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How to Sue a State Court in U.S. District Court to Enjoin Residential Eviction Hearings During the Covid-19 Pandemic

As many states resume economic activity, state and local eviction moratoria are being withdrawn or being allowed to expire in many jurisdictions. Yet the Covid-19 pandemic persists, and will likely worsen as the easing of social distancing requirements and stay-at-home orders increases the incidence of transmission. Stopping or materially slowing the resumption of residential eviction proceedings thus remains a significant public health concern, and should be a foremost priority of housing advocates. This memorandum examines the use of federal litigation as a means for restraining or encumbering local courts, or possible entire state court systems, in resuming or hearing eviction cases as the pandemic rages on.

A. Possible claims

There appear to be three families plausible federal claims on which to potentially enjoin state judicial eviction proceedings: (i) claims based on non-compliance with Section 4024(b) of the Coronavirus Aid, Relief, and Economic Security Act;[1] (ii) claims based on the (14th Amendment) Due Process Clause, and (iii) claims based on anti-discrimination statutes such as the Fair Housing Act or Americans with Disabilities Act.

1. CARES Act claims

The basic claim based on the CARES Act essentially derives from the complexity of the eviction moratorium established in Section 4024(b) and the difficulty of identifying which rental units are covered. Briefly, the CARES Act took effect on March 27, 2020, and restricts lessors of "covered dwellings" from filing new eviction actions for non-payment of rent or other fees or charges during the first 120 days thereafter (i.e., until July 25, 2020). See Pub.L. 116-136, § 4024(b)(1). A "covered dwelling" means substantially any type of residential tenancy, so long as the tenant actually occupies the unit and the unit is in a "covered property." See *Id*., § 4024(a)(1)(A). The Act then defines "covered property" to include any property that "participates" in a housing program covered under the Violence Against Women Act (VAWA) or the rural housing voucher program, or that has a federal backed mortgage loan or multifamily mortgage loan. See *Id*., § 4024(a)(2).

Determining whether a property is covered can be challenging because tenants may not know, and may not be able to find out, whether a property has a federally-backed loan or participates in a VAWA-covered program or the RD voucher program. Fannie Mae, Freddie Mac, and

[1] Pub.L. 116-136, § 4024(b).

organizations such as the National Low-Income Housing Coalition have created resources that may be used to find out whether most (though not necessarily all) multi-family properties (i.e., 5+ units) have federally-backed multifamily mortgage loans or participate in certain site-based subsidy programs covered by VAWA. But many tenants live in small (1-4 unit) rental properties, and the Freddie Mac and Fannie Mae on-line lookup tools for finding out whether such smaller properties have federally-backed mortgage loans may only be used by borrowers—not tenants, advocates, or courts. And there are no such tools for finding out whether housing vouchers are present in a multifamily property; indeed, federal (and likely state) privacy protections would likely restrict voucher administrators from disclosing the locations of their tenants.[2]

Though determining whether specific units are subject to the CARES Act moratorium can be difficult, there is no question that the amount of housing subject to the Act is extensive. The Urban Institute has estimated that approximately 12.3 million rental housing units (28% of the 43.8 million overall U.S. rental units) have federally-backed mortgage loans.[3] About seven million U.S. rental units are assisted by housing vouchers or other federal subsidies that are covered through VAWA or the rural voucher program,[4] as well as more than 3.1 million low-income housing tax credit units--also covered via VAWA.[5] Of course, many of these units may overlap (e.g., a LIHTC unit could be in a building with a federally-backed multifamily mortgage loan, or be occupied by a tenant with a voucher). But in addition to these units that are directly covered, non-participating housing units can be also be covered dwellings if in properties where other units have vouchers or participate VAWA-covered programs. See CARES Act, § 4024(a)(2)(A). Hence, the actual percentage of rental units covered by the CARES Act moratorium is likely far above 28%.

Given the high percentage of rental housing units subject to the CARES Act moratorium and the difficulty of determining which rental properties are covered and which are not, some landlords will inevitably file eviction cases prohibited by the Act. Indeed, this has already occurred.[6] If courts do not adopt procedures designed to avoid those filings, or to quickly detect and dismiss improper filings, then those courts will hear and decide matters contrary to federal law. Preventing such violations could serve as a basis to enjoin a court system from resuming eviction hearings until appropriate case screening procedures have been adopted.

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[2] See, e.g., 5 U.S.C.A. § 552a(b) (2014).

[3] Urban Institute, "The CARES Act Eviction Moratorium Covers All Federally Financed Rentals—That's One in Four US Rental Units," UrbanWire (Apr. 2, 2020), on-line at: https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units.

[4] *See* Congressional Research Service, "CARES Act Eviction Moratorium," p. 2 (Apr. 7, 2020), on-line at: https://crsreports.congress.gov/product/pdf/IN/IN11320.

[5] HUD, Office of Policy Dev. & Research, "Low-Income Housing Tax Credits," (May 24, 2019), on-line at: https://www.huduser.gov/portal/datasets/lihtc.html.

[6] See by Jeff Ernsthausen, Ellis Simani and Justin Elliott, "Despite Federal Ban, Landlords Are Still Moving to Evict People During the Pandemic," Pro Publica (Apr. 16, 2020), on-line at: https://www.propublica.org/article/despite-federal-ban-landlords-are-still-moving-to-evict-people-during-the-pandemic

A number of states (Arkansas, Georgia, Michigan, South Carolina, Texas) that have continued to allow evictions during the pandemic have adopted rules requiring eviction plaintiffs to submit declarations or otherwise affirmatively verify having made diligent inquiries and confirmed that the disputed premises are not covered.[7] Such rules properly place the burden of establishing non-applicability of the CARES Act moratorium on landlords, rather than tenants—who may not know, and may not have access to the information from which to find out, whether their properties are covered. Such rules also help fulfill the public health objectives underlying the Act, because requiring tenants to respond to such complaints, investigate and gather evidence of CARES Act coverage, and appear in court and argue for dismissal or improperly-filed cases would expose tenants, court personnel, and other members of the public to heightened and unnecessary risk of infection and viral transmission during the pandemic.

But not all states have adopted such rules, and few local courts have done so on their own. An injunction claim based on the CARES Act would seek to restrain evictions in one or more state courts, or an entire state, until that local court or state court system adopts appropriate rules and procedures for detecting covered properties and screening improper filings.

2. Procedural due process claims

As discussed in the NHLP memo entitled "Procedural Due Process Challenges to Evictions during the Covid-19 Pandemic,"[8] many of the circumstances related both to the pandemic itself and to rules and procedures courts may adopt in response to the pandemic call into question whether tenants sued for eviction during the emergency period can or will receive full and fair opportunities to defend. Where advocates can identify a generally-existing condition or a consistent rule or practice that undermines the due process rights of tenants in all eviction cases or in particular categories of eviction cases, advocates may be able to pursue an injunction to stop the court from hearing or deciding such cases until the problematic condition, rule, or practice has been addressed.

Numerous cases from the public housing context suggest that a federal court may enjoin state judicial eviction proceedings where the state process does not afford procedural due process to tenants. See, e.g., *Caulder v. Durham Housing Authority,* 433 F.2d 998, 1002 (4th Cir. 1970) (proper to enjoin eviction through state judicial mechanism where required procedural safeguards were not afforded to public housing tenant). In *Caulder*, a PHA brought evictions proceedings against a public housing tenant and held an administrative grievance hearing replete with procedural due process violations:

> On February 19, 1969, she attended a meeting with the Housing Authority project manager, at which she was informed that several of her neighbors had complained of the conduct and morals of her children. The identity of the complaining neighbors, however, was not disclosed.

[7] The National Housing Law Project has a list of state administrative orders designed to facilitate compliance with the CARES Act moratorium and links to those orders at: https://www.nhlp.org/campaign/protecting-renter-and-homeowner-rights-during-our-national-health-crisis-2/

[8] On-line at: https://www.nhlp.org/wp-content/uploads/procedural-due-process-covid-evictions.pdf.

> On March 1, 1969, she received written notice from the Housing Authority that her lease would be terminated for cause at the expiration of the current month. The letter specified neither the names of the complainants nor the offenses of which her children were accused but asserted that she had been previously informed of the causes.
>
> The plaintiff obtained legal assistance and requested a written list of specific charges. A meeting with the executive director of the Housing Authority was arranged and held on March 18. At the meeting she and her attorney were informed that the meeting constituted 'an administrative hearing'' [at which the] executive director read aloud from certain papers which he represented as affidavits. The papers contained complaints about the plaintiff's children, which included allegations of specific immoral acts, all of which the plaintiff denied. Neither plaintiff nor her attorney was permitted to see the affidavits nor were the names of the complainants disclosed.
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> Nine days later a hearing was conducted before the commissioners of the Housing Authority. The commissioners denied the requests of plaintiff's attorney for the specifics of the charges, the names of the complainants, and the rules governing the manner in which the hearing would be conducted. The evidence of the complaining witnesses was heard in camera with no opportunity for plaintiff to challenge or cross-examine them. Her attorney, however, was permitted to introduce affidavits from neighbors who considered plaintiff a satisfactory tenant. Plaintiff was not told the names of the persons making complaints nor the dates of specific acts of misconduct or immoral behavior on the part of her children.

Caulder, 433 F.2d at 1000. After the PHA commissioners upheld the termination, the PHA filed a judicial eviction proceeding in state court, and obtained a judgment for possession. At that point, the tenant sued in federal court, seeking to enjoin execution of the eviction judgment and the PHA termination.[9] See *Id*. at 1001. Though the U.S. District Court dismissed the action, the Fourth Circuit reversed and enjoined the state eviction matter. *Id*. at 1004. Critical to this outcome was the appellate court's observation that the state summary eviction proceeding would not have afforded the procedural safeguards to which the tenant was entitled before eviction. See *Id*. at 1002 ("It is significant that the final notice of termination on which the Housing Authority proceeded before the magistrate constituted an exercise of the unlimited power of termination contained in the lease. It did not condition termination on the fact that any covenant of the lease had been breached, or that the rent had not been paid.").

Other recent examples of cases in which federal courts restrained state eviction proceedings include *Sinisgallo v. Town of Islip Hous. Auth.,* 865 F. Supp. 2d 307 (E.D.N.Y. 2012) and *Shepherd v. Weldon Mediation Services, Inc.,* 794 F. Supp. 2d 1173 (W.D. Wash. 2011). *Sinisgallo* was a public housing eviction case based on violent criminal activity, in which the tenant argued the criminal activity was disability-related and there was a reasonable accommodation the PHA could have made to enable the tenant to remain in the housing without engaging in future violent conduct. See *Sinisgallo* at 314-15. The PHA grievance tribunal upheld the eviction and the PHA brought a state eviction lawsuit, but the federal court enjoined the unlawful detainer action because the state court would not have been able to hear or adjudicate the reasonable accommodation defense. See *Sinisgallo* at 328.

[9] It is unclear whether the *Caulder* case, if brought today, would survive under the *Rooker-Feldman* doctrine, discussed *infra*.

Whereas *Caulder* and *Sinisgallo* concerned injunctions for individual relief, in *Shepherd* several public housing tenants and a tenant organization alleged that certain customs and policies by which a public housing authority's grievance hearings were conducted rendered those proceedings less-than-meaningful. These included claims that the hearing officer who presided over the grievances was not properly trained and qualified, and that the PHA prohibited the hearing officer from considering certain relevant arguments or defenses. The court found the plaintiffs were likely to prevail on these claims, and entered a preliminary injunction directing the PHA, among other things, not to "[assign] hearing officers who lack training or experience to consider and resolve arguments based on applicable federal, state, or local law to preside over grievance hearings." *Id*. at 1187. That order functionally amounted to an injunction against further grievance hearings until such time as the PHA hired and trained new hearing officers with the proper qualifications.

To bring a similar type of due process challenge to enjoin eviction hearings during the Covid-19 pandemic, advocates would need to identify conditions or court practices that taint the quality of eviction hearings consistently across full dockets. A handful of the possible examples may include:

- Individual courts
    - Court access limitations of which parties and witnesses are not notified (including both limitations on persons who cannot enter, or rules for entry such as mask use);
    - Lack of remote participation options, insufficient steps taken to address technology barriers, or failure to notify parties of options for appearing remotely;
    - Remote hearing options that provide a significantly diminished quality of the opportunity to be heard (e.g., inability to present documents or exhibits, poor sound or video quality, inability to access sign language or foreign language interpretation, etc.);
    - Lack of adequate social distancing or health measures taken at court facilities, including both lack of sufficient policies as well as lack of consistent enforcement;
    - Entry of default judgments against tenants who have not appeared without efforts to ensure tenants have were not denied entry to the courthouse or unable to appear remotely due to lack of notice;
    - Failure to appoint counsel for an unrepresented tenant who may have defenses under CARES Act or state/local Covid-19 related protection
- Court systems
    - Continued use of form pleadings (such as eviction summonses or notices) that are rendered inaccurate or misleading because of Covid-19 related policies or practices (e.g., summons instructs tenant to appear in person and does not inform of court access restrictions or remote hearing alternatives);

- Court management/administrative orders directing trial courts to hear or resume processing eviction cases without adopting sufficient public health/social distancing rules (or affirmatively instructing courts to adopt social distancing practices that are facially inadequate)

The scheme of the injunction sought through such a challenge would be to restrict the state court (or entire court system) from hearing eviction cases until the rule or circumstance infringing on tenant due process rights is corrected.

3. Fair housing claims

The third family of claims that appears plausible as a means of enjoining state judicial eviction proceedings for all or some portion of the ongoing pandemic would be claims arising under the Fair Housing Act or other anti-discrimination laws, such as Title II of the Americans with Disabilities Act, or Equal Protection Clause claims under the Fourteenth Amendment. Possible theories advocates might be able to develop under this family of claims includes:

- Disparate impact claims where members of certain protected classes are significantly more likely to be unfairly prejudiced by Covid-19 related court practices (e.g., courts that fail to adopt remote hearing practices that accommodate LEP populations could be amenable to national origin claims;
- Discriminatory methods of administration[10] claims for disability discrimination where courts fail to adopt adequate remote hearing options or other accessible alternatives for persons with disabilities that make appearing in public places during the Covid-19 pandemic unreasonably dangerous;
- Hybrid intentional discrimination/disparate impact claims[11] against local governments where discriminatory animus can be shown to have factored into a decision to allow continued evictions or resume evictions after having had a temporary moratorium.
- Intentional discrimination claims against local governments where discriminatory animus can be shown to have driven or factored into a decision to allow continued evictions or resume evictions after having had a temporary moratorium.

Among these claims, those based on disability discrimination are likely the most broadly available. In-person hearings will not provide equal access for tenants or witnesses with

[10] See 28 C.F.R. § 35.130 (prohibiting public entities from "utilize[ing] criteria or methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or] have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities…") (underline added).

[11] See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 (1977) (evidence that a government policy will have a significantly harsher effect on racial minorities than others is a factor that can contribute to a finding of intentional discrimination); see *Ave. 6E Investments, LLC v. City of Yuma,,* 217 F. Supp. 3d 1040, 1055 (D. Ariz. 2017) (noting that "evidence of discriminatory intent can bolster a disparate impact case," and holding that evidence a city based a zoning decision on discriminatory concerns of neighboring homeowners coupled with evidence of some disparate impact enabled plaintiffs to make a prima facie showing of discrimination), *citing Casa Marie, Inc. v. Superior Court,* 988 F.2d 252, 270 n.20 (1st Cir. 1993).

disabilities that prevent them from being able to safely travel to or enter court facilities during the pandemic. Hence, a court that does not make remote hearings available could be amenable to a disability-based challenge, as well as perhaps where remote hearings are available but significantly inferior to in-person hearings (e.g., if tenants are not able to present or examine exhibits, if the sound or video quality is poor or unstable, or if sign or language interpretation the tenant or witness needs is not provided or not effective). Note that remote proceedings might suffice for some types of hearings (e.g., non-evidentiary motion hearings or scheduling procedures) and not others (e.g., trials or other evidentiary hearings).

For courts that do provide viable remote hearing solutions, disability-based challenges remain possible, though would likely need to be narrower. For instance, some tenants may simply lack access to the necessary technology and high-speed internet connections required for remote participation, or lack the ability to use the equipment properly. Others might have both respiratory or immune disabilities that prevent them from appearing in person, and also other disabilities that make remote hearings impractical. The U.S. Supreme Court has already held that state courts are public entities amenable to suit, at least for declaratory relief and damages, under the ADA. See *Tennessee v. Lane,* 541 U.S. 509 (2004) ("Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' §5 authority to enforce the guarantees of the Fourteenth Amendment.").

Potential racial and ethnic discrimination claims deserve a more in-depth investigation than can be undertaken here. But that Covid-19 disproportionately impacts people and communities of color is no secret, both because people of color are "particularly vulnerable to both the virus itself" and because the pandemic exacerbates "systemic and institutional racism that [causes] Black people, people of color and indigenous people [to] face underlying inequities in health, income, wealth, access to government resources and participation, incarceration, education, and nearly every additional feature of society."[12] And residential evictions also tend to disproportionately harm people and communities of color—especially African-American women—even outside pandemic conditions.[13]

Accordingly, one would intuitively anticipate that resuming (or simply continuing with) evictions during the Covid-19 crisis would likewise have a significant disproportionate harmful effect on people and communities of color. Purposefully causing that harm may or may not motivate any a particular jurisdiction in resuming evictions—though one need only recall images of "alt-right" protestors demanding state governments lift stay-at-home orders to realize how far from

[12] See National League of Cities, "Disparate Impacts of Covid-19 on Communities of Color" (Apr. 201, 2020), on-line at: https://citiesspeak.org/2020/04/21/disparate-impacts-of-covid-19-on-communities-of-color/; see also U.S. House of Representative Ways & Means Committee hearing on May 27, 2020, on-line at: https://waysandmeans.house.gov/legislation/hearings/disproportionate-impact-covid-19-communities-color-0

[13] See, e.g., Deena Greenberg, Carl Gershenson, and Matthew Desmond, "Discrimination in Evictions: Empirical Evidence and Legal Challenges," Harvard Civil Rights-Civil Liberties L. Rev. 115, 120 (2016).

unthinkable the notion may be, particularly in jurisdictions whose leadership is sympathetic to those voices.[14]

If racial or ethnic discrimination could be shown to have driven a decision to resume evictions, then an injunction could be possible on equal protection grounds unless other evidence makes clear the jurisdiction would have resumed evictions anyway. See *Hunter v. Underwood,* 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.").

If intentional discrimination cannot be shown, disparate impact theories may be available to challenge housing providers, or possibly state or local governments, who resume evictions during the pandemic. Mounting such a challenge would likely require two major components. For one, advocates would need to identify a specific harm or group of harms that the eviction practices caused on African-Americans (or other protected class) and quantify those effects statistically. See *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507, 2523 (2015). This would likely involve showing that the number of households facing evictions under the resumed docket was disproportionately African-American, for instance. Making this statistical showing could be especially challenging given the uncertain coverage of the CARES Act moratorium (*supra*)—especially in communities where large portions of the local African-American population lives in subsidized housing units.

Assuming the necessary statistical basis could be developed, advocates would then need to identify less-discriminatory alternatives for achieving any legitimate purposes those evictions might serve. The essential rationale for evicting a tenant due to a rent arrearage is the notion that the delinquent tenant may be replaced with a new tenant who will reliably pay the rent. But pandemic conditions may call that assumption into question. If a tenant's delinquency is a function an income disruption related to Covid-19, one might plausibly assume the delinquent tenant will likely be able to resume paying rent at the conclusion of the pandemic, when his or her income is restored. This is not certain, of course—there is no guarantee that a person who becomes unemployed due to Covid-19 will return to the same job, or secure a different job at a similar or better rate of pay. But neither can it necessarily be presumed that a landlord who evicts one tenant during pandemic conditions will quickly secure a new, rent-paying occupant.

Allowing delinquent tenants to remain in their homes until the conclusion of the pandemic (or, at least, until some other logical transition point) and establish payment plans on Covid-19 related rent arrearages is thus at least arguably an equally effective less discriminatory alternative to business-as-usual evictions. Additional factors that may assist in this calculus include the possibility of federal rental assistance to tenants affected by Covid-19 layoffs, and the availability of forbearances or other payment concessions on federally-backed mortgage loans encumbering rental properties.

[14] See, e.g., Adam Serwer, "The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying," *The Atlantic* (May 8, 2020), on-line at: https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/

A corollary to this analysis is that advocates would likely need to narrow any such claims to steer clear of evictions for which no less-discriminatory alternative is available, while restraining others. This might mean, for example, allowing evictions based on dangerous criminal activity or other serious behavioral lease violations to proceed while challenging the resumption of nonpayment or other economically-driven evictions. A resulting claim might be far less sweeping than advocates might prefer (e.g., instead of enjoining all evictions, a plausible claim might be something such as an action to restrain a housing provider from filing evictions for non-payment of rent where the nonpayment is related to Covid-19 and the tenant can demonstrate a reasonable likelihood of being able to pay rent in a timely manner at the conclusion of the Covid-19 emergency"). Should challenges of this kind prove viable, however, even with limitations such as those contemplated herein, they could absolutely reach enough of the looming eviction cases to make them worthwhile.

B. Avoiding abstention (and abstention-like substances)

Restraining a state court or court system from evicting tenants during a pandemic through federal litigation unfortunately requires much more than simply a viable legal theory. Such injunctions are so heavily disfavored that advocates must navigate a veritable legal minefield of statutory and doctrinal provisions designed to knock such claims out short of consideration on the merits. These include the Anti-Injunction Act, *Younger* abstention, *Pullman* abstention, *Burford* abstention, *Colorado River* abstention, the so-called "Rooker-Feldman doctrine," Eleventh Amendment sovereign immunity, and judicial immunity. Steering such a path requires both careful plaintiff and case selection, as well as precise timing.

1. Anti-Injunction Act/Section 1983

The federal Anti-Injunction Act (or "AIA") states that no federal court may "grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. This means any federal court action to stop state eviction proceedings would need to fit within one of the three exceptions. See *Mitchum v. Foster,* 407 U.S. 225, 228-29 (1972).

Enjoining state eviction proceedings would not be necessary to protect or effectuate a federal court's judgments, except perhaps in a circumstance where the federal court had already decided some matter related to the pending state eviction. However, the advocates could, subject to some limitations, fit the above-contemplated claims within the remaining two exceptions to the AIA.

The U.S. Supreme Court has held that actions brought under 42 U.S.C. § 1983 to enforce federally-protected rights are permissible under the "expressly authorized by Act of Congress" exception to the AIA. See *Mitchum,* 407 U.S. at 242-43. Hence, this exception could allow a federal court to enjoin a state eviction tribunal based on a Sec. 1983 claim asserting federal due process rights (indeed, *Mitchum* itself concerned a Sec. 1983 suit to enforce both Fourteenth Amendment due process rights and First Amendment free speech rights). See *Mitchum* at 227.

Mitchum is not limited to Sec. 1983 claims enforcing constitutional rights, however, so the "expressly authorized" exception could potentially also enable a Sec. 1983 claim based on the CARES Act to avoid the AIA. See *Mitchum* at 243. However, whether the CARES Act is actually enforceable through Sec. 1983 is less clear; if not, the AIA would bar a CARES Act claim because the CARES Act has no enforcement mechanism of its own.

To determine whether the CARES Act is enforceable under Section 1983 requires an analysis under the so-called *Blessing* factors—i.e., the statute must unambiguously create obligation on the state of which the plaintiff is the intended beneficiary, and the asserted rights cannot be too vague or amorphous to enforce judicially. See *Blessing v. Freestone,* 520 U.S. 329, 340-41 (1997). There is a strong argument that the CARES Act does create such a right; the text very specifically prohibits (in mandatory language) the filing of a carefully-defined set of eviction lawsuits, and tenants in covered dwelling units are unmistakably the intended beneficiaries of that protection. See CARES Act, § 4024(b). Nothing in the CARES Act specifically forecloses Sec. 1983 enforcement, and there is no administrative enforcement procedure or other mechanism Congress might have intended to address violations. See, c.f., *Gonzaga University v. Doe,* 536 U.S. 273, 291 (2002) (establishing a detailed administrative enforcement scheme may reflect Congressional intent to preclude Sec. 1983 enforcement of a particular statute).

Even so, the trend among federal courts has been increasingly hostile to Sec. 1983 claims in recent years; that the text specifically imposes the obligation <u>on landlords</u> not to file certain eviction cases (rather than restrict state courts from accepting them), as well as the availability of practical enforcement through the dismissal of state eviction lawsuits, could satisfy many federal judges that Sec. 1983 enforcement is not available. See CARES Act, § 4024(b). Of great concern in this regard are a series of federal decisions declining to imply a private right of action to enforce the Protecting Tenants at Foreclosure Act (which, among other things, required a person who purchased a home at a foreclosure sale to give a bona fide tenant occupying that property at least 90 days' notice before evicting them). See, e.g. *Logan v. U.S. Bank,* 722 F.3d 1163, 1172 (9th Cir. 2013) (nothing in PTAF evinced Congressional intent to create private cause of action and Congress could have intended the Act simply to create defense cognizable in state law eviction proceedings), see *Mik v. Freddie Mac,* 743 F.3d 149, 159 (6th Cir. 2014) (PTAF "is meant to protect tenants living in foreclosed properties. However, the Act does so by regulating <u>the conduct of successors in interest</u> to foreclosed properties") (underline added).

Though the PTAF cases analyze whether an implied cause of action was available to enforce that statute against private actors, the analysis with respect to whether a statute creates a right cognizable under Sec. 1983 is the same. See *Gonzaga*, 536 U.S. at 284-85 ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983. But the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case…"). For this reason, advocates contemplating CARES Act challenges (to resumed eviction proceedings) should be prepared to distinguish the PTAF cases. Probably the most likely basis for distinction is that dismissal after filing was generally a sufficient remedy for tenants improperly sued under the

PTAF—whereas forcing tenants to appear and move to dismiss cases filed in violation of the CARES Act undermines the public health and social distancing objectives behind the law, to the detriment of both tenants and their communities. Otherwise, advocates may wish to consider finding ways to couch CARES Act claims as due process violations, as well as options for bringing such claims under state law vehicles (such as writs of prohibition or superintending control).

As to fair housing claims, several federal circuits have held that the Fair Housing Act does not contain an explicit Congressional authorization to enjoin state judicial proceedings, at least in the broad manner that *Mitchum* held Sec. 1983 to do. See, e.g*., Casa Marie, Inc. v. Superior Court,* 988 F.2d 252, 262 (1993); *U.S. v. Billingsly,* 615 F.3d 404, 410 (5th Cir. 2010); see also *Mercer v. Sechan Reality, Inc.,* 569 Fed.Appx. 652, 653 (11th Cir. 2014); *Bond v. JPMorgan Chase Bank, N.A.,* 526 Fed.Appx. 698 at *3 (7th Cir. 2013). At least one U.S. District Court has ruled the AIA likely precludes injunctive relief against state courts under Title II of the Americans with Disabilities Act as well. See *Braverman v. New Mexico, 2011* WL 6013587 at *12 (D.N.M. 2011) (on motion for temporary restraining order, plaintiff did not show likelihood of success on merits because relief sought was probably barred by AIA). Accordingly, advocates seeking to restrain state eviction proceedings on a fair housing basis may face a steep climb. However, there do appear to be a few paths up the mountain.

For one, the reasoning on which courts have largely found the AIA to bar injunctive actions against state courts is that discrimination claims are generally cognizable in state judicial proceedings—and hence a federal injunction is ordinarily not necessary to ensure the federal anti-discrimination protections may be asserted and enforced. See *Casa Marie,* 988 F.2d at 261 ("a federal statute comes within the Anti–Injunction Act's 'expressly authorized exception [if]: '(1) the statute … created a specific and uniquely federal right or remedy, enforceable in a federal court of equity,' and (2) the federal right or remedy … can be "given its intended scope *only* by the stay of a state court proceeding.'") (emphasis in original), quoting *Mitchum* at 237-38. But a claim that the court's decision to hear eviction cases at all, or the administrative methods by which courts hold those hearings (including the management of facilities, options for remote appearance, social distancing practices, etc.) may, at least as a practical matter, not be feasible or possible to present in eviction cases—or may not be cognizable under some state summary proceedings rules. See, *e.g., Lindsey v. Normet,* 405 U.S. 56, 68 (1972) (state eviction proceedings may exclude certain defenses and counterclaims and require them to be litigated separately). Thus, advocates challenging such meta aspects of a state or local judicial eviction court may be able to successfully distinguish the above cases holding such actions barred under the AIA.

Second, albeit similarly, the court in *Sinisgallo v. Islip Housing Authority* relied on the "necessary in aid of its jurisdiction" exception to find that the AIA did not prevent a federal court from enjoining a state eviction proceeding in which tenant would not be able to present a disability discrimination defense. *Sinisgallo v. Islip Housing Authority,* 865 F. Supp. 2d 307, 328 (E.D.N.Y. 2012). This exception appears highly on-point for fair housing challenges to administrative court procedures that deny full and equal access to litigants with disabilities or produce harmful community-wide effects manifesting beyond individual cases.

Third, as discussed above, advocates could also consider ways of packaging fair housing claims in the guise of due process violations. For example, tenants whose disabilities prevent them from traveling to or entering court facilities may be denied full and meaningful opportunities to defend if they are not given comparable access to court through remote hearing options, whether because those options do not exist or because they are not notified of them. That such remote procedures are required by anti-discrimination laws could then serve as a factor refuting any contention that the governmental interest in efficient procedures justifies the resulting increased risk of erroneous deprivation. See generally *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) (process due in particular case depends on the importance of the interest at stake, the risk of erroneous deprivation, and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

Fourth, instead of actually seeking injunctive relief, advocates could bring actions seeking declaratory relief and damages. See e.g., *Tennessee v. Lane,* 541 U.S. at 533-34 (Title II of ADA enforceable for damages because Congress validly abrogated states' Eleventh Amendment immunity). Courts would presumably revise their practices to in response to a declaratory judgment finding challenged practices unlawful. Problematically, of course, without a claim for injunctive relief such a case may not be heard or decided in time to prevent a substantial number of evictions.

2. Formal abstention doctrines

The next set of obstacles that a federal action to enjoin evictions would need to surmount are the formal abstention doctrines, under which federal courts refrain from interfering with state judicial activities as a matter of "equity, comity, and federalism." See *Mitchum* at 242-243.

a. *Younger* abstention, *Colorado River* abstention, and *Rooker-Feldman* doctrine

Probably the most well-known abstention doctrine is so-called "*Younger* abstention," so-named for the case of *Younger v. Harris,* 401 U.S. 37 (1971), and intended to avoid undue interference with state goals and functions. See *Younger* at 45. Under *Younger* abstention, a federal court must decline jurisdiction when state proceedings are pending at the time the federal action is filed, if the state proceedings both implicate important state interests and provide an opportunity to raise the federal claim. See *Moore v. Sims,* 442 U.S. 415, 426 (1979).

State eviction tribunals likely implicate important state interests. See *Middlesex County Ethics Cmte. v. Garden State Bar Assn.,* 457 U.S. 423, 432 (1982) ("Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation."). Many, probably most, state eviction courts allow an adequate opportunity to raise federal defenses, such as due process violations or fair housing violations. See, e.g., *Moore* at 428-30 (federal court may not assert jurisdiction on the basis that the state court may not be competent to adjudicate the federal matter,

rather, "abstention is appropriate unless state law clearly bars the interposition of the constitutional claims").

As such, a tenant who is already being sued for eviction in state court likely cannot avoid *Younger* abstention. This means a viable challenge would probably need to be brought on behalf of a tenant who has not yet been sued for eviction (e.g., a tenant who has received a notice to vacate or otherwise anticipates being sued for eviction, but before the case is formally filed), or on behalf of an organization or other third-party plaintiff that would not be directly involved in the state eviction case.

Bringing suit in federal court on behalf of a plaintiff who has not been sued in state court also avoid so-called *Colorado River* abstention, which—though uncommon—is appropriate in some circumstances where a parallel state proceeding may resolve a matter. See *Colorado River Water Conservation Dist. v. U.S.,* 424 U.S. 800, 817-8 (1976).

Perhaps more importantly, bringing an action on behalf of tenant who has yet to be sued in state court also avoid the more troublesome "*Rooker-Feldman* doctrine," under which a federal court lacks subject matter jurisdiction to hear an actions that collaterally attacks final state court judgment "if the constitutional claims are 'inextricably intertwined' with the state court's decision." See *Ananiev v. Freitas,* 37 F. Supp. 3d 297, 312 (D.D.C. 2014); see also *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 284 (2005) (*Rooker–Feldman* doctrine "is confined to cases … brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.").

A tenant against whom a state eviction judgment is entered could have a difficult time establishing that a CARES Act defense, due process violation, or fair housing issue was not inextricably intertwined with the state eviction action. See *D.C. Ct. App. v. Feldman,* 460 U.S. 462, 486–87 (1987) (claims may be found inextricably intertwined even if not raised in the state proceeding). But a tenant who has yet to be sued cannot, by definition, have had a state eviction judgment entered against him or her.

b. Other abstention doctrines

Two additional abstention doctrines exist on which a federal may, or may be required, to decline jurisdiction, but neither not appears especially relevant here. One is *Pullman* abstention, which calls for a federal court to decline jurisdiction, or possibly certify questions to a state high court, where a case involves a potentially dispositive question of state law. See *Texas Railroad Commn. v. Pullman Co.,* 312 U.S. 496 (1941). The other, *Burford* abstention, is a concern when the federal action challenges a complex state regulatory system and presents state law questions related to state public policies, the importance of which "transcends the result in the case then at bar." *Colorado River Water Conservation Dist. v. U.S.,* 424 U.S. 800, 814 (1976); see also *New Orleans Pub. Svc. Inc. v. New Orleans City Council,* 491 U.S. 350, 361-62 (1989), discussing *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).

3. Immunity doctrines

The final set of obstacles that a federal action would need to avoid arise under Eleventh Amendment sovereign immunity and judicial immunity.

Eleventh Amendment immunity protects states against lawsuits generally except where the state consents to be sued (e.g., waives its sovereign immunity), or where the state's immunity has been abrogated by a clear and valid Act of Congress. See *Hoffman v. Connecticut,* 492 U.S. 96, 101 (1989). While some anti-discrimination laws, including Title II of the ADA, have been held to abrogate states' sovereign immunity, others—such as the Fair Housing Act, have not. See *Lane*, 541 U.S. at 531; see *McCardell v. HUD,* 794 F.3d 510, 522 (2015). Note that Eleventh Amendment immunity does not extend to local governments that are not "arms of the state." See *Alden v. Maine,* 527 U.S. 706, 756 (1999) ("The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State.").

To avoid Eleventh Amendment immunity, then, plaintiffs bringing cases against state officials typically rely on the "*Ex Parte Young*" doctrine, under which an action may be brought against a public official in her individual capacity to restrain an unconstitutional act. See *Ex Parte Young,* 209 U.S. 123 (1908). But this leads to a second concern, in that the state officials who might be sued in this type of challenge are judges, who may be entitled to judicial immunity.

Judicial immunity is a sweeping form of immunity that precludes not only liability, but even litigation against a judge or other official acting in an adjudicative capacity. See *Forrester v. White,* 484 U.S. 219, 228 (1988). However, judicial immunity does not apply to other (i.e., non-adjudicatory) functions that a judge or adjudicator may carry out—such as promulgating rules or managing staff. See *Forrester* at 229 ("nature of the function performed, not the identity of the actor who perform[s] it, [has] informed our immunity analysis.").

Hence, judicial immunity would bar actions that challenge the manner in which a judge or court heard or decided a particular case. See *Forrester* at 225 (discussing rationale for judicial immunity as "a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error"). But a challenge that targets policies or practices related to court administration affecting all cases or categories of cases should be able to avoid judicial immunity.

4. Putting it all together

Assuming a viable cause of action may be identified (whether under the CARES Act, due process clause, or a fair housing law), a federal court challenge to state eviction proceedings could be heard on the merits if the plaintiffs fulfill the following criteria:

- Bring the case on behalf of a person or entity that has not already been sued (for eviction or in some intertwined matter) in state court;

- Bring the case (a) against a local government that is not an arm of the state, (b) under a statute that waives the state's Eleventh Amendment immunity (e.g., Title II of the ADA), or (c) against state official in his or her individual capacity; and
- Challenge an administrative court practice or general rule broadly applying to all cases—not the processing or adjudication of any specific case.

Accordingly, viable plaintiffs for a federal court challenge to renewed evictions would appear to include:

- Individuals who anticipate being sued for eviction (e.g., though having received eviction notices or other directives to vacate) but have not yet been sued in state court, and who would be subjected to the challenged policies or practices;
- Associations with members who have been, are being, or anticipate being sued for eviction and affected by the challenged practices; and
- Organizations that are directly harmed (either through diversion of resources or frustration of mission) by the challenged practices—such as eviction defense clinics, legal aid programs, or other organizations that provide services to people facing eviction.