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## Navigating the COVID-19 Eviction Crisis: The CDC's Emergency Eviction Moratorium and Judicial Deference

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# **Navigating the COVID-19 Eviction Crisis: The CDC's Emergency Eviction Moratorium and Judicial Deference**

**Deepika Chandrashekar**

## ABSTRACT

*The COVID-19 pandemic has exacerbated America's pre-pandemic affordable housing crisis and millions of renters have paid the price. The Centers for Disease Control and Prevention (CDC) issued a nationwide eviction moratorium in September of 2020 due to the ongoing COVID-19 pandemic. While the moratorium was originally intended to be temporary, the CDC under the Biden administration was forced to extend the moratorium in August of 2021 due to a lack of congressional action. The CDC is empowered by the Public Health Service Act to take actions necessary to prevent the spread of communicable diseases, and the ongoing COVID-19 pandemic constitutes such a threat.*

*This Comment analyzes the statutory construction of Section 361 of the Public Health Service Act, the enabling statute that gives the CDC the power to enforce measures to stop the spread of communicable diseases through measures such as quarantines. Using Chevron deference and looking at the legal framework and history of this statute, this Comment argues that the moratorium was a reasonable response to the ongoing pandemic because of the widespread economic disruption and displacement of those unable to pay rent due to financial hardship. Finally, this Comment argues that the temporary nature of the moratorium combined with the compelling public interest to protect vulnerable and marginalized communities tipped in favor of a federal eviction moratorium.*

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The COVID-19 pandemic placed a spotlight on the millions of American renters who are unable to make their rent. COVID-19 exacerbated a pre-pandemic affordable housing problem, which has significant imbalances that jeopardize the strength of an economic recovery affecting everyone. The existing state-level system for tenants seeking relief is patchwork at best and there is precedent for prioritizing urgent public need in times of emergency.<sup>1</sup> As an administrative agency working under the executive branch and endowed with powers by Congress through Section 361 of the Public Health Service Act (PHSA),<sup>2</sup> the Center for Disease Control and Prevention (CDC) is better equipped to determine when a federal eviction moratorium is necessary than an unelected, nonrepresentative court.

The CDC's use of Section 361 to create a temporary federal eviction moratorium during a global pandemic is a reasonable interpretation of the statutory language because it aligns with the legislative intent for the CDC's use of quarantines to prevent the spread of infectious diseases. Had the Supreme Court followed the *Chevron U.S.A., Inc. v. Natural Resources Defense Council* precedent, the Court should have shown deference to the CDC's reasonable interpretation of ambiguous statutory text.<sup>3</sup> Although creating a federal eviction moratorium is an unprecedented exercise of the CDC's power, the Court should continue to show deference towards administrative agencies in times of emergency when balancing in favor of the public interest.

Those who critique the eviction moratorium as an abuse of the CDC's authority neglect Section 361's extensive history and fail to realize the legislature has authorized the CDC and other

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<sup>1</sup> See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1984).

<sup>2</sup> 42 U.S.C. § 264(a).

<sup>3</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984). The *Chevron* two-step test inquires first whether Congress has spoken directly on the issue. If Congress has not expressly addressed the issue, the second inquiry is whether the agency's interpretation of the statute is reasonable. *Id.*

public health agencies to create eviction moratoria.<sup>4</sup> While there is no question that this is the most considerable use of that power to date, the CDC’s order remains true to the drafters’ intent, creating temporary measures to prevent contaminated persons from interstate travel and stepping in to address a problem that is too large for states and local governments to handle alone adequately.<sup>5</sup> Additionally, the CDC’s order is not some blanket eviction moratorium because the CDC specifically tailored the moratorium to only come into play when COVID-19 transmissions are at their worst and drastic measures are warranted.<sup>6</sup> The consistent waves of new variants that emerge on a seasonal basis demonstrate both how difficult COVID-19 is to contain and how new variants differ in their strength.<sup>7</sup>

Part I summarizes the current COVID-19 landscape as it has affected communities and local litigation.<sup>8</sup> Part II catalogues the history of Section 361 of the Public Health Service Act and quarantines.<sup>9</sup> It considers both administrative agencies’ early use of Section 361 authority as well as the CDC’s recent use of Section 361 to create a federal eviction moratorium.<sup>10</sup> Part III addresses

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<sup>4</sup> WEN W. SHEN, CONG. RSCH. SERV., R46758, SCOPE OF CDC AUTHORITY UNDER SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT (PHSA) 1, at 14 (2021). [hereinafter CDC’S AUTHORITY UNDER SECTION 361]

<sup>5</sup> *Id.*

<sup>6</sup> Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292–96 [hereinafter Temporary Halt in Residential Evictions]; *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, CENTER FOR DISEASE CONTROL AND PREVENTION (Aug. 3, 2021), <https://www.cdc.gov/media/releases/2021/s0803-cdc-eviction-order.html>.

<sup>7</sup> *Tracking Omicron and Other Coronavirus Variants*, NEW YORK TIMES (updated May 31, 2022), <https://www.nytimes.com/interactive/2021/health/coronavirus-variant-tracker.html>.

<sup>8</sup> *See infra* Part I.

<sup>9</sup> *See infra* Part II.

<sup>10</sup> *Id.*

how the CDC structured and tailored the eviction moratorium to reflect the urgent need of a global pandemic while being temporary in nature.<sup>11</sup> Part IV makes the argument that the Court should apply deferential *Chevron* review to the CDC’s eviction moratorium and apply *Blaisdell* precedent as this is a temporary emergency.<sup>12</sup> Part IV addresses arguments that this deferential statutory interpretation would give administrative agencies overly broad power by explaining how the moratorium is tailored to apply only in areas with high rates of transmission, and will thus be restricted to times of urgent need.<sup>13</sup> Part V concludes.

I. PATCHWORK STATE AND LOCAL EVICTION MORATORIA PROVIDE INADEQUATE  
PROTECTION FROM COVID-19

A. COMMUNITY RESPONSES TO COVID-19 FAIL TO PROTECT VULNERABLE TENANTS

The Coronavirus Disease 2019 (COVID-19) pandemic created an urgent need for immediate responses by state and local governments seeking to preserve public health and safety. A combination of vaccinations, “community mitigation activities (such as social distancing and use of face covering),” and “traditional tools of communicable disease control (such as testing, contact tracing, quarantine, and isolation)” have been employed to prevent the spread of COVID-19.<sup>14</sup> Additional regulations, such as stay-at-home orders and gathering limitations, were enacted by state and local governments exercising their police powers to “provide for the public health, safety, and morals’ of the states’ inhabitants,” resulting in a loss of revenue and income in a variety

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<sup>11</sup> *See infra* Part III.

<sup>12</sup> *See infra* Part IV.

<sup>13</sup> *Id.*

<sup>14</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 1.

of industries, as well as increased unemployment rates.<sup>15</sup> In an attempt to alleviate the economic impact on tenants struggling to afford rent, state and local governments have created relief measures such as eviction moratoria.<sup>16</sup>

Tenant-advocates criticized these temporary measures as insufficient for fully addressing the long-term consequences of unpaid rent and debt that tenants will bear.<sup>17</sup> In January 2021, 814,200 million California renter households were behind on rent, down from 1.1 million households in December 2020.<sup>18</sup> Californian renters face an estimated \$3.7 billion in rent debt,

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<sup>15</sup> *Id.* (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991)); Rakesh Kochhar, *Unemployment Rose Higher In Three Months Of COVID-19 Than It Did In Two Years Of The Great Recession*, PEW RESEARCH CENTER (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

<sup>16</sup> CDC'S AUTHORITY UNDER SECTION 361, *supra* note 4, at 2.

<sup>17</sup> Kacey Reid, *Eviction*, CALIF. L. REV. ONLINE, (Feb. 2021), <https://www.californialawreview.org/eviction-tidal-wave/>. Those who critique eviction moratoria as a band-aid solution for the pervasive debt crisis tenants face suggest alternatives to eviction moratoria, such as rent-forgiveness programs. *Id.* Indeed, some have sought to implement relief programs for tenants and landlords, such as Minnesota Representative Ilhan Omar's Rent and Mortgage Cancellation Act, which would suspend payments for tenants and allow landlords to recoup rent directly from the federal government. Press Release, Ilhan Omar, Rep. Ilhan Omar Introduces Bill to Cancel All Rent and Mortgage Payments During the COVID-19 Pandemic, (Apr. 17, 2020), <https://omar.house.gov/media/press-releases/rep-ilhan-omar-introduces-bill-cancel-all-rent-and-mortgage-payments-during>. While some advocate for rent cancellation, others advocate for more measured rent relief as a solution that protects landlords and tenants. Reid, *supra* note 17.

<sup>18</sup> See Michelle Huang, *Fact Sheet: Preventing Eviction and Indebtedness in California*, BAY AREA EQUITY ATLAS (Mar. 2021), [https://bayareaequityatlas.org/sites/default/files/California\\_Eviction\\_Fact\\_Sheet\\_FINAL\\_20210126\\_0.pdf](https://bayareaequityatlas.org/sites/default/files/California_Eviction_Fact_Sheet_FINAL_20210126_0.pdf). This study was conducted by Housing NOW! California (a tenants' rights group) and Bay Area Equity Atlas (a partnership between PolicyLink, the USC Equity Research Institute, and the San Francisco Foundation) to advance policies protecting renters at risk of eviction during the pandemic. *Id.* These groups further advocate that: (1) no California renter should be evicted or burdened with years of debt from unpaid rent; (2) rent forgiveness for debt incurred during the pandemic, not conditioned on landlord's acceptance of funds; (3) financial assistance to landlords, specifically for small community-based landlords and nonprofits; (4) local municipalities should be authorized to pass stronger eviction moratoriums and preserve debt protection; and (5) landlords should continue to fulfill legal obligations to tenants, maintain habitable premises, refrain from harassment and retaliation, and respect tenants' legal rights, regardless of if tenants are receiving rent assistance. *Id.* at 2.

approximately \$3,400 per household.<sup>19</sup> Of those households, people of color have been disproportionately impacted by the recession and are thus less likely to make their rent payments on time.<sup>20</sup> Those who suffer from comorbidities—such as cardiac disease, high blood pressure, and respiratory disease—are especially vulnerable, as these conditions would put them at a higher risk of death or severe illness if evicted.<sup>21</sup> With that in mind, an administrative agency with the resources to conduct research studies and utilize investigative committees is better equipped to tailor policies for those most vulnerable to eviction, rather than an unelected, non-representative court.

Those who believe federal initiatives are better suited for addressing such a pervasive, national economic problem have criticized this system of state and local government-created moratoria as patchwork and inadequate to fulfil the overall goal of preventing the spread of

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Of the households of color that are disproportionately at risk of eviction, 27% are Latinx, 22% are Black, and 22% are Asian. *Id.* A whopping 60% of Black women are cost-burdened, meaning they spend over one-third of their income on housing—more than any other group. Molly Solomon & Erin Baldassari, *Why Black Women Are More Likely to Face Eviction: The Color of Evictions*, KQED SOLD OUT (Feb. 21, 2022), <https://www.kqed.org/news/11905386/why-black-women-are-more-likely-to-face-eviction>. Factors leading to this inequality include lack of job opportunity, as Black women have higher rates of unemployment and low-paying jobs. *Id.* Additionally, having children in the home can make a prospective tenant undesirable, as landlords associate children with property damage, noise, and unwanted attention from law enforcement like child protective services or health care or social workers. *Id.* According to sociologist Matthew Desmond in his book *Evicted*, eviction is both a result and a cause of poverty. An eviction can result in the loss of employment, and it is directly associated with homelessness. MATTHEW DESMOND, *EVICTED* 333 (Broadway Books, 2016).

<sup>21</sup> Solomon & Baldassari, *supra* note 20. For those suffering from comorbidities, having a home is a critical part of their health. *Id.* A house is instrumental in refrigerating medication, plugging in nebulizers for respiratory distress, and providing shelter from environmental harm. Those who are 212tah212e-compromised are especially susceptible to COVID-related illnesses. *Id.* Studies have shown an eviction can also take years off one's life, resulting in a higher mortality rate and depression. *Id.*



COVID-19.<sup>22</sup> Eviction moratoria vary amongst state and local governments.<sup>23</sup> While these moratoria take place at different eviction process phases, they are all intended to prevent the spread of COVID-19 that would occur through evictions and homelessness.<sup>24</sup> The eviction process includes many different people: “Tenants, landlords, juries, attorneys, judges, court personnel, process servers, and sheriffs’ departments are all at increased risk” of transmission due to potential exposure to COVID-19 during the eviction process.<sup>25</sup> Furthermore, “tenants who are evicted and lose their housing during the pandemic will have a reduced ability to practice social distancing—and most definitely cannot comply with shelter-in-place orders. . . . [Those] who are evicted are forced to double up, reside in poor-quality housing, or become homeless,” increasing their risk of infection.<sup>26</sup>

One of the risks of this patchwork of state-level orders and eviction moratoria is that, by stopping evictions at different eviction process stages, they do not completely prevent evictions and thus do not achieve the overall goal of preventing COVID-19 spread through evictions and homelessness.<sup>27</sup> An eviction moratorium that prevents one stage of eviction only succeeds in

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<sup>22</sup> Sarah Schindler & Kellen Zale, *How the Law Fails Tenants (And not Just During a Pandemic)*, 68 UCLA L. REV. DISC. 146, 146–58 (2020).

<sup>23</sup> *Eviction Moratorium Maps: Eviction Moratorium Protections Vary Widely*, REGIONAL HOUSING LEGAL SERVS., <https://www.rhls.org/evictionmoratoriums> [<https://perma.cc/L5DJ-TVN6>] (last visited Oct. 26, 2021); Emily Benfer, Eric Dunn, Norrinda Brown Hayat & Rachel Blake, *What an Effective Eviction Moratorium Must Include*, SHELTER FORCE, (March 24, 2020), <https://shelterforce.org/2020/03/24/what-an-effective-eviction-moratorium-must-include/>.

<sup>24</sup> Benfer, Dunn, Brown Hayat & Blake, *supra* note 23.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* “Their health will be further compromised as eviction almost always results in increased instability and homelessness, or a downward move to a disadvantaged neighborhood and/or substandard conditions.” *Id.*

<sup>27</sup> *Id.*

preventing those cases that have not yet reached that phase from proceeding.<sup>28</sup> Cases that have already passed that stage will continue to be processed.<sup>29</sup> Local moratoria that halt all court hearings succeed in preventing tenants from being evicted in any case that has yet to be heard but do not prevent the physical eviction of tenants who have already had a court hearing.<sup>30</sup> It may seem logical to stop evictions at the beginning—the court hearing—since a court cannot enter an order to remove the tenant without a hearing, but this moratorium form fails to account for the tenants who already passed this eviction stage.<sup>31</sup> Furthermore, this kind of moratorium does not deter landlords from posting eviction notices, which many tenants will comply with out of fear of being sued and having evictions on their records, precluding them from being able to rent in the

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* One way that state legislatures could implement more effective eviction moratoria is to create a “state emergency management statute [that] may authorize the governor to restrict the issuance of new eviction notices or the physical execution of eviction orders.” *Id.* Another example that may come from “a state’s supreme court or other judicial official” is “an order restricting new court filings or canceling eviction dockets.” *Id.* However, this may lead to an avalanche of eviction cases that would add to the pre-existing backlog of unlawful detainer cases many state courts face. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

future.<sup>32</sup> It also allows landlords to file new cases and compound the mountain of landlord litigation.<sup>33</sup>

A federal public health order would be more effective in accomplishing this because attempting to stop evictions at all phases of the process on a state level would require coordination from local governmental agencies, whereas a federal order would be comprehensive.<sup>34</sup> Section 361 of the Public Health Service Act (PHSA) is an appropriate instrument to achieve this purpose.

#### B. LOCAL EVICTION MORATORIUM LITIGATION HAS HEAVILY FAVORED THE PUBLIC INTEREST IN PROTECTING TENANTS

Prior to the Supreme Court's involvement, most landlord suits challenging eviction moratoria failed.<sup>35</sup> Contrary to the overwhelming public support for eviction moratoria and other relief measures intended to assist renters,<sup>36</sup> landlords mounted an enormous amount of litigation

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<sup>32</sup> *Id.* An eviction can remain on an individual's records for years. Solomon & Baldassari, *supra* note 20. Sometimes referred to as the "Scarlet E," an eviction will appear when an individual applies for housing and is screened by the landlord. *Id.* Applications will sometimes require that applicants self-identify as having been evicted in the past. *Id.* The ACLU has advocated for more eviction diversion programs to address the problem of electronic records of evictions staying on a tenant's rental history. American Bar Ass'n Standing Comm. On Legal Aid And Indigent Def., *ABA Ten Guidelines for Residential Eviction Laws*, (Feb. 14, 2022), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2022/612-midyear-2022.pdf>. These eviction diversion programs are an alternative dispute resolution method that connects landlords and renters with rental assistance providers and sometimes other social agencies in residential eviction proceedings. *Id.* Instead of facing court eviction, eviction diversion tries to allow the parties to negotiate a resolution that settles the rent arrears and allows the tenancy to continue, or at the very least allows the tenant to move into acceptable new housing before being physically evicted. *Id.* The best programs divert cases to negotiations before filing eviction papers in court, allowing the tenant to avoid having an eviction appear on their rental history when applying for future housing.

<sup>33</sup> Benfer, Dunn, Brown Hayat & Blake, *supra* note 23.

<sup>34</sup> *Id.*

<sup>35</sup> Nino C. Monea, Comment, *Eviction Moratorium Litigation: What Courts Said, and What Courts Missed*, 51 U. BALT. L. REV. 187 (2022).

<sup>36</sup> Rachel D. Godsil, *Memo: Addressing Housing Precarity in the Context of Coronavirus Crisis*, DATA FOR PROGRESS, (Apr. 14, 2020), <https://www.dataforprogress.org/memos/addressing-housing-precarity-coronavirus>. See also Annie Knox, *Poll: Nearly Half of Utah Citizens Agree the State Should Have Moratorium on Evictions in Pandemic*, DESERET NEWS (Feb. 20, 2021),

challenging the eviction moratoria as government overreach.<sup>37</sup> These cases usually failed because the court disagreed with the landlord's claims or the government ran out the clock.<sup>38</sup> Additionally, landlords were required to meet a very high standard.<sup>39</sup> Many landlords sought injunctions hoping to prevent the government from enforcing the eviction moratoria. Landlords thus had to show the typical elements of an injunction: (1) a likelihood of success on the merits, (2) that the landlord would suffer irreparable harm without the injunction, (3) the balance of equities is in their favor, and (4) the injunction is in the public's best interest.<sup>40</sup> The third and fourth prongs are combined into a balancing test when the government is defending a policy.<sup>41</sup>

Courts heavily favored arguments that the public interest of the eviction moratorium outweighed any other arguments that landlords might make about overreach of government and individual injury.<sup>42</sup> Rather than make the difficult argument that receiving rent was more important than preventing mass waves of COVID-19 transmissions, landlords instead argued that

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<https://www.deseret.com/215tah/2021/2/20/22289806/poll-nearly-half-of-utahns-say-the-state-should-have-a-moratorium-on-evictions-in-pandemic-covid-cox> (showing Utah citizens favored an eviction moratorium by a nearly two-to-one margin). One poll showed 89% support for banning evictions nationwide, and another found 80% support.

<sup>37</sup> Monea, *supra* note 35.

<sup>38</sup> *Id.* at 1.

<sup>39</sup> *Id.* at 14.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* Courts were not persuaded by the argument that landlords' constitutional rights were violated by the eviction moratoria. *Brown v. Azar*, 497 F.Supp.3d 1270, 1290–91 (N.D. Ga. 2020); *Apartment Ass'n of L.A. Cnty., Inc.*, 500 F. Supp. 3d at 1100 (court and date) (noting that courts have found irreparable injury for a First Amendment violation, without addressing how the principle could be applied outside of First Amendment law).

a regulatory action can never be in the public interest if it is not authorized by Congress or violative of the Constitution.<sup>43</sup>

In challenges to local state eviction moratoria, courts found that the eviction moratorium did not actually frustrate landlords' rights to pursue a legal claim using two lines of reasoning.<sup>44</sup> First, landlords could still sue tenants for arrearages through a breach of contract action, although a disfavored remedial proceeding for landlords, a breach claim nonetheless provides landlords with a means to pursue legal action.<sup>45</sup> Second, the mere delay of filing a lawsuit is not a constitutional violation when the plaintiff will eventually regain access to the legal process.<sup>46</sup>

Courts opined similar reasoning regarding the federal eviction moratorium.<sup>47</sup> First, the moratorium did not prohibit landlords from pursuing breach of contract actions, now or in the future.<sup>48</sup> Second, the Order was temporary and thus the landlord's eviction rights would renew when the Order expired.<sup>49</sup> Third, the landlords were able to immediately begin eviction proceedings now and potentially obtain eviction orders that could be enforced when the Order expired.<sup>50</sup> Thus, the courts have been inclined to balance in favor of public interest, and hesitant to second-guess public health experts.

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<sup>43</sup> Monea, *supra* note 35 at 17; Chambless Enter., LLC, et al. v. Robert Redfield, et al., 508 F.Supp.3d.101 (W.D. La. 2020); 500 F. Supp. 3d at 1103.

<sup>44</sup> Elmsford Apartment Associates, 469 F.Supp.3d 148, 158–59 (S.D.N.Y. 2020); Brown, 497 F.Supp.3d at 1290–91.

<sup>45</sup> *Elmsford Apartment Associates*, 469 F.Supp.3d at 158-59.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 469 F.Supp.3d at 158-59; 497 F.Supp.3d at 1290–91.

<sup>49</sup> 469 F.Supp.3d at 158-59; 497 F.Supp.3d at 1290–91.

<sup>51</sup> 469 F.Supp.3d at 158-59; 497 F.Supp.3d at 1290–91.

II. SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT HAS HISTORICALLY VESTED  
ADMINISTRATIVE AGENCIES WITH QUARANTINE POWER

President Franklin Delano Roosevelt (FDR) signed the PHSA into law in 1944 to consolidate and revise laws affecting the United States Public Health Service (PHS), as well as to expand the federal government’s role in addressing public health issues that were traditionally governed by the states under the police power doctrine.<sup>51</sup> PHS, at this time, was a public health agency led by the Surgeon General.

Some of the language in the PHSA reflected the PHS’s roots in marine hospitals founded in 1798, as seen in the language of Section 361, subsection (c), titled “Application of Regulations to Persons Entering from Foreign Countries.”<sup>52</sup> The United States’ long history of quarantines began in the colonial era, and evolved in the 1800s to address the concern associated with communicable diseases such as smallpox and yellow fever and their “introduction by sea from foreign ports, rather than domestic sources.”<sup>53</sup> Although quarantines were traditionally handled at a state level, the deadly diseases of the Civil War instigated the first Congressional statutes which enabled the federal government and the executive branch to exercise independent discretion and action with respect to quarantines.<sup>54</sup> The federal government’s role in public health and

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<sup>51</sup> Off. Of The Surgeon Gen., *Public Health Service Act*, 1944, 59 PUB. HEALTH REP. 897, 916 (Jul.14, 1944), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2017078/pdf/pubhealthreporig01529-0001.pdf>.

<sup>52</sup> *Id.* at 916. “The new law retains all the important duties which Congress has laid upon the Service in previous legislation enacted over the last half century. Basic responsibilities still include medical and hospital care of American Merchant Marine seamen, the United States coast Guard, and other Federal beneficiaries; the National Quarantine Service...Assistance to State and Territorial health departments also will continue.” *Id.* at 916; 42 U.S.C. § 264(a); *see also* CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 5.

<sup>53</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 8.

<sup>54</sup> *Id.* During the Civil War, as a result of more soldiers dying from infectious diseases than from the battlefield, Congress passed the Act of April, 29 1878, empowering the “Surgeon General, then the head of

quarantines would gradually grow over the following decades to assist with controlling the spread of infectious diseases, both from abroad and interstate.<sup>55</sup>

Like much of the New Deal era-programs, FDR's PHSA sought to expand the federal government's authority, this time within the public health realm.<sup>56</sup> A Public Health Report describing the passage of the PHSA provided context for the new law: "In recent years, the trend of public health work has been toward tackling public health problems individually and directing all available resources to the eradication of widely prevalent diseases which place an unnecessary burden upon the health and economy of the Nation."<sup>57</sup>

The drafters of PHSA and Section 361 sought to consolidate this long history of codes and laws regarding communicable diseases and quarantines, as well as designate an avenue in which the federal government could execute and enforce laws beyond the scope of when states requested help.<sup>58</sup> Additionally, the drafters commented on the intent behind subsection (a), which addresses two kinds of quarantine: foreign and interstate.<sup>59</sup> The drafters, speaking at a congressional hearing,

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the Marine Hospital Service (MHS)—the predecessor agency to PHS—to implement federal quarantine regulations that would prevent the introduction of contagious or infectious diseases into the United States, but also stipulated that federal regulations must not conflict with nor impair those of state and local authorities. *Id.* The new law also strengthened federal quarantine authority by requiring incoming vessels to report to the MHS incidences of infectious disease, thus establishing it as the central agency to monitor ships coming from infected ports or bearing infected passengers." *Id.*; see also Jeffrey S. Sartin, *Infectious Diseases During the Civil War: The Triumph of the "Third Army,"* 16 CLINICAL INFECTIOUS DISEASES 580, 580 (1993).

<sup>55</sup> *Id.*

<sup>56</sup> 59 PUB. HEALTH REP. 897 at 916.

<sup>57</sup> *Id.*

<sup>58</sup> CDC'S AUTHORITY UNDER SECTION 361, *supra* note 4, at 9.

<sup>59</sup> *Hearing Before a Subcomm. On Interstate & Foreign Commerce on H.R. 3379: A Bill to Codify the Laws Relating to the Public Health Service, and for Other Purposes*, 78<sup>th</sup> Cong. 139 (1944) (statement of Alanson W. Willcox, Assistant Gen. Couns., Fed. Sec. Agency).

expressed that states had “wholly withdrawn from the field of foreign quarantine regulation,” and that federal regulation of interstate quarantine was “confined to matters pertaining to the interstate movement of people or things over which the States have both constitutional and practical difficulties in achieving effective control.”<sup>60</sup> As such, the drafters of Section 361 intended that the federal government have a role in enforcing interstate quarantines.

The language of Section 361 reads as follows:

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.<sup>61</sup>

Section 361 delegates authority to the Surgeon General, but following congressional ratifications leading to the reorganizations of public health departments, the HHS Secretary authorized the CDC and FDA with the power to enforce Section 361.<sup>62</sup> This delegation of power is an example of how the branches of government share power under the framework of federalism and is a logical way for Congress to not overextend itself while still regulating this aspect of public health.<sup>63</sup> Subsection (d) is of particular interest in the context of a federal eviction moratorium.

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<sup>60</sup> *Id.*

<sup>61</sup> 42 U.S.C. § 264(a).

<sup>62</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 5.

<sup>63</sup> *Id.* Under the nondelegation doctrine, the Supreme Court has interpreted this constitutional requirement to generally prohibit Congress from delegating its legislative power to another branch, which would include administrative agencies. However, the Court has recognized that the Constitution does not deny Congress “the necessary resources of flexibility and practicality” that would enable it to perform its functions, or the ability to “obtain[] the assistance of its coordinate Branches.” *Id.* As such, the nondelegation doctrine allows a statutory delegation of authority as long as Congress articulates a specific principle to which the person or body vested with the delegated authority must conform. *Id.* at 21.



While subsections (a) through (c) apply to individuals from outside countries, subsection (d) extends the scope of this section. Subsection (d) can apply to “any individual [residing within a state if the individual is] reasonably believed to be infected with a communicable disease in a qualifying stage . . . .”<sup>64</sup> Subsection (d)(1) is thus relevant to containing individuals within the states—a power that Congress has granted to public health agencies when limited to those individuals who are engaging in interstate travel, as suggested by subsection (d)(2). Subsection (d)(2) applies to those “moving [or about to move from one] State to another State,” or “a probable source of infection to individuals who, while infected with such disease . . . , will be moving from [one] State to another” while the disease is in a qualifying stage.<sup>65</sup> The drafters clarified that the intent of subsection (d) was directed towards the spread of venereal disease, but expressly stated that they did not intend to limit subsection (d), leaving it as a catchall for unforeseen emergency situations,<sup>66</sup> under which a global pandemic would likely fit.

#### A. AGENCIES USE OF SECTION 361 THROUGHOUT HISTORY

Agencies have invoked Section 361 since its creation to “issue regulations related to the quarantine and isolation of individuals believed to have been infected or exposed to a contagious disease” in addition to “the control or treatment of areas, animals, or articles that were susceptible or subject to contamination or infection.”<sup>67</sup> These regulations followed the precedent of

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<sup>64</sup> 42 U.S.C. § 264.

<sup>65</sup> *Id.*

<sup>66</sup> *Hearing Before a Subcomm. On Interstate & Foreign Commerce on H.R. 3379: A Bill to Codify the Laws Relating to the Public Health Service, and for Other Purposes*, 78<sup>th</sup> Cong. 140 (1944) (statement of Alanson W. Willcox, Assistant Gen. Couns., Fed. Sec. Agency).

<sup>67</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 11.

quarantines in the 1900s, “including the examination by federal medical inspectors of most airplanes and vessels entering the United States.”<sup>68</sup> Following the development of vaccines and other “significant medical advances in the 1950s and 1960s,” the impact of communicable diseases declined, leading to a reorganization of agencies in the 1970s and a “more limited exercise of agencies’ Section 361 authority.”<sup>69</sup> Following the reorganization of agencies and shifts in authority from the Surgeon General to the Health, Education, and Welfare Secretary (HEW), the HEW Secretary delegated authority under Section 361 to the CDC and U.S. Food and Drug Administration (FDA): the CDC was responsible for foreign quarantine while the FDA was responsible for interstate quarantine.<sup>70</sup> In 2000, the HEW redistributed responsibilities, consolidating all quarantine authority over persons—foreign and interstate—within the CDC.<sup>71</sup>

Prior to COVID-19, the CDC used Section 361 “to issue and refine regulations relating to quarantine and isolation.”<sup>72</sup> Examples include: “specif[ying] . . . the conditions and procedures for subjecting individuals to temporary custody to determine if a federal quarantine or isolation order is warranted”; “subjecting individuals to medical examination and sample collection by authorized health care providers”; issuing federal quarantine and isolation orders; “conduct[ing] general traveler health screening at ports of entry and locations of interstate travel”; “impos[ing] certain reporting requirements on individuals and commercial carriers to facilitate contact tracing”;

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 12.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

and “prohibit[ing] individuals subject to a federal quarantine or isolation order from traveling even in intrastate traffic, unless they have received a written travel permit issued by the CDC.”<sup>73</sup>

The CDC invoked its Section 361 authority to create a breadth of quarantine-related measures in its response to the COVID-19 pandemic, to protect against both foreign and interstate transmission.<sup>74</sup> To safeguard against the spread of COVID-19 from foreign sources at the beginning of the pandemic, the CDC “impose[d] additional reporting requirements on airlines to provide identifying information about passengers or crew who may be at risk of exposure to a communicable disease.”<sup>75</sup> The CDC also imposed mandatory quarantines for certain travelers upon arrival from China and required airlines “to verify that every arriving passenger over the age of two departing from any foreign country” received and provided documentation of a negative COVID-19 test result at least three calendar days before the flight’s departure.<sup>76</sup>

To protect against the interstate spread of COVID-19, the CDC used broad authority under Section 361, issuing an order in September 2020 halting “residential evictions nationwide for tenants making less than \$99,000 a year (or \$198,000 jointly) through December 2020 under specified conditions.”<sup>77</sup> This eviction order came on the heels of the expiration of Congress’s CARES Act, which provided a narrower set of eviction protections preventing renters from “being forced to vacate between March 27 and August 23, 2020 [and] applied only to rental properties

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<sup>73</sup> *Id.* at 12–13.

<sup>74</sup> *Id.* at 14.

<sup>75</sup> *Id.* at 13.

<sup>76</sup> *Id.* “For passengers who recovered from COVID-19, the passenger may instead provide documentation from a licensed health care provider or public health official stating they are cleared for travel. Although the order does not specify, the CDC appears to have imposed these requirements based on its power under Section 361(a) to conduct general passenger health screenings.” *Id.* at 13–14.

<sup>77</sup> *Id.* at 14.

receiving certain federal assistance or federally related financing.”<sup>78</sup> The CDC identified four main reasons for creating a national eviction moratorium. First, COVID-19 is highly contagious in “congregate settings.”<sup>79</sup> Second, “as many as 30-40 million people . . . could be at risk of eviction.”<sup>80</sup> Third, many of these people are at risk of becoming homeless and thus living in “new congregate settings that increase the risk of COVID-19 transmission.”<sup>81</sup> Finally, state efforts were insufficient in curbing COVID-19 transmission.<sup>82</sup>

The CDC concluded that the state and local eviction moratoria patchwork systems did not reach all vulnerable populations that would be high-risk for COVID-19.<sup>83</sup> Additionally, the CDC emphasized the causal link between evictions and homelessness.<sup>84</sup> “In Seattle-King County, 5–15% of people experiencing homelessness between 2018 and 2020 cited eviction as the primary reason for becoming homeless.”<sup>85</sup> Those experiencing homelessness cannot isolate as readily, avoid congregate settings like homeless shelters, or easily access facilities which would allow them to wash their hands with soap and water, important community measures to avoid the spread of the virus.<sup>86</sup> “Throughout the United States, among 208 shelters reporting universal diagnostic

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<sup>78</sup> *Id.*

<sup>79</sup> Temporary Halt in Residential Evictions, *supra* note 6, at 55292.

<sup>80</sup> *Id.* at 55295.

<sup>81</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 14.

<sup>82</sup> *See id.*

<sup>83</sup> *See* Temporary Halt in Residential Evictions, *supra* note 6, at 55294–97.

<sup>84</sup> *Id.* at 55295. “The statistics on interstate moves show that mass evictions would likely increase the interstate spread of COVID–19. Over 35 million Americans, representing approximately 10% of the U.S. population, move each year. Approximately 15% of moves are interstate.” *Id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

testing data, 9% of shelter clients have tested positive.”<sup>87</sup> In an effort to address these issues, the CDC recommended housing shelters to increase the amount of space between beds; shelters complying with these guidelines have to reduce the number of clients they can serve, while those that choose not to adhere to the guidelines operate at a higher risk of outbreaks.<sup>88</sup> Additionally, shelters limited the amount of “volunteer access and participation,” making it even more difficult to serve clients.<sup>89</sup>

The CDC identified two key issues that would occur from increased evictions: (1) homeless shelters could potentially increase occupancy to accommodate those newly evicted in a way that could increase infection rates, and (2) homeless shelters may have to turn away potential clients leading to more unsheltered people contributing to the COVID-19 spread.<sup>90</sup>

Unsheltered homeless persons are defined as “those who are sleeping outside or in places not meant for human habitation.”<sup>91</sup> Because of the “risks associated with sleeping and living outdoors or in an encampment setting,” along with “exposure to the elements and inadequate access to hygiene, sanitation facilities, health care, and therapeutics,” unsheltered homeless persons are at especially high risk for infection within their community.<sup>92</sup>

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<sup>87</sup> *Id.* “In Seattle, Washington, a network of three related homeless shelters experienced an outbreak that led to 43 cases among residents and staff members. In Boston, Massachusetts, universal COVID–19 testing at a single shelter revealed 147 cases, representing 36% of shelter residents. COVID–19 testing in a single shelter in San Francisco led to the identification of 101 cases (67% of those tested).” *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Temporary Halt in Residential Evictions, *supra* note 6, at 55294–97.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

The CDC also justified the temporary eviction moratorium because many of those at risk of eviction are predisposed to developing serious symptoms if they were to contract COVID-19.<sup>93</sup> For example, studies have shown an association between eviction and hypertension and many homeless people have underlying conditions that may increase their risk of contracting COVID-19.<sup>94</sup> The CDC also found “evidence to suggest that the homeless are more susceptible to respiratory tract infections;” while this finding relates to influenza, COVID-19 is also a respiratory disease.<sup>95</sup> Furthermore, while vaccinations have been effective at curtailing the spread of COVID-19, “the COVID-19 vaccination effort has a slower rate of penetration among the populations most likely to experience eviction.”<sup>96</sup>

#### B. THE LEGAL FRAMEWORK OF THE CDC’S CURRENT EVICTION MORATORIUM

The CDC issued its first temporary eviction moratorium in response to COVID-19 in September 2020 under 42 C.F.R. § 70.2 titled “Measures in the event of inadequate local control.”<sup>97</sup> Congress extended the CDC moratorium on December 21, 2020, as a part of “a COVID-19 relief plan in the Consolidated Appropriations Act, 2021.”<sup>98</sup> This Act “extended the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 55296.

<sup>96</sup> Krishnadev Calamur & Chris Arnold, *The Supreme Court Will Allow Evictions to Resume. It Could Affect Millions Of Tenants*, NPR (Aug. 26, 2021), <https://www.npr.org/2021/08/26/1024668578/court-blocks-biden-cdc-evictions-moratorium>.

<sup>97</sup> 42 C.F.R. § 70.2 (2020).

<sup>98</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 14.

CDC moratorium until January 31, 2021, and provided \$25 billion for states and localities to fund emergency rental assistance.”<sup>99</sup> The CDC further extended the moratorium on January 29, 2021, to end on March 31, 2021.<sup>100</sup> On March 2021, Congress created the American Rescue Plan Act of 2021 providing further pandemic relief for those experiencing difficulty paying rent, “including \$21.55 billion for emergency rental assistance and \$5 billion for new emergency housing vouchers for people at risk of experiencing homelessness and those fleeing domestic, dating, or sexual violence.”<sup>101</sup> On March 28th, the CDC further extended the eviction moratorium until June 30, 2021.<sup>102</sup> On June 24, 2021, the Biden administration, absent any Congressional action and amidst growing pressure to continue the moratorium, once again invoked the CDC’s authority to extend the moratorium until July 31, 2021, telling the Supreme Court that, barring another rise in COVID-19 cases, the CDC did not plan on extending the order in the future.<sup>103</sup>

The Alabama Association of Realtors challenged this decision in a Supreme Court case.<sup>104</sup> Justice Kavanaugh, writing for the majority, decided to uphold the eviction ban because the eviction moratorium was set to expire on July 31st.<sup>105</sup> He further warned the Biden administration that any future eviction moratoria would need to be issued or authorized by Congress, effectively attempting to tie the administration’s hands from utilizing the CDC as a mechanism to create

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S.Ct. 2320 (2021).

<sup>105</sup> *Id.*

eviction moratoria.<sup>106</sup> The Biden administration began researching legal authority, other than 42 C.F.R. §70.2, that would allow the CDC to issue eviction moratoria.

However, emergence of the Delta variant—largely in areas with low vaccination rates—led to a steady spike in COVID-19 cases, and the Biden administration faced mounting pressure to continue to protect tenants with the CDC’s moratorium.<sup>107</sup> Accordingly, on August 3, 2021, the CDC issued another eviction order in “[a]reas of [s]ubstantial and [h]igh [t]ransmission.”<sup>108</sup> The vast majority of U.S. counties fell into this category, as shown in the map below s.<sup>109</sup>

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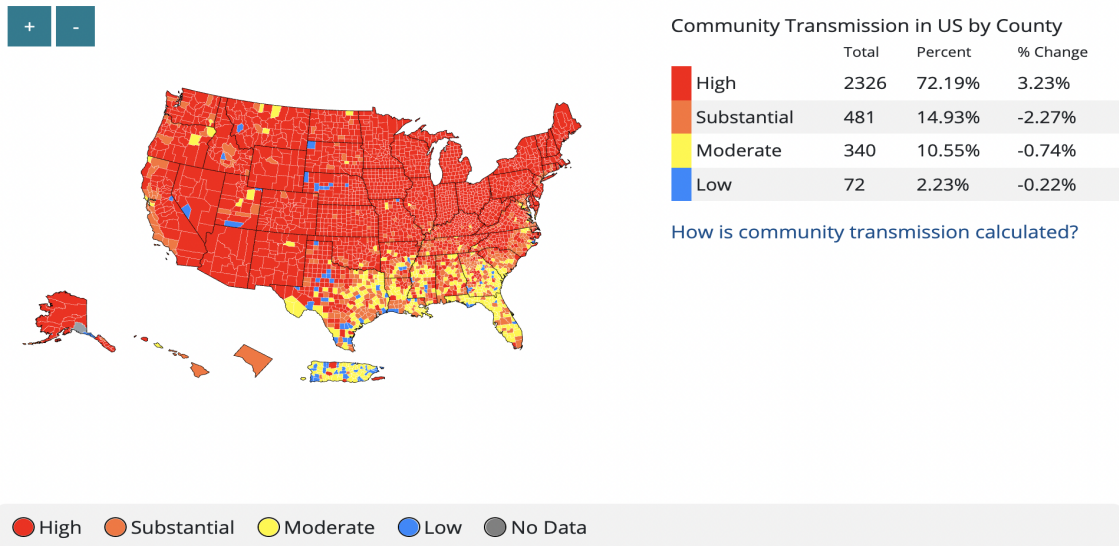
<sup>106</sup>*Id.*

<sup>107</sup> Since the August 2021 eviction moratorium order, the Omicron variant has surpassed Delta as the dominant variant in the United States as of November 26, 2021. *Coronavirus Variant Tracker*, N.Y. TIMES, (Updated Feb. 11, 2022), <https://www.nytimes.com/interactive/2021/health/coronavirus-variant-tracker.html>.

<sup>108</sup>*CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, *supra* note 6.

<sup>109</sup> *COVID-19 Integrated County View*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#county-view> (last visited date). This map displays the community transmission in the United States by county as captured on Wednesday, November 17, 2021. *Id.*





Current 7-days is Wed Nov 10 2021 - Tue Nov 16 2021 for case rate and Mon Nov 08 2021 - Sun Nov 14 2021 for percent positivity. The percent change in counties at each level of transmission is the absolute change compared to the previous 7-day period.

The Biden administration distinguished this eviction moratorium because it drew its legal authority from PHSA Section 361 instead of from 42 C.F.R. §70.2.<sup>110</sup> Property owners, like the Alabama Realtors Association<sup>111</sup>, argue the CDC acted outside the scope of its authority by creating this moratorium, which cost landlords billions of dollars a month in lost rent.<sup>112</sup> They argue Congress’s inaction combined with Justice Kavanaugh’s August opinion show a lack of Congressional authority with this federal eviction moratorium.<sup>113</sup> Contrarily, pro-tenant housing groups argue Congress’s initial authorization should count as Congressional approval.<sup>114</sup>

<sup>110</sup> *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, *supra* note 6

<sup>111</sup> *See generally Ala. Ass’n of Realtors*, 141 S.Ct. 2320.

<sup>112</sup> Calamur & Arnold, *supra* note 96.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

### C. CONGRESS’S RENTAL RELIEF PROGRAMS FAIL TENANTS

In addition to the eviction moratorium, Congress passed two Emergency Rental Assistance programs providing rent relief to households unable to pay rent or utilities. However, these programs leave renters insufficiently protected because of their temporary nature.<sup>115</sup> Congress established Emergency Rental Assistance 1 (ERA1) in 2021, providing up to \$25 billion under the Consolidated Appropriations Act.<sup>116</sup> Emergency Rental Assistance 2 (ERA2) was enacted under the American Rescue Plan Act of 2021, and provides up to \$21.55 billion.<sup>117</sup> The ERA1 federal funds go directly to states, US territories, local governments, and Indian tribes.<sup>118</sup> Grant recipients disperse funds to eligible households through rental assistance programs.<sup>119</sup> Although these relief programs helped avert an eviction crisis, some tenants who received federal help are nonetheless threatened with eviction.<sup>120</sup>

In a poll conducted by the National Housing Law Project, of legal aid attorneys and civil rights advocates, eighty-six percent of respondents reported incidents of landlords refusing to

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<sup>115</sup> See *Emergency Rental Assistance Program*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program> (last visited date).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Michael Casey, *Landlords finding ways to evict tenants after getting federal rental aid*, L.A. TIMES (Feb. 11, 2022, 11:42 AM PT), <https://www.latimes.com/world-nation/story/2022-02-11/landlords-finding-ways-to-evict-after-getting-rental-aid>. “Gene Sperling, who is tasked with overseeing implementation of President Biden’s \$1.9-trillion coronavirus rescue package, said there were no data to suggest landlords evicting tenants after getting assistance is a ‘pervasive issue’ but that it was ‘completely unacceptable.’” *Id.* Sterling remarked that while it’s “not against the letter of the act, it’s against the spirit of it.” *Id.*

accept assistance, or receiving money but proceeding to evict residents.<sup>121</sup> Respondents also reported increases in landlords lying in court to evict tenants, and consequently illegally locking tenants out.<sup>122</sup>

When states do not implement the Treasury Department’s advice of requiring landlords to postpone evictions after receiving funds, it results in rental aid restrictions.<sup>123</sup> Even though the program prohibits landlords from evicting tenants during the rental assistance period, the Treasury Department can only encourage states to implement regulations prohibiting evictions for up to three months later.<sup>124</sup> According to the National Low Income Housing Coalition, only twenty-nine states and localities approved regulations prohibiting landlords from evicting renters for a term ranging from thirty days to twelve months in 2021.<sup>125</sup> Arizona, Kentucky, Louisiana, New York, North Carolina, and West Virginia enacted regulations, along with some towns and counties in Texas and Maryland.<sup>126</sup>

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<sup>121</sup> *Id.* Tenant advocates describe these rental relief programs as a “Band-Aid” due to the temporary nature. *Id.*

<sup>122</sup> *Id.* Tenant advocates complain that these Congressional packages do not address the underlying problem—lack of affordable housing. *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

Over 100 grantees indicate near depletion of their ERA1 funds, especially in large state programs, such as New York, Texas, and California.<sup>127</sup> The Treasury suggests reallocating federal funds, but it is unclear if these measures will be enough to fill the chasm.<sup>128</sup>

The lack of resources and a landlord's eventual ability to defeat the intended goal of rental assistance programs suggest that these initiatives are ineffective on their own. Therefore, the federal eviction moratorium can only help to resolve the situation of evictions.

III. THE COURT SHOULD SHOW DEFERENCE TO ADMINISTRATIVE AGENCIES LIKE THE CDC  
WHEN INTERPRETING AMBIGUOUS STATUTORY LANGUAGE

Before the Supreme Court case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts generally applied a more rigid standard of review when considering challenges to agency interpretations of statutes, occasionally supplanting an agency's reasoning with their own judgment.<sup>129</sup> The *Chevron* decision was a landmark decision in administrative law completely changing the scope of judicial review. Under the *Chevron* doctrine, courts must give deference to an agency's interpretation of a statute if it is reasonable and not in

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<sup>127</sup> Michael Casey, *Treasury: November saw highest disbursement of rental aid*, AP NEWS, (Jan. 7, 2022), <https://apnews.com/article/coronavirus-pandemic-joe-biden-business-health-gene-sperling-7dbfb8157401d1e6d838116455c11556>.

<sup>128</sup> *Id.* Executive Deputy Commissioner Barbara Guinn of the New York State Office of Temporary and Disability Assistance said in a state court filing that the State's twenty-seven million dollars may only be enough to fulfill 2,177 applications. *Id.* Guinn's filing came only days before a state judge ordered New York to reopen its application portal, which had been closed since November (provide timing). *Id.* Tenant advocacy groups say New York should resume accepting applications that provide applicants with eviction protections for a limited time. *Id.* However, lawyers for the State claimed that New York should keep the application page closed in order to avoid giving future applicants "false hope" due to a rental relief funding shortage. *Id.*

<sup>129</sup> *Chevron, U.S.A., Inc.*, 467 U.S. at 837.

conflict with the intent of Congress.<sup>130</sup> The question is whether the agency action carries the force of law.<sup>131</sup> The two-prong *Chevron* test involves asking whether (1) Congress has spoken directly on the issue and if not, (2) whether the agency’s interpretation of the statute is reasonable.<sup>132</sup> If there is a finding that Congress addressed the issue under the first prong, then the agency and the Court must respect Congress’s explicit statutory intent.<sup>133</sup> However, if Congress has not spoken on the issue, courts must typically defer to the agency’s reasonable interpretation of ambiguous statutory language.<sup>134</sup>

In Section 361, Congress delegated authority to the CDC to regulate and restrict movement that may contribute to infectious disease transmission.<sup>135</sup> The CDC acted within this power when it created the eviction moratorium because it was regulating movement of persons who could transmit COVID-19, both intra- and inter-state.<sup>136</sup> The agency action carries the force of law as seen when the CDC issued the federal eviction moratorium order to the American public.<sup>137</sup>

#### A. ANALYZING SECTION 361 OF THE PHSA

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<sup>130</sup> *Id.* at 843. The Court reasoned that agency officials have greater subject-matter expertise than courts to resolve the niche issues agencies regulate.

<sup>131</sup> *Id.* at 842–843.

<sup>132</sup> *Id.* at 843.

<sup>133</sup> *Id.* at 842.

<sup>134</sup> *Id.* at 843.

<sup>135</sup> 42 U.S.C. § 264(a).

<sup>136</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 26.

<sup>137</sup> *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, *supra* note 6.

The statutory language in Section 361 is ambiguous because the last clause is broad and open to interpretation.<sup>138</sup> “For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection . . . *and other measures, as in his judgment may be necessary.*”<sup>139</sup> The initial list of measures is merely illustrative, and it is not exhaustive. While public health agencies endowed with Section 361 power have traditionally limited their use of the power to the list, this last catch-all clause suggests that Congress understood and wanted Section 361 to account for emergency measures not included at the time of enactment. Thus, this list is arguably non-exhaustive, and the CDC can use their “judgment” to create other “necessary” measures. Courts, evaluating whether an agency’s interpretation is reasonable, must “take into account, among other considerations, the sufficiency of an agency’s reasoning and whether the agency interpretation comports with the overall purpose of the statute.”<sup>140</sup>

Prior case law addressed this ambiguity, with courts offering broad and narrow Section 361 interpretations. The broader interpretation acknowledges that the listed measures are non-exhaustive. The district court in *Independent Turtle Farmers of Louisiana, Inc. v. United States*, 703 F. Supp. 2d 604 (W.D. La. 2010), found that the discrete list of examples in § 264(a) “does not act as a limitation upon the types of regulations that may be enacted under Section 361,” as it “directly precedes a ‘catch-all’ grant of authority [that] allow[s] [agencies] to enact ‘other measures, as in [their] judgment may be necessary.’”<sup>141</sup> The district court further elaborated that

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<sup>138</sup> 42 U.S.C. § 264(a).

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 17.

<sup>141</sup> *Indep. Turtle Farmers of La., Inc. v. U.S.*, 703 F. Supp. 2d 604, 619–20 (W.D. La. 2010).

the items on this list are mere suggestions.<sup>142</sup> *Brown v. Azar*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020), adopted this broader construction, interpreting the language in Section 361(a) to show “Congress’ unambiguous intent to delegate broad authority to the CDC.”<sup>143</sup> Thus, the CDC may take measures it deems “reasonably necessary to prevent the spread of disease,” so long as it determines that the measures taken by any “state [or] local [government are] insufficient to prevent the spread of disease.”<sup>144</sup> The courts in *Independent Turtle Farmers* and *Brown* used broad constructions to conclude that, “the agency regulation or order at issue—a turtle sale ban in the case of *Independent Turtle Farmers* and the eviction moratorium in the case of *Brown*—did *not* exceed the agency’s Section 361 authority.”<sup>145</sup>

Narrower readings of Section 361(a) have been grounded in highly textual interpretation. Plaintiffs have relied “principally on semantic canons of statutory construction,” and “argued that an agency’s authority to issue regulations ‘necessary’ to prevent the spread of communicable diseases is limited to measures similar to those enumerated in the subsequent sentence in Section 361(a).”<sup>146</sup> Courts that have agreed with this reading found Section 361(a) limits agencies to only

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<sup>142</sup> *Id.* at

<sup>143</sup> *Brown*, 497 F.Supp.3d at 1283 (N.D. Ga. 2020). *Brown* has since been vacated by *Brown v. Sec’y, U.S. Dep’t of Health and Hum. Servs.*, 20 5<sup>th</sup> 1385 (11<sup>th</sup> Cir. 2021) following the *Ala. Ass’n of Realtors* decision.

<sup>144</sup> *Id.* at 1279–80. In *Brown*, the district court examined the plaintiffs’ request for a preliminary injunction while determining the extent of CDC’s power. The plaintiffs’ failure to show a likelihood of success on the merits of their allegation that the CDC eviction moratorium exceeds the Agency’s Section 361 jurisdiction, among other things, led the court to decline to enjoin the eviction moratorium. The plaintiffs have since appealed the district court’s denial.

<sup>145</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 25.

<sup>146</sup> *Id.* at 24.

regulate similar “property interest restrictions”<sup>147</sup> or measures with “specific targets found to be sources of infection,” but not “amorphous disease spread.”<sup>148</sup>

#### B. ADDRESSING CRITICISM OF THE CDC’S EVICTION MORATORIUM

While an eviction moratorium goes beyond the property interests outlined in Section 361(a)’s second sentence, the CDC’s second order is more narrowly tailored to address the pandemic than their original eviction moratorium.<sup>149</sup> The second moratorium targets only areas with high and substantial infection rates.<sup>150</sup> This language encompasses individuals most vulnerable to eviction and contracting COVID-19, as it includes high-density areas; to this end, this eviction moratorium is specifically targeting areas with a high chance of becoming sources of infection and can fit the narrower interpretation.<sup>151</sup>

While this language may be construed as overinclusive, this depends on infection rates.<sup>152</sup> This eviction order was written to reflect need. Based on how many people are actually at risk of infection, the order is restricted to those counties with heightened COVID-19 transmission

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<sup>147</sup> *Tiger Lily, LLC v. U.S Dep’t of Hous. & Urb. Dev.*, 992 F.3d 518, 523–24 (2021). “This kind of catchall provision at the end of a list of specific items warrants application of the *ejusdem generis* canon.” *Id.* The *ejusdem generis canon* is a means of statutory interpretation where courts construe general words following specific words within the same context of the preceding specific words. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001).

<sup>148</sup> *Skyworks, Ltd. V. Centers for Disease Control and Prevention*, 544 F.Supp.3d 745, 758 (N.D. Ohio 2021).

<sup>149</sup> See generally *Temporary Halt in Residential Evictions supra* note 6, at 55292, 294–96; *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission, supra* note 6.

<sup>150</sup> *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission, supra* note 6

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*



levels.<sup>153</sup> There may be times when the moratorium reaches 90% of counties, as some critics fear, but if that is the case, then drastic measures are likely warranted, as has been the case with the recent Delta and Omicron variants. Developments, like the vaccine, will optimally result in fewer counties meeting that “substantial and high levels of community transmission” standard, ultimately rendering CDC’s eviction moratorium unnecessary.<sup>154</sup> But as discussed above, there are significant numbers of tenants and homeless who are susceptible to life-threatening diseases without some level of oversight over evictions.<sup>155</sup> The CDC moratorium, like in *Blaisdell*, is a temporary measure; it does not cancel owed rent, but merely prevents tenants from eviction if they cannot afford rent due to COVID-19.<sup>156</sup>

Critics of this broad interpretation argue the moratorium grants the CDC unlimited power for any situation involving a communicable disease— like the flu— allowing the CDC to “restrict almost any type of activity” since “[e]very year, thousands of people die because of the flu.”<sup>157</sup> Comparing COVID-19 to the annual flu is a gross exaggeration. In 2020, the United States alone had approximately 375,000 deaths; COVID-19 was the third leading cause of death after heart

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *See infra* Part II(A).

<sup>156</sup> *Id.*

<sup>157</sup> Ilya Somin, *The CDC’s New Eviction Moratorium Has Virtually all the Same Flaws as the Old*, VOLOKH CONSPIRACY (Aug. 3, 2021, 9:41 PM), <https://reason.com/237olokh/2021/08/03/the-cdcs-new-eviction-moratorium-has-virtually-all-the-same-flaws-as-the-old/>.

disease, and cancer, respectively.<sup>158</sup> From 2019–2020<sup>159</sup>, there were 20,000 flu-related deaths.<sup>160</sup> The CDC’s eviction moratorium, while an extreme exercise of power, was parallel to the extreme and novel illness to which the agency was responding. COVID-19 presented a unique challenge in that there was little information on how to best manage the virus in its early days, whereas diseases like the flu and common cold are not novel diseases and are more easily managed.<sup>161</sup> The CDC’s actions were extreme, but necessary. Additionally, the PHSA speaks to this concern over what diseases would qualify as dangerous enough to give the CDC this authority.<sup>162</sup>

Section 264(b) limits the CDC’s “application of foreign and interstate quarantine and isolation authority to prevent the spread of *only* communicable diseases designated by an executive order.<sup>163</sup> For the case at hand, the Trump administration declared a national state of emergency as a reaction to COVID-19 in March 2020,<sup>164</sup> presumably to allow administrative agencies to launch more aggressive programs to tackle the countless issues created by COVID-19. It is

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<sup>158</sup> Farida B. Ahmad, Jodi A. Cisewski, Arialdi Miniño, Robert N. Anderson, *Provisional Mortality Data — United States, 2020*, CTR. FOR DISEASE CONTROL & PREVENTION (Apr. 9, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e1.htm>.

<sup>159</sup> *2020-2021 Flu Season Summary*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 25, 2021), <https://www.cdc.gov/flu/season/faq-flu-season-2020-2021.htm>. Flu season activity was unusually low from 2020-2021, likely due to social distancing measures and stay-at-home mandates. *Id.* For that reason, the 2019-2020 flu season is a more representative example of deaths from flu in the United States. *Id.*

<sup>160</sup> *Estimated Flu-Related Illnesses, Medical visits, Hospitalizations, and Deaths in the United States — 2019–2020 Flu Season*, CENTER FOR DISEASE CONTROL AND PREVENTION (Oct. 1, 2021), <https://www.cdc.gov/flu/about/burden/2019-2020.html>.

<sup>161</sup> *See generally id.*

<sup>162</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 26 n.268

<sup>163</sup> *Id.* (emphasis added).

<sup>164</sup> *CMS Takes Action Nationwide to Aggressively Respond to Coronavirus National Emergency*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Mar. 13, 2020), <https://www.cms.gov/newsroom/press-releases/cms-takes-action-nationwide-aggressively-respond-coronavirus-national-emergency>.

completely reasonable that COVID-19 would warrant special measures as opposed to diseases like the flu and the common cold.

Furthermore, a federal eviction moratorium is in line with Section 361's overall purpose, as Congress wrote the statute with the intent of empowering the CDC to create regulations aimed at preventing the spread of infectious diseases. "In general, at least in the federal courts of appeals, agency interpretations are typically accorded deference when a case is resolved at *Chevron's* second step, recognizing that an ambiguous statute inherently permits a range of plausible interpretations."<sup>165</sup> Should the Court recognize Section 361's ambiguity, the CDC should be permitted to interpret the statute reasonably. The CDC's acts, while an unwarranted exercise of statutory authority, were grounded in public need; furthermore, the CDC, as an administrative agency with investigatory power, is best suited to understand when drastic action is required.<sup>166</sup>

The drafter's comments regarding their intent while writing Section 361 further bolster a broad interpretation: "Necessary" can encompass "regulations that implement any evidenced-based public health measures that have been established as effective in preventing transmission, such as quarantine, inspection, and other enumerated measures that were in use as of 1944."<sup>167</sup> The drafters were careful to verbalize their intent in providing Section 361 agencies with broad authority so as "to cope with emergency situations which we cannot now foresee," while still understanding Section 361(a) to encompass quarantines.<sup>168</sup> The text of subsection (a) encompasses

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<sup>165</sup> CDC'S AUTHORITY UNDER SECTION 361, *supra* note 4, at 17.

<sup>166</sup> Calamur & Arnold, *supra* note 96. The CDC order has protected "[m]ore than 7 million people [who] are still behind on rent" from eviction, which researcher Peter Hepburn notes is "about twice as many people as normal not being able to pay." *Id.*

<sup>167</sup> CDC'S AUTHORITY UNDER SECTION 361, *supra* note 4, at 31.

<sup>168</sup> *Id.*

more than quarantine measures, relegating them to subsequent subsections as merely examples of this authority, consistent with the drafter’s intent.<sup>169</sup>

IV. THE COURT SHOULD CONTINUE TO SHOW DEFERENCE IN TIMES OF EMERGENCY

A. APPLYING THE MODERN BLAISDELL REASONING, THE COURT SHOULD BALANCE IN  
FAVOR OF PUBLIC NEED

The CDC’s federal eviction moratorium can be likened to the Minnesota eviction moratorium at issue in *Home Building & Loan Ass’n v. Blaisdell* within the context of the Court’s deference in times of emergency.<sup>170</sup> While “*Blaisdell* [is most notable as it] marked the beginning of the Supreme Court significantly curtailing the Contracts Clause’s prohibitive force,”<sup>171</sup> it is also an example of the Court’s willingness to balance in favor of great public need during emergencies. In *Blaisdell*, the Court upheld Minnesota’s statutory eviction moratorium on two grounds: (1) the legislation addressed a legitimate need as there was an emergency following the Great Depression and the state sought to protect the public’s interest in preventing mass foreclosures, and (2) the measure was temporary.<sup>172</sup> *Blaisdell* is a watershed case because the Court was so willing to defer in the face of an emergency that it allowed the Contract Clause, which had traditionally been closely defended in American jurisprudence, to be eroded.<sup>173</sup>

*Blaisdell*’s progeny has similarly allowed for greater deference in Contract Clause cases. Notably, “the Court clarified a more modern approach to the Contracts Clause post-*Blaisdell*” in

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<sup>169</sup> *Id.*

<sup>170</sup> *See Home Bldg. & Loan Ass’n*, 290 U.S. at 398.

<sup>171</sup> *Apartment Ass’n of Los Angeles Cnty., Inc. v. City of Los Angeles*, 10 F.4<sup>th</sup> 905, 912 (2021).

<sup>172</sup> *Home Bldg. & Loan Ass’n*, 290 U.S. at 426.

<sup>173</sup> *Id.*

*Energy Reserves Group v. Kansas Power & Light Co.*, “articulating the flexible considerations courts must consider in a Contracts Clause case.”<sup>174</sup> The Court in *Energy Reserves* highlighted the ends-means analysis, finding in favor of the government’s interest in creating appropriate and reasonable means to advance “a significant and legitimate public purpose.”<sup>175</sup> The Supreme Court and lower courts found a legitimate public purpose to be such an overriding interest that if this interest can be established, there is no need to even address the traditionally fiercely guarded Contracts Clause.<sup>176</sup>

*Blaisdell* is an example of how far the Court will go in times of emergency to defer to public need, as well as an example of the balancing test between the interests of banks versus the interests of citizens.<sup>177</sup> If the Court is weighing the interests of landlords and private property owners versus the interests of tenants and the general public, the analysis would likely lean in favor of the general public, as there is a legitimate interest in preventing the transmission of COVID-19. As the Court said in *Jacobson v. Massachusetts*, “the duty of the constituted authorities [is] primarily to keep in view the welfare, comfort, and safety of the many, and not [to] permit the interests of the many to be subordinated to the wishes or convenience of the few.”<sup>178</sup>

#### B. PUBLIC HEALTH EMERGENCIES WARRANT EXTREME MEASURES

The CDC is acting under the executive branch, which enjoys great power during emergencies. Specifically, “[i]n a health emergency scenario,” the most effective measures are

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<sup>174</sup> *Apartment Ass’n of Los Angeles Cnty.*, 10 F.4<sup>th</sup> at 912.

<sup>175</sup> *Energy Reserves Grp. V. Kansas Power & Light Co.*, 459 U.S. 400, at 411 (1983).

<sup>176</sup> *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 at 505–06 (1987).

<sup>177</sup> *Home Bldg. & Loan Ass’n*, 290 U.S. at 398.

<sup>178</sup> *Jacobsen v. Massachusetts*, 197 U.S. 11, 25 (1905).

fast and direct.<sup>179</sup> In these instances, “the public, despite knowing that the President’s actions infringe upon the liberties of the few for the good of the many, may nonetheless yield without much conflict.”<sup>180</sup> Advocates of granting extreme power to the executive branch in emergencies argue that “[i]n times of national and public health emergencies . . . the common good [must] be protected and secured.”<sup>181</sup> Additionally, the “responsibility [to ensure the common good] justifies the curtailment of basic liberties and rights during the time of the emergency.”<sup>182</sup>

The Court’s precedent also recognizes the common good within the context of health crises. The Court in *Jacobson v. Massachusetts* upheld a Massachusetts law mandating smallpox vaccinations, finding that citizens are subject to laws promoting the public health and safety and that the means employed by the state—mandatory vaccination—were reasonably related to that interest.<sup>183</sup> The Court justified the harms at-risk individuals suffer, such as isolation, quarantine, or compulsory vaccination, as necessary to advance the public good and prevent the spread of infectious disease.<sup>184</sup> The Court reasoned that public health and safety outweighed any temporary

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<sup>179</sup> Joshua L. Friedman, *Emergency Powers of the Executive: The President’s Authority When All Hell Breaks Loose*, 25 J.L. & HEALTH 265 (2012) at 296. [https://www.law.csuohio.edu/sites/default/files/academics/jlh/friedman\\_final\\_version\\_of\\_article-2.pdf](https://www.law.csuohio.edu/sites/default/files/academics/jlh/friedman_final_version_of_article-2.pdf). “[A]n active executive may credibly stretch these powers given exigent circumstances, most particularly those requiring immediate response to a crisis. There are none more necessary or imminent than in a public health emergency scenario, where the smallest delay can cause extensive loss of life.” *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> GEORGE P. SMITH, *LAW AND BIOETHICS INTERSECTIONS ALONG THE MORTAL COIL* 126 (Taylor & Francis) (2012).

<sup>182</sup> George P. Smith, II, *Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage*, 18 ANN. HEALTH L. 1, 34 (2009) [hereinafter *Re-shaping the Common Good*]. “The failure to recognize or accept this responsibility courts the collapse of society itself.” *Id.*

<sup>183</sup> *Jacobson*, 197 U.S. at 12.

<sup>184</sup> *Id.*

inconvenience to the individual.<sup>185</sup> Thus the government aims to strike a balance between individual liberty interests and rights against the public health safety benefits.<sup>186</sup> Individual rights usually do not trump collective health advantages in most cases.<sup>187</sup>

As mentioned above, the PHSA gives the CDC and the executive branch broad discretion during a public health emergency to create necessary measures, including quarantine.<sup>188</sup> To stop the introduction and spread of contagious diseases, the CDC and executive branch may deem a quarantine<sup>189</sup> necessary.<sup>190</sup> For example in 2009, the H1N1 pandemic prompted President Obama to use this Act to declare a public health emergency.<sup>191</sup>

While some may critique the breadth of power granted to the executive branch as a blank check, the Court grappled with this issue before and “dismissed any possibility of ‘executive tyranny’ in the existence of a showing of necessity,” so long as the executive branch acts with

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<sup>185</sup> *Id.*

<sup>186</sup> *Re-shaping the Common Good*, supra note 182, at 3.

<sup>187</sup> *Id.*

<sup>188</sup> 42 U.S.C. § 264(a).

<sup>189</sup> *Id.* Quarantine, isolation, and stay-at-home orders are all different things. *Id.* Quarantine encompasses “[c]ompulsory separation, including restriction of movement, of people who potentially have been exposed to a contagious disease, until it can be determined whether they have become sick or no longer pose a risk to others.” *Id.* Meanwhile, isolation is defined as “separation of people known or suspected (via signs, symptoms or laboratory criteria) to be infected with a contagious disease from those who are not sick to prevent them from transmitting the disease to others.” *Id.* Stay-at-home orders apply broadly to the entire state or local population, affecting more than just those who are confirmed to have an infectious disease or who have encountered someone carrying the disease. *Id.* Under a stay-at-home order, individuals are encouraged to stay home and leave their residence only out of necessity, for instance, to shop for groceries or receive medical care. *Id.* During the COVID-19 pandemic, every state used different language and had specific requirements related to these executive order(s). *Id.*

<sup>190</sup> *State Quarantine and Isolation Statutes*, NAT’L CONF. OF STATE MEASURES.

<sup>191</sup> Friedman, supra note 179, at 300.

authority that is either included in the Constitution, delegated by Congress, or absent in the Constitution.<sup>192</sup>

In emergency situations where government implements public health strategies to deal with extenuating circumstances such as emergencies or pandemics, it is natural to have a fear of an overextension of government power or perhaps a police state.<sup>193</sup> Public health officials are typically “conferred” with “broad . . . powers . . . with uneven levels of accountability” in response to these emergencies or pandemics.<sup>194</sup> Generally, “when the government claims emergency powers in times of disaster, it is most . . . justified in doing so under the rubric of the inherent powers of states to advance and maintain the common good through the exercise of their broad police powers.”<sup>195</sup>

Understandably, there is much debate in the legal community about the appropriate level of judicial review for times when public safety is at stake and accountability is not as readily defined. Within the context of national emergencies, “the judiciary must make careful efforts to maintain constitutional integrity in the decision-making process” and be willing to find a “balance between the interest in liberty from government restraint or interference and the interest in public safety.”<sup>196</sup> Judicial review must encompass many competing interests, but at the public safety must be at heart of public health emergencies. Executive actions put in place to “safeguard the

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<sup>192</sup> *Id.* at 304; *see generally* *Youngstown Sheet & Tube Co.*, 343 U.S. at 582.

<sup>193</sup> Smith, *supra* note 183, at 3.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*, at 5.; *see also* RICHARD A. POSNER, NOT A SUICIDE PACT 31 (Oxford Univ. Press, 1<sup>st</sup> ed. 2006); Sharona Hoffman, *Responders’ Responsibility: Liability and Immunity in Public Health Emergencies*, 96 GEO. L.J. 1913, 1919–24 (2008).



public in times of emergency and to preserve the common good” should be met with “judicial modesty.”<sup>197</sup> Those who would advocate for strict textualist interpretation of statutory provisions in times of emergency should consider how odd “it would be . . . if the framers of the Constitution had cared more about every provision of the Bill of Rights than about national and personal survival.”<sup>198</sup>

Courts must be sensitive to emergency and pandemic timelines. The development of an efficient anti-viral vaccination is a critical component for virus containment.<sup>199</sup> However, until the pandemic influenza strain appears and is recognized, the government cannot confirm the length for vaccine production.<sup>200</sup> Legislators writing and passing effective legislation to effectively respond to public concerns may also be lengthy. Indeed, Kavanaugh initially allowed the first CDC eviction moratorium, recognizing that it would expire soon and that it addressed a serious issue impacting thousands of Americans.<sup>201</sup>

Courts must assess temporary orders that infringe on civil freedoms to ensure public health in light of the order's shortness and the gravity of the threat. National emergencies create discord in the system of liberties and constitutional rights, as public safety concerns take precedence over unassailable core ideals.<sup>202</sup> As such, “pragmatic courts and pragmatic social orders . . . must respond accordingly to these changed circumstances by recalibrating what has been a point of

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<sup>197</sup> Smith *supra* note 183 at 33.

<sup>198</sup> See POSNER, *supra* note 196.

<sup>199</sup> See Smith, *supra* note 183, at 16.

<sup>200</sup> *Id.*

<sup>201</sup> *Ala. Ass'n of Realtors.*, 141 S.Ct. at 2485.

<sup>202</sup> See Smith, *supra* note 183, at 34.

balance or equilibrium by restricting previously validated civil liberties in favor of safety and maintenance of the common good.”<sup>203</sup>

## V. CONCLUSION

The eviction crisis pre-dated the COVID-19 pandemic, and has long been recognized as modern America’s most devastating battlegrounds of poverty and economic exploitation.<sup>204</sup> While the argument that Congressional authorization is important in evaluating public need, the scales shift in times of emergency.<sup>205</sup> The tidal wave of evictions that would occur during the pandemic due to unemployment would lead to high-rates of COVID-19 transmissions.<sup>206</sup> Local courts have appropriately hesitated to second-guess public health experts and administrative agencies that have training and resources beyond what unelected, nonrepresentative judges could understand within the walls of their courtrooms.<sup>207</sup> On a local level, courts have been willing to balance in favor of public interest and have not found for landlords challenging eviction moratoria as an overreach of government power. Landlords are not suffering constitutional violations because the Order is temporary, and landlords can still file breach of contract actions; and delayed litigation is not sufficient grievance to state a constitutional violation.<sup>208</sup>

Lastly, it cannot be stated enough how crucial it is to protect those most vulnerable to f evictions and COVID-19. Marginalized communities such as people of color, low-income

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<sup>203</sup> *Id.* at 34.

<sup>204</sup> Desmond, *supra* note 20.

<sup>205</sup> *Home Bldg. & Loan Ass’n*, 290 U.S. at 398.

<sup>206</sup> CDC’S AUTHORITY UNDER SECTION 361, *supra* note 4, at 21.

<sup>207</sup> *See Chambless Enter.*, 508 F.Supp.3d at 101.; *Apartment Ass’n of L.A Cnty., Inc.* 500 F. Supp. 3d at 1103.

<sup>208</sup> *Elmsford*, 469 F.Supp. 3d at 158–59; *Brown.*, 497 F.Supp. 3d at 1290–91.

households, and those suffering from comorbidities are at an increased risk of eviction,<sup>209</sup> and will be burdened not only with debt, but also with the “Scarlet E” representing an eviction on their rental history for years to come, preventing them from finding affordable housing in the future.<sup>210</sup>

Eviction moratoria may be critiqued as temporary solutions to the long-standing housing inequity problem, but they have offered a glimpse into what pro-tenant policy could look like.<sup>211</sup> Before the Supreme Court struck down the CDC’s eviction moratorium, landlord lawsuits filed in state courts balancing in favor of the public interest provided a moment of relief for tenants.<sup>212</sup> Some states and counties continued their own eviction moratoria as the COVID-19 impact is still overwhelming and renters are still struggling to afford their rent.<sup>213</sup>

State and federal government efforts managed to prevent an estimated 1.5 million evictions from occurring in 2020.<sup>214</sup> While it is difficult to know exactly how many of those evictions would have resulted in COVID-19 infections, studies documented a strong correlation between the lifting of state moratoria and COVID-19 cases.<sup>215</sup> This number is large in isolation, but there are still millions of Americans who are struggling to make rent payments and living in fear of eviction.<sup>216</sup>

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<sup>209</sup> Solomon & Baldassari, *supra* note 20.

<sup>210</sup> *Id.* An eviction appears on a rental history may create barriers for finding affordable housing, resulting in many to resort to expensive living options, such as extended-stay hotel rooms or resort to living out of their vehicles. *Id.*

<sup>211</sup> Monea, *supra* note 35, at 46–47.

<sup>212</sup> *Id.*

<sup>213</sup> Benfer, *supra* note 23.

<sup>214</sup> Monea, *supra* note 35 at 46–47; Peter Hepburn, U.S. Eviction Filing Patterns in 2020, SCUIUS 7, 1 (2021).

<sup>215</sup> Kathryn M. Leifheit, Expiring Eviction Moratoria and COVID-19 Incidence and Mortality, AM. J. OF EPIDEMIOLOGY (Nov. 30, 2020) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3739576](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3739576).

<sup>216</sup> *See infra* Part II.

The patchwork efforts of states and local governments may have had some success, but vulnerable renters would better be served by improved rent relief programs and a comprehensive federal eviction moratorium.

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