

PANDEMIC RESIDENTIAL EVICTION MORATORIUMS: AN ANALYSIS OF JUDICIAL IMPLEMENTATION AND RECOMMENDATIONS FOR THE FUTURE

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I. INTRODUCTION

When you think of government officials with a designed public health role, trial court judges do not immediately come to mind. But, judges were forced to confront a myriad of issues concerning residential evictions during an outbreak of a highly infectious respiratory illness.¹ While judges usually had nothing to do with establishing a quarantine, whether a quarantine would continue was often dependent upon a judicial decision.² You cannot “stay at home [to] save lives” if you no longer have a home.³ The executive branch attempted to take a leadership role in guiding the eviction process through the pandemic; however, as will be shown, much of that guidance was problematic.⁴

This Article will discuss how one set of judges in a major metropolitan area responded to state and then to federal residential eviction moratoriums.⁵ On occasion, courts had to create legal fiction to find a way for various executive orders to work in conjunction with longstanding state law.⁶ Although most state law discussions will focus on Arizona, especially on Maricopa County, the same or similar problems arose in virtually every jurisdiction.⁷ Finally, the authors will make some recommendations for the future.⁸

1. See generally *States Figuring Out How to Implement CDC Eviction Moratorium Order*, NAT'L CTR. STATE CTS., <https://www.ncsc.org/newsroom/at-the-center/2020/states-figuring-out-how-to-implement-cdc-eviction-moratorium-order> (last visited Mar. 1, 2022).

2. See generally Adam Liptak & Glen Thrush, *Supreme Court Ends Biden's Eviction Moratorium*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/2021/08/26/us/eviction-moratorium-ends.html>.

3. *The Best Thing Everyday Americans Can do to Fight Coronavirus? #Stayhome, Save Lives*, USA TODAY (Mar. 24, 2020, 9:17 PM), <https://www.usatoday.com/story/opinion/2020/03/15/coronavirus-stay-home-hel-america-save-lives-column/5054241002/>.

4. See discussion *infra* Section I.G (describing the controversial nature of the federal eviction moratorium).

5. See discussion *infra* Section I.B (describing how the Maricopa County Best Practices Committee reconciled executive orders with state law).

6. See discussion *infra* Section I.B (describing how the Maricopa County Best Practices Committee reconciled executive orders with state law).

7. See generally Liptak & Thrush, *supra* note 2.

8. See *infra* Part II (recommending how lawmakers should craft future eviction moratoriums).

II. BACKGROUND

The twenty-six justice courts⁹ in Maricopa County are high-volume courts. They serve the area in and around Phoenix, Arizona. Even though some things started to slow down due to COVID-19, in March 2020, justice courts still had the following incoming cases filed: 437 driving under the influence cases;¹⁰ 1,657 additional criminal traffic cases;¹¹ 647 additional misdemeanor cases;¹² 8,686 civil traffic cases;¹³ 983 small claims cases;¹⁴ 3,931 residential eviction actions;¹⁵ 6,541 civil lawsuits;¹⁶ 316 domestic violence orders of protection;¹⁷ and 152 injunctions against harassment.¹⁸ While nearly 4,000 evictions filed in one month in one county may seem high, the usual average was closer to 6,000.¹⁹ In fact, in December 2019, the number was 6,218.²⁰ March 2020 was comparatively light.

The vast majority of residential eviction cases allege non-payment of rent as one of the allegations.²¹ In Arizona, prior to filing an eviction action for nonpayment of rent, the landlord must give the tenant a five-day cure notice.²² This notice must: (1) state the amount of any unpaid rent and any other amount due; (2) notify the tenant of the landlord's intent to terminate the lease if the amount due is not received within five days after the notice is given to the tenant, and (3) inform the tenant that if the amount due is not paid, the tenant must then surrender possession of the residence.²³ After that, the landlord can file an eviction action.²⁴

9. In Arizona, a justice of the peace and a constable are elected to four-year terms to serve each independent justice court. ARIZ. REV. STAT. ANN. §§ 22-101 to -104 (2021).

10. *Statistics*, AZCOURTS, <https://www.azcourts.gov/statistics/Interactive-Data-Dashboards/JPC> (last visited Mar. 1, 2022).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*; see Kayla Schwenk, *Maricopa County Eviction Attempts Reach Highest Level Since Pandemic Began*, PHX. NEW TIMES (Feb. 3, 2022, 6:00 AM), <https://www.phoenixnewtimes.com/news/maricopa-county-landlord-eviction-attempts-skyrocket-once-again-after-covid-19-12950983>.

16. AZCOURTS, *supra* note 10.

17. *Id.*

18. *Id.*

19. See Schwenk, *supra* note 15.

20. *Id.*

21. See Kyle Nelson et al., *Evictions: The Comparative Analysis Problem*, 31 HOUS. POL'Y DEBATE 696, 701 (2021).

22. ARIZ. REV. STAT. ANN. § 33-1368(A)(2) (2021).

23. *Id.* § 33-1368(B). If the allegation alleges non-payment of rent for a space in a mobile home park, then the landlord must give the tenant a seven-day notice. *Id.* § 33-1476(B); see also Daniel W. Bernal, *Pleadings in a Pandemic: The Role, Regulation, and Redesign of Eviction Court Documents*, 73 OKLA. L. REV. 573, 573 (2021) (suggesting that “tenants who receive landlord-created (as opposed to court-created) pleading documents are 16% less likely to attend their eviction hearing.”).

24. ARIZ. REV. STAT. ANN. § 33-1337 (2021).

Many states are “pay and stay” jurisdictions.²⁵ In those cases, a tenant can pay all of the rent and any late fees any time before the lawsuit is filed and avoid eviction.²⁶ If the eviction action has been filed, then the tenant must pay all past due rent, late fees, attorney’s fees and court costs.²⁷ If the tenant does so any time before a judgment is entered, he or she can avoid eviction.²⁸ However, after a judgment has been entered, reinstatement of the lease is generally solely in the landlord’s discretion.²⁹

Residential eviction actions typically move through a courthouse significantly faster than any other type of litigation.³⁰ Depending on the aggressiveness of the landlord, tenants who fail to pay rent can be removed from their residence in about two and a half weeks in some jurisdictions.³¹ If the procedural requirements have been met, then often the only defense to an allegation of nonpayment of rent is proof that the rent actually was paid.³² In Arizona, once the summons is served, a court date is set for the landlord and the tenant to appear in no more than six and not less than three days.³³

A. A Governor Orders Evictions be Postponed

On March 24, 2020, Arizona Governor Doug Ducey issued an executive order directing that tenants not be evicted if the tenant had been impacted by COVID-19.³⁴ The order listed specific criteria and required a tenant provide

25. See Phillip Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 641 (2019).

26. ARIZ. REV. STAT. ANN. § 33-1368(B) (2021). Also, a landlord can obtain a judgment for rent, costs, and attorney’s fees where possession of the dwelling was returned to landlord after the eviction was filed but before the judgment was signed. *Keenen v. Biles*, 17 P.3d 111, 113 (Ariz. Ct. App. 2001).

27. ARIZ. REV. STAT. ANN. § 33-1368(B) (2021).

28. *Id.*

29. *Id.*

30. See generally Hon. Gerald A. Williams, *Representing Residential Tenants in Eviction Actions*, 48 ARIZ. ATT’Y 12 (Nov. 2011) (discussing the speed in which judgments are signed).

31. *Id.* at 16 n.36.

32. *Id.* at 12.

33. ARIZ. REV. STAT. ANN. § 33-1377 (2021); Williams, *supra* note 30, at 12 (discussing the Arizona eviction process for nonpayment of rent).

34. Postponement of Eviction Actions, Ariz. Exec. Order No. 2020-14 (Mar. 24, 2020), https://azgovernor.gov/sites/default/files/eo_2020-14.pdf; see also Hon. Gerald A. Williams, *About the Governor’s No Evictions Order*, GLENDALE STAR, Apr. 9, 2020, at 10; Press Release, Cmty. Legal Servs., Ariz. Tenants Must Pay Their May 2020 Rent (Apr. 28, 2020); *Guidance for Processing Eviction Matters During the COVID-19 Pandemic*, ARIZ. OFF. CTS. (Apr. 29, 2020), <http://co.la-paz.az.us/Documentcenter/view/5212/Guidance-for-processing-eviction-mattersduring-the-covid-19-pandemicpdf>. Constables are elected at the same time as justices of the peace, but constables are members of the executive branch. ARIZ. REV. STAT. ANN. §§ 22-131 to -138 (2021). Cf. Ugochi Anaebere-Nicholson, *Evictions in a COVID-19 World*, 62 ORANGE CNTY. LAW. 32, 32 (2020) (California’s response); Adam J. Espinosa & Javon Quarles, *The COVID-19 Eviction Impact*, 50 COL. LAW. 43, 43–47 (2021) (Colorado Law); Cashauna Hill, *Evictions and the COVID-19 Pandemic*, 35 A.B.A. PROB. & PROP. 43, 43–46 (2021) (Louisiana’s response); Kendall Lewellen, *There’s No Place Like Home: Legal Aid Programs Respond to the COVID-19 Crisis*, 56 ARK. LAW. 42, 42 (2021) (Legal aid programs in Arkansas); Karen Merrill Tjapkes & Ashley Lowe, *COVID-19 Eviction Crisis: Large-Scale Development of Eviction Diversion*

notice to his or her landlord, but the order applied broadly to any tenant who was quarantined, to any tenant who had a member of their household quarantined, or to any tenant who had suffered a substantial loss of income due to COVID-19.³⁵ The order focused on medical issues and also covered anyone with an underlying health condition that made them more susceptible to COVID-19, but it also applied to parents staying home because their child's school had closed.³⁶

This order did not go through a legislative or rule-making process and created quite a conundrum for courts to figure out how to implement.³⁷ The Maricopa County Justice Court (MCJC) Best Practices Committee concluded that the governor's order did not change any aspect of landlord and tenant law until the point where the constable arrived at the residence to serve the writ of restitution so that the order only affected the executive branch and,

Programs in Michigan, 100 MICH. BAR J. 36, 36–39 (2021) (examining rental assistance and eviction prevention efforts in Michigan).

35. Postponement of Eviction Actions, Ariz. Exec. Order No. 2020-14 stated in part:

1. Unless a court determines on motion of the parties that enforcement is necessary in the interest of justice or is in accordance with A.R.S. § 33-1368(A), pursuant to A.R.S. §§ 26-303 et al, 36-787, all Arizona Peace Officer Standards and Training Board certified law enforcement officers and any person subject to the jurisdiction of the Constable Ethics Standards and Training Board, shall temporarily delay enforcement of eviction action orders for residential premises when one of the following circumstances exist and are documented to the landlord or property owner:

- a. The individual is required to be quarantined based on their diagnosis of COVID-19.
- b. The individual is ordered by a licensed medical professional to self-quarantine based on their demonstration of symptoms as defined by the Centers for Disease Control and Prevention.
- c. The individual is required to be quarantined based on someone in the home being diagnosed with COVID-19.
- d. The individual demonstrates that they have a health condition, as defined by the Centers for Disease Control and Prevention, that makes them more at risk for COVID-19 than the average person.
- e. The individual suffered a substantial loss of income resulting from COVID-19, including:
 - i. Job loss;
 - ii. Reduction in compensation;
 - iii. Closure of place of employment;
 - iv. Obligation to be absent from work to care for a home-bound school-age child; or
 - v. Other pertinent circumstances.

Postponement of Eviction Actions, Ariz. Exec. Order No. 2020-14 (Mar. 24, 2020), https://azgovernor.gov/sites/default/files/eo_2020-14.pdf.

36. *Id.* California Governor Gavin Newsom issued an executive order that prohibited eviction enforcement against tenants who were being evicted for non-payment of rent and who could document an impact from COVID-19 (e.g., layoff, wage loss, not able to work due to illness in self or household member, or lack of childcare due to school closure). Cal. Exec. Order N-37-20 (Mar. 27, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-EO-N-37-20.pdf>.

37. See generally *Guidance for Processing Eviction Matters during the COVID-19 Pandemic*, ARIZ. ADMIN. OFF. CTS. (Apr. 29, 2020), <http://co.la-paz.az.us/Documentcenter/view/5212/Guidance-for-processing-eviction-mattersduring-the-covid-19-pandemicpdf>.

therefore, did not violate the separation of powers doctrine.³⁸ But, due to a widespread belief that Arizona had banned residential tenants from being evicted, there was a need for justices of the peace to explain.³⁹

The MCJC Best Practices Committee coordinated with constables and prepared its first Best Practice—written guidance on how to implement the governor’s executive order.⁴⁰ The order provided a framework for tenants to request protection, but how it would be implemented remained open.⁴¹

Any tenant could trigger the relief provided in the executive order by providing their landlord with written documentation of their belief that the order should apply to them.⁴² A text or an e-mail likely would have been sufficient, but the Arizona Judicial Branch developed a printable form for tenants to use.⁴³ In Maricopa County, the constables agreed to give tenants five additional days to get this documentation to their landlord.⁴⁴ If the tenant showed this documentation to the constable, then the constable would not enforce the writ.⁴⁵

At that point, the ball was back in the landlord’s court to allege that the tenant did not have a qualifying condition.⁴⁶ They could do so by filing a motion to compel with the court that issued the writ.⁴⁷ The governor’s order required no court action before that point, but it did create some unique legal issues.⁴⁸

38. See *Maricopa County Justice Courts Best Practices*, MARICOPA CNTY. JUST. CTS. 1–4 (Apr. 29, 2020), https://assets.noviams.com/novi-file-uploads/ama/COVID-19/Maricopa_County_Justice_Courts_-_Best_Practices.pdf.

39. See *id.* In addition to state law remedies for tenants, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act. 15 U.S.C. § 9058; see *infra* note 248 (discussing a federal case that challenged the CDC’s eviction ban).

40. See MARICOPA CNTY. JUST. CTS., *supra* note 38. This Best Practice was completed and distributed the day after the governor issued his executive order. *Id.* On April 29, 2020, it was amended to cover additional issues that had arisen. *Id.* Charles Adornetto, Maricopa County Justice Courts Judicial Education Officer, was the primary author of the Best Practice. *Id.*; see also MICHAEL McDONALD ET. AL., PIMA COUNTY EVICTION AND HOMELESSNESS PREVENTION TASK FORCE REPORT 1–6 (Dec. 2020), https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/CSET/CSET%20newsroom/2020/Eviction%20Task%20Force/Final%20Task%20Force%20ereport1208.pdf (discussing the eviction crisis in Pima County).

41. See MARICOPA CNTY. JUST. CTS., *supra* note 38.

42. See *id.* at 2.

43. See *Notice to Landlord-Postponement of Eviction Action*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/selfservicecenter/Landlord-Tenant-Disputes-Eviction-Actions/Notice-to-Landlord-Postponement-of-Eviction-Action?fbclid=IwAR25vPTRst3-jJektTvPf2VzW35qmsHnDmlCurrklXaxsGlhPH7suRTKVkg> (last visited Mar. 1, 2022).

44. MARICOPA CNTY. JUST. CTS., *supra* note 38, at 2.

45. *Id.*

46. *Id.*

47. *Id.* From March 2020 to June 2020, the justice courts in Maricopa County heard 249 motions to compel enforcement of writs of restitution. *Justice Court Case History*, MARICOPA CNTY. JUST. CTS., <http://justicecourts.maricopa.gov/findacase/casehistory.aspx> (last visited Mar. 1, 2022). That comparatively small number was perhaps an indication that most landlords and their tenants were resolving issues on their own. *Id.* Of that 249, 163 were granted (landlord prevailed), sixty were denied (tenant prevailed), twenty-four became moot, and two were continued. *Id.*

48. See MARICOPA CNTY. JUST. CTS., *supra* note 38.

B. The Governor's Order Created a Legal Fiction

The legal status of a tenant who remains in possession of the residence while the execution of the writ of restitution has been postponed was unclear.⁴⁹ There is no recognized term or category to describe such a situation.⁵⁰ The recognized options, such as holdover tenant,⁵¹ tenant at sufferance, trespasser, or squatter, did not seem to apply.⁵² If the tenant was no longer a tenant, could the landlord turn off the utilities?⁵³ Would the landlord's acceptance of rent, after an eviction judgment had been signed, create a new tenancy?⁵⁴

"Traditionally, and unquestionably, an eviction judgment terminated a lease."⁵⁵ However, our Best Practices Committee determined that the only way to merge the executive order with Arizona law was to interpret the order as creating a temporary exception and hold that a residential lease (during the time of the executive order) was not terminated either until the writ was actually executed or until the tenant returned the keys to the landlord.⁵⁶ This interpretation furthered the intent of the executive order and avoided the absurd result of a former tenant remaining in possession of a residence without the protections of either the lease or state law.⁵⁷

The governor's executive order also had a practical impact. Many landlords chose not to even file residential eviction actions while the postponement order was in effect.⁵⁸ These tables provide comparative data for Maricopa County.⁵⁹

Evictions Filed	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.
2019	4,363	5,029	5,817	5,669	6,071	6,243	6,099	6,226	5,804
2020	3,917	1,805	1,480	1,617	1,768	2,171	2,863	3,383	3,174
Decrease	10.22%	64.11%	74.56%	71.48%	70.88%	65.23%	53.06%	45.66%	46.20%

49. *See id.*

50. *See id.*

51. *See id.*; ARIZ. REV. STAT. ANN § 33-1375 (2021).

52. *See* MARICOPA CNTY. JUST. CTS., *supra* note 38; ARIZ. REV. STAT. ANN § 33-1375 (2021).

53. *See* ARIZ. REV. STAT. ANN. §§ 33-1322 to -1324 (2021) (landlord obligations); *id.* §§ 33-1363 to -64, -67 (tenant remedies).

54. *See id.* §§ 33-1322 to -1324 (landlord obligations); *id.* §§ 33-1363 to -64, -67 (tenant remedies).

55. MARICOPA CNTY. JUST. CTS., *supra* note 38, at 4.

56. *Id.*

57. *Id.*

58. *See* MARICOPA CNTY. JUST. CTS., *supra* note 47

59. *Id.* The justice courts in Maricopa County have a centralized Justice Court Administration that performs many functions, including the collection of case management data. *Id.* The information for these two tables is from Communications Officer Scott Davis. *Id.*

Writs Issued*	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
2019	1,663	1,224	1,135	1,338	1,541	1,411	1,723	1,739	1,689	1,851	1,553	1,589
2020	1,533	1,305	976	641	534	607	666	735	1,000	1,025	908	1,114
% change from prior yr	-7.82%	-6.62%	-14.01%	-52.09%	-65.35%	-56.98%	-61.35%	-57.73%	-40.79%	-44.62%	-41.53%	-29.89%
2021	108	159	206	139	101	254	217	168	310	381	189	461
% change from prior yr	-92.95%	-87.82%	-78.89%	-78.32%	-81.09%	-58.15%	-67.42%	-77.14%	-69.00%	-62.83%	-79.19%	-58.62%

Because of changes instituted to ease the spread of COVID-19, the Maricopa County Justice Courts changed the practice of in-person eviction hearings.⁶⁰ Nearly all eviction cases proceeded initially by telephone and subsequently by video.⁶¹ Courts provided the parties with a phone number and a code that would connect them to a conference call.⁶² Although the judge was often the only person present in the courtroom, the proceedings were on the record.⁶³ Prior to a trial, the parties had to get their proposed exhibits to the court in advance.⁶⁴ They usually did so as an e-mail attachment.⁶⁵

C. The State Chief Justice Issued an Administrative Order Addressing Evictions

On July 7, 2020, Arizona Chief Justice Robert Brutinel issued an administrative order titled *Disposition of Residential Eviction Cases During the Public Health Emergency*.⁶⁶ Several key points from the MCJC Best Practice were incorporated into this order.⁶⁷

60. *Notices From Maricopa County Justice Courts*, MARICOPA CNTY. JUST. CTS., <http://justicecourts.maricopa.gov/Notices/covid-19.aspx> (last visited Mar. 1, 2022).

61. *Id.*

62. Fernanda Galan Martinez, *Here Are the Advantages of the Court System Going Virtual*, AZ BIG MEDIA (Nov. 30, 2021), <http://azbigmedia.com/business/here-are-the-advantages-of-the-court-system-going-virtual/>.

63. Matt Hesketh & Sean Moore, *What You Should Know About How Covid-19 is Affecting Courts in Arizona*, SHERMAN & HOWARD, <https://shermanhoward.com/publications/what-you-should-know-about-how-covid-19-is-affecting-courts-in-arizona> (last visited Mar. 1, 2022).

64. *See Exhibition Submissions Format*, CLERK OF THE SUPERIOR CT. MARICOPA CNTY. ARIZ., <http://clerkofcourt.maricopa.gov/services/exhibits-submission/exhibit-submissions-formed> (last visited Mar. 1, 2022).

65. *Id.* The virtual appearance option became so popular that the landlord bar requested the legislature make the option mandatory. ARIZ. REV. STAT. ANN. § 22-206 (2021).

66. *Disposition of Eviction Cases During the Public Health Emergency*, ARIZ. SUP. CT. (July 7, 2020), <http://www.azcourts.gov/portals/22/admorder/orders20/2020-105Final.pdf?ver=2020-07-07-153304-167>. The Chief Administrative Judge for New York had previously ordered that all eviction proceedings and all eviction orders would be suspended. Administrative Order of the Chief Administrative Judge of the Courts, No. A0/78/20 (Mar. 22, 2020), <https://nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>. Evictions for non-payment of rent were deemed to be non-essential filings and were suspended. *Id.*

67. ARIZ. SUP. CT., *supra* note 66.

Many had expressed concerns that writs of restitution that had been postponed for several weeks would suddenly be served on tenants with little or no notice.⁶⁸ The order addressed that concern by mandating that postponed writs could not be served without a justice court first granting a motion to compel.⁶⁹

The administrative order also provided legal authority for the legal theory that a resident who remained in the residence while the writ was postponed was still a tenant because the order specifically authorized landlords to file motions to amend residential eviction judgments.⁷⁰ The legal and case management theories behind the administrative order were that justice courts could have a single hearing that could resolve issues concerning any unpaid accrued rent and, when necessary, provide the tenant with the standard five days of additional time to move prior to any writ being issued.⁷¹

An option outside of the administrative order was for landlords to resolve remaining issues by initiating a second eviction action concerning the same property.⁷² In such a case, the first judgment presumably would be vacated and any outstanding rent balances and other permissible monetary damages would be incorporated into the new judgment.⁷³ Although judges cannot select the format of the cases that come before them, the authors of our Best Practices argued against this option.⁷⁴

The main problems with a second eviction action are that everything associated with a second case arguably unnecessarily hurt tenants.⁷⁵ A second case triggered a second set of court costs; but much more significantly, even if the first judgment was set aside, anyone performing a background check on the tenant would see that a landlord filed two eviction actions against them with two different case numbers.⁷⁶ Many might inappropriately conclude that the tenant had been evicted twice.⁷⁷

68. Some of these concerns may have been somewhat alleviated by an Arizona statute that generally prohibits someone outside of the public health community from entering a quarantined residence. ARIZ. REV. STAT. ANN. § 36-788 (2021).

69. ARIZ. SUP. CT., *supra* note 66, at 3.

70. *Id.*

71. ARIZ. REV. STAT. ANN. § 12-1178(C) (2021). Included as an attachment to the Chief Justice's Administrative Order was a three-page sample form titled, "Consent Order for Conditional Dismissal (Eviction Action)." ARIZ. SUP. CT., *supra* note 66, at 4. It provided a mechanism for landlords and tenants who wanted to dismiss the eviction action but still have an enforceable way for a landlord to obtain money damages and possession without having to file a new eviction action case. *Id.*

72. *See Eviction Actions: Landlord/Tenant*, MARICOPA CNTY. JUST. CTS., <http://justicecourts.maricopa.gov/CaseTypes/eviction.aspx> (last visited Mar. 1, 2022).

73. *See id.*

74. MARICOPA CNTY. JUST. CTS., *supra* note 38, at 4.

75. *See generally* MARICOPA CNTY. JUST. CTS., *supra* note 72.

76. *See generally id.*; Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times*, CONSUMER REPS. (Mar. 11, 2021), <http://consumerreports.org/algorithm-mic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/>.

77. *See generally* Waddell, *supra* note 76.

D. The Governor Extended and Replaced His Orders, But Did They Apply to Expired Leases?

Governor Ducey's executive order, directing that enforcement of residential evictions be postponed, was set to expire on July 24, 2020.⁷⁸ At an afternoon press conference on July 16, 2020, he announced that the order was being extended until October 31, 2020,⁷⁹ but there were additional conditions. In addition to previous documentation requirements, tenants requesting protection under the executive order after August 21, 2020, were now also required to prove that they were willing to participate in a payment plan and had applied for rental assistance.⁸⁰

The extended order created some additional legal issues. For example, given the length of time that eviction enforcement had been postponed, leases started to expire.⁸¹ As such, were evictions based on the lease not being renewed covered by the governor's executive order? The consensus opinion of the MCJC Best Practices Committee was "yes."⁸²

An argument could certainly be made that the governor's executive order only applied to parties that were in a landlord-tenant relationship.⁸³ If

78. Postponement of Eviction Actions, Ariz. Exec. Order No. 2020-14 (Mar. 24, 2020), https://azgovernor.gov/sites/default/files/eo_2020-14.pdf.

79. Continued Postponement of Eviction Enforcement Actions, Ariz. Exec. Order No. 2020-49 (July 16, 2020), <https://azgovernor.gov/sites/default/files/eo2020-49.pdf>.

80. *Id.* The language of the new order eliminated tenants from requesting a purely medical exemption. *Id.* Paragraph 3 stated: "After August 21, 2020, a tenant, lessee[,], or resident is entitled to the delay in the enforcement of a writ of restitution for residential premises outlined in paragraph 1 provided they demonstrate the following:" financial hardship due to COVID-19 and submission of an application for rental assistance. *Id.* But, paragraph 1 also included all of the medical reasons to seek an eviction postponement. *Id.* When paragraph 3 was read literally, the only basis for a tenant to seek relief after August 21, 2020, was financial hardship. *Id.* In theory, a tenant with active COVID-19 could be evicted, but a tenant who had not paid rent since March could stay through Halloween. *See id.* However, in reality, someone with active COVID-19 was also likely experiencing a financial hardship. *See generally id.* The Arizona Supreme Court Administrative Office of Courts published a Tenant Checklist detailing what a tenant needed to do to postpone an eviction action after August 21, 2020. *Notice to Landlord—Postponement of Eviction Action*, AZ.COURTS.GOV, <https://www.azcourts.gov/selfservice/landlord-tenant-disputes-eviction-actions/notice-to-landlord-postponement-of-eviction-action> (last visited Mar. 1, 2022); *see also* Gerald A. Williams, *Judge Explains New Eviction Requirements*, Foothills Focus, Aug. 12, 2020, at 5.

81. Continued Postponement of Eviction Enforcement Actions, Ariz. Exec. Order No. 2020-49 (July 16, 2020), <https://azgovernor.gov/sites/default/files/eo2020-49.pdf>.

82. *See* MARICOPA CNTY. JUST. CTS., *supra* note 38.

83. *See* Continued Postponement of Eviction Enforcement Actions, Ariz. Exec. Order No. 2020-49 (July 16, 2020). The duration of a rental agreement can be any length on which the parties agree. ARIZ. REV. STAT. ANN. § 33-1314(D) (2021). However, if a lease expires, and the tenant remains in possession, and the landlord continues to accept rent in the amount stated in the lease, then the terms of the lease continue to govern the landlord and tenant relationship; except now, the term of the lease is month-to-month. *Id.* Either side can terminate a month-to-month tenancy by giving a 30-day notice to the other. *Id.* § 33-1375. A month-to-month tenancy "is not a continuing right of possession[;]. . . [it] ends and recommences at the expiration of every month." *Thompson v. Gin*, 556 P.2d 17, 18 (Ariz. Ct. App. 1976) (citations omitted). In addition, "tenant" is defined to mean a "person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others." ARIZ. REV. STAT. ANN. § 33-1310(17) (2021).

the lease has expired, then that relationship has as well. In addition, landlords could justifiably complain if their leases were being involuntarily extended with tenants who were not paying the full amount of rent that was due.⁸⁴ When eviction moratoriums were litigated before the Virginia Supreme Court, a dissenting justice captured the frustration of landlords around the nation:

It does not matter whether the landlord will eventually get paid everything that he is owed (a highly optimistic supposition at best) or whether he can collect future rents if the tenant becomes employed or starts receiving government subsidies. What the landlord wants is possession of his property. He does not want to continue in a breached lease against his will.⁸⁵

While such arguments are well-grounded, in Arizona, the effect of the order mandated constables postpone evictions unless “enforcement is necessary in the interest of justice or is in accordance with A.R.S. § 33-1368(A).”⁸⁶ If the governor wanted to also exempt evictions when the lease expired, he presumably would have said so in his order. Consequently, based on the plain language of the order, the MCJC Best Practices Committee concluded that the governor’s executive order extended the landlord and tenant relationship for these types of cases as well.⁸⁷

The Chief Justice also issued a new administrative order.⁸⁸ The previous order had excluded time deadline requirements set by court rule and statute

84. See generally Continued Postponement of Eviction Enforcement Actions, Ariz. Exec. Order No. 2020-49 (July 16, 2020).

85. Justice William C. Mims et al., *In Re: Amendment of Eighth Order Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency* (Aug. 7, 2020), https://www.vacourts.gov/news/items/covid/200_0807_sev_amendment_to_eighth_order.pdf. On July 24, 2020, Virginia Governor Ralph Northam wrote a two-page letter to the Chief Justice of the Virginia Supreme Court requesting, “that the Court extend and renew its Order of Judicial Emergency suspending unlawful detainer proceedings and writs of eviction until September 7, 2020.” Letter from Ralph Northam, Governor of Virginia, to Donald Lemons, C.J. of Va. Sup. Ct. (July 24, 2020). In response, the majority of the Virginia Supreme Court extended the moratorium on evictions from August 10, 2020, until September 7, 2020. Jason Slotkin, *Virginia Supreme Court Grants Temporary Moratorium on Evictions*, NPR (Aug. 8, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/08/900464731/virginia-supreme-court-grants-temporary-moratorium-on-evictions>.

86. Postponement of Eviction Actions, Ariz. Exec. Order No. 2020-14 (Mar. 24, 2020), https://azgovernor.gov/sites/default/files/ao_2020-14.pdf. The basis for these types of evictions is either a material or irreparable breach or a non-compliance with the lease after the tenant was given notice but failed to cure the breach. ARIZ. REV. STAT. ANN. § 33-1368(A) (2021).

87. See MARICOPA CNTY. JUST. CTS., *supra* note 38.

88. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2020-119, at 3 (July 22, 2020), <https://www.azcourts.gov/portals/22/admorder/orders20/2020-119FINAL.pdf?ver=2020-07-28-110618-610>. Both this order and the previous order mandated judicial training. *Id.*; Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No 2020-105, at 3 (July 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-105Final.pdf?ver=2020-07-07>. Mr. Adornetto conducted statewide training for both orders over Zoom. Charles J Adornetto & Paul Julien, *Critical Issues in Evictions: Part 3*, AZCOURTS.GOV (Sept. 18, 2020), <https://www.azcourts.gov/Portals/2/EDSERV/2020/Critical%20Issues%20in%20Evictions%20-%202020-09-18%20-%20Presentation%20Slides.pdf?ver=2020-09-18-121>

concerning court scheduling requirements until October 15, 2020.⁸⁹ The subsequent order extended this time exclusion period until December 15, 2020.⁹⁰ Of note, however, the second order specifically said that the time exclusion period did “not apply to issuance of the writ of restitution.”⁹¹ This order also clarified that amending a prior eviction judgment would only be appropriate if the tenant remained in possession of the residence.⁹²

E. A Superior Court Judge Rejected the Constitutional Challenge to the Governor’s Order

On May 8, 2020, a landlord filed what appeared to be a fairly routine eviction action for nonpayment of rent in the Hassayampa Justice Court in Maricopa County.⁹³ Five days later, the justice of the peace issued a judgment in favor of the landlord that included unpaid rent for two months in the amount of \$3,474.80.⁹⁴ The tenants had originally owned the property but had sold it to the landlord and were leasing it back.⁹⁵ Before the court, the tenants unsuccessfully claimed that they were not required to pay all of the rent that was due because of repairs that were allegedly not made in accordance with the terms of the real estate purchase contract.⁹⁶ The tenants also alleged that they had lost their jobs due to COVID-19.⁹⁷

After a constable presented but stayed a writ of restitution, the parties appeared in court again on the landlord’s motion to compel enforcement of the writ.⁹⁸ The June 3, 2020 hearing was hotly contested with both sides alleging bad faith by the other.⁹⁹ The judge gave the tenants additional time to provide documentation from their employer that they had suffered a financial loss due to COVID-19 in accordance with the governor’s executive

651-217. On September 18, 2020, Mr. Adornetto conducted a statewide training for over 100 participants titled, “Critical Issues in Evictions: Part 3.” *Id.*

89. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No 2020-105, at 3 (July 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-105Final.pdf?ver=2020-07-07>.

90. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin Order No 2020-119, at 3 (July 22, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-119FINAL.pdf>.

91. *Id.* While courts had an obligation to issue writs of restitution promptly, enforcement of them could still be delayed under the Governor’s executive order. MARICOPA CNTY. JUST. CTS., *supra* note 38, at 4.

92. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin Order No 2020-119, at 3 (July 22, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-119FINAL.pdf>.

93. Gregory Real Est. & Mgmt. LLC v. Keegan, No. 1 CA-CV 20-0419, 2021 WL 1187398, ¶ 3 (Ariz. Ct. App. Mar. 30, 2021).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

order.¹⁰⁰ The tenants did not supply all of the requested documents, but they did provide documents indicating that they were receiving unemployment benefits.¹⁰¹ The judge concluded that the tenants had met the requirements of the governor's order and denied the motion to compel.¹⁰²

The landlord filed a special action in the superior court "in the nature of mandamus" claiming that issuing a writ of restitution was a ministerial act and that the trial court lacked the legal authority to stay it.¹⁰³ The landlord alleged that the governor's executive order was unconstitutional because there was no authority for the governor to issue it because it violated the separation of powers, and because it was an unconstitutional taking of private property.¹⁰⁴ Maricopa County Superior Court Judge Christopher Coury rejected each of those arguments in an eleven-page opinion.¹⁰⁵

The court found that A.R.S. § 36-787 gave Arizona's Governor the authority to declare a public health emergency and that Governor Ducey was justified under Arizona law in issuing this executive order to mitigate the spread of COVID-19 "by promoting physical distancing through the delay of evictions."¹⁰⁶

The court also held that the executive order did not violate the separation of powers doctrine.¹⁰⁷ After establishing and providing authority that constables are executive branch employees, Judge Coury wrote:

The Executive Order does not prohibit members of the Judicial Branch from exercising discretion, hearing cases, or issuing eviction orders, nor does it direct what the rulings must be in eviction cases. Courts and judicial officers have the full authority and ability to hear eviction cases and to issue eviction orders. [The executive order] merely delays when eviction orders may be enforced by officers of the Executive Branch.¹⁰⁸

In addition, the governor's executive order was consistent with separation of powers because it provided for a "judicial override" through the motion to compel process.¹⁰⁹ The court also found that the landlord did not suffer an unconstitutional taking of property, in part, because the executive

100. *Id.*

101. *Id.*

102. *See generally* Under Advisement Ruling Verdict, Gregory Real Est. Mgmt. LLC v. Keegan, CV2020-007629 (Ariz. Super. Ct. Maricopa Cnty. July 22, 2020), <https://superiorcourt.maricopa.gov/media/6390/cv2020007629-926-07222020final.pdf>.

103. *Id.* at 2.

104. *Id.*

105. *Id.*; *see also* Rebekah L. Sanders, *Arizona Judge Upholds Governor Doug Ducey's Eviction Relief after Landlord Had Sued*, AZCENTRAL (July 22, 2020, 5:00 PM), <https://www.azcentral.com/story/money/real-estate/2020/07/22/arizona-eviction-relief-judge-upholds-governor-ducey-moratorium/5481745002/>.

106. Under Advisement Ruling Verdict *supra* note 102, at 4.

107. *Id.*

108. *Id.* at 6.

109. *Id.*

order expressly protected a landlord's right to receive rent and all other obligations under a lease agreement.¹¹⁰

*F. A Second Constitutional Challenge*¹¹¹

On August 12, 2020, the Arizona Multihousing Association, along with some individual landlords, filed a special action in the Arizona Supreme Court challenging the constitutionality of the governor's executive orders.¹¹² The petitioners maintained that the governor acted in violation of constitutional guarantees of separation of powers and even cited *The Federalist Papers* as authority.¹¹³

The petitioners alleged that the executive order was beyond the scope of the governor's statutory authority under A.R.S. §§ 26-303 and 36-787 because the eviction postponements were, in reality, an economic welfare program and not a public health measure.¹¹⁴ They traced the history of the statutes through the 1918 influenza epidemic and a Cold War era civil defense act and concluded that providing economic relief to keep people from being dislocated during a pandemic was neither contemplated nor authorized.¹¹⁵

In the alternative, the petitioners argued that even if the statutes authorized the governor's order, they were unconstitutional as applied because that type of legislative power cannot be delegated.¹¹⁶ They maintained that state law did not empower the governor to legislate on any and everything concerning COVID-19.¹¹⁷ If it did, "then it is difficult to envision any facet of Arizona's economic, social and cultural landscape that would escape this sweeping prerogative."¹¹⁸

In support of this position, the petitioners maintained that no state statute articulated a basis to suspend the enforcement of private residential leases

110. *Id.* at 3–11.

111. Portions of this section previously appeared in *Arizona Attorney Magazine*, February 2021. Reprinted with permission.

112. *Id.*

113. Petition for Special Action at 36, *Ariz. Multihousing Ass'n v. Fritz*, No. CV-20-0228-SA (Ariz. 2020). Organizations submitting amicus briefs included the Arizona Association of Realtors, Phoenix Chapter of National Association of Residential Property Managers, Arizona Real Estate Investors Association, Community Legal Services, Southern Arizona Legal Aid, and the William E. Morris Institute for Justice. Brief for *Ariz. Ass'n of Realtors et al. Supporting Petitioners*, *Ariz. Multihousing Ass'n v. Fritz*, No. CV-20-0228-SA (Ariz. 2020); Brief for *Cnty. Legal Services et al. as Amici Curiae Supporting Real Party in Interest Governor Ducey*, *Ariz. Multihousing Ass'n v. Fritz*, No. CV-20-0228-SA (Ariz. 2020).

114. Special Action, *supra* note 113.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 30 (citation omitted).

statewide.¹¹⁹ Instead, the governor's orders simply announced, directed, and defined a statewide moratorium on residential evictions.¹²⁰

The Arizona Governor's office responded by filing a motion to intervene, stating that he should have been named in the lawsuit because his authority was being challenged.¹²¹ His motion was granted.¹²² In response to the merits of the petitioners' claims, his attorneys argued that his executive order was lawful because it only temporarily postponed enforcement of residential eviction actions, because it did not relieve any tenant of any obligation to pay rent, and because it allowed landlords to file a motion with a trial court alleging that enforcement of an eviction was either necessary in the interests of justice or under Arizona law.¹²³

Governor Ducey, through counsel, argued that there was an insufficient factual record for the Supreme Court to hear the case and that landlords had a remedy at the lower court level, as evidenced in part by the case that had been filed in the Hassayampa Justice Court.¹²⁴ However, the focus on the governor's response was that he did, in fact, have the constitutional and legislative authority to issue a moratorium on evictions that is tied to a public health emergency.¹²⁵

In contrast to Governor Ducey wanting to get into the lawsuit, the Attorney General of Arizona filed a response requesting that the State of Arizona not be a party in the case.¹²⁶ The attorney general's office made several arguments, alleging that the Arizona Supreme Court lacked jurisdiction over the State of Arizona in this context.¹²⁷

On October 7, 2020, the Arizona Supreme Court issued a two-paragraph order declining jurisdiction.¹²⁸ The court agreed that the issues should be resolved by having a case filed in a lower court where a more complete factual record could be developed.¹²⁹ One cannot also ignore the practical consideration that, because of the issuance of the Centers for Disease Control and Prevention (CDC) order, below, the case would soon become moot

119. *Id.*

120. *Id.*

121. *See* Motion to Intervene for Governor Ducey at 1–18, *Ariz. Multihousing Ass'n v. Fritz*, No. CV-20-0228-SA (Ariz. 2020).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* Response to Governor's Motion to Intervene, *Ariz. Multihousing Ass'n v. Fritz*, No. CV-20-0228-SA (Ariz. 2020).

127. State of Arizona's Response to Petition for Special Action at 9–37, *Ariz. Multihousing Ass'n v. Fritz*, No. CV-20-0228-SA (Ariz. 2020).

128. *See generally* Order, *Ariz. Multihousing Ass'n v. Fritz*, No. CV-20-0228-SA (Ariz. Oct. 7, 2020), <https://www.azcourts.gov/Portals/21/users/037/65/48165/ASC-CV200228%20AZMultihousing.pdf?ver=2020-10-26-154337-780>.

129. *Id.* Justice Clint Bolick was the only justice who voted to grant jurisdiction. *Id.*

because Governor Ducey would almost certainly allow his executive order to expire on October 31, 2020.

G. The Federal Executive Branch and the State Judicial Branch Issue Additional Orders

After Congress did not renew the Coronavirus Aid, Relief, and Economic Security Act (CARES),¹³⁰ the federal executive branch decided to act on its own.¹³¹ On September 4, 2020, the CDC added its own ban blocking residential evictions for nonpayment of rent until after December 31, 2020.¹³² The CDC protection served as an “overlay,” supplementing any state protections that were less comprehensive or operating in the absence of state protections.¹³³

[T]enants earning up to \$99,000 (\$198,000 for married couples who file joint tax returns) may qualify for protection under the CDC order if they sign an affidavit informing their landlord: (1) they have used best efforts to obtain government rental assistance, (2) they cannot pay their rent either because they have had a substantial loss of income or because they have extraordinary out-of-pocket medical bills, and (3) their eviction would force them into homelessness or into a crowded living situation. Tenants must also acknowledge that rent and late fees will continue to become due and that this temporary halt on evictions concludes at the end of the year.¹³⁴

The CDC order was controversial, in part, because it was based exclusively on an inability to pay rent and did not require anyone to actually

130. On March 27, 2020, President Donald Trump signed the CARES Act. 15 U.S.C. § 9058 (expired July 25, 2020). It included a 120-day moratorium on evictions for residential tenants who received federal housing assistance or who lived in a property with a federally backed mortgage. *Id.* § 9058(b). Any civil or small claims action seeking rent for the period March 27 through July 25, 2020, was required to include an attestation as to the applicability of the CARES Act. Disposition of Residential Eviction Cases Related to the Pub. Health Emergency Ariz. Sup. Ct. Admin. Order No. 2020-119, at 2 (July 22, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-119FINAL.pdf>. The CARES Act expired on July 25, 2020. 15 U.S.C. § 9058(b).

131. 15 U.S.C. § 9058(b).

132. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf>; Gerald A. Williams, *Eviction Holds Expire This Month*, Foothills Focus, Dec. 9, 2020, at 17 [hereinafter Williams, *Eviction Holds*] (announcing the upcoming end of CARES Act’s eviction moratorium); Gerald A. Williams, Opinion, *Judge Explains CDC Eviction Postponements*, Foothills Focus, Sept. 23, 2020, at 8 [hereinafter Williams, *CDC Eviction Postponements*].

133. See Williams, *CDC Eviction Postponements*, *supra* note 132 (explaining the CDC’s Eviction Postponements’ effect on Arizona).

134. *Id.* (explaining the requirements of the CDC’s Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 order); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292.

have COVID-19.¹³⁵ Although a stated basis for the order is to stop the spread of COVID-19, actually contracting COVID-19 was not a basis to request relief under the order.¹³⁶ It also triggered a constitutional challenge in federal court.¹³⁷

On September 8, 2020, the New Civil Liberties Alliance filed a complaint on behalf of a landlord in federal district court in Atlanta.¹³⁸ It alleged the CDC's order was unconstitutional because the CDC had not identified any act of Congress that conferred upon it the power to halt evictions or preempt state landlord-tenant law.¹³⁹ The lawsuit also alleged the CDC's order impermissibly commandeered state courts and state officers to apply, enforce, and implement an unconstitutional federal law.¹⁴⁰ On October 2, 2020, the Department of Justice filed a response. In addition to other procedural and substantive positions, it argued that the CDC's order did not mean what it said: "[E]ven where a tenant is entitled to its protections, the order does not bar a landlord from commencing a state court eviction proceeding, provided that the actual eviction does not occur while the order remains in place."¹⁴¹ This view conflicted with the CDC order's definition of *eviction*, which included "any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action"¹⁴²

On top of the CDC order, state administrative orders also added requirements for landlords and trial courts.¹⁴³ On September 16, 2020, the Arizona Chief Justice issued an administrative order mandating that landlords provide written attestations to courts hearing residential eviction cases concerning whether the tenant in each case had given their landlord a CDC declaration.¹⁴⁴ As had other administrative orders, this one ordered that the time requirements—in court rules and in state statutes requiring that residential eviction cases be heard promptly—were inapplicable through February 15, 2021.¹⁴⁵

135. See *Brown v. Azar*, 497 F. Supp. 3d 1270, 1286 (N.D. Ga. Oct. 29, 2020), *vacated by* *Brown v. U.S. Dep't of Health & Hum. Servs.*, 20 F.4th 1385 (11th Cir. 2021).

136. See *id.* at 1274; Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,293.

137. See generally *Azar*, 497 F. Supp. 3d at 1298 (claiming the CDC order strips the right to access the courts).

138. Complaint at 1–27, *Brown v. Azar*, F. Supp. 3d (N.D. Ga. 2020) (No. 20-cv-03702-3).

139. *Id.* at 25.

140. *Id.* at 25–26.

141. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 42, *Brown v. Azar*, 497 F. Supp. 3d 1270 (N. D. Ga. 2020) (No. 20-CV-3720) (citations omitted).

142. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,293 (Sept. 4, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf>.

143. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Admin. Order No. 2020-147, at 1 (Sept. 16, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-147%20pdf.pdf?ver=2020-09-16-104553-637>.

144. *Id.* at 3.

145. *Id.*

On the same day the Arizona Supreme Court denied jurisdiction to hear the constitutional challenge to the governor's order, the chief justice issued another administrative order concerning CDC declarations.¹⁴⁶ In addition to the ongoing directives, this additional administrative order did four main things.¹⁴⁷

First, it provided a mechanism for a landlord to challenge the validity of a tenant's CDC declaration.¹⁴⁸ A landlord now had the option of filing a motion with supporting evidence to contest a tenant's CDC declaration.¹⁴⁹ After reviewing the motion and the evidence attached, the trial judge had the option of setting the motion for a hearing.¹⁵⁰ After the hearing, the judge could grant the motion as long as the judge verbally made factual and legal findings on the record.¹⁵¹ At that point, an eviction action could proceed.¹⁵²

Second, for eviction cases based on something other than nonpayment of rent, trial judges were required to provide written findings establishing the basis for any noncompliance of a lease.¹⁵³ Consequently, evictions based on facts as diverse as having a meth lab in the kitchen to having an unauthorized cat now required written judicial findings.¹⁵⁴

Third, the order resolved a substantive law dispute.¹⁵⁵ Unlike the governor's order, the CDC regulation had no language supporting a view that it applied to evictions in cases where the lease had expired.¹⁵⁶ The plain language of the CDC regulation stated that it applied only to nonpayment of rent cases.¹⁵⁷ The administrative order created a rebuttable presumption that if the landlord did not renew a tenancy, the landlord did so because the tenant was not paying rent.¹⁵⁸

Under such circumstances, the administrative order directed that the CDC eviction prohibition would apply, unless the landlord could prove

146. See generally *id.*; see also Zona Law Group PC, *AZ Supreme Court Declines Jurisdiction in Case Against Governor's Order*, AZREIA (Oct. 8, 2020), <https://azreia.org/az-supreme-court-declines-jurisdiction-in-case-against-governors-order/>.

147. See generally *Disposition of Residential Eviction Cases Related to the Public Health Emergency*, Ariz. Admin. Order No. 2020-147 (Sept. 16, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-147%20pdf.pdf?ver=2020-09-16-104553-637>.

148. *Id.* at 1–7.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 4.

154. *Id.*

155. See generally *id.* at 1–5.

156. *Id.*; Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf>.

157. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292.

158. *Disposition of Residential Eviction Cases Related to the Public Health Emergency*, Ariz. Admin. Order No. 2020-159, at 1–5 (Oct. 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-159%20FINAL%20pdf.pdf?ver=2020-10-07-154943-473>.

otherwise.¹⁵⁹ One interesting side effect was that the administrative order stated that the landlord's termination was "presumed to be due to nonpayment of rent, if unpaid rent, a penalty or interest is owed."¹⁶⁰ This presumption arguably provided an incentive for tenants to stop paying their rent if their lease had expired.¹⁶¹ By doing so, they could make it more difficult for their landlord to prove a neutral reason for not renewing their lease and could make it easier for them to establish protection under the CDC order.¹⁶²

Fourth, the administrative order expanded an original requirement of the rules that govern residential evictions.¹⁶³ Landlords were already required to serve a handout on the tenants that explains the eviction process.¹⁶⁴ The administrative order added a requirement that landlords serve a second page to the handout in each case explaining the CDC declaration.¹⁶⁵ The order specified the language used in the handout and that its use was mandatory from October 24, 2020 until December 31, 2020.¹⁶⁶

The next shoe dropped.¹⁶⁷ The CDC issued "non-binding guidance" agreeing with the Justice Department that the CDC order did not mean what it said.¹⁶⁸ After repeating the definition of an eviction as "any action" by a landlord to recover possession, the CDC guidance stated:

The order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order.¹⁶⁹

On October 14, 2020, the chief justice issued another administrative order concerning residential evictions.¹⁷⁰ It allowed justices of the peace to sign a judgment in cases with a CDC declaration but stay the issuance of a

159. *See id.* at 3–4.

160. *Id.* at 4.

161. *See id.*

162. *Id.* at 2.

163. *Id.*

164. ARIZ. R. EVICT. P. 5(a)(5).

165. Disposition of Residential Eviction Leases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2020-159, at 2 (Oct. 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-163FINAL.pdf?ver=2020-10-14-160741-570>.

166. *Id.*

167. *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, Frequently Asked Questions*, HUD, <https://www.hud.gov/sites/dfiles/Main/documents/EvictionMoratoriaOrderFAQs.pdf> (last visited Mar. 1, 2022).

168. *Id.*

169. *Id.*

170. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2020-163, at 1–5 (Oct. 14, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-163FINAL.pdf?ver=2020-10-14-160741-570>.

writ of restitution.¹⁷¹ The previous administrative order required cases in that category to be either delayed or dismissed.¹⁷²

Keeping with the year's theme of atypical lawmaking, on December 27, 2020, President Donald Trump signed the Consolidated Appropriations Act of 2021.¹⁷³ It extended the regulation governing the CDC declaration and its moratorium on evictions for non-payment of rent until January 31, 2021.¹⁷⁴ This action resulted in the odd occurrence of a federal statute temporarily extending a federal regulation.¹⁷⁵ But consistent with how 2020 had been, some significant additional requirements were added as the year came to a close.¹⁷⁶

In response to concerns raised that may have been primarily hypothetical, on December 30, 2020, the chief justice issued one more administrative order.¹⁷⁷ The order mandated landlords to state in writing in each case whether they had applied for rental assistance and, if so, it required them to provide an accounting as to how any funds received were applied to

171. *Id.* at 3.

172. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Admin Order No. 2020-159, at 4 (Oct. 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-163FINAL.pdf?ver=2020-10-14-160741-570>.

173. See *President Trump Signs Consolidated Appropriations Act, 2021*, NAT'L SOC'Y TAX PRO. (Dec. 28, 2020), <https://www.nstp.org/article/President%20Trump%20signs%C2%A0Consolidated%20Appropriations%20Act%2C%202021>.

174. *Id.*

The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264), entitled 'Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19' (85 Fed. Reg. 55292 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182.

175. See Erika Richard & Natasha Khwaja, *State Policymakers are Working to Change How Courts Handle Eviction Cases*, PEW (Aug. 26, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/08/26/state-policymakers-are-working-to-change-how-courts-handle-eviction-cases>.

176. The rapid development and distribution of vaccines appeared to have little impact on eviction moratoriums. Paul Gregory, *Getting the Facts Right on Operation Warp Speed*, THE HILL (Mar. 1, 2021), <https://thehill.com/opinion/white-house/544175-getting-the-facts-right-on-operation-warp-speed>. On May 15, 2020, the Trump Administration announced Operation Warp Speed. *Operation Warp Speed, Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges*, U.S. GOV'T. ACCOUNTABILITY OFF. REP. 1-40 (Feb. 2021), <https://www.gao.gov/assets/gao-21-319.pdf>. It was a partnership between the Department of Health and Human Services, Defense Department, and private industry to accelerate the development of a COVID-19 vaccine. *Id.* On December 11, 2020, the Food and Drug Administration (FDA) approved Pfizer's vaccine for emergency use authorization. *Id.* Remarkably, Americans began receiving vaccinations only four days later. *Id.* On December 18, 2020, the FDA issued an emergency use authorization for second vaccine for the prevention of coronavirus. *Id.* The second one was manufactured by Moderna. Paul Gregory, *Getting the Facts Right on Operation Warp Speed*, THE HILL (Mar. 1, 2021), <https://thehill.com/opinion/white-house/544175-getting-the-facts-right-on-operation-warp-speed>; see also U.S. GOV'T. ACCOUNTABILITY OFF. REP., *supra*.

177. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2020-229, at 1-4 (Dec. 30, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-229%20Final.pdf?ver=2020-12-30-185707-290>.

a tenant's obligations.¹⁷⁸ Landlords were likewise directed to state whether there was a prior judgment against a tenant and if so, state that the damages sought in their current case were not included in that prior case.¹⁷⁹ All of these requirements became effective on January 1, 2021.¹⁸⁰

H. The CDC Extended the Eviction Moratorium Again and Again and Again. . .

President Joseph Biden's Administration extended the CDC's ban blocking residential evictions for nonpayment of rent until March 31, 2021¹⁸¹ and then again until June 30, 2021.¹⁸² On June 22, 2021, forty-four members of Congress sent a letter to President Biden and to the director of the CDC requesting that the government continue the CDC moratorium.¹⁸³ Two days later, the CDC extended their eviction moratorium yet again, this time until July 31, 2021.¹⁸⁴ Although some of the rationale was updated, the language was essentially the same as the flawed CDC agency order from 2020.¹⁸⁵

Even before the last two extensions, the temporary CDC eviction moratorium was looking as if it would be with us for the foreseeable future.¹⁸⁶ As such, there was arguably a need for some type of case processing standard among the justice courts hearing these cases. For example, some courts were delaying eviction actions only upon request but usually proceeded to a judgment with a writ of restitution (actual physical eviction) date to be determined after an eviction moratorium was no longer in place.¹⁸⁷ Other judges were, essentially, automatically continuing all eviction actions until

178. *Id.* at 2.

179. *Id.*

180. *Id.*

181. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-03/pdf/2021-02243.pdf>.

182. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-31/pdf/2021-06718.pdf>.

183. Katherine Davis-Young, Gallego, Grijalva Call for Extending Eviction Moratorium, KJZZ (June 23, 2021, 2:32 PM), <https://kjzz.org/content/1693904/gallego-grijalva-call-extending-eviction-moratorium> (text of letter contained within story).

184. *CDC Director Extends the Eviction Moratorium for 30 Days*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 24, 2021), <https://www.cdc.gov/media/releases/2021/s0624-eviction-moratorium.html>.

185. See *supra* notes 139, 142, 162 and accompanying text (discussing the 2020 CDC order).

186. See generally Annie Nova, *Millions of Americans Face Eviction as Housing Protection Expires in June*, CNBC (May 31, 2021, 9:00 AM), <https://www.cnbc.com/2021/05/31/millions-of-americans-could-face-eviction-as-housing-protection-expires-in-june.html> (explaining how the moratorium lasted a long time).

187. See Catherine Raegor & Paulina Pineda, *An Eviction Reprieve in Phoenix Area Could Depend on the Judge*, AZCENTRAL (Mar. 20, 2020, 10:46 PM), <https://www.azcentral.com/story/money/real-estate/catherine-raegor/2020/03/19/justices-peace-split-how-handle-eviction-cases/2877554001/>.

the eviction ban was over.¹⁸⁸ A problem with that course of action was that the expiration date kept changing.¹⁸⁹

In Maricopa County, the MCJC Best Practices Committee came up with suggested guidance in its Eighth Amended Best Practice.¹⁹⁰ A reasonable compromise between the public policy goals of keeping people in their residences during a pandemic and the landlords' desire for immediate access to the courts to be able to enforce their contract and property rights was to continue eviction actions for thirty days if the tenant had submitted a CDC declaration at or before their initial appearance.¹⁹¹

Doing so would have provided tenants an additional opportunity to receive rental assistance, to pay the amount due, and to have their case dismissed.¹⁹² Otherwise, an eviction case had the potential to proceed to a judgment with a writ date that would be stayed until after the eviction moratorium expires.¹⁹³ This process would have provided a bright-line rule on whether a case should be delayed at the initial appearance.¹⁹⁴

The Chief Justice of the Arizona Supreme Court issued an order requiring a somewhat different direction.¹⁹⁵ His February 1, 2021, administrative order required cases to be set for an initial appearance, but the initial appearance could be delayed for an unstated period of time if there was good cause to allow the tenant to file a CDC declaration.¹⁹⁶ If a CDC declaration had been signed, there was a mandatory thirty-day delay of entry of judgment "if the defendant *agre[ed] to apply* and the court *believ[ed]* the defendant *may qualify* for rental assistance."¹⁹⁷ If so, this was followed by another mandatory delay for an unstated period of time if "*the application process [was] underway.*"¹⁹⁸

Regardless of when the case was heard, getting timely and accurate information to tenants was (and remains) an ongoing difficulty.¹⁹⁹ Landlords

188. See generally Jerod MacDonald Envoy, *Maricopa Courts Stay the Course After Federal Judge Strikes Down CDC Eviction Ban*, AZ MIRROR (May 5, 2021, 2:12 PM), <https://www.azmirror.com/blog/maricopa-courts-stay-the-course-after-federal-judge-strikes-down-cdc-eviction-ban/> (explaining how some judges operated).

189. See *supra* notes 182–83 (discussing the multiple CDC expiration date extensions).

190. See MARICOPA CNTY. JUST. CTS., *supra* note 38.

191. See *id.* at 3.

192. See *id.*

193. See *id.*

194. See *id.* Tenants who had not completed a declaration prior to their initial court appearance would not be entitled to a continuance to do so; they would, however, be instructed that they might be able to forestall an eviction if they completed one prior to the arrival of the constable to execute upon the writ of restitution. See *id.* at 2.

195. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2021–19, at 1–3 (Jan. 15, 2021), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-19.pdf?ver=2020-01-15-133933-493>.

196. *Id.*

197. *Id.* (emphasis added).

198. *Id.* (emphasis added).

199. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2020-159, at 1–5 (Oct. 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/>

continued to be required to serve a handout to tenants that explained the eviction process as well as a second handout explaining the CDC declaration.²⁰⁰ However, when judges asked tenants whether they had read these handouts, it was clear that many had not read or understood the materials.²⁰¹

Consequently, our MCJC Best Practice Committee developed a standardized minute entry for distribution to tenants after their initial appearance.²⁰² It was designed for use in cases where the tenant had completed a CDC declaration as well as those cases where the tenant had not yet done so and it again advised tenants of their potential ability to postpone their eviction.²⁰³ By administrative order, this minute entry became mandatory statewide.²⁰⁴

I. Pima County “Adopts” Additional Eviction Ban; But Backs Off

On February 2, 2021, the Pima County²⁰⁵ Board of Supervisors clumsily adopted an oral motion that most likely conflicted with the Arizona Residential Landlord and Tenant Act.²⁰⁶ The board ostensibly attempted to prohibit evictions based on a tenant committing a “minor” material non-compliance with the lease.²⁰⁷ The board believed that landlords were increasingly attempting to evict people for comparatively minor things, such as unauthorized pets or a failure to trim shrubbery.²⁰⁸

Orders20/2020-159%20FINAL%20pdf.pdf.

200. *Id.*

201. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2021–19, at 1–3 (Jan 15, 2021), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-19.pdf?ver=2020-01-15-133933-493>.

202. *Id.*

203. *Id.*

204. *Id.*

205. Tucson, Arizona is located in Pima County. *Tucson, Arizona Population 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities/tuscon-az-population> (last visited Mar. 1, 2022). Tucson is the second most populous city in Arizona, and Pima is the second most populous county in Arizona. *Id. Population of Counties in Arizona (2022)*, WORLD POPULATION REV., <https://worldpopulationreview.com/uc/Counties/states/az> (last visited Mar. 1, 2022).

206. Letter from Sen. Vince Leach, Arizona State Senate, to The Hon. Mark Brnovich, Att’y Gen. of Ariz., at 1 (Feb. 9, 2021), www.azag.gov/sites/default/files/docs/complaints/2021/21-001/1487_Complaint_Request_Pima_Cty_Eviction_Moratorium.pdf.

207. *Id.* at 2. The text of the motion reads as follows:

Motion to adopt as a public-health regulation, through March 31, 2021, applicable throughout Pima County, a moratorium on all evictions in Pima County except those for material falsification or for material and irreparable breaches as provided in A.R.S. 33-1368(A), and to direct the Pima County Health Department to develop a form / declaration eligible tenants can sign to show their eligibility for the protections of this moratorium, consistent with the terms of this moratorium and otherwise with the Centers for Disease Control’s eviction moratorium; and to make such form easily accessible to the public.

Id.

208. Press Release, Pima County, Supervisor Heinz’s Statement About Expansion of Eviction Moratorium in Pima County (Feb. 2, 2021), https://webcms.pima.gov/UserFiles/Servers/Server_6/File/

While this local moratorium attempted to stop these often comparatively minor lease violations, it could not actually do so because all of the breaches contained in A.R.S. § 33-1368(A) become “material” after a second failure to remedy.²⁰⁹ One of the news stories covering the action was titled, *Pima County Stops Landlords from Using Eviction Moratorium Loophole*.²¹⁰ An alternate headline could have been, *Board of Supervisors Attempts to Prevent Landlords from Enforcing Additional Lease Provisions*.²¹¹ Either way, this was not a new issue.²¹²

There was an ongoing concern that landlords would attempt to exacerbate alternate reasons to evict tenants who were not paying their rent.²¹³ On October 7, 2020, the Chief Justice of the Arizona Supreme Court issued an administrative order that, among other things, required trial judges to provide written findings establishing the basis for any noncompliance of a lease for cases based on something other than nonpayment of rent.²¹⁴

It is also perhaps incorrect to refer to landlord attempts to take action (when a tenant has breached their lease by committing a material non-compliance with the lease terms) as a loophole, especially if that breach affects the health and safety of other tenants.²¹⁵ The most common examples of this type of breach are unauthorized people and unauthorized animals.²¹⁶ But even something as seemingly “minor” as the failure to maintain the landscaping can become significant if the landlord is being fined repeatedly by their homeowners’ association.²¹⁷

Before a landlord can successfully file this type of eviction action, the landlord is required to first give the tenant a ten-day cure notice.²¹⁸ The tenant then has ten days to resolve the issue or to fix the problem, and a failure to do so does become a material non-compliance subject to eviction pursuant to A.R.S. § 33-1368(A).²¹⁹

Government/Board%20of%20Supervisors/Dist2/Heinz/Statements/DISTRICT%20%20statement%20of%20expansion%20of%20eviction%20moratorium.pdf.

209. *Id.*

210. Luzdelia Caballero, *Pima County Stops Landlords from Using Eviction Moratorium Loophole*, ABC KGUN 9 (Feb. 2, 2021, 8:36 PM), <https://www.kgun9.com/news/local-news/pima-county-stops-landlords-from-using-eviction-moratorium-loophole>.

211. *Id.*

212. *Id.*

213. *Id.*

214. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Admin. Order No. 2020-159, at 1–5 (Oct. 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-159%20FINAL%20pdf.pdf?ver=2020-10-07-154943-473>.

215. *Id.*

216. *Id.*

217. *Id.*

218. ARIZ. REV. STAT. ANN. § 33-1368(A) (2021).

219. *Id.*

At least two Arizona legislators asked Arizona Attorney General Mark Brnovitch to declare the Pima County board's action illegal.²²⁰ In any event, the Pima County board never put anything in writing and allowed its alleged moratorium to expire.²²¹

The Pima County board continued to be concerned about eviction issues, however, and in March 2021, it approved a motion to consider the creation of an eviction court within the Pima County Consolidated Justice Court.²²²

By the summer of 2021, the Pima County board did establish an eviction court and staffed it with a *pro tem* judge who would hear nearly all of the eviction cases in Tucson.²²³ They also employed the use of “navigators” who would attend the eviction initial appearances and help to guide eligible tenants through the confusing rental assistance process.²²⁴ The navigator concept has proven popular, and the Arizona Supreme Court has encouraged other counties to adopt it.²²⁵

J. Additional Requirements for Landlords and Judges

As administrative orders were updated, the requirements for landlords increased.²²⁶ An administrative order from the chief justice required eviction proceedings to state whether the property was covered under the CARES Act and whether the landlord had received a CDC declaration from the tenant.²²⁷ These, and additional requirements for landlords, were due to a concern that landlords were not doing enough to ensure compliance with federal law.²²⁸ The concerns were well founded. The State Bar of Arizona placed a landlord-

220. Howard Fischer, *Arizona Lawmakers Claim New Eviction Protections in Pima County Illegal*, ARIZ. DAILY STAR (Feb. 9, 2021), https://tucson.com/news/local/arizona-lawmakers-claim-new-eviction-protections-in-pima-county-illegal/article_e1b2d9dc-672e-50d3-85c6-16fc5d0e000e.html#:~:text=Arizona%20lawmakers%20claim%20new%20eviction%20protections%20in%20Pima%20County%20illegal,-By%20Howard%20Fischer&text=PHOENIX%20%E2%80%94%20Two%20state%20lawmakers%20are,Pima%20County%20supervisors%20are%20illegal.

221. *See generally 2020 Administrative Orders*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/orders/Administrative-orders-Index/2020-Administrative-Orders> (last visited Mar. 1, 2022).

222. *See generally id.*

223. *See generally id.*

224. Memorandum from C.H. Huckleberry 1–3 (Aug. 24, 2021), https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Administration/CHHmemosFor%20Web/2021/December/December%206,%202021%20-%20Emergency%20Eviction%20Legal%20Services%20Update.pdf. Arizona's judicial branch has made additional information, including a video explanation on the Housing Stability Court Navigator Program. *See Housing Stability Court Navigator Program*, AZCOURTS, <https://www.azcourts.gov/selfservicecenter/Landlord-Tenant-Disputes-Eviction-Actions/Housing-Stability-Court-Navigator-Program> (last visited Mar. 1, 2022).

225. *See generally id.*

226. *See Disposition of Residential Eviction Cases Related to the Public Health Emergency*, Ariz. Sup. Ct. Admin. Order No 2020-151, at 1–4 (Sept. 23, 2020), <https://www.azcourts.gov/Portals/22/adminOrders20/2020-151Final.pdf?ver=2020-09-23-133830-510>.

227. *Id.*

228. *See id.*

attorney on probation for failing to determine which landlord properties were covered by the CARES Act.²²⁹ In successive administrative orders, the court required landlords to serve a handout to each tenant that explained the CDC declaration²³⁰ and to declare whether the landlord had received rental assistance,²³¹ whether there was a prior judgment against the tenant, whether the landlord was in a federal mortgage relief forbearance program, and whether the landlord had a mortgage from the HCFA for a multifamily property.²³² Judges and landlords obviously needed to remain current in this ever changing legal environment.²³³

Every administrative order mandated judicial training.²³⁴ The Administrative Office of the Court scheduled a total of twelve virtual judicial training classes from July 8, 2020 to September 3, 2021.²³⁵ The primary presenter for each session was the co-author of this Article, Charles Adornetto, who also conducted a training for superior court judicial officers.²³⁶

There were numerous scenarios with required outcomes based on what the tenant had done and the type of property.²³⁷ By August 13, 2021, landlords were required to attest in writing the following items:

- If rent was being sought for any period between March 27, 2020 through July 24, 2020, whether the CARES Act applied;²³⁸
- Whether the tenant submitted a CDC Declaration;²³⁹
- Whether the tenant applied for rental assistance and if money was received, how were those funds applied;²⁴⁰

229. Catherine Reagor & Jessica Boehm, *Phoenix Attorney Disciplined Following Republic Investigation into Wrongful Evictions*, AZCENTRAL (Dec. 22, 2021, 7:01 AM), <https://www.azcentral.com/story/money/business/consumers/2021/12/22/phoenix-eviction-attorney-scott-clark/disciplined/8891492002/> (discussing how an attorney admitted that 128 of his firm's cases were filed in violation of federal law).

230. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Admin. Order No. 2020-159, at 1–5 (Oct. 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-159%20FINAL%20pdf.pdf?ver=2020-10-07-154943-473>.

231. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2020-229, at 1–4 (Dec. 30, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-229%20Final.pdf?ver=2020-12-30-185707-290>.

232. *Id.*

233. *See id.*

234. *See generally* ARIZ. JUD. BRANCH, *supra* note 221.

235. *See generally id.*

236. *See generally id.*

237. *See generally id.*

238. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Sup. Ct. Admin. Order No. 2020-229, at 1–4 (Dec. 30, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-229%20Final.pdf?ver=2020-12-30-185707-290>.

239. *Id.*

240. *Id.*

- Whether the landlord had obtained a prior judgment against the tenant and if so, that the amounts sought were not awarded in a prior judgment;²⁴¹ and
- Whether the tenant was living in a multi-family residence with a mortgage backed by either Fannie Mae or Freddie Mac.²⁴²

K. Federal Courts Split on Challenges to the CDC's Eviction Ban

A group of landlords challenged the CDC eviction moratorium in federal court in Atlanta, among others, on the basis that the CDC had neither the statutory nor regulatory authority to issue a nationwide residential eviction ban.²⁴³ The federal court disagreed.²⁴⁴

In *Brown v. Azar*, the federal judge analyzed the CDC's eviction prohibition within the context of the global COVID-19 pandemic and the potential prevention of the spread of a communicable disease.²⁴⁵ Federal judge J.P. Boulee stated that it was not his role to determine whether the CDC should have done something else.²⁴⁶ Instead, the court's "important but limited role" was to examine whether the CDC engaged in reasoned decision-making.²⁴⁷ After concluding that the CDC had done so, the court found that the landlords had not shown a substantial likelihood that they would succeed on their claim that the CDC ban is not reasonably necessary to prevent the spread of disease.²⁴⁸

Other federal courts upheld challenges to the CDC eviction moratorium.²⁴⁹ A federal judge in Texas was one of the first to approach these issues differently.²⁵⁰

In *Terkel v. Centers for Disease Control & Prevention*, a group of landlords filed suit in federal court in the Eastern District of Texas.²⁵¹ The complaint maintained that the federal government lacked constitutional authority to "suspend the terms of a rental agreement between private parties,

241. *Id.*

242. *Id.*

243. *Brown v. Azar*, 497 F. Supp. 3d 1270, 1275–79 (N.D. Ga. 2020).

244. *Id.* at 1300.

245. *Id.* at 1299.

246. *Id.* at 1288.

247. *Id.* (citing *Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. 260 (2016)).

248. *Id.* at 1286–89.

249. See *Chambless Enters., LLC v. Redfield*, 508 F. Supp. 3d 101, 115 (W.D. La. 2020) (rejecting claims that CDC eviction ban exceeded statutory and regulatory authority); *Tiger Lily LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 550–51 (W.D. Tenn. 2020) (finding that the landlords' "constitutional claims are insufficient to trigger a finding of irreparable harm.").

250. See *Terkel v. Ctrs. for Disease Control & Prevention*, 521 F. Supp. 3d 662, 665–69 (E.D. Tex.), *appeal dismissed*, 15 F.4th 683 (5th Cir. 2021).

251. *Id.*

interfere with state legal proceedings, or prevent private property owners from removing unlawfully present persons from their property.”²⁵²

Specifically, the landlords alleged that the CDC eviction moratorium could not be justified as an inherent Article II executive power and, therefore, it had to fall under an Article I, Section 8 enumerated power.²⁵³ But that analysis failed as well because “[s]uch a moratorium could not be supported under the Commerce Clause, Necessary and Proper Clause, or any other enumerated power.”²⁵⁴ On February 25, 2021, the federal court granted summary judgment in a declaratory judgment action and held “that the federal government’s Article I power to regulate interstate commerce and enact laws necessary and proper to that end does not include the power to impose the challenged eviction moratorium.”²⁵⁵

Attorneys defending the CDC regulations made the interesting choice to do so under the Commerce Clause and, in the alternative, the Necessary and Proper Clause of Article I.²⁵⁶ Both arguments were rejected by the federal district court; but the Commerce Clause argument was especially problematic to the court.²⁵⁷

Judge J. Campbell Barker noted:

Even though quarantining an infected person from new contacts would keep the person from traveling interstate (or anywhere else), the CDC order is not such a quarantine. The order applies without regard to a tenant’s infection with, prior exposure to, or vaccination against COVID-19. It applies without regard to whether an evicted tenant would move to a new city, much less a new state.”²⁵⁸

Federal government attorneys even conceded that their expanded view of inherent constitutional authority would allow a federal eviction ban for any reason, including fairness.²⁵⁹ The federal district judge wrote:

The government’s argument would thus allow a nationwide eviction moratorium long after the COVID-19 pandemic ends. The eviction remedy could be suspended at any time based on fairness as perceived by Congress or perhaps an agency official delegated that judgment. Such broad authority

252. Complaint for Declaratory and Injunctive Relief at 3, *Terkel v. Ctrs. for Disease Control & Prevention*, 521 F. Supp. 3d 662 (E.D. Tex. 2021) (No. 20-cv-00564).

253. *Id.* at 14.

254. *Id.* at 3.

255. *Terkel*, 521 F. Supp. 3d at 666–67.

256. *Id.* at 666–68.

257. *Id.* at 674.

258. *Id.*

259. *Id.* at 676.

over state remedies begins to resemble, in operation, a prohibited federal police power.²⁶⁰

The impact of this decision was limited because the judge considered, but rejected, ordering an injunction. On Saturday, February 27, 2021, the justice department agreed and issued a press release stating the decision was binding only on the parties.²⁶¹ Also on that Saturday, the Department of Justice (DOJ) filed its appeal in *Terkel* and, in a pleading in another federal case, argued that the holdings in *Terkel* did not prohibit the application of the CDC order to any other parties.²⁶²

On March 10, 2021, the U.S. District Court for the Northern District of Ohio upheld a challenge to the CDC eviction moratorium—but for a slightly different reason.²⁶³ The federal court in Ohio held that Congress never gave the CDC the authority to establish a nationwide ban on residential evictions.²⁶⁴ As in *Terkel*, the DOJ immediately took the position that the Ohio decision only applied to the parties of that particular case.²⁶⁵

The federal court in Ohio openly disagreed with a prior decision from a federal court in Louisiana.²⁶⁶ The judge in Louisiana found “the plain text of the statute is unambiguous and evinces a legislative determination to defer to the ‘judgment’ of public health authorities about what measures they deem ‘necessary’ to prevent contagion.”²⁶⁷ The federal judge in Ohio responded that the court in Louisiana

appears to ground its reasoning in a healthy dose of deference to the judgment of federal experts in the face of medical and scientific uncertainty. Without question, effective pandemic response depends on the judgment of reliable science—not political science. But that obvious truism does not empower agencies or their officials to exceed the mandate Congress gives them.²⁶⁸

260. *Id.*

261. Press Release, Dep’t of Just., Department of Justice Issues Statement Announcing Decision to Appeal *Terkel v. CDC* (Feb. 27, 2021), <https://www.justice.gov/opa/pr/department-justice-issues-statement-announcing-decision-appeal-terkel-v-cdc#:~:text=The%20Department%20of%20Justice%20respectfully,Department%20has%20appealed%20that%20decision>.

262. Defendants’ Response to Plaintiffs’ Notice of Supplemental Authority at 1, *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-cv-3377 (D.D.C. Cir. Feb. 27, 2021) (arguing that “the *Terkel* judgment does not extend beyond the plaintiffs in that case and does not prohibit the application of the [o]rder to any other parties, including the Plaintiffs in this case . . . [a] court may ‘declare the rights and other legal relations of any interested party seeking such declaration[.]’” (citation omitted).

263. See generally *Skyworks, LTD. V. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745 (N.D. Ohio 2021).

264. *Id.* at 759. This opinion was authored by Judge Phillip Calabrese. *Id.*

265. Defendants’ Response to Plaintiffs’ Notice of Supplemental Authority, *supra* note 262.

266. *Skyworks*, 24 F. Supp. 3d at 759.

267. *Chamberless Enters., LLC v. Redfield*, 508 F. Supp. 3d 101, 111 (W.D. La. 2020).

268. *Skyworks*, 524 F. Supp. 3d at 759 (citation omitted).

The ruling in *Alabama Association of Realtors v. United States Department of Health and Human Services*²⁶⁹ is similar to the other decisions that went against the CDC order, in so far as they conclude that the government's position would give the CDC sweeping power that goes far beyond anything authorized by Congress.²⁷⁰ But, it differs from the earlier cases because it addresses the issue within the context of the Supreme Court's famous *Chevron* ruling.²⁷¹ The Justice Department argued that the CDC deserves *Chevron* deference in this case.²⁷² The court disagreed and noted that such an overly expansive reading of the statute would raise serious constitutional problems, and therefore, the statute must be construed in a way that avoids those problems.²⁷³

The Sixth Circuit²⁷⁴ was the first federal appellate court to issue a written opinion on these issues; however, it did so in the context of whether a stay of a trial court's order should be granted.²⁷⁵ In denying the stay, the Sixth Circuit made it clear that it believed the CDC was acting beyond its authority and even found that the federal government defendant's appeal was unlikely to succeed on the merits on that basis.²⁷⁶

On June 29, 2021, the Supreme Court made an initial ruling on the *Alabama Association of Realtors* case.²⁷⁷ The Court denied the plaintiff's request to vacate the stay.²⁷⁸ Doing so kept the eviction moratorium in place.²⁷⁹ There was little explanation for doing so other than a one-paragraph concurring opinion from Justice Brett Kavanaugh.²⁸⁰ In the concurrence, he wrote that he agreed that the CDC had exceeded its statutory authority in issuing the eviction ban, but because it was going to expire "in only a few weeks," he was in favor of allowing "for [the] additional and more orderly distribution of congressionally appropriated rental assistance-funds."²⁸¹

269. See generally *Ala. Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 29 (D.D.C. Cir. 2021), *appeal dismissed* No. 21-5093, 2021 WL 4057718 (D.C. Cir. Sept. 3, 2021).

270. *Id.* at 40.

271. *Id.* at 37–42; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–66 (1984) (requiring federal courts to defer to "reasonable" executive agency interpretations of statutes in cases where the agency is tasked with enforcing the law in question and Congress has not specifically addressed the question at issue).

272. *Ala. Ass'n of Realtors*, 539 F. Supp. 3d at 37–42.

273. *Id.*

274. See *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 520 (6th Cir. 2021).

275. See *id.*

276. *Id.* at 524.

277. See *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320 (2021).

278. *Id.*

279. See *id.*

280. See *id.* at 2320–21 (Kavanaugh, J., concurring).

281. *Id.*

L. August Whiplash — The On Again Off Again Eviction Moratorium

In August 2021, the eviction ban was off for two days, back on for an additional twenty-three days, and then off permanently.²⁸² How did this happen?

On August 1, 2021, most believed that the CDC eviction moratorium was over.²⁸³ And it was.²⁸⁴ The next day, White House Press Secretary Jen Psaki said, “[t]o date, CDC Director [Rochelle Walensky] and her team have been unable to find legal authority, even for a more targeted eviction moratorium . . . [but] [t]his President wants to do everything within his power [to help renters avoid eviction].”²⁸⁵

On August 3, 2021, the CDC resurrected the eviction moratorium under the guise of a new “targeted,” not nationwide, moratorium and extended it until October 3, 2021.²⁸⁶ The new CDC declaration added a sixth criteria: the individual resides “in a U.S. county experiencing substantial or high rates of transmission of community levels of SARS-CoV-2 as defined by the CDC.”²⁸⁷ A footnote provided a mathematical formula to calculate the rates.²⁸⁸ The vast majority of the country, and all of Arizona, qualified for protection under the targeted moratorium. The “new” CDC order stated a previously submitted CDC declaration form would remain sufficient, and there was still no requirement for the tenant submitting the declaration to have been impacted by COVID-19.²⁸⁹

But what about the concerns over the lack of legal authority? According to media reports,²⁹⁰ President Biden sought out options from constitutional scholars on how to move forward given the Supreme Court’s ruling in the *Alabama Association of Realtors* case. Apparently, the majority view was

282. See generally David G. Savage, *Supreme Court Blocks Biden’s Extension of Eviction Ban*, L.A. TIMES (Aug. 26, 2021, 6:30 PM), <https://www.latimes.com/politics/story/2021-08-26/supreme-court-biden-eviction-moratorium>.

283. See generally White House, Press Briefing by Press Secretary Jen Psaki and White House American Rescue Plan Coordinator and Senior Advisor to the President Gene Sperling (Aug. 2, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/02/press-briefing-by-press-secretary-jen-psaki-and-white-house-american-rescue-plan-coordinator-and-senior-advisor-to-the-president-gene-sperling-august-2-2021/>.

284. See *id.*

285. *Id.*

286. See Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244 (Aug. 6, 2021) (Order effective Aug. 3, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-08-06/pdf/2021-16945.pdf>.

287. *Id.*

288. See *id.*

289. *Id.*

290. Kaitlan Collins et al., *CDC Announces Limited, Targeted Eviction Moratorium Until Early October*, CNN (Aug. 3, 2021), <https://www.cnn.com/2021/08/03/politics/eviction-moratorium-high-covid-spread/index.html>.

that the eviction moratorium was likely unconstitutional.²⁹¹ Even so, a smaller group of legal experts told him it might pass constitutional muster.²⁹² The President concluded it was worth the litigation risk to keep the ban in place because doing so kept renters housed.²⁹³

On the evening of August 26, 2021, the Supreme Court of the United States vacated the stay of the lower court decision in the *Alabama Association of Realtors* case, making the opinion of the lower court enforceable nationwide.²⁹⁴ The Court held that the CDC lacked the authority to issue a nationwide eviction ban and stated: “If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.”²⁹⁵

The *per curiam* opinion concluded that federal agencies cannot act unlawfully, even if in pursuit of desirable ends.²⁹⁶ Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissented.²⁹⁷ The majority opinion contained some harsh language for supporters of the CDC eviction ban.²⁹⁸

The case has been thoroughly briefed before us—twice. And careful review of that record makes clear that the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority. It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts . . . The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing.²⁹⁹

In response to the ruling, the Secretary of the Treasury, the Attorney General, and the Secretary of Housing and Urban Development sent a letter to state governors, to mayors, and to court officials urging that evictions remain stopped until tenant applications for rental assistance can be processed.³⁰⁰ The letter also requests the creation of eviction diversion

291. *Id.*

292. *Id.*

293. *See id.*

294. Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021).

295. *Id.* at 2490 (Breyer, J., dissenting).

296. *Id.*

297. *Id.*

298. *See generally id.* at 2486, 2488 (majority opinion).

299. *Id.*

300. Janet L. Yellen et al., *Eviction Moratorium Joint Letter*, U.S. DEP’T OF THE TREASURY 1 (Aug. 27, 2021), <https://home.treasury.gov/system/files/136/Eviction-Moratorium-Joint-Letter.pdf>.

programs.³⁰¹ New York responded by adopting legislation extending a statewide eviction ban until January 15, 2022.³⁰²

M. End Game

With the exception of two days, some type of residential eviction moratorium was in place in Arizona from March 24, 2020 until August 26, 2021.³⁰³ Everyone, including leaders in our judicial branch, knew it would end.³⁰⁴ The only question was when.

Chief Justice Robert Brutinel’s August 11, 2021 administrative order established procedures for whenever the CDC eviction moratorium was no longer in effect.³⁰⁵ Because it was uncertain whether the moratorium would remain in effect, it was essentially a combination of the prior two administrative orders to reinstate the prior court practices under the CDC order and then to account for its expiration or termination.³⁰⁶

A major change was that normal statutory and rule time for eviction actions, which had been excluded since March 2020, would no longer be excluded after July 31, 2021.³⁰⁷ This is because the Arizona Legislature, at the request of the landlord bar, enacted House Bill 2893, a budget bill, that amended A.R.S. § 12-109 to prohibit the Arizona Supreme Court from issuing administrative orders that would “abridge, enlarge or modify statutory, contractual or common law real property rights or . . . questions of substantive law.”³⁰⁸

301. *Id.*

302. Mihir Zaveri & Luis Ferre-Sadurni, *New York Passes Bill Extending Eviction Moratorium to January*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/nyregion/eviction-moratorium-new-york.html>.

303. *See generally Ala. Ass’n of Realtors*, 141 S. Ct. at 2486–87.

304. *See id.*

305. Disposition of Residential Eviction Cases Related to the Public Health Emergency as Defined in the August 3, 2021 CDC Order Temporarily Halting Residential Evictions in Certain Counties, Ariz. Sup. Ct. Admin. Order No. 2021-129, at 7–8 (Aug. 11, 2021), <https://www.azcourts.gov/Portals/22/admorder/Orders21/2021-129-Corrected.pdf?ver=2021-08-11-142403-683>.

306. *Id.*

307. *Id.* at 4. While the administrative order would not exclude time statewide, it did allow for the presiding superior court judges to exclude time because of “calendar congestion.” *Id.* Judge Joseph C. Kramer, on behalf of Presiding Judge Joseph C. Welty, did exclude time in Maricopa Courts through the end of August through Administrative Order 2021-114, and Judge Welty again excluded time through the end of September through Administrative Order 2021-133. *Id.*

308. H.R. 2893, 55th Leg., 1st Reg. Sess. (Ariz. 2021). *But see* Ariz. Sch. Bds. Ass’n v. State, 501 P.3d 731, 741–42 (Ariz. 2022) (holding that a budget legislation violated the single-subject rule). Whether A.R.S. § 12-109 was also unconstitutional was not directly before the Arizona Supreme Court, but the same reasoning would appear to apply. *See Ariz. Sch. Bds. Ass’n*, 501 P.3d at 741–42.

N. Eviction Tsunami?

Nearly every time any eviction moratorium was expected to expire, there were predictions that an immediate tidal wave of evictions would follow.³⁰⁹ The chart below provides data for residential evictions filed in Maricopa County.³¹⁰ It is limited, however, to cases actually filed in court. It is almost impossible to know how many tenants voluntarily moved out at any point based on a belief that the eviction moratorium was ending.³¹¹

II. LESSONS LEARNED

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
2019	6,213	5,256	4,363	5,029	5,817	5,669	6,071	6,243	6,099	6,226	5,804	5,928
2020	5,863	5,609	3,870	1,770	1,473	1,609	1,763	2,168	2,859	3,381	3,170	4,214
2021	3,240	3,148	3,247	2,477	2,615	2,985	3,623	2,989	4,257	4,669	3,813	4,403
2022	5,213	4,509	4,700									

A. Do Not Cast Judges in the Role of Advocate

Almost everyone wants to help tenants, who are typically unrepresented,³¹² but judges must remain neutral and objective.³¹³ Perhaps landlords could be required to disclose their tenant's contact information to state and local housing agencies so that the latter can keep supplying updated information.³¹⁴ As intrusive as such a requirement would be, it may be preferable and more timely and effective than placing those obligations on the court because by the time an eviction matter has reached the court, it is often too late to prevent an eviction.³¹⁵

In the recent eviction moratoriums, the court was required to confirm that the tenant had received a handout explaining the CDC declaration prior to the initial appearance and was required to issue a minute entry after the

309. See Rachel Siegel & Jonathon O'Connell, *The Feared Eviction 'Tsunami' Has Not Yet Happened. Experts are Conflicted on Why*, WASH. POST (Sept. 28, 2021, 8:00 AM), <https://www.washingtonpost.com/business/2021/09/28/eviction-cliff-moratorium-rental-assistance/>.

310. The information in this table is from Maricopa County Justice Court Communications Officer, Scott Davis (on file with author).

311. See generally *id.*

312. See Bernal, *supra* note 23, at 582.

313. ARIZ. CODE OF JUD. CONDUCT, Canon 2, r. 2.2 (2021).

314. See generally Bernal, *supra* note 23, at 601.

315. *Id.* at 605.

initial appearance explaining the CDC declaration again.³¹⁶ At the initial appearance, the judge was required to ask tenants questions that would likely trigger a mandatory delay.³¹⁷ In addition to what is required in every case by the rules that govern eviction cases, by the end of the moratorium, judges were required to inquire concerning written attestations by landlords as to (1) whether the CARES Act applied; (2) whether a CDC declaration had been signed; (3) whether rental assistance had been received and if so, whether it was properly credited; (4) whether the landlord had a prior judgment against the tenant; (5) whether the landlord participated in a federal mortgage forbearance program; and (6) whether the property had a federal multifamily mortgage under Fannie Mae or Freddie Mac.³¹⁸

Landlords are represented by attorneys.³¹⁹ Arizona tenants seldom are.³²⁰ As such, it is completely appropriate for judges to explain the process to self-represented litigants.³²¹ Even so, and certainly from the perspective of landlords, requiring that judges explain to tenants how to either delay court dates or defeat allegations made by their landlord caused some participants to question the impartiality of some judges.³²²

B. Do Not Make Protections Available Only to Renters in Certain Types of Property

CARES included a 120-day moratorium on evictions for residential tenants who received federal housing assistance or who lived in a property with a federally backed mortgage.³²³ In addition, the federal government

316. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Admin. Order No. 2020-159, at 1–5 (Oct. 7, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-159%20FINAL%20pdf.pdf?ver=2020-10-07-154943-473>.

317. *Critical Issues in Evictions: 7th Edition, Supplemental Pandemic Script and Checklist While CDC Order is in Effect*, AZCOURTS 1–9 (Apr. 6, 2021), <https://www.azcourts.gov/Portals/2/EDSERV/2021/2021-04%20Critical%20Issues%20Evictions%207%20Materials.pdf?ver=DD8v-zVsSH0%3d>.

318. *Critical Issues in Evictions: 7th Edition, Plaintiffs Attestation*, AZCOURTS (Apr. 6, 2021), <https://www.azcourts.gov/Portals/2/EDSERV/2021/2021-04%20Critical%20Issues%20Evictions%207%20Materials.pdf?ver=DD8v-zVsSH0%3d>. *Plaintiff Attestation*, attachment to *Critical Issues in Evictions*, ADMIN. OFF. OF THE COURTS (Apr. 6, 2021).

319. Bernal, *supra* note 23, at 585.

320. *Id.*

321. “It is not a violation of this rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.” ARIZ. CODE OF JUD. CONDUCT, Canon 2, r. 2.2, cmt. 4 (2021).

322. Judges do have somewhat of a role in assisting tenants because Rule 11 of the RPEA requires a judge to determine whether there is a either a factual or a legal basis for a defense to the complaint, either by reviewing a written answer or by questioning the defendant in open court. 17B A.R.S. Rules Proc. Evic. Act., Rule 11(c)(1).

323. 15 U.S.C. § 9058 (Disposition of Residential Eviction Cases Related to the Public Health Emergency). Any civil or small claims action seeking rent for the period March 27 through July 25, 2020, was required to include an attestation as to the applicability of the CARES Act. Disposition of Residential Eviction Cases Related to the Public Health Emergency Ariz. Sup. Ct. Admin. Order No. 2020-119, at 3 (July 22, 2020), <https://www.azcourts.gov/portals/22/admorder/orders20/2020-119FINAL.pdf?ver=2020>

created additional protections for tenants whose landlords were in federal mortgage forbearance relief programs or had an FHFA mortgage for a multifamily property.³²⁴ It was legally sound, but it was often unworkable in practice because there was no simple way to determine whether a rental property currently had a federally-backed mortgage.³²⁵ Some tenants, who should have received protection, were evicted.³²⁶

Because judges may not perform their own investigations,³²⁷ courts were reliant upon the parties to provide current and correct information.³²⁸ This was not always done.³²⁹ This caused the chief justice to continue to require plaintiff attestations in eviction cases via administrative orders, despite Arizona being a notice pleading state.³³⁰

C. Any Eviction Moratorium Should Address What Happens When the Lease Expires

The eviction moratoria were unprecedented in Arizona law and history.³³¹ Traditionally, and unquestionably, an eviction judgment terminated a lease.³³² However, that interpretation was based upon an expectation that a court would execute a writ of restitution shortly after issuing a judgment or that the parties would voluntarily enter into a new agreement.³³³ If enforcement of a writ was delayed because of the governor's executive order or the CDC declaration, that was no longer the case, and the tenant now remained on the rental premises without a legal agreement to do so.³³⁴ Exacerbating the problem was that, while each moratorium was enacted with a short expiration date, each extension virtually guaranteed that leases would expire during the pendency of the moratorium.³³⁵

-07-28-110618-610. (That administrative order was replaced and the attestation is no longer required in civil or small claims cases). The CARES Act eviction moratorium expired on July 25, 2020. 15 U.S.C. § 9058(b).

324. *Id.* § 9057.

325. *See generally id.*

326. Melissa Egan, *Fact Finders: Eviction Concerns Under CARES Act a Potential 'Tsunami of Terror,'* TUCSON KOLD 13 (July 16, 2020), <https://www.kold.com/2020/07/16/fact-finders-eviction-concerns-under-cares-act-potential-tsunami-terror/>.

327. ARIZ. CODE OF JUD. CONDUCT, Canon 2, r. 2.9(c) (2021).

328. *See generally id.*

329. *See generally id.*

330. *Anserv Ins. Serv., Inc v. Albrecht*, 960 P.2d 1159, 1160 (Ariz. 1998).

331. MARICOPA CNTY. JUST. CTS., *supra* note 38.

332. ARIZ. REV. STAT. ANN. § 33-1368(B) (2021).

333. *See id.*

334. *See* Anne Munsil Courchaine, *Eviction Moratorium: Making Sense of COVID-19 Eviction Guidance Under Federal and Arizona Law*, PROVIDENT LAWS. (Oct. 26, 2020), <https://www.providentlawyers.com/eviction-moratorium-making-sense-of-covid-19-eviction-guidance-under-federal-and-arizona-law/>.

335. *See id.*

The governor's executive orders specifically required the tenant to "acknowledge that [the] terms of the lease remain in effect" in order to invoke the protections of the executive order.³³⁶ Further, the order required all individuals to "pay rent or comply with any other obligation that an individual may have under a tenancy."³³⁷ While less clear, the CDC order "does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract."³³⁸

Accordingly, the Maricopa Justice Court Best Practice Committee concluded that it was a best practice to interpret the executive and CDC orders as temporary exceptions to Arizona law, allowing that a lease not terminate and remain in effect until a writ was executed or the tenant vacated the premises.³³⁹ Under this interpretation, the terms and obligations of the lease remain in effect and there is no need for a second judgment or to consider the tenant a holdover tenant, trespasser, or squatter.³⁴⁰ The supreme court's administrative orders also provided legal authority for the theory that a resident who remained in their residence while the writ was postponed was still a tenant because the orders specifically authorized landlords to file motions to amend residential eviction judgments.³⁴¹ In addition, the Supreme Court interpreted the CDC order to provide protection following the nonrenewal of a lease if the reason for nonrenewal was for nonpayment of rent.³⁴² This created a similar problem regarding status.³⁴³ Accordingly, the committee similarly concluded that the terms of a tenancy continue if the CDC order halted an eviction after nonrenewal of a lease for nonpayment of rent.³⁴⁴

The legal fictions were required because the executive or legislative branches did not fully consider all of the possible consequences of the moratoria, which ties into the next suggestion.³⁴⁵

336. Postponement of Eviction Actions, Ariz. Exec. Order No. 2020-14, at 2 (Mar. 24, 2020), https://azgovernor.gov/sites/default/files/eo_2020-14_0.pdf.

337. *Id.*

338. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,736 (Mar. 31, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-31/pdf/2021-06718.pdf>.

339. MARICOPA CNTY. JUST. CTS., *supra* note 38.

340. *See id.*

341. Disposition of Residential Eviction Cases Related to the Public Health Emergency, Ariz. Admin. Order No. 2020-147 (Sept. 16, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-147%20pdf.pdf?ver=2020-09-16-104553-637>.

342. *Id.* at 1.

343. *See, e.g.*, Continued Postponement of Eviction Enforcement Actions, Ariz. Exec. Order No. 2020-49 (July 16, 2020), <https://azgovernor.gov/sites/default/files/eo2020-49.pdf>; Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. at 16,736.

344. MARICOPA CNTY. JUST. CTS., *supra* note 38.

345. *Id.*

D. Any Eviction Policy Proposals Should Include Input from Court Personnel

In 2021, the Arizona legislature introduced companion legislation.³⁴⁶ The legislation called for the creation of a statewide committee to study eviction prevention and housing affordability.³⁴⁷ Membership on this committee was listed in some fairly specific detail.³⁴⁸ It included representatives from housing advocacy organizations, rental assistance organizations, and historically disadvantaged communities.³⁴⁹ Also on the committee were landlords, university researchers, and constables.³⁵⁰ However, there were no justice court personnel.³⁵¹

In December 2020, the Pima County Eviction and Homelessness Prevention Task Force issued a significant report.³⁵² It contained forty specific recommendations, one of which was for justices of the peace to attend fifteen hours of eviction training every year.³⁵³ However, this committee had no justices of the peace among its members as well.³⁵⁴

When explaining the problems with implementing the various eviction moratoria, a common refrain was that this did not go through the legislative or rule-making process.³⁵⁵ The CDC order, in particular, was so poorly drafted that the CDC later issued non-binding frequently asked questions which seemingly (or obviously) contradicted the provisions of the actual order.³⁵⁶ The CDC never changed the operative language of the regulation, with minor exceptions (for example, indicating that someone filing as a head of household may be able to sign a declaration on behalf of the household).³⁵⁷

The vast majority of eviction actions in Arizona run through the justice courts.³⁵⁸ Justice court personnel, through necessity and experience, have specific and useful insight into the process.³⁵⁹ The authors are disappointed

346. H.B. 2197, 55th Leg., 1st Sess. (Ariz. 2021); S.B. 1039, 55th Leg., 1st Sess. (Ariz. 2021).

347. H.B. 2197; S.B. 1039.

348. H.B. 2197; S.B. 1039.

349. H.B. 2197; S.B. 1039.

350. H.B. 2197; S.B. 1039.

351. See H.B. 2197; S.B. 1039.

352. See generally *December 2020 Report*, PIMA CNTY. EVICTION & HOMELESSNESS PREVENTION TASK FORCE, https://webcms.pima.gov/Userfiles/servers/server_6/File/Government/CSET/CSET%20newsroom/2020/Eviction%20Task%20Force/Final%20Task%20Force%20ereport1208.pdf (last visited Mar. 1, 2022).

353. *Id.* at i–ii.

354. See *id.*

355. See, e.g., *id.*; MARICOPA CNTY. JUST. CTS., *supra* note 38, at 4.

356. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,736 (Mar. 31, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-31/pdf/2021-06718.pdf>.

357. See *id.*

358. See *supra* notes 9–20 and accompanying text (discussing the number of eviction actions piled in the justice courts in Maricopa County).

359. See generally *supra* notes 9–20 and accompanying text (discussing the number of eviction actions piled in the justice courts in Maricopa County).

that policymakers would consider and implement serious changes to the eviction process without including people who have extensive knowledge of the process.³⁶⁰

For example, in addition to the issue of the lease expiring, the moratoria created quite an issue with the partial payment provision of A.R.S. § 33-1371(A).³⁶¹ Both the executive and CDC orders required the tenant to continue to pay rent or make their best efforts to pay their rent.³⁶² However, pursuant to A.R.S. § 33-1371(A), a landlord cannot proceed with an eviction action after accepting a partial payment unless the tenant “agrees in a contemporaneous writing to the terms and conditions of the partial payment with regard to continuation of the tenancy.”³⁶³

The MCJC Best Practices Committee had recognized that landlords were rejecting partial payments because they did not want to lose their right to continue with an eviction action.³⁶⁴ Accordingly, in several later iterations of its Best Practices on Disposition of Evictions During the Pandemic, the committee had recommended treating the CDC declaration as the functional equivalent of a partial payment agreement.³⁶⁵ However, both tenants’ rights attorneys and landlord attorneys objected to this practice in the absence of legislative or executive direction because not all judges followed the suggestions of the Best Practice.³⁶⁶

Accordingly, in the Ninth Amended Best Practice, the committee rescinded its earlier recommendation, so that landlords were required to comply with A.R.S. § 33-1371 and obtain a contemporaneous writing from the tenant if accepting a partial payment and continuing with an eviction action in process.³⁶⁷

The failure of the legislative and executive branches to recognize this issue left all parties in a no-win situation, and the problem may have been resolved with the appropriate participation of people more familiar with the process.³⁶⁸ The Maricopa County Justice Courts attempted to fill in some of

360. See *supra* Section art I.G (discussing changes in the eviction process by policymakers and other government sources).

361. *Ninth Amended Best Practice on Disposition of Eviction Matters during the Pandemic*, MARICOPA CNTY. JUST. CTS. 1, 4 (Feb. 24, 2021), <https://spaces.hightail.com/space/T4SAZTyzha/files/fi-4cc16092-2f34-4a6a-8181-8ca29fb11ee8/fv-f743de68-b3cc-4c99-b1e9-da0897f448e1/2021-02-24%209th%20Amended%20BP.pdf#pageThumbnail-1>.

362. *Id.*

363. ARIZ. REV. STAT. ANN. § 33-1371(A) (2021).

364. MARICOPA CNTY. JUST. CTS., *supra* note 38.

365. *Id.*

366. See *id.*

367. *Id.*

368. See generally *supra* notes 364–66 and accompanying text (discussing the multitude of eviction actions that run through the justice courts and how they have expertise in that area).

the gaps with its Best Practices, but those Best Practices are only suggestions.³⁶⁹

E. The Best Time to Help Tenants Is at the Notice Stage

This is not a new observation, but it is so significant that it is worth repeating. Prior to filing a residential eviction action in court, a landlord must give the tenant notice and an opportunity to cure the alleged breach.³⁷⁰ The greatest opportunity to provide meaningful help to tenants is at this stage in the process.³⁷¹ It is also a point in time where a tenant can turn a case that would be a defense verdict into a judgment for the landlord.³⁷²

For example:

Arizona does not allow tenants to “rent strike.” Tenants may not withhold rent unless expressly allowed to do so by statute. If there is a problem with the residence, the tenant cannot simply stop paying rent. Instead, the tenant must first give the landlord an opportunity to repair the problem.³⁷³

Perhaps legal aid organizations could work with local air conditioning repair and plumbing companies to distribute information on what tenants should do if their landlord will not make the required repairs.

In addition, the supreme court’s Self-Represented Litigant in Limited Jurisdiction Courts Workgroup has created a tremendous amount of legal information in easily understandable portions, including videos in English and Spanish and legal information sheets.³⁷⁴ Those materials may be found at www.azcourts.gov/eviction and www.azcourts.gov/desalojo.³⁷⁵

369. For the ten Best Practices, together with the materials for all of the judicial webinars, see *A Journey Through the Eviction Crisis*, MARICOPA CNTY., <https://spaces.hightail.com/space/T4SAZTyzha> (last visited Mar. 1, 2022).

370. See Williams, *supra* note 30. An exception would be for immediate evictions (e.g., tenant commits a crime). *Id.*; see also Shannon Price, *Stay at Home: Rethinking Rental House Law in an Era of Pandemic*, 28 GEO. J. ON POVERTY L. & POL’Y 1, 1–33 (2020) (providing a nationwide overview of lease termination requirements and recommending statutory changes to help tenants).

371. See generally Williams, *supra* note 34; Beth Dillman, *Tenant Defenses to Eviction in Arizona*, NOLO, <https://www.nolo.com/legal-encyclopedia/tenant-defenses-evictions-arizona.html> (last visited Mar. 1, 2022).

372. See Williams, *supra* note 30.

373. *Id.*

374. *Landlord/Tenant Disputes & Eviction Actions*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/selfservicecenter/landlord-tenant-disputes-eviction-actions> (last visited Mar. 1, 2022) [hereinafter *Landlord/Tenant Disputes & Eviction Actions*]; *Disputas Entre Inquilinos y Arrendadores y Demandas de Desalojo*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/elcen-trodeautoservicio/Disputas-entre-inquilinos-y-arrendadores-y-demandas-de-desalojo> (last visited Mar. 1, 2022) [hereinafter *Disputas Entre Inquilinos y Arrendadores y Demandas de Desalojo*].

375. *Landlord/Tenant Disputes & Eviction Actions*, *supra* note 373; *Disputas Entre Inquilinos y Arrendadores y Demandas de Desalojo*, *supra* note 373.

F. With or Without a Pandemic, Be Careful About Tinkering with Eviction Processes

The Arizona Supreme Court adopted the Rules of Procedure for Eviction Actions (RPEA) in 2009.³⁷⁶ Nearly every year since then, there has been at least one rule change petition seeking to add another requirement for either landlords or courts.³⁷⁷ Should it be more difficult for landlords to evict tenants? That answer is a public policy decision that is arguably beyond the normal role of a trial court judge. But the authors urge caution.

Officials at the White House hosted a conference with a nationwide video plenary session on residential eviction issues.³⁷⁸ Panelists recommended three main changes to current eviction practices: (1) require the landlord and tenant to go through mediation as a prerequisite for bringing any eviction action in court; (2) require court appointed attorneys for tenants; and (3) require a system of government funded rental assistance to continue.

Well-intended changes designed to provide additional protections for tenants facing eviction could ultimately harm the tenant community in general.³⁷⁹ Landlords unable to collect rent from some may be forced to raise rent for all.³⁸⁰ Landlords also may be much more hesitant to rent to someone with a problematic history if they know that any eviction would be difficult if similar problems recur.³⁸¹

Our nation's entire economic system is based on the belief that contractual relationships will be honored, and if they are not, then there will be consequences for the breaching party.³⁸² Both landlords and tenants should be secure in the knowledge that leases will be enforced, and that they will be enforced in a consistent manner.

376. See generally *Rules of Procedure for Eviction Actions*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/rules/recentamendments/morerules/rulesofprocedureforevictionactions.aspx> (last visited Mar. 1, 2022).

377. *Id.*

378. *Readout of the White House Eviction Prevention Summit*, WHITE HOUSE (June 30, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/readout-of-the-white-house-eviction-prevention-summit/>.

379. See Courtney Holmes, *Renters at Tempe Complex Scramble for Housing after Huge Increase in Rent*, ABC15 ARIZ. (July 29, 2021, 11:53 AM), <https://www.abc15.com/news/Rebound/coronavirus-money-help/renters-at-tempe-complex-scramble-for-housing-after-huge-increase-in-rent>.

380. *Id.*

ABC15 asked the Arizona Multihousing Association (AMA), a lobbying group for landlords, about the growing number of extreme spikes in rent. It attributes the increases to several things including a shortage of rental units, an increase in land prices and property taxes, landlords not receiving rent from several renters throughout the pandemic, and slow-moving rental assistance.

Id.

381. See Jacob Passy, *The Eventual End of the Eviction Moratorium Will Hurt Renters—And Not in the Way You Expect*, MARKET WATCH (Aug. 14, 2021, 4:27 PM), <https://www.marketwatch.com/story/the-eventual-end-of-the-eviction-moratorium-will-hurt-renters-and-not-in-the-way-you-expect-11628716287>.

382. See Daniel Indiviglio, *A Free Market Needs Free Contracts*, THE ATLANTIC (Jan. 20, 2010), <https://www.theatlantic.com/business/archive/2010/01/a-free-market-needs-free-contracts/33861/>.