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# LESSONS FROM TENANT PROTECTION PROVISIONS IN FEDERAL FINANCIAL CRISIS LEGISLATION

KATY RAMSEY MASON<sup>†</sup>

## INTRODUCTION

2020 has brought an unprecedented level of upheaval in the American economy and way of life. Coronavirus, known also as COVID-19, has ushered in what seems poised to be a long-lasting stretch of financial, public health, and social uncertainty.<sup>1</sup> Low-income tenants, who are disproportionately people of color, are particularly vulnerable to the economic and public health effects of the coronavirus pandemic.<sup>2</sup> But coronavirus is not the first crisis in the United States to threaten low-income residential renters; the Great Recession, from approximately 2007 to 2009, is the next most recent example, and its effects are still felt today.<sup>3</sup>

This article will examine federal tenant protection legislation from recent stimulus bills and suggest provisions that future legislation should include in order to best protect residential tenants and prevent waves of homelessness. Twice in the past fifteen years, Congress has passed huge financial relief bills to address the effects of the Great Recession and the coronavirus pandemic. The first, the Toxic Asset Relief Program (TARP), was passed in 2009 in the wake of the foreclosure crisis that devastated the American mortgage market in the first decade of the twenty-first century. The second, the Coronavirus Aid, Relief, and Economic Security (CARES)

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<sup>1</sup> See, e.g., Patricia Cohen & Tiffany Hsu, *'Rolling Shock' As Job Losses Mount Even with Reopenings*, N.Y. TIMES, (May 14, 2020, updated June 11, 2020), <https://www.nytimes.com/2020/05/14/business/economy/coronavirus-unemployment-claims.html>.

<sup>2</sup> *Coronavirus Pandemic Has Harmed Lower-Income Workers the Most*, UCHICAGO NEWS, (May 5, 2020), <https://news.uchicago.edu/story/coronavirus-pandemic-has-harmed-lower-income-workers-most>.

<sup>3</sup> *Chart Book: The Legacy of the Great Recession*, CENTER ON BUDGET AND POLICY PRIORITIES, (June 6, 2019), <https://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession>.

Act, was passed in 2020 to deal with the sudden economic fallout caused by the international pandemic. Both of these pieces of legislation contained specific provisions designed to prevent or delay the eviction of residential tenants who were affected by these crises through no fault of their own.

During the Great Recession, policymakers were concerned about unprecedented numbers of people losing their homes, often through foreclosures of mortgages put in place as a result of predatory lending in lower-middle-class communities of color.<sup>4</sup> While most of the foreclosures affected individual homeowners, approximately 20 percent of renters across the country were affected by the crisis.<sup>5</sup> In response, in 2009 Congress passed the Protecting Tenants at Foreclosure Act (PTFA) as a part of the Helping Families Save Their Homes Act.<sup>6</sup> The PTFA first sunset in 2014, but was permanently extended by Congress in 2018.<sup>7</sup> The National Low Income Housing Coalition estimated that approximately 40 percent of the evictions due to the foreclosure crisis that contributed to the Great Recession were people renting their homes.<sup>8</sup>

As the coronavirus pandemic set in and state and local governments began to order the closure of many businesses and services, millions of Americans suddenly found themselves unemployed.<sup>9</sup> To address some of the most immediate economic fallout, Congress passed the CARES Act on

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<sup>4</sup> See Todd C. Frenkel & Dan Keating, *Eviction Filings and Code Complaints: What Happened When A Private Equity Firm Became One City's Biggest Homeowner*, WASH. POST, (Dec. 25, 2018), [https://www.washingtonpost.com/business/economy/eviction-filings-and-code-complaints-what-happened-when-a-private-equity-firm-became-one-citys-biggest-homeowner/2018/12/25/995678d4-02f3-11e9-b6a9-0aa5c2fcc9e4\\_story.html](https://www.washingtonpost.com/business/economy/eviction-filings-and-code-complaints-what-happened-when-a-private-equity-firm-became-one-citys-biggest-homeowner/2018/12/25/995678d4-02f3-11e9-b6a9-0aa5c2fcc9e4_story.html).

<sup>5</sup> Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL'Y 243, 245 (2010) (In some areas, the percentage of tenants affected was much higher.).

<sup>6</sup> Carsten Grellman, *Why State Courts May Prove Most Effective at Allowing the Protecting Tenants at Foreclosure Act to Protect Tenants*, 20 J. AFFORDABLE HOUS. & COMMUNITY DEV. 295, 296 (2012).

<sup>7</sup> *Id.* at 300; Elayne Weiss, *Protecting Tenants at Foreclosure*, NAT'L LOW INCOME HOUS. COALITION 1, 1 (2019), [https://nlihc.org/sites/default/files/AG-2018/Ch06-S05\\_PTFA\\_2018.pdf](https://nlihc.org/sites/default/files/AG-2018/Ch06-S05_PTFA_2018.pdf).

<sup>8</sup> Weiss, *supra* note 7.

<sup>9</sup> Patricia Cohen & Ben Casselman, *Hiring Outlook Remains Dim, With 'Scarring in the Economy'*, N.Y. TIMES, (July 9, 2020), <https://www.nytimes.com/2020/07/09/business/economy/unemployment-claims-coronavirus.html>.

March 26, 2020.<sup>10</sup> The CARES Act was the largest economic stimulus package in history, and included relief for small businesses, expanded unemployment benefits, direct stimulus payments to most Americans, and other provisions intended to curb the economic fallout from the COVID-19 crisis.<sup>11</sup> Also included in the CARES Act was perhaps the most comprehensive set of eviction protections for residential tenants that the federal government has ever passed.

Another unfortunate and striking similarity between the foreclosure crisis and the coronavirus crisis is the disproportionate effect each situation has had on low-income people of color, which is why it is imperative for lawmakers to ensure that they are taking residential renters into account when passing stimulus legislation. During the foreclosure crisis, communities of color were the hardest-hit, and black and brown homeowners and tenants suffered more than their white counterparts.<sup>12</sup> During the coronavirus pandemic, people of color have faced a number of disparities, including in infection rates, job losses, and risk of eviction.<sup>13</sup> As a result of these documented disparities, effective legislation that protects tenants at risk of losing their homes during economic and public health crises is especially important.

This article aims to examine the eviction and tenant protections contained in the PTFA and the CARES Act and make suggestions for how future federal legislation designed to protect tenants can be most effective. It will discuss the protections that each piece of legislation provides to vulnerable tenants, and will consider the strengths and weaknesses of each act. It will then suggest that Congress should consider additional substantive and procedural protections in the future. Part I of this paper will describe the

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<sup>10</sup> Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES, (March 26, 2020), <https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html>.

<sup>11</sup> *Id.*

<sup>12</sup> See Todd C. Frenkel & Dan Keating, *supra* note 4 (describing how “[s]ince the 2008 financial crisis, no major city has suffered a bigger percentage drop in owner-occupied single-family housing than Memphis,” and how the foreclosure crisis devastated the middle-class African American community there); Steven T. Hasty, *Protecting Tenants at Foreclosure by Funding Needed Repairs*, 20 J.L. & POL'Y 581, 594 (2012) (discussing that “[t]he problem [of increases in housing code violations in foreclosed properties] is especially acute in low-income neighborhoods and communities of color”).

<sup>13</sup> See UChicago News, *supra* note 2.

Great Recession, the foreclosure crisis, and the PTFA. Part II will describe the coronavirus pandemic of 2020 and the accompanying economic fallout, including the CARES Act and its tenant protection measures. Part III will make recommendations of how future federal disaster relief legislation can best account for the protection of vulnerable tenants.

## I. THE GREAT RECESSION AND THE PTFA

The Great Recession that began in the mid-2000s and the coronavirus crisis of 2020 are two of the most economically devastating events to the American and global economies in recent memory. They are also similar because neither was caused by a natural disaster, unlike other events that created economic crisis, such as Hurricane Katrina in 2005, and also because their effects have been significant and widespread around the world.

### A. The Great Recession and the Foreclosure Crisis

The Great Recession that gripped the nation in the latter part of the first decade of the twenty-first century was perhaps the most devastating economic event in the United States since the Great Depression.<sup>14</sup> The crisis was caused in large part by the prevalence of subprime mortgage lending by private banks. As one scholar has written, “The circumstances leading to the Foreclosure Crisis can best be likened to a brewing storm that escaped attention while it gathered strength, but once it rolled in was too furious to escape.”<sup>15</sup> The causes of the financial crisis are varied,<sup>16</sup> but it quickly became clear that the bubble that had been created in the U.S. mortgage market through predatory lending and banks’ targeting of vulnerable consumers had burst.<sup>17</sup>

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<sup>14</sup> U.S. Dep’t of Hous. & Urban Dev., *Report to Congress on the Root Causes of the Foreclosure Crisis*, vi (Jan. 2010), [https://www.huduser.gov/portal/publications/Foreclosure\\_09.pdf](https://www.huduser.gov/portal/publications/Foreclosure_09.pdf).

<sup>15</sup> Matthew J. Rossman, *Counting Casualties in Communities Hit Hardest by the Foreclosure Crisis*, 2016 UTAH L. REV. 245, 251 (2016).

<sup>16</sup> FINANCIAL CRISIS INQUIRY COMMISSION, *THE FINANCIAL CRISIS INQUIRY REPORT*, at xxv-xxvi (2011) (attributing the main causes of the crisis to “capital availability and excess liquidity, the role of Fannie Mae and Freddie Mac (the GSEs), and government housing policy”). *See also generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017) (explaining how the federal government’s housing policy since the Great Depression was designed to keep communities segregated and directly led to the vulnerability of lower-income communities of color during the foreclosure crisis).

<sup>17</sup> *See* Rossman, *supra* note 15, at 252.

Beginning in the 1990s, a bubble began to develop around the U.S. housing market.<sup>18</sup> Home prices increased in ways that were out of sync with increases in income, and combined with a boom in subprime mortgage lending in the early 2000s, the bubble burst around August 2007, setting off a wave of foreclosures against borrowers who could no longer afford their mortgage payments.<sup>19</sup> Many of the borrowers who lost their homes during the financial crisis had been the victims of predatory lending by banks and other financial institutions, who preyed on vulnerable borrowers, including lower-income African Americans.<sup>20</sup> The effects of the foreclosure crisis were devastating. Nearly four million homes went into foreclosure between 2007 and 2010.<sup>21</sup> While many of the homes were owner-occupied, the National Low Income Housing Coalition estimates that as many as 40 percent of the foreclosed homes were occupied by renters.<sup>22</sup> In certain parts of the country, however, studies found that the percentage of tenants affected by foreclosures was much higher.<sup>23</sup> Since people who rent their homes are more likely to be low-income and people of color, the effects of the foreclosure crisis on residential tenants disproportionately affected those population groups.<sup>24</sup>

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<sup>18</sup> Martin Neil Baily, Robert E. Litan & Matthew S. Johnson, *The Origins of the Financial Crisis*, BROOKINGS INST. 1, 7 (2008), [https://www.brookings.edu/wp-content/uploads/2016/06/11\\_origins\\_crisis\\_baily\\_litan.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf).

<sup>19</sup> *Id.* at 7-8; See also Colin McArthur & Sarah Edelman, *The 2008 Housing Crisis*, CTR. FOR AMERICAN PROGRESS (April 13, 2017), <https://www.americanprogress.org/issues/economy/reports/2017/04/13/430424/2008-housing-crisis/> (The bursting of the housing market bubble came “when the housing market stalled and interest rates began to rise in the mid-2000s.”).

<sup>20</sup> See RICHARD ROTHSTEIN, *THE COLOR OF LAW* 109 (2017) (discussing the “regulatory tolerance of banks’ ‘reverse redlining’ – excessive marketing of exploitative loans in African American communities”).

<sup>21</sup> Sharada Dharmasankar & Bhash Mazumder, *Have Borrowers Recovered from Foreclosures During the Great Recession?*, Fed. Reserve Bank of Chicago (2016), <https://www.chicagofed.org/publications/chicago-fed-letter/2016/370#ftnref1>.

<sup>22</sup> Shambhavi Manglik, *Renters in Foreclosure: A Fresh Look at an Ongoing Problem*, Nat’l Low Income Hous. Coalition, at xi (2012), <https://nlihc.org/sites/default/files/rentersinforeclosure2012.pdf>.

<sup>23</sup> Creola Johnson, *Renters Evicted En Masse: Collateral Damage Arising From the Subprime Foreclosure Crisis*, 62 FLA. L. REV. 975, 981 (2010).

<sup>24</sup> Manglik, *supra* note 22, at 7. (“Based on NLIHC’s analysis [of four New England states], the census tracts with the lowest percentage of White individuals and the highest percentage of households that are under the poverty line continue to have the highest foreclosure rates.”) (citations omitted).

Prior to 2009, many states did not have any specific protections for tenants living in properties that were in foreclosure.<sup>25</sup> This meant that tenants, who may not have had knowledge of the owner's pending foreclosure, could be subject to eviction by a new owner, often a bank, with little prior notice.<sup>26</sup> In 2009, Congress passed comprehensive legislation to try to address some of the worst economic effects of the financial crisis, and included the Protecting Tenants in Foreclosure Act as part of that legislation.

### B. The Protecting Tenants in Foreclosure Act

As the foreclosure crisis continued to deepen in 2008, the federal government began to structure an economic relief program, which eventually became known as the Troubled Asset Relief Program, or TARP.<sup>27</sup> After the collapse of Lehman Brothers in September 2008, the Treasury Department was concerned about a complete collapse of the American banking system, and approved \$700 billion to assist financial institutions.<sup>28</sup> Other federal legislation soon followed, aimed at helping individuals affected by the financial crisis. The Helping Families Save Their Homes Act of 2009 included \$300 billion to assist homeowners in foreclosure, and also included provisions designed to assist residential renters in foreclosed properties, which was known as the Protecting Tenants in Foreclosure Act (PTFA).<sup>29</sup> On May 20, 2009, President Obama signed the act into law.<sup>30</sup> The PTFA was originally supposed to sunset in 2012, but was extended to 2014 by the Dodd-Frank Act.<sup>31</sup> In 2018, Congress voted to reauthorize the PTFA permanently.<sup>32</sup>

### C. Deficiencies of the PTFA

The PTFA itself, like the CARES Act eviction moratorium, is quite short. Additionally, “[the PTFA’s] provisions apply primarily to mortgage

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<sup>25</sup> See Johnson, *supra* note 23, at 980-984.

<sup>26</sup> *Id.*

<sup>27</sup> *Reviled and Revered, TARP Expires*, NAT’L PUB. RADIO, (Oct. 3, 2010), <https://www.npr.org/templates/story/story.php?storyId=130308567>.

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

<sup>29</sup> Associated Press, *Congress Approves an Anti-Foreclosure Bill*, N.Y. TIMES, (May 19, 2009).

<sup>30</sup> *Renters in Foreclosure: A Fresh Look at an Ongoing Problem*, NAT’L LOW INCOME HOUS. COALITION, 9 (2012), <https://nlihc.org/sites/default/files/rentersinforeclosure2012.pdf>.

<sup>31</sup> Grellman, *supra* note 6, at 299-300.

<sup>32</sup> *Tenants and Foreclosure*, NAT’L HOUS. L. PROJECT, <https://www.nhlp.org/initiatives/foreclosure-and-tenants/> (last visited July 31, 2020).

lenders, and thus federal agencies that oversee such entities have taken administrative measures to assess compliance with the PTFA, although none are expressly empowered to impose a penalty in the event of noncompliance.”<sup>33</sup> While the PTFA requires lenders to give 90 days’ notice to tenants who live in foreclosed properties, the legislation does not specify “when notice should be given and what the contents of the required notice should be.”<sup>34</sup> The CARES Act does contain a requirement for a 30-day notice after the eviction moratorium expires, which is a slight improvement over the provisions of the PTFA.<sup>35</sup> Because the PTFA is silent on when and what form the notice should take, lenders are able to wait until a foreclosure sale has been completed before notifying the tenant living in the property.<sup>36</sup> Since a foreclosure action is initiated after an owner has already defaulted on payments, a more effective way to protect tenants living in those properties, who are unlikely to be aware of the landlord’s default, would be to notify them of the possible foreclosure at the time that the foreclosure action is initiated by the lender.<sup>37</sup> In most states, renters are not required to be named parties in foreclosure actions against owners/landlords.<sup>38</sup>

One of the most problematic deficiencies of the PTFA is that it has no enforcement mechanism, either through an agency process or explicit private right of action.<sup>39</sup> This means that a tenant seeking to challenge a bank’s violation of the PTFA may have trouble asserting a claim.<sup>40</sup> Application of the PTFA is quite broad, because it applies to all mortgage lenders and therefore all tenants in foreclosure.<sup>41</sup> Therefore, the number of tenants covered by the law is potentially quite broad, yet there is no clearly-defined avenue for them to bring claims against violators of the law.

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<sup>33</sup> Grellman, *supra* note 6, at 300.

<sup>34</sup> Johnson, *supra* note 23, at 995. Johnson points out, “The PTFA is silent about 1) the contents of the notice that is to be given to the tenant; 2) the obligations of the tenant to pay rent during the pendency of the foreclosure case and after the foreclosure sale; 3) the obligations of the lender to maintain the property until the tenant vacates; 4) the improper practices of the lender to force out tenants; and 5) the penalties the lender is subject to for violating the law.” *Id.* at 990.

<sup>35</sup> Coronavirus Aid Relief and Economic Security Act (CARES Act) § 4024, 15 U.S.C. § 9058 (2020).

<sup>36</sup> Johnson, *supra* note 23, at 995.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 980–81.

<sup>39</sup> See Grellman *supra* note 6.

<sup>40</sup> See *infra* Section D. Enforcement Mechanisms for discussion on federal cases that have determined that there is no implied private right of action under PTFA.

<sup>41</sup> Johnson, *supra* note 23, at 989.



An additional deficiency of the PTFA, which is shared by the CARES Act, is that the law does not contain any requirement that the owner or the lender who has foreclosed on the mortgage maintain the property.<sup>42</sup> Many tenants were living in buildings where the owner does not have sufficient funds to make mortgage payments, much less make necessary repairs to the property.<sup>43</sup> As a result, tenants may find themselves constructively evicted from uninhabitable properties.<sup>44</sup> This can also be a problem while a foreclosure action is pending, because receivers who are appointed to manage properties during that time may only have access to income from rent payments to maintain and repair the property.<sup>45</sup>

Moreover, the PTFA only applies to buildings that are designed to accommodate one to four families, or to Section 8 tenants in any size building.<sup>46</sup> While many foreclosures are of smaller dwellings, this leaves out many tenants who live in large buildings and would benefit from the protections of the law.<sup>47</sup> Many large buildings in foreclosure are managed by receivers during the pendency of the foreclosure.<sup>48</sup>

## II. THE CORONAVIRUS PANDEMIC OF 2020 AND THE CARES ACT

### A. The Coronavirus Crisis

In late 2019, a novel form of coronavirus, a category of viruses that includes the flu, appeared in Wuhan, China.<sup>49</sup> During the first months of 2020, the virus spread quickly around the globe, moving first into Europe and then to the United States.<sup>50</sup> On March 11, 2020, the World Health

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<sup>42</sup> *See Id.* at 980.

<sup>43</sup> *See* Steven T. Hasty, *Protecting Tenants at Foreclosure by Funding Needed Repairs*, 20 J.L. & POL'Y 581, 581–83 (2012).

<sup>44</sup> *Id.* at 584.

<sup>45</sup> *Id.* at 584–85.

<sup>46</sup> 12 U.S.C. § 5220 (2009), *amended by* 12 U.S.C. § 1484 (2010).

<sup>47</sup> *See* Hasty, *supra* note 43, at 581–83, 598 (describing the foreclosure of ten large apartment buildings in the Bronx owned by Milbank Real Estate Services, which defaulted on a \$35 million loan and left hundreds of tenants living in extremely poor conditions).

<sup>48</sup> *See Id.*

<sup>49</sup> WHO Timeline – COVID-19, WORLD HEALTH ORG., [https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19?gclid=CjwKCAjwrcH3BRApEiwAxjdPTblSBZvDAo4PWozZz0D9ldCSw5TG00\\_eUHD\\_ARsoTnMozga37oWt7DRoCD3cQAvD\\_BwE](https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19?gclid=CjwKCAjwrcH3BRApEiwAxjdPTblSBZvDAo4PWozZz0D9ldCSw5TG00_eUHD_ARsoTnMozga37oWt7DRoCD3cQAvD_BwE) (last visited June 22, 2020).

<sup>50</sup> *Id.*

Organization declared the virus to be a global pandemic.<sup>51</sup> Within just a few months, the coronavirus had spread to nearly every country in the world, and had infected more than 7 million people worldwide.<sup>52</sup> In the United States, by the middle of June 2020, there were nearly 2 million confirmed cases of the virus and more than 110,000 deaths.<sup>53</sup>

The health effects of the virus were quickly recognized to be devastating. Before the virus took complete hold in the United States, media in other countries were reporting horrific rates of infection<sup>54</sup> and death.<sup>55</sup> In order to stop the spread of the virus, which is highly contagious and for which there is no vaccine, public health and elected officials recommended social distancing measures<sup>56</sup> as the way to reduce infection rates, and government officials at the local and state levels ordered the closure of schools, businesses, and restaurants, and required citizens to stay at home and reduce

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<sup>51</sup> *Id.*

<sup>52</sup> *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES, (updated June 8, 2020), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

<sup>53</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, (updated June 8, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>54</sup> Marco Pavesi, Opinion, *I'm a Doctor in Italy. We Have Never Seen Anything Like This.*, N.Y. TIMES (March 18, 2020), <https://www.nytimes.com/2020/03/18/opinion/coronavirus-italy.html> (reporting that Italy's health care system was on the verge of collapse and that "triaging patients – to give priority to those with more chances of survival – may become standard practice.").

<sup>55</sup> University of Washington, *COVID-19: Study Reports 'Staggering' Death Rate in U.S. Among Those Infected Who Show Symptoms*, SCIENCE DAILY, (May 18, 2020), <https://www.sciencedaily.com/releases/2020/05/200518144915.htm> (explaining that the death rate for COVID-19 among people who show symptoms is 1.3 percent, more than ten times greater than the death rate from seasonal flu).

<sup>56</sup> The Centers for Disease Control and Prevention describes social distancing, also known as physical distancing, as the practice of staying at least six feet away from other people. *Social Distancing, Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited June 22, 2020).

travel as much as possible.<sup>57</sup> The economic effects of these policies, which were necessary to protect public health and safety, were swift and brutal.<sup>58</sup>

Not unlike the foreclosure crisis of a decade before, the coronavirus crisis of 2020 has had disproportionate effects on people of color, especially those who are low income. The disparate impact has been seen in both the health and economic crisis aspects of the coronavirus pandemic. A study from Yale University showed that African Americans were more than three and a half times more likely to die of coronavirus than white Americans.<sup>59</sup> In cities like Memphis, where the poverty rate is nearly thirty percent,<sup>60</sup> high numbers of people of color were housing and food insecure before coronavirus hit, and job losses tend to take a harder toll when money is already tight.<sup>61</sup> A national survey conducted at the beginning of April 2020 found that nearly one-third of residential renters had not paid their rent by the first week of the month, an increase of more than ten percent above normal.<sup>62</sup> Two months later, a census survey found that “forty-four percent

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<sup>57</sup> Allyson Chiu, *New York Is Shutting Down Its Bars and Restaurants. What Does That Mean for Service Workers?*, WASH. POST (Mar. 16, 2020, 7:13 a.m.), <https://www.washingtonpost.com/nation/2020/03/16/coronavirus-new-york-city-shutdown/>; Joel Achenbach & Laura Meckler, *Shutdowns Prevented 60 Million Coronavirus Infections in the U.S., Study Finds*, WASH. POST (June 8, 2020, 2:15 p.m.), <https://www.washingtonpost.com/health/2020/06/08/shutdowns-prevented-60-million-coronavirus-infections-us-study-finds/>.

<sup>58</sup> Patricia Cohen & Tiffany Hsu, *‘Rolling Shock’ as Job Losses Mount Even With Reopenings*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/business/economy/coronavirus-unemployment-claims.html> (noting that 36 million unemployment claims were filed in two months after coronavirus shutdowns began); Jeanna Smialek, *Poor Americans Hit Hardest by Job Losses Amid Lockdowns, Fed Says*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/business/economy/coronavirus-jobless-unemployment.html> (“Fully 39 percent of former workers living in a household earning \$40,000 or less lost work, compared with 13 percent in those making more than \$100,000, a Fed official said”).

<sup>59</sup> Graeme Wood, *What’s Behind the COVID-19 Racial Disparity?*, ATLANTIC (May 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/we-dont-know-whats-behind-covid-19-racial-disparity/612106/>.

<sup>60</sup> Elena Delavega & Gregory Blumenthal, *2019 Memphis Poverty Fact Sheet*, U. MEMPHIS 1 (2019), <https://www.memphis.edu/socialwork/research/2019povertyfactsheet.pdf>.

<sup>61</sup> Jane Roberts, *The Poor, African Americans Face Worst of Coronavirus*, DAILY MEMPHIAN (Apr. 15, 2020), <https://dailymemphian.com/article/13012/coronavirus-attacks-poor-in-layers-of-assault>.

<sup>62</sup> Chris Arnold, *Nearly A Third of Renters Didn’t Pay by 1st Week of April*, NAT’L PUB. RADIO (Apr. 8, 2020), <https://www.npr.org/sections/coronavirus-live->

of black tenants said that they have little or no confidence they would be able to meet their next rent payment.”<sup>63</sup> Since African Americans and Latinos are significantly more likely than white people to rent their homes, nonpayment evictions due to the effects of coronavirus are more likely to affect those communities.<sup>64</sup>

### B. The CARES Act and Its Limitations

As the drastic economic effects of the coronavirus crisis began to reveal themselves, Congress passed the CARES Act, which was signed into law on March 27, 2020.<sup>65</sup> The CARES Act contained a comprehensive set of economic relief measures, including provisions intended to shore up businesses forced to close temporarily, expanded unemployment benefits, and direct economic stimulus payments to most Americans.<sup>66</sup>

Included in the CARES Act were protections for both homeowners and home renters who would have trouble making mortgage or rent payments due to the COVID crisis.<sup>67</sup> Homeowners with a federally-backed mortgage<sup>68</sup> were allowed to request forbearance on their mortgage payments for 180 days.<sup>69</sup> Additionally, the CARES Act imposed a foreclosure moratorium on loan servicers of federally-backed mortgages, prohibiting them from

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updates/2020/04/08/829850505/millions-didnt-pay-rent-last-week-amid-pandemic-woes.

<sup>63</sup> Katy O'Donnell, *Black Community Braces for Next Threat: Mass Evictions*, POLITICO (June 12, 2020, 4:30 a.m.), <https://www.politico.com/news/2020/06/12/mass-evictions-314699>.

<sup>64</sup> *Id.*

<sup>65</sup> CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>66</sup> Tara Siegel Bernard & Ron Lieber, *F.A.Q. on Stimulus Checks, Unemployment, and the Coronavirus Plan*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/article/coronavirus-stimulus-package-questions-answers.html>.

<sup>67</sup> See CARES Act §§ 4022–24.

<sup>68</sup> A federally-backed mortgage is defined in the CARES Act as “any loan which is secured by a first or subordinate lien on residential real property [...] that is – (A) insured by the Federal Housing Administration under title II of the National Housing Act (12 U.S.C. 1707 et seq.); (B) insured under section 255 of the National Housing Act (12 U.S.C. 1715z-20); (C) guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z-13a, 1715z-13b); (D) guaranteed or insured by the Department of Veterans Affairs; (E) guaranteed or insured by the Department of Agriculture; (F) made by the Department of Agriculture; or (G) purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.” CARES Act § 4022(a)(2).

<sup>69</sup> CARES Act § 4022(b).

initiating or executing any foreclosure action for 60 days.<sup>70</sup> Owners of multifamily properties with federally-backed multifamily mortgages<sup>71</sup> were allowed to request forbearance of their mortgage payments for up to three 30-day periods.<sup>72</sup> During the time that the forbearance was in place, the property owner was not allowed to “evict or initiate the eviction of a tenant [...] solely for nonpayment of rent or other fees or charges” or “charge any late fees, penalties, or other charges to a tenant [...] for late payment of rent.”<sup>73</sup>

In addition to the prohibitions against foreclosure and eviction discussed above, the CARES Act also included an eviction moratorium for tenants in properties where the owners did not necessarily request forbearance. Section 4024 of the CARES Act, titled “Temporary Moratorium on Eviction Filings,” forbids owners of buildings with federally-backed mortgages or federally-backed multifamily mortgages from filing any eviction action against a tenant for nonpayment of rent or late fees or penalties for 120 days.<sup>74</sup> Additionally, at the end of the 120-day moratorium, any landlord seeking to evict a tenant for nonpayment of rent must provide the tenant with a 30-day notice no earlier than the expiration date of the

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<sup>70</sup> CARES Act § 4022(c)(2).

<sup>71</sup> A federally-backed multifamily mortgage is defined as “any loan (other than temporary financing such as a construction loan) that – (A) is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of 5 or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and (B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.” CARES Act § 4023(f)(2).

<sup>72</sup> CARES Act § 4023(c).

<sup>73</sup> CARES Act § 4023(d).

<sup>74</sup> CARES Act § 4024(b). The actual text of the legislation reads, “During the 120-day period beginning on the date of enactment of this Act, the lessor of a covered dwelling may not – (1) make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges; or (2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent.” *Id.*

moratorium.<sup>75</sup> This 30-day notice requirement is longer than many states' laws require for nonpayment of rent.<sup>76</sup>

While the protections of the CARES Act moratorium were more substantial than what many states put in place,<sup>77</sup> there was some immediate confusion about the requirements. One issue that immediately arose was whether the moratorium applied to all of the tenants in a multifamily building where only certain units were occupied by Section 8 tenants, or just to the tenants receiving the federal subsidy. On July 1, 2020, HUD issued guidance clarifying that only tenants receiving the subsidy were protected under the CARES Act moratorium, not every tenant in a building without a federally-backed mortgage.<sup>78</sup> Moreover, not every renter affected by the coronavirus crisis would be protected by the CARES Act moratorium because many tenants live in buildings where the owner's mortgage is not federally backed.<sup>79</sup> Many states imposed their own eviction moratoriums, but those efforts were piecemeal and the length and comprehensiveness of the moratoriums varied significantly state to state.<sup>80</sup> Additionally, the CARES Act moratorium only applied to situations involving nonpayment of rent. Landlords seeking to evict tenants on other grounds, including nuisance or

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<sup>75</sup> CARES Act § 4024(c).

<sup>76</sup> *State Laws on Termination for Nonpayment of Rent*, NOLO, <https://www.nolo.com/legal-encyclopedia/state-laws-on-termination-for-nonpayment-of-rent.html> (last updated Dec. 15, 2019).

<sup>77</sup> See, e.g., Tennessee and others.

<sup>78</sup> Notice H 20-07, Guidance on CARES Act Eviction Moratorium, U.S. DEP'T OF HOUS. AND URBAN DEV. (July 1, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-07hsgn.pdf>.

<sup>79</sup> Congressional Research Services estimates that as many as 45 percent of the approximately 43 million rental units in the U.S. could be "covered dwellings" under the CARES Act. Sarah Stein & Nisha Sutaria, *Housing Policy Impact: Federal Eviction Protection Coverage and the Need for Better Data*, FED. RES. BANK ATLANTA, <https://www.frbatlanta.org/community-development/publications/partners-update/2020/covid-19-publications/200616-housing-policy-impact-federal-eviction-protection-coverage-and-the-need-for-better-data> (last visited Sept. 15, 2020). However, this leaves potentially tens of millions of tenants who could have lost income or been otherwise affected by COVID unprotected by the federal legislation.

<sup>80</sup> See *Eviction, Mortgage, & Foreclosure Relief During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/eviction-mortgage-foreclosure-relief-during-covid-19-50-state-resource/> (last updated Sept. 2020). For example, Tennessee's eviction moratorium, imposed by the state's Supreme Court, expired on June 1, 2020, while New York's moratorium, ordered by the governor, lasted until September 4, 2020.

alleged criminal activity, were still permitted to do so under the CARES Act and most state and local moratoriums.<sup>81</sup>

Another immediate question was how tenants would know that they were protected by the CARES Act moratorium. Information about a mortgage's origin and securitization status is usually held by the landlord and is not necessarily immediately accessible by the tenant. The federal government did not give instructions right away for how to determine whether a property was covered by the CARES Act moratorium, but independent groups such as the National Low Income Housing Coalition and ProPublica created their own searchable databases so that anyone could enter their address and find out if their property was potentially covered under the CARES Act.<sup>82</sup> The databases are not foolproof; ProPublica includes a disclaimer that reads, "Some properties that qualify for federal protections, including ones with fewer than five units backed by Fannie Mae and Freddie Mac, are not in our database."<sup>83</sup> For tenants who live in smaller buildings or single-family homes, it is much more difficult to determine whether they are protected under the CARES Act moratorium.

Finally, similar to the PTFA, the CARES Act did not include any enforcement mechanism for property owners who violated the eviction moratorium. In response to concerns raised by tenants' advocates around the country that there would be widespread eviction filings in violation of the CARES Act and that tenants would have little knowledge or ability to effectively defend themselves against illegal evictions, many local governments and state supreme courts ordered landlords filing new eviction cases to sign affidavits affirming under penalty of perjury that they were in compliance with the CARES Act.<sup>84</sup> State courts would presumably be open

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<sup>81</sup> See Jeff Ernsthause, Ellis Simani & Justin Elliott, *Despite Federal Ban, Landlords Are Still Moving To Evict People During the Pandemic*, PROPUBLICA (Apr. 16, 2020), <https://www.propublica.org/article/despite-federal-ban-landlords-are-still-moving-to-evict-people-during-the-pandemic>. Many municipalities make it very easy for landlords to evict tenants on the basis of nuisance or alleged criminal activity. See Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting A Flawed Federal Eviction Law*, 65 UCLA L. Rev. 1146 (2018).

<sup>82</sup> *Federal Eviction Moratoriums: Multifamily Properties Subject to the CARES Act*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/federal-moratoriums> (last visited June 16, 2020); Al Shaw, Ellis Simani & Jeff Ernsthause, *Can I Be Evicted During Coronavirus?*, PROPUBLICA, <https://projects.propublica.org/covid-evictions/> (May 18, 2020) (last visited June 16, 2020).

<sup>83</sup> Shaw, *supra* note 82.

<sup>84</sup> See, e.g., Tennessee and others.

to hearing complaints by tenants who believed that an eviction had been filed against them in violation of the CARES Act.

### III. RECOMMENDATIONS FOR FUTURE FEDERAL TENANT PROTECTION LEGISLATION

The Great Recession and the COVID-19 pandemic have forever changed American economic and social foundations. Their proximity in time also underscores the urgent need for policymakers to be prepared the next time a crisis hits. Each of these crises has struck at the heart of the problem of housing instability and access to safe and affordable housing for lower-income Americans, especially people of color. Property owners and landlords have also experienced detrimental effects because of these crises, and future federal legislation should also be sure to include measures that assist landlords with staying in business, while also holding them accountable for their obligations under the law.<sup>85</sup> Both the PTFA and the CARES Act offer some residential tenants protection against eviction during times of crisis. However, both laws have significant drawbacks that should be amended and remedied in any future federal crisis-related tenant protection legislation. This section offers recommendations for substantive and procedural tenant protections for policymakers to consider in the face of future public health and financial crises in order to mitigate the impact of crisis-related housing instability, especially for low-income tenants of color.

#### A. A Brief Note on the HEROES Act

On May 15, 2020, the House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act.<sup>86</sup> The Senate refused to bring the HEROES Act to the floor, resulting in it stalling in Congress indefinitely.<sup>87</sup> The HEROES Act, among other things, would have provided another round of direct stimulus payments to most Americans, and also contained a number of housing and homelessness

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<sup>85</sup> Abby Vesoulis, *How Eviction Moratoriums Are Hurting Small Landlords—and Why That's Bad For the Future of Affordable Housing*, TIME (June 11, 2020), <https://time.com/5846383/coronavirus-small-landlords/>.

<sup>86</sup> Alicia Adamczyk, *HEROES Act Would Provide Another Stimulus Check, Broader Student Loan Relief*, CNBC (May 16, 2020), <https://www.cnbc.com/2020/05/16/what-you-need-to-know-about-the-heroes-act.html>.

<sup>87</sup> See Emily Cochrane, *House Passes \$3 Trillion Aid Bill Over Republican Opposition*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/politics/house-simulus-vote.html>.



protections.<sup>88</sup> These protections included additional funding for emergency rental assistance, additional Emergency Solutions Grants (ESG) funding “to respond to and prevent outbreaks [of COVID-19] among people experiencing homelessness,” and a year-long nonpayment eviction moratorium that would cover “substantially all rental housing,” among other things.<sup>89</sup>

## B. National Eviction Moratorium

During the coronavirus crisis of 2020, many states and local jurisdictions enacted temporary eviction moratoria, prohibiting landlords from evicting tenants for nonpayment of rent during a proscribed time period.<sup>90</sup> These eviction moratoria varied drastically in several important

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<sup>88</sup> *Id.*; see also *What’s Good and What’s Missing in the HEROES Act*, CENTURY FOUND. (May 19, 2020), <https://tcf.org/content/report/whats-good-and-whats-missing-in-the-heroes-act/?agreed=1>.

<sup>89</sup> *Overview of Housing and Homelessness Provisions in the HEROES Act*, NAT’L LOW INCOME HOUS. COAL. (May 13, 2020), <https://nlihc.org/resource/overview-housing-and-homeless-provisions-heroes-act>.

<sup>90</sup> See generally *COVID-19 and Changing Eviction Policies Around the Nation*, EVICTION LAB, <https://evictionlab.org/covid-eviction-policies/> (last visited July 8, 2020). See, e.g., *Executive Order N-33-20*, EXEC. DEP’T OF CAL. (Mar. 4, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>; *Order*, ST. OF CONN. SUPER. CT. (June 9, 2020), <https://www.jud.ct.gov/HomePDFs/ExecutionStayAug1.pdf>; Exec. Dep’t Dover, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat*, ST. OF DEL. (Mar. 24, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf>; Office of the Governor, *Executive Order Number 20-159*, ST. OF FLA. (June 30, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-159.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-159.pdf); Office of the Governor, *Fifth Supplementary Proclamation*, ST. OF HAW. (Apr. 16, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/04/2004088-ATG\\_Fifth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/04/2004088-ATG_Fifth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf); *Executive Order 2020-30*, ILL. GOV’T (April 23, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-30.aspx>; Exec. Dep’t Indianapolis, *Executive Order 20-06*, ST. OF IND. (Mar. 19, 2020), [https://www.in.gov/gov/files/EO\\_20-06.pdf](https://www.in.gov/gov/files/EO_20-06.pdf); Exec. Dep’t, *Proclamation of Disaster Emergency*, ST. OF IOWA (April 2, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Disaster%20Proclamation%20-%202020.04.02.pdf>; *Executive Order 2020-44*, SUP. CT. OF KY. (May 29, 2020), [https://kycourts.gov/courts/supreme/Rules\\_Procedures/202044.pdf](https://kycourts.gov/courts/supreme/Rules_Procedures/202044.pdf); *Executive Order*, No. 40 FY 19/20, ME. OFFICE OF THE GOVERNOR (Apr. 16, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20Regarding%20Unlawful%20Evictions%2C%20Writs%20of>

aspects. First, some covered entire states, and some only covered local counties or cities.<sup>91</sup> There were also places where a statewide moratorium

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[%20Possession%2C%20and%20Initiation%20of%20Eviction%20Proceedings.pdf](#); Office of the Governor, *Proclamation by the Governor Order 20-19.2: Evictions and Related Housing Practices*, ST. OF WASH. (June 2, 2020), [https://www.governor.wa.gov/sites/default/files/20-19.2%20Coronavirus%20Evictions%20%28tmp%29.pdf?utm\\_medium=email&utm\\_source=govdelivery](https://www.governor.wa.gov/sites/default/files/20-19.2%20Coronavirus%20Evictions%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery).

<sup>91</sup> See generally *Foreclosure and Eviction Moratoriums*, MAYER BROWN (June 12, 2020), <https://www.mayerbrown.com/-/media/files/uploads/general/mortgage-and-eviction-moratoriums.pdf>. See, e.g., *Ordinance No. 6482*, CITY OF ANAHEIM (Mar. 2020), [https://local.anaheim.net/docs\\_agend/questys\\_pub/24729/24759/24761/25427/25429/ORD\\_6482.pdf](https://local.anaheim.net/docs_agend/questys_pub/24729/24759/24761/25427/25429/ORD_6482.pdf) (stating that ordinance covers both residential and commercial tenants and that tenants have 120 days following expiration of ordinance to pay past due rent); *Executive Order*, LOS ANGELES COUNTY (amended Apr. 14, 2020), <https://covid19.lacounty.gov/covid19-news/board-of-supervisors-expands-eviction-moratorium-rent-freeze-to-protect-additional-renters-across-los-angeles-county/> (stating that tenants will have 12 months after termination of the county's executive order to pay past due rent); *Ordinance No. 186585*, CITY OF L.A. (Mar. 31, 2020), [http://clkrep.lacity.org/onlinedocs/2020/20-0147-S19\\_ORD\\_186585\\_03-31-2020.pdf](http://clkrep.lacity.org/onlinedocs/2020/20-0147-S19_ORD_186585_03-31-2020.pdf) (declaring that residential tenants will have 12 months after local emergency period to pay past due rent where nonpayment is because of financial impacts related to COVID-19); *Ordinance No. 20-O-2805*, CITY OF BEVERLY HILLS (Mar. 16, 2020), [http://www.beverlyhills.org/cbhfiles/storage/files/296826135501737712/Ordinance\\_20-O-2805revised.PDF](http://www.beverlyhills.org/cbhfiles/storage/files/296826135501737712/Ordinance_20-O-2805revised.PDF).; *Fourth Revised First Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency*, CITY OF SANTA MONICA (Mar. 18, 2020), [https://www.santamonica.gov/Media/Default/COVID-19/1d\\_-\\_Fourth\\_Revised\\_First\\_Supplement\\_-\\_Local\\_Emergency\\_-\\_COVID\\_19\\_-\\_Eviction\\_Moratorium.pdf](https://www.santamonica.gov/Media/Default/COVID-19/1d_-_Fourth_Revised_First_Supplement_-_Local_Emergency_-_COVID_19_-_Eviction_Moratorium.pdf) (stating tenants have up to 12 months to repay the past due rent after expiration of the order); *Temporary Moratorium on Tenant Evictions Due to COVID-19*, CITY OF SACRAMENTO (June 30, 2020), <https://www.cityofsacramento.org/-/media/Corporate/Files/CDD/Code-Compliance/Programs/FINAL-FAQs-EXTENDED-TEMPORARY-MORATORIUM-ON-TENANT-EVICTIONS-DUE-TO-COVID-06012020.pdf?la=en>; *Ordinance No. O-2020-97*, CITY OF SAN DIEGO (Mar. 24, 2020), <https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/O-2020-97%20COR.%20COPY%20Emergency%20Ordinance%20-%20Eviction%20Moratorium.pdf?meetingId=3955&documentType=Agenda&itemId=188927&publishId=368380&isSection=false>. See also Kathleen B. Kunz, *Pima County Constables: No Evictions During COVID-19 Outbreak*, TUCSON WEEKLY (March 18, 2020), <https://www.tucsonweekly.com/TheRange/archives/2020/03/18/pima-county-constables-no-evictions-during-covid-19-outbreak>; *General Administrative Order*

was in effect, but local authorities enacted a longer or more protective moratorium than was in place at the state level.<sup>92</sup> Second, the length of time of the moratoria were wildly inconsistent. Some states, like New York, imposed a five-month moratorium,<sup>93</sup> while others, like Tennessee, only had a moratorium in effect during very beginning of the coronavirus crisis, for approximately two months.<sup>94</sup> Third, the actual restrictions that the moratoria imposed were significantly different.<sup>95</sup> Some jurisdictions instituted

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2020-01, CIR. CT. OF COOK CTY. (Apr. 3, 2020), [http://www.cookcountycourt.org/Portals/0/4\\_3\\_20%20GAO%202020-01%20amended%20\(eff\\_%20April%203%202020\).pdf?ver=2020-04-16-164635-443](http://www.cookcountycourt.org/Portals/0/4_3_20%20GAO%202020-01%20amended%20(eff_%20April%203%202020).pdf?ver=2020-04-16-164635-443); *Administrative Order 2020-10*, CIR. CT. OF PIKE AND LINCOLN CTY., MO. (May 15, 2020), <https://www.courts.mo.gov/file.jsp?id=153237> (extending eviction moratorium through July 25).

<sup>92</sup> Compare *Executive Order N-66-20*, EXEC. DEP'T ST. OF CAL. (May 29, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.29.20-EO-N-66-20-text.pdf> (extending authorization for local governments to halt evictions for renters impacted by the COVID-19 pandemic through July 28), with *supra* note 91 (indicating local eviction moratoria where the halt on evictions is longer than the State's eviction moratorium). Compare *Ninth Emergency Order Regarding the COVID-19 State of Disaster*, SUP. CT. OF TEX. (Apr. 6, 2020), <https://www.txcourts.gov/media/1446345/209052.pdf> (stating no hearings before April 30, no execution of writs of possession before May 7), with Philop Jankowski, *Coronavirus in Austin: Council Approves Eviction Moratorium in Slate of Relief Measures*, STATESMAN (Mar. 26, 2020), <https://www.statesman.com/news/20200326/coronavirus-in-austin-council-approves-eviction-moratorium-in-slate-of-relief-measures> (declaring an eviction moratorium through May 25), and *Amended Order of County Judge Clay Jenkins*, DALLAS COUNTY (Mar. 22, 2020), <https://www.dallascounty.org/Assets/uploads/docs/judge-jenkins/covid-19/03232020-AmendedOrder.pdf> (stating no hearings or writs through May 22).

<sup>93</sup> See Executive Chamber, *Executive Order No. 202.28*, ST. OF N.Y. (May 7, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.28.pdf> (stating that statewide eviction moratorium through August 20 where hearings are not currently being held, and tenants who have lost income due to the virus will not be removed by law enforcement).

<sup>94</sup> See generally Order Continuing Suspension of In-Person Court Proceedings and Extension of Deadlines, No. ADM2020-00428, TENN. (Mar. 24, 2020).

<sup>95</sup> See generally Dan Keating & Lauren Tierney, *Which States are Doing a Better Job Protecting Renters from Being Evicted During the Coronavirus Pandemic*, WASH. POST (Apr. 29, 2020), <https://www.washingtonpost.com/nation/2020/04/29/which-states-are-doing-better-job-protecting-renters-being-evicted-during-coronavirus-pandemic/?arc404=true> (explaining which states have the best protections in place for tenants during the pandemic).

comprehensive moratoria, prohibiting the filing, hearing, and execution of evictions.<sup>96</sup> Others relied only on limitations on in-person hearings in courts to prevent eviction actions from being adjudicated, but allowed them to restart as soon as courts reopened.<sup>97</sup> Still others, like Tennessee, issued orders ordering court officials not to take any action to initiate or execute eviction actions, but did not prohibit filings of new cases during the pendency of the moratorium, nor the execution of eviction warrants that had been issued prior to the moratorium.<sup>98</sup> This piecemeal approach created significant confusion

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<sup>96</sup> See *Exec. Order No. 7G*, ST. CONN. (Mar. 19, 2020), <https://jud.ct.gov/HomePDFs/Executive-Order-No-7G.pdf>; see also Press Release, Governor Ned Lamont, St. of Conn. (June 29, 2020), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/06-2020/Governor-Lamont-Announces-Assistance-for-Renters-Homeowners-and-Residential-Landlords> (stating “Governor Lamont announced today a comprehensive plan to put more than \$33 million in state and federal resources to work providing emergency assistance to renters, homeowners, and residential landlords impacted by the COVID-19 public health emergency”).

<sup>97</sup> See Deidre Woollard, *Cities and States that Have Paused Evictions Due to COVID-19*, MSN (Mar. 25, 2020), <https://www.msn.com/en-us/finance/realestate/cities-and-states-that-have-paused-evictions-due-to-covid-19/ar-BB11Ak7O> (explaining that the courts in Maine are closed for eviction hearings, but individuals continue to be served); see also *Exec. Order No. 40FY 19/20*, ME. (Apr. 16, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline-files/An%20Order%20Regarding%20Unlawful%20Evictions%2C%20Writs%20of%20Possession%2C%20and%20Initiation%20of%20Eviction%20Proceedings.pdf>. See *State AG Tells Landlords, Lenders Residents Cannot be Evicted from Their Homes During Covid-19 Crisis*, PITTSBURGH POST GAZETTE (Mar. 31, 2020, 10:13 a.m.), <https://www.post-gazette.com/news/state/2020/03/31/attorney-general-pennsylvania-evictions-coronavirus-lenders-landlords/stories/202003310076> (“The state Supreme Court had ordered courts closed, including the suspension of all eviction proceedings, due to the COVID-19 state of emergency. The court’s order is applicable to all Pennsylvania property owners, managers, landlords, as well as mortgage brokers and lenders.”).

<sup>98</sup> See *supra* note 5 and accompanying text; see also Brandon Richard, *Eviction Cases Looming in Shelby Co. as Hearings Resume*, WMC ACTION NEWS (June 15, 2020, 5:32 p.m.) <https://www.wmcactionnews5.com/2020/06/15/eviction-hearings-resume-shelby-county/> (explaining that approximately nine thousand evictions cases have piled up in Shelby County, Tennessee over the last few months from before and during the COVID-19 crisis). See also *Covid-19 Housing Policy Scorecard: Tennessee*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard/tn/> (last updated June 16, 2020) (stating that no current law in Tennessee is preventing landlords from filing eviction notices and as such, cases and hearings are expected to surge).

for tenants, landlords, and attorneys trying to understand their rights and obligations during the pandemic.<sup>99</sup>

One of the potential issues with any federal mandate regulating property is whether the federal government has the authority to impose the restrictions and requirements on private property owners, or whether those measures could be successfully challenged as unlawful takings. This paper is not intended to delve into the arguments related to that issue but does attempt to make suggestions that are not obviously unconstitutional. The CARES Act and the PTFA both sidestepped potentially successful takings claims by tying their tenant protections to entities that the federal government can already regulate. For the PTFA, this was banks as mortgage lenders, and for the CARES Act, this was federally-backed mortgages.<sup>100</sup> The HEROES Act would have imposed essentially a national eviction moratorium for one year. This approach would prevent a wave of evictions and address the patchwork of local and state efforts that characterized the coronavirus crisis,<sup>101</sup> avoiding significant confusion among tenants and landlords about who is covered by a moratorium and for how long.

When considering an eviction moratorium during a financial or public health crisis, policymakers should also consider expanding the moratorium to include grounds beyond just nonpayment of rent, allowing evictions to be initiated only in truly extenuating circumstances. Since landlord-tenant law in most states prioritizes the landlord's right to possession of the premises above all other considerations in an eviction case, landlords in many less tenant-friendly jurisdictions may be accustomed to cases moving very quickly through the court system.<sup>102</sup> During the coronavirus pandemic, as soon as the CARES Act and local moratoria were announced, stories began to emerge of tenants being illegally evicted by

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<sup>99</sup> See, e.g., Emily A. Benfer, *Coronavirus Rent Freezes Are Ending – And A Wave of Evictions Will Sweep America*, NBC NEWS (June 22, 2020, 3:30 a.m.), <https://www.nbcnews.com/think/opinion/coronavirus-rent-freezes-are-ending-wave-evictions-will-sweep-america-ncna1230916>.

<sup>100</sup> See PTFA and CARES Act.

<sup>101</sup> Benfer, *supra* note 99.

<sup>102</sup> See *Lindsey v. Normet*, 405 U.S. 56, 64 (1972), which upheld the constitutionality of the summary process in eviction cases. Every state now uses a summary process for evictions. Mary B. Spector, *Tenant's Rights Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000). In many states, eviction cases can proceed from complaint to trial in as few as six days. *Id.*

landlords who did not want to wait for court processes to resume.<sup>103</sup> Moreover, limiting moratoria to evictions based on nonpayment of rent does not prevent landlords from using other reasons as pretexts for evicting tenants for invalid reasons.<sup>104</sup>

### C. Improved Notice Requirements

Since federal legislation supersedes state law,<sup>105</sup> one of the challenges that both tenants and landlords can face when Congress passes crisis-related laws is understanding whether or not they are covered by the laws and what their rights and obligations are. Explicit notice requirements in federal legislation would provide uniformity and consistency for tenants and landlords and would help avoid the confusion about the laws and requirements in different jurisdictions. There should be at least two types of required notices: first, notice to both tenants and landlords about their status under the law; and second, if a landlord is going to proceed with an eviction, the legislation should specify the type and content of any notice that the landlord must provide to the tenant before initiating the eviction proceeding.

#### 1. Status Notice

Future legislation should ensure that there is a mechanism for both tenants and landlords to be notified if they fall under the protections of the legislation. The CARES Act eviction moratorium applied to tenants who lived in properties with a federally backed mortgage.<sup>106</sup> Usually, information about the origin and current status of a mortgage is held by the landlord or property owner, and may not always be available to a tenant even if she were

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<sup>103</sup> See, e.g., Kelli Cook, *Evictions Halted Through April Under Tenn. Supreme Court Order Amid Coronavirus Outbreak*, WMC ACTION NEWS 5 (Mar. 31, 2020, 10:54 p.m.), <https://www.wmctionnews5.com/2020/04/01/evictions-halted-through-april-under-tenn-supreme-court-order-amid-coronavirus-outbreak/> (quoting a tenant who said that her landlord has asked the utility company to disconnect her utilities even though she had not been formally evicted).

<sup>104</sup> See, e.g., Ramsey *supra* note 81 at 1146 (discussing how local ordinances that allow landlords to evict tenants for a single instance of alleged criminal behavior can be used to keep out tenants that landlords or communities consider to be undesirable).

<sup>105</sup> See, e.g., *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368 (1986) (“The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law.”).

<sup>106</sup> CARES Act § 4023(d)(1).

to seek it out.<sup>107</sup> Occasionally, even a landlord may not be aware if her mortgage is federally backed.<sup>108</sup> One of the challenges with the CARES Act eviction moratorium was that it was extremely difficult for tenants to obtain definitive information about whether the property where they resided was covered.<sup>109</sup> In a foreclosure situation, presumably the owner of the property is aware whether or not she has defaulted on mortgage payments, but unless state law requires notice to tenants when a foreclosure proceeding is initiated, tenants are unlikely to know the status of the landlord's mortgage.<sup>110</sup> Under the PTFA, there was no requirement for a property owner or a mortgage lender to notify tenants during the pendency of a foreclosure beyond what states might have required, so many tenants only found out that their homes were in foreclosure when they received eviction notices.<sup>111</sup>

One way for Congress to ensure that every property owner and tenant was aware of their status under federal crisis legislation would be to include a mechanism to notify every affected owner, and possibly every affected tenant, if they were covered by the legislation. An appropriate government agency, such as HUD, could send notices to all covered property owners, and require them to notify the tenants living in those properties. For example, during the Great Recession, New Jersey passed a law, the New Jersey Foreclosure Fairness Act, in which it required banks that had purchased foreclosed properties to either send letters directly to tenants or post notices in common areas of the bank's purchase, depending on the size of the property.<sup>112</sup> Ensuring that tenants are aware of the protections they fall under would require either landlords or HUD to notify them directly. Tenants

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<sup>107</sup> Ernsthausen *supra* note 81.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (stating that because there is no penalty in the CARES Act for landlords who file evictions in violation of the moratorium, it “effectively puts the onus on renters to figure out if they are protected from eviction”).

<sup>110</sup> States have three primary approaches to the rights of tenants in foreclosure proceedings. “First, a large number of jurisdictions permit foreclosure purchasers to summarily evict or eject tenants without notice. Second, some jurisdictions require that foreclosing parties provide tenants with notices of foreclosure actions or require that tenants be made parties to the foreclosure proceedings. Third, a few jurisdictions require the owner to show “good cause” or “just cause” before a tenant is evicted or ejected, under which foreclosure does not fall.” Aleatra P. Williams, *Real Estate Market Meltdown, Foreclosures and Tenants' Rights*, 43 IND. L. REV. 1185, 1186 (2010).

<sup>111</sup> *Id.* at 1207.

<sup>112</sup> Johnson *supra* note 23, at 992–93.

should also be notified if their landlord has requested a mortgage forbearance similar to what the CARES Act allowed for.

During the coronavirus crisis, some states required landlords filing eviction cases to include an affidavit certifying that the property in question was not covered by the CARES Act moratorium.<sup>113</sup> These affidavits were intended to help courts determine whether tenants were entitled to the protections afforded by the CARES Act. While well-intentioned, it was still difficult for tenants and courts to obtain information about which properties were covered under the CARES Act if the properties contained fewer than four units and were not discoverable on publicly-available databases.<sup>114</sup> Across the country, there were still many eviction cases filed in violation of the CARES Act moratorium.<sup>115</sup>

## 2. Specifics of Eviction Notices

If eviction of a tenant becomes inevitable, federal tenant protection legislation should include specific notice requirements that an owner or landlord should follow before being allowed to initiate an eviction action. While the PTFA required that new owners of foreclosed buildings give existing tenants at least three months' notice that they will need to vacate, the law did not specify the language the notice should contain, the form it should take, or the way it should be delivered to the tenant.<sup>116</sup>

One of the notable provisions of the CARES Act eviction moratorium was its requirement that after the moratorium expired on July 24, 2020, a landlord seeking to evict a tenant in a covered property had to provide the tenant with a 30-day notice before an eviction action could be filed.<sup>117</sup> This 30-day notice requirement was longer than what many states require for

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<sup>113</sup> See, e.g., *Order Continuing Suspension of In-Person Court Proceedings and Extension of Deadlines*, No. ADM2020-00428, ST. TENN. (Mar. 24, 2020), [http://tncourts.gov/sites/default/files/docs/tsc\\_order\\_5-26.pdf](http://tncourts.gov/sites/default/files/docs/tsc_order_5-26.pdf); In Re: Magistrate Court Rule 46 (Ga. Apr. 30, 2020), <https://www.magistratefulton.org/DocumentCenter/View/2803/Dispossessory-Rule-46--Final-Magistrate>.

<sup>114</sup> See Ernsthausen *supra* note 81.

<sup>115</sup> Matthew Goldstein, *Landlords Jump the Gun as Eviction Moratorium Wanes*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/business/evictions-moratorium-cares-act.html>.

<sup>116</sup> PTFA § 702(a).

<sup>117</sup> CARES Act § 4024(c).



nonpayment evictions.<sup>118</sup> In addition to the moratorium for tenants in properties with federally backed mortgages, the CARES Act also contains a prohibition on evicting tenants when a landlord has requested a forbearance on their mortgage payments, if the mortgage is federally backed.<sup>119</sup> However, the legislation was silent as to whether or how a tenant would be notified that their landlord had requested or received such a forbearance.<sup>120</sup>

If a landlord does ultimately move to evict a tenant when a moratorium or forbearance expires, legislation should describe exactly what form the notice to the tenant should take and any language that ought to be included. This is something that New Jersey did with its Foreclosure Fairness Act.<sup>121</sup>

#### D. Enforcement Mechanism

A drawback of both the PTFA and the CARES Act was that neither piece of legislation contained created an explicit enforcement mechanism for lenders or landlords who violate them.<sup>122</sup> Neither piece of legislation contains either an agency enforcement provision or an express private right of action.

##### 1. Agency Enforcement

When the PTFA was passed in 2009, even though it did not include any specific enforcement provisions, several federal agencies took it upon themselves to encourage banks and mortgage lenders to comply with the law, including the Federal Reserve Board, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation, even though they could not actually enact any penalties for noncompliance.<sup>123</sup> Each of these agencies issued letters, or, in the case of OCC, a worksheet, to explain to banks what their obligations were under the PTFA and each agency's processes for assessing whether a bank was in compliance with the law.<sup>124</sup>

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<sup>118</sup> See, e.g., Tennessee's law, which only requires a 14-day notice. TENN. CODE § 66-7-109 (2020). Even New York, perhaps the most tenant-friendly state in the country, requires a 14-day notice in nonpayment of rent cases. N.Y. REAL PROP. ACTS. LAW § 711(2) (2020).

<sup>119</sup> CARES Act § 4023.

<sup>120</sup> *Id.*

<sup>121</sup> Johnson *supra* note 23, at 993.

<sup>122</sup> See *infra*.

<sup>123</sup> Grellman *supra* note 6, at 300–04.

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

When the CARES Act was passed in 2020, HUD issued several rounds of guidance aimed at public housing authorities and property owners about the requirements of the Act's eviction moratorium. HUD, under Secretary Ben Carson, appears to have taken the most narrow view possible of which tenants were covered by the CARES Act. For example, the language of the Act itself was ambiguous regarding the situation of a multifamily owner whose mortgage was not federally backed but who had one or more (but not all) units occupied by tenants with Section 8 Housing Choice Vouchers.<sup>125</sup> The Act did not specify whether the entire property was covered by the eviction moratorium, or just the specific tenants who received the federal subsidy.<sup>126</sup> HUD issued guidance on May 29, 2020, clarifying that the eviction moratorium applied only to the tenants receiving the federal subsidy.<sup>127</sup> Additionally, as the moratorium was set to expire in July 2020, HUD issued guidance on July 1, 2020, reminding property owners of the requirement under the CARES Act to provide tenants with a 30-day notice before filing a nonpayment eviction action and adding additional protections for tenants whose owners requested mortgage forbearance under the CARES Act.<sup>128</sup>

Similar to the 2009 TARP legislation, the CARES Act did include enforcement provisions for some of its financial assistance aspects.<sup>129</sup> It appointed Inspectors General to oversee certain programs under the CARES Act, including the Paycheck Protection Program and other programs

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<sup>125</sup> The Section 8 Housing Choice Voucher program is a federal housing assistance subsidy for low-income tenants that allows tenants to rent private-market housing and HUD provides the assistance payment directly to the landlord. *Housing Choice Voucher Fact Sheet*, DEP'T OF HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/about/fact\\_sheet](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet) (last visited July 24, 2020).

<sup>126</sup> CARES Act.

<sup>127</sup> U.S. DEP'T OF HOUS. & URBAN. DEV., COVID-19 FAQs FOR PUBLIC HOUSING AGENCIES 9 (2020), [https://www.hud.gov/sites/dfiles/PIH/documents/COVID19\\_FAQSRound4final.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/COVID19_FAQSRound4final.pdf).

<sup>128</sup> U.S. DEP'T OF HOUS. & URBAN. DEV., NOTICE H 20-07 (2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-07hsgn.pdf>. It is worth noting that one of the persistent challenges with the CARES Act eviction moratorium was that it was extremely difficult, if not impossible, for tenants to know if their landlord had requested or received mortgage forbearance under the Act.

<sup>129</sup> Boris Bershteyn et al., *Enforcement Risks and the CARES Act*, SKADDEN (May 14, 2020), <https://www.skadden.com/insights/publications/2020/05/enforcement-risks-and-the-cares-act>.

administered by the Treasury Department.<sup>130</sup> The federal government is obviously more concerned about financial fraud than about enforcing provisions that protect vulnerable tenants.

## 2. Private Right of Action

Again, one of the deficiencies of both the PTFA and the CARES Act moratorium is that neither of them included an express private right of action to allow plaintiffs to file complaints of violations of the legislation in federal court. It is too early to know how much litigation will take place around the CARES Act, though leading up to the expiration of the CARES Act eviction moratorium, there were numerous news reports of evictions filed in violation of the moratorium.<sup>131</sup>

After the PTFA was passed in 2009, there were a number of lawsuits filed in federal court alleging violations of the law by banks. Two federal circuit courts issued reported decisions finding that the PTFA did not include an implied private right of action. The first, *Logan v. U.S. Bank National Association*, was decided by the Ninth Circuit in 2013.<sup>132</sup> The plaintiff, Karen Logan, sued U.S. Bank, which had foreclosed on the property she was renting in Westlake, California, in 2009.<sup>133</sup> She alleged that U.S. Bank had not served her with the required 90-day notice under the PTFA, and sought temporary injunctive relief and damages.<sup>134</sup> The district court dismissed her complaint, holding that the federal court had no subject matter jurisdiction over the claim because there was no implied private right of action under the PTFA.<sup>135</sup> The Ninth Circuit affirmed, holding that there was no “clear and unambiguous intent” on the part of Congress to create a private right of action.<sup>136</sup> Rather, the court stated, “The PTFA is framed in terms of ‘protections’ for tenants, suggesting that it was intended to provide a defense in state eviction proceedings rather than a basis for offensive suits in federal court.”<sup>137</sup>

The other circuit court decision came from the Sixth Circuit in 2014 in the case of *Mik v. Federal Home Loan Mortgage Corporation* (Freddie

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<sup>130</sup> *Id.*

<sup>131</sup> Goldstein *supra* note 115.

<sup>132</sup> 722 F.3d 1163 (9th Cir. 2013).

<sup>133</sup> *Id.* at 1165.

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

<sup>135</sup> *Id.* at 1165–66.

<sup>136</sup> *Id.* at 1171.

<sup>137</sup> *Id.* at 1173.

Mac).<sup>138</sup> In this case, Paul and Lee Ann Mik, residents of Meade County, Kentucky, alleged that they were unlawfully evicted in violation of the PTFA after the property they had a rent-to-own contract on was foreclosed on by CITI, who transferred the bid to Freddie Mac.<sup>139</sup> The Miks sued Freddie Mac, claiming that Freddie Mac violated the PTFA and that they were wrongfully evicted in violation of Kentucky state law.<sup>140</sup> The district court dismissed the Miks' case, holding that there was no private right of action under the PTFA.<sup>141</sup> The Sixth Circuit affirmed, holding, like the *Logan* court, that Congress did not intend to create a private right of action.<sup>142</sup>

By not including an express private right of action in either the PTFA or the CARES Act eviction moratorium, Congress has forestalled an important avenue for tenants who seek to assert claims based on violations of the laws. Including an express private right of action in these types of laws is not unheard of at the state level, though. In the New Jersey Foreclosure Fairness Act, passed in 2009, there was a provision that allowed for tenants to seek damages up to \$2,000, including attorneys' fees.<sup>143</sup> Allowing for a private right of action would encourage compliance with the law and would therefore benefit the tenants covered by the law.

#### CONCLUSION

In times of economic and public health instability, Congress has taken action to try to protect residential renters who are at risk of losing their homes. In 2009, in the wake of the foreclosure crisis that ushered in the Great Recession, Congress passed the PTFA, which was intended to protect tenants in foreclosed properties from immediate eviction. In 2020, Congress passed the CARES Act in response to the coronavirus pandemic that forced the shutdown of the economy and has killed tens of thousands of Americans. The CARES Act contained a four-month eviction moratorium for tenants living in properties with a federal subsidy or with a federally backed mortgage.

While these pieces of legislation were important steps to protecting vulnerable tenants during times of crisis, neither law went far enough. When

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<sup>138</sup> 743 F.3d 149 (6th Cir. 2014).

<sup>139</sup> *Id.* at 154–55.

<sup>140</sup> *Id.* at 156.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 160. However, the *Mik* court did find that the PTFA preempted Kentucky state law on foreclosure evictions, and that the PTFA could be used offensively, and not just defensively, under state law. *Id.* at 166–67.

<sup>143</sup> Johnson *supra* note 23, at 994.

the country is facing future financial or public health crises, Congress should implement a national eviction moratorium, include specific notice requirements to tenants in the text of the legislation, and include an agency enforcement mechanism and an express private right of action for tenants who believe they have been the victims of violations of the laws. These measures will go a long way towards ensuring that vulnerable tenants are protected during times of national crisis.