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Oversight of Pandemic Evictions: Assessing Abuses by Corporate Landlords and Federal Efforts to Keep Americans in Their Homes

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Thank you Chairman Clyburn, Ranking Member Scalise, and other members of the committee for the opportunity to testify today. My name is Joel Griffith. I am a Research Fellow in Financial Regulations at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

This testimony will focus on why the eviction moratoria instituted by the CDC, Congress, and state governments were unfair, unnecessary, and economically harmful.

Government-mandated shutdowns and restrictions in response to the COVID-19 pandemic caused unemployment to soar from near-record lows in January to generational highs just months later.

Policy makers forced property owners to shoulder much of the economic fallout of these decisions with eviction moratoriums.

With the threat of evictions rising, the federal CARES Act in March 2020 imposed a four-month eviction moratorium—along with a ban on late fees—on the more than 28% of rental properties financed with federally backed mortgages or participating in federal housing programs.[1]

An executive order followed on September 4, 2020, banning property owners from commencing the eviction process in courts until the end of 2020. [2]This was predicated on the Public Health Services Act.[3] States and dozens of cities followed suit with their own versions of moratoria.[4] For instance, Portland, Oregon, declared a moratorium for some renters lasting up to six months after the emergency ends.[5]

This impacted fundamental constitutional rights while eroding the separation of powers (through executive branch misapplication of the Public Health Services Act) and federalism (by encroaching on the right of states to determine their own eviction processes).

These eviction moratoria unfairly burden property owners with the costs of societal shutdowns, create unintended consequences, and implicate serious legal and constitutional concerns.

- **<u>The Eviction Moratoria Forced Property Owners to Subsidize the Destructive Shutdowns Implemented by State and Local Policymakers</u>**

Federal taxpayers should not continue to subsidize state and local decisions to shutter businesses and ruin livelihoods. Eviction moratoriums move the costs of overly restrictive shutdowns to private property owners and allows governors additional latitude to keep society shuttered with one-size-fits-all policies. Targeted, temporary, and local economic restrictions may be necessary, but those decisions, and the costs that they incur, should be weighed by the responsible policymakers.[6]

[1] Congressional Research Service, "CARES Act Eviction Moratorium," April 7, 2020, https://crsreports.congress.gov/product/pdf/IN/IN11320 (accessed June 13, 2020).

[2] Federal Register, "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19," September 4, 2020, https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19 (accessed June 13, 2021).

[3] 42 U.S.C. §264, https://www.govinfo.gov/link/uscode/42/264?type=usc&year=mostrecent&link-type=html.

[4] National Low Income Housing Coalition, "Eviction and Foreclosure Moratoriums," https://nlihc.org/eviction-and-foreclosure-moratoriums

[5] https://www.dailysignal.com/2019/02/28/oregons-proposed-rent-controls-would-shrink-supply-of-housing/ (accessed June 13, 2021).

[6] Ditch et al., "Bipartisan Senate COVID-19 Package Should do More to combat COVID-19, Remove Wasteful Spending," The Heritage Foundation, December 14, 2020, https://www.heritage.org/budget-and-spending/report/bipartisan-senate-covid-19-package-should-do-more-combat-covid-19-remove (accessed March 15, 2021).

- **Eviction Moratoria Allowed Many Who Were Not Impacted Financially to Live Rent-Free**

Eviction moratoria were a needlessly blunt tool to address the financial hardships from the COVID-19 shutdowns.

The Census Bureau Household Pulse Survey tracking the impact of COVID-19 on financial health indicates that 19% of renters failed to pay rent in June 2020, during the heart of the shutdowns. [7] That compares with approximately 16% reporting failure to pay or deferral in the month of March 2020.[8]

Of interesting note, only about 9% of Census Bureau respondents reported a loss of income for themselves or anyone they reside with. In fact, loss of income appears to be a factor for only half of those failing to pay rent.

Data from the National Multifamily Housing Council, which tracks more than 11 million professionally managed apartment units, showed only a minimal deterioration in rental payments year over year.[9]

In July 2020, 77.4% of units had made a rental payment by the 6th of the month, down just slightly from 79.7% in 2019.

Despite the relatively small increase in missed rental payments and the unprecedented federal unemployment benefits, many local governments preemptively issued moratoria on evictions throughout the pandemic.

The plunge in evictions coinciding with only a slight rise in delinquent rent payments strongly suggests the moratorium allowed many who were neither impacted by COVID-19 nor experiencing financial hardship to live rent-free.

- **The Eviction Moratoria Are Economically Harmful**

Politicians may enjoy a short-term boost in popularity from such measures. However, the unintended consequences are extensive. Initially, the decrease in cash flow affects the landlord only. However, as this persists, delayed maintenance and upgrades ensue.

Some landlords may delay their own mortgage payments, negatively affecting the owners of those mortgages—banks, credit unions, investors, institutional shareholders, and even taxpayers.

As landlords postpone property tax payments, local schools, fire departments, law enforcement, and parks experience a decline in funding.

Landlords will increase rents to mitigate the heightened risk of future moratoria and to recoup revenue already lost. Prospective renters may find themselves subject to increased security deposits and tighter credit checks.

Ultimately, fewer affordable housing units may be constructed.

Quality of life for other tenants is impacted as well. Landlords found it impossible to evict those who are a nuisance to others with disorderly conduct, illegal drug use, or failure to upkeep premises.

[7] United States Census Bureau, "Week 11 Household Pulse Survey: July 9 - July 14, 2020," https://www.census.gov/data/tables/2020/demo/hhp/hhp11.html (accessed June 13, 2021).

[8] United States Census Bureau, Week 1 Household Pulse Survey," https://www2.census.gov/programs-surveys/demo/tables/hhp/2020/wk1/housing1b_week1.xlsx

[9] National Multifamily Housing Council, Rent Payment Tracker, https://www.nmhc.org/globalassets/research--insight/rent-payment-tracker/data-downloads/rent-payment-tracker-07222020.xlsx .

- **Eviction moratoria may violate the Takings Clause of the Fifth and the Fourteenth Amendments along with the Contract Clause**

The eviction process serves as a safeguard to protect our constitutional right to private property. Eviction moratoria may violate the Takings Clause of the Fifth and the Fourteenth Amendments of the U.S. Constitution which guarantee that no person may "be deprived of life, liberty, or property without due process of law." Some of the numerous lawsuits challenging the CDC moratorium have succeeded.[10] On the state level, moratorium may warrant scrutiny by the Supreme Court for possible violations of Article 1, Section 10, Clause 1 of the U.S. Constitution (the Contract Clause) which prohibits states from passing laws "impairing the obligation of contracts."

- **CDC's Ban on Eviction Proceedings Was Unlawful Because it Exceeded its Congressional Mandate**

The executive order prohibiting landlords from using the court system to evict tenants until the end of the year. The order stated: "Eviction moratoria — like quarantine, isolation, and social distancing — can be an effective public health measure utilized to prevent the spread of communicable disease."[11]

The executive order was predicated on the Public Health Services Act which authorizes regulations "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"—international and interstate spread of communicable diseases.[12] Examples listed in Public Health Services Act include "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."

Eviction moratorium is not on this list of authorized regulations. Using the "other measures" term to allow eviction moratoria is inappropriate.

As Heritage legal scholars explain:

> "A basic canon of statutory construction—known as the "ejusdem generis" (Latin for "of the same kind") rule—is that when a broad, vague term follows a list of specifics, that term must refer only to the same sort of things listed before it. Nationwide eviction bans are nothing like the localized, limited actions of inspecting, fumigating, or disinfecting specific buildings or neighborhoods or exterminating pests."[13]

Furthermore, even if eviction moratorium were a permitted CDC action under the Public Health Services Act, the CDC should hardly focus only on relocations due to COVID. Total relocations in a typical year far exceed the number of evictions experienced even in the depths of the Great Recession at the end of the last decade. Then, the number of evictions failed to top 1 million households annually —

[10] Trial courts in Skyworks LTD v. CDC and Terkel v. CDC, declared the CDC Order unconstitutional. See Terkel v. Centers for Disease Control & Prevention, No. 6:20-CV-00564, __ F.Supp.3d __, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021); see Skyworks, Ltd. v.Centers for Disease Control & Prevention, No. 5:20-CV-2407, "2021 WL 911720, at *1 (N.D. Ohio Mar. 10, 2021).

[11] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020), https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19

[12] 42 U.S.C. §264, https://www.govinfo.gov/link/uscode/42/264?type=usc&year=mostrecent&link-type=html.

[13] Gian Carlo Canaparo, Amy Swearer, Zach Smith, "CDC's Unlawful, Unconstitutional Moratorium on Evictions," The Heritage Foundation, September 15, 2020, https://www.heritage.org/the-constitution/commentary/cdcs-unlawful-unconstitutional-moratorium-evictions (accessed June 13, 2021).

or fewer than 2.5 million individuals.[14] In contrast, more than 30 million Americans moved from one location to another in 2019 in a healthy economy.[15] This fact further illustrates that the moratorium is an economic relief measure rather than a congressionally authorized disease prevention tool of the CDC.

Even the order itself shows the ban is meant as an economic relief measure, not a tool to protect the public from the spread of disease. For instance, the moratorium excludes people not in poverty or otherwise able to pay their rent. The CDC did not have the requisite congressional authority to ban property owners from utilizing eviction proceedings.

- **CDC's Ban on Eviction Proceedings Was Unconstitutional**

Even if Congress had authorized the CDC to enact an eviction moratorium, such authorization would be unconstitutional. Congress may only delegate to the executive branch the powers granted to it by the Constitution. The Commerce Clause—upon which the CDC powers are based—does not provide a basis for Congress to prohibit citizens from seeking legal recourse in state courts for enforcement of rental contract provisions.

Our Constitution diminished the dangers of centralized power by reserving to the sovereign states retain all powers except those expressly delegated to the national government under our Constitution. One of the most important powers granted to Congress is the power to regulate interstate commerce (the Commerce Clause). Even if regulated activity itself is not interstate commerce (instead being intrastate), Congress may regulate the activity if it is "economic activity [that] substantially affects interstate commerce."[16] If the regulated activity itself is only intrastate and is not economic in nature, Congress may only regulate such intrastate activity it the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate [noneconomic] activity were regulated."[17]

For all regulations enacted under the Commerce Clause—whether the activity itself is interstate or intrastate, economic in nature or not economic in nature—the regulation itself must be "necessary and proper for carrying into Execution" the powers granted Congress.[18]

The CDC moratorium fails to meet constitutional muster.

The eviction proceedings banned by the CDC is not economic in nature; an eviction proceeding is not a good which can be purchased, sold, or distributed. Even if it were an economic good, the eviction proceedings do not have a substantial effect on interstate commerce. Nor was the CDC moratorium "an essential part of a larger regulation of economic activity."

Regardless, even if use of the eviction process itself were economic in nature, even if evictions in one state did have a "substantial impact" on interstate commerce, or even if the moratorium were "an essential part of a larger regulation of economic activity," denying landlords access to state courts to enforce eviction law is not a "proper" use of federal government power. In fact, such a ban on accessing the court is itself a violation of one's right First Amendment of the U.S. Constitution to "petition the government for a redress of

[14] The Eviction Lab, Princeton Unviversity, "National Estimates: Eviction in America," May 11, 2018, https://evictionlab.org/national-estimates/ (accessed June 13, 2021).
[15] U.S. Census Bureau, "Geographic Mobility: 2018 to 2019," November 2019, https://www.census.gov/data/tables/2019/demo/geographic-mobility/cps-2019.html (accessed June 13, 2021).
[16] United States v. Lopez, 514 U.S. 549, at 560.
[17] United States v. Lopez, 514 U.S. 549, at 561.
[18] The Necessary and Proper Clause (Article 1, Section 8 of the U.S. Constitution).

grievances." This includes the right to request the court to issue an order for eviction. [19]

Our system of government, including enumerated powers and separation of powers, requires each branch to stay in its assigned lane. And it demands that the federal government respect the sovereignty of the individual states. Creating economic policy through executive order threatens a further encroachment of the executive branch upon the legislative branch.

- **A Federal Wrongful Eviction Cause of Action Raises Similar Constitutional Concerns, Provides a Duplicative Remedy, and Does Not Protect a Federal Statutory or Constitutional Right**

As discussed above, federal regulation of the state eviction process falls outside the powers granted Congress under the Commerce Clause.

Federal causes of action enable citizens to sue government actors for violation of federal statutory rights or constitutional rights or to sue private parties for violating constitutional rights under color of state law. A federal cause of action for wrongful eviction departs starkly from these norms by allowing private parties to sue a private party in federal court for violation of a state statutory provision. The tenant's cause of action does not involve the violation of a federal statutory right nor a violation of constitutional right.

Furthermore, such a federal cause of action would be duplicative. In all states, landlords must follow the eviction process delineated by state and local law. A tenant evicted outside the lawful process may sue a landlord in state court for failing to act in accordance with the law.

A separate federal cause of action is unnecessary in addition to being unconstitutional.

- **Draconian Shutdowns in Some States Needlessly Perpetuated Economic Distress on Families**

Unemployment rates and business conditions vary wildly across the nation dependent largely on the restrictions some governors and mayors continue to impose on society. State and local policymakers oversee decisions that affect businesses' abilities to operate, and they should assume the potential costs of new and ongoing business, school, and other closures they impose. States with the most restrictive economic policies are those that are suffering the largest business and employment losses.

The data certainly bear out the economic decline stemmed from government-mandated closures and people responding to what they heard from some public health officials.

For the first time in our nation's history, governments intentionally suppressed the supply of goods and services. Likewise, restrictions on consumer activity artificially suppressed demand. An historic plunge in the production of goods, provision of services, and private investment resulted in the second quarter of 2020.[20]

[19] For a far more thorough analysis of the CDC eviction proceedings moratorium (including why the eviction process itself is not an economic good, see BRIEF OF THE CATO INSTITUTE, PROFESSOR RANDY E. BARNETT, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND INDEPENDENCE INSTITUTE
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES in Terkel
v. Centers for Disease Control and Prevention, in United States Court of Appeals, Fifth Circuit, https://www.cato.org/sites/cato.org/files/2021-06/Terkel%20v%20CDC%205th%20Cir.pdf (accessed June 13, 2021).

[20] The nation's economy in the second quarter of 2020 shrank at a 31.4% annualized rate. Personal consumption dropped at a 33.2% annualized rate. Consumption of personal services dropped 41.8% annualized. Table 1.1.1, Bureau of Economic Analysis,https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey (accessed February 24,

The robust recovery beginning in the second half of 2020 has closed nearly all of the 10.2 percent economic contraction (real GDP in Q1 of 2021 is down just 0.9 percent from pre-pandemic).[21] But much damage remains as a result of the shutdowns and the counterproductive federal jobless bonuses, with 6.8 million fewer individuals employed[22] and hundreds of thousands of businesses closed forever, including more than 100,000 restaurants.[23]

Government-mandated closures and government-influenced public perception of the crisis suppressed and even criminalized economic activity. The skyrocketing federal debt and rapidly expanding central bank balance sheet creates the additional risk of a monetary crisis.

Full economic recovery does not stem from stimulus checks or bailouts from Washington. Rather, it's largely a result of individuals and businesses safely and legally interacting with others. Those properly informed of the actual risks of the virus and the appropriate mitigation measures are enthusiastically participating in this reopening.

The Federal Reserve State Coincident Indexes—an approximation of state GDP—vividly illustrates how variant the economic recovery is based on states.[24] This index suggests economic output at the end of 2020 was actually greater than pre-pandemic in Utah, Missouri, Idaho, Nebraska, Alaska, South Dakota, Mississippi, and Georgia—notably states without crushing, long-lasting shutdowns. The economies in Hawaii, Michigan, Rhode Island, Massachusetts all were more than 10% smaller. Meanwhile, states like New York, Hawaii, and Illinois remain mired in severe recessions.

At the end of 2020, El Centro, California, saw 17.7% unemployed, and Los Angeles suffered 9.9% unemployment. Across New York City, draconian restrictions and an army of compliance officers pushed tens of thousands of businesses out of business, resulting in 8.4% unemployment by the end of 2020.[25]

Meanwhile, unemployment in numerous communities in Alabama, Idaho, Iowa, Nebraska, South Dakota, and Utah saw unemployment at the end of 2020 at 3% or less. The statewide unemployment rate of under 4% in Alabama, Iowa, Kansas, Nebraska, South Dakota, Utah, and Vermont contrasted sharply with rates at least twice as high in California, Colorado, Connecticut, Hawaii, Illinois, Nevada, New York, and Rhode Island.[26] Overall, in December, the 10 states with the fewest restrictions in place[27] averaged 4.7 percent unemployment—while the 10 states with the most restrictions averaged 7.1 percent unemployment.[28]

State or local governments wishing to provide COVID-19 rental relief should do so through transparent, democratically implemented assistance.

2021). By the middle of 2020, the economy had contracted by 10.2% from its peak. Federal Reserve Bank of St. Louis, Series GDP, https://fred.stlouisfed.org/series/GDP (accessed February 24, 2021).
[21] https://fred.stlouisfed.org/series/GDPC1 (accessed
[22] Federal Reserve Bank of St. Louis, Series PAYEMS, June 2021, https://fred.stlouisfed.org/series/PAYEMS (accessed July 26, 2021).
[23] "Restaurant Industry in Free Fall; 10,000 Close in Three Months," National Restaurant Association, December 7, 2020, https://restaurant.org/news/pressroom/press-releases/restaurant-industry-in-free-fall-10000-close-in (accessed February 24, 2021).
[24] Federal Reserve Bank of Philadelphia, State Coincident Indexes, https://www.philadelphiafed.org/-/media/frbp/assets/surveys-and-data/coincident/coincident-revised.xls (accessed February 16, 2021).
[25] U.S. Bureau of Labor Statistics, Unemployment Rates for Metropolitan Areas, preliminary for December 2020, https://www.bls.gov/web/metro/laummtrk.htm (accessed February 23, 2021).
[26] U.S. Bureau of Labor Statistics, Unemployment Rates for Metropolitan Areas, preliminary for December 2020, https://www.bls.gov/web/metro/laummtrk.htm (accessed February 23, 2021).
[27] Adam McCann, "States with the Fewest Coronavirus Restrictions," WalletHub, January 26, 2021, https://wallethub.com/edu/states-coronavirus-restrictions/73818 (accessed February 4, 2021).
[28] U.S. Department of Labor, Bureau of Labor Statistics, Local Area Unemployment Statistics Data Series, December 2020, https://www.bls.gov/web/laus/laumstrk.htm (accessed February 4, 2021).

Unemployment rates and business conditions vary wildly across the nation dependent largely on the restrictions some governors and mayors continue to impose on society. State and local policymakers oversee decisions that affect businesses' abilities to operate, and they should assume the potential costs of new and ongoing business, school, and other closures they impose. States with the most restrictive economic policies are those that are suffering the largest business and employment losses.

State or local governments wishing to provide rental relief for those impacted by their shutdowns should do so through transparent, democratically implemented assistance. This spreads the cost of aid across the entire community, rather than placing the entire burden on a small group of property owners.

Consider Pittsburgh with 330,000 renter households.[29] During the peak of the COVID-19 pandemic, unemployment increased by 11.2 percentage points to 16.4%.[30] A surge in delinquencies directly proportional to the increase in the overall unemployment rate would result in nearly 37,000 delinquent rental units.

With a median two-bedroom apartment rental[31] in Pittsburgh of $910 monthly, a program covering half the rental costs for three months on these units would cost the city $50 million, more than 8% of the city's annual operating budget.[32]

That type of profligate spending comes with its own downsides, but at least allows residents to hold politicians accountable. Moratoriums, on the other hand, concentrate the costs initially on the property owners—allowing politicians to escape accountability. However, the broader public faces the economic repercussions in future years.

Conclusion:

Families across parts of the nation face economic hardship as a result of the myriad of lingering unreasonable COVID-19 restrictions enacted by state and local governments. This economic misery persistent across portions of the nation should not be used an excuse to further erode private property rights, enlarge federal power beyond constitutional limits, rewrite legislation by executive fiat, or deny property owners access to the courts.

As the shutdowns end and COVID-19 benefits begin to expire, far-left activists demand look to build upon last year's eviction moratoriums—and demand even more, including rent forgiveness even without proof of hardship on the part of the renter and with possibly no government reimbursement to the landlord by the government.[33]

Those efforts represent an abdication of a core government responsibilities; namely, enforcement of private contracts and protection of private property. Forcing property owners to provide free housing is a subtle form of expropriation of private property without just compensation. This breach of federalism,

[29] Department of Housing and Urban Development, "Comprehensive Housing Market Analysis," July 1, 2016, https://www.huduser.gov/portal/publications/pdf/PittsburghPA-comp-17.pdf (accessed July 26, 2021).

[30] Federal Reserve Bank of St. Louis, Series PITT342URN, https://fred.stlouisfed.org/series/PITT342URN (accessed July 26, 2021).

[31] SmartAsset, The Cost of Living in Pittsburgh, July 10. 2019, https://smartasset.com/mortgage/the-cost-of-living-in-pittsburgh (accessed July 26, 2021).

[32] *City of Pittsburgh, 2020 Operating Budget & 5 Year Plan*, December 17, 2019, https://apps.pittsburghpa.gov/redtail/images/8055_Operating_Budget_as_approved__by_Council_12-17-19(3).pdf (Accessed July 2026, 2021).

[33] Portland Tenants United, "PTU Demands," https://www.pdxtu.org/ (accessed June 13, 2021).

assault on private property rights, and rule by executive fiat should concern us all.

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