensating landowners unless the government has "unfairly singled out" a landowner and has deprived the landowner of the property's economic use[143]—a lofty burden to meet. In *Penn Central*, the Court was not sympathetic to the landowner on this factor, reasoning that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[144]

The second factor to consider is the relevant interference with the landowner's investment-backed expectations.[145] The expectations here must be objectively reasonable under all the circumstances, with an additional showing of an investment backing the expectations.[146] This analysis requires a court to look at the governing law at the time of the landowner's purchase compared to the effect the new regulation in question has on the landowner's property.[147] What makes this factor so cryptic is the fact that the current value of property is often predicated on the anticipated use of the property, meaning any restriction on property will interfere with a landowner's investment-backed expectations[148]—the question is how much interference is enough to trigger a taking? While this factor is often confusing to courts, the test draws a similar comparison to the test for vested rights or estoppel.[149]

Looking at the facts of *Penn Central* under the investment-backed expectations factor, the Court noted that the landowner's argument that its air rights (an allegedly reasonable expectation at the time of purchase) had been taken was not accepted for a

143. Yee v. City of Escondido, 503 U.S. 519, 523 (1992).

144. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)). An example given by the Court is the taxing power. *Id.*

145. *Id.*

146. *See id.* at 127–28; Practical Law Government Practice, *supra* note 87.

147. Practical Law Government Practice, *supra* note 87. For instance, a landowner is not likely to win on this factor by purchasing land with a development in mind that was not allowed under the law at the time when he or she purchased the land.

148. Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 961 (1989).

149. *See id.* at 962 nn.206–08 (explaining how courts in vested rights cases "measure the amount of at-risk capital irrevocably devoted to a development project in good faith reliance on prior governmental assurances"). Investment-backed expectations can be compared to the test for estoppel in the sense that the landowner reasonably expected to execute their plans for their property and relied upon this expectation to make an investment-backed expectation that the new law has upset.

couple reasons.[150] First, the landmark preservation law did not interfere with the primary expectation of the property of which it had been used for sixty-five years: "as a railroad terminal containing office space and concessions."[151] Second, the law did not prevent all use of the landowner's air rights because only two proposals denying construction of around fifty stories were denied at the time,[152] and the landowner was granted transferrable development rights in exchange for its air rights.[153] While Penn Central's plans to make a fortune off new office space were heavily curtailed, there was no hard evidence showing that the investment it made in the air rights was reasonable (considering the building became preserved before negotiations to lease and renovate the building) and there was still an opportunity for Penn Central to make a "reasonable return" on its investment through continuing to use the property as-is and selling the transferrable development rights.[154] Perhaps if Penn Central had already leased the property, gained approval for its construction plans, and already started construction, it would have had a stronger investment-backed expectations argument under an estoppel/vested rights theory.[155] However, this was not the case, and the Court did not find Penn Central's argument persuasive under this factor either.[156]

The third and final factor within a partial takings framework regards the character of the governmental action.[157] *Penn Central* provides guidance on this factor by saying "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common

150. *See Penn Cent. Transp. Co.*, 438 U.S. at 130, 130 n.27.

151. *Id.* at 136.

152. *Id.* at 136–37. While the Commission denied the two submitted plans, there was no indication that a more minor alteration or construction on the building would be denied, meaning there was no evidence on the record showing that Penn Central could not use *any* of its air rights. *Id.*

153. *Id.* at 137. Transferrable development rights allow a landowner burdened with regulations prohibiting expansion that would otherwise be allowed on his or her land (sending area) to sell the rights to this development to another piece of property where development is encouraged (receiving area). *See* JOHN THEILACKER, TRANSFER OF DEVELOPMENT RIGHTS 1 (Nate Lotze et al. eds., 2d ed. 2019), https://conservationtools.org/guides/12-transfer-of-development-rights.

154. *Penn Cent. Transp. Co.*, 438 U.S. at 136–37.

155. *See* Manheim, *supra* note 148, at 962 nn.206–08.

156. *See Penn Cent. Transp. Co.*, 438 U.S. at 131.

157. *Id.* at 124.

good."[158] What this means is that a regulation may affect some property owners more than others and not necessarily trigger a regulatory takings claim, for this would cause an unnecessary burden on the legislature.[159] In fact, Supreme Court jurisprudence most often upholds land use regulations that may diminish the value of some landowners' property more than others so long as the regulation is "reasonably related to the promotion of the general welfare."[160] However, facts showing that the landowner was uniquely or solely burdened in a way that other landowners were not will sway this factor more in favor of the landowner.[161]

In *Penn Central*, the landowner argued that the landmark preservation law singled out select properties containing historical buildings and inordinately burdened these landowners to the point where it constituted a taking.[162] The Court rejected this argument, finding that while the law applies to only select parcels, it did not amount to a discriminatory application of the law that singled out landowners; the comprehensive plan was formulated to preserve historic and aesthetic structures for the public welfare, which was enough to uphold a regulation of this kind.[163] Landowners being burdened more than other landowners due to a regulation is merely a part of land use law, and without a showing of a physical invasion or something truly egregious, courts will not be persuaded by this argument and will strike down a landowner's argument similar to the Court in *Penn Central*.[164]

While not necessarily a stand-alone factor, the entire partial takings analysis is analyzed under the no-segmentation rule.[165] This rule requires a court to look at the character of the action and the nature and extent of the interference on the parcel as a whole, rather than dividing the parcel up into discrete segments in an

158. *Id.* A physical invasion by the government that does not rise to a per se taking would be very convincing to establish a partial regulatory taking under this factor. *See supra* pt. III.B.1.a.

159. *See Penn Cent. Transp. Co.*, 438 U.S. at 133–34.

160. *Id.* at 131; *see, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding a new zoning ordinance diminishing landowner's property value by seventy-five percent was constitutional because it was not arbitrary and unreasonable and bore relation to the "public health, safety, morals, or general welfare").

161. *See Penn Cent. Transp. Co.*, 438 U.S. at 134.

162. *Id.* at 131–35.

163. *Id.* at 131–33.

164. *See id.* at 133–34.

165. *See id.* at 130–31. The no-segmentation rule is also referred to as the "whole parcel rule."

attempt to claim that an entire segment has been eliminated.[166] While the Court in *Penn Central* used this rule to determine that the appellants' restriction to use their air rights was not a taking because it did not restrict the land as it had been previously and currently used,[167] this rule can also apply to the temporary moratoria restricting new construction.[168] For illustration purposes, the no-segmentation rule can be used vertically, as in *Penn Central*,[169] as well as horizontally, as in *Tahoe-Sierra*.[170]

IV. HOW A FUTURE EVICTION MORATORIUM CAN TRIGGER A REGULATORY TAKING

A temporary emergency eviction moratorium similar to the CDC's recent moratoria, yet passed by Congress, would likely be found unconstitutional under the Fifth Amendment's Takings Clause.[171] A total per se taking will likely not be found since landowners do not automatically lose "all economically beneficial use" of their property resulting from a congressionally-authorized moratorium.[172] A physical invasion per se taking is a stronger argument to consider because the affected property would be physically occupied by tenants due to the moratorium.[173]

Finally, if a per se taking is not found, there is a possible argument to prove a partial taking under the *Penn Central* factors.[174] This partial taking could be supported by the economic

166. *Id.* ("'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, [courts focus] . . . on the . . . parcel as a whole.").

167. *See id.* at 130.

168. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 331 (2002).

169. The no-segmentation rule was used to find no partial taking despite being unable to build an existing building taller—vertically. *See Penn Cent. Transp. Co.*, 438 U.S. at 130–31.

170. The no-segmentation rule was used to find no total taking despite being unable to build new construction for thirty-two months—horizontally. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330–32.

171. Importantly, this thesis applies to not only COVID-related or even other pandemic-related moratoria, but also to a potential range of future national crises in which an eviction moratorium could be enacted, such as economic depressions, housing bubble bursts, severe unemployment, or natural disasters.

172. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). *See generally Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. 302.

173. *See generally* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

174. *See Penn Cent. Transp. Co.*, 438 U.S. at 124.

impact on landowners not being able to collect full rent, the interference with landowners' investments in their properties, and the character of the governmental action being similar to a physical invasion in spite of the common good the moratorium was intended to protect.[175] To combat future Takings Clause litigation, Congress should propose a comprehensive emergency legislative action to implement in future pandemics and crises that balances the interests of landlords and tenants in a way that preserves the landowners' rights as well as the stability of tenants' housing situations without rising to the level of an unlawful regulatory taking.

A. Analyzing a Moratorium Under a Per Se Regulatory Takings Argument

A per se regulatory taking claim is a high threshold to meet, but a similar moratorium enacted in the future has a significant chance of triggering an unconstitutional per se taking. While a total taking will most likely not be found under a temporary moratorium,[176] a physical invasion taking may be established since the moratorium requires a physical occupation of landowners' property without the ability to collect rent, thereby resulting in a physical appropriation of property.[177]

1. A Total Taking?

A total taking will likely not be found if a similar congressional moratorium for eviction, in light of a nationwide pandemic or crisis, were put in place. To fit under this kind of taking, the regulation in question must render the affected land valueless with the deprivation of "all economically beneficial use."[178] A moratorium halting evictions does not necessarily render landowners' land valueless and deprive "all economically beneficial use" from the landowners' properties—after a moratorium expires, the remaining tenants who took advantage of the order must repay the balance of what they owe and evictions for nonpayment may

175. *See id.*
176. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330–32.
177. *See Cedar Point Nursery*, 141 S. Ct. at 2074.
178. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). Remember, one hundred percent of the property's value must be gone as a result of the regulation, nothing short. *Id.* at 1019 n.8.

take place again.[179] Therefore, business may continue as usual, and the rental property retains its value, meaning a total taking has not occurred.

While this case is in strong favor of the government, the landowner does have an argument. For instance, the landowner could argue that he or she lost "all economically beneficial use" of the property during the time of the moratorium, specifically if rent was never paid at the expiration of the moratorium and eviction was necessary. However, temporary moratoria do not generally fall under the total takings rule because decreases in property values during the life of the regulation in question do not affect the entire duration of the estate (presumably, a fee simple estate); to hold otherwise would violate the no-segmentation rule, particularly in light of the fact that property values normally increase and decrease and that the diminution of value on the affected property would rebound after the expiration of the moratorium.[180] A landowner putting his or her faith in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, a Supreme Court case holding that temporary takings that deny landowners all use of their property require compensation,[181] would be mischaracterizing the holding—*Tahoe-Sierra* made clear that the *First English* holding concerned a compensation question about damages, not the ultimate question of whether a temporary total taking occurred.[182] The government can further rebut the

179. *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. 43244, 43250 (Aug. 6, 2021).

180. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330–32; *see also Penn Cent. Transp. Co.*, 438 U.S. at 130–31 ("'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. [Instead], this Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole."). While *Penn Central* dealt with partial takings, not per se takings, the no-segmentation rule still guides per se takings analysis. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 331 (stating that there was error in "disaggregat[ing] petitioners' property into temporal segments corresponding to the regulations at issue and then analyz[ing] whether petitioners were deprived of all economically viable use during each period"); *see also id.* at 331–32 (citations omitted) (reasoning that temporary restrictions cannot cause permanent deprivations of value to property held in fee simple, but that fluctuations of property value resulting from temporary regulations were "incidents of ownership").

181. 482 U.S. 304, 318 (1987).

182. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 328–29. The Court emphasized that the *First English* holding is that when the government has already committed a taking via regulation, the government cannot just undo the regulation without providing just

landowner's argument by showing that the landowner could have just sold the property affected by the moratorium—even if the property went down in value because of the moratorium, it is not valueless.

Keep in mind that in the majority opinion for *Tahoe-Sierra*, Justice Stevens noted that moratoria lasting longer than one year "should be viewed with special skepticism," but it would likely not be enough to constitute a total taking outright.[183] Therefore, while a landowner can argue this point, it will not likely sway a court in finding a total taking. Even in *Tahoe-Sierra*, where Justice Stevens acknowledged the skepticism about moratoria lasting over one year, the moratorium in question lasted for thirty-two months and was still not found to be a total taking.[184] Therefore, a landowner arguing against a moratorium similar to the CDC's, which did not even last for a full year, would be unsuccessful in arguing a total taking of his or her property. This argument could be worth making if it lasted an unreasonably long time, but again, this is probably best analyzed under the *Penn Central* factors.

The final argument a landowner may make is that because a covered tenant under a moratorium did not pay full rent, the landowner lost his or her property to foreclosure, thereby losing "all economically beneficial use" of the property because the property is no longer under his or her ownership. Despite this seemingly more convincing and sympathetic argument, this would likely still not satisfy a total takings claim because the no-segmentation rule concerns the effect on the land itself, which will recover value after the expiration of the moratorium, not the landowner's indirect harm.[185] While this fact may be convincing, it would likely still be too far of a leap to constitute a rather rare total taking; the Supreme Court or a lower court would likely defer to a partial takings analysis where an advocate can utilize this fact on the economic impact on the landowner factor.[186] However, the

compensation for the temporary taking of all the landowner's use of his or her property. *Id.* In fact, the Court gave more context by revealing that the landowner in *First English*, after having the remedial question decided by the Supreme Court, lost on the merits on remand, and the Court declined review. *Id.*

183. *Id.* at 341–42. However, the fact that a moratorium lasts longer than one year would be given serious weight in a standard *Penn Central* analysis. *See id.*

184. *Id.* at 306, 341–42.

185. *See Penn Cent. Transp. Co.*, 438 U.S. at 130–31 (discussing the effect on the "*parcel* as a whole," not exactly the effect on the owner (emphasis added)).

186. *See id.* at 124 (discussing the economic impact on a landowner).

overall arguments under a total takings analysis favor the government, meaning a future similar moratorium that is congressionally-authorized would withstand a total takings analysis and just compensation would not be owed to a landowner under this theory.

2. A Physical Invasion Taking?

While a "permanent physical occupation"[187] would not be found if a similar moratorium were enacted in response to a new COVID-19 strain or other crisis, there is a strong argument in favor of finding a "government-authorized invasion[] of property"[188] that would constitute a per se physical taking of property.

A similar future moratorium would not cause a permanent occupation of property, thereby not triggering a *Loretto* taking. This test is simple: if a regulation forces something upon a landowner's property that is a physical intrusion and permanent, compensation is owed.[189] While the CDC's eviction moratorium lasted for almost one year,[190] this was by no means intended to be a permanent halt on residential evictions for nonpayment of rent.[191] The point of these moratoria were to *temporarily* halt evictions, meaning that the landowner was *temporarily* restricted from evicting residential tenants for nonpayment of rent if they complied with the necessary requirements.[192] Logically, this temporary halt does not reach the level of permanent invasion and appropriation of a landowner's right to exclude, thereby failing to meet the *Loretto* threshold of permanence.

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187. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

188. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

189. *See generally Loretto*, 458 U.S. 419.

190. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55292 (Sept. 4, 2020) (setting the original expiration date of December 31, 2020); 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. 43244, 43252 (Aug. 6, 2021) (extending the moratorium to expire on October 3, 2021). *See generally* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (prematurely ending the CDC's eviction moratorium on August 26, 2021).

191. The word "temporary" is used to begin the various moratoriums promulgated by the CDC. *See supra* notes 9–18 and accompanying text (exhibiting the word "temporary" to begin the original moratorium and each extension).

192. *See supra* notes 9–18 and accompanying text (exhibiting the word "temporary" to begin the original moratorium and each extension).

An administrative order similar to the CDC's eviction moratorium, however, would likely create a temporary physical appropriation of property amounting to a per se physical invasion taking.[193] In *Cedar Point Nursery*, the physical takings rule was expanded from *Loretto* to encompass temporary physical takings in addition to permanent physical takings.[194] Furthermore, *Cedar Point Nursery* exemplifies the fact that the occupation of a person on another's land constitutes a "physical" invasion.[195] Despite only granting outside access to the affected landowners' property for three hours per day for 120 days a year, the Court still found that the landowners' property was invaded and appropriated as the outsiders were granted the right to "take access" under the regulation.[196] Similarly, under the CDC's eviction moratorium, landlords were prevented from evicting residential tenants for nonpayment of rent, so long as the tenants were complying with the CDC's order.[197] In both instances, the landowner's right to exclude is being usurped by an order granting temporary access to those that the landowner would normally have the right to exclude from his or her property.[198] Also, in both cases, the invasion occurring on the property comes in the form of people. Simply put, in both *Cedar Point Nursery* and in a similar future moratorium on evictions, "[b]ecause the government appropriated a right to invade, compensation [is] due."[199]

The negative case law that seemingly chips away at the finding of a physical invasion taking will not likely destroy the finding of a physical taking; nonetheless, it is worth investigating and considering. For instance, the right to exclude is not absolute. Consider the classic first-year property class case of *State v. Shack*.[200] This New Jersey case held that migrant farmworkers residing on the landowner's farm were allowed to receive visitors (in this case, nonprofit organizations attempting to assist the

193. *Cedar Point Nursery*, 141 S. Ct. at 2074.
194. *Id.* at 2074–75.
195. *See id.*
196. *Id.*
197. *See generally* 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. 43244, 43245 (Aug. 6, 2021).
198. Under the common law, landlords may consider a tenant in breach of their lease as a trespasser, which a landlord has a right to exclude. 49 TEX. JUR. 3D *Landlord and Tenant* § 264, Westlaw (database updated Jan. 2022).
199. *Cedar Point Nursery*, 141 S. Ct. at 2076.
200. 277 A.2d 369 (N.J. 1971).

farmworkers) against the wishes of the landowner, so long as the visitors did not interfere with the farming activities.[201] The New Jersey Supreme Court's holding that these visitors were not trespassers chips away at a landowner's right to exclude, thereby potentially affecting a landowner's right to exclude tenants not paying rent under an eviction moratorium and perhaps defeating a physical invasion taking argument.[202]

The limitation on the right to exclude in *Shack*, however, will have little to no bearing in a physical invasion taking argument. In its reasoning in *Cedar Point Nursery*, the majority distinguishes a similar case to *Shack*: *National Labor Relations Board v. Babcock & Wilcox Co.*[203] In *Babcock*, the Supreme Court held that employers that denied union organizers (who were attempting to distribute literature on company property to employees) access to the employers' property had a right to do so unless the employees were "beyond the reach of reasonable union efforts to communicate with them."[204] In *Cedar Point Nursery*, the California Agricultural Labor Relations Board argued that this balancing approach from *Babcock* should have been used to consider the relationship between property rights and organizational rights, but the Court quickly extinguishes this argument: "*Babcock* did not involve a takings claim."[205] As the majority in *Cedar Point Nursery* found *Babcock*'s policy-based approach unpersuasive, the Supreme Court would likely find other similar approaches, such as *Shack*'s grant of a right of access, insufficient to defeat a takings argument.[206] Applying *Shack* or *Babcock* to a takings claim would be shoving a square peg into a round hole—they are not compatible.[207]

A leading case regarding per se physical invasion takings and rent control provides another powerful counterargument for the

201. *Id.* at 371–75.

202. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (emphasizing 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"). While *State v. Shack* is a state case, therefore having no authority over federal precedent, it illustrates how a court can potentially limit the right to exclude.

203. 351 U.S. 105 (1956).

204. *Cedar Point Nursery*, 141 S. Ct. at 2077 (quoting *Babcock & Wilcox Co.*, 351 U.S. at 113). The Court noted that such a situation is unusual. *Id.*

205. *Id.*

206. *See id.*; *Shack*, 277 A.2d at 374–75.

207. *See Cedar Point Nursery*, 141 S. Ct. at 2077 (distinguishing the instant case from *Babcock*, which granted a narrow right in a case that did not involve a takings claim).

government. In *Yee v. City of Escondido*, California's Mobilehome Residency Law provided protection for mobile homeowner's tenancy, limiting mobile home park owners' reasons for termination of tenancy to "nonpayment of rent, the mobile home owner's violation of law or park rules, and the park owner's desire to change the use of his land."[208] This law also did not allow park owners to remove a mobile home if it was sold and forced park owners to continue renting to the new mobile home purchaser if the new purchaser was able to pay the rent.[209] Additionally, the City of Escondido approved a rent control ordinance in the city.[210] A group of mobile home park owners brought suit alleging that altogether the laws constituted a per se physical taking.[211] On appeal, the Supreme Court held that no physical taking had occurred because the park owners had voluntarily solicited tenants to rent spaces on their property and they could not prove a taking just because they could not exclude certain tenants[212]—the government never forced tenants upon them, it merely regulated the relationship between landlord and tenant.[213]

While some lower courts have used *Yee* to find that residential eviction moratoria do not cause a physical taking,[214] the overlooked fact is that *Yee* regarded rent control and tenant protection rights, not an exemption from paying rent placing landlords "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery."[215] In distinguishing this argument, the analogies to *Yee* must first be accounted for. It is true that landlords bound by an eviction moratorium have voluntarily invited physical occupation to the public onto their

208. 503 U.S. 519, 524 (1992).
209. *Id.*
210. *Id.*
211. *Id.* at 525–26.
212. *Id.* at 531.
213. *Id.* at 528.
214. *See, e.g.*, Gonzales v. Inslee, 504 P.3d 890, 904–05 (Wash. Ct. App. 2022) (finding a state eviction moratorium was not a physical invasion taking after analogizing to *Yee*, as in both cases the landlords voluntarily opened their land to physical occupation and the challenged regulations merely regulated the landlord-tenant relationship rather than forced occupation); Jevons v. Inslee, 561 F. Supp. 3d 1082, 1106–07 (E.D. Wash. 2021) (finding a state eviction moratorium was not a physical invasion taking after analogizing to *Yee*, as in both cases the landlords voluntarily opened their land to physical occupation and the challenged regulations merely regulated the landlord-tenant relationship rather than forced occupation).
215. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

property, as in *Yee*.[216] Furthermore, there is an argument that an eviction moratorium merely regulates the landlord-tenant relationship by limiting the ability to evict a tenant for certain reasons, which is supported by *Yee*.[217]

However, what lower courts' reasoning[218] has failed to account for is the fact that challenged regulations in *Yee* are distinguishable from an eviction moratorium. One of the laws in *Yee* limited the reasons why a park owner may lawfully evict a mobile homeowner renting land on park property.[219] Notably, this law in *Yee* allowed a park owner to evict a mobile homeowner for "nonpayment of rent"[220]—exactly what an eviction moratorium similar to the CDC's *forbids* an owner to do. This key distinction was not properly accounted for in lower courts' opinions, and it contributes to the finding of a physical invasion taking. The second law in *Yee* was a rent control ordinance.[221] Again, this is completely different than an eviction moratorium, as rent control at least guarantees landlords to receive timely rent proceeds (albeit lower rent than what they would likely charge), while an eviction moratorium does not promise timely rent.[222] Rent control (unaccompanied by other protections) also does not extinguish landlord rights to eviction for nonpayment of rent, while an eviction moratorium does.[223] Altogether, it is hard to imagine that an eviction moratorium merely regulates the landlord-tenant relationship in a manner similar to that in *Yee*. While landlords affected by an eviction moratorium have opened their property to physical occupation, these landlords did so in exchange for the promise of payment. Extinguishing landlords' right to eviction for

216. *See Yee*, 503 U.S. at 531.

217. *See id.* at 528.

218. *See, e.g.*, *Gonzales*, 504 P.3d at 904–05; *Jevons*, 561 F. Supp. 3d at 1106–07.

219. *Yee*, 503 U.S. at 524 (allowing park owners to evict only for reasons such as "nonpayment of rent, the mobile home owner's violation of law or park rules, and the park owner's desire to change the use of his land").

220. *Id.*

221. *Id.*

222. *See generally All About Rent Control: What It Is, How It Works, and How It Impacts Your Housing Market*, BUNGALOW (Feb. 1, 2022), https://bungalow.com/articles/all-about-rent-control-what-it-is-how-it-works-and-how-it-impacts-your#what-is-rent-control (discussing rent control); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34010, 34012–13 (June 28, 2021) (discussing the eviction moratorium). In practice, a struggling tenant deferring rent payments each month may never be able to pay back the rent, thereby guaranteeing the landlord nothing.

223. *See Yee*, 503 U.S. at 524 (illustrating that additional mobile homeowner tenant protections were needed in addition to rent control; these additional protections would not be needed if rent control afforded sufficient tenant eviction protection rights).

nonpayment of rent goes beyond what was considered in *Yee* and leaves the landlord with little recourse to seek timely payment, therefore rising to the level of a physical invasion taking of property.[224]

While the government could make some final counterarguments here regarding policy, public welfare, and the police power, its efforts would likely fall short in the modern Supreme Court. For instance, the government could argue that this is not an unconstitutional taking because it was utilizing its all-encompassing police power to promote the "health, morals, safety, and general welfare of the communit[ies] [with substantially higher transmission of COVID-19 (or some other kind of future crisis)]."[225] This is a good argument for the government as the eviction moratorium was enacted for the purpose of controlling COVID-19 spread.[226] However, the Court will likely be unpersuaded by this argument since this police power argument would violate the landowner's right to exclude, one of the most fundamental and treasured rights of property ownership that the Court made sure to emphasize throughout its opinion in *Cedar Point Nursery*,[227] and even in *Alabama Ass'n of Realtors*.[228] With such strong agreement within the 2021 Supreme Court on the importance of right to exclude, the expansion of per se physical takings to include temporary takings, and the omen alluding to a regulatory taking argument in *Alabama Ass'n of Realtors*,[229] a future legislative action halting residential evictions in a manner similar to the CDC's eviction will likely falter under a per se

224. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074–75 (2021) (finding a regulation granting a right of intermittent access to private property without recourse available to the landowner constituted a per se physical invasion taking).

225. Ilya Somin, *A Takings Clause Lawsuit Against the CDC Eviction Moratorium*, THE FEDERALIST SOC'Y (Aug. 5, 2021), https://fedsoc.org/commentary/fedsoc-blog/a-takings-clause-lawsuit-against-the-cdc-eviction-moratorium; Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926).

226. Somin, *supra* note 225.

227. 141 S. Ct. at 2077. "We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right,' that cannot be balanced away." *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979)).

228. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam). "[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

229. *See id.*

physical invasion takings argument, thereby owing just compensation to affected landowners.[230]

B. Analyzing a Moratorium Under a Partial Regulatory Takings Argument

If a court does not find that a per se physical invasion taking has occurred in a future eviction moratorium similar to the CDC's recent moratorium, there is a chance that a court, particularly the Supreme Court, would find a partial regulatory taking and award just compensation for what was taken from affected landowners.[231] Partial regulatory takings are considered on a case-by-case basis that are generally guided by the following factors: (1) "[t]he economic impact of the regulation on the [landowner]"; (2) the regulation's interference with the landowner's "investment-backed expectations"; and (3) "the character of the governmental action."[232] These factors are guided by the no-segmentation rule, which requires a court to look at the character of the action and the nature and extent of the interference with the parcel as a whole, rather than dividing the parcel up into separate segments in an attempt to claim that an entire segment has been eliminated.[233] While these guidelines are unpredictable as they are applied on a case-by-case basis, a situation where the landowner is able to come out on top on each of the three factors is theoretically possible (although, admittedly difficult), which could establish a partial taking where just compensation is owed.[234]

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230. In regulatory takings cases, just compensation is owed to the affected landowner in the form of compensatory damages, even if the government decides to invalidate the law itself to try and reverse the temporary taking. First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 318–19 (1987); *Takings*, *supra* note 66.

231. *See generally* Somin, *supra* note 225. The damages awarded to a victorious landowner would likely differ depending on the case. A landowner who lost out on a few months of rent proceeds would likely recover the amount he or she did not receive, whereas a landowner who lost out on rent, which then caused late mortgage payment penalties and foreclosure, would be asking for damages replacing forgone rent proceeds, mortgage penalties, and perhaps the amount lost in foreclosure.

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

233. *Id.* at 130–31.

234. Importantly, the *Penn Central* partial taking factors are very fact-intensive, meaning there cannot be a blanket analysis rendering all takings arguments under this framework either granted or denied. *See id.* at 124. This Article will attempt to balance different fact scenarios that could potentially lead to landowner and government victories.

1. Economic Impact on the Landowner

First, the economic impact on landowners/landlords will be great since they are losing monthly rent revenue. To sway a court in favor of the landowner on this factor, the economic impact upon the landowner must amount to serious financial losses resulting from the questioned regulation, but this factor is almost certainly not enough to win a takings claim alone on.[235]

When looking at the economic impact upon landowners/landlords, there is no debate that they are at risk of serious financial loss. Landlords are supposed to be owed the rent money that covered tenants are deferring payment on, but how are landlords supposed to get by in the interim? A survey conducted by Avail, a company serving informational resources and rental services to both property owners and tenants,[236] showed that around half of respondents were small property owners with modest incomes; in fact, over one-third of the respondents were retired.[237] Under the CDC's eviction moratorium, the government placed the burden of subsidizing housing upon landlords while they still had to maintain their ownership costs, and the landlords' only tool to prevent their losses—eviction—had been suspended.[238] There is also a large risk that the tenant will not be able to pay the landlord after the expiration, which could drive the tenant into bankruptcy and the landlord into debt or foreclosure, despite having foreclosure aid programs.[239]

While the economic impact upon landlords under a future eviction moratorium would be great, this factor alone will likely not be met with sympathy on the landowner. It is expected that government regulations will affect some more than others, and if every diminution in value was a taking, government could not

235. *See id.* at 124–25; Practical Law Government Practice, *supra* note 87; *supra* notes 140–44 and accompanying text.

236. Sharon Yamen, Hilary Silvia & Linda Christiansen, *In Defense of the Landlord: A New Understanding of the Property Owner*, 50 URB. LAW. 273, 305 n.210 (2019–2020).

237. *Id.* at 305–06.

238. *Id.* at 306.

239. While mortgage forbearance programs were available during the COVID-19 pandemic, they only applied to federally-backed mortgages and there was much difficulty, confusion, and hardship in repaying deferred mortgage payments at the expiration of these programs. *See* Julia Ingram, *A Tsunami of Deferred Debt Is About to Hit Homeowners No Longer Protected by a Foreclosure Moratorium*, WASH. POST (Aug. 1, 2021, 9:00 AM), https://www.washingtonpost.com/business/2021/08/01/tsunami-deferred-debt-is-about-hit-homeowners-no-longer-protected-by-foreclosure-moratorium/.

function.[240] In fact, without a showing that the government essentially singled out the specific landowners challenging the moratorium,[241] the government will almost always win despite the landowner showing an overwhelming amount of negative economic impact.[242] To prevail on this factor, the landowner would have to have very egregious facts, such as having modest means, a mortgage afforded no emergency protections, an extreme loss of income or property, and/or tenants being unjustly enriched at the expense of their landlord.[243] Evidently, the economic burden upon the landowner under the CDC's eviction moratorium was substantial, and it would likely remain this way under similar future legislation; however, this is generally not enough to win a partial regulatory takings claim,[244] thus the analysis must move on in search of further factors favoring the landowner.

2. Interference with the Investment-Backed Expectations

Second, the interference with the investment-backed expectations factor could potentially favor landowners as the deferral and/or loss of rent proceeds affects the return on their investments made into their rental properties. When determining the effect on the landowner's investment-backed expectations, a court must find that the landowner's expectations were objectively reasonable considering the governing law at the time of purchase compared to the effect the new regulation has on the landowner's property.[245] Further, the landowner must show an investment made in support of his or her reasonable expectations.[246] While this factor is often confusing to courts, the principle of estoppel is

240. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

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

242. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (seventy-five percent diminution caused by zoning law did not constitute a taking); Hadacheck v. Sebastian, 239 U.S. 394, 405, 413–14 (1915) (eighty-seven percent property value loss caused by zoning law requiring landowner to cease industrial operations did not constitute a taking); Haas v. San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979) (ninety-five percent diminution of property value did not constitute a taking).

243. *See generally* Practical Law Government Practice, *supra* note 87.

244. It is highly unlikely for a landowner to win a partial regulatory takings case on this factor alone. *See Penn Cent. Transp. Co.*, 438 U.S. at 124–25; Practical Law Government Practice, *supra* note 87; *supra* notes 140–44 and accompanying text.

245. *Penn Cent. Transp. Co.*, 438 U.S. at 127; Practical Law Government Practice, *supra* note 87.

246. *Penn Cent. Transp. Co.*, 438 U.S. at 121, 124; Practical Law Government Practice, *supra* note 87.

helpful in determining the outcome[247] while being guided by fairness and reliance.[248]

While the facts could change depending on the situation, it is not difficult to imagine a casual landlord or retiree looking to make some side income investing into rental property with the reasonable expectation of being able to rent units, actually renting out units and receiving income, and evicting tenants who are not paying rent. This is not a far-fetched principle, but rather the basic form of investing in rental properties—landowners displace their own financial situation and often leverage debt to finance their long-term rental properties to eventually own these properties outright and generate profit for themselves.[249] As with any investment, there is risk associated with investing in rental properties, but the interference with the landlord's ability to evict and collect timely income is an unforeseeable risk that the landlord could not have reasonably expected when purchasing property, and surely this was not in his or her title at the time of purchase.

Comparing this factor to estoppel, the landowner relied upon his or her ability to make a reasonable return on the investment into rental property, and the interference with this investment presents an unforeseen risk that one could not have objectively seen coming.[250] Looking at *Penn Central*, the landowner did not persuade the Court on this factor because the negotiations to lease the property were still ongoing and contingent upon gaining major approval for renovations *after* the landmark preservation law had encompassed the property.[251] A landlord challenging an eviction moratorium, however, would have already invested in his or her relevant property by purchasing (and perhaps renovating) the property, potentially setting up a business entity, and incurring rental and management costs. Furthermore, the landlord at this point would have been collecting rent proceeds from tenants with the option of eviction in the case of nonpayment. Some of these

247. Manheim, *supra* note 148, at 962 nn.206–08.

248. Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 619 (2014).

249. For a general discussion on rental property investing, see Nathan Paulus, *Becoming an Investor in Real Estate Rental Properties*, MONEYGEEK (Aug. 15, 2022), https://www.moneygeek.com/mortgage/resources/rental-property-investing/.

250. Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 5 (1987).

251. *Penn Cent. Transp. Co.*, 438 U.S. at 115–17.

landlords may have been doing this for years, or even decades.[252] This sets up a much more sympathetic argument for landlords' investment-backed expectations, as they have been upset after having already made long-term investments in both their objective and subjective expectations to receive rent proceeds.

While this factor could present a variety of different arguments, the situation above provides an almost certain situation that would arise again out of a similar future eviction moratorium. However, a court could find that if the landlord could still make a reasonable return during the time the rent proceeds were deferred, the landlord would likely lose on this factor.[253] Again, egregious facts would need to occur here for a court to find a partial taking, such as a landlord's rental property being foreclosed or having extremely heavy mortgage penalties resulting from the deferred proceeds.[254] If presented with facts showing this unreasonable interference with a landowner's right to rent property to tenants and collect revenue, thereby violating investment-backed expectations, this factor could sway in favor of the landowner.

3. Character of the Governmental Action

Third, the character of the governmental action prong of the *Penn Central* factors favors the landowners as the occupation of nonpaying tenants can be classified as a physical invasion.[255] When looking at this factor, a court will more readily find a taking when the regulation's interference with property is a "physical invasion by government," rather than "some public program adjusting the benefits and burden of economic life to promote the common good."[256] The regulation may lawfully burden some more than others, but a court will sway more in favor of the landowner if he or she can show a unique or sole burden.[257]

252. *See id.* at 136 (emphasizing that the train station had been used in its current state for sixty-five years as its primary purpose, and this purpose was not affected by the new regulation).

253. *Id.*

254. *See* Manheim, *supra* note 148, at 958–64; *see also* Practical Law Government Practice, *supra* note 87.

255. *See supra* pt. IV.A.2.

256. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

257. *Id.*

As of the Supreme Court's opinion in *Cedar Point Nursery* and *Alabama Ass'n of Realtors*, this factor can likely fall in favor of the landowners if a similar eviction moratorium were to be reinstated for a resurgence in COVID-19 cases or a future crisis.[258] First, a regulation similar to the CDC's eviction moratorium will likely be classified as a physical invasion of property. The Supreme Court has redefined its per se physical takings precedent by now allowing temporary physical appropriations of property to be considered a per se taking.[259] While the above analysis explained why an eviction moratorium would likely constitute a per se physical invasion taking, if this argument falls short of a per se taking, then the physical invasion argument could be used very persuasively here, as physical invasions not amounting to a per se taking may still facilitate a partial taking under *Penn Central*.[260] Again, a similar eviction moratorium would force landlords to house tenants who are not paying full rent (or perhaps even no rent at all); therefore, this moratorium would be encroaching on landlords' right to exclude the physical invasion occurring on their property. Although temporary, this still counts as a physical invasion of property that will weigh heavily in favor of the landowners as an infringement of their right to exclude. However, the government's police power allows wide discretion in regulating the landlord-tenant relationship and affording various protections to tenants in crisis, and the analysis on how important the government's interest on this factor will drastically vary depending on the facts of a future moratorium.[261]

Also, using the Court's own reasoning, a moratorium is not the best use of promoting the common good through a public program. Regarding the CDC's eviction moratorium, the Court has plainly stated that "[a]s harm to the applicants has increased, the Government's interests have decreased [regarding COVID-19 as more vaccinations and treatment options have become more widely available]."[262] While it does not seem like landlords are being uniquely burdened or targeted, and that the government had good intentions of relieving struggling tenants unable to make full rent

258. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021); *see also* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021) (per curiam).
259. *Cedar Point Nursery*, 141 S. Ct. at 2074; *see supra* pt. IV.A.2.
260. *Penn Cent. Transp. Co.*, 438 U.S. at 124.
261. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926).
262. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

payments, "[t]he equities do not justify depriving the applicants of . . . judgment in their favor. 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."[263] In a future moratorium, there is a good chance that this factor can sway toward the government if COVID-19 cases drastically rise again or if a similar crisis, such as war, economic depression, or another widespread pandemic, causes a similar or greater effect on the United States.[264] However, while this moratorium was originally put in place as a public program shifting benefits and burdens, the majority of the 2021 Supreme Court was not convinced regarding the necessity of this regulation, and a similar moratorium in the future would heavily depend on the facts of the scenario in a future decision.

4. The No-Segmentation Rule

Considering the above analysis in the context of the no-segmentation rule, the landowners could potentially face some serious problems, but a court may find in their favor anyways if it is thoroughly convinced in the landowners' case in the above *Penn Central* factors. Using the no-segmentation rule, the landowners could potentially prevail since the rule requires a court to look at the entire duration of the landowners' estate, which is, presumably, ownership in fee simple (i.e., ownership forever). Losing revenue for just the duration of a moratorium is only a temporary loss, not a permanent deprivation of property or lost revenue. However, a court may still find a way to find in favor of the landowners if thoroughly convinced that they have otherwise met the *Penn Central* factors. Furthermore, a court may be willing to look past this in light of the Supreme Court's holding in *Cedar Point Nursery* that physical invasions of property may be merely temporary to be a per se physical taking,[265] which is supposed to be a higher threshold to meet than a partial takings claim. Therefore, if a landowner in a future similar moratorium can show

263. *Id.*

264. *See generally id.* at 2492–94 (Breyer, J., dissenting) (arguing for the equities strongly favoring the government due to the uptake of COVID-19 cases at the time of the decision).

265. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

that the *Penn Central* factors sway in his or her favor, the landowner could win a partial takings claim and would then be entitled to just compensation for the land that was taken, although it would take a rather extraordinary set of facts to succeed.

V. BALANCING THE EQUITIES IN FUTURE MORATORIA WHILE AVOIDING A REGULATORY TAKING

Regardless of what the outcome of regulatory takings litigation surrounding a similar future moratorium might be, all parties would agree that the process would be costly, cumbersome, and time-consuming. This can all be avoided by passing thoughtfully crafted legislation that provides a housing solution appeasing all parties during future crises. A few possible options include the government giving rent money to tenants directly, the government giving rent money to landlords directly, or a variation of a housing choice voucher program. If one of these options were adopted into emergency legislation, most preferably the housing choice voucher program, other emergency tactics such as mortgage forbearance and temporary Internal Revenue Code provisions can be implemented to better spread and reduce costs in an equitable manner across all parties involved.

A. The Government Lends Money to Tenants

First, the government could subsidize housing by giving rent money to tenants directly. This empowers tenants to receive federal funding to pay their rent outright when being adversely affected by a national crisis. Furthermore, the tenant would be able to pay his or her landlord as normal, thereby injecting funds into the economy to retain a stable market. A government-to-citizen model of aid is feasible, as demonstrated by food stamps and stimulus checks.[266] This option does come with some downsides, however, as the tenant could potentially misuse the funding, be unable to make rent payments, and would have no protection from eviction during a health crisis. Furthermore, the government would have to figure out how to collect the money back

266. Notably, food stamps are subsidized by the government, not grocery stores, adding further support to the argument that if the government wants to relieve tenants of rent payments during a crisis, then it should also pay for the relief without forcing landlords to subsidize it.

from the affected tenants, particularly the financially burdened ones who would have a hard time making repayments.

B. The Government Lends Money to Landlords

Next, the government could subsidize housing by giving rent money to landlords directly. This system is streamlined compared to giving the money to tenants as it cuts out the middleman and directly supplies the landlord with burdened tenants' rent money, thereby securing tenants a suitable place to live. In fact, this program was suggested by Judge Kinsey, the judge who heard one of the first lawsuits regarding the CDC's eviction moratorium; she noted that the moratorium amounted to a taking, but that it could be remedied if the federal government had just paid tenants' rent to the landlord directly to provide just compensation.[267] This program could perhaps be combined with an eviction moratorium as a condition of receiving the federal rent money, which would release all possibility of a taking since just compensation would be being provided, just as Judge Kinsey claimed.[268] The downside to this solution is that landlords may be able to scam the system and somehow take more rent money than they are owed. Also, landlords may increase their rent and further burden tenants; the federal government could potentially have some sort of rent control component as a condition of receiving federal funding, but this again puts more pressure on landlords. As with lending money to tenants directly, there would be difficulty for the government to keep track of whose rent it paid and being able to collect money from those relieved individuals. Finally, and perhaps most obviously, both giving money to tenants and landlords is incredibly costly to the federal government, which is already over $31 trillion in debt.[269]

C. Taking Advantage of the Housing Choice Voucher Program

Finally, the government could utilize an already-existing program but apply it to future crises—the housing choice voucher

267. Spicliff, Inc. v. Cowley, No. 2020-CC-003778, 2020 WL 7681027, at *2 (Fla. Escambia County Ct. Nov. 24, 2020).

268. *See id.*

269. *What Is the National Debt?*, FISCALDATA, https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/ (last visited Mar. 6, 2023).

program. The housing choice voucher program (colloquially known as "section 8 housing") is a federal program that assists low-income families, the elderly, and disabled people to afford suitable housing in the private market.[270] Eligible participants in this program are able to obtain vouchers from local public housing agencies ("PHAs") that receive federal funding from the U.S. Department of Housing and Urban Development ("HUD") that may be used to acquire private rental housing.[271] The PHA pays the voucher amount to the landlord directly, and the participating family pays the remainder, which may not exceed thirty percent of the family's monthly adjusted gross income.[272]

While the housing choice voucher program is similar to giving landlords money directly from the federal government, this option could be more attractive since there is already an established platform for giving out these vouchers, and the rules governing the program are formally codified.[273] A legislative action plan for future health crises could include an emergency variation of a housing choice voucher program for eligible participants (such as meeting the definition of a "covered person" in the CDC's moratorium,[274] or perhaps a stricter definition since the tenant will be essentially be receiving free rent money) by using the same or very similar platforms, codes, and guidelines established in the housing choice voucher program. This would provide the benefits of giving rent money directly to landlords, but through a more structured manner that is better-managed and more familiar. The downside to this option is that wait times to get on the housing choice voucher program are very long and limited, and, of course, it is a very expensive option. However, utilizing this program for future crises may bring more attention to the housing choice voucher program and its crisis variation, which could hopefully bring about positive change in lessening wait times, streamlining costs, and reaching more people in need.

270. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8#hcv01 (last visited Feb. 18, 2023).

271. *Id.*

272. *Id.*

273. *See generally* 24 C.F.R. § 982 (2021).

274. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34010, 34011 (June 28, 2021).

D. Who Should Bear the Burden?

After discussing the above proposals, there are a few policy questions that merit discussion. Can the federal government afford to go into more debt to solve the rental housing problem during a national crisis? Which party or parties are in the best position to bear the burden during an emergency? Are these burdens even equitable? While this Article does not claim to have all the answers, there are a few cost-reduction/cost-spreading methods that can potentially be implemented within one of the above solutions (most preferably the modified housing choice voucher program), such as mortgage forbearance and temporary tax provisions.

The vast majority of this Article analyzed three parties: landlords, tenants, and the federal government. Notably absent from this discussion were mortgage lenders and banks—arguably the most important parties, as these are the entities holding the mortgage or debt backing many landlords' rental properties.[275] Perhaps the financial institutions holding the mortgages for the rental properties in question should also bear part of the burden, particularly because these entities already have recourse if default occurs, such as penalty payments, asset seizure, and foreclosure, as well as the fact that these major entities generally have more resources than smaller real estate investors. One potential solution is a more extensive mortgage forbearance program for affected landlords. While mortgage forbearance programs were available during part of the COVID-19 crisis, they only applied to federally-backed mortgages and were not user-friendly.[276] A stronger mortgage forbearance program would not only aid landlords in avoiding penalties, foreclosure, and negative credit

275. Gay Cororaton, *Landlord Statistics from the 2018 Rental Housing Finance Survey*, NAT'L ASS'N OF REALTORS (Sept. 15, 2020), https://www.nar.realtor/blogs/economists-outlook/landlord-statistics-from-the-2018-rental-housing-finance-survey (finding "59% of [rental] properties have a mortgage or similar debt"). However, the percent of smaller properties with a mortgage or other debt varies. *Id.* The research shows 39.2% and 52.3% of properties with one unit and two-to-four units, respectively, were backed by a debt. *Id.* This is an important finding as the whopping majority of individual landlords—totaling 14.1 million—own rental properties with only one-to-four units. Drew DeSilver, *As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S.*, PEW RSCH. CTR. (Aug. 2, 2021), https://www.pewresearch.org/fact-tank/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/#:~:text=In%20fact%2C%2072.5%25%20of%20single,owned%20by%20for%2Dprofit%20businesses.

276. *See* Ingram, *supra* note 239.

score impact due to late payments or temporary default,[277] but could also assist the federal government in mitigating the need for extreme aid to landlords in crisis and preventing a negative impact on housing markets.[278] Ideally, this program could be developed within the context of the housing choice voucher program crisis solution discussed earlier.[279]

Other potential solutions to help alleviate the cost burdens of an emergency housing crisis legislative action come from tax law. Tax law is governed by the Internal Revenue Code, title 26 of the United States Code, and is often amended to reflect the policy goals of the Code, including fairness, efficiency, and neutrality.[280] To ensure the Code's policy goals function appropriately during a housing crisis, temporary tax provisions could be implemented into a legislative action. For instance, to help lighten the burden off certain landlords, Congress could temporarily allow more expansive deductions for passive activity losses. The Code bifurcates "passive" and "non-passive" activities, meaning passive activity losses cannot be used to offset non-passive activity income (such as personal income).[281] The threshold for the passive/non-passive distinction is "material participation," which asks if the taxpayer participated in that activity in a "regular," "continuous," and "substantial" manner.[282] Unless a landlord-investor meets this stringent requirement of material participation, passive losses can

277. *See* Liane Fiano, *Protecting Your Credit During the Coronavirus Pandemic*, CONSUMER FIN. PROT. BUREAU (July 29, 2020), https://www.consumerfinance.gov/about-us/blog/protecting-your-credit-during-coronavirus-pandemic/ (explaining that under the CARES Act, there were stringent requirements to meet for a landlord to protect his or her credit due to late mortgage payments, even if the lender agreed to accommodate the late payments through a forbearance program).

278. *See* Christina Hughes Babb, *Many Small-Scale Landlords Risk Defaulting on Mortgage Loans*, MREPORT (Feb. 26, 2021), https://themreport.com/news/data/02-26-2021/many-small-scale-landlords-risk-defaulting-on-mortgage-loans (stating that "the longer the eviction bans are in place, the higher the likelihood that these landlords are going to default on their mortgages . . . which could have a negative impact on local housing markets" (quoting Rick Sharga, the Executive Vice President of RealtyTrac)).

279. *See supra* pt. V.C.

280. JOHN A. MILLER & JEFFREY A. MAINE, THE FUNDAMENTALS OF FEDERAL TAXATION 5–6, 8 (5th ed. 2018).

281. I.R.C. § 469(a); MILLER & MAINE, *supra* note 280, at 386. Importantly, these rules only apply to activities from a trade or business, or an income-producing activity producing rents and royalties (e.g., rental properties). I.R.C. § 469(c)(1)–(2); *see* Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987) (stating the test for a "trade or business" as an activity which the taxpayer carries on with (1) "continuity and regularity" and a (2) primary purpose of profit); I.R.C. § 62(a)(4) (including expenses from income-producing property held for production of rents and royalties as above the line deductions).

282. I.R.C. § 469(h)(1); MILLER & MAINE, *supra* note 280, at 386.

only offset passive income, and the remaining losses are carried into future years[283]—this effectively eliminates most landlords who invest and manage a smaller, one-to-four unit rental property on the side of their primary career. The exception to this is the "mom and pop rental real estate activities" exception, allowing up to $25,000 of passive losses to be treated as non-passive so long as the taxpayer's adjusted gross income is below $100,000 (this treatment is reduced by $1 for every $2 of adjusted gross income exceeding $100,000), the taxpayer owns at least ten percent of the property, and actively participates in the activity (a lower threshold than material participation).[284] The Code attempts to balance fairness in its policy by allowing an exception for the "mom and pop rental real estate activities," but perhaps this provision could be temporarily expanded in national crises to mitigate taxes for landowners. For instance, the "mom and pop" exception could be expanded to allow a certain amount of previously accrued passive activity losses to be freed up for the year in which a national emergency is declared. Additionally, the $25,000 cap on passive activity losses allowed to be treated as non-passive losses could be increased to a number that equitably enables landlords to recoup some of their hardship costs. Beyond this, the entire provision of § 469 could be expanded (not just the "mom and pop" exception), but this may not efficiently target the smaller landlords that more desperately need the aid (which is the point of the "mom and pop" exception).

Despite the attractiveness to landlords of the expansion of the "mom and pop" exception, the federal government may not be as excited since it is missing out on taxes while also having to fund efforts to mitigate the displacement of tenants in need during a crisis. An admittedly less beneficial option for landlords, but a cost-reducing effort for the government, would be including a temporary deferral for rental property depreciation deductions. The Code allows a taxpayer to take depreciation deductions for an asset so long as the asset is depreciable, meaning it is subject to wear, tear, and obsolescence, and used in a trade or business or held for the production of income.[285] For residential real estate, a taxpayer is allowed a depreciation deduction of 3.64% of his or her

283. I.R.C. § 469(b), (d)(1); MILLER & MAINE, *supra* note 280, at 387.
284. I.R.C. § 469(i); MILLER & MAINE, *supra* note 280, at 387.
285. I.R.C. § 167(a); MILLER & MAINE, *supra* note 280, at 147.

adjusted basis over 27.5 years.[286] While this deduction is incredibly advantageous for owners of residential rental property, Congress could consider a depreciation deduction deferral program during a national crisis—this way the federal government is owed more taxes during the year a national crisis emerges and can utilize more resources to help displaced tenants. Under this proposed emergency provision, landlords could be allowed to collect the difference in the year following the end of the crisis or collect proportionally over time until the 27.5 years have elapsed. However, this likely does not accomplish the tax policy goal of fairness, as the federal government is arguably in a better position than smaller landlords to weather the financial hardships of a national crisis. On the bright side, since the country has already gone through the COVID-19 pandemic and the rental housing crisis, there is still time to learn from what went well, what went wrong, and how to better weigh options in the future to reach a better solution that better balances the equities of all parties involved, while also avoiding a regulatory taking, of course.

VI. CONCLUSION

The COVID-19 pandemic has caused tremendous hardship, pain, and suffering not only on the American people, but on the entire world—the last thing people want at this point is more litigation surrounding a moratorium that was enacted to help those suffering the most. However, in light of the Supreme Court's recommendation to the government that Congress must authorize an eviction moratorium if one is needed in the future,[287] the possibility of new litigation over a future regulation necessitates discussion and analysis. If the most recent eviction moratorium[288] were to be congressionally-authorized, a valid regulatory takings claim would arise, and based on evolving Supreme Court precedent, this claim would be successful as a per se physical invasion taking since temporary physical appropriations of property are now considered per se takings where just

286. *See* I.R.C. §§ 167(c), 168(a)–(c); MILLER & MAINE, *supra* note 280, at 147–49.

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

288. *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. 43244 (Aug. 6, 2021).

compensation is owed.[289] If this argument fails, then there is a possibility that compensation will still be owed under a partial regulatory takings theory, seemingly sealing the government's fate. However, all hope is not lost—a variation of the housing choice voucher program could potentially be an option for Congress to explore to equitably distribute federal funding to landlords to directly pay for a portion of affected tenants' rent during national crises, while also binding landlords to an eviction moratorium, thereby awarding just compensation for what was taken. The burdens imposed on various parties throughout this solution can also be mitigated using a combination of mortgage forbearance programs, as well as emergency Internal Revenue Code provisions. While no one wishes another crisis or pandemic on our country, one can never be too prepared for the future that is yet to come. It is time to learn from past mistakes and rally together as a country to find a solution that brings equity, justice, and fairness to all.

289. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).