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PERSPECTIVE

COVID can't cancel the Constitution

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California has led the nation in responding to COVID-19 challenges with sweeping, unilateral executive decrees, rule-making and legislation, some of which the courts have reversed, and Sacramento politicians continue to reshape the state in the name of COVID. Just as ballots are being mailed to determine whether his tenure will end early, Gov. Gavin Newsom extended the state's eviction ban until after the recall election. The seemingly indefinite ban (this is the second extension of the 16-month-old ban) may violate the constitutional rights of property owners by forcing them to bear the costs of providing free housing to other citizens, and abrogating the contracts between owners and residents. This constitutional conundrum will now be in the hands of the courts, thanks to a suit filed by the California Rental Housing Association (CRHA) on behalf of small and medium-size property owners.

The new law, Assembly Bill 832, extends the current eviction ban from Aug. 1 to Nov. 1, preventing property owners from evicting tenants who file a Declaration of COVID-19-Related Financial Distress, and requiring owners to urge tenants to complete the boilerplate form. Tenants need only claim an inability to pay full rent due to circumstances related to the pandemic. There is no requirement to prioritize rent over other payments or otherwise spend carefully, or any threat of need verification.

The CRHA alleges that AB 832 unconstitutionally violates their members' property and contract rights, and seeks an injunction prohibiting its enforcement. The



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Gov. Gavin Newsom at a news conference at Kaiser Permanente facility in Oakland, Calif. on Monday, July 26.

CHRA contends that the state is not sufficiently screening against residents who can in fact afford to pay their rent and are violating their leases under the cover of the moratorium. The eviction ban thus unlawfully forces small and medium property owners to house other Californians rent-free in some cases, even though the owners need the rental income to pay for the rental property's mortgages and maintenance in addition to their own living expenses. CRHA's president, Christine Kevane LaMarca, said the evictions ban is causing small and medium rental property providers to suffer "severe economic distress" and losses.

The 5th Amendment to the U.S. Constitution prohibits the government from taking a person's

property for public use without just compensation. Nonetheless, CHRA has an uphill battle in the courts. Several district courts have upheld COVID-pandemic eviction bans on the grounds that an eviction ban did not destroy all of a property's value as required under a traditional "regulatory taking" analysis. See, e.g., *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 165-166 (S.D.N.Y. 2020) (law must have "effectively prevented [Plaintiffs] from making any economic use of [their] property"; loss of rent from subset of tenants was not a taking). Some district courts have held that the Constitution is practically suspended during the pandemic. See *Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789, 806 (D. Minn. 2020)

(law enacted during public health crisis not subject to challenge unless it 'has no real or substantial relation' to protecting the public health or is 'beyond all question[] a plain, palpable invasion' of fundamental rights." (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905) (upholding vaccination requirement)).

CHRA will have to persuade a court that allowing another the exclusive use of one's property for a year and a half while permitting the renter to not pay for it is different than a typical land use regulation. CHRA's complaint indeed asserts that AB 832 law takes property for a private use, rather than a public use, and thus is a per se violation of the 5th Amendment.

CHRA also argues that AB 832 violates the contracts clause in Article 1, section 10 of the Constitution, which prohibits the government from “impairing” private contracts (the leases). A court will consider whether AB 832 appropriately and reasonably advances a significant and legitimate public purpose. Essentially, do the ends justify the means?

Ironically, the state’s shuttering of businesses contributed to the economic hardships that it will cite to justify effectively redistributing private property. But since the state let businesses open, the state’s economy is rebounding strongly. According to the Employment Development Department, California’s unemployment rate was 7.7% in June, down from 14.1% one year earlier, while payroll jobs rose from 15.6 million to 16.4 million and the number of recipients of unemployment insurance dropped by nearly 2.2 million. According to the Bureau of Labor Statistics, California’s unemployment rate is about the same as it was in 2014, and better than it was between 2008 and 2014.

But district courts have so far rejected contracts clause challenges to eviction bans. *See, e.g., HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 353 (E.D. Pa. 2020) (eviction ban necessary to address housing emergency caused by the pandemic, to protect public health by ensuring that city residents can remain at home, to “protect[] the mental and physical health of citizens who could suffer greatly by evictions”). Curiously, the roots of this line of cases lead to a Supreme Court case in which it protected property owners with a foreclosure ban. *See Home Building Loan Assn. v. Blaisdel*, 290 U.S. 398 (1934).

Even without a pandemic, the state has authority to provide an economic safety net to those in need. However, it isn’t necessary to violate property owners’ fundamental constitutional rights to do so. The state can instead increase or extend unemployment benefits, provide food aid, grant tax credits, or give direct financial assistance to anyone with a demonstrated financial need to spend as

they judged their circumstance to require (instead of just on rent).

Courts have repeatedly done their part to uphold the rule of law by striking down pandemic-era assertions of untrammelled government power and discretion, in areas ranging from discriminating against religious worship,

to micromanaging private school openings. The CRHA lawsuit is the latest in a string of opportunities for the judiciary to remind its sister branches that our state is governed by constitutional norms, and no virus provides a sufficient excuse to ignore these fundamental guard rails. ■

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