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## The Balancing of Executive Emergency Powers as They Relate to the Pandemic and Eviction Control

Marialexa Natsis

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# The Balancing of Executive Emergency Powers as They Relate to the Pandemic and Eviction Control

MARIALEXA NATSIS\*

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## I. INTRODUCTION

Governor Gavin Newsom has implemented an eviction moratorium (“moratorium”) to great criticism, yet it has not been proven unconstitutional. The moratorium is being criticized for its lack of specificity, for the possibility of it being a Taking without just compensation, for the possibility of it violating the Contracts Clause of the Constitution, and because it has not created the intended economic effects that Governor Newsom stated were the reason for its implementation. While the criticism is plentiful, precedent and legislation have led to this moratorium being presumed constitutional. However, a current challenge to the moratorium could prove otherwise. Regardless, even if current laws cannot invalidate Governor Newsom’s actions, a more specific and effective system for dealing with evictions during a pandemic must be implemented in order to prevent future California governments from relying on Governor Newsom’s current actions as precedent.

In this article, I will address the moratorium itself, local California orders with greater protections than the moratorium, executive orders in general, whether the moratorium is a Taking according to the Constitution, other orders which have been challenged during this pandemic and specifically some of those orders of Governor Newsom’s that have been challenged, the intended economic effects of the moratorium, and the resulting and predicted economic effects of the moratorium. I will argue that, while the moratorium itself is a legal exercise of Governor Newsom’s executive emergency powers, we must establish a bright-line rule for how to deal with rent and the landlord-tenant relationship during future pandemics or I fear we will be threatened with the use of Governor Newsom’s current actions as precedent in the future.

While a moratorium like this might only minimally negatively affect big companies with landlords who can take an economic hit from time to time, not every landlord has the luxury of staying afloat while not receiving rent payments for over a year. In fact, Howard Iten, a Los Angeles landlord, has recently challenged the moratorium as it applies in Los Angeles for that very reason.<sup>1</sup> It is landlords like Mr. Iten, a retired auto mechanic with a troublesome tenant who he has been unable to evict for over a year now, that are being negatively affected by the moratorium.<sup>2</sup> And, for that reason, it is important to determine whether the moratorium is being legally implemented, and whether landlords will be repaid for their losses.

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1. Howard ITEN, Plaintiff, v. COUNTY OF LOS ANGELES, Defendant, 2021 WL 185088 (C.D.Cal).

2. *Id.*

## II. THE MORATORIUM ITSELF

Governor Newsom issued an eviction moratorium on March 16, 2020. This initial moratorium came within executive order N-28-20 that declared a State of Emergency on March 4, 2020 due to the COVID-19 pandemic.

This moratorium stated:

2) Any provision of state law that would preempt or otherwise restrict a local government's exercise of its police power to impose substantive limitations on residential or commercial evictions as described in subparagraphs (i) and (ii) below—including, but not limited to, any such provision of Civil Code sections 1940<sup>3</sup> et seq. or 1954.25<sup>4</sup> et seq.—is hereby suspended to the extent that it would preempt or otherwise restrict such exercise. This paragraph 2 shall only apply to the imposition of limitations on evictions when:

(i) The basis for the eviction is nonpayment of rent, or a foreclosure, arising out of a substantial decrease in household or business income (including, but not limited to, a substantial decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or a substantial decrease in business income caused by a reduction in opening hours or consumer demand), or substantial out-of-pocket medical expenses; and

(ii) The decrease in household or business income or the out-of-pocket medical expenses described in subparagraph (i) was caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19, and is documented.

The statutory cause of action for judicial foreclosure, Code of Civil Procedure section 725a<sup>5</sup> et seq.; the statutory cause of action for unlawful detainer, Code of Civil Procedure section 1161<sup>6</sup> et seq., and any other statutory cause of action that could be used to evict or otherwise reject a residential or commercial tenant or occupant of residential real property after foreclosure is suspended only as applied to any tenancy, or residential real property and any occupation thereof, to which a local government has imposed a limitation on eviction pursuant to this paragraph 2, and only to the extent of the limitation imposed by the local government.

Nothing in this Order shall relieve a tenant of the obligation to pay rent, nor restrict a landlord's ability to recover rent due.

The protections in this paragraph 2 shall be in effect through May 31, 2020, unless extended.<sup>7</sup>

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3. Cal. Civil Code § 1940 (1996).

4. Cal. Civil Code § 1954.25 (2019).

5. Cal. Civil Code § 725a (1933).

6. Cal. Civil Code § 1161 (2019).

7. Executive Department State of California, *Executive Order N-28-20*, 2 (Mar. 16, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf>.

The moratorium has since been extended multiple times. Most recently, N-80-20 extended the eviction moratorium through June 30, 2021.<sup>8</sup>

### III. LOCAL ORDERS WITH GREATER PROTECTIONS BUILDING ON THE MORATORIUM

While the moratorium is to be enforced statewide, counties and cities are free to add further restrictions tailored specifically to those areas. Notably, both San Francisco and Oakland have passed their own laws tailoring the moratorium to their cities.

One issue with Governor Newsom's moratorium is a lack of specificity and a lack of accountability for missed payments. In San Francisco, "[q]ualifying commercial tenants who miss a rent payment due to a loss of income related to COVID 19 are given at least a month to cure...Qualifying business[es] include commercial tenants that earn less than \$25M per year."<sup>9</sup> San Francisco made an effort to narrow the moratorium, not only with regards to how long payment could be delayed, but also for the categories of tenants that this moratorium applies to.<sup>10</sup>

Similarly to San Francisco, Oakland has narrowed the California eviction moratorium by laying out which businesses it applies to within Oakland, the reasoning for their failure to pay rent, its connection to the pandemic, and its documentation.<sup>11</sup> In Oakland, on March 27, 2020, "Oakland City Council passed an emergency order restricting landlords from evicting residential and commercial tenants during the COVID-19 pandemic, or 'Local Emergency', through May 31, 2020."<sup>12</sup> They further specified the emergency order by defining that it "[a]pplies to all evictions except Ellis Act evictions and evictions where the tenant poses imminent threat to the health and safety of others."<sup>13</sup> Lastly, the emergency order stated that "[a] commercial tenant cannot be evicted for nonpayment of rent if: They are a qualifying small business; and The failure to pay rent during the local emergency was a result of a substantial decrease in income; and The decrease in income was caused by the COVID 19 pandemic; and The decrease is documented."<sup>14</sup> While Oakland officials found it important to clarify the application of this moratorium to their city, the statewide moratorium did not provide such clarity, not only to residents, but also to officials of cities and counties on how to narrow such an order.

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8. Executive Department State of California, *Executive Order N-03-21*, 2 (Mar. 4, 2021), <https://www.gov.ca.gov/wp-content/uploads/2021/03/3.4.21-EO-N-03-21.pdf>.

9. Asian American Bar Ass'n of the Greater Bay Area, *Understanding COVID-19's Impact On California Real Property And Housing Litigation*, 21 (May 7, 2020), [https://www.aaba-bay.com/resources/Documents/CLE%20Event%20Materials/2020.04.30\\_Presentation%20-%20AABA%20Webinar%20Eviction%20Moratorium.pdf](https://www.aaba-bay.com/resources/Documents/CLE%20Event%20Materials/2020.04.30_Presentation%20-%20AABA%20Webinar%20Eviction%20Moratorium.pdf).

10. *Id.*

11. *Id.*

12. *Id.* at 27.

13. *Id.*

14. *Id.* at 29.

Governor Newsom's moratorium is so broad it does not provide relief to just those in need, but also affects landlords with tenants who are able to pay their rent. However, despite not narrowing the moratorium, Governor Newsom's implementation of the moratorium is legal, as he retains the executive power to issue such an order.

#### IV. EXECUTIVE ORDERS

##### A. WHERE DOES THE POWER EMANATE FROM?

Executive power most absolutely emanates from the governor's ability to issue executive orders and it is then passed down to other executive officials. In this case, Governor Newsom's moratorium is "more sweeping and more comprehensive in its focus on rent payments that are overdue" than the original eviction moratorium signed by President Biden, which has since been deemed unconstitutional.<sup>15</sup> Although moratoriums like this have been implemented statewide, the California Governor's moratorium has shown to push the executive power even further by focusing especially on rent payments and limiting commercial evictions during this time.

Notably, a recent case, *Terkel v. Centers for Disease Control and Prevention*, clarifies that state representatives hold the power to issue eviction moratoriums, while the federal government does not hold this power.<sup>16</sup> Specifically, the plaintiffs argue that the "authority to order property owners not to evict specified tenants" "is not among the limited powers granted to the federal government in Article I of the Constitution, and thus the decision whether to enact an eviction moratorium rests within a given State."<sup>17</sup> The court ruled in favor of the plaintiffs that this power rests within each state as this authority would exceed "the power granted to the federal government to 'regulate Commerce . . . among the several States' and to 'make all Laws which shall be necessary and proper for carrying into Execution' that power. U.S. Const. art. I, § 8."<sup>18</sup>

##### B. GOVERNOR NEWSOM'S POWER

With regards to California, specifically, Governor "Newsom has been able to govern this way through two main channels. The first is the longstanding authority of policing powers that states have, allowing them to act to improve the health and safety of residents. The second is a powerful

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15. John Myers, *Newsletter: Essential Politics: On Evictions and Education, a Huge Week for Gov. Gavin Newsom*, L.A. TIMES (Jan. 25, 2021, 6:00 AM), <https://www.latimes.com/politics/newsletter/2021-01-25/california-eviction-education-deadlines-sacramento-essential-politics>; *Terkel v. Centers for Disease Control & Prevention*, No. 6:20-CV-00564, 2021 WL 742877, at 10 (E.D. Tex. Feb. 25, 2021).

16. *Terkel v. Centers for Disease Control & Prevention*, No. 6:20-CV-00564, 2021 WL 742877, at 20 (E.D. Tex. Feb. 25, 2021).

17. *Id.* at 1.

18. *Id.* at 10.

and little-known state law called the Emergency Services Act [ESA].<sup>19</sup> The first of these, the police power, “is inherent in a state’s sovereignty — it doesn’t need constitutional or statutory authorization,”<sup>20</sup> thus Governor Newsom lawfully exercised this power in implementing his executive orders. The second, the ESA, “‘is just a legislative codification of procedures for the state to deploy that power in an emergency.’” The 124-page emergency act gives the governor nearly unlimited power during the state of emergency to suspend or waive laws and regulations. A review of the orders Newsom has signed shows just how broad that power is.<sup>21</sup>

Additionally, the ESA, used during states of emergency, gives the executive branch even greater powers to amend laws, which are evidenced by the broad array of orders implemented during the COVID-19 pandemic by Governor Newsom specifically.<sup>22</sup> However, “[w]hile the emergency power is strong it can’t nullify protections under the Constitution, [David] Carrillo[, executive director of UC Berkeley’s California Constitution Center,] said. Those rights can be limited during the emergency, within limits. ‘Courts have consistently upheld emergency police power measures done for the common good, as in a war or quarantine setting, even when those measures impact individual liberty,’ he said.”<sup>23</sup> Although the California Constitution protects individual liberty and emergency police power doesn’t upend its values, individual liberty is sometimes sacrificed during unprecedented times.

### C. HISTORICAL SUPPORT FOR BROAD EXECUTIVE EMERGENCY POWERS

While some may argue against the hinderance of their individual liberty, historically, emergency police power measures have consistently been upheld.<sup>24</sup> Thus, while the Constitution does not encourage such power, precedent shows that governors do have this power and can exercise it in times of emergency.<sup>25</sup> As “Steve Merksamer, a Sacramento political consultant who was chief of staff to former Gov. George Deukmejian”<sup>26</sup> said, “[t]he only real limitation [on Governor Newsom’s executive power], besides the Constitution, is common sense.”<sup>27</sup> Thus, although many fight against Governor Newsom’s implementation of the orders, it seems that they

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19. Greg Moran, *Government by executive order: state emergency law gives governor broad power in pandemic*, THE SAN DIEGO UNION-TRIBUNE (Mar. 11, 2020, 5:00 AM), <https://www.sandiegouniontribune.com/news/courts/story/2020-05-11/government-by-executive-order-state-emergency-law-gives-governor-broad-power-in-pandemic>.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Debra Kahn, *Newsom Executive Orders Test Constitutional Bounds—And Legislative Goodwill*, POLITICO, <https://www.politico.com/states/california/story/2020/04/22/newsom-executive-orders-test-constitutional-bounds-and-legislative-goodwill-1279094> (last updated Apr. 24, 2020).

27. *Id.*

are criticizing his common sense, and might not have a legal method to fight against these orders.

However, the United States' political system was created to be a balance of the powers, so balancing and checking the executive power of a governor is important in order to keep the country in order. In fact, allowing governors to issue executive orders “‘instantaneously activates a huge transfer of power from the legislative branch to the executive branch,’ said Garry South, an adviser to former Gov. Gray Davis during the 2001 energy crisis. ‘The governor can ignore laws, unilaterally suspend [environmental laws] and other regulations, spend state funds in ways other than those allocated by the Legislature, and essentially govern via executive order.’”<sup>28</sup> While the executive branch can legally issue these orders, this transfer of power can be seen as a failure of the checks and balances of our government system. If the executive branch can just as easily transfer the legislative branch's power to their own power, then the legislative branch loses both power and authority in times of crisis.

Furthermore, an emergency of this magnitude has never been seen in our lifetimes. In fact, Elisa Della-Piana, legal director of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area<sup>29</sup> stated that, “[t]he limits of the executive power in the time of emergency really haven't been tested in my lifetime...I think it's an open question whether during this crisis, especially if it goes on for a long time, we will see suits challenging and courts establishing any limits on the executive's authority.”<sup>30</sup> Since we are in an unprecedented situation of our lifetime, there is truly no recent precedent to determine whether this use of executive power is that, or is abuse. However, in order to avoid this indeterminacy in the future, it is clear that we must create a law to guide our government in the future with regards to executive power in times of crisis.

Although the 1918 Influenza Pandemic (also known as the “Spanish Flu”) was not during our lifetime, government officials can look towards the orders that the state governments implemented in reaction to that pandemic to justify the current orders being put in place. Similar to today's orders, when the Spanish Flu reached San Francisco, “Mayor James Rolph put in place social distancing practices and met with Hassler [the city's health officer], other health officials, local business owners as well as officials from the federal government to discuss a plan to close the city.”<sup>31</sup> Not only were similar plans drafted, but criticism and hesitation was similar as “officials demurred at the idea [of closing the city], worried about damage to the city's

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28. *Id.*

29. *Id.*

30. *Id.*

31. Dartunorro Clark. *San Francisco had the 1918 flu under control. And then it lifted the restrictions. A cautionary tale about the dangers of reopening too soon.*, NBC NEWS (Apr. 25, 2020, 43:06 AM), <https://www.nbcnews.com/politics/politics-news/san-francisco-had-1918-flu-under-control-then-it-lifted-n1191141>.

economy and the risk of causing public panic”.<sup>32</sup> However, despite criticism and fear, city officials voted “to shut down ‘all places of public amusement’.”<sup>33</sup> Although city officials were in charge of San Francisco’s shut down, whereas state officials are in charge of the current shut downs, it is clear that the city officials had such authority to shut down the city and that such authority did not emanate from the federal government. Furthermore, criticism and fear did not stop officials from exercising their power in order to create a greater situation for their citizens, just as criticism and fear has not stopped Governor Newsom from exercising his power to decrease the negative effects of the pandemic on the greater population.

Notably, governors created new laws during the 1918 Spanish Flu as well. For example, “California governor William Stephens declared that it was the ‘patriotic duty of every American citizen’ to wear a mask and San Francisco eventually made it the law.”<sup>34</sup> However, no specific laws or cases relating to eviction moratoriums during pandemics and governmental power to issue them have resurfaced to serve as a guide for today’s governors.

Thus, although Governor Newsom’s power to make executive orders lawfully emanates from police power and the ESA, without precedent to determine how broad this power is, his executive power remains unchecked. Power of this magnitude remaining unchecked is a threat to our political system, thus it is important to create a bright-line rule in order to guide future government officials on how to handle the balancing of the powers during emergencies.

#### D. LIMITING A GOVERNOR’S POWER

Although the limiting of a Governor’s use of emergency power by other branches is uncommon and questionably unconstitutional, it has been done and is currently being done in Wisconsin. After losing the race to be reelected as Governor of Wisconsin in 2018, “Governor Scott Walker ‘signed legislation to cut the power of the Democrat who defeated him, a final act of a tumultuous tenure that moved Wisconsin firmly to the right’.”<sup>35</sup> He implemented new laws to “curb the authority of Mr. Evers [the Democrat] in the rule-making process and give lawmakers, not the new governor, most appointments on an economic development board until”<sup>36</sup> summer 2019. During the pandemic in 2020, “The Wisconsin Supreme Court... ruled to uphold most Republican-backed lame-duck laws approved in late 2018 that limited the power of the incoming Democratic governor and attorney

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32. *Id.*

33. *Id.*

34. Dave Roos, *How U.S. Cities Tried to Halt the Spread of the 1918 Spanish Flu*, HISTORY, <https://www.history.com/news/spanish-flu-pandemic-response-cities> (last updated Mar. 27, 2020).

35. Mitch Smith and Monica Davey, *Wisconsin’s Scott Walker Signs Bills Stripping Powers From Incoming Governor*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/wisconsin-governor-scott-walker.html>.

36. *Id.*

general.”<sup>37</sup> Notably, “[w]hile the five unions that brought the initial challenge argued the laws violated the state constitution’s separation-of-powers doctrine and thus should be rejected, the court largely rejected the premise and found that wasn’t the case across the board.”<sup>38</sup> This case and state government prove that a Wisconsin governor’s executive orders can not only be overruled, but his powers can be generally limited by the other branches.

Even more poignant to the current situation, “Republican lawmakers in Wisconsin approved a joint resolution...overriding Gov. Tony Evers’...COVID-19 state of emergency.”<sup>39</sup> However, just because a Wisconsin state legislature can strip their governor of his emergency powers, does not necessarily mean that a California legislature can do the same. Notably, there is no evidence of a check on a California governor’s executive emergency authority, and we cannot rely on precedent from Wisconsin. Therefore, while future Wisconsin legislatures may be able to use the current treatment of Tony Evers’s executive powers as precedent for future exercises of governmental executive power, the California state legislature cannot. However, now it is evident that states do have the option to dampen a governor’s executive power if their state constitution permits.

## V. IS THIS A TAKING?

The main constitutional challenge posed in this circumstance is “whether the governor’s use of power constitutes a permissible ‘Taking’ under the 5th and 14th amendments to the Constitution.”<sup>40</sup> It is important to consider that there are two sides to an eviction and “[a] reprieve in rent payments must also consider methods to ease the burden on landlords.”<sup>41</sup> A rent jubilee of this form cancels out a lease contract between landlord and tenant.<sup>42</sup>

“When Governor Newsom changed the terms of the lease agreement, he made a unilateral modification to the contract. Some opponents to his order argue that his actions rendered the lease meaningless because there was no ‘meeting of the minds’ as to an essential term (i.e. payment).”<sup>43</sup> Since a unilateral modification of a contract would render each lease meaningless,

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37. Briana Reilly, *Wisconsin Supreme Court upholds lame-duck laws stripping power from governor*, *AG*, THE CAPITAL TIMES (July 9, 2020) [https://madison.com/ct/news/local/govt-and-politics/wisconsin-supreme-court-upholds-lame-duck-laws-stripping-power-from-governor-ag/article\\_a8be1773-9fbb-585a-9f16-78ec245bd2a1.html](https://madison.com/ct/news/local/govt-and-politics/wisconsin-supreme-court-upholds-lame-duck-laws-stripping-power-from-governor-ag/article_a8be1773-9fbb-585a-9f16-78ec245bd2a1.html).

38. *Id.*

39. Dustin Jones, *One Emergency After Another: Wisconsin Governor and Legislators Battle Over COVID-19*, NPR (Feb. 4, 2021, 5:57 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/02/04/964213636/one-emergency-after-another-wisconsin-governor-and-legislators-battle-over-covid>.

40. Eileen Kendall, *The Constitutionality of Rent Freezes and Moratoriums*, KENDALL L.: A PRO. L. CORP. (May 26, 2020), <https://www.kendalllaw.net/the-constitutionality-of-rent-freezes-and-moratoriums/>.

41. *Id.*

42. *Id.*

43. *Id.*

Governor Newsom is in essence rendering a multitude of agreements meaningless without the consent of either of the parties.<sup>44</sup>

However, the orders must be further analyzed under the Takings Clause of the Constitution to determine whether they are a Taking. “The Takings Clause provides that ‘private property [shall not] be taken for public use without just compensation’,”<sup>45</sup> thus we must determine whether landlords are being compensated for their loss of income. In *Penn Central*, a three-factor test was laid out to determine whether a government act was a Taking. The test’s three prongs are: “(1) the economic impact of the regulation in question; (2) whether, and to what extent, the owner suffered the loss of ‘investment-backed’ expectations; and (3) the ‘character’ of the government action (i.e., if the government physically occupied or damaged the property in question, it is more likely to be considered a Taking).”<sup>46</sup> For prong one, while the economic impact of the regulation in question is great on landlords, the economic impact of COVID-19 in general greatly outweighs it.<sup>47</sup> Here, the owner/landlord is suffering a great loss on this commercial building, and they invested a great amount in it with expectations of commercial tenants paying rent. And lastly, the government action’s “character” is just a temporary halt of rent payments—they are not damaging, or seizing the property, or physically occupying it.<sup>48</sup> Thus, prong one and prong three are not satisfied, so it is highly unlikely that the rent moratorium is a Taking.<sup>49</sup> Although Governor Newsom rendered many contracts meaningless with the moratorium, it is not a Taking according to the *Penn Central* test.

Furthermore, precedent points in the same direction as the test, showing that, historically, similar moratoriums have not been considered Takings either. In “*Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, the U.S. Supreme Court held that a 32-month moratorium on development pending the preparation and adoption of a comprehensive land use plan is not a regulatory taking since development could occur at some point.”<sup>50</sup> Similarly, in our case, the moratorium is only temporary, and the landlord-tenant relationship can continue as usual at some point when it is lifted. Specifically, “[t]o determine economic impact, the court compared the value taken from the property with the value that remains in the property. As stated by the court, a property ‘cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted’.”<sup>51</sup> In our case, it is clear that the

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *COVID-19 Orders: Government Takings?*, BEST BEST & KRIEGER ATTY’S AT L. (July 6, 2020), <https://www.bbklaw.com/news-events/insights/2020/authored-articles/07/covid-19-orders-government-takings>.

51. *Id.*

properties in question are not rendered valueless. This “temporary prohibition on economic use”<sup>52</sup> is just that, temporary, and the property can recover once the moratorium is lifted.

However, without a definite, explicit solution as to how to compensate these landlords for their losses during this moratorium, they will never fully recover the value of their property. They may receive present rent once the moratorium is lifted, but will not be compensated for the months of rent that was never received while the moratorium was in place. This can lead to a negative earning cycle—one where landlords attempt to make up for lost earnings for months, maybe years due to the moratorium.

Furthermore, it is rare to find one sympathetic to landlords; in fact, “given the enormous economic losses caused by COVID-19 and the fact that many people are living paycheck to paycheck, any judge would be reticent to issue a ruling against a struggling tenant.”<sup>53</sup> Although we are seeing a great amount of criticism, as landlords are being directly negatively affected by this order, tenants have been greatly negatively affected by the COVID-19 pandemic, therefore government officials find it necessary to provide eviction relief. The *Penn Central* test and precedent both point towards the necessity of this moratorium and the fact that it is not considered a Taking under the Constitution.

## VI. CHALLENGING THESE ORDERS

Recently, several executive orders implemented in response to the state of emergency caused by the COVID-19 pandemic have been challenged in various states in the United States.<sup>54</sup> Although these cases are different than the eviction moratorium in question, they lend guidance as to the way claims relating to challenges to executive orders during this pandemic are being litigated.

### A. FRIENDS OF DANNY DEVITO V. WOLF

In *Friends of Danny DeVito v. Wolf*, petitioners challenged Governor Wolf’s order in Pennsylvania as the executive order in question prohibited the members of Danny DeVito’s campaign for Pennsylvania State House of Representatives from meeting in their office to run said campaign.<sup>55</sup> They argued that the order did not stop the incumbent Representative, Anita Kulik, from running her campaign as “she retain[ed] access to her office, staff and office equipment.”<sup>56</sup> Respondents rejected the claims, as “the Pennsylvania Constitution and the above-referenced statutory enactments charge the

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52. *Id.*

53. Kendall, *supra* note 40.

54. See *Friends of DeVito v. Wolf*, 227 A.3d 872, 881 (Pa. 2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68-69 (2020); *Iten v. Cnty. of L.A.*, 2021 WL 185088; *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, 141 S.Ct. 1285 (2021).

55. *DeVito*, 227 A.3d at 881 (Pa. 2020).

56. *Id.*

Executive Branch of the state government with combating public health emergencies and providing it with broad powers to do so.”<sup>57</sup> Respondents’ argument reinforces the role of the executive branch in emergencies, which role Governor Newsom performed through his implementation of the eviction moratorium.

Furthermore, these emergency executive powers are triggered by natural disasters.<sup>58</sup> While a pandemic is not a natural disaster in the traditional sense, the court agreed with Respondents “that the COVID-19 pandemic qualifies as a ‘natural disaster’ under the Emergency Code for at least two reasons.”<sup>59</sup> First, the types of disasters specified in the Emergency Code lack commonality and are only similar because “they all involve ‘substantial damage to property, hardship, suffering or possible loss of life.’ In this respect, the COVID-19 pandemic is of the ‘same general nature or class as those specifically enumerated,’ and thus is included, rather than excluded, as a type of ‘natural disaster’.”<sup>60</sup> Second, “[t]here is nothing in the Emergency Code to indicate that the General Assembly intended in any way to narrow the operation of the statute or the Governor’s authority.” Thus, the government implicitly left room in the Code for a disaster, such as the COVID-19 pandemic, to be included as a “natural disaster” for purposes of executive power.<sup>61</sup>

In *Friends of Danny DeVito*, the Pennsylvania Supreme Court concluded that the “pandemic triggered the Governor’s authority under the Emergency Code” and that the Governor had the authority to declare Pennsylvania a disaster area.<sup>62</sup> Similarly, in our case, the COVID-19 pandemic triggered Governor Newsom’s authority under the Emergency Code to declare California a disaster area and treat it as such when implementing Executive Orders.

However, despite the governor’s authority to implement Executive Orders, such orders should not be unduly oppressive, or they should be overruled.<sup>63</sup> In *Friends of Danny DeVito*, the court ruled that, “[f]aced with protecting the health and lives of 12.8 million Pennsylvania citizens, we find that the impact of the closure of these businesses caused by the exercise of police power is not unduly oppressive. The protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power.”<sup>64</sup> The standard to which we should weigh this order against is whether the order is “unduly oppressive.”<sup>65</sup> Similarly to *Friends of Danny DeVito*, the order in our case is used to protect many residents of California

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57. *Id.* at 883.

58. *Id.* at 887.

59. *Id.* at 888.

60. *Id.* at 889.

61. *Id.*

62. *Id.* at 890.

63. *Id.*

64. *Id.* at 892.

65. *Id.* at 890.

and save tenants from bankruptcy and landlords from foreclosure.<sup>66</sup> The purpose of this order is great enough that its effect is not seen as unduly oppressive.

Additionally, the order in *Friends of Danny DeVito* was challenged for violating the separation of powers doctrine and constituting a “taking requiring just compensation,”<sup>67</sup> as our moratorium has similarly been criticized for. In *Friends of Danny DeVito*, the court stated that the separation of powers doctrine was not violated by the order in question because “[t]he Emergency Code specifically recognizes that under its auspices, the Governor has the authority to issue executive orders and proclamations which shall have the full force of law.”<sup>68</sup> Governor Newsom’s eviction moratorium similarly does not violate the separation of powers doctrine as he has the authority to issue it and “have the full force of law.”<sup>69</sup> In *Friends of Danny DeVito*, the court challenged petitioners’ argument that the executive order was a Taking without compensation by stating that “the Executive Order results in only a temporary loss of the use of the Petitioners’ business premises, and the Governor’s reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to “protect the lives, health, morals, comfort, and general welfare of the people.”<sup>70</sup> In our case, any loss is only temporary, and the moratorium serves a greater good of preventing bankruptcy and foreclosure, thus the moratorium should not be ruled as a Taking without just compensation.<sup>71</sup> Lastly, the court in *Friends of Danny DeVito* concluded that Governor Wolf had the statutory authority to issue the Executive Order.<sup>72</sup> As our case is similar to *Friends of Danny DeVito*, and it was determined in that case that the Executive Order in question was constitutional, our executive order is likely constitutional.<sup>73</sup>

One of the likely reasons that Governor Newsom’s orders have been challenged recently is due to the unprecedented situation that the COVID-19 pandemic has created. While “California governors have long made liberal use of executive orders during states of emergency,” such as when “Former Gov. Jerry Brown relied on executive orders after a series of wildfires hit in recent years to accelerate cleanup and rebuilding, reopen schools and extend

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66. *United States: Governor Newsom, Senate President Pro Tempore Atkins and Assembly Speaker Rendon Issue Statement on Eviction Protection Legislation*, MENA REP., 1, <http://uchastings.idm.oclc.org/login?url=https://www-proquest-com.uchastings.idm.oclc.org/trade-journals/united-states-governor-newsom-senate-president/docview/2439498069/se-2?accountid=33497> (Sept. 2, 2020).

67. *DeVito*, 227 A.3d at 892.

68. *Id.*

69. *Id.*

70. *Id.* at 895.

71. MENA REP., *supra* note 66.

72. *DeVito*, 227 A.3d at 903.

73. *Id.*

tax deadlines” and when “Former Governors Pete Wilson and Deukmejian each used executive orders to bypass environmental rules to speed up repairs to freeways after the Northridge and Loma Linda earthquakes, respectively[,]” “none had to grapple with an emergency that spans the entire state and has no clear end to its economic havoc. Nor were they left to essentially govern alone, without the Legislature in session and with courts delaying proceedings.”<sup>74</sup> Thus, while California governors do have precedent to rely on for Executive Orders, the current crisis is so unforeseen, that it is difficult to use precedent to determine its constitutionality. Notably, wildfires and earthquakes are so prevalent in California that, although their occurrence does create a crisis, they are not unprecedented, once-in-a-lifetime crises that demand extraordinarily novel executive orders. This is where it becomes especially difficult to use these past orders to determine the constitutionality of Governor Newsom’s current orders.

#### B. ROMAN CATHOLIC DIOCESE OF BROOKLYN V. CUOMO

However, not all challenges to executive orders that were implemented during the pandemic have been unsuccessful. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, petitioners argued against Governor Cuomo’s executive order banning religious gatherings, and were successful in getting their religious services enjoined.<sup>75</sup> The Court stated that “[w]hile we could presumably act more swiftly in the future, there is no guarantee that we could provide relief before another weekend passes. The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification.”<sup>76</sup> This case shows a success on the part of challengers to lift severe restrictions due to an executive order.

In this case, the order banned the religious gathering of individuals of the Roman Catholic Church, and their challenge was successful because the harm they were suffering was irreparable.<sup>77</sup> Although the challengers succeeded in this case, our case is not that similar, as it does not involve the deterrence of individuals from exercising religious freedom. Additionally, the harm suffered by landlords and tenants is not irreparable, as stated earlier, because this order is only temporary, and they are able to receive past due rent at a later date. Thus, as our case is dissimilar to this case, and this case involved a success on the challengers’ part, it is unlikely that any challengers of our case will succeed.

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74. Kahn, *supra* note 26.

75. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68-69 (2020).

76. *Id.*

77. *Id.* at 66.

### C. *ITEN V. COUNTY OF LOS ANGELES*

While this challenge has not yet been argued in court, Howard Iten, the Los Angeles citizen who has filed to challenge Governor Newsom's moratorium (*See supra* p. 2), alleges the moratorium violates the Contracts Clause of the U.S. Constitution.<sup>78</sup> In *Iten v. County of Los Angeles*, Mr. Iten, "a retired auto repair shop owner and mechanic" is challenging the moratorium because "he owns a one-half fee simple interest in a commercially zoned parcel in the City of Lawndale and the County of Los Angeles" and, "[b]ecause of the eviction moratorium, Mr. Iten is prohibited from evicting, or attempting to evict, his Tenant for failing to pay in full and in a timely fashion under the lease. Further, Mr. Iten is prohibited from charging late fees or interest, as well from attempting to recover back-rent that came due during the eviction moratorium period until twelve months following the moratorium's expiration."<sup>79</sup>

The Contracts Clause of the U.S. Constitution provides, "No State shall . . . make any . . . Law impairing the Obligation of Contracts[.]"<sup>80</sup> "Whether a law unconstitutionally impairs the obligation of contracts depends on three considerations: whether the law substantially impairs existing contractual rights; whether the government has identified a legitimate and significant public interest that the challenged law purportedly serves; and whether the law's impairment of contractual rights is reasonably related to that interest."<sup>81</sup> Plaintiff argues that the "eviction moratorium violates the Contracts Clause of the U.S. Constitution[.]" "because the County's eviction moratorium substantially impairs the lease contracts of Mr. Iten and similarly situated commercial landlords, but is not reasonably related to any legitimate and significant governmental interest or based upon reasonable conditions."<sup>82</sup> Although this case has not yet gone to court, it provides yet another angle for challenging the eviction moratorium, and could result in history-changing precedent if Plaintiff were to succeed in his claim.

## VII. GOVERNOR NEWSOM'S ORDERS

### A. CRITICISM OF THE MORATORIUM

Several of Governor Newsom's orders have been criticized, and specifically the moratorium has been criticized for its one-sided relief. Charles Stocker, a real estate lawyer, said that Governor Newsom's order was "mostly. . . fine," except that the moratorium "is going to cause a lot of

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78. *Iten*, 2021 WL 185088, at 1.

79. *Id.*

80. U.S. Const. art. I, § 10, cl. 1.

81. Complaint at 10, *Iten v. County of Los Angeles*, No. CV 21-00486, filed (C.D. Cal. Sept. 15, 2021).

82. *Id.* at 13.

damage.”<sup>83</sup> He pointed out that if “we stop evictions and all of this payment to landlords, . . . we’re going to see entire apartment complexes or for rent homes go under. And that’s a scary situation. A few families unable to pay rent or be kicked out for paying people may now doom dozens. Compassion is needed, but we also need common sense fiscal responsibility. This executive order takes a side in it instead of trying to help all parties out. And it will end up hurting everyone.”<sup>84</sup> Thus, although this may be improving life for tenants, the domino effect of this order could create great hardships for both landlords and the commercial market in general.<sup>85</sup> Since this order only negatively affects landlords, it is unbalanced with regards to its effect and how it harms or helps.

Furthermore, many have criticized the moratorium for not accomplishing its intended goals, and instead, it “creates chaos in the courts and causes unnecessary confusion for workers who’ve been asked to stay at home.”<sup>86</sup> Additionally, “Brian Augusta, an attorney with the California Rural Legal Assistance Foundation” says that “[a]lthough it’s being billed as a moratorium on evictions, the order only delays a tenant’s legal window for responding in court – allowing them 60 days to respond, rather than five days – when a landlord files an eviction. It doesn’t stop new evictions from being filed.”<sup>87</sup> Thus, not only is the moratorium not accomplishing its goals, but it is also creating an unnecessary delay for the parties involved. While a decision on the moratorium has not yet come from the courts, as some of Governor Newsom’s other orders, it has been heavily criticized, especially with regards to it not successfully accomplishing its intended effects.

## B. CHALLENGES TO OTHER EXECUTIVE ORDERS BY GOVERNOR NEWSOM

### *i. Six v. Newsom*

In *Six v. Newsom*, plaintiffs filed to secure a temporary restraining order against Governor Newsom’s stay-at-home order.<sup>88</sup> In that case, the court established that “a plaintiff may secure a temporary restraining order if he establishes ‘[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest’.”<sup>89</sup> With regards to the first prong, it is determined that “when a state

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83. Evan Symon, *Newsom Signs Executive Order Extending Eviction Moratoriums Until September 30th*, CAL. GLOBE (July 1, 2020, 2:16 PM), <https://californiaglobe.com/section-2/newsom-signs-executive-order-extending-eviction-moratoriums-until-september-30th/>.

84. *Id.*

85. *Id.*

86. Erin Baldassari & Molly Solomon, *Newsom’s Eviction Moratorium ‘Useless, Misleading’ Tenants Groups Say*, KQED (Mar. 27, 2020), <https://www.kqed.org/news/11809328/newsoms-eviction-moratorium-useless-misleading-tenants-groups-say>.

87. *Id.*

88. *Six v. Newsom*, 462 F. Supp. 3d 1060, 1065 (C.D. Cal. 2020).

89. *Id.* at 1067.

or locality exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless: (1) there is no real or substantial relation to public health, or (2) the measures are ‘beyond all question’ a ‘plain, palpable invasion of rights secured by [. . .] fundamental law’.”<sup>90</sup>

Following these guidelines, Governor Newsom’s moratorium is definitely related to public health as it was put in place in reaction to the COVID-19 pandemic. Also, as stated earlier, his moratorium did not gravely deprive landlords or tenants of their rights. In *Six v. Newsom*, the court concluded that, since “Plaintiffs’ claims are unlikely to succeed on the merits—indeed, that no serious questions going to the merits exist—it need not consider the remaining factors[,]” thus the court denied the Plaintiffs’ application for a temporary restraining order.<sup>91</sup> As our case similarly is not likely to succeed on the merits, and the plaintiffs in *Six v. Newsom* were denied their challenge, it is likely that a challenge to Governor Newsom’s order would be denied as well.

*ii. Cross Culture Christian Center v. Newsom*

In *Cross Culture Christian Center v. Newsom*, Plaintiffs’ challenge was similarly unsuccessful as the orders were deemed a permissible exercise of emergency police powers.<sup>92</sup> There, the “Church and its pastor filed action against city, police chief, and state and county officials, alleging that stay-at-home orders enacted by California Governor and county during COVID-19 pandemic impermissibly infringed upon their constitutional and statutory rights to speak, assemble, and practice religion.”<sup>93</sup> For two reasons, that “both stay at home orders flow from valid exercises of state and local emergency police powers,”<sup>94</sup> and that “Plaintiffs are unlikely to show the orders violate the Free Exercise Clause or even implicate RLUIPA’s protection[,]”<sup>95</sup> the Plaintiffs were unlikely to succeed on their claims, and “also fail[ed] to raise serious questions going to the merits of these two claims.”<sup>96</sup> Similar to *Six v. Newsom*, the plaintiffs in this case are unlikely to succeed on the merits, thus their claims are likely to be squashed early on in their challenge.<sup>97</sup>

Furthermore, the court determined that “Plaintiffs fail to show [the orders’] goal, and the means used to achieve it, do not bear a ‘real and substantial relationship’ to preventing widespread transmission of COVID-19.”<sup>98</sup> In our case, the goal of Governor Newsom’s moratorium is to lessen

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90. *Id.* at 1068.

91. *Id.* at 1073.

92. *Cross Culture Christian Center v. Newsom* 445 F. Supp. 3d 758, 766 (E.D. Cal. 2020).

93. *Id.* at 763.

94. *Id.* at 766.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 768.

the burden on parties involved in commercial lease agreements.<sup>99</sup> Clearly, this has a “real and substantial relationship”<sup>100</sup> to prevent eviction, bankruptcy and foreclosure.

Additionally, the court stated that Plaintiffs in *Cross Culture Christian Center* were not likely to succeed on their free exercise claim.<sup>101</sup> The court then denied Plaintiffs’ “ex parte application for a temporary restraining order.”<sup>102</sup> A quote from the “U.S. Supreme Court more than 100 years ago in a case concerning compulsory vaccination during a smallpox epidemic”<sup>103</sup> can help us further understand the treatment of individuals in United States history during pandemics, which quote said, “in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.”<sup>104</sup> In our case, society’s wellbeing is put above that of the individual—specifically, commercial tenants are put above landlords. While this may seem unfair, it is justified by providing relief to the people most at risk.

### iii. *Emergency Exceptions*

The Supreme Court and other courts have expressed their recognition of emergency exceptions “to constitutional claims arising from a public agency’s police power.”<sup>105</sup> For example, the Court quoted the Fifth Circuit:

“[I]ndividual rights secured by the Constitution do not disappear during a public health crisis, but the [*Jacobson*] Court plainly stated that rights could be reasonably restricted during those times” and review of a statute enacted in the name of public health, morals or safety is only available when it “has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights.”<sup>106</sup>

Here, we see a counterargument to those who believe that the executive orders are taking away individual rights guaranteed to them by the Constitution. Although these rights are being restricted, it is being done for the safety and greater good of society, thus it is justified.

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99. Kahn, *supra* note 26.

100. *Six v. Newsom*, 262 F. Supp. 3d at 1060.

101. *Cross Culture Christian Center*, 445 F. Supp. 3d at 771.

102. *Id.* at 772.

103. Best Best & Krieger, *supra* note 50.

104. *Id.*

105. *Id.*

106. *Id.*

In another case, “Senior United States District Judge Dean D. Pregerson ruled on November 13, 2020 that the apartment owners,”<sup>107</sup> when challenging Mayor Eric Garcetti’s eviction moratorium in Los Angeles, “had failed to show ‘irreparable harm’ because (a) there was no immediate threat of foreclosure, and (b) the City Moratorium appeared to be ‘imminently reasonable’ in the context of the unprecedented pandemic.”<sup>108</sup> Judge Pregerson expressed that “‘courts are an imperfect tool to resolve such conflicts,’ as are laws and ordinances that ‘shift economic burdens from one group to another.’”<sup>109</sup> Furthermore, he stated that “lawmakers and not the courts should lead us to a speedy and fair solution.”<sup>110</sup> This court’s reasoning was based on the fact that “landlords are not deprived of their right to sue for unpaid rent, and further found that the injury to the landlords can be remedied with money damages.”<sup>111</sup>

Judge Pregerson emphasizes that lawmakers and not the courts should create the solution, yet he is suggesting that landlords can seek their own solution by going to court and suing for unpaid rent and money damages.<sup>112</sup> Thus, it can be confusing to a landlord as to why lawmakers haven’t attempted to remedy this situation, and landlords are forced to rely upon the courts for a fair solution and must spend their own time and money on finding this solution.

#### iv. *Sutter County*

In Sutter County Superior Court, Judge Sarah Heckman ruled on Governor Newsom’s ability to require “vote-by-mail ballots to be sent to the state’s 22 million registered voters.”<sup>113</sup> Heckman ruled “Newsom’s executive order to send out the vote-by-mail ballots, as well as enact other precautions to reduce the threat of spreading the virus during the elections process, violated the California Constitution because it created new law. Under the state’s constitutional separation of powers, only the Legislature has the power to create laws.”<sup>114</sup> Additionally, the “ruling found that the Emergency Services Act, also referred to as CESA, gives the governor authority ‘to suspend certain statutes, not to amend any statutes or create new ones.’”<sup>115</sup> This Sutter County ruling would seem to point to Governor Newsom’s

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107. Talya Gulezian & Pamela Westhoff, *Federal Judge Blocks Eviction Moratorium Challenge by Los Angeles Apartment Owners*, JD SUPRA (Dec. 14, 2020), <https://www.jdsupra.com/legalnews/federal-judge-blocks-eviction-79929/>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Phil Willon, *Gov. Newsom Rebuked by Sutter County Court for Use of Executive Power Amid COVID-19 Pandemic*, L.A. TIMES (Nov. 2, 2020, 3:54 PM), <https://www.latimes.com/california/story/2020-11-02/gavin-newsom-covid-19-executive-actions-sutter-county-court-ruling>.

114. *Id.*

115. *Id.*

eviction moratorium also being a violation of the California Constitution as he created a new law. While the Emergency Services Act is what gives him the power to suspend laws, he cannot create a new law as an executive authority by allowing a rent freeze for all commercial property.<sup>116</sup> This is where Governor Newsom went wrong with N-28-20 and the eviction moratorium.

In the Sutter County case, “[t]he legal challenge was filed by two Republican state assemblymen, James Gallagher of Yuba City and Kevin Kiley of Rocklin, who are both attorneys and argued the case.”<sup>117</sup> They commented that “[t]oday the judicial branch again gave [Governor Newsom] the check that was needed and that the Constitution requires.”<sup>118</sup> They continued by saying “[n]obody disputes that there are actions that should be taken to keep people safe during an emergency. But that doesn’t mean that we put our Constitution and free society on hold by centralizing all power in the hands of one man.”<sup>119</sup>

Here, we are seeing the balance of powers return to our government, with the check on the executive branch by the judicial branch for taking power from the legislative branch. There is a reason that the power is separated—not only to allow a fair and balanced system, but more specifically, to ensure that situations like this won’t happen—where one man is using his power to change laws in an entire state during a crisis.

Thus, while criticism can only go so far, and several challenges to Governor Newsom’s executive orders have failed, the executive branch cannot create new laws under the California Constitution.<sup>120</sup> Therefore, Governor Newsom’s seemingly unchecked power can and should be checked by the judicial branch.

## VIII. EFFECTS OF THE EVICTION MORATORIUM ORDER

### A. INTENDED ECONOMIC EFFECTS

While many have criticized the effects of this moratorium, its intended economic effects are more widely accepted, despite not being met. It is now understood that “[t]he executive order was written largely to help maintain a lifeline for many people as coronavirus cases continue to rise in California and reopenings across the state being delayed. The order also aims at... reducing the spread of COVID-19 while also continuing important services.”<sup>121</sup> Furthermore, Governor Newsom implemented this order to protect “California renters with COVID-related economic hardship by

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Symon, *supra* note 83.

eliminating the possibility of eviction”<sup>122</sup> for a temporary period and protect “small property owners from foreclosures by adding new accountability and transparency protections.”<sup>123</sup>

However, while landlords and tenants are being affected by the pandemic nationwide, Governor Newsom has stated “California is leading the way by enacting the strongest eviction protections in the nation, which will provide relief for millions of Californians dealing with financial difficulties as a result of COVID-19.”<sup>124</sup> Thus, perhaps the criticism towards Governor Newsom’s moratorium is specifically fueled by its strength in comparison to other states’ orders. Notably, Governor Newsom stated “[t]his law not only provides greatly needed support for tenants, but also provides relief to small property owners in need of assistance to pay for mortgages, thanks to \$2.6 billion in federal stimulus funding.”<sup>125</sup>

Therefore, the moratorium was aimed at relief for tenants and small property owners, and did not aim to relieve hardship on landlords. Thus, not only are the frustrations of landlords justified, but also they are reinforced by the ultimate intentions of this moratorium.

#### B. RESULTING/PREDICTED ECONOMIC EFFECTS

However, despite the well intentions of Governor Newsom when implementing the moratorium, its resulting and predicted economic effects vary greatly from those intentions. For example, “landlords are likely to argue that they suffered a taking without due process or just compensation, and that they have suffered an unfair burden when compared with many other essential businesses and services that have not been forced to provide their goods and services free of charge. As a result, many landlords remain hopeful that legislative action will be taken, at the federal, state and local levels, to provide relief in the form of grants, vouchers or tax credits that allow them to recoup some portion of their losses.”<sup>126</sup> Thus, courts could soon be inundated with tenant-landlord cases in which landlords are attempting to gain money damages and just compensation for these losses.

Although landlords are hopeful that this will happen without the need to go to court and sue for these fees, few predict this legislative action will be taken soon. As “Sonnenblick Development Chairman Bob Sonnenblick said,” this is a “two-part structure,” “solving only half the problem is going

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122. MENA Report, *supra* note 66.

123. MENA Report, *supra* note 66.

124. OFF. OF GOVERNOR GAVIN NEWSOM, *Governor Newsom Signs Legislation to Extend Eviction Moratorium and Assist Tenants and Small Property Owners Impacted by COVID-19* (Jan. 29, 2021), <https://www.gov.ca.gov/2021/01/29/governor-newsom-signs-legislation-to-extend-eviction-moratorium-and-assist-tenants-and-small-property-owners-impacted-by-covid-19/>.

125. *Id.*

126. Gulezyan & Westhoff, *supra* note 107.

to create huge foreclosures when every tenant stops paying rent.”<sup>127</sup> Furthermore, he stated that “[i]f the tenants stop paying rent and the owners can’t pay their mortgage, they’ll go into default and the banks are going to foreclose. You’re going to see mass foreclosures across the city.”<sup>128</sup> Sonnenblick noted this moratorium is just a temporary “solution” to the problem. A halt on rent payment will result in a domino effect of missed payments by many participants, which will eventually result in mass foreclosures after the eviction moratorium is lifted.<sup>129</sup> Thus, by “fixing” one part of this two-part structure, Governor Newsom is ultimately creating more problems for landlords and tenants.<sup>130</sup>

An especially grave effect of this moratorium could be the impact of unpaid mortgages on pension funds. In fact, “Carol Galante, faculty director for the Terser Center for Housing Innovation at the University of California, Berkeley, explained, ‘[t]hose mortgages are often securitized. They’re packed up into bonds and they’re sold as investments, and those investors are expecting a certain interest payment off of those securities on an ongoing basis. If they do not get those, then those investors suffer... the fact is that many of those investors are things like pension funds’.”<sup>131</sup> And, these pension funds often “benefit teachers, first responders and others, in ways that may not be immediately apparent.”<sup>132</sup> Thus, while on the surface this moratorium involves the landlord-tenant relationship, it doesn’t just negatively affect landlords—on top of that we must take into account its effect on investments and pension funds. At first glance it seems like we are providing relief to tenants and only temporarily negatively impacting landlords, however, the problem goes much broader than that and can derail our entire economy.<sup>133</sup>

Lastly, as the COVID-19 pandemic has brought about an unprecedented economic state in our country, it is difficult to predict whether the promises of this order will be kept. For example, “[w]e can make a strong argument that once the Governor’s order expires, any surviving repayment periods are invalid and unenforceable. Once the Governor’s order expires, counties and cities can no longer enforce an order suspending eviction statutes to permit tenants to defer rent due and owing under a lease. Such an order, prohibiting evictions based on the failure to repay rent due and owing, would run afoul of the California Constitution.”<sup>134</sup> Although counties and cities can currently tailor the moratorium according to the needs of their citizens, once the

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127. Joseph Pimentel, *Landlords Push Back as California Cities Order Halt to CRE Evictions*, BISNOW (Mar. 22, 2020), <https://www.bisnow.com/los-angeles/news/commercial-real-estate/la-mayor-orders-moratorium-on-commercial-evictions-landlords-respond-103504>.

128. *Id.*

129. *Id.*

130. *Id.*

131. Kahn, *supra* note 26.

132. *Id.*

133. *Id.*

134. Asian American Bar Ass’n of the Greater Bay Area, *supra* note 9.

moratorium is lifted, it is likely that no action can be taken with regards to rent due because only the Governor has the power to issue these executive orders.<sup>135</sup> Furthermore, even if Governor Newsom's executive order is not seen as a violation of the California Constitution, despite his using of executive power to make new laws, further violations of the California Constitution are likely to occur due to county and city officials attempting to fix the commercial rent deferral system.<sup>136</sup> Thus, although Governor Newsom's intended economic effects to this moratorium were well-intentioned, they fall short of their intentions, and, in turn, pose great consequences with regards to landlord-tenant relationships and the repayment of rent.

#### IX. PROPOSAL – PREVENTING HARMFUL PRECEDENT

While California has not implemented a plan for future pandemics or for how to deal with rent and evictions in our current pandemic, the City of San Francisco has created a plan of its own. They have “divided ‘Covered Commercial Tenants’ into four tiers based on the number of full-time employees they have”.<sup>137</sup> This tiered system provides the most protection to those tenants who are most directly affected by the pandemic.<sup>138</sup> Notably, “[t]he City of San Francisco has stated that the financial hardships caused by COVID-19 have most adversely affected small businesses and therefore such tenants require additional protections.”<sup>139</sup> The City of San Francisco has created this system in order to better categorize those in need and help facilitate the repayment of past rents due.<sup>140</sup>

This is a good example of what California as a state should be doing. There should be a law created in which current commercial rent and future commercial rent during crises can be determined—both for a current payment plan and repayment of past rent due. Without this written legislative guide, once the moratorium is lifted, landlords could end up without any past-rent-due compensation and, if a crisis of this magnitude were to happen again, California officials would still be unsure how to navigate this situation. Not only would this send an unclear message as to how situations like this should be handled, but it would create precedent for future situations in which the government could look to Governor

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135. *Id.*

136. *Id.*

137. Jonathan August & Manuel Fishman, *Buchalter COVID-19 Client Alert: San Francisco Commercial Eviction Moratorium Update*, BUCHALTER (Dec. 21, 2020), <https://www.buchalter.com/publication/buchalter-covid-19-client-alert-san-francisco-commercial-eviction-moratorium-update/>.

138. *Id.*

139. *Id.*

140. *Id.*

Newsom's past orders and actions and choose to just rule according to that, instead of according to a law set in stone.

As is evident from the current situation of Wisconsin's government, without a guide as to how this current pandemic should be governed, California could end up with future conflict between government representatives as to whether executive power during a pandemic should be handled according to Governor Newsom's precedent or whether that precedent is invalid.

## X. CONCLUSION

While no current legislation or case law points towards Governor Newsom illegitimately exercising his executive powers during this pandemic, the California government must create specific laws pertaining to executive power usage during pandemics or we could be faced with an abuse of power during possible future pandemics. Just because previous challenges to executive orders during this pandemic have been unsuccessful, does not mean that the moratorium is justified.

Moreover, our legal system must be flexible and turn into a system that is fully equipped for when another pandemic is inevitably brought upon us. While it is customary to base current legislature on past cases and law, our legal system needs to be ever evolving and, specifically, we must be willing to change and adapt to curveballs that are thrown our way so that our government can take specific actions towards a fair and uniform solution. This moratorium's threat as a possible Taking, a possible violation of the Contracts Clause, and a possible overall abuse of power, while not proven in a court of law or through laws which were written years ago, still creates grave consequences in our society today. Thus, our best next step is to decide and declare, through law and precedent in our court system, a current solution, and a future guide as to how to solve a rent crisis in inevitable future pandemics.