UNPRECEDENTED TAKINGS: DID COVID–19 EVICTION MORATORIUM ORDERS EFFECT COMPENSABLE TAKINGS OF LANDLORDS' PROPERTY?

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I. INTRODUCTION

On March 13, 2020, President Trump declared the COVID–19 pandemic a national emergency, marking the start of the nation's indefinite departure from normalcy.[1] In the following days, states began to shut down to combat the further spread of the virus, impacting hospitals, businesses, and landlords.[2] The government's shutdown response to the COVID–19 crisis has raised numerous issues related to private property ownership, including whether the government's eviction moratorium orders impermissibly deprived landlords of their right to exclude nonpaying

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1. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337.

2. Caroline Kantis et al., *UPDATED: Timeline of the Coronavirus*, THINK GLOBAL HEALTH, https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus [https://perma.cc/6TN7-W24M] (last accessed Mar. 4, 2022).

tenants.[3] This issue implicates the Takings Clause,[4] and numerous claimants have alleged that COVID–19 eviction moratoria constitute unconstitutional takings of landlords' property.[5]

This Note argues that such takings claims are not viable based on Supreme Court precedent and public policy. Part II of the Note will present background information on the government's implementation of COVID–19 eviction moratorium orders and resulting legal challenges, seminal Supreme Court Takings Clause cases, and federal district courts' recent application of such jurisprudence to landlords' eviction moratoria–related takings challenges. In Part III, this Note will analyze this takings issue under the various Takings Clause doctrines and explore likely policy repercussions that disfavor the landlords' position. Finally, Part IV concludes that courts should reject landlords' takings challenges to COVID–19 eviction moratorium orders.

II. BACKGROUND

A. Governmental Response to the COVID–19 Pandemic

Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act in March 2020.[6] The Act sought to combat the COVID–19 pandemic's ill effects, providing $2.2 trillion in aid to adversely affected individuals and businesses.[7] The CARES Act also established a 120-day eviction moratorium for federally subsidized rental properties.[8] When the moratorium expired on July 25, 2020, the CDC took action pursuant to Executive Order 13945, establishing a temporary eviction

3. *See* Michael Allan Wolf, POWELL ON REAL PROPERTY SPECIAL ALERT, *COVID-19 Pandemic and Real Property Law: An Early Assessment of Relief Measures for Tenants and Residential Mortgagors* 1 (2020) (noting that the "current stream of property-related COVID-19 litigation promises to become a flood" and that landlords have alleged that COVID–19 eviction moratoria constitute physical occupations of property).

4. U.S. CONST. amend. V.

5. *E.g.*, El Papel LLC v. Durkan, No. 220-CV-01323-RAJ-JRC, 2021 WL 4272323 (W.D. Wash. Sept. 15, 2021); Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199 (D. Conn. 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022).

6. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

7. Leon LaBrecque, *The CARES Act Has Passed: Here Are the Highlights*, FORBES (Mar. 29, 2020, 7:00 AM), https://www.forbes.com/sites/leonlabrecque/2020/03/29/the-cares-act-has-passed-here-are-the-highlights/?sh=7bf5eaed68cd [https://perma.cc/TL2H-YT2J].

8. Coronavirus Aid, Relief, and Economic Security Act, § 4024.

moratorium that halted evictions based on a tenant's nonpayment of rent.[9] The CDC asserted that it possessed the requisite authority to issue the moratorium order under the Public Health Service Act, relying on language that vested in the Surgeon General the power to create and enforce regulations designed to prevent the spread of disease.[10]

The CDC's order temporarily prohibited landlords from evicting individuals who certified that they, among other things, could not fully pay rent due to substantial income loss and would likely become homeless if faced with eviction.[11] The order expressly stated that the moratorium was temporary and that it did "not relieve any individual of any obligation to pay rent."[12] Additionally, the order provided that the CDC's moratorium did not apply in states with an existing moratorium order that matched or exceeded the level of protection guaranteed by the CDC's order.[13] While this eviction moratorium was initially scheduled to expire on December 31, 2020, Congress extended it an additional month.[14] Thereafter, the CDC extended the moratorium multiple times, ultimately extending the order through July 2021.[15] At the state level, more than 30 states imposed eviction moratorium measures within the early months of the COVID–19 crisis.[16]

B. Legal Challenges to COVID–19 Eviction Moratorium Orders

Following the government's enactment of COVID–19 eviction moratoria, numerous landlords challenged the moratorium orders at both the federal and state levels, alleging violations of various constitutional

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9. Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, 85 Fed. Reg. 49,935. In this executive order, President Trump noted that evictions would potentially endanger vulnerable individuals and prevent them from effectively socially distancing. He further ordered the Secretary of Health and Human Services and the Director of the CDC to consider whether a ban on evictions would be "reasonably necessary" to mitigate the spread of COVID–19. *Id.*

10. Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021).

11. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). The Order also required declarants to certify that they used "best efforts" to secure all available governmental rental or housing assistance, satisfied certain income requirements, and were using their best efforts to provide their landlords with timely partial payments. *Id.* at 55,293.

12. *Id.* at 55,294.

13. Shannon Price, *Stay at Home: Rethinking Rental Housing Law in an Era of Pandemic*, 28 GEO. J. POVERTY LAW & POL'Y 1, 24 (2020).

14. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2487.

15. *Id.*

16. Price, *supra* note 13, at 2.

rights including those under the Takings Clause.[17] Those challenging the nationwide moratorium were ultimately successful; property managers and realtor associations from Alabama and Georgia defeated the CDC's moratorium order in *Alabama Ass'n of Realtors v. Department of Health & Human Services*.[18] In that case, the Supreme Court reviewed the District Court for the District of Columbia's decision that the CDC's eviction moratorium was unlawful.[19] The Court indicated that the CDC almost certainly exceeded its authority by imposing the eviction moratorium order after Congress' statutory moratorium had expired.[20] The Court then noted that the CDC could only further extend its eviction moratorium if Congress "specifically authorize[d] it."[21] Since Congress had not provided such authorization, the Court vacated the lower court's stay, terminating the CDC's eviction moratorium order.[22] Despite landlords' success on the federal level, those challenging statewide eviction moratorium orders have been unsuccessful thus far.[23]

C. Takings Clause Jurisprudence and Courts' Application to Eviction Moratoria Challenges

The Takings Clause of the Fifth Amendment states that the government shall not take private property "for public use, without just compensation."[24] The Takings Clause has been incorporated to the states

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17. U.S. CONST. amend. V; *e.g.*, Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022); Baptiste v. Kennealy, 490 F. Supp. 3d 353, 369 (D. Mass. 2020); Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 155 (S.D.N.Y. 2020), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, No. 20-2565-CV, 2021 WL 3009153 (2d Cir. July 16, 2021).

18. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2487, 2490.

19. *Id.* at 2486.

20. *See id.* ("[T]he applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority"). The Court further noted that Congress did not specifically authorize the CDC's order — rather, the agency improperly relied on a "decades-old statute" that pertained to subject matter quite distinct from pandemic response. *Id.*

21. *Id.* at 2490.

22. *Id.*; Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID–19 to Prevent the Further Spread of COVID–19, 86 Fed. Reg. 43,244-01 (Aug. 6, 2021).

23. *See, e.g.*, El Papel LLC v. Durkan, No. 220-CV-01323-RAJ-JRC, 2021 WL 4272323, at *47 (W.D. Wash. Sept. 15, 2021); Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 229 (D. Conn. 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 815 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022).

24. U.S. CONST. amend. V; *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that the Takings Clause was "designed to bar Government from forcing some

via the Fourteenth Amendment.[25] Until the early twentieth century, courts typically found that the Takings Clause only applied to situations in which the government directly appropriated private property.[26] However, in *Pennsylvania Coal Co. v. Mahon*, the Supreme Court acknowledged that regulations can also effect takings of private property.[27] Courts now recognize two general types of takings: per se physical takings and regulatory takings.[28]

1. Per se Physical Takings

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court formulated the per se physical takings doctrine, holding that the government effectuates a taking when it authorizes a "permanent physical occupation" of private property, irrespective of any public interests the occupation serves.[29] This seminal case centered on whether a New York law that authorized a television company to install a cable on the exterior of a landlord's building constituted a taking of the landlord's private property.[30] Before announcing its per se rule, the Court noted that courts typically undertake an ad hoc analysis in determining whether governmental action constitutes a compensable taking.[31] The *Loretto* Court also emphasized that regulations that promote public interests are typically valid (i.e., they are not compensable takings) even where they substantially regulate an individual's use of her private property.[32] Further, the Court explained that states have significant authority to regulate landlord-tenant relationships without providing compensation for all resulting economic diminution that may result.[33] However, the Court drew a constitutionally significant difference between regulations that authorize a physical occupation and those that do not.[34] The Court characterized the former type of laws as "a property restriction of an unusually serious character for purposes of the Takings Clause" and stated that the invasive character of such regulations is dispositive in determining whether the

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people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

25. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897).
26. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).
27. *Id.*
28. Jevons v. Inslee, 561 F. Supp. 3d 1082, 1103 (E.D. Wash. 2021).
29. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).
30. *Id.* at 421.
31. *Id.* at 426.
32. *Id.*
33. *Id.* at 440.
34. *Id.* at 426.

government has effected a taking.[35] After explaining why past Supreme Court cases supported its "historical" per se rule,[36] the *Loretto* Court returned to the facts at hand, holding that the television company's cable installation on the appellant landlord's building was a physical intrusion on her property and thus constituted a compensable taking.[37]

While the *Loretto* majority seemingly limited its rule to only cover permanent physical occupations,[38] the Supreme Court recently explained in *Cedar Point Nursery v. Hassid* that the per se physical takings rule also extends to non-permanent physical occupations.[39] In *Cedar Point*, fruit growing companies alleged that a California regulation effected a compensable taking of their property because the law required the growers to grant union organizers up to 120 days of access to their properties each year.[40] The growers contended that the regulation effectively appropriated a free easement[41] for the union organizers' benefit and was therefore a per se physical taking.[42]

Analyzing the growers' claim, the Court first emphasized that a property owner's right to exclude is "one of the most treasured rights of property ownership" and is one of the foundational justifications behind the per se physical takings rule.[43] The *Cedar Point* Court then articulated a broader version of the *Loretto* rule, stating that any "government-authorized invasion[] of property" constitutes a per se taking.[44] Applying this rule to the facts of the case, the Court held that the California law was a per se physical taking because the regulation appropriated to union organizers the right to invade the companies' property.[45] In so deciding, the Court emphasized that the regulation's intermittency was irrelevant as to the issue of whether the government had authorized a per se physical

35. *Id.*

36. *Id.* at 426–34. While the *Loretto* majority asserted that its per se rule was rooted in history, the dissent vigorously disagreed. *Id.* at 446 (Blackmun, J., dissenting).

37. *Id.* at 438.

38. *Id.* at 441 (characterizing the Court's holding as "very narrow" and expressly including the word "permanent" in the summation of the per se rule).

39. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074–75 (2021) (asserting that the Supreme Court, in past cases, has recognized that permanent physical invasion is a taking regardless of the occupation's duration).

40. *Id.* at 2069–70.

41. California state law defines an easement as an "interest in real property that entitles its owner to limited use or enjoyment of land in the possession of another." 10 CALIFORNIA REAL ESTATE LAW & PRACTICE § 343.10 (2022).

42. *Cedar Point*, 141 S. Ct. at 2070.

43. *Id.* at 2072 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

44. *Id.* at 2074.

45. *Id.*

taking.[46] Rather, the regulation effectuated a per se physical taking solely because it granted to union organizers the ability to invade the growers' property.[47]

Yee v. City of Escondido, another Supreme Court case involving per se physical takings, has been particularly relevant in the context of Takings Clause challenges to COVID–19 eviction moratoria; multiple federal courts have employed the *Yee* Court's reasoning to reject landlords' per se physical takings claims.[48] In *Yee*, owners of mobile home parks in Escondido, California challenged a local mobile home rent control ordinance.[49] Before the city passed the ordinance in 1988, California had enacted a statute that limited the grounds on which park owners could evict the mobile home owners who rented pads[50] in their parks.[51] The park owners claimed that the rent control ordinance, viewed in light of the restrictive California statute, constituted a per se physical taking because the mobile home owners could effectively occupy the pads at an artificially low rental rate in perpetuity.[52]

The *Yee* Court summarily rejected the park owners' claim, finding no per se physical taking.[53] The Court stressed that a per se physical taking only occurs where the government forces a landowner to "submit to the physical occupation of his land."[54] In contrast, the park owners had voluntarily rented their pads to the mobile home owners and could still evict these tenants, albeit under narrow circumstances.[55] Since the government had neither forced the park owners to initiate rental relationships with their tenants nor required them to continue renting to

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46. *Id.* at 2074–75 (2021) (noting that the length of an appropriation is relevant only when a court determines compensation, not when it assesses whether a regulation physically appropriates private property).

47. *See id.* at 2075 ("[W]hen the government physically takes an interest in property, it must pay for the right to do so. . . . The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.").

48. *E.g.*, Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 812 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022); El Papel LLC v. Durkan, No. 220-CV-01323-RAJ-JRC, 2021 WL 4272323, at *15–16 (W.D. Wash. Sept. 15, 2021).

49. Yee v. City of Escondido, 503 U.S. 519, 525 (1992).

50. *Id.* at 523 (explaining that in a mobile home park, a "pad" is a plot of land that a mobile home owner typically rents from a mobile home park owner).

51. *Id.* at 524 (noting that the statute limited grounds for lease termination but still permitted eviction for rent delinquency, violations of law, and when a park owner decided to use his land for a different purpose).

52. *Id.* at 526–27.

53. *Id.* at 527.

54. *Id.*

55. *Id.* at 527–28 (noting that pursuant to the California statute, the park owners could cease to rent their property to the mobile home owners by changing the use of their land).

the tenants in perpetuity, there was no physical invasion.[56] Rather, the *Yee* Court characterized the ordinance and the California statute as mere use regulations that targeted landlord-tenant relationships.[57] Citing *Loretto*, the Court emphasized that states have broad authority to regulate landlord-tenant relationships without paying compensation for every economic consequence that arises as a result.[58] Thus, the *Yee* Court barred the park owners' per se physical taking claim.[59]

Many lower courts analyzing landlords' COVID–19 eviction moratoria takings challenges have relied upon *Yee* to foreclose physical takings claims.[60] In *Auracle Homes, LLC v. Lamont*, for example, a Connecticut district court cited to *Yee* and asserted that the state's eviction moratorium had not authorized a physical invasion of the landlords' property.[61] Rather, the court emphasized that similar to the rent control ordinance in *Yee*, the state's eviction moratorium constituted a mere landlord-tenant land use restriction on the landlords' otherwise voluntary relationship with their tenants.[62] The federal district court in *Heights Apartments, LLC v. Walz* similarly concluded that *Yee* militated against a finding of a per se physical taking.[63] This court also looked to the voluntary nature of the landlords' relationship with their tenants and stated that the government had not compelled an invasion of the landlords' property.[64] The landlords in *Heights Apartments* attempted to distinguish their case from *Yee*, claiming that the eviction moratorium before the court indefinitely precluded evictions while the regulation in *Yee* permitted evictions.[65] The court rejected this purported distinction, noting that the moratorium order still allowed the landlords to evict their tenants in certain circumstances and that the permissible grounds for eviction in *Yee* were limited.[66]

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56. *Id.* at 528.
57. *Id.*
58. *Id.* at 528–29.
59. *Id.* at 539.
60. *E.g.*, Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 220–21 (D. Conn. 2020); Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 162–64 (S.D.N.Y. 2020), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, No. 20-2565-CV, 2021 WL 3009153 (2d Cir. July 16, 2021); Baptiste v. Kennealy, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 812 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022).
61. 478 F. Supp. 3d 199, 220 (D. Conn. 2020).
62. *Id.*
63. *Heights Apartments, LLC*, 510 F. Supp. 3d at 812.
64. *Id.*
65. *Id.*
66. *Id.*

Some claimants have argued that the eviction moratorium orders constitute physical takings under *Cedar Point Nursery v. Hassid* because they appropriate landlords' right to exclude their tenants.[67] These attempts to analogize to *Cedar Point* have proven unsuccessful, however.[68] In *Southern California Rental Housing Ass'n v. City of San Diego*, the court quickly dispensed with the plaintiffs' claim that *Cedar Point* favored their position, emphasizing that the landlords "invited the renters to inhabit" their properties via their rental agreements and that the temporary eviction moratorium did not eliminate the plaintiffs' right to exclude.[69] In *Jevons v. Inslee*, the Washington Eastern District Court similarly distinguished *Cedar Point*, reiterating principles from *Yee*[70] and stating that *Cedar Point* did not overrule or undermine *Yee*'s holding.[71] The *Yee* decision has thus posed a formidable obstacle for landlords mounting physical takings challenges to COVID–19 eviction moratoria.[72]

2. Regulatory Takings

The Supreme Court has also recognized that an unduly burdensome regulation may violate the Takings Clause. As the Court explained in *Pennsylvania Coal Co. v. Mahon*, a "regulation [that] goes too far . . . will be recognized as a taking."[73] This category of takings is distinct from the per se physical takings doctrine because regulatory takings do not involve

67. *See*, *e.g.*, S. Cal. Rental Hous. Ass'n v. City of San Diego, 550 F. Supp. 3d 853, 865 (S.D. Cal. July 26, 2021); Jevons v. Inslee, 561 F. Supp. 3d 1082, 1102 (E.D. Wash. Sep. 20, 2021).

68. *S. Cal. Rental Hous. Ass'n*, 550 F. Supp. 3d at 866 ("*Cedar Point* is distinguishable from the facts before this Court."); *Jevons*, 561 F. Supp. 3d at 1107 ("*Cedar Point Nursery* also does not disturb the Court's analysis.").

69. *S. Cal. Rental Hous. Ass'n*, 550 F. Supp. 3d at 866.

70. *Jevons*, 561 F. Supp. 3d at 1107 (noting that the plaintiffs' relationship with their tenants was voluntary rather than compelled and that the eviction moratorium is a land-use regulation, not a physical appropriation).

71. *Id.*

72. *See, e.g.*, Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 220–21 (D. Conn. 2020); Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 162–64 (S.D.N.Y. 2020), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, No. 20-2565-CV, 2021 WL 3009153 (2d Cir. July 16, 2021); Baptiste v. Kennealy, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 812 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022).

73. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–15 (1992) (discussing *Pennsylvania Coal Co.* and the "70-odd years of succeeding 'regulatory takings' jurisprudence" that took place in between *Pennsylvania Coal Co.* and *Lucas*).

the physical occupation of private property.[74] Courts recognize two forms of regulatory takings: categorical and non-categorical.[75]

A regulation constitutes a categorical regulatory taking if it eradicates a property owner's entire "economically beneficial use" of her property.[76] If the regulation prohibits an owner from using her land in a manner that amounts to a common-law nuisance,[77] however, the regulation does not effectuate a taking.[78]

The Supreme Court formulated this per se rule in *Lucas v. South Carolina Coastal Council*.[79] In that case, Lucas, a developer, challenged a South Carolina statute that barred him from constructing any permanent residences on two beachfront residential lots that he had acquired for $975,000.[80] Lucas argued that the statute constituted a taking, notwithstanding the validity of the legislature's use of its police powers, because it had extinguished the entire value of his property.[81] The Court extended its holding in *Agins v. City of Tiburon*[82] and emphasized that a regulation effects a taking where it depletes all economically viable use of land.[83] The *Lucas* Court then added an exception to its rule, explaining that there is no categorical taking where a regulation proscribes a common-law nuisance because such a regulation explicitly prohibits what was "*always* unlawful."[84] Since the trial court determined that the South Carolina statute had depleted the entire value of Lucas' beachfront lots, the Court found that Lucas was entitled to just compensation unless the state could establish that Lucas' intended land use would constitute a common-law nuisance.[85]

District courts considering COVID–19 eviction moratorium takings claims have summarily concluded that the moratorium orders do not

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74. *See Lucas*, 505 U.S. at 1014.

75. *Heights Apartments, LLC*, 510 F. Supp. 3d at 812.

76. *Lucas*, 505 U.S. at 1015.

77. "Nuisance" in this context refers to a noxious use of property; a common-law nuisance is a use of land that violates a state's private nuisance laws. *Id*. at 1010, 1029.

78. *Id.* at 1029.

79. *Id.* at 1027–30.

80. *Id.* at 1006–09.

81. *Id.* at 1009.

82. Agins v. City of Tiburon, 447 U.S. 225, 260 (1980), *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (holding that a zoning ordinance constitutes a taking of property if it fails to "substantially advance legitimate state interests" or deprives a property owner of the economically productive use of her land). As noted in II.C.3 *infra*, the *Lingle* Court rejected *Agins*' "substantially advances" language in the context of takings analysis. *Lingle*, 544 U.S. at 543.

83. *Lucas*, 505 U.S. at 1015.

84. *Id.* at 1030.

85. *Id.* at 1020, 1031–32.

constitute categorical takings.[86] In *Baptiste v. Kennealy*, the court reasoned that the challenged eviction moratorium order did not deny the landlords all economic value of their property given that the order was temporary.[87] The courts in *Heights Apartments, LLC v. Walz* and *Auracle Homes, LLC v. Lamont* each found that the moratorium order at issue did not effect a categorical taking since the landlords could continue to accept rental payments from some tenants.[88]

A regulation that does not eliminate all of the economically beneficial use of land may nonetheless constitute a taking.[89] If a court finds that governmental action does not constitute a categorical taking, it will turn to a "fact-based inquiry" and perform a multi-factor analysis to determine whether the government has effected a noncategorical taking.[90] Courts conduct this analysis pursuant to the framework established in *Penn Central Transportation Co. v. New York City*.[91]

In *Penn Central*, the Supreme Court considered whether a New York City landmark law had effectuated a taking by restricting Penn Central Transportation Co.'s ability to maximize its economic use of the Grand Central Terminal.[92] The law, designed to preserve historic New York City landmarks, delegated authority to a commission to designate certain properties as landmarks.[93] Once the commission declared a site to be a landmark, the owner of the site faced restrictions on its use of the property, including a requirement to obtain the commission's approval before altering the site.[94] Penn Central, seeking to construct a 50-plus-story office building on top of the Grand Central Terminal, sought the commission's approval to alter the landmark site.[95] The commission denied Penn Central's request, prompting the company to challenge the landmark law on takings grounds.[96]

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86. *E.g.*, Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 221 (D. Conn. 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 812–13 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022); Baptiste v. Kennealy, 490 F. Supp. 3d 353, 388–89 (D. Mass. 2020).

87. *Baptiste*, 490 F. Supp. 3d at 388–89.

88. *Auracle Homes, LLC*, 478 F. Supp. 3d at 221; *Heights Apartments, LLC*, 510 F. Supp. 3d at 812–13.

89. 26 AM. JUR. 2D *Eminent Domain* § 13.

90. *Id.*

91. *See*, *e.g.*, *Heights Apartments*, 510 F. Supp. 3d at 813; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

92. *Penn Cent. Transp. Co.*, 438 U.S. at 122.

93. *Id.* at 109–10.

94. *Id.* at 111–12.

95. *Id.* at 116–117.

96. *Id.* at 117, 119.

In considering Penn Central's claim, the Court noted that an "ad hoc" analysis was the appropriate method of resolution and primarily examined three factors: (1) the regulation's economic impact on the claimant's property, (2) the extent to which the law interferes with the claimant's "distinct investment-backed expectations," and (3) the "character of the governmental action."[97] Expounding on the first factor, the Court stated that its past decisions concerning land-use laws enacted to promote general welfare "reject[ed] the proposition that diminution in property value, standing alone, can establish a 'taking.'"[98] As such, Penn Central's contention that the law significantly reduced the value of the Grand Central Terminal was far from dispositive.[99] As to the second factor, the Court characterized *Pennsylvania Coal Co. v. Mahon* as an instructive case, noting that the *Pennsylvania Coal Co.* Court found a taking where a statute rendered it commercially impracticable for the claimant to mine coal on its property.[100] The *Penn Central* Court emphasized that the New York City law did not interfere with Penn Central's investment-backed expectations because the regulation had no impact on the company's present uses of its terminal site.[101] Rather, Penn Central could continue to use its property as a railroad terminal, which was how it had used the site for the previous sixty-five years.[102]

Finally, regarding the third factor, the Court explained that a regulation more likely constitutes a taking where it authorizes a physical invasion of private property than when it interferes with property pursuant to "some public program adjusting the benefits and burdens of economic life to promote the common good."[103] The Court indicated that New York City's landmark law belonged in the latter category, asserting that the law was neither an invasion nor an impairment of Penn Central's property.[104] Based on its ad hoc analysis, the Court held that the landmark law did not result in a taking of Penn Central's property.[105]

So far, courts applying *Penn Central*'s framework to COVID–19 eviction moratorium challenges have rejected landlords' noncategorical

97. *Id.* at 124.
98. *Id.* at 131.
99. *See id.* (stating that New York's landmark law was reasonably related to promoting the general welfare and refusing to find a taking simply because the law led to a diminution in Grand Central's economic value).
100. *Id.* at 127 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).
101. *Id.* at 136.
102. *Id.*
103. *Id.* at 124.
104. *See id.* at 135.
105. *Id.* at 138.

takings claims.[106] Courts have generally agreed that the first *Penn Central* factor, the economic impact of the disputed regulation, cuts in favor of the government because the moratoria resulted in merely temporary delays in rental income and landlords' estimations of damages have been imprecise.[107] On the issue of whether the government interfered with landlords' distinct investment-backed expectations, courts have arrived at different conclusions.[108] Some have found that landlords should be accustomed to their states' historically heavy regulation of landlord-tenant relationships while others have emphasized that a reasonable landlord would not have expected to encounter any regulation resembling a COVID–19 eviction moratorium order.[109] Courts have consistently held that the third *Penn Central* factor, the character of the government's action, militates against finding a noncategorical taking because the eviction moratorium orders constitute programs "that adjust[] the benefits and burdens of economic life to promote the common good" rather than a state-authorized appropriation of private property.[110]

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106. *E.g.*, Baptiste v. Kennealy, 490 F. Supp. 3d 353, 390 (D. Mass. 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 814–15 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022); Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 165 (S.D.N.Y. 2020), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, No. 20-2565-CV, 2021 WL 3009153 (2d Cir. July 16, 2021).

107. *See e.g.*, *Baptiste*, 490 F. Supp. 3d at 389 (finding that the claimants had only experienced a temporary delay of their rental income, which was insufficient to constitute a substantial economic impact); *Elmsford Apartment Assocs., LLC*, 469 F. Supp. 3d at 165–66 (noting that the landlords' allegations of economic loss were "insufficiently precise" and holding that even if some tenants were behind on their rental payments, the challenged eviction moratorium order still had not significantly diminished the value of the landlords' rental properties).

108. *Compare* Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 222 (D. Conn. 2020) (finding that the challenged moratorium order did not interfere with the plaintiff landlords' investment-backed expectations considering Connecticut's established landlord-tenant regulatory framework), *with Baptiste*, 490 F. Supp. 3d at 389–90 (finding that the government did interfere with the landlords' investment-backed expectations because a reasonable landlord would not have expected "a virtually unprecedented event like the COVID–19 pandemic and the ensuing six-month ban on evicting and replacing tenants who do not pay rent.").

109. *See Baptiste*, 490 F. Supp. 3d at 390 (explaining that some courts have determined that an eviction moratorium does not interfere with landlords' investment-backed expectations and disagreeing with this view); *see also Heights Apartments LLC*, 510 F. Supp. 3d at 813–14 ("[A]lthough they understood that they were entering a regulated industry, neither Landlord could have expected regulations of the duration and on the scale of the [moratoria].").

110. *E.g.*, *Baptiste*, 490 F. Supp. 3d at 390 (quoting Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 225 (1986)); *Heights Apartments LLC*, 510 F. Supp. 3d at 814 (quoting Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 225 (1986)); *Auracle*

3. Erroneous Takings

Since the Supreme Court indicated that the CDC's eviction moratorium exceeded the agency's congressional authorization,[111] a claimant challenging the nationwide moratorium may attempt to use this fact to bolster a takings claim. One could characterize this line of argument as an "erroneous takings" claim—a claim theorizing that governmental errors or unlawful actions that decrease an individual's property value should give rise to takings liability.[112] There are decades-old scholarly works that address this topic,[113] and some courts found takings in cases involving erroneous governmental action.[114]

These courts largely relied on *Agins v. City of Tiburon*,[115] which stated that regulations that fail to "substantially advance legitimate state interests" constitute takings.[116] In *Lingle v. Chevron U.S.A. Inc.*, however, the Supreme Court rejected the *Agins* rule and clarified that determining whether governmental action is valid is a question "logically prior to and distinct" from a takings inquiry.[117] The Court further emphasized that if the government has acted unlawfully, "for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."[118] Therefore, under *Lingle*, a claimant cannot secure compensation for an unlawful governmental action via a takings challenge.[119]

Homes, LLC, 478 F. Supp. 3d at 223 (quoting Sherman v. Town of Chester, 752 F.3d 554, 565 (2d Cir. 2014)); *Elmsford Apartment Assocs., LLC*, 469 F. Supp. 3d at 168.

111. Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021).

112. John D. Echeverria, *When Does Retroactivity Cross The Line?: Winstar, Eastern Enterprises and Beyond: Takings and Errors*, 51 ALA. L. REV. 1047, 1048, 1055 (2000) (stating that erroneous takings challenges are a "relatively small . . . subset of cases in which owners seek compensation under the Takings Clause when the government action was or is alleged to be erroneous . . . . These claims include "cases in which the government defendant exceeded its jurisdiction."); *id.* at 1048.

113. *E.g.*, Matthew D. Zinn, *Ultra Vires Takings*, 97 MICH. L. REV. 245 (1998); Echeverria, *supra* note 112.

114. *See, e.g.*, Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 408 (Neb. 1994) (finding that the city effected a taking where it erroneously denied Whitehead Oil's use permit application); Echeverria, *supra* note 112, at 1051.

115. 447 U.S. 255 (1980) *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

116. Echeverria, *supra* note 112, at 1050–51 (quoting *Agins*, 447 U.S. at 260).

117. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005).

118. *Id.*

119. *See id.*

4. Judicial Takings

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Supreme Court addressed, but failed to decide, the issue of whether a judicial decision can effect a taking of private property.[120] In that case, owners of beachfront property in Florida challenged the Florida Supreme Court's finding that the owners did not have certain littoral rights to the water, alleging that the decision effected a taking of their property rights.[121] Writing for a plurality of the Court, Justice Scalia asserted that the Takings Clause fully applies to all the branches of government, and as such, judiciaries can effect takings.[122] Justice Scalia emphasized that when a court "declares that what was once an established right of private property no longer exists, it has taken that property."[123] The plurality also noted that if a court's decision does constitute a taking, the proper remedy is a reversal.[124] The state legislature would then need to determine whether to provide compensation.[125] In the years following *Stop the Beach Renourishment*, there have been no successful judicial takings claims in which a court has awarded compensation.[126] Judicial takings doctrine remains murky as several courts considering judicial takings claims have declined to determine whether judicial takings exist, instead dismissing these claims on other bases.[127]

III. ANALYSIS

Based on the above background on Takings Clause jurisprudence, this Note will explore and evaluate arguments that landlords may raise when challenging the COVID–19 eviction moratorium orders as compensable

120. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713–14 (2010); DAVID L. CALLIES ET AL., LAND USE CASES AND MATERIALS 331 (8th ed. 2021).

121. *Stop the Beach Renourishment*, 560 U.S. at 711–12.

122. *Id.* at 714–15.

123. *Id.* at 715.

124. *Id.* at 724 (explaining that had the Florida Supreme Court "effected an uncompensated taking in this case, we would not validate the taking by ordering Florida to pay compensation. We would simply reverse the Florida Supreme Court's judgment . . . . The power to effect a *compensated* taking would then reside…in the Florida Legislature.").

125. *Id.*

126. CALLIES ET AL., *supra* note 120, at 332.

127. *E.g.*, Petro-Hunt, L.L.C. v. United States, 126 Fed. Cl. 367, 380 (2016), *aff'd*, 862 F.3d 1370 (Fed. Cir. 2017) ("This court finds that it is not necessary to determine if plaintiff's judicial takings claim is cognizable in federal court because, even if it is, the United States Court of Federal Claims lacks jurisdiction to determine if a judicial taking occurred in these cases."); CALLIES ET AL., *supra* note 120, at 331.

takings of private property. It will consider whether landlords can secure compensation under the various types of takings theories and ultimately conclude that courts should reject landlords' claims.

A. Per se Physical Takings

Landlords challenging COVID–19 eviction moratorium orders as physical takings will presumably analogize their cases to *Cedar Point Nursery v. Hassid*. At first blush, the *Cedar Point* decision seems promising for the landlords given that the eviction moratoria prevented landlords from evicting non-paying tenants,[128] seemingly contravening the landlords' right to exclude—a right that the *Cedar Point* Court recognized as "one of the most treasured rights of property ownership."[129] Further, the Court's emphasis that even temporary occupations can constitute per se physical takings[130] would appear to strengthen landlords' claims, as the moratorium orders are temporary rather than permanent.[131] As such, landlords would presumably contend that the eviction moratorium orders enabled a government-sanctioned invasion of property because the orders prohibited landlords from evicting nonpaying tenants.[132] This, the landlords will argue, mirrors the regulation in *Cedar Point* that gave union workers intermittent access to the growers' properties[133] since both the moratorium orders and the access regulation denied the property owners' right to exclude, forcing them to accommodate unwelcome individuals on their properties.

While the eviction moratorium orders did temporarily abrogate landlords' ability to exclude in some circumstances, the *Yee v. City of Escondido* decision almost certainly forecloses the landlords' physical takings challenges. First, as the *Yee* Court explained, a compensable per se physical taking occurs not when a law merely regulates a landlord's use of his or her land, but when the government facilitates a physical invasion of private property.[134] Second, the Court recognized that states have

128. *See* Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID–19 to Prevent the Further Spread of COVID–19, 86 Fed. Reg. 43,244, 43,245 (Aug. 6, 2021) (protecting nonpaying renters from eviction procedures where such individuals qualify as "covered" persons).

129. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

130. *Id.* at 2074.

131. *E.g.*, 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 43,245 ("The [CDC] is issuing a new order temporarily halting evictions").

132. *Id.*

133. *Cedar Point*, 141 S. Ct. at 2069.

134. Yee v. City of Escondido, 503 U.S. 519, 527–28 (1992).

extensive authority to regulate landlord-tenant relationships.[135] Finally, the *Yee* Court emphasized that regulations restricting landlords' ability to evict their tenants do not authorize a compelled physical occupation where the underlying relationship is consensual.[136] *Yee* thus precludes landlords' physical takings challenges to the eviction moratorium orders since the orders merely restricted the landlords' use of their land (i.e., they prevented evictions under certain circumstances) and regulated voluntary landlord-tenant relationships.[137] Indeed, the eviction moratorium orders' temporary restrictions much more closely resemble the land-use restrictions at issue in *Yee* than they do a government-authorized physical invasion.[138] Despite the *Cedar Point* Court's apparent modification of the *Loretto* per se physical takings rule, the Court has not disturbed *Yee*'s holding.[139] Thus, landlords' challenges to COVID–19 eviction moratorium orders should fail because the orders did not authorize invasions of property but rather regulated voluntary landlord-tenant relationships.[140]

B. Regulatory Takings

1. Categorical Takings

Courts should not construe eviction moratorium orders as categorical takings because they have not wiped out all of landlords' economically beneficial uses for their rental properties. Rather, as the *Heights Apartments* and *Auracle Homes* courts noted, landlords could still collect

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135. *Id.* at 528–29.

136. *See id.* at 532.

137. *See, e.g.*, Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID–19 to Prevent the Further Spread of COVID–19, 86 Fed. Reg. 43,244 (Aug. 6, 2021).

138. *See Yee*, 503 U.S. at 528 (noting that the challenged mobile home ordinance simply regulated park owners' use of their land and was therefore not a per se physical taking, which requires that the government physically invade private property). The Court also emphasized that the government had not compelled the park owners to rent out their property or "to refrain in perpetuity from terminating a tenancy," which would undoubtedly effect a per se physical taking. *Id*. Likewise, the eviction moratoria restricted landlords' ability to evict certain tenants but did not force them to take on tenants in the first place, nor have the moratoria required landlords to house their tenants in perpetuity. *See e.g.*, 86 Fed. Reg. at 43,245 (indicating that the new eviction order sought to "temporarily halt[] evictions . . . .").

139. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (recognizing that even temporary compelled property invasions constitute per se physical takings); Jevons v. Inslee, 561 F. Supp. 3d 1082, 1107 (E.D. Wash. 2021) (noting that the *Cedar Point* Court did not modify *Yee*'s "legal underpinnings").

140. *See* Yee v. City of Escondido, 503 U.S. 519, 527–28 (1992).

rent from some tenants in their buildings notwithstanding the moratorium orders' restrictions.[141] Even if a landlord could demonstrate that all of his or her tenants ceased paying rent during the duration of an eviction moratorium order, the landlord would likely still have difficulty demonstrating that the order erased all economically beneficial use of the rental property. The landlord could presumably sell his or her rental property for a nonzero value or wait until the order expired and then evict the tenants and sign new leases with paying tenants.[142]

2. Non-Categorical Takings

Since evaluating a non-categorical taking requires an ad hoc balancing approach,[143] determining whether COVID–19 eviction moratorium orders constitute non-categorical takings will inherently be less clear-cut than application of the bright-line categorical takings rule. As explained above, courts applying the *Penn Central* framework to landlords' takings challenges have found that the COVID–19 moratorium orders at issue do not amount to non-categorical takings.[144] Courts should continue to find that these orders do not effect non-categorical takings since landlords probably cannot satisfy the three-prong *Penn Central* test.

Under *Penn Central*, as discussed above, there are three relevant factors to consider: (1) the extent to which the regulation diminishes the value of the claimant's property, (2) the extent to which the law contravenes the claimant's "distinct investment-backed expectations," and (3) the "character of the governmental action."[145] The first factor seemingly cuts against landlords' position because the COVID–19 eviction moratorium orders are temporary and do not relieve tenants' rental obligations.[146] Since the moratoria do not excuse tenants' rental

141. Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 812 (D. Minn. 2020), *aff'd in part, rev'd in part and remanded*, 30 F.4th 720 (8th Cir. 2022); Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 221 (D. Conn. 2020).

142. *See* Baptiste v. Kennealy, 490 F. Supp. 3d 353, 388–89 (D. Mass. 2020) (stating that any deprivation of the landlords' economically beneficial use of their property was temporary and thus insufficient to constitute a categorical regulatory taking).

143. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (noting that whether the government has effected a taking typically depends upon the circumstances of the case).

144. *E.g.*, *Baptiste*, 490 F. Supp. 3d at 390 (D. Mass. 2020); *Heights Apartments, LLC,* at 814–15; Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 165 (S.D.N.Y. 2020), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, No. 20-2565-CV, 2021 WL 3009153 (2d Cir. July 16, 2021).

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

146. *E.g.*, 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.

obligations and only temporarily prevent evictions, the diminution of landlords' rental property value appears insufficient. Under the second factor, the landlords seem to have a stronger case. Some district courts have asserted that landlords, operating in the heavily regulated rental industry, should not have been surprised by the moratoria-related restrictions; however, other courts have rejected this reasoning, emphasizing that no reasonable landlord could have anticipated the moratoria.[147]

The courts that have found that the moratorium orders interfere with landlords' investment-backed expectations appear to take the better-reasoned approach given that landlords, while accustomed to heavy industry regulation, presumably could not have expected a nationwide pandemic and subsequent widespread eviction freezes. The third *Penn Central* factor, however, seems to strongly weigh against the landlords because the eviction moratorium orders, designed to slow the spread of COVID–19,[148] appear to plainly arise from a "public program adjusting the benefits and burdens of economic life to promote the common good."[149] Further, as discussed above in the context of per se physical takings, the eviction restrictions do not effect a physical invasion since the underlying landlord-tenant relationships are voluntary.[150] Thus, under the *Penn Central* balancing test, courts should continue to find that the

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Reg. 43,244, 43,250 (Aug. 6, 2021) ("This Order is a temporary eviction moratorium to prevent the further spread of COVID–19. This Order does not relieve any individual of any obligation to pay rent.").

147. *Compare* Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 222 (D. Conn. 2020) (noting that landlords' reasonable investment-backed expectations must take into account the heavy regulation present in the state's rental industry and finding no interference with the plaintiffs' investment-backed expectations), *and Elmsford Apartment Assocs., LLC*, 469 F. Supp. 3d at 167–68 (finding that the moratorium order at issue did not interfere with landlords' investment-backed expectations since the state's rental industry is heavily regulated), *with Baptiste*, 490 F. Supp. 3d at 390 (finding that the government did interfere with the landlords' investment-backed expectations because a reasonable landlord would not have expected "a virtually unprecedented event like the COVID–19 pandemic and the ensuing six-month ban on evicting and replacing tenants who do not pay rent."), *and Heights Apartments, LLC*, 510 F. Supp. 3d at 813–14 (agreeing with the *Baptiste* court's analysis of the second *Penn Central* prong and assuming that the challenged moratorium order interfered with the plaintiffs' investment-backed expectations).

148. *E.g.*, 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 43,246 (stating that the purpose of the eviction moratorium order is to prevent the spread of COVID–19).

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

150. Yee v. City of Escondido, 503 U.S. 519, 527–28 (1992).

COVID–19 eviction moratorium orders do not effectuate non-categorical regulatory takings of landlords' property.

C. Other Takings Theories

In the wake of *Alabama Ass'n of Realtors v. Department of Health & Human Services*, a landlord may contend that the government, in imposing and enforcing an unlawful order, effected an unlawful taking of private property.[151] However, such a claim should not succeed given that the *Lingle* Court clearly emphasized that a compensable taking presupposes valid governmental action.[152] Thus, landlords cannot claim that the CDC's moratorium order constituted a taking solely because the CDC imposed the order without proper authority.

A landlord claimant could also attempt to argue that a court's enforcement of an eviction moratorium order constitutes a judicial taking because a court enforcing such an order deprives a landlord of his or her right to exclude tenants. The *Stop the Beach Renourishment* plurality recognized that a court can effect a taking and does so when it "declares that what was once an established right of private property no longer exists."[153] Relying on *Stop the Beach Renourishment*, a landlord alleging a judicial taking would presumably contend that a court, in preventing landlords from evicting their non-paying tenants pursuant to a COVID–19 eviction moratorium order, has declared nonexistent the landlords' established right to exclude.[154] As a practical matter, given the murky status of judicial takings doctrine, courts may be hesitant or unwilling to adjudicate such a claim.[155] Even if a court were to consider the merits of a landlord's judicial takings claim, it seems likely that the claim would fail because the durations of eviction moratorium orders are temporary.[156] Accordingly, courts enforcing the eviction moratorium orders are not

151. *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (finding that the CDC lacked authority to impose its eviction moratorium order).

152. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible…that is the end of the inquiry. No amount of compensation can authorize such action.").

153. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 715 (2010).

154. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) ("The right to exclude is one of the most treasured rights of property ownership." (quoting Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 435 (1982))).

155. *See* CALLIES ET AL., *supra* note 120, at 332.

156. *See e.g.*, Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID–19 to Prevent the Further Spread of COVID–19, 86 Fed. Reg. 43,244 (Aug. 6, 2021) (stating that the eviction moratorium order is temporary).

abrogating landlords' right to evict their nonpaying tenants; they are simply deferring this right until the expiration of the orders. Therefore, since courts enforcing the moratorium orders have simply delayed landlords' ability to exclude delinquent tenants rather than declared that this right "no longer exists," courts should reject landlords' judicial takings claims.[157]

D. Policy Considerations

While application of past Takings Clause cases alone demonstrates that courts should reject landlords' eviction moratoria takings claims, courts should also dismiss these claims as a matter of sound public policy. Multiple considerations require such a result.

First, permitting these claims would contradict the Supreme Court's historical stance on respecting states' broad authority under the police powers to regulate landlord-tenant relationships without providing compensation for every resulting economic injury.[158] The per se physical takings doctrine is an exception to this general rule, but as explained above, the eviction moratorium orders have not authorized invasions of landlords' properties and thus do not effect physical takings. If courts nonetheless found that the moratorium orders effectuated compensable takings, they would encroach upon states' regulatory power in the landlord-tenant sphere and potentially discourage states from regulating landlord-tenant relationships in the future.

Additionally, recognizing landlords' eviction moratoria–related takings claims would likely damage states' abilities to effectively respond to similar future emergencies implicating the rental sector because governments would presumably incur significant expense after both responding to the emergency and compensating landlords for attendant regulatory action. To make this point more concrete, consider a scenario in which courts do determine that the COVID–19 eviction moratorium orders effected compensable takings of landlords' property. If some new highly transmissible disease thereafter emerged and overtook the U.S., state governments, concerned about the potentially staggering cost of compensating numerous landlords, might be hesitant to impose eviction moratorium orders even if doing so would constitute the most effective emergency response. This misalignment of states' incentives could therefore reduce the efficacy of governmental relief measures in such a situation and potentially cost lives. Courts can avoid this alarming outcome by continuing to reject landlords' eviction moratoria–related

157. *Stop the Beach Renourishment*, 560 U.S. at 715.

158. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440, 452 (1982).

takings claims, thereby safeguarding state governments' abilities to respond to future emergencies resembling the COVID–19 pandemic. Thus, based on courts' historic deference to states in regulating landlord-tenant matters and the need to protect states' abilities to effectively respond to future emergencies, sound policy militates against a finding that COVID–19 eviction moratorium orders effected compensable takings.[159]

IV. CONCLUSION

Courts have thus far rejected landlords' Takings Clause challenges to states' COVID–19 eviction moratorium orders, and they should continue this trend.[160] While the eviction moratorium orders may have temporarily denied landlords' ability to evict tenants under some circumstances, this fact alone is not sufficient for courts to find that the orders effected compensable takings.[161] Rather, somewhat straightforward application of Takings Clause jurisprudence demonstrates that the eviction moratoria have not effectuated takings of landlords' private property.

First, the eviction moratorium orders did not authorize any physical invasion of property, so they did not constitute per se physical takings. Although landlords could not evict some nonpaying tenants for the moratoria's duration,[162] the underlying landlord-tenant relationships were voluntary such that the eviction prohibition was a land-use regulation rather than a state-authorized property invasion.[163] Second, the eviction moratoria did not constitute categorical takings because the orders did not wipe out all value of the landlords' property.[164] Third, while courts make non-categorical regulatory taking determinations on a case-by-case basis, the temporary nature of the moratoria mitigates the extent of landlords' economic diminution, and the moratoria constitute "public program[s] adjusting the benefits and burdens of economic life to promote the common good" since they were emergency responses to the COVID–19

159. *Id.*

160. *See e.g.*, El Papel LLC v. Durkan, No. 220-CV-01323-RAJ-JRC, 2021 WL 4272323, at *47 (W.D. Wash. Sept. 15, 2021); Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 229 (D. Conn. 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 815–16 (D. Minn. 2020).

161. *E.g.*, 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 43,245.

162. *See id.*

163. *See* Yee v. City of Escondido, 503 U.S. 519, 527–28 (1992).

164. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

crisis.[165] Thus, courts should reject landlords' noncategorical regulatory takings claims under *Penn Central*. Fourth, the Supreme Court's finding that the CDC's eviction moratorium was an unlawful extension of authority does not benefit landlord claimants because the Takings Clause presupposes that the government acted lawfully.[166] Finally, judicial takings doctrine is unavailing for landlords challenging the eviction moratorium orders because the orders merely delayed evictions rather than declared nonexistent landlords' right to exclude.[167]

Sound public policy also dictates that courts reject landlords' takings challenges to the eviction moratorium orders because failure to do so would erode states' broad authority to regulate landlord-tenant relationships under the police power and hinder state governments' ability to effectively manage future crises. Courts should therefore dismiss landlords' takings challenges to COVID–19 eviction moratorium orders.

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165. *E.g.*, 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 43,245; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978).

166. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005).

167. *E.g.*, 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 43,245; Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 715 (2010).