

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

LCG HOLDINGS LTD,	:	
	:	
Plaintiff,	:	
	:	
-VS-	:	CASE No. 2021 CVG 002360
	:	
EARL MARSHALL,	:	
	:	
Defendant.	:	

DEFENDANT’S RESPONSE TO PLAINTIFF’S MEMORANDUM CONTRA

Defendant submits this response to *Plaintiff’s Memorandum Contra*, filed March 4, 2021. Defendant’s Response is outlined as follows:

Index

- I. Facts and Procedural History
- II. Jurisdictional Priority Rule
- III. Supremacy Clause of the U.S. Constitution
- IV. CDC Order’s Application to “Hold Over” Tenancies
- V. Review of CDC Challenges in Federal Courts
- VI. The CDC Order is Constitutional
 - a. Congress’s delegation of legislative powers was constitutional
 - b. The CDC acted within the scope of its delegated authority
 - c. The CDC Order validly preempts state and local law
 - d. The Contracts Clause is inapplicable
 - e. The CDC Order does not deny Plaintiff access to courts or deprive Plaintiff of Due Process
 - f. Anti-Commandeering
- V. Conclusion

I. Facts and Procedural History

In June 2020, Mr. Marshall's year long lease expired, rendering him a month-to-month tenant. *See Defendant's Exhibit A*. On or about September 2, 2020, the Plaintiff filed a complaint for Forcible Entry and Detainer of the Premises for 6471 Banyan Way Unit #37-6471, Canal Winchester, OH 43110 for non-payment of rent. On September 22, 2020, the Defendant filed with the clerk of the Franklin County Municipal Court a Declaration Under Penalty of Perjury for the Centers for Disease Control and Prevention's Temporary Halt in Evictions to Prevent Further Spread of COVID-19 signed by Defendant in Case No. 2020 CVG 021681 (Marshall I). In Marshall I, after Defendant met his burden of proof that the CDC Moratorium applied to him, this Court determined that the Defendant, Mr. Marshall, met the requirements of the CDC Order and granted a stay of the case on October 30, 2020, prior to any judgement. This stay has been in place since then pursuant FCMC Administrative Order 02-2021 and relevant extensions to the moratorium by Congress and the CDC.

On November 13, 2020, Mr. Marshall received a 60 day notice to terminate his tenancy. See previously admitted *Plaintiff's Exhibit B*. On that same date, Mr. Marshall received a notice of balance due with the notice to terminate tenancy. See attached *Defendant's Exhibit C*. On January 29, 2021, Plaintiff filed the instant case for Forcible Entry and Detainer of 6471 Banyan Way Unit #37-6471, Canal Winchester, OH 43110 for hold-over tenancy.

In *Marshall I*, Mr. Marshall established that he lost his income due to the pandemic and receives only \$94 every week for unemployment. This money is used to pay for the cost of feeding himself and his children, as well as keeping utilities on. Mr. Marshall at this time has no means of moving but has been working diligently with various governmental services to obtain financial and housing assistance. These organizations include, Franklin County Department of Jobs and Family Services for unemployment and PRC; IMPACT Community Action Network for rental assistance and utilities, YMCA stable families for housing assistance and connection to other related services, Legal Aid Society of Columbus to get proper access to veteran's benefits, and Veteran's affairs to apply for a VASH Voucher once his discharge status is updated. If Mr. Marshall were to become homeless, he and his children would be forced into a shelter or stay with family. Moving into such congregated settings is the precise situation the CDC intended to prevent that could lead to increased exposure to the spread of COVID-19. But for this pandemic, Mr. Marshall would have been in a better position to maintain housing for himself and his two children.

II. This Court is without jurisdiction under the Jurisdictional Priority Rule

This Court does not have jurisdiction to hear this FED Action because, under the jurisdictional priority rule, "if two suits pertain to the same claim between the same parties, the first suit prevents the second tribunal from acquiring jurisdiction of the second suit" *Looking Forward Properties, LLC v. Heeter*, Franklin M.C. No.

2020-CVG-029236 (Jan. 25, 2021), citing *State ex rel. Hasslebach v. Sandusky Cty. Bd. of Elections*, 157 Ohio St.3d 433, 2019-Ohio-3751, 137 N.E.3d 1128. This is true even when “the causes of action and relief requested are not exactly the same as long as the actions present part of the same ‘whole issue’”. *State ex rel. Dunlap v. Sarko*, 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 11, quoting *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 29.

Here, the actions the Plaintiff took in filing the hold-over tenancy case pertain to the same “whole issue,” because the underlying reasoning for the decision to terminate Mr. Marshall’s tenancy was his failure to pay rent. This failure to pay rent was the sole issue in Marshall I. Here, the Plaintiff has made no attempts to express displeasure with Mr. Marshall’s tenancy except as to the non-payment of rent, the sole issue in Marshall I. Additionally, Plaintiff’s reasoning behind the decision to terminate Mr. Marshall’s tenancy is implied by the accompanying notice provided to of Mr. Marshall of his past due balance at the same day that they notified him of their decision to terminate his tenancy. Therefore, under the jurisdictional priority rule, this Court cannot hear this case because it involves issues that are at least partly related to the whole issue in Marshall I: that Mr. Marshall could not pay rent.

R.C. 1923.03 states that “Judgement is not a bar to a later action brought by either party.” There was no final judgement in *Marshall I*. While the CDC moratorium is often asserted post-judgement for restitution of the premises, in Mr. Marshall’s case, the moratorium was raised prior to judgement for restitution of the premises. On October 30, 2021, the Court in *Marshall I* issued a stay on the case

prior to any judgement. Thus, R.C. 1923.03 does not apply because *Marshall I* is still pending and no final judgement of eviction was rendered.

Plaintiff's citations, used to assert that the jurisdictional priority rules do not apply to eviction cases, are inapplicable because there was no final judgement in *Marshall I*. The entire body of law supporting *Showe Mgt. Corp. v. Hazelbaker*, 12 Dist. Fayette No. CA2006-01-004, 2006-Ohio-6356, does not apply because in all previous cases, judgement was rendered in the first filing of the eviction action or the second filing was in regards to money, not possession of the premises. See *Hamilton Brownfields Redevelopment, LLC. v. Duro Tire & Wheel*, 156 Ohio App.3d 525, 2004-Ohio-1365, 806 N.E.2d 1039 (12th Dist.); *Weikart v. Abbe*, 7th Dist. Columbiana App. No. 02 CO 32, 2003-Ohio-3076; *Haney v. Roberts*, 130 Ohio App.3d 293, 720 N.E.2d 101 (4th Dist.1998); *Reck v. Whalen*, 114 Ohio App.3d 16, 682 N.E.2d 721 (2d Dist.1996). Therefore, the body of law the Court depended upon in *Heeter II* is applicable.

Plaintiff asserts that R.C. 1923.03 allows a landlord to file an eviction action while previous litigation between the same parties is pending so long as the newly litigated issues were not raised or litigated in the previous action. This is not entirely supported by the cases cited by Plaintiff nor would such an interpretation be practical. Instead of addressing all existing grounds for an eviction in a single action, Plaintiff proposes that landlords can file multiple eviction actions based on separate grounds regardless of whether those grounds could have been tried simultaneously. This creates serious due process and efficiency concerns for tenants

if they are required to respond to multiple actions that could have initially been consolidated into one. If a tenant is behind on rent, is a holdover tenant, and is disturbing the neighbors, it would be nonsensical to allow the landlord to file three separate eviction actions. This is not to say landlords are not prohibited from filing future eviction actions based on new grounds, such as failure to pay rent for a future month. Even without R.C. 1923.03 this would be the case as long as the future grounds for termination are not barred by res judicata through prior litigation. However, if a subsequent action presents part of the “whole issue” from a previous action that is still being litigated, the previous action must be resolved before commencing new litigation. This prevents litigation on same or similar issues that could lead to inconsistent outcomes or undue confusion between cases.

Furthermore, R.C. 1923.03 does not prevent courts from inquiring about whether multiple eviction cases involve the same issues or facts. Plaintiff wishes to limit this Court’s inquiry to the issue of holdover tenancy alone, despite the circumstances surrounding the termination of the tenancy and how they relate to the stay ordered in Marshall I.

III. The Supremacy Clause of the U.S. Constitution prohibits this Court from considering nullification of the CDC eviction moratorium.

Plaintiff has requested this Court to declare the CDC eviction moratorium unconstitutional and unenforceable. This Court does not have jurisdiction to entertain such a challenge. Article VI, Clause 2, of the Constitution of the United States states in full,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

“The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 371, 110 S.Ct. 2430, 2440 (1990). The CDC eviction moratorium is federal law, both imposed as an executive order and affirmed by Congress, and is therefore current law that must be followed by this Court.

Challenges to federal law may be initiated in federal court, which have actual jurisdiction to hear such challenges and require notice to the respective federal agencies to invite a response. 28 U.S.C. 2403. Allowing private parties to litigate the constitutionality of federal laws without participation or notice to a federal representative would undermine the legislative foundations of federal law and disregard the entire purpose of electing representatives to Congress to create laws that reflect the will of the public.

In fact, the CDC eviction moratorium was challenged in our local federal district court, the U.S. Southern District of Ohio, and resulted in a Stipulation of Dismissal that left the CDC eviction moratorium intact. *Exhibit D - Stipulation of Dismissal, KBW Investment Properties, LLC v. Azar*, No. 2:20-cv-4852 (S.D. Ohio filed Oct. 9, 2020). With nothing contrary from the U.S. Southern District of Ohio or a

higher court, or a reversal in the law by Congress or an Executive Action, this Court is bound to uphold the moratorium and cannot entertain constitutional arguments presented solely by private parties.

IV. The CDC Order applies to “hold over” tenancies where the tenancy was terminated for non-payment of rent

The CDC Order prohibits residential evictions of covered persons for any reason other than those enumerated in the Order. 85 Fed. Reg. 55,296. (Sep. 4, 2020) (“[S]ubject to the limitations under the ‘Applicability’ section, a landlord . . . shall not evict any covered person from any residential property in any State or U.S. territory in which there are documented cases of COVID-19 that provides a level of public-health protections below the requirements listed in this Order.” (emphasis added)). The CDC Order enumerates five reasons for which evictions of covered persons may proceed during the moratorium. Those reasons are limited to situations where the covered person has violated the law or the person’s lease:

(1) Engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) *violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment* (including non-payment or late payment of fees, penalties, or interest).

Id. at 55,294 (emphasis added).

“Holding over” does not constitute a violation of a contractual obligation where the lease does not impose a duty on the tenant to vacate at the end of the term. Under Ohio law, and the terms of the lease at issue in this case, when a

tenant remains in possession past the term of their lease, the lease is renewed. Here, when Mr. Marshall's lease expired on June 23, 2020, he did not vacate, and the lease was continued on a month-to-month basis. *See Defendant's Exhibit A.*

Under the CDC Order, a landlord cannot terminate the lease of a covered person without the occurrence of an enumerated crime or contractual violation. The CDC defines "Eviction" as "*any action* by a landlord . . . to remove or *cause the removal of* a covered person from a residential property." 85 Fed. Reg. 55,293 (emphasis added). Interpreting the CDC Order otherwise would be inconsistent with its plain language and express intent, findings, and objectives.

Here, Plaintiff initiated this action not only to attempt to circumvent the stay ordered in *Marshall I*, but to circumvent the CDC Order as well. Plaintiff's purported termination of the tenancy was for non-payment of rent, not for any of the five enumerated reasons for which evictions can proceed under the CDC Order. Accordingly, dismissal of this case is proper because the court is without jurisdiction due to the stay ordered in *Marshall I* and Plaintiff has not raised any new grounds for eviction which are outside the applicability of the CDC Order.

V. Review of CDC Challenges in Federal Courts

Courts have consistently denied challenges to the CDC eviction moratorium.

After reviewing 34 cases returned from a Westlaw search on all state and federal court decisions on the CDC eviction moratorium (searched "adv: CDC & eviction & moratorium"), 8 federal district court decisions upheld the CDC eviction

moratorium. *Brown v. Azar*, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020); *Chambless Enterprises, LLC v. Redfield*, 2020 WL 7588849 (W.D. La. Dec. 22, 2020); *Heights Apartments, LLC v. Walz*, 2020 WL 7828818 (D. Minn. Dec. 31, 2020); *Baptiste v. Kennealy*, 2020 WL 5751572 (D. Mass. Sept. 25, 2020); *El Papel LLC v. Inslee*, 2020 WL 8024348 (W.D. Wash. Dec. 2, 2020); *KC Tenants v. Byrn*, 2020 WL 7063361 (W.D. Mo. Nov. 30, 2020); *Threadmill Master Tenant, LLC v. Fraser*, 2020 WL 6483964 (Conn. Super. Ct. Oct. 13, 2020). *Tiger Lily LLC v. United States Dep't of Hous. & Urban Dev.*, 2020 WL 7658126 (W.D. Tenn. Nov. 6, 2020).

Only 1 federal district court decision found the CDC eviction moratorium unconstitutional. *Terkel v. Centers for Disease Control & Prevention*, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021). Assessment of the *Terkel* case will be submitted in a supplemental brief.

The remaining 25 cases did not address any challenges to the CDC eviction moratorium or assess its constitutionality. No state level case law was found that evaluated the constitutionality of the moratorium.

The only known federal case in this jurisdiction that challenged the CDC eviction moratorium was *KBW Investment Properties, LLC v. Azar*, which resulted in a Stipulated Dismissal that acknowledged the validity and enforceability of the CDC eviction moratorium.

VI. The CDC Order is Constitutional

a. Congress's delegation of legislative powers was constitutional

Plaintiff incorrectly argues that the CDC’s statutory basis for issuing the eviction moratorium does not actually provide “any legal authority to allow the CDC to halt evictions nationwide.” Congress provided the Center for Disease Control and Prevention with the power to regulate by the Public Health Service Act which was an act of congress codified at 42 U.S.C. 264 and more importantly, if Congress did not intend for the CDC to act in this manner, Congress would not have extended the order further in The Coronavirus Response and Relief Supplemental Appropriations Act, 2021, enacted December 27, 2020. *See Consolidated Appropriations Act, 2021, Division M, Sec. 502.*

The Public Health Service Act provides that the Secretary of HHS can “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States . . . or from one State . . . into any other State.’ The statute then states that for purposes of carrying out and enforcing such regulations, the Secretary of HHS ‘may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.’” *Brown v. Azar*, No. 1:20-CV-03702-JPB, at *6 (N.D. Ga. filed Oct. 29, 2020), quoting 42 U.S.C. 264(a). The Secretary of HHS, in 42 C.F.R., 70.2, delegated their authority to the Director of the CDC. This authority was delegated so that “whenever the Director of the CDC determines that the measures taken by the health authorities of any state or

local jurisdiction are insufficient to prevent the spread of a communicable disease, 'he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.'" *Brown* at *7, citing 42 C.F.R. 70.2.

First, Plaintiff argues that the canons of construction in interpreting the statutory basis for the CDC's authority to act cannot be interpreted to allow an eviction moratorium. In *Brown*, the Court held that Plaintiff's argument that ejusdem generis, expression uniu, noscitur a sociis, and casus omissus result in the CDC not having authority to issue the Order was not persuasive because "cannons are not mandatory rules," but are simply guides to aid ambiguity, which does not exist in the case of the CDC's authority to Order a halt on evictions. *Id.* at *9, citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct.528, (2001).

Next, Plaintiff argues that delegation provision of 42 U.S.C. 264(a) does not allow for measures such as the CDC Moratorium on evictions, indicating that it is an exhaustive list. However, as a Federal Court has already illustrated, the language of 42 U.S.C. 264(a) is not exhaustive because the statute specifically states at the end of the list Plaintiff quotes, that the Secretary of Health and Human Services can take "other measures, as in his judgement may be necessary." 42 U.S.C. 264(a); see *Brown*. This broad authority was delegated to the Director of the CDC by the Secretary of HHS in 42 C.F.R. 70.2 which provides the Director of the CDC to take such action upon determination that the measures taken by the health

authorities of any state are insufficient to prevent the spread of communicable disease. The Court in *Brown* held that “Congress’ intent, as evidenced by the plain language of the delegation provision, is clear: Congress gave the Secretary of HHS broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases. Because, as forth below, the Order is necessary to control the COVID-19 pandemic, the CDC was authorized to issue it.” *Brown*, at *7.

Now that the statutory authority for the CDC to act in issuing the CDC Order to Temporarily Halt Evictions is established, the Plaintiff (in passing) argues that this statutory authority failed to provide an intelligible principle, therefore rendering the delegation of power improper under Article I of the U.S. Constitution. The United States Supreme Court rarely finds a delegation of legislative authority lacks intelligible standards.

b. The CDC acted within the scope of its delegated authority

Plaintiff inaccurately argues that even if the CDC’s statutory basis for acting is constitutional, that the CDC acted beyond the scope of said authority. As stated above, 42 C.F.R allows for the Director of the CDC to take any steps “reasonably necessary” to stop the spread of disease. The Plaintiff argues that there is no evidence that evictions will result in an increased spread of COVID-19. However, this claim is entirely unfounded as multiple reputable sources have cited research to support the link between the spread of COVID-19 and evictions. It goes without

saying that evictions often lead to homelessness, including living in shelters or moving in with friends and/or family.

The National Low Income Housing Coalition (NLIHC) reported on an earlier study conducted by University of Pennsylvania in which a research team led by an epidemiologist found through simulated scenarios and mathematical models that “higher eviction rates increased infection levels and deaths due to the epidemic. A monthly eviction rate of 0.25% of all renter households led to infections in an additional 1.5% of the population compared to a no-eviction baseline, and a 2% per month eviction rate led to infections in an additional 13%. In all the scenarios studied, higher eviction rates led to increases in disease prevalence.” NLIHC, *Preliminary Research Shows Evictions Contribute to Spread of COVID-19*, <https://nlihc.org/resource/preliminary-research-shows-evictions-contribute-spread-covid-19> (Sep. 8, 2020).

The NLIHC later reported in December that a study, titled “Expiring eviction Moratoriums and COVID-19 Incidence and Mortality” found that “lifting state eviction moratoriums led to an estimated 433,700 excess COVID cases and 10,700 excess deaths.” NLIHC, *New Research Indicates Evictions Increase COVID-19 Cases and Deaths*, <https://nlihc.org/resource/new-research-indicates-evictions-increase-covid-19-cases-and-deaths> (Dec. 7, 2020), citing Kathryn M. Leifheit, Sabriya L. Linton, Julia Raifman, et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3739576 (Dec. 3, 2020).

These studies are just the tip of the iceberg when it comes to evidence of a positive correlation between evictions and the spread of COVID-19. Therefore, the CDC acted within the scope of its authority because the Order temporarily halting evictions, was “reasonably necessary” to stop the spread of COVID-19.

c. The CDC Order validly preempts state and local law

The CDC Order was issued pursuant to the agency’s authority under 42 CFR 70.2, implementing the Public Health Service Act, 42 U.S.C. 264 et seq. Consistent with the Act’s preemption clause, 42 U.S.C. 264(e), the Order precludes any interpretation or state or local implementation of the Order that conflicts with or undermines its requirements or objectives. 85 Fed. Reg. 55,293 (“This Order shall be interpreted and implemented in a manner as to achieve the following objectives: [m]itigating the spread of COVID-19 within congregate or shared living settings, or through unsheltered homelessness; mitigating the further spread of COVID-19 from one U.S. State or U.S. territory into any other U.S. State or U.S. territory; and supporting response efforts to COVID-19 at the Federal, State, local, territorial, and tribal levels.”).

Under the Supremacy Clause, any state law that conflicts with a federal law is preempted. *Gibbons v. Ogden*, 22 U.S. 1 (1824). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. *In re Miamisburg Train Derailment Litigation*, 68 Ohio St.3d 255, 1994-Ohio-490, 626 N.E.2d 85 (1994), quoting *Louisiana Pub. Serv. Comm. v. Fed. Communications*

Comm., 476 U.S. 355, 369, 106 S.Ct. 1890, 1899 (1986). For a federal provision to validly preempt state law, “it must represent the exercise of a power conferred on Congress by the Constitution,” and “since the Constitution confers upon Congress the power to regulate individuals, not States, [the] provision at issue must be best read as one that regulates private actors.” *Murphy v. NCAA*, 138 S.Ct. 1461, 1479 (2018).

Congress’s authority to enact the Public Health Service Act relies on the Commerce Clause. The CDC’s authority to implement the eviction moratorium pursuant to the Public Health Service Act is “well supported and falls firmly within the scope of [the CDC’s] authority.” *Chambless Enterprises, LLC v. Redfield*, No. 3:20-cv-01455, 13 (W.D.La. filed Dec. 22, 2020). Regulation of the rental real estate market “unquestionably” falls within the scope of the federal government’s authority under the Commerce Clause. *Russell v. United States*, 471 U.S. 858, 862 (1985). Further, the provision at issue is one that regulates private actors, prohibiting “any action by a landlord . . . to remove or cause the removal of a covered person from a residential property.” 85 Fed. Reg. 55,293. Accordingly, the CDC Order is a valid preemption of state and local law which contradicts it.

d. The Contracts Clause is inapplicable

Plaintiff asserts in its Memorandum Contra, “There is [sic] nothing in the relevant statutes or regulations that purports to give CDC the authority to supercede the Contracts Clause of Article I, Section 10 of the United States Constitution, and preempt the Contracts Clause of the Ohio Constitution (Oh.

Const. Art. II, §28).” See Plaintiff’s Memo Contra. This application of both the Federal and Ohio state constitution is incorrect because both statutes do not apply to the federal government’s ability to interfere with contracts. Article I, Section 10 of the U.S. constitution states “[n]o *state* shall ... pass any ... Law impairing the Obligation of Contracts” (emphasis added). Article II, Section 28 of the Ohio Constitution states, “The [state] general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts..”

Thus, these constitutional provisions do not apply because both provisions refer to the *state’s* ability to interfere with contracts, not the federal government’s ability to interfere with contracts.

e. The CDC Order does not deny Plaintiff access to courts or deprive Plaintiff of due process

Plaintiff’s argument that the CDC order denies landlords access to courts in violation of the constitution is flawed because landlords are still free to file eviction cases for any reason and obtain a judgement of eviction eventually. This issue, as well as almost every other issue Plaintiff raises, was also raised in the United States District Court for the Southern District of Ohio in *KBW Investment Properties, LLC v. Azar, infra*. The parties reached an agreement in the form of a stipulated dismissal in which the parties acknowledged that landlords are not denied access to courts because they can file evictions in state court, allows for landlords to seek “judicial review of a tenant’s right to remain on his or her

property, including seeking an evidentiary hearing to challenge the veracity of a [CDC] declaration.” *Id.*

Given the emergency, temporary, and limited nature of the Order, and additional resources available to mitigate harm to landlords (such as federal rental assistance monies and the option to set up a payment plan), and open access to the courts, the Order is not a “complete foreclosure of relief” because it leaves open alternatives, aside from possession of the property, to mitigate harm suffered by the landlord in cases of non-payment of rent or other related non-payment actions. Even in this case where the case was filed for hold-over tenancy, but the underlying issue is non-payment of rent and utilities, the Plaintiff is not barred from accessing these harm-mitigation resources.

f. Anti-commandeering

Plaintiff argues that the “CDC is unconstitutionally commandeering state resources and state officers to achieve its policy objectives or execute federal laws.” *Plt’s Memo Contra § IV*. Although Plaintiff accurately outlines case law on commandeering, Plaintiff confuses it with preemption, which is the effect of the CDC eviction moratorium. Preemption is “The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.” *PREEMPTION, Black’s Law Dictionary* (11th ed. 2019). Commandeering, on the other hand, limits how far Congress may go to direct states and to enforce federal laws. *Murphy v. Natl. Collegiate Athletic Ass’n*, 138 S.Ct. 1461, 1475, 200 L.Ed.2d 854 (2018). While Congress has the broad power “to pass

laws requiring or prohibiting certain acts” by private actors, the federal government cannot “directly. . . compel the States to require or prohibit those acts.” *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct. 2408, 2423, 120 L.Ed.2d 120 (1992).

In the case of the CDC eviction moratorium, there are no direct orders to the State of Ohio, the City of Columbus, this Court or its staff, or any other state actors. Our Court has a constitutional duty to uphold federal laws, while the anti-commandeering principle prevents directing states to enforce them. Enforcement of the CDC eviction moratorium, just like any federal law, is up to the individual states to interpret and implement. Plaintiff’s line of reasoning would render federal laws meaningless by allowing state courts to completely disregard any federal law that affects its litigants. Such reasoning would, for example, equate the federal Fair Housing Act’s prohibition against racial discrimination to “commandeering” state courts to interfere with landlord-tenant relationships.

V. Conclusion

This Court should dismiss for lack of jurisdiction, or in the alternative, stay the case pursuant to the CDC Moratorium.

This case must be dismissed because this Court does not have jurisdiction under the jurisdictional priority rule because this case, *Marshall II*, shares the same “whole issue” as *Marshall I*. R.C. 1923.03 does not apply because no judgement has been entered into *Marshall I* and its outcome is still pending.

Even if this Court has jurisdiction, this Court must uphold the CDC eviction moratorium and impose a stay on this case as it did in *Marshall I*. This Court lacks jurisdiction to entertain a constitutional challenge to the CDC. Even if it did, the order is constitutional because Congress appropriately delegated legislative power, the CDC properly acted within the scope of that power, the Order is a valid preemption of state law, and the Plaintiff is not denied access to the courts or due process. The CDC Order has been a critical part of federal policy controlling the spread of COVID-19. NLIHC, *Eviction and Utility Disconnection Moratoriums Led to Fewer COVID-19 Cases and Deaths*, <https://nlihc.org/resource/eviction-and-utility-disconnection-moratoriums-led-fewer-covid-19-cases-and-deaths> (Feb. 8, 2021).

Mr. Marshall and his family will be at a higher risk of catching COVID-19 or spreading it to others if they are evicted and forced into congregate housing, which is the very situation the CDC and Congress intended to prevent. Plaintiff should not be allowed to circumvent the moratorium by simply claiming Mr. Marshall is a holdover tenant when the reality is Plaintiff is attempting to create a loophole that undermines the purpose of the moratorium.

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CERTIFICATE OF SERVICE

The undersigned represents that a copy of the foregoing was served upon the Plaintiff's attorney via hand delivery, on March 4, 2021.

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