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Mitigating Housing Instability During a Pandemic

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INTRODUCTION

One evening in April 2020, as the COVID-19 pandemic swept through the United States and businesses closed their doors, Margarita Lopez received a knock on hers.[1] When she opened it, a man handed her a note and said "Good luck."[2] She was being evicted from her Staten Island apartment; New York's emergency eviction freeze was set to expire, leaving Lopez with little time or recourse.[3] Reflecting on the experience, Lopez told a reporter, "Every time I walk out of this door, I'm scared for my life. I feel like I have no power. . . . I feel stuck. If I end up homeless, a shelter is not an option because eventually I'll get sick. It's a lot of questions about what comes next."[4]

Lopez is not alone. Only one-third of tenants nationwide were able to pay rent in April 2020, and only slightly more than half were expected to be able to pay their full rent in the following months.[5] Homeowners also fell behind. Roughly 3.4% of Americans were delinquent on their mortgage payments as of April 2020, and by July 2020, 4.1 million homeowners were in forbearance.[6] Yet the federal policy response to the pandemic included remarkably few direct interventions to reduce housing instability and prevent homelessness.[7] This failure to prioritize mitigating housing instability during the initial

1 Caroline Spivack, *'I Have No Power': The New York Renters Who Aren't Protected from Eviction*, CURBED NY (June 1, 2020, 6:35 PM), https://ny.curbed.com/2020/6/1/21273338/new-york-city-eviction-rent-relief-coronavirus [https://perma.cc/8UMW-M7PD].

2 *Id.*

3 *Id.* Although the state freeze would later be extended until January 1, 2021, Margarita's case did not meet the narrower criteria to qualify for additional time.

4 *Id.*

5 Paula A. Franzese et al., *There'll Be a Tragic Wave of Evictions Unless Legislators Act Soon*, NJ.COM (June 26, 2020), https://www.nj.com/opinion/2020/06/therell-be-a-wave-of-evictions-unless-legislators-act-soon-opinion.html [https://perma.cc/4MZC-KKQP].

6 Andrew Van Dam, *An Indicator That Presaged the Housing Crisis Is Flashing Red Again*, WASH. POST (July 14, 2020, 8:05 AM), https://www.washingtonpost.com/business/2020/07/14/new-mortgage-delinquencies-hit-record-high/ [https://perma.cc/L64P-BUSL].

7 This Article focuses on housing instability as it affects the public health crisis. However, note that under international human rights law, the right to adequate housing is a crucial component of a right to an "adequate standard of living" as conveyed in the UN Declaration of Human Rights. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing . . . and the right to security in the event of unemployment, sickness, . . . or other lack of livelihood in circumstances beyond his control." G.A. Res. 217 (III) A, Universal Declaration of Human Rights, 3rd Sess., Supp. No. 25, U.N. Doc. A/810 (Dec. 10, 1948) 71. The United States contributed to and endorsed the UN Declaration of Human Rights in 1948.

stages of the pandemic places millions of Americans at risk of eviction or foreclosure, with great consequences for public health.[8]

This Article analyzes the pathways by which unmitigated housing instability could impede the success of public health strategies during the pandemic and provides a historically grounded evaluation of the housing policy response. The phrase *housing instability* is used to capture the multiple and often overlapping dimensions of how the pandemic may directly or indirectly affect housing tenure and security. Although most of the dimensions of housing instability described were present prior to the pandemic, their potential impact becomes much greater given the economic, social, and public health shocks associated with COVID-19.[9]

Social distancing, the primary public health tool for controlling a pandemic like COVID-19, is likely to increase housing instability. Because social distancing requires people to remain home as much as possible, it has been accompanied by business closures and a rise in unemployment. If unemployed workers are unable to pay their mortgage or rent, homelessness will increase, effectively preventing people from social distancing. Such effects undermine the public health response.

For these reasons, this Article argues that it is essential for lawmakers to address housing instability directly. Yet lawmakers have rarely taken the steps needed to effectively mitigate housing instability, even when its harms have been more salient. To understand why, this

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8 Alicia Adamczyk, *Millions of Americans Could Face Eviction in July—and It Could Destabilize Communities for Years to Come*, CNBC (Jan. 12, 2021, 9:26 AM), https://www.cnbc.com/2020/07/01/nearly-7-million-households-could-face-eviction-without-assistance.html [https://perma.cc/CES6-K9NK]. In New Jersey alone, a Stout report prepared for the Coalition of Housing Advocates in NJ estimates that 450,000 renters ("approximately 40% of all renter households") will be unable to pay their August rent. STOUT, THE POTENTIAL IMPACT OF COVID-19 RELATED EVICTIONS IN NEW JERSEY 7 (July 23, 2020). Furthermore, "New Jersey could experience 304,000 eviction filings in the coming four months" once the eviction moratoriums are lifted, "an estimated 600% increase from pre-COVID-19 levels." *Id.* at 4.

9 Research shows that evictions lead to "homelessness, mental and physical health challenges, employment loss, [and] challenges re-renting. . . . These impacts often trigger a social safety net response (e.g., use of homeless shelters, Medicaid spending . . . , [and] payment of unemployment benefits . . .) that is extremely expensive for states and cities. Furthermore, these impacts are likely to be significantly worse when coupled with COVID-19. The virus's community transmission could worsen its already detrimental effects, including contributing to an increase in . . . cases, particularly among vulnerable populations. If this were to happen, generational poverty in New Jersey, especially for Black and Brown renter household[s] would undoubtedly be exacerbated." STOUT, *supra* note 8, at 28.

Article analyzes policies intended to mitigate housing instability during the last significant economic crisis, the Great Recession, when housing instability was at the forefront. Despite the prominent role housing instability played during the Great Recession, lawmakers failed to implement policies that reduced such instability effectively.

Drawing on this analysis, this Article provides a historically grounded critique of the initial policy response to the COVID-19 pandemic. We show that the initial response to the COVID-19 pandemic has faced many of the same barriers to effectively mitigating housing instability as those faced during the Great Recession and, as a result, further intervention is necessary. Ultimately, our analysis concludes that further people-based and place-based interventions are necessary to mitigate housing instability. People-based policies include assistance provided directly to individuals, such as cash or rental vouchers.[10] We argue that people-based interventions are essential during the pandemic, but that some forms of assistance may be more effective than others. For example, housing payment assistance is preferable to indirect forms of relief to homeowners and renters. Similarly, grants are preferable to tax expenditures. In contrast, place-based interventions "target specific communities or locations, often with the explicit goal of revitalizing entrenched pockets of poverty."[11] We argue that place-based interventions will be necessary to address ongoing housing instability in the months and years following this crisis.

This Article makes several important contributions to the current literature. First, it adds to the growing body of literature on COVID-19 by providing an account of the barriers to mitigating housing instability during periods of crisis and placing the pandemic in context with historic policy interventions. Second, this Article contributes to the urban and poverty law literatures by using the COVID-19 pandemic as a case study to reveal new insights about the relative effectiveness of housing laws during pandemic conditions. Third, this Article contributes to the tax law literature by describing both the potential and the limitations of the tax expenditure approach to promote affordable housing during a pandemic.

The Article proceeds as follows. Part I analyzes data from the Eviction Lab to predict that housing instability, as reflected in eviction

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[10] Nestor M. Davidson, *Essay: Reconciling People and Place in Housing and Community Development Policy*, 16 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2009).

[11] *Id.*

rates, is likely to rise because of the pandemic. It argues that policymakers are most likely to take steps to mitigate rising housing instability if they understand the public health risks associated with housing instability. Accordingly, it describes the pathways by which housing instability threatens to undermine the public health response during the COVID-19 pandemic.

Part II describes the major interventions taken during the Great Recession and identifies the barriers to their effective implementation. During the Great Recession, the policy response focused on foreclosure prevention, primarily through loan modification, and place-based interventions to increase the supply of permanent affordable housing. These programs generally failed to meet expectations due to multiple factors, including resource constraints, the use of incentives rather than more direct controls, a focus on long-term place-based strategies at the expense of more immediate people-based strategies, slow government implementation, a reluctance among regulators to administer the programs, and low participation by banks. Direct housing assistance, including a homelessness prevention and rapid rehousing program, played a much smaller role but was arguably more effective.

Drawing on the foregoing analysis, Part III examines the initial policy response of federal, state, and local governments during the COVID-19 pandemic, including the first significant emergency legislation, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). In addition to providing cash assistance to individuals and businesses, initial policies have included foreclosure moratoriums and eviction freezes that directly mitigate housing risk. However, these interventions have failed to eliminate the need for direct housing payment assistance and grant-funded place-based interventions.

For these reasons, Part IV sets forth two significant priorities for lawmakers: direct relief to renters and homeowners to mitigate housing instability during the pandemic, and place-based interventions to mitigate housing instability and geographic inequality after the crisis. To this end, we recommend three significant policy interventions: (1) rental assistance and mortgage payment assistance programs; (2) a civil right to counsel in evictions to help ensure the efficacy of eviction freezes and foreclosure moratoriums; and (3) targeted place-based interventions to promote affordable housing development. These recommended interventions, which are designed to mitigate housing instability, are not only essential to address the continuing threat from COVID-19 but also to prepare the United States for future pandemics.

I
HOUSING INSTABILITY DURING A PANDEMIC

A. Predicting the Impact of COVID-19 on Housing Instability

Social distancing strategies used to control the COVID-19 pandemic created a sudden and widespread wave of business closures, employee furloughs, and layoffs.[12] Even before precautionary shutdowns were instituted in parts of the United States, the country officially entered a recession in February 2020.[13] By the end of April 2020, the official U.S. unemployment rate had risen to 14.7%, easing to 13.3% in May.[14] This May number was almost certainly an underestimate, as state employment agencies struggled to process claims, and many unemployed workers had not yet filed for unemployment.[15]

Though many states implemented eviction moratoriums to prevent unemployment from causing a wave of evictions,[16] "[h]ousing attorneys say that they've seen a flood of [wrongful eviction] cases nationwide since the economic collapse precipitated by the spread of COVID-19."[17] Such housing instability is likely to increase as unemployment persists.[18] It is important to note that eviction rates were high even before the pandemic and disproportionately affected communities of color.[19] Just as the COVID-19 virus has had a

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12 Shawn Donnan & Joe Deaux, *Layoffs Start Turning from Temporary to Permanent Across America*, BLOOMBERG BUSINESSWEEK (May 6, 2020, 8:12 AM), https://www.bloomberg.com/news/articles/2020-05-06/temporary-coronavirus-layoffs-are-turning-permanent-around-u-s?utm_campaign=news&utm_medium=bd&utm_source=applenews [https://perma.cc/BCA9-9YG8].

13 Jeanna Smialek, *The U.S. Entered a Recession in February*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/08/business/economy/us-economy-recession-2020.html [https://perma.cc/2RVU-B854].

14 *Id.*

15 Yuki Noguchi, *Advice on Filing for Unemployment Benefits: Document Everything and Be Persistent*, NPR (Mar. 26, 2020, 3:08 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/821933358/advice-on-filing-for-unemployment-benefits-document-everything-and-be-persistent [https://perma.cc/N482-VQ3S].

16 *See infra* Appendix A.

17 Alana Semuels, *Renters Are Being Forced from Their Homes Despite Eviction Moratoriums Meant to Protect Them*, TIME (Apr. 15, 2020, 2:47 PM), https://time.com/5820634/evictions-coronavirus/[https://perma.cc/WN8Q-YTQ4]; *see also Millions Face Housing Crisis After Federal Moratorium on Evictions Expires*, NPR (July 26, 2020, 7:45 AM), https://www.npr.org/2020/07/26/895480905/millions-face-housing-crisis-after-federal-moratorium-on-evictions-expires [https://perma.cc/23QQ-AHUJ].

18 *See, e.g.*, Franzese et al., *supra* note 5.

19 Zoe Greenberg & Tim Logan, *A 'Tsunami of Evictions' Threatens to Strike Boston*, BOS. GLOBE (June 28, 2020 12:01 AM), https://www.bostonglobe.com/2020/06/28/metro/tsunami-evictions-threatens-strike-boston [https://perma.cc/2F59-F7UV]. Researchers found

disproportionate effect on this population, communities of color will also suffer a disparate impact with respect to housing instability comparable to the 2007 housing crisis.[20]

The nation's long-term eviction crisis has garnered substantial public attention. Trends before, during, and after recessions can help predict how the economic turmoil caused by the COVID-19 pandemic may impact housing instability. To this end, Figure 1 analyzes data from Eviction Lab[21] to show how eviction rates have changed in the states of California, Illinois, Louisiana, New York, and Michigan since 2000. Designated recession periods, including the 2008–2009 Great Recession, are shaded in gray.

We highlight two key observations. First, eviction rates among these states reflect substantial variations due in part to state-level eviction laws.[22] Though the causes of these variations are beyond the scope of this Article, it is worth noting that some states with consistently high eviction rates—such as Michigan and Louisiana—experienced steep spikes in eviction rates during the early stages of the Great Recession. Once the rates had spiked in these states, they remained high for several years before declining. This suggests that housing instability may persist long after a crisis event like the COVID-19 pandemic.

Second, in many states, the rate of eviction has continued to rise in the years leading up to the pandemic. One explanation is that, in many parts of the country, rental housing markets substantially restructured after the Great Recession to include new classes of institutionally owned single-family rental properties.[23] Research shows that eviction rates within these institutionally owned single-family rental properties

that between 2014 and 2016, a disproportionate number of evictions happened in communities of color and that the number of Black renters in an area is a better predictor of eviction filings than any other factor in Boston. *Id.* Other groups also likely to be disproportionately affected by housing instability include LGBT people (generally more likely than non-LGBT people to face housing instability during noncrisis periods, making them especially vulnerable during the pandemic). *See LGBT People Are More Likely than Non-LGBT People to Face Housing Instability*, WILLIAMS INST., (Apr. 2, 2020), https://williamsinstitute.law.ucla.edu/press/lgbt-housing-press-release/ [https://perma.cc/PUB7-FFQ6].

20 Elora Raymond et al., *Race and Uneven Recovery: Neighborhood Home Value Trajectories in Atlanta Before and After the Housing Crisis*, 31 HOUS. STUD. 3, 14–15 (2015); *see also* STOUT, *supra* note 8, at 27.

21 *About Eviction Lab*, EVICTION LAB, https://evictionlab.org/about/ [https://perma.cc/9NGJ-B64X].

22 Megan E. Hatch, *Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUS. POL'Y DEBATE 98, 113 (2017).

23 Elora Lee Raymond et al., *From Foreclosure to Eviction: Housing Insecurity in Corporate-Owned Single-Family Rentals*, 20 HOUS. POL'Y DEBATE 159, 160–61 (2018).

may be higher than for other rental properties.[24] Large institutional landlords are also likely to use evictions—and particularly serial filings—against the same tenant as a means to regulate their relationship with tenants facing other forms of economic instability.[25] These changes to the rental housing market may make tenants more vulnerable during the pandemic than they were prior to the Great Recession.

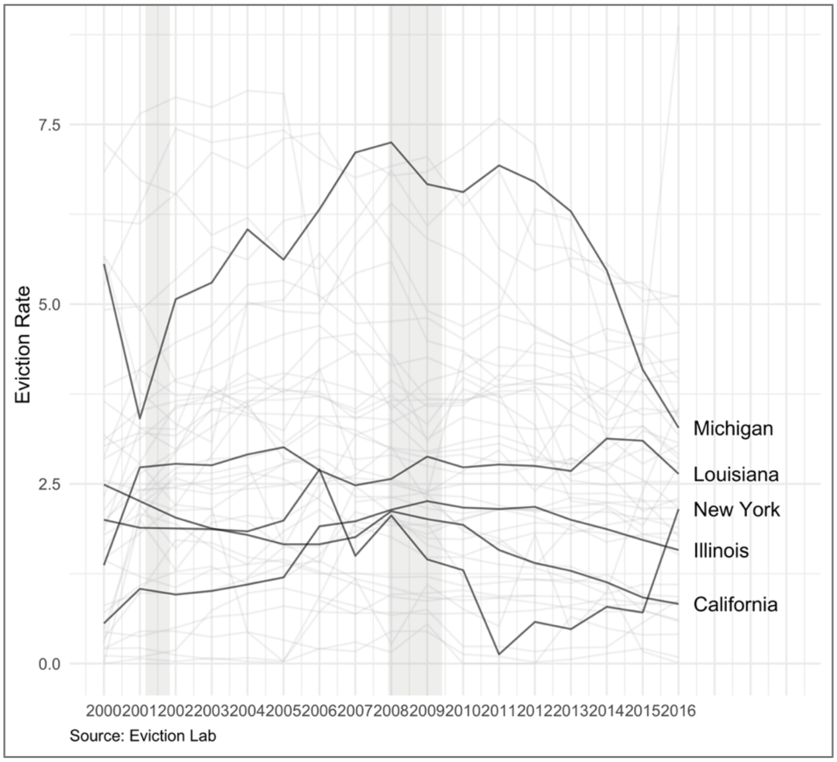

Figure 1. Residential Eviction Rate by U.S. State (2000–2016).

A study on evictions in Boston found that market-rate eviction filings are nearly twice as common in two- and three-family "properties where the landlord does not live in the building as in properties where the landlord is an owner-occupant."[26] Furthermore, the study noted

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24 *Id.* at 179. These trends can be explained in part by different motives for institutional investors when compared to other rental property owners. *Id.* at 179–80.

25 Dan Immergluck et al., *Evictions, Large Owners, and Serial Filings: Findings from Atlanta*, 35 HOUS. STUD. 903, 920 (2019).

26 DAVID ROBINSON & JUSTIN STEIL, EVICTIONS IN BOSTON: THE DISPROPORTIONATE EFFECTS OF FORCED MOVES ON COMMUNITIES OF COLOR 73 (2020). Fifty-five percent

significant racial disparities in the neighborhoods most affected by evictions with respect to market-rate housing. "Seventy percent of market-rate eviction filings occur in neighborhoods where a majority of residents are people of color," even though these communities contain less than half of the city's market-rate rental housing.[27] In fact, even after controlling for income, market-rate eviction filings are more prevalent in census tracts with a higher proportion of Black tenants, suggesting "that housing instability and evictions have a disproportionate impact on Boston's Black residents."[28] This is partially due to a history of racial segregation in Boston combined with current-day high rental burdens and housing instability.[29] This research indicates that lifting the moratorium will more directly affect communities of color.[30]

Our own analysis of cross-sectional eviction data at the county level from 2016[31] shows that, on average, eviction rates tend to increase as the proportion of nonwhite county population increases. We split all counties in the United States into quintiles based upon the proportion of nonwhite population, with the first quintile having the fewest nonwhite residents and the fifth quintile having the greatest. The eviction filing rate in those counties in the fifth quintile was more than four times that of the counties in the first quintile. Likewise, the eviction rate in these counties was nearly double.[32]

These data suggest that without effectively mitigating housing instability caused by COVID-19, eviction rates are likely to rise for a sustained period and are likely to disproportionately affect racial minorities. This may be particularly true in states with consistently high eviction rates and those where institutional landlords have broad discretion to evict. The next section argues that the willingness of lawmakers to take steps to mitigate housing instability during the

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of "two- and three-family properties in Boston are owner-occupied." *Id.* Owners of owner-occupied buildings "filed for an eviction in one in every 137 units each year between 2014 and 2016" whereas absentee landlords "filed for an eviction in one in every 105 units." *Id.*

27 *Id.* at 36. The authors note "that historic patterns of housing discrimination and residential segregation that persist today and the related concentration of disadvantage in communities of color are reflected in the disproportionate distribution of eviction filings and severe housing instability." *Id.* at 35.

28 *Id.* at 40.

29 *Id.* at 49.

30 *Id.* at 13–14 ("According to court data, 78 percent of eviction cases in Boston that were suspended due to COVID-19 were in communities of color.").

31 *About Eviction Lab*, *supra* note 21.

32 Data analysis on file with author.

pandemic may depend on whether housing instability is recognized as a public health threat.

B. Policy Response to Housing Instability Varies by Perceived Harm

As this section will explain, the rhetoric and policies during the Great Recession show that lawmakers take housing instability most seriously when it is perceived as creating spillover effects that harm the broader public. Housing instability featured prominently as a cause of the Great Recession.[33] A rapid expansion of the secondary mortgage industry during the early 2000s had been fueled by the introduction of risky subprime mortgages.[34] These subprime mortgages led to a wave of defaults and foreclosures in 2006 and 2007 and ultimately triggered the collapse of the housing finance industry that precipitated the recession.[35] The national unemployment rate peaked at 10.0% in October 2009,[36] and the number of moderately cost-burdened rental households "grew to 49%, with 26% of renters severely burdened."[37] From 2007 to 2010, family homelessness rose by 20%.[38] In 2009, 62% of shelter residents were racial or ethnic minorities.[39]

There is ample literature outlining the effects of housing instability on personal and community health. For example, a review of twenty-five unique studies on foreclosure found that home foreclosure adversely affects physical and mental health at the individual level as

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33 Raphael Bostic & Ingrid Gould Ellen, *Introduction: Special Issue on Housing Policy in the United States*, 24 J. HOUS. ECON. 1, 1 (2014). Note that there has been "considerable debate as to the causes of the crises," and contributing factors may have included changes in the housing credit industry and government regulation (including affordable housing mandates). *Id.*

34 Chad D. Emerson, *A Troubled House of Cards: Examining How the Housing and Economic Recovery Act of 2008 Fails to Resolve the Foreclosure Crisis*, 61 OKLA. L. REV. 561, 564–65 (2008).

35 *Id.* at 565.

36 Evan Cunningham, *Great Recession, Great Recovery? Trends from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Apr. 2018), https://www.bls.gov/opub/mlr/2018/article/great-recession-great-recovery.htm [https://perma.cc/6BLG-SB53].

37 Edward J. Sullivan & Karin Power, *Coming Affordable Housing Challenges for Municipalities After the Great Recession*, 21 J. AFFORDABLE HOUS. & CMTY. DEV. L. 297, 300 (2012).

38 Maria Foscarinis, *Homelessness in America: A Human Rights Crisis*, 13 J.L. SOC'Y 515, 519 (2012).

39 U.S. DEP'T OF HOUS. & URB. DEV., THE 2009 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 22 (June 18, 2010). Of the minorities, African Americans were the most likely to be homeless, representing approximately 39% of the sheltered homeless population, "more than 3 times their share of the U.S. population." *Id.* at 24.

well as the community level.[40] "[T]he stress of personally experiencing foreclosure was associated with worsened mental health and adverse health behaviors, which were in turn linked to poorer health status; at the community level, increasing degradation of the neighborhood environment had indirect, cross-level adverse effects on health and mental health."[41] Research on renters who have been evicted noted increased levels of stress, depression, anxiety, or insomnia as well as other negative impacts on these tenants' and their children's mental and physical health.[42] For reasons such as these, some advocates described the foreclosure crisis as a "humanitarian crisis."[43]

However, the political rhetoric during the Great Recession overwhelmingly downplayed the social welfare aspects of housing instability. At every stage of the policy response, mitigation strategies were aimed toward minimizing economic harm and protecting markets.[44] There was political "opposition to using federal resources to assist distressed homeowners" and "[n]either the Obama administration nor the Bush administration made any sustained efforts to convince the public that helping distressed homeowners was the right or sensible thing to do."[45] Instead, policymakers emphasized goals such as "alleviating the 'spillover effects' of mortgage foreclosure (e.g., the decrease in property values of non-foreclosed homes when foreclosures happen nearby)" and the need to stabilize the credit market.[46]

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40 LAUREN A. TAYLOR, HOUSING AND HEALTH: AN OVERVIEW OF THE LITERATURE 2 (June 2018).

41 Alexander C. Tsai, *Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations*, 10(4) PLOS ONE 1, 1 (2015).

42 *See, e.g.*, THE SEATTLE WOMEN'S COMM'N & HOUS. JUST. PROJECT OF THE KING CNTY. BAR ASS'N, LOSING HOME: THE HUMAN COST OF EVICTION IN SEATTLE (Sept. 2018); CTR. ON URB. POVERTY & CMTY. DEV., THE CLEVELAND EVICTION STUDY: OBSERVATIONS IN EVICTION COURT AND THE STORIES OF PEOPLE FACING EVICTION (Oct. 2019); Rilwan Babajide et al., *Effects of Eviction on Individuals and Communities in Middlesex County* (May 12, 2016), https://www.pschousing.org/sites/default/files/2016_EvictionStudyFinalDraft.pdf [https://perma.cc/BRH4-HRTM].

43 Foscarinis, *supra* note 38, at 519.

44 *See, e.g.*, Bruce Arthur, *Housing and Economic Recovery Act of 2008*, 46 HARV. J. ON LEGIS. 585, 596–97 (2009) (describing market stabilization efforts under the Bush Administration); Dan Immergluck, *Too Little, Too Late, and Too Timid: The Federal Response to the Foreclosure Crisis at the Five-Year Mark*, 23 HOUS. POL'Y DEBATE 199, 200–01 (2013) (describing the reluctance of both the Bush and Obama administrations to advance policies to address harms foreclosures caused to distressed homeowners).

45 Immergluck, *supra* note 44, at 200–01.

46 Arthur, *supra* note 44, at 596.

Accordingly, the initial interventions focused on mortgage reform and loan counseling to slow the rate of foreclosures but omitted housing payment assistance.[47] As housing instability increased due to job losses, so did the need to assist struggling homeowners and tenants. Nevertheless, rental assistance and mortgage payment assistance remained an exceedingly small part of subsequent interventions. Again, policy justifications emphasized societal costs beyond harm to homeowners, including harms to "[(1)] lenders holding mortgages on foreclosed properties, [(2)] homeowners living near foreclosed properties, and [(3)] local governments."[48]

Thus, this section has shown that lawmakers readily implemented policies to mitigate housing instability when it was perceived as a threat to industries or the broader public, but they implemented few programs to provide direct monetary assistance to struggling homeowners. Keep in mind that minority homeowners were particularly affected by this housing crisis "and experienced especially high rates of foreclosure, independent of their regional location."[49] This history highlights the importance of educating policymakers and the public about the public health threat that housing instability presents. It also reveals a political reality: individual harms to tenants and defaulting homeowners are not sufficiently compelling to lawmakers to ensure the rapid implementation of housing legislation. For this reason, the next section of this Article describes how housing instability may undermine efforts to contain the COVID-19 pandemic, ultimately contributing to its spread.

C. Housing Instability as a Public Health Risk During COVID-19

Housing instability threatens to undermine the public health response to the pandemic by increasing the number of households facing acute housing distress and homelessness, ultimately increasing the risk of transmission and exposure to COVID-19. As a result, the pandemic raises the stakes associated with long-standing housing

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47 *See infra* Section II.A.

48 Michael K. Hollar, *Regulatory Impact Analysis: Emergency Homeowners' Loan Program*, 13 CITYSCAPE 185, 185–86 (2011); *see also* Paul A. Joice, *Neighborhood Stabilization Program*, 13 CITYSCAPE 135, 136–37 (2011).

49 Matthew Hall et al., *Variations in Housing Foreclosures by Race and Place, 2005–2012*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 217, 218 (2015) (noting the high rates of risky mortgages among racial minorities and "explicit targeting of black and brown neighborhoods by predatory lenders").

issues such as homelessness, shortages of affordable housing, and the relationship between income insecurity and housing instability.

As housing instability increases, people are more likely to move into crowded spaces like shared residences, where the rate of transmission is higher. Even prior to the pandemic, millions of housing-insecure people lived "doubled up" with family members or friends.[50] When two or more families share a single-family residence, there is less physical space between occupants, making it difficult to practice social distancing in the home. People living in doubled-up residences are less likely to be able to self-quarantine or isolate if they experience symptoms.[51] This allows the virus to spread between members of the residence, causing even more infections.[52]

The public health risk further increases if housing-insecure families lose all access to housing and seek refuge in overcrowded and underfunded homeless shelters.[53] It is important to note that Pacific

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50 *State of Homelessness: 2020 Edition*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/ [https://perma.cc/GQB3-J89C] [hereinafter *State of Homelessness*].

51 *What to Do if You Are Sick*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html (Sept. 11, 2020).

52 Philip Bump, *Where the Clusters of the Highest Density of Coronavirus Cases — and Deaths — Are Located*, WASH. POST (Apr. 6, 2020), https://www.washingtonpost.com/politics/2020/04/06/where-clusters-highest-density-coronavirus-cases-deaths-are-located/ [https://perma.cc/G5TL-NA5U]. For example, the largest outbreak in Massachusetts is in Chelsea, where a largely immigrant community of low-wage workers live in crowded triple-deckers with numerous people squeezed into a single room. Antibody tests show about a third of the population has likely been infected. Jose A. Del Real, *In an Immigrant Community Battling Coronavirus, 'Essential' Means 'Vulnerable*,*'* WASH. POST (May 9, 2020), https://www.washingtonpost.com/national/in-an-immigrant-community-battling-coronavirus-essential-means-vulnerable/2020/05/08/c25cdb4e-8e1e-11ea-a9c0-73b93422d691_story.html [https://perma.cc/LU6S-4QF5]; Ellen Barry, *In a Crowded City, Leaders Struggle to Separate the Sick from the Well*, N.Y. TIMES (Apr. 25, 2020), https://www.nytimes.com/2020/04/25/us/coronavirus-chelsea-massachusetts.html; Jonathan Saltzman, *Nearly a Third of 200 Blood Samples Taken in Chelsea Show Exposure to Coronavirus*, BOS. GLOBE (Apr. 17, 2020), https://www.bostonglobe.com/2020/04/17/business/nearly-third-200-blood-samples-taken-chelsea-show-exposure-coronavirus [https://perma.cc/KYW9-7NRK].

53 An additional risk factor is the so-called criminalization of homelessness, resulting in some homeless people spending time in jails. Bidish Sarma & Jessica Brand, *The Criminalization of Homelessness: Explained*, APPEAL (June 29, 2018), https://theappeal.org/the-criminalization-of-homelessness-an-explainer-aa074d25688d [https://perma.cc/6ZEV-TXMT]. Jails have emerged as virus hotspots during the COVID-19 pandemic. Jimmy Jenkins & Matt Katz, *'A Ticking Time Bomb': Advocates Warn COVID-19 Is Spreading Rapidly Behind Bars*, NPR (Apr. 28, 2020, 5:00 AM), https://www.npr.org/2020/04/28/846678912/a-ticking-time-bomb-advocates-warn-covid-19-is-spreading-rapidly-behind-bars; *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional & Detention Facilities*, CTR. FOR DISEASE CONTROL & PREVENTION,

Islanders, Native Americans, Black Americans, multiracial Americans, and Latinxs "are far more likely to be homeless than the national average and white Americans."[54] Inside crowded shelters, people are unable to maintain the six feet of social distance recommended by the Centers for Disease Control and Prevention or practice basic hygiene.[55] People in shelters sleep only a few feet apart and use communal bathrooms, creating the perfect conditions for a virus to spread rapidly throughout the shelter.[56] At least one confirmed outbreak at a homeless shelter in San Francisco infected more than seventy residents and staff.[57]

Other large cities such as New York and Chicago face similar challenges dealing with COVID-19 and their homeless populations. U.S. Department of Housing and Urban Development (HUD) estimates in 2019 showed that there were about 78,000 people without access to consistent housing in New York City, with at least 3,500 people without access to emergency or transitional housing.[58] These homeless people are typically taken to congregate housing where COVID-19 easily spreads due to close quarters and lack of supplies. By May 2, 2020, sixty such homeless persons had died, 75% of whom had been staying at shelters.[59]

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https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (Feb. 19, 2021).

54 *State of Homelessness*, *supra* note 50 ("Overall homelessness has decreased by 12 percent since 2007," but the COVID-19 crisis will likely wipe out these gains.).

55 Sam Levin, *'If I Get It, I Die': Homeless Residents Say Inhumane Shelter Conditions Will Spread Coronavirus*, GUARDIAN (Mar. 19, 2020), https://www.theguardian.com/world/2020/mar/19/if-i-get-it-i-die-homeless-residents-say-inhumane-shelter-conditions-will-spread-coronavirus; *see also* Lynn Jolicoeur, *Coronavirus Testing in Boston's Homeless Community Shows Shelter Size and Density Matter*, WBUR (May 15, 2020), https://www.wbur.org/commonhealth/2020/05/15/boston-homeless-coronavirus-testing [https://perma.cc/9MYC-4JGC] (noting that crowded homeless shelters in Boston had a positive rate of greater than 30% in randomized universal testing).

56 *See* Levin, *supra* note 55.

57 Liam Dillon & Maura Dolan, *70 Test Positive for Coronavirus at San Francisco Homeless Shelter*, L.A. TIMES (Apr. 10, 2020, 3:59 PM), https://www.latimes.com/california/story/2020-04-10/70-test-positive-for-coronavirus-at-san-francisco-homeless-shelter.

58 U.S. DEP'T OF HOUS. & URB. DEV., HUD 2019 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS (Sept. 20, 2019), https://files.hudexchange.info/reports/published/CoC_PopSub_CoC_NY-600-2019_NY_2019.pdf [https://perma.cc/9Q8A-RRG9].

59 Nikita Stewart & Nate Schweber, *Stark Symbol of Pandemic in N.Y.: Homeless People Huddled on the Subway*, N.Y. TIMES (May 2, 2020), https://www.nytimes.com/2020/05/02/nyregion/coronavirus-nyc-subway-homeless.html [https://perma.cc/T3JS-NHGE]. By July 6, 2020, at least 100 homeless people had died of COVID-19 and approximately 1,300 had tested positive in New York City. Eyewitness News, *Coronavirus News: 100 Deaths from*

If the challenges of preventing outbreaks in homeless shelters result in shelter closures, then many homeless people will be forced back onto the street.[60] Already, some homeless people have voluntarily left crowded shelters and set up camp in an effort to avoid catching COVID-19.[61] As a result, people who may have been exposed to the virus in shelters may become prevalent in public spaces—contrary to public health recommendations for isolation or self-quarantine—increasing the risk of exposure to the broader public.[62]

Moreover, with many public facilities such as libraries and public restrooms closed due to social distancing efforts, the number of safe and sanitary restrooms available to homeless people has plummeted drastically.[63] For example, when New York City closed many of its other public spaces, the subways became a refuge for those without housing. Demonstrating the public health hazard that ensued, more than 100 transit workers have died from COVID-19[64] while 6,000 became sick or were quarantined.[65] New York City and State were forced to take unprecedented action. As of May 6, 2020, the Metropolitan Transportation Authority has closed the subways between 1:00 and 5:00 a.m., allowing for deep cleaning and disinfecting and eliminating the overnight shelter that some homeless people had come to rely on.[66]

Because failure to mitigate housing instability may undermine broader public health goals, we argue that early action to assist the growing number of housing-insecure people is essential. To help shed light on what interventions may be most effective for mitigating

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COVID-19 Among Homeless in NYC, ABC 7 N.Y. (July 6, 2020), https://abc7ny.com/homeless-covid-coronavirus-update-nyc/6303504/ [https://perma.cc/4HFZ-TFFE].

60 Mario Koran, *Las Vegas Parking Lot Turned into 'Homeless Shelter' with Social Distancing Markers*, GUARDIAN (Mar. 30, 2020), https://www.theguardian.com/us-news/2020/mar/30/las-vegas-parking-lot-homeless-shelter.

61 Levin, *supra* note 55.

62 *Id.*

63 Alex Brown, *The Pandemic Has Closed Public Restrooms, and Many Have Nowhere to Go*, PEW (July 23, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/23/the-pandemic-has-closed-public-restrooms-and-many-have-nowhere-to-go [https://perma.cc/9VHU-E7YQ].

64 Stewart & Schweber, *supra* note 59.

65 Christina Goldbaum, *41 Transit Workers Dead: Crisis Takes Staggering Toll on Subways*, N.Y. TIMES (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/nyregion/coronavirus-nyc-mta-subway.html [https://perma.cc/4KL9-7T9M].

66 Christina Goldbaum, *N.Y.C.'s Subway, a 24/7 Mainstay, Will Close for Overnight Disinfection*, N.Y. TIMES (Apr. 30, 2020), https://www.nytimes.com/2020/04/30/nyregion/subway-close-cuomo-coronavirus.html [https://perma.cc/F5XD-Y6ZZ]. As of May 3, 2020, NY Penn Station's Amtrak and NJ Transit concourses will also be closed from 1 a.m. until 5 a.m. for intensive cleaning of the transit hub and trains.

housing instability, Part II reviews the major interventions taken during the Great Recession and identifies barriers to their effective implementation. By learning from the past, lawmakers can increase the likelihood that new policies implemented during the pandemic will effectively mitigate housing instability.

II
LEARNING FROM HISTORY: POLICY FAILURES AND THE GREAT RECESSION

This Article argues that unmitigated housing instability has the potential to undermine the public health response to COVID-19.[67] For this reason, an effective policy response during the pandemic must include preventative policies that keep owners and renters in their homes, as well as a housing safety net that facilitates rapid rehousing of people who lose their homes to foreclosure or eviction. Because mitigating housing instability was at the center of the policy response to the Great Recession, an analysis of interventions during that period can help inform current policymaking.

This part will analyze three categories of interventions used during the Great Recession: foreclosure prevention strategies such as the FHASecure program, place-based interventions such as the Neighborhood Stabilization Program, and people-based interventions such as the Homelessness Prevention and Rapid Rehousing program that were implemented during the Great Recession to mitigate housing instability. Through this analysis, this part identifies barriers to effectively mitigating housing instability, including the overreliance on incentives, the prioritization of place-based interventions over people-based assistance, implementation challenges, and low participation due to the voluntary nature of most of the foreclosure programs. We conclude this part with three important lessons relevant to the COVID-19 response: (1) housing payment assistance to individuals may be more effective than indirect interventions such as mortgage modification incentives directed at lenders, (2) grants may be more effective than tax expenditures during crisis periods, and (3) place-based investment in neighborhoods may be necessary.

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[67] *See supra* Section I.C.

A. Foreclosure Prevention During the Great Recession

During the Great Recession, both the Bush and Obama Administrations "relied on incentives and subsidies to lenders and servicers to modify loans."[68] However, as this section will explain, the success of these programs was hindered by slow program rollouts, their voluntary nature, low participation by banks, prohibitively restrictive eligibility requirements, and a reluctance among regulators to administer the programs to their fullest potential. Unless these barriers are addressed, similar loan modification programs are unlikely to effectively mitigate housing instability during the pandemic.[69]

The first significant federal effort to slow foreclosures during the Great Recession was the Bush Administration's FHASecure program, which encouraged lenders to modify adjustable-rate mortgages.[70] That program was followed by two other Bush-era loan modification programs, the Hope Now Alliance[71] and the Hope For Homeowners program.[72] All these programs fell short of expectations.

FHASecure resulted in a mere 4,212 loan modifications (as compared to 80,000 predicted modifications).[73] Hope Now Alliance was "responsible for only approximately 9% of loan modifications in the first six months of 2008" and 2% in the second half of the year.[74] The Hope for Homeowners program also "failed to get any traction" and only 340 loans were modified under the program in 2010.[75] This number was disappointing, as 400,000 loan modifications were anticipated.[76]

The Obama Administration's loan modification programs also failed to reach their full potential. These initiatives included the Home

68 David A. Zalewski, *Collective Action Failures and Lenders of Last Resort: Lessons from the U.S. Foreclosure Crisis*, 46 J. ECON. ISSUES 333, 335 (2012); *see also* CHRISTOPHER K. ODINET, FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA (Cambridge Univ. Press 2019).

69 *See* LINDA E. FISHER & JUDITH FOX, THE FORECLOSURE ECHO: HOW THE HARDEST HIT HAVE BEEN LEFT OUT OF THE ECONOMIC RECOVERY, Chs. 2, 4 (Cambridge Univ. Press 2019).

70 Zalewski, *supra* note 68, at 335.

71 Immergluck, *supra* note 44, at 204.

72 Housing and Economic Recovery Act (HERA) of 2008, Pub. L. No. 110-289, 122 Stat. 2654. Note that in August 2007, the Federal Housing Administration (FHA) implemented the FHA Secure program to help refinance mortgages into more affordable loans. Immergluck, *supra* note 44, at 204.

73 Immergluck, *supra* note 44, at 204.

74 *Id.* at 206.

75 *Id.* at 204.

76 Arthur, *supra* note 44, at 601.

Affordable Modification Program (HAMP)[77] and the Hardest Hit Fund created under the Troubled Assets Relief Program (TARP).[78] Under HAMP, eligible homeowners temporarily received a lower interest rate that would become permanent if they did not default.[79] Although three to four million homeowners were expected to participate, only about 816,000 homeowners were granted loan modifications during the first two years of the program.[80]

The Hardest Hit Fund earmarked $7.6 billion in federal grants to state housing finance agencies to develop local foreclosure prevention strategies.[81] However, during the first year of the program, only 3% of funds were expended, and only 7% of total projected homeowners were assisted.[82] Only $478 million of approved funds were spent in the first year and a half.[83] These statistics reflected the low number of loan modifications made during the period. For example, during the first year, only three homeowners were approved for debt reduction in Arizona even though almost half of the state's homeowners held underwater mortgages.[84]

At least two factors contributed to these loan modification programs' failures to reach expectations. First, the federal government was reluctant to fully administer these programs. Under the Bush Administration, free-market ideologies resulted in the early programs being "half-hearted and underfinanced."[85] But the Obama-era foreclosure mitigation efforts suffered from a similar lack of will on the part of federal regulators and government-sponsored enterprises (GSEs). According to one report on the Hardest Hit Fund, "the two largest mortgage guarantors, Fannie Mae and Freddie Mac, [would] not

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77 *Home Affordable Modification Program (HAMP)*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx [https://perma.cc/Q8MF-JDFY] (Jan. 30, 2017).

78 Zalewski, *supra* note 68, at 335–36.

79 *Id.* at 336.

80 *Id.* Frequently homeowners resorted to the courts in order to secure loan modifications under HAMP following lender intransigence. *See* Plaintiff's Complaint, Begum v. J.P. Morgan Chase Bank, No. 1:10-cv-02014 (E.D.N.Y. May 6, 2010). One of the authors of this Article was part of the legal team that filed this case.

81 Zalewski, *supra* note 68, at 336.

82 Blair D. Russell et al., *Take-Up of Mortgage Assistance for Distressed Homeowners: The Role of Geographic Accessibility*, 24 J. HOUS. ECON. 57, 58–59 (2014).

83 Zalewski, *supra* note 68, at 336.

84 Shaila Dewan, *Freddie and Fannie Reject Debt Relief*, N.Y. TIMES (Oct. 5, 2011), https://www.nytimes.com/2011/10/06/business/opposition-from-freddie-and-fannie-stalls-debt-reduction.html [https://perma.cc/4CF2-578P].

85 Zalewski, *supra* note 68, at 338.

participate" in the program.[86] The GSEs and then-Director of the Federal Housing Financing Agency Edward J. Demarco had taken the position that reducing mortgage principal was "bad for business, and as a result bad for taxpayers."[87] This experience suggests that significant political challenges stand to limit the effectiveness of loan modification programs.

Second, all these loan modification programs relied on voluntary participation by both lenders and homeowners. Lenders were reluctant to participate due to "the market structure of mortgages and securitization that may complicate renegotiations, lack of incentives and authority for servicers to modify loans, and overall servicer congestion and lack of capacity to process applications."[88] On the borrower-side, voluntary participation was affected by program awareness, eligibility criteria, and the extent to which homeowners persisted throughout the application processes.[89] One researcher found that proximity to intake agencies affected take-up rates.[90] Another noted that some homeowners may have been reluctant to participate because the modifications would cost them "half of future appreciation and significant pride."[91]

Unless these barriers can be overcome, such incentive-based programs may be ineffective to mitigate housing instability, particularly in cases of prolonged unemployment caused by an ongoing pandemic.[92]

B. Place-Based Interventions During and After the Great Recession

Although the policy response during the Great Recession centered on foreclosure prevention, some efforts were made to increase the supply of affordable housing. Two significant place-based interventions included in the Housing and Economic Recovery Act of

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86 Dewan, *supra* note 84.

87 *Id.*

88 Russell et al., *supra* note 82, at 59.

89 *Id.*

90 *Id.* at 65 (noting the "greater distances associated with lower percentages of complete applications").

91 Arthur, *supra* note 44, at 599.

92 Dan Immergluck, *The Foreclosure Crisis, Foreclosed Properties, and Federal Policy: Some Implications for Housing and Community Development Planning*, 75 J. AM. PLAN. ASS'N 406, 415 (2009) ("Borrowers suffering from long spells of unemployment are less likely to be helped by moderate reductions in mortgage payments.").

2008 (HERA)[93] were the expansion of the Low-Income Housing Tax Credit (LIHTC) program[94] and the introduction of the Neighborhood Stabilization Program (NSP), which provides emergency funding for rehabilitation of abandoned and foreclosed homes.[95]

Subsequent legislation doubled down on the place-based approach. The fiscal stimulus package in the American Recovery and Reinvestment Act of 2009 (ARRA)[96] included supplemental grant funding to bolster the LIHTC program[97] and an appropriation to the Public Housing Capital Fund for rehabilitation of vacant rental units.[98] Later, when certain low-income areas failed to recover from the recession, lawmakers introduced the Opportunity Zones tax incentive to further combat blight in distressed neighborhoods.[99] This section analyzes the impact of these interventions and argues that place-based interventions were insufficient to mitigate the spike of housing instability in the short term.

1. LIHTC Expansion and Supplemental Grants

HERA made several statutory changes to the LIHTC program, including increasing the size of the program,[100] expanding the 9%

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93 Housing and Economic Recovery Act (HERA) of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

94 HERA §§ 3001-05. The LIHTC provides for a tax credit equal to the "applicable percentage" of the qualified basis of each qualified low-income building. I.R.C. § 42 (2008). The tax credit functions as a supply-side subsidy for affordable housing and is the largest federal subsidy for affordable housing production. Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 878 (1993).

95 HERA § 2301; Immergluck, *supra* note 44, at 199. For a detailed discussion of all housing-related changes included in HERA, *see generally* Michael J. Novogradac & Glenn A. Graff, *Impact of the Housing and Economic Recovery Act of 2008 on Current and Future Low-Income Housing Tax Credit Properties*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 47 (2008).

96 *See* American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. No. 111-5, 123 Stat. 115.

97 ARRA Title XII (Home Investment Partnerships Program).

98 ARRA Title XII (Public Housing Capital Fund).

99 I.R.C. § 1400Z-1 (as included by the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017)).

100 HERA temporarily increased the per capita allocation of LIHTCs for each state for 2008 and 2009. HERA § 3001. The law "increased the per capita allocation by 10% for 2008—from $2.00 to $2.20—which resulted in a per capita allocation of $2.30 in 2009 after adjusting for inflation." U.S. GOV'T ACCOUNTABILITY OFF. (GAO), GAO-13-66, LOW-INCOME HOUSING TAX CREDITS: AGENCIES IMPLEMENTED CHANGES ENACTED IN 2008, BUT PROJECT DATA COLLECTION COULD BE IMPROVED 9 (2012). The ceiling was also increased for 2019, 2020, and 2021. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 102(a), 132 Stat. 540-41 (2018).

credit,[101] adding a discretionary "basis boost" to provide a larger tax credit for select projects,[102] and expanding acquisition and rehabilitation credits.[103] Despite these changes, investor appetite declined the following year.

A significant barrier to the effective mitigation of housing instability through tax expenditures is the fact that tax relief is not as attractive to investors during recessions as it is during periods of growth. In a growing economy, financial institutions readily invest in LIHTC projects to reduce their income tax burden.[104] However, the Great Recession "reduced the profitability of banks and other financial institutions that were large LIHTC investors."[105] With less tax liability to offset, these investors no longer needed nonrefundable tax credits, and demand for the newly expanded tax credits decreased.[106]

To address this problem, ARRA authorized the Tax Credit Assistance Program (TCAP) to provide supplemental grants for LIHTC

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101 HERA § 3002. The applicable percentage is the yield over a ten-year period. It is common to refer to "4% credits" (used for rehabilitation projects or tax credits automatically awarded for projects financed with tax-exempt bonds) and "9% credits" (competitively allocated tax credits for new construction projects). Historically, the "9% credit" floated between 7.35% and 9.27%. CONG. RSCH. SERV., AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT (Feb. 27, 2019). HERA established a 9% floor for the applicable rate for the competitive 9% tax credits. Without this change, the applicable rate would have been 7.94% in August 2008. GAO, *supra* note 100, at 9. Initially applicable only to projects placed in service prior to 2013, the change was made permanent in 2016. Consolidated Appropriation Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (codified as amended at I.R.C. § 42(b)(2)). HERA also expanded the number of projects eligible for the 9% credit by narrowing the definition of ineligible federally subsidized projects. HERA § 3002(b) (codified as amended at I.R.C. § 42(i)(2)(A)). Prior to the change, "if any part of a building's eligible basis was federally subsidized, the building was ineligible for the 9 percent credit." GAO, *supra* note 100, at 9.

102 HERA provided for a discretionary basis boost whereby state housing authorities could treat individual projects "as if" they were in difficult development areas. HERA § 3003(a). This gives housing finance authorities "the ability to designate any building, regardless of location, as eligible for an enhanced credit of up to 130 percent of the building's eligible basis" (rather than 100 percent). GAO, *supra* note 100, at 9; I.R.C. § 42(d)(5)(B)(v). Some states have used this flexibility to locate LIHTC projects in higher opportunity neighborhoods, while others have not undertaken such efforts. *See* Blaine G. Saito, *Collaborative Governance and the Low-Income Housing Tax Credit*, 39 VA. TAX REV. 451, 487–88 (2020).

103 HERA relaxed the 10-year waiting period for rehabilitation of existing buildings. HERA § 3003(f) (codified as amended at I.R.C. § 42(d)(6)). Prior to the change, "the acquisition cost of an existing building would not be eligible for the credit unless there was a period of at least 10 years between the date" acquired and placed in service. GAO, *supra* note 100, at 9.

104 GAO, *supra* note 100, at 10.

105 *Id.*

106 *Id.*

projects.[107] A related program, the Tax Credit Exchange Program, allowed state housing finance agencies to exchange portions of their housing credit ceiling for cash grants to finance low-income housing.[108] Data limitations make it difficult to fully assess the impact of these interventions. Our analysis of LIHTC project allocations from 2008 to 2011 reflects 208 projects financed with the TCAP subsidy.[109] Over half of the TCAP allocations were made in 2009, when 131 projects (approximately 9% of projects) were supplemented by the grants.[110] This suggests that, at minimum, the program was implemented quickly.

Nevertheless, HUD records suggest that the number of LIHTC subsidized projects placed in service declined sharply during the period from 2008 to 2010.[111] Although the Government Accountability Office found that the interventions "likely prevented even further decreases in LIHTC projects after 2008, particularly in rural areas,"[112] the declines suggest that the interventions were insufficient to fully overcome the market forces that chill LIHTC investment during recession periods.

2. Rehabilitation Subsidies

a. Interventions During the Great Recession

In addition to increasing the need for affordable housing, the waves of foreclosures during the Great Recession increased the number of foreclosed properties in many metropolitan areas.[113] As a result, a major policy question during and after the crisis was how to deal with

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107 CONGR. BUDGET OFF., FEDERAL HOUSING ASSISTANCE FOR LOW-INCOME HOUSEHOLDS 8 (2015), http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-lowincomehousing.pdf [https://perma.cc/75Y7-9S8T]. Note that ARRA included a total of $17.2 billion for housing assistance programs. According to the Congressional Budget Office, "[m]ore than one-third of that amount went to projects that had received assistance from the Low-Income Housing Tax Credit (LIHTC). Public housing improvements accounted for about one-quarter of that spending, as did the combination of community development programs and assistance to the homeless. The rest went to owners of project-based rental assistance (PBRA) properties." *Id.* at 8; *see also* GAO, *supra* note 100, at 11; American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. No. 111-5, Title XII, 123 Stat. 115 (2009).

108 GAO, *supra* note 100, at 11.

109 *Nat'l Low Income Hous. Tax Credit (LIHTC) Database*, HUD USER, https://lihtc.huduser.gov/ [https://perma.cc/ZM63-DW3F]. Data analysis on file with author.

110 *Id.*

111 GAO, *supra* note 100, at 22. Drawing on HUD data, the GAO reported that 1,225 projects were placed in service in 2007; 1,286 in 2008; 886 in 2009; and 594 in 2010. *Id.*

112 *Id.* at 24.

113 Immergluck, *supra* note 92, at 409.

vacant properties. While "[a]ddressing problems associated with neighborhood blight are typically the responsibility of local government agencies . . . the scale of the housing crisis exceeded the resources of many local governments."[114]

The primary federal intervention was the NSP introduced by HERA.[115] The program, implemented in the fall of 2008, provided $3.92 billion in emergency funding to state and local governments for rehabilitation of abandoned and foreclosed homes.[116] Another $2 billion was subsequently appropriated under the ARRA,[117] and a final round of $1 billion in funding was included in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[118]

The purpose of the NSP was to "mitigate the impact of foreclosures on neighborhoods by reducing the stock of distressed properties, removing visual blight and sites of crime, and signaling to residents that the neighborhood was capable of improvement."[119] Local governments and nonprofits were tasked with using the funds for five approved activities: "rehabilitation or redevelopment of foreclosed and vacant properties, demolition of blighted structures, land banking, and stand-alone financing for purchase or development of affordable housing."[120] The majority of NSP funds were allocated to state and local government entities and local nonprofits, though "several national organizations, including Habitat for Humanity, also received funds."[121]

The outcomes of the NSP program are uncertain. Some early observers expressed optimism that the program would encourage investment in rental housing,[122] noting that "[o]ne known outcome is that many NSP awardees have purchased properties to 'land bank' them for future affordable housing development."[123] Other studies

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114 Jenny Schuetz et al., *Have Distressed Neighborhoods Recovered? Evidence from the Neighborhood Stabilization Program*, 34 J. HOUS. ECON. 30, 30 (2016).

115 Housing and Economic Recovery Act (HERA) of 2008, Pub. L. No. 110-289, § 2301, 122 Stat. 2654 (2008).

116 Immergluck, *supra* note 44, at 219.

117 American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. No. 111-5, Title XII, 123 Stat. 115 (Community Development Fund).

118 Immergluck, *supra* note 44, at 210.

119 Schuetz et al., *supra* note 114, at 30–31.

120 *Id.* at 31.

121 James C. Fraser & Deirdre Oakley, *The Neighborhood Stabilization Program: Stable for Whom?*, 37 J. URB. AFF. 38, 39 (2015).

122 *See generally* Laura Schwarz, *The Neighborhood Stabilization Program: Land Banking and Rental Housing as Opportunities for Innovation*, 19 J. AFFORDABLE HOUS. & CMTY. DEV. L. 51 (2009).

123 Fraser & Oakley, *supra* note 121, at 38.

predicted that NSP investment would have a "multiplier effect" whereby private market investors choose to invest in areas that have received NSP subsidies.[124] Still others noted the long-term benefits that might arise from the organizational and coalition capacities put in place.[125] Meanwhile, one community and economic development attorney provided an anecdotal account of a nonprofit using NSP funds to combat blight in a low-income Miami neighborhood without social displacement.[126]

On the other hand, an early report by researchers at Enterprise Community Partners noted that less than half of the funds were being used to develop affordable rental housing.[127] Later studies reported mixed impacts on neighborhoods, with some targeted census tracts exhibiting statistically significant reductions in distressed properties compared to nontargeted tracts but others noting no significant differences.[128] One researcher speculated that the lack of consistent results might be due to "the small scale of [NSP] activity in most targeted areas."[129] Others have pointed to administrative complexity and the short time frame as barriers to participation.[130]

b. Interventions After the Great Recession

Significantly, the spatially uneven recovery from the Great Recession—the effects of which are still visible in many low-income neighborhoods—was an important impetus for the enactment of Opportunity Zone (OZ) legislation.[131] This tax incentive, created by

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124 *Id.* (citing Carolina Reid, *The Neighborhood Stabilization Program: Strategically Targeting Public Investments*, 23 COMM. INV. 23 (2011)).

125 Fraser & Oakley, *supra* note 121, at 38.

126 Shahrzad Emami, *Combatting Gentrification Through Community-Based Lawyering*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 231, 236–40 (2016).

127 DVORA LOVINGER & AMANDA SHELDON, ENTER. CMTY. PARTNERS, CHANGES AND UPDATES TO NSP IN THE AMERICAN RECOVERY AND REINVESTMENT ACT 1, 22 (2009).

128 Schuetz et al., *supra* note 114, at 31.

129 *Id.* at 45.

130 Fraser & Oakley, *supra* note 121, at 39.

131 Siri Bulusu, *How a Tax Perk Can Turn a Paper Mill into a Fish Farm (Podcast)*, BLOOMBERG TAX (May 10, 2019, 1:45 AM), https://news.bloombergtax.com/daily-tax-report/how-a-tax-perk-can-turn-a-paper-mill-into-a-fish-farm-podcast [https://perma.cc/V453-PWDL]. Noticeably, however, opportunity zones do little to address the racial wealth gap. For instance, Latinx and African Americans have one-tenth the net worth of white Americans. RAY BOSHARA ET AL., THE DEMOGRAPHICS OF WEALTH: HOW AGE, EDUCATION AND RACE SEPARATE THRIVERS FROM STRUGGLERS IN TODAY'S ECONOMY 7 (Federal Reserve Bank of St. Louis, Center for Household Financial Stability) (2015). The implementation of opportunity zones offers scant evidence that it will increase wealth for

the Tax Cuts and Jobs Act (TCJA) of 2017,[132] was not part of the emergency response to the Great Recession. However, its subsequent enactment constitutes an important legal development after the recession that merits discussion due to its prominent position among existing place-based incentives.

The Opportunity Zone tool is the latest place-based tax incentive to encourage investments in distressed neighborhoods.[133] Specifically, the law provides for favorable tax treatment of capital gains that are reinvested into qualified opportunity funds (QOFs).[134] A QOF is a corporation or partnership formed to invest in qualified Opportunity Zone property.[135] The Treasury Department designated Qualified Opportunity Zones that were first nominated by the respective States, U.S. territories, and the District of Columbia.[136] For example, each governor was allowed to nominate a number of census tracts within their state not exceeding 25% of the number of low-income

those who live in areas where investment is to occur, many of whom are Latinx and African American. Brett Theodos et al., *An Early Assessment of Opportunity Zones for Equitable Development Projects: Nine Observations on the Use of the Incentive to Date*, URB. INST. (June 2020), https://www.urban.org/sites/default/files/publication/102348/early-assessment-of-ozs-for-equitable-development-projects_0.pdf [https://perma.cc/4T6X-LK7R].

132 Amendment of 1986 Code, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

133 Many studies unfortunately show that place-based tax policies have not had a measurable impact on alleviating poverty. Michelle D. Layser, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WIS. L. REV. 745, 766 (2019).

134 *See generally* I.R.C. § 1400Z–2. Specifically, a taxpayer who realizes a gain from a sale of property and reinvests that gain in a QOF within a designated timeframe may defer recognition of the gain. I.R.C. § 1400Z–2(a)(1), (b)(1). *See also* IRS Notice 2020-39, *Relief for Qualified Opportunity Funds and Investors Affected by Ongoing Coronavirus Disease 2019 Pandemic* (June 4, 2020) and IRS Notice 2021-10, *Extension of Relief for Qualified Opportunity Funds and Investors Affected by Ongoing Coronavirus Disease 2019 Pandemic* (Jan. 19, 2021). Furthermore, if a taxpayer holds the QOF investment for at least 10 years, the taxpayer may increase the basis to the fair market value at the date of sale. I.R.C. § 1400Z–2(c). If at least 5 years, the taxpayer increases the basis by an amount equaling 10% of the amount of gain deferred. I.R.C. § 1400Z–2(b)(2)(B)(iii). If at least 7 years, the taxpayer further increases the basis by an amount equaling 5% of the amount of gain deferred. I.R.C. § 1400Z–2(b)(2)(B)(iv). In effect, the taxpayer gets to both defer payment of taxes on the taxpayer's initial capital gains and to eliminate the capital gains taxes on the QOF investment. I.R.C. § 1400Z–2(c).

135 I.R.C. § 1400Z–2(d)(1). Specifically, the fund must hold at least 90% of its assets in such property. *Id.* See IRS Notice 2020-39 for a temporary relaxation of this rule. IRS Notice 2020-39, *supra* note 134. Opportunity zone property can be QOZ stock, QOZ business property, or a QOZ partnership interest. I.R.C. § 1400Z–2(d)(2)(A).

136 I.R.C. § 1400Z–1(b)(2)(C).

communities[137] within their state.[138] A census tract that was not a low-income community could still qualify if the tract bordered a designated low-income opportunity zone and the median family income did not exceed 125% of that of the bordering, low-income community.[139] There are currently 8,764 designated opportunity zones throughout the United States and its territories.[140]

According to the Federal Deposit Insurance Corporation, as of September 2019, there were at least 235 self-reported QOFs that collectively hold an estimated $62 billion to $72 billion.[141] However, as the TCJA did not include any reporting requirements for QOFs, we are reliant on various organizations that are collecting data, and this information varies widely. Novogradac estimated that there were $10

137 Low-income communities are defined as such based on poverty rates and median family income, as per I.R.C § 45D(e), the New Markets Tax Credit program. *See* THE PROMISE OF OPPORTUNITY ZONES, JOINT ECON. COMM. (Nov. 29, 2018), https://www.jec.senate.gov/public/index.cfm/republicans/2018/11/the-promise-of-opportunity-zones#_edn1 [https://perma.cc/R3NR-ZKWZ].

138 I.R.C. § 1400Z–1(d). In New Jersey, tracts were chosen based on a formula using the Municipal Revitalization Index, which reflected economic indicators such as income, unemployment rate, and property values; access to transit; and the value of existing investments. State of N.J. Dep't of Cmty. Affairs, *Opportunity Zones*, https://www.state.nj.us/dca/divisions/lps/opp_zones.html [https://perma.cc/R442-YHAE]. Guidance provided by the House Committee Report suggested considering tracts "that: (1) are currently the focus of . . . private economic development initiatives . . . (2) have demonstrated success in geographically targeted development programs . . . and (3) have recently experienced significant layoffs . . . ." Tax Cuts and Jobs Act, H.R. Rep. No. 115-466, at 538–39 (2017).

139 I.R.C. § 1400Z–1(e)(1). Two hundred thirty were contiguous tracts representing 2.6% of all designated tracts. BRETT THEODOS ET AL., DID STATES MAXIMIZE THEIR OPPORTUNITY ZONE SELECTIONS? ANALYSIS OF OPPORTUNITY ZONE DESIGNATIONS, URB. INST 2 (revised July 2018), https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_7.pdf [https://perma.cc/547F-HQXF].

140 *See* IRS Notice 2018-48, *Designated Qualified Opportunity Zones Under Internal Revenue Code § 1400Z-2* (Jul. 9, 2018), https://www.irs.gov/pub/irs-drop/n-18-48.pdf [https://perma.cc/TNW3-KYWD]. The OZs range from 14 in the Virgin Islands to 879 in California, with 514 OZs in New York and 169 in New Jersey. OPPORTUNITY ZONES DATABASE, OPPORTUNITY ZONES BY LOCATION, https://opportunitydb.com/location/ [https://perma.cc/88T5-ZRF6]. The median family income in an OZ is 37% below the State median. More than 20% of OZs have a poverty rate higher than 40%, compared to just 5% of census tracts nationwide. DEP'T HOUS. & URB. DEV., IMPLEMENTATION PLAN FOR THE WHITE HOUSE OPPORTUNITY AND REVITALIZATION COUNCIL 4 (2019), https://www.hud.gov/sites/dfiles/Main/documents/WHORC-Implementation-Plan.pdf [https://perma.cc/AE69-VMD6] [hereinafter HUD IMPLEMENTATION PLAN].

141 FDIC, OPPORTUNITY ZONES: COMMUNITY BANKS, MINORITY DEPOSITORY INSTITUTIONS, AND CDFI BANKS (DRAFT) 3 (2019), https://www.fdic.gov/communitybanking/2019/2019-10-10-opzones-mdi.pdf [https://perma.cc/6XBW-3PRA]. The investment focus of these QOFs covers 48 states, Washington, DC, and Puerto Rico with 30% (71) reporting a national focus. *Id.*

billion in funds raised by 406 QOFs reporting equity by April 2020.[142] The Opportunity Zones Database (OpportunityDB) reported 133 QOFs with an investment capacity of $43.2 billion as of May 2020.[143] In March 2020, the National Council of State Housing Agencies (NCSHA) reported 210 QOFs with a total anticipated investment of $47.6 billion and noted that 63% of these funds target investment in affordable housing and community development.[144]

However, concerns remain about who the program ultimately benefits.[145] Economist Paul Krugman has criticized the Opportunity Zone "tax break" as a way for Republicans to "bribe private investors" to spend on infrastructure rather than do so themselves.[146] Other news articles reported that the law was driving billions of investment profits into projects such as high-end apartment buildings, hotels, student housing, and storage facilities.[147] For opportunity zones to help distressed communities, there must be an affirmative effort for

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142 OPPORTUNITY FUNDS LIST, NOVOGRADAC, https://www.novoco.com/resource-centers/opportunity-zone-resource-center/opportunity-funds-listing [https://perma.cc/KM5U-6NVR] (Apr. 30, 2020).

143 OPPORTUNITY ZONE DATABASE, QUALIFIED OPPORTUNITY ZONE FUNDS, https://opportunitydb.com/funds/ [https://perma.cc/UTK4-8RHT].

144 NATIONAL COUNCIL OF STATE HOUSING AGENCIES, OPPORTUNITY ZONE FUND DIRECTORY, https://www.ncsha.org/resource/opportunity-zone-fund-directory/ [https://perma.cc/FTP2-HEKT] (May 5, 2020).

145 Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 4 (2020) (citing Alex Nitkin, *Origin Opportunity Fund Raises $105M in 17 Hours*, *Citing "Insane Amount of Demand*,*"* REAL DEAL (Nov. 20, 2018, 1:30 PM), https://therealdeal.com/chicago/2018/11/20/origin-opportunity-fund-raises-105m-in-17-hours-citing-insane-amount-of-demand/ [https://perma.cc/X4KP-288F]).

146 Paul Krugman, *The Great Tax Break Heist*, N.Y. TIMES (Sept. 2, 2019), https://www.nytimes.com/2019/09/02/opinion/trump-tax-opportunity-zones.html [https://perma.cc/53F2-ZNGQ]. The OZ tax incentive benefits wealthy individuals given that the top 1% of households have 69% of all reported capital gains. CAPITAL GAINS GO OVERWHELMINGLY TO WEALTHY FAMILIES, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 11, 2018), https://www.cbpp.org/capital-gains-go-overwhelmingly-to-wealthy-families [https://perma.cc/KB8N-29Z5].

147 Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Aug. 31, 2019), https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html [https://perma.cc/ZH6K-RT5V] (noting that OZ investors minimize risk by investing in high-end assets with little benefit going to the community); *see, e.g.*, Mark A. Pinsky & Keith Mestrich, *Opportunity Zones Are All Sizzle, Fizzle and the Abuse of Good Intentions*, MARKETWATCH (Nov. 22, 2019, 4:20 PM), https://www.marketwatch.com/story/opportunity-zones-are-all-sizzle-fizzle-and-the-abuse-of-good-intentions-2019-10-08 [https://perma.cc/4UYE-KY4P] ("The results to date show that the outcomes are more likely to be luxury apartments and sparse jobs, not affordable housing and employment opportunities.").

investments to reflect the needs of the residents within those communities.[148]

Current barriers to using QOFs for affordable housing include the law's emphasis on increasing property value to receive capital gains tax relief,[149] a requirement that developers double the basis of rehabilitated property,[150] the absence of any requirement that QOFs adopt a social mission,[151] and barriers to engaging nonprofits in Opportunity Zone transactions.[152] Despite these barriers, the NCSHA has featured three case studies on their website of Opportunity Zone investments that are developing affordable homes for very-low- to moderate-income households and further community revitalization efforts.[153]

The first example, the Tappan, is a mixed-use, mixed-income building in Cleveland with ninety-five apartments, including fifty-nine apartments affordable to households earning between 80% and 120% of Area Median Income (AMI), and a ground-floor bakery.[154] The Tappan is financed with a combination of Opportunity Zone equity from local investors and debt and Opportunity Zone equity from PNC Bank, as well as a loan and tax incentives from the City of Cleveland.[155]

The second example, the Ox Fibre Apartments, is a historic paintbrush factory in Frederick, Maryland, that was repurposed into eighty-three affordable apartments for families earning between 40% and 60% of AMI (Ox Fibre Apartments rent as much as $500 less than

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148 Michelle D. Layser, *How Place-Based Tax Incentives Can Reduce Geographic Inequality*, 73 TAX L. REV. 55, 59 (forthcoming 2021), https://papers.ssrn.com/abstract=3516469 [https://perma.cc/TQ9A-P7WR].

149 De Barbieri, *supra* note 145, at 45.

150 Letter from Daryl J. Carter, Chairman and Chief Executive Officer of Avanath Capital Management, LLC, to Ms. Jennifer DeCaspers, Chief of Staff of the Internal Revenue Service (June 6, 2019) (on file with author).

151 De Barbieri, *supra* note 145, at 32 (explaining the self-certification process).

152 Layser, *supra* note 148, at 62–63.

153 Press Release, Economic Innovation Group (EIG), Opportunity Zone Investments Create Affordable Homes, Support Community Revitalization (Nov. 20, 2019), https://eig.org/news/opportunity-zone-investments-create-affordable-homes-support-community-revitalization-2 [https://perma.cc/9V7M-WKMX] ("These encouraging developments illustrate some of the ways Opportunity Zones are attracting investment in affordable housing and community revitalization.").

154 NAT'L COUNCIL OF STATE HOUS. AGENCIES, OPPORTUNITY ZONE DEVELOPMENT PROFILE: THE TAPPAN, https://www.ncsha.org/wp-content/uploads/Case-Study-The-Tappan.pdf [https://perma.cc/924F-QGPW]. Tappan was developed by Sustainable Community Associates.

155 *Id.*

market rates in the area).[156] The financing includes 4% LIHTCs from the Maryland Department of Housing and Community Development, federal historic credits, Opportunity Zone equity, tax-exempt permanent financing from Freddie Mac, and additional debt from state and local sources.[157]

The last example, Parramore Oaks, is an energy-efficient building in Orlando with twenty-four market-rate apartments and ninety-six apartments affordable to families earning between 40% and 60% of AMI, including people with special needs or transitioning from homelessness.[158] It was one of the first developments to combine the Opportunity Zone tax incentive with 9% LIHTCs, allocated by the Florida Housing Finance Corporation.[159]

Moreover, the White House Opportunity and Revitalization Council established during the Trump Administration featured affordable housing collaborations in some of its road shows.[160] For example, HUD hosted an Opportunity Zones convening in Trenton to provide information and resources for municipalities and local stakeholders to attract investments in their cities.[161] New Jersey HMFA Executive Director Richman noted how LIHTCs "are fundamental to expanding affordable housing."[162] New Jersey revised its guidelines for awarding

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156 NAT'L COUNCIL OF STATE HOUS. AGENCIES, OPPORTUNITY ZONES DEVELOPMENT PROFILE: OX FIBRE APARTMENTS, https://www.ncsha.org/wp-content/uploads/Case-Study-Ox-Fibre.pdf [https://perma.cc/X97D-XJTL].

157 *Id.*

158 NAT'L COUNCIL OF STATE HOUS. AGENCIES, OPPORTUNITY ZONES DEVELOPMENT PROFILE: PARRAMORE OAKS, https://www.ncsha.org/wp-content/uploads/Case-Study-Parramore.pdf [https://perma.cc/94YU-WA9Q]. Developed in partnership with Alliant affiliate Invictus Development, SunTrust Community Capital provided the equity investment as well as a construction loan and permanent financing. The Orlando Community Redevelopment Agency contributed additional debt.

159 *Id.*

160 Exec. Order No. 13,853, 83 C.F.R. § 65071 (2018), Establishing the White House Opportunity and Revitalization Council. On December 12, 2018, President Trump established this Council to further the Administration's plan to coordinate federal resources to be used in opportunity zones.

161 *HUD Regional Administrator Lynne Patton Convenes in Trenton to Maximize Investments in New Jersey Opportunity Zones*, HUD (Mar. 4, 2020), https://www.hud.gov/states/new_jersey/stories/2020-03-04 [https://perma.cc/VQG7-C3X3] (Lynne Patton, HUD Regional Administrator for NY and NJ noting "[a]t HUD, we are passionate about this initiative, because we know that Opportunity Zones will elevate distressed neighborhoods by encouraging new business development and creating substantial job opportunities").

162 *HUD Regional Administrator Lynne Patton Convenes in Trenton to Maximize Investments in New Jersey Opportunity Zones*, INSIDER NJ (Mar. 4, 2020), https://www

LIHTCs and now awards points for projects located within opportunity zones.[163] Because the NCSHA case studies demonstrated that affordable housing projects need to leverage multiple incentives, the interaction between the LIHTC program and the Opportunity Zone tool should be carefully examined.

C. People-Based Interventions During the Great Recession

Housing payment assistance to mitigate housing instability was rare during the Great Recession. Few interventions were directed to homeowners themselves, let alone renters. However, two people-based interventions were notable. First, under ARRA, funds were appropriated to HUD for homelessness prevention and rapid rehousing, including short- and middle-term rental assistance for tenants.[164] Second, the Dodd-Frank Act created the Emergency Homeowners' Loan Program to provide mortgage payment relief to certain eligible homeowners.[165] This section analyzes these interventions and argues that targeted programs to prevent homelessness were generally successful; however, general mortgage payment assistance programs faced many of the same barriers to effectiveness as other foreclosure prevention interventions.

1. Rental Assistance

The American Recovery and Reinvestment Act created the Homelessness Prevention and Rapid Re-Housing (HPRR) program in 2009.[166] Under the law, $1.5 billion was earmarked for housing search assistance, temporary rental assistance, and funds to cover security deposits and other one-time or short-term costs associated with securing housing.[167] These funds were to be used for financial assistance (e.g., short- and medium-term rental assistance, security and utility deposits, utility payments, moving cost assistance, motel and

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.insidernj.com/press-release/hud-regional-administrator-lynne-patton-convenes-trenton-maximize-investments-new-jersey-opportunity-zones/ [https://perma.cc/7AR3-FMSH].

163 New Jersey Low Income Housing Tax Credit Qualified Allocation Plan, Sections 5:80-33.15 (a)(14)(i), https://nj.gov/dca/hmfa/media/download/tax/qap/tc_qap_proposed_2019_2020.pdf [https://perma.cc/WXC4-ACA7].

164 American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. No. 111-5, Title XII, 123 Stat. 115 (Homelessness Prevention Fund).

165 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1496, 124 Stat. 1376, 2207–09 (2010).

166 American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. No. 111-5, Title XII, 123 Stat. 115 (Homelessness Prevention Fund).

167 *Id.*

hotel vouchers); housing relocation and stabilization services (e.g., case management, outreach, housing search and placement, legal services, credit repair); data collection and evaluation; and administrative costs.[168] The program ran for three years and was discontinued in September 2012.[169]

Compared to the other interventions discussed in this part, the HPRR program was relatively successful. According to HUD, almost 700,000 people were served in the first year, and nearly all "were subsequently able to obtain or maintain permanent housing."[170] Because few states had significant homelessness prevention programs in place prior to HPRR, some economists concluded that the federal subsidy probably did not substitute for states' existing funds.[171] Meanwhile, one researcher found "a significant decrease in the probability of being homeless in school districts that were more likely to have received [HPRR] funds" and that having the program either "in the county, or closer to the school district where families live, on average reduces the number of homeless students by five to seven percent."[172]

These findings suggest that targeted interventions to prevent homelessness through housing payment assistance and supplemental programs may be more effective than indirect strategies (e.g., loan modification programs) to mitigate housing instability during a crisis.

2. Mortgage Payment Relief

The $1 billion Emergency Homeowners' Loan Program (EHLP) was created under the Dodd-Frank Act.[173] The EHLP provided "a zero interest, forgivable bridge loan to homeowners who have experienced

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168 U.S. DEP'T OF HOUS. & URB. DEV., HOMELESSNESS PREVENTION AND RAPID RE-HOUSING PROGRAM (HPRP): YEAR 3 & FINAL PROGRAM SUMMARY (2016).

169 Brendan O'Flaherty, *Homelessness Research: A Guide for Economists (and Friends)*, 44 J. HOUS. ECON. 1, 12 (2019).

170 U.S. DEP'T OF HOUS. & URB. DEV., THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS (2010), https://www.huduser.gov/portal/sites/default/files/pdf/2010HomelessAssessmentReport.pdf [https://perma.cc/H558-BDZT].

171 O'Flaherty, *supra* note 169, at 12.

172 Gabriel Piña Blanco, *Federal Policies and the Poor: Allocation Decisions and Impacts of Housing Financial Assistance Programs* 6 (Jan. 2018) (unpublished Ph.D. dissertation, Indiana University) (ProQuest Number 10743655); *see also* Gabriel Piña & Maureen Pirog, *The Impact of Homeless Prevention on Residential Instability: Evidence From the Homelessness Prevention and Rapid Re-Housing Program*, 29 HOUS. POL'Y DEBATE 501, 511 (2019).

173 U.S. DEP'T OF HOUS. & URB. DEV., HUD ARCHIVES: EMERGENCY HOMEOWNERS' LOAN PROGRAM (EHLP), https://archives.hud.gov/initiatives/ehlp/index.cfm [https://perma.cc/RW4M-CDMA].

a substantial loss of income (a reduction of at least 15%) due to unemployment or underemployment caused by adverse economic conditions or medical condition."[174] When the program was introduced, a HUD report estimated that it would benefit as many as 34,474 homeowners.[175]

However, like other foreclosure mitigation programs, the EHLP failed to meet expectations. The program benefited fewer than 12,000 homeowners[176] with only half of the allocated funds being spent.[177] Reasons for the deficiency included program start delays and "borrowers having difficulty meeting the eligibility criteria to qualify for assistance."[178] Although the program was created in July 2010, it was not launched until summer 2011.[179] Thus, like the other foreclosure prevention initiatives, lackluster participation and a slow government rollout ultimately undermined the EHLP.

D. Lessons for COVID-19

As this part has explained, many of the interventions used during the Great Recession took the form of incentive programs that encouraged voluntary participation among private market participants. However, participation in these programs was lower than expected due to a variety of factors. Barriers to successful implementation included resource constraints; the use of incentives rather than more direct controls; a focus on long-term place-based strategies at the expense of more immediate people-based strategies; slow government implementation; a reluctance among regulators to administer the programs; and low participation rates.

As a result, these programs generally failed to reach their full potential. This section draws on this analysis to highlight three lessons for mitigation of housing instability during the COVID-19 pandemic: (1) housing payment assistance may be more effective than indirect interventions; (2) grants may be more effective than tax expenditures

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174 U.S. DEP'T OF HOUS. & URB. DEV., HOW DOES EHLP WORK?, https://archives.hud.gov/initiatives/ehlp/how.cfm [https://perma.cc/99H7-MLGG]. Homeowner eligibility was limited to households that earned up to 120% of AMI. Hollar, *supra* note 48, at 185.

175 Hollar, *supra* note 48, at 186.

176 Immergluck, *supra* note 44, at 210.

177 KATIE JONES, CONG. RSCH. SERV., R40210, PRESERVING HOMEOWNERSHIP: FORECLOSURE PREVENTION INITIATIVES (2017), https://crsreports.congress.gov/product/pdf/R/R40210 [https://perma.cc/3958-ESBP].

178 *Id.*

179 Immergluck, *supra* note 44, at 210.

for promoting affordable housing development during a pandemic; and (3) there may be a continued need for place-based interventions to revitalize neighborhoods that are disproportionately affected by the pandemic.

1. Housing Payment Assistance Is Preferable to Indirect Interventions

Housing payment assistance may be more effective than indirect interventions for mitigating housing instability. Despite receiving a comparatively small funding allocation, the HPRR program—one of the few interventions to include housing payment assistance—was arguably more successful than other programs at mitigating housing instability.[180] This suggests that a large-scale, fully funded homelessness prevention program that includes housing payment assistance may be beneficial to mitigate housing instability during the pandemic. However, onerous application processes and restrictive eligibility criteria would likely chill participation, preventing people from receiving the assistance they need.

2. Grants Are Preferable to Tax Expenditures

Grants may be more effective than tax expenditures to support affordable housing development. Most of the changes to the LIHTC remain fully or partially in place under current law,[181] raising the question of whether further expansion would be warranted during the COVID-19 pandemic. There are several reasons why statutory changes to the LIHTC may not be effective in the current crisis. First, evidence from the Great Recession suggests that statutory expansions to the LIHTC may be insufficient to promote affordable housing development during a recession period when financial institutions are less profitable. Direct grants like TCAP may be more effective than tax credits at sustaining affordable housing development during crisis periods.

Second, the current value of LIHTCs to investors is lower than it was prior to the Great Recession as tax credits are less valuable to investors with less tax liability. When the 2017 TCJA reduced the highest corporate tax rate from 35% (the rate applicable during the Great Recession) to 21%, the value of the LIHTC also declined.[182] For

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180 U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 168, at 14.

181 *See supra* notes 100–02.

182 H. Blair Kincer & Mark O'Meara, *A Look at the LIHTC: Past Pricing Trends, the Current Market and Future Concerns*, NOVOGRADAC (Mar. 3, 2020), https://www.novoco

example, prior to tax reform, investors in Midwest and Southeast markets would pay $1.05 to $1.10 per dollar of tax credit, an amount that reflected a premium paid for points earned for compliance with the Community Reinvestment Act.[183] In 2020, the "vast majority of deals get 90 cents to $1 per credit" in those same markets.[184] This suggests that roughly 10% of federal dollars spent on affordable housing under the LIHTC projects are captured by investors instead of being used by developers. Even if this leakage is deemed acceptable during nonrecession periods, it suggests that LIHTC expansion would not be the most efficient use of emergency spending.

3. Place-Based Interventions Are Necessary

A third lesson revealed by the uneven recovery after the Great Recession is that place-based interventions are necessary to prevent long-term housing instability following a crisis. In the context of the pandemic, place-based intervention may be especially important if a prolonged pandemic causes vacancies. Both the harms associated with vacant and abandoned properties and the tendency for uneven distributions of such properties have been well documented.[185]

Figure 2 visualizes data from the HUD's USPS vacancy dataset to explore state-level variations in vacancies. The chart shows that state-level vacancy rates tend to remain relatively constant over time, with substantial interstate variation in overall vacancy rates. Vacancy rates rose in all states during the Great Recession and remained elevated for several years before noticeably dropping in 2015.

This may be explained in two ways. First, units in weak housing markets are likely to remain vacant for extended periods during economic crisis because landlords may prefer to keep units on the market and unrented rather than lowering their prices. This may be the most salient observation for our analysis. Second, units under construction but not yet occupied may remain vacant for long periods and, upon completion, may take time to be absorbed into the housing market. In either case, prolonged elevated vacancy rates are indicative of housing distress.

.com/periodicals/articles/look-lihtc-past-pricing-trends-current-market-and-future-concerns [https://perma.cc/XG7K-YUSP].

183 *Id.*

184 *Id.*

185 Layser, *supra* note 148, at 23–25.

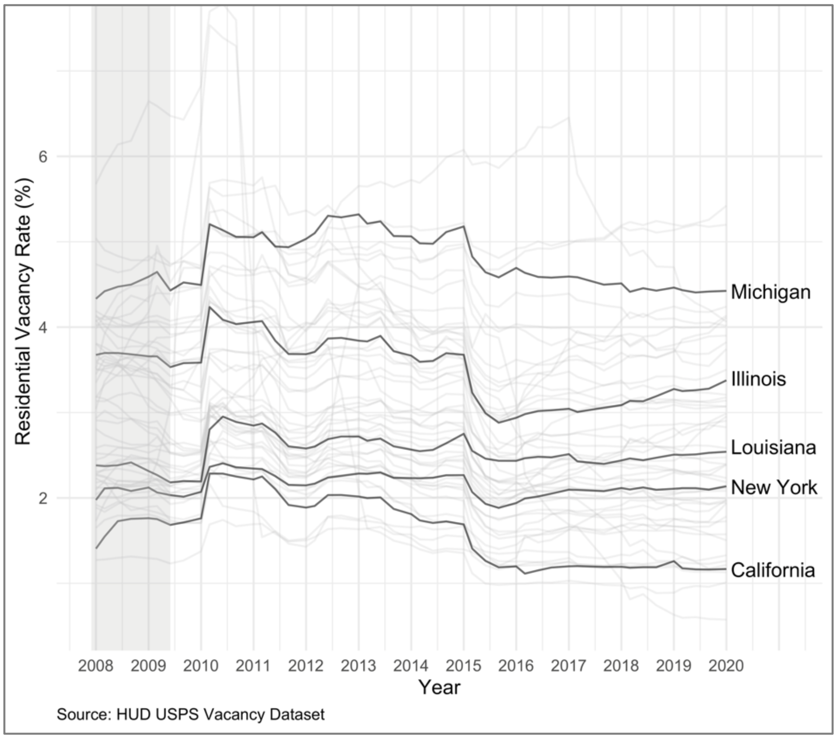

Figure 2. Residential Vacancy Rate by U.S. State (2008–2020).

States like Michigan that already have high vacancy rates may be particularly vulnerable to such spikes if the pandemic results in foreclosures. State-level statistics also mask significant variations across smaller geographic units. During the Great Recession, both the distribution of foreclosures and uneven recovery tended to disadvantage places with lower incomes and more racial minorities.[186] While vacancy rates may not rise to the same degree during the COVID-19 pandemic, if steps are not taken to mitigate housing instability, similar patterns could emerge.

During the pandemic, vacancies may concentrate in low-income areas for several reasons. Higher population density in low-income areas may lead to a concentration of COVID-19 outbreaks that lead to unemployment and, ultimately, housing instability.[187] Even in the

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186 Emily T. Molina, *Foreclosures, Investors, and Uneven Development During the Great Recession in the Los Angeles Metropolitan Area*, 38 J. URB. AFFS. 564, 565 (2016); Matthew Hall et al., *Variations in Housing Foreclosures by Race and Place, 2005–2012*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 217, 218 (2015).

187 *See supra* notes 52–55 and accompanying text.

absence of outbreaks, unemployment rates may be higher among residents of low-income neighborhoods if residents' low-wage positions are not easily adapted to remote-work arrangements. Preexisting housing insecurity in low-income neighborhoods may make residents particularly vulnerable to such economic shocks. For these reasons, a complete policy response to the current crises should include strategies to mitigate the long-term impact of the pandemic on low-income neighborhoods.

However, experience with the Neighborhood Stabilization Program suggests that—at a minimum—such interventions may require higher funding levels than past programs if they are to have a significant impact. Ideally, such programs would not only target low-income areas that experience a high rate of vacancies but would also prioritize areas where such vacancies threaten neighborhoods (e.g., by increasing health risks or facilitating crime).[188] Experience with opportunity zones also suggests that if place-based tax incentives are used, they should carefully target problem areas and define the activities eligible for subsidies.[189] To ensure that the benefits of these interventions flow to neighborhood residents instead of outside investors, the law should also limit subsidized development to affordable housing and development that will benefit community residents.[190]

These lessons, derived from Great Recession–era interventions, can help inform current strategies to mitigate housing instability during pandemics like COVID-19. Yet, as the next part will show, the initial policy response has repeated many of the same mistakes that limited the effectiveness of interventions during the Great Recession. Namely, the early interventions have failed to include direct housing payment assistance to homeowners. Though early interventions have included efforts to freeze mortgage and rental payments, those interventions suffered from lack of enforcement. Meanwhile, the indirect measures taken to mitigate housing instability during the early months of the COVID-19 crisis are insufficient to mitigate housing instability. The next part evaluates these interventions and argues that more direct efforts to mitigate housing instability will be necessary.

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188 Layser, *supra* note 148, at 56–59; *see also* Molina, *supra* note 186; Hall et al., *supra* note 186.

189 Layser, *supra* note 148, at 60–61.

190 *Id.*

III
HISTORY REPEATS ITSELF: THE COVID-19 PANDEMIC

As demonstrated in Part II, a variety of policy tools were implemented during the Great Recession to mitigate housing instability, but few realized their full potential. This part argues that many of the initial interventions during the COVID-19 crisis face barriers like those faced during the Great Recession. These barriers—which include administrative hurdles, reliance on voluntary participation, resource constraints, and political pushback, among others—may prevent these interventions from effectively mitigating housing instability.

Part II highlighted the importance of including direct forms of housing payment assistance to struggling homeowners and renters. Examples of direct assistance may include cash payments made directly to landlords or lenders, or it may include housing vouchers akin to the current Housing Choice Voucher program. The initial legislative response to the COVID-19 pandemic did not include direct housing payment assistance. Instead, the initial response relied upon (1) temporary eviction freezes and foreclosure moratoriums, and (2) indirect interventions. As this part will demonstrate, the temporary eviction freezes and foreclosure moratoriums were insufficient to eliminate the need for direct housing payment assistance, and the indirect interventions have failed to fill that gap. This part will also explain how tax expenditures are not sufficient to reduce housing instability.

A. Temporary Eviction Freezes and Foreclosure Moratoriums

To mitigate housing instability during the pandemic, policymakers may choose to provide financial assistance in either of two ways: sending people money or temporarily halting their recurring necessary expenses.[191] Though the early policy response has embraced both strategies, housing instability has been mitigated primarily through the latter approach. In fact, the most direct early interventions to mitigate

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191 Pamela Foohey et al., *CARES Act Gimmicks: How Not to Give People Money During a Pandemic and What to Do Instead*, 2020 U. ILL. L. REV. ONLINE 81, 83 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583464 [https://perma.cc/4Q6S-F7BX].

housing instability have taken the form of foreclosure moratoriums and eviction freezes.[192]

Federal law has been used to freeze evictions and stave off foreclosures on federally financed properties. The CARES Act provides for nationwide foreclosure moratoriums, forbearance rights, and eviction freezes.[193] Under the law, borrowers of federally backed mortgages may request forbearance for up to 180 days, with an additional 180-day forbearance period permitted.[194] Meanwhile, servicers of federally backed mortgages temporarily may not foreclose on defaulted loans.[195]

The law also places a temporary moratorium on eviction filings against tenants living in buildings financed with federally backed mortgages.[196] The Urban Institute estimates that "eviction moratoria covering federally financed properties will apply to roughly 12.3 million (28[%]) of the 43.8 million [U.S.] rental units."[197] State-level eviction freezes have supplemented the federal law to cover additional tenant populations. As shown in Appendix A, at least forty-three states have implemented eviction freezes in the first few months of the pandemic, and at least thirty-one states have imposed foreclosure

192 *See* Elmsford Apartment Assocs. v. Cuomo, No. 20-cv-4062, 2020 WL 3498456, at *2–3 (S.D.N.Y. June 29, 2020) (discussing New York's EO 202.28, which, *inter alia*, temporarily halts evictions of financially impacted tenants during the COVID-19 pandemic).

193 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 4022, 134 Stat. 281 (2020). Specifically, the law applies to any loan for a one- to four-family home insured by Federal Housing Administration, Department of Veterans Affairs, Department of Agriculture, or purchased or securitized by Federal Home Loan Mortgage Corporation or Federal National Mortgage Association. CARES Act § 4022(a)(2). The CARES Act also mandates foreclosure forbearance for greater than four-family housing, allowing for up to three thirty-day forbearance periods for mortgage payments due. CARES Act § 4023(c).

194 CARES Act § 4022(b). The Stout analysis cites a Furman Center study that reports, "About 20 percent of New York City renters live in 2–4-unit buildings. Across the nation, 34 percent of renters live in single-family homes, with an additional 17 percent in 2–4-unit buildings. Rental arrears may pose particular problems for owners of smaller buildings, placing those owners at risk of maintaining mortgage payments." *See also* STOUT, *supra* note 8, at 34.

195 Brenda Richardson, *Government Agencies Extend Foreclosure and Eviction Moratoriums*, FORBES (June 17, 2020, 3:06 PM), https://www.forbes.com/sites/brendarichardson/2020/06/17/government-agencies-extend-foreclosure-and-eviction-moratoriums/ [https://perma.cc/ZSP4-RRUS].

196 CARES Act § 4024(b).

197 Laurie Goodman et al., *The CARES Act Eviction Moratorium Covers All Federally Financed Rentals—That's One in Four US Rental Units*, URB. INST. (Apr. 2, 2020), https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units [https://perma.cc/C58U-WMAC].

moratoriums. However, these state-level interventions vary with respect to the populations covered, their duration, and the degree of protection.[198]

When they apply, these foreclosure moratoriums and eviction freezes are mandatory direct regulations, which differ from the voluntary loan modification incentives used during the Great Recession. Compared to the voluntary programs of the previous crisis, recent efforts have been relatively successful at preventing a wave of foreclosures and evictions even as unemployment levels have spiked to unprecedented levels.[199] However, in addition to the limited coverage of the freezes, the interventions are hindered by at least two factors: (1) uncertainty about how past-due payments should be treated once the moratoriums and freezes are lifted and (2) an informal (and often illegal) practice of evicting tenants without initiating formal eviction procedures.

Although banks have complied with the mortgage foreclosure moratoriums, the law provided little guidance as to how the moratoriums should be structured, and the approaches taken by banks have varied. Early reports indicated that some banks intended to require borrowers to repay missed payments in a lump sum at the end of the forbearance period.[200] Many borrowers worried that they would be unable—after months of unemployment—to repay the full forbearance amount at the end of the period. While the unemployment assistance and stimulus payments may enable some borrowers to comply with such terms, others may be unable to do so if they experience delays or are ineligible for those relief payments.[201]

In response to these concerns, "the Federal Housing Finance Agency announced that servicers of mortgages backed by Freddie Mac and Fannie Mae should not require lump sum repayments once the forbearance period ends."[202] However, borrowers with privately held

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198 Eviction Lab, *COVID-19 Housing Policy Scorecard*, EVICTION LAB, https://evictionlab.org/covid-policy-scorecard/ [https://perma.cc/JX5F-SE66]. For a comparative summary of states' eviction freeze laws, see the Eviction Lab's COVID-19 Housing Policy Scorecard. *Id.*

199 *See* FISHER & FOX, *supra* note 69 (arguing that government programs to modify mortgages need to be more robust and include principal write-downs).

200 Dima Williams, *After Confusion over Lump Sum Payments, Homeowners Finally Get Clarification on Mortgage Forbearance*, FORBES (Apr. 27, 2020, 11:08 AM), https://www.forbes.com/sites/dimawilliams/2020/04/27/no-you-do-not-have-to-pay-a-lump-sum-at-the-end-of-mortgage-forbearance/ [https://perma.cc/MF4X-7ABB].

201 *See infra* Section III.B.

202 Williams, *supra* note 200.

mortgages—about 30% of mortgage holders—are not protected by those rules, and many continue to face burdensome repayment requirements.[203] Among homeowners with federally guaranteed mortgages, "confusion has lingered, with homeowners whose mortgages are backed by the government still being told that they'd have to make lump-sum payments when they resumed their loans."[204]

Similarly, questions remain as to what will happen once lawmakers lift eviction freezes and mortgage moratoriums. Most eviction freezes permit widespread eviction as soon as the freezes are lifted.[205] Unless the social safety net is sufficient to ensure that such people will receive assistance that enables them to pay their housing payments when due, the current moratoriums and freezes may simply delay—rather than prevent—waves of foreclosures and evictions.

However, it is important to note that even during the covered period, lack of enforcement has undercut the effectiveness of the eviction freezes. According to some reports, "landlords and even public-housing authorities in some states have continued to file for eviction without consequences."[206] In other cases, landlords are using illegal "self-help" evictions to evict tenants without using formal court procedures, such as by changing tenants' locks or making threats.[207] Low-income tenants may be particularly vulnerable to these tactics due to lack of attorney representation, lack of knowledge about their rights, and fear of legal repercussion.[208]

Thus, these interventions fail to eliminate the need for direct housing payment assistance. The CARES Act included no such assistance. Instead, the law included several indirect efforts to mitigate housing instability through monetary relief to individuals and employers. The next section argues that these interventions are insufficient to prevent housing instability.

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203 Tara Siegel Bernard, *Mortgage Relief That Comes with a $4,000 Bill*, N.Y. TIMES (May 15, 2020), https://www.nytimes.com/2020/05/15/business/coronavirus-mortgage-relief.html [https://perma.cc/3BTU-L5HW].

204 *Id.*

205 Eviction Lab, *supra* note 198.

206 Rebecca Burns, *Landlords Illegally Evicting Tenants, Despite Federal Restrictions*, AM. PROSPECT (Apr. 23, 2020), https://prospect.org/api/content/a9dd126e-84e1-11ea-8b47-1244d5f7c7c6/ [https://perma.cc/7L3X-7U8B].

207 Semuels, *supra* note 17.

208 MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

B. Overreliance on Indirect Interventions

In lieu of direct housing payment assistance, the CARES Act included several programs with the potential to mitigate housing instability indirectly. These programs included monetary relief for individuals, such as unemployment insurance and stimulus payments,[209] as well as assistance to employers in the form of loan programs.[210] Unlike direct housing payment assistance, which directly targets distressed homeowners or renters for the express purpose of mitigating housing instability, these programs address housing instability only indirectly. For this reason, this section characterizes such programs as "indirect" assistance, even when some monetary assistance is provided directly to individuals—and it argues that overreliance on these indirect interventions will be insufficient to mitigate housing instability during the pandemic.

1. Monetary Relief for Individuals

a. Unemployment Assistance

Among the indirect forms of relief, the most promising early intervention to prevent housing-insecure people from slipping into homelessness has been a major expansion of the unemployment insurance safety net. The CARES Act expands unemployment insurance along numerous dimensions. It expands (1) the qualification criteria for covered workers; (2) the amount of time people are eligible to remain within the unemployment compensation system; (3) the amount of benefits people receive from unemployment compensation; and (4) the availability of short-time unemployment compensation, otherwise known as work-share programs. All these interventions have significant potential to mitigate housing instability.

However, the effectiveness of these interventions may be limited by several factors. These factors include structural features of state unemployment programs, administrative challenges and implementation delays, and the voluntary nature of some of the interventions. As a result, the capacities and actions of state governments and private market participants may present barriers to effective administration of the federal unemployment assistance program.

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[209] *See infra* Section III.B.1.

[210] *See infra* Section III.B.2.

The most significant expansion of unemployment insurance under the CARES Act is the Federal Pandemic Unemployment Compensation (FPUC) program, which provides an additional $600 per week to anyone receiving any form of unemployment insurance compensation until July 31, 2020.[211] The potential reach of this benefit is bolstered by two other changes under the law—expanded eligibility criteria and extended coverage periods.[212] However, for reasons to be explained in this section, implementation delays and the structure of states' existing unemployment systems may nevertheless limit the program's potential to mitigate housing instability.

At the outset, it is worth noting that the scope of unemployment assistance under the CARES Act is unprecedented. The $600 supplement to states' existing unemployment insurance is sufficient to bring the national average replacement rate, the ratio of average unemployment benefits to average wages in each state, close to 100%.[213] For many low-wage workers, the extra $600 per week could yield more compensation than if they had remained employed.[214]

The CARES Act also provides significant support to many workers who normally would not qualify for unemployment benefits. Specifically, self-employed individuals (e.g., gig workers), part-time employees, and those with limited employment history may be eligible to receive up to thirty-nine weeks of benefits if they are unable to work as a result of COVID-19.[215] The CARES Act also provides an

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211 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 2104(b), 134 Stat. 318 (2020). This extra $600 per week is disregarded for purposes of determining eligibility for Medicaid and the Children's Health Insurance Program (CHIP). CARES Act § 2104(h). The CARES Act also supports short-time compensation programs known as work-share programs. CARES Act §§ 2108–10. This program allows employers to reduce employees' hours to avoid layoffs. I.R.C. § 3306(v); Greg Iacurci, *This Is a Lucrative — but Little-Used — Unemployment Benefit: 'It's a Complete Windfall,'* CNBC (June 2, 2020, 12:31 PM), https://www.cnbc.com/2020/06/02/work-sharing-programs-are-a-lucrative-but-little-used-unemployment-benefit.html [https://perma.cc/CU4A-XMMU]; U.S. DEP'T OF LAB., SHORT-TIME COMPENSATION (STC), https://oui.doleta.gov/unemploy/stc.asp [https://perma.cc/GQF5-AK9W]. In return, employees of a participating employer can collect unemployment benefits to cover part of the lost income from the reduction in hours. *Id.* However, as of May 9, fewer than 1% of the 31 million Americans collecting unemployment were doing so under the short-time compensation program.

212 *See infra* notes 212–14 and accompanying text.

213 Ella Koeze, *The $600 Unemployment Booster Shot, State by State*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/interactive/2020/04/23/business/economy/unemployment-benefits-stimulus-coronavirus.html [https://perma.cc/D9MR-PEW6].

214 *Id.*

215 CARES Act §§ 2102(a)(3)(A)(ii)(I)–(II), (c)(1)–(2). CARES Act § 2102(a)(3)(A)(ii)(I) outlines eleven reasons that qualify one as unemployed because of this pandemic.

extension of unemployment compensation for those who have exhausted their regular and extended unemployment benefits.[216] This thirteen-week extension includes the normal unemployment compensation and the additional $600 per week.[217]

If effective, these interventions stand to mitigate housing instability by providing unemployed workers the income support necessary to meet necessities, including rents and mortgages. However, some features of the law may prevent it from realizing its full potential. Most significantly, all these programs are funded by the federal government but implemented by the states. This structure may result in regional variations in implementation that render the program more effective in some places than others. Such variation will likely stem from (1) differences in states' capacities to administer an unemployment insurance program of this scale, and (2) differences in states' capacities or willingness to provide large unemployment insurance safety nets.

In many states, the unemployment insurance system has been overwhelmed by the sheer volume of applications for benefits.[218] In some states, an IT infrastructure of antiquated hardware that could not handle the sudden rush of claims has compounded this problem.[219]

Note that some categories of workers, such as undocumented immigrants and those who work in criminalized markets (e.g., sex work, illegal drug sales) are not covered by unemployment insurance. Though there may be strong public policy reasons to exclude such groups from coverage, the failure to assist these groups will leave them particularly vulnerable to housing instability.

216 CARES Act § 2107(a)(1)–(3).

217 CARES Act § 2107(a)(4).

218 Robert Iafolla, *For Jobless Gig Workers, Stimulus Bill Benefits No Silver Bullet*, BLOOMBERG L. (Mar. 31, 2020, 3:01 AM), https://news.bloomberglaw.com/daily-labor-report/for-jobless-gig-workers-stimulus-bill-benefits-no-silver-bullet [https://perma.cc/27RJ-NGWN]; The Weeds, *Help Is on the Way (Sort Of)*, VOX (Apr. 17, 2020), https://www.stitcher.com/podcast/voxs-the-weeds/e/68904343 [https://perma.cc/3C3N-P66J] [hereinafter Weeds]; Ella Nilsen, *Getting Unemployment Has Been a Nightmare for Millions of People Across the Country*, VOX (Apr. 20, 2020, 7:40 AM), https://www.vox.com/2020/4/20/21220931/unemployment-insurance-coronavirus-websites-crashing [https://perma.cc/DZN3-L2LX]; Matthew Haag, *They Filed for Unemployment Last Month. They Haven't Seen a Dime.*, N.Y. TIMES (Apr. 17, 2020), https://www.nytimes.com/2020/04/17/nyregion/coronavirus-pandemic-unemployment-assistance-ny-delays.html [https://perma.cc/6ZEH-W9WY]; Nelson D. Schwartz et al., *Stymied in Seeking Benefits, Millions of Unemployed Go Uncounted*, N.Y. TIMES (Apr. 30, 2020), https://www.nytimes.com/2020/04/30/business/economy/coronavirus-unemployment-claims.html [https://perma.cc/BA8J-5R8U].

219 Nilsen, *supra* note 218; Haag, *supra* note 218; Amelia Thomson-DeVeaux, *America's Social Safety Net Wasn't Ready for the Coronavirus Crisis*, FIVETHIRTYEIGHT (Apr. 8, 2020), https://fivethirtyeight.com/features/americas-social-safety-net-wasnt-ready-for-the-coronavirus-crisis/ [https://perma.cc/GP5S-CVRE]; Weeds, *supra* note 218; Schwartz et al., *supra* note 218; Klint Finley, *Can't File for Unemployment? Don't Blame Cobol*,

Meanwhile, states have been tasked with the implementation and administration of new unemployment benefits under the CARES Act and have had to rapidly increase the number of government employees available. Even with the additional flexibility provided under the CARES Act,[220] this has resulted in significant delays in implementation.

As a result, many self-employed people have been unable to promptly receive unemployment benefits.[221] Claiming unemployment benefits has required significant persistence on the part of unemployed workers to overcome the administrative hurdles. Lack of persistence may negatively impact take-up rates. If unable to receive their entitled benefits, some are likely to lose housing quickly—especially when the eviction freezes and foreclosure moratoriums expire.

Even if perfectly implemented, the law would likely mitigate housing insecurity in some states more effectively than others. The reason stems from differences in states' capacities or willingness to provide large unemployment insurance safety nets. For example, state laws vary in the duration and level of generosity of their weekly unemployment benefits.[222] And although the $600 supplement may help fill gaps, it applies uniformly and does not adjust for cost of living.[223] As a result, the real economic value of the federal benefit will vary across geographies, making it particularly important that states' baseline unemployment benefits provide a sufficient safety net. Furthermore, some states, like Florida, have placed onerous restrictions on unemployment and other social safety net programs, making it difficult for people to access them even in times of need.[224] As a result, restrictions designed to prevent benefits from reaching the wrong

WIRED (Apr. 22, 2020), https://www.wired.com/story/cant-file-unemployment-dont-blame-cobol/ [https://perma.cc/4HWE-URVX].

220 Nilsen, *supra* note 218; Haag, *supra* note 218; Thomson-DeVeaux, *supra* note 219; Weeds, *supra* note 218; Schwartz et al., *supra* note 218; Finley, *supra* note 219.

221 WASH. POST (Apr. 2, 2020, 5:37 AM), https://www.washingtonpost.com/business/2020/04/02/uber-airbnb-lyft-unemployment-coronavirus/ [https://perma.cc/J2T5-KJC6]; Weeds, *supra* note 218; Schwartz et al., *supra* note 218.

222 Thomson-DeVeaux, *supra* note 219.

223 *Id.*; Koeze, *supra* note 213; Schwartz et al., *supra* note 218.

224 Gary Fineout & Marc Caputo, *'It's a Sh— Sandwich': Republicans Rage as Florida Becomes a Nightmare for Trump*, POLITICO (Apr. 3, 2020, 5:02 AM), https://www.politico.com/states/florida/story/2020/04/03/its-a-sh-sandwich-republicans-rage-as-florida-becomes-a-nightmare-for-trump-1271172 [https://perma.cc/Y4TG-WYP2]; Weeds, *supra* note 218; Rebecca Vallas, *Republicans Wrapped the Safety Net in Red Tape. Now We're All Suffering.*, WASH. POST (Apr. 15, 2020, 11:25 AM), https://www.washingtonpost.com/outlook/2020/04/15/republicans-harder-access-safety-net/ [https://perma.cc/TH4T-UDGN].

people may cause significant harms to those who are entitled to benefits.[225]

In addition to these barriers to effective implementation, other problems loom. First, the limited duration of the federal supplement may remove an important intervention that helps those who are housing insecure. A failure to extend this program may harm people in those states with inadequate benefits, exacerbating housing instability.[226] This would lead to a public health crisis by potentially creating a surge of the homeless population that, in turn, leads to a new surge in COVID-19 cases and deaths.

Second, states' fiscal health may present additional risks. While the federal government fully funds the new benefits, traditional regular benefits and extended benefits are still partially funded by the states.[227] Now with a fall in revenues, states have had to borrow from the federal government to meet these needs, which could lead to additional delays and future fiscal crises that exacerbate housing instability.[228]

b. Stimulus Payments

In addition to ongoing unemployment assistance, the CARES Act also provided for a single cash payment to be delivered to all people—regardless of work status—except for nonresident alien individuals and

225 Weeds, *supra* note 218. Indeed, as of July, about three months after the passage of the CARES Act's expanded unemployment benefits, many people entitled to these benefits still have not had their claims processed or received benefits. Eli Rosenberg, *Workers Are Pushed to the Brink as They Continue to Wait for Delayed Unemployment Payments*, WASH. POST (July 13, 2020, 3:40 AM), https://www.washingtonpost.com/business/2020/07/13/unemployment-payment-delays/ [https://perma.cc/X2LU-EXR7].

226 *See* Ella Nilsen, *Exclusive: One Democrat's Plan to Stretch Expanded Unemployment Insurance Through December*, VOX (May 1, 2020, 8:10 AM), https://www.vox.com/2020/5/1/21241850/expanded-unemployment-insurance-benefits-december [https://perma.cc/QYL2-2DDP].

227 *What Is the Unemployment Insurance Trust Fund, and How Is It Financed?*, TAX. POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-unemployment-insurance-trust-fund-and-how-it-financed [https://perma.cc/37H8-DWQF] (describing how traditional unemployment insurance programs are funded through state-federal partnerships).

228 Sarah Chaney, *California Is First State to Borrow from Federal Government to Make Unemployment Payments*, WALL ST. J. (May 4, 2020, 5:35 PM), https://www.wsj.com/articles/california-is-first-state-to-borrow-from-federal-government-to-make-unemployment-payments-11588617257 [https://perma.cc/KJN4-36SP]; Brian Galle, *The States Should Quickly Reform Unemployment Insurance Programs to Prevent Economic Harm*, MEDIUM (Apr. 20, 2020), https://medium.com/whatever-source-derived/the-states-should-quickly-reform-unemployment-insurance-programs-to-prevent-economic-harm-8099b277042b [https://perma.cc/E595-LTRD].

individuals claimed as dependents on other people's tax returns.[229] Because the law does not contain any minimum income requirement, the payment is available to even the poorest individuals.[230] For this reason, although the payment is primarily intended as an economic stimulus, it also serves as a limited social safety net for many recipients. This payment may be especially important in cases when unemployment assistance is delayed.

Specifically, the payment was structured as a refundable tax credit to offset individuals' 2020 tax liability—but the payment was to be paid in advance and adjusted, if necessary, when taxes are filed.[231] Subject to phaseouts,[232] the amount of the credit was up to $1,200 for an eligible individual or $2,400 for eligible individuals filing a joint return.[233] Eligible individuals with children received an additional $500 per child.[234]

However, the delivery of stimulus payments was more difficult than anticipated.[235] Despite the effort to simplify the process by distributing payments to taxpayers via direct deposit,[236] many people received

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229 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 2201(a), 134 Stat. 318 (2020) (to be codified at I.R.C. § 6428(d)).

230 CARES Act § 2201(a) (to be codified at I.R.C. § 6428(d)). Note, however, that recipients must possess and remember a valid social security number to claim the payment. *Id.*

231 CARES Act § 2201(a) (to be codified at I.R.C. § 6428(a), (b), (e), (f)).

232 However, the credit phases out for eligible individuals with an adjusted gross income (AGI) over $75,000. CARES Act § 2201(a) (to be codified at I.R.C. § 6428(c)(3)). For those eligible individuals who file a joint return, the phaseout starts above $150,000, while for heads of household it starts above $112,500. CARES Act § 2201(a) (to be codified at I.R.C. § 6428(c)(1), (2)). The phaseout decreases the credit by 5% for each dollar above these defined thresholds. In other words, for each $100 above the phaseout amount, the credit decreases by $5. *Id.* Thus, for an eligible individual the credit disappears at an AGI of $99,000, at $198,000 for those who file a joint return, and $136,500 for a head of household filer.

233 CARES Act § 2201(a) (to be codified at I.R.C. § 6428(a)(1)).

234 *Id.*

235 *See* Richard Rubin, *The Government Wants to Send You Money—but How Soon Will It Arrive?*, WALL ST. J. (Mar. 18, 2020, 3:07 PM), https://www.wsj.com/articles/the-government-wants-to-send-you-moneybut-how-soon-will-it-arrive-11584558455 [https://perma.cc/RS4K-DDQY] (noting that the difficult policy problem of getting money to people accurately and quickly, the problems with a reduced IRS capacity because of budget cuts, and the issues regarding people for whom the government lacks contact).

236 Lisa Rein, *IRS to Begin Issuing $1,200 Coronavirus Payments April 9, but Some Americans Won't Receive Checks Until September, Agency Plan Says*, WASH. POST (Apr. 2, 2020, 4:05 PM), https://www.washingtonpost.com/politics/irs-to-begin-issuing-1200-coronavirus-payments-april-9-but-some-americans-wont-receive-checks-until-september-agency-plan-says/2020/04/02/8e0cfc84-751e-11ea-85cb-8670579b863d_story.html [https://perma.cc/LGF3-CH5M].

amounts that did not cover dependent children or had other glitches.[237] Other barriers to the efficient rollout of stimulus payments included technological issues, missing identification data, and the vulnerability to scammers.

First, technological issues resulted in the rejection of direct deposits to many low-income taxpayers who used tax preparation services or software to claim their earned income tax credit.[238] Many of these companies allow such taxpayers to pay for the preparation services from their refund.[239] When claimants use these services, the return preparer creates a bank account for direct deposit, and the money is transferred to the taxpayer after deducting fees.[240] However, when the IRS attempted to deposit stimulus payments into those accounts, the banks rejected the payments.[241] This resulted in confusion and delays for many of the lowest-income taxpayers,[242] many of whom are housing insecure.[243]

Second, missing identification data delayed payments to a large portion of housing-insecure people who have not filed taxes in recent years.[244] People who are not on Social Security or Veterans Benefits must go to a website to enter either direct deposit information or their address.[245] But this application system was available only online, and

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237 Richard Rubin, *When the Stimulus Check in Your Bank Account Isn't What You Expected*, WALL ST. J. (Apr. 16, 2020, 5:50 PM), https://www.wsj.com/articles/when-the-stimulus-check-in-your-bank-account-isnt-what-you-expected-11587054049 [https://perma.cc/86PV-MT38]; Heather Long & Michelle Singletary, *Glitches Prevent $1,200 Stimulus Checks From Reaching Millions of Americans*, WASH. POST (Apr. 16, 2020, 10:13 AM), https://www.washingtonpost.com/business/2020/04/16/coronavirus-cares-stimulus-check/ [https://perma.cc/LKX2-QN7U].

238 Paul Kiel et al., *Millions of People Face Stimulus Check Delays for a Strange Reason: They Are Poor*, PROPUBLICA (Apr. 24, 2020, 11:40 AM), https://www.propublica.org/article/millions-of-people-face-stimulus-check-delays-for-a-strange-reason-they-are-poor [https://perma.cc/2HBL-HL9G].

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.*

243 *See supra* Section I.A.

244 Ron Lieber & Alan Rappeport, *Needy Will Face Hurdles to Getting Coronavirus Stimulus*, N.Y. TIMES (Apr. 15, 2020), https://www.nytimes.com/2020/04/01/business/coronavirus-stimulus-social-security.html [https://perma.cc/69G5-3P4N].

245 Laura Saunders & Richard Rubin, *IRS Adds New Ways to Claim Coronavirus Stimulus Payments for Low Earners*, WALL ST. J. (Apr. 10, 2020, 12:18 PM), https://www.wsj.com/articles/irs-adds-ways-for-low-earners-to-claim-stimulus-payments-11586533870 [https://perma.cc/4B5N-ZGR4]; Richard Rubin, *Social Security Recipients Won't Need to File Tax Returns for Coronavirus Stimulus Payment*, WALL ST. J. (Apr. 1, 2020, 9:09 PM), https://www.wsj.com/articles/social-security-recipients-wont-need-to-file-tax-returns-for

many poor people who are housing insecure lack access to the internet—particularly when libraries and free tax clinics are closed due to shelter-in-place orders.[246] This inability to access the application website means that many low-income people experienced delays or never received their payments.

Third, scams have emerged as a serious problem, particularly for those who have not recently filed taxes.[247] As a result of data breaches, the dark web is full of personal information that criminals can use to claim nonfilers' stimulus payments.[248] If nonfilers fail to claim their payments via the website described above, then an identity thief may claim their payment instead.[249] For this reason, in addition to addressing the internet access issues, it will be essential to raise awareness about the availability of future stimulus payments and the steps needed to claim them. Otherwise, take-up rates may be lower than anticipated.

In addition to these barriers to effective implementation, unintended transaction costs may also undermine the goals of the economic stimulus payments. About 6.5% of Americans do not have a bank account, and about 25% of all Americans are underbanked, meaning that although they have a bank account, "they use other financial services."[250] When receiving a check like the stimulus payment, many of these individuals turn to check cashers, who charge exorbitant fees.[251] Other options like preloaded ATM cards or other financial

-coronavirus-stimulus-payment-11585787205 [https://perma.cc/3YPD-YC5Q]. But if these people had qualifying children for the $500, they still had to go to the IRS online tool to get that other amount at some point in April 2020, or risk having to wait until next year for that amount. Michelle Singletary, *If You're One of These American Taxpayers, the Deadline to File for a $500-per-Child Stimulus Check Has Passed*, WASH. POST (Apr. 20, 2020, 12:27 PM), https://www.washingtonpost.com/business/2020/04/20/if-youre-one-these-american-taxpayers-you-have-until-noon-wednesday-file-500-per-child-stimulus-check/.

246 Lieber & Rappeport, *supra* note 244.

247 Nathaniel Popper, *'Pure Hell for Victims' as Stimulus Programs Draw a Flood of Scammers*, N.Y. TIMES (Sept. 15, 2020), https://www.nytimes.com/2020/04/22/technology/stimulus-checks-hackers-coronavirus.html [https://perma.cc/NG8D-5BLB].

248 *Id.*

249 *Id.*

250 Tory Newmyer, *The Finance 202: Cash-Strapped Americans Will Face Excruciating Wait for Coronavirus Relief Money*, WASH. POST (Mar. 27, 2020, 4:46 AM), https://www.washingtonpost.com/news/powerpost/paloma/the-finance-02/2020/03/27/the-finance-202-cash-strapped-americans-will-face-excruciating-wait-for-coronavirus-relief-money/5e7d24c688e0fa101a753a91/ [https://perma.cc/LM29-CK9V].

251 Lieber & Rappeport, *supra* note 244.

technology payment delivery may be appealing for speed, but fees may reduce the amount of the payment that reaches the recipient.[252]

Furthermore, features of the law itself may limit the effectiveness of the economic stimulus payments for mitigating housing instability. For example, the statute excludes several groups of people who may disproportionately experience housing instability, including nonresident aliens and those without work-authorized social security numbers, such as undocumented immigrants.[253] These exclusions may lead to a spike in homelessness within these vulnerable populations. Although the law provides additional stimulus to households with children, it excludes adult dependents from this calculation.[254] As a result, the parents of college students[255] or caregivers of elderly dependents will not receive additional stimulus payments despite the extra costs associated with supporting them.[256] To the extent that current economic conditions strain the finances of these families, the lack of additional stimulus support may lead to housing instability among these families.[257]

Finally, because the statute provides for flat $1,200 payments throughout the country,[258] the impact of the payment will vary based on cost of living. For example, a family living in a high cost of living area—including some of the major metropolitan areas that have become public health hot spots—may not see significant financial relief from these payments. Residents of lower cost of living areas, on the

252 Cat Zakrzewski, *The Technology 202: Silicon Valley Companies Are Rolling Out Coronavirus Stimulus Check Services*, WASH. POST (Apr. 16, 2020, 6:28 AM), https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2020/04/16/the-technology-202-silicon-valley-companies-are-rolling-out-coronavirus-stimulus-check-services/5e9764e388e0fa101a763bac/ [https://perma.cc/QV6N-DZQS]; Katanga Johnson, *U.S. Pre-Paid Card Providers Angle for Slice of Stimulus Check Action: Industry Groups*, REUTERS (Apr. 23, 2020, 12:46 PM), https://www.reuters.com/article/us-health-coronavirus-stimulus-cards/u-s-pre-paid-card-providers-angle-for-slice-of-stimulus-check-action-industry-groups-idUSKCN2253FL [https://perma.cc/TSB5-YBAF].

253 Richard Rubin, *Who's Left Out of Coronavirus Stimulus Payments? Many College Students, Adult Dependents*, WALL ST. J. (Mar. 28, 2020, 8:00 AM), https://www.wsj.com/articles/whos-left-out-of-coronavirus-stimulus-payments-many-college-students-adult-dependents-11585396800 [https://perma.cc/KU7K-3R2B].

254 *Id.*

255 *Id.*; Terry Nguyen, *Why Millions of College Students and Young Adults Won't Get a Stimulus Check*, VOX (Apr. 15, 2020, 12:40 PM), https://www.vox.com/the-goods/2020/4/15/21222170/stimulus-checks-dependents-excluded.

256 Rubin, *supra* note 237.

257 *Id.*

258 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 2201(a), 134 Stat. 318 (2020) (to be codified at I.R.C. § 6428(a)(1)).

other hand, may benefit greatly from the payments. The failure to adjust for variations in regional housing costs or other cost of living indicators could lead to a geographically uneven distribution of mitigation for housing instability.

Thus, although the stimulus payments have the potential to reach low-income populations that may be overlooked by the other interventions targeted specifically to workers, several challenges may limit the impact of the program. As this section has explained, the full potential for the stimulus program to mitigate housing instability may be limited by implementation problems, transaction costs, and structural aspects of the law that disadvantage certain populations. As a result, some people may encounter delayed payments, reduced payments, or no payments at all—thereby limiting the extent to which the stimulus payments can help mitigate housing instability.[259]

2. Monetary Relief for Employers

A second form of indirect mitigation of housing instability during the pandemic has taken the form of monetary relief for employers. The CARES Act greatly expanded the funds available for employers to borrow to help them keep current staff employed and on payroll. As described below, the new Paycheck Protection Program (PPP) provides for significant loans to be extended to small businesses. The law also expanded the Emergency Economic Injury Disaster Loan (EIDL) Grant Program, an existing lending program that authorizes the Small Business Administration (SBA) to make loans available to small business employers.[260] While these programs have the potential to help struggling homeowners and renters indirectly by assisting their employers, this section argues that their capacity to mitigate housing instability has been limited by their failure to support small businesses.

a. Paycheck Protection Program

The CARES Act created the PPP, which authorized over $670.3 billion in loans to employers.[261] Eligible loan recipients include small

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[259] *See* Popper, *supra* note 247 ("'I cried all day,' said [Krystal] Phelps, who is about a month away from being unable to pay her mortgage and has cut out everything but the basics, canceling cable and eliminating snacks for the kids. 'It is a little relief, and then you find out it isn't happening.'").

[260] Small Business Act, Pub. L. No. 85-536, as amended, § 7(a).

[261] CARES Act § 1102(a)(2), codified at 15 U.S.C. § 636(a)(36)(A)(iii); CARES Act § 1102(b)(1), *amended by* Pub. L. No. 116-139, § 101(a) (adding an additional $331 billion when the initial $349 billion was depleted within two weeks); *see* Danielle

businesses that employ 500 or fewer employees,[262] as well as sole proprietors, independent contractors, and self-employed individuals.[263] Under the statute, these borrowers can receive a maximum loan amount that is the lesser of $10 million or 2.5 times their average monthly payroll amount.[264] If an employer uses at least 60% of the loan proceeds for payroll costs and any additional proceeds to cover rent, utility payments, and interest on a mortgage, then the loan can be forgiven in full.[265] These amounts must be paid by the business in the covered period starting with the origination date of the loan and ending on the earlier of twenty-four weeks or December 31, 2020.[266]

Kurtzleben, *Small Business Emergency Relief Program Hits $349 Billion Cap in Less than 2 Weeks*, NPR (Apr. 16, 2020, 11:13 AM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835958069/small-business-emergency-relief-program-hits-349-billion-cap-in-less-than-2-week [https://perma.cc/5ZCU-624L]. The Paycheck Protection Program Flexibility Act of 2020 (PPPF Act) has modified certain provisions of the Small Business Act and the CARES Act to provide more flexibility in the PPP program. PPPF Act, Pub. L. No. 116-142, 134 Stat. 641 (2020).

262 CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)(D)). These include nonprofit organizations, veterans' organizations, or Tribal business concerns. *Id.* The affiliation rules for businesses in the accommodation and food service industry can qualify each location as if it were a separate business concern, so long as there are 500 or fewer employees at each location. CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)(D)(iii)).

263 CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)(D)(i)–(ii)). Independent contractors do not qualify as employees compensated by a business for the purpose of calculating loan forgiveness. Business Loan Program Temporary Changes: Paycheck Protection Program, 85 Fed. Reg. 20811, 20814 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) (Q&A 2.p.). An Interim Final Rule also excludes hedge funds, private equity firms, and firms in bankruptcy from the program. Business Loan Program Temporary Changes: Paycheck Protection Program, 85 Fed. Reg. 23450, 23451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pt. 120–21) (Q&A 2.a., 4.). Firms that likely could have received capital elsewhere, like publicly traded companies, and thus did not meet the self-certification standard are also excluded but can return funds if they improperly received them by May 14, 2020. *Id.* at 23451–52 (Q&A 5), modified by 85 Fed. Reg. 30835, 30835–37 (May 21, 2020).

264 CARES Act § 1102(a)(1)(B) (codified at 15 U.S.C. § 636(a)(36)(E)); *see* CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)(L)) (stating interest must be below 4%); Business Loan Program Temporary Changes: Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) (Q&A 2.i.) (setting interest rate at 1%).

265 CARES Act § 1106(d)(8), *amended by* Pub. L. No. 116-142, § 3(b)(2)(B).

266 CARES Act § 1106(a)(3), *amended by* Pub. L. No. 116-142, § 3(b) (extending the covered period from eight weeks to twenty-four weeks). The amount forgiven can be adjusted downward if there is a reduction in the number of employees or in the wages of employees, though there are exceptions, for example, if the business, because of public health measures cannot resume the same level of activity. CARES Act § 1106(d)(2), (d)(3), *amended by* Pub. L. No. 116-142, § 3(b)(2)(B). Borrowers must certify that the funds are needed to meet ongoing operating costs because of current economic conditions. CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)(G)); Business Loan Program

The PPP loans are distributed by banks and other lending institutions, with the SBA as a guarantor of 100% of the loan amounts.[267] These institutions were to issue loans on a first-come, first-served basis, prioritizing businesses "in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals . . . , women, and businesses in operation for less than [two] years."[268]

Yet a series of implementation problems have prevented PPP loans from meeting expectations, particularly in the case of very small businesses. First, delayed issuance of guidance led to mass confusion and long waits in the initial days of the program.[269] Second, banks

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Temporary Changes: Paycheck Protection Program, 85 Fed. Reg. 20811, 20814 (Apr. 15, 2020) (to be codified as 13 C.F.R. pt. 120) (Q&A t.). To qualify for forgiveness, 60% of the loan proceeds must go to payroll costs, while 40% can go to rent, mortgage interest, or utilities. CARES Act § 1106(d)(8), *amended by* Pub. L. No. 116-142, § 3(b)(2)(B).

267 CARES Act § 1102(a)(1)(B) (codified at 15 U.S.C. § 636(a)(36)(F)). $30 million was set aside for distribution by community financial institutions and insured depository institutions and credit unions with consolidated assets of $10 million to $50 million. Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, § 101(d), 134 Stat. 620, 621–22 (2020).

268 CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)(P)(iv)); Business Loan Program Temporary Changes: Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) (Q&A 2.m.).

269 Stacy Cowley, *Banks Warn of 'Overwhelming' Demand and Messy Start for Small Business Loans*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/04/02/business/small-business-coronavirus-stimulus.html [https://perma.cc/ZE2Y-9AY4]; Stacy Cowley & Emily Flitter, *Frenzy and Desperation as Small Businesses Grab for Government Aid*, N.Y. TIMES (Apr. 3, 2020), https://www.nytimes.com/2020/04/03/business/sba-loans-coronavirus.html [https://perma.cc/7T6S-92UQ]; *see also* Yuka Hayashi, *Small-Business Loan Program Resumes with Reports of Delays*, WALL ST. J. (Apr. 27, 2020, 6:42 PM), https://www.wsj.com/articles/small-business-loan-program-resumes-with-reports-of-delays-11588013225 [https://perma.cc/BK7E-T9DB] (noting problems persisting even into the second tranche of funding); Stacy Cowley, *Bankers Rebuke S.B.A. as Loan System Crashes in Flood of Applications*, N.Y. TIMES (Apr. 27, 2020), https://www.nytimes.com/2020/04/27/business/sba-loan-system-crash.html [https://perma.cc/4R7S-QQDG]. Guidance was so slow for sole proprietors, individual contractors, and the self-employed that by the time they received the information, the initial $349 billion of funding had already run dry. Amara Omeokwe & Charity L. Scott, *Freelancers and Self-Employed Workers Undone by Late Start in Coronavirus Stimulus Program*, WALL ST. J. (Apr. 28, 2020, 8:00 AM), https://www.wsj.com/articles/freelancers-and-self-employed-workers-undone-by-late-start-in-coronavirus-stimulus-program-11588075202 [https://perma.cc/DX4C-3MYM] (noting that guidelines for the self-employed were not released until April 14, 2020); *see also* 85 Fed. Reg. 21747, 21748–50 (Apr. 20, 2020) (outlining the rules for self-employed, sole proprietors, and independent contractors); Amara Omeokwe, *Lawmakers in Congress Press for Changes in Small-Business Aid Program*, WALL ST. J. (May 3, 2020, 11:23 AM), https://www.wsj.com/articles/lawmakers-in-congress-press-for-changes-in-small-business-aid-program-11588507201 [https://perma.cc/3GTZ-BH4V]. The problematic initial rollout

administered the PPP loans in ways that disadvantaged the smallest businesses. For example, large banks prioritized loans to existing customers with which they had strong relationships.[270] Furthermore, some banks refused to give loans to businesses that lacked existing loans or credit cards, disproportionately harming smaller businesses and benefiting larger ones.[271]

Third, although Congress acted to replenish the PPP funding after it initially ran out, as of June 30, 2020, about $130 billion in aid remained unused.[272] Some of the many reasons why there was leftover money stemmed from the fact that many small businesses were concerned as

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led to many small businesses deciding to not use the program. *See supra* notes 253–54 and accompanying text.

270 *See* Ruth Simon & Peter Rudegeair, *In Race for Small-Business Loans, Winning Hinged on Where Firms Bank*, WALL ST. J. (Apr. 20, 2020, 7:32 PM), https://www.wsj.com/articles/in-race-for-small-business-loans-winning-hinged-on-where-firms-bank-11587410421 [https://perma.cc/Q2K3-NF7U] (discussing how bank and SBA relationships helped secure a PPP loan); Peter Rudegeair et al., *Small Businesses Were at a Breaking Point. Small Banks Came to the Rescue.*, WALL ST. J. (May 4, 2020, 9:52 AM), https://www.wsj.com/articles/small-businesses-were-at-a-breaking-point-small-banks-came-to-the-rescue-11588590013 [https://perma.cc/GJR3-LNJT] (discussing how small banks were more effective at disbursing the funds). Moreover, less than 10% of Community Development Financial Institutions—the community banks that more frequently lend more equitably, i.e., those that lend at greater rates to women- and minority-owned businesses—are participating in PPP. *See* Emily Flitter, *Black-Owned Businesses Could Face Hurdles in Federal Aid Program*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/04/10/business/minority-business-coronavirus-loans.html [https://perma.cc/B2QG-GWUX].

271 Cowley & Flitter, *supra* note 269; Stacy Cowley et al., *Small-Business Loan Program, Chaotic From Start, Gets 2nd Round*, N.Y. TIMES (May 13, 2020), https://www.nytimes.com/2020/04/26/business/ppp-small-business-loans.html [https://perma.cc/2ZXA-EQJU] (noting how connections helped in securing a loan in the first round); Alan Rappeport & Jeanna Smialek, *Treasury Clarifies Small-Business Loans as Fed Vows Transparency*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/us/politics/coronavirus-treasury-fed-small-business-loans.html [https://perma.cc/J7WV-V5DR] (discussing how Shake Shack and other large chains got loans that Treasury wants them to return). Treasury and the SBA later said that larger businesses, like publicly traded companies, should return the money. Kate Davidson, *Mnuchin Says Big Companies Should Apologize for Taking Small Business Loans*, WALL ST. J. (Apr. 28, 2020, 3:37 PM), https://www.wsj.com/articles/mnuchin-warns-larger-companies-against-seeking-coronavirus-funds-meant-for-small-businesses-11588083665 [https://perma.cc/YAC2-3LSX]; Jeanne Whalen, *Vague Rules for Paycheck Protection Program Complicate Treasury Effort to Claw Back Money*, WASH. POST (May 5, 2020, 11:38 AM), https://www.washingtonpost.com/business/2020/05/05/vague-rules-paycheck-protection-program-complicate-treasury-effort-claw-back-funds/ [https://perma.cc/FJ7J-4BQD].

272 *See* Stacy Cowley, *$130 Billion Left at Paycheck Program Deadline, but Senate Acts to Extend It*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/business/paycheck-protection-program-coronavirus.html [https://perma.cc/S6V3-FGVJ]. Pub. L. No. 116-147 extended the application deadline for PPP loans to August 8, 2020. Pub. L. No. 116-147, 134 Stat. 660 (2020).

to whether they would have full forgiveness of the loan, given the shifting rules of the program.[273] Furthermore, the botched rollout may have reduced confidence in the program, ultimately chilling uptake during later stages of the program. Finally, many small businesses could not benefit from PPP given the relatively short time frame it covers considering the potentially long duration of various public health restrictions as the virus ebbs and flows.[274]

The failure of PPP loans to support many small businesses limits its effectiveness to mitigate housing instability.[275] First, many women- and minority-owned businesses did not get loans,[276] despite being specifically listed as intended recipients.[277] Business owners with certain criminal histories were excluded from receiving funds.[278] In many cases, the owners of such businesses have invested significant

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273 *See* Cowley et al., *supra* note 271.

274 *See* Emily Flitter, *'I Can't Keep Doing This:' Small-Business Owners Are Giving Up*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html [https://perma.cc/QCH7-HAY7].

275 The number of active business owners decreased by 3.3 million (22%) between February and April 2020. Black-owned businesses fell by 41%, Latinx by 32%, Asian by 26%, and female by 25%. Robert W. Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey* 1 (Nat'l Bureau Econ. Rsch. Working Paper, Paper No. 27309, 2020), http://www.nber.org/papers/w27309 [https://perma.cc/X6WC-8225] ("[C]oncentrations of female, black, Latinx and Asian businesses in industries hit hard by the pandemic contributed to why losses were higher for these groups than the national average loss."). *Id.* at 2.

276 U.S. SMALL BUS. ADMIN., OFFICE INSPECTOR GEN., REPORT NO. 20-14, FLASH REPORT: SMALL BUSINESS ADMINISTRATION'S IMPLEMENTATION OF THE PAYCHECK PROTECTION PROGRAM REQUIREMENTS (2020), at 4 [hereinafter SBA OIG]; Flitter, *supra* note 270; Danielle Kurtzleben, *Minority-Owned Small Businesses Were Supposed to Get Priority. They May Not Have*, NPR (May 12, 2020, 5:04 AM), https://www.npr.org/2020/05/12/853934104/minority-owned-small-businesses-were-supposed-to-get-priority-they-may-not-have [https://perma.cc/V92U-FT25].

277 *See* Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 318 (2020) (codified at 15 U.S.C. § 636(a)(36)(P)(iv)) (noting that loan distribution should prioritize businesses "in underserved and rural markets, including . . . small business concerns owned and controlled by socially and economically disadvantaged individuals . . . , women, and businesses in operation for less than 2 years"). The IG faulted the SBA and Treasury for failing to promulgate sufficient guidance for how to prioritize women- and minority-owned businesses or to collect data to aid in this effort. SBA OIG, *supra* note 276, at 4; CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)(P)(iv)).

278 *See* SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM APPLICATION FORM, SBA FORM 2483 (03/20), OMB Control No. 3245-0407 (Expiration Date: 09/30/2020), https://www.sba.gov/sites/default/files/2020-03/Borrower%20Paycheck%20Protection%20Program%20Application_0.pdf [https://perma.cc/7NAX-TDUV]. Such exclusion increased the likelihood of preventing more Black and Latinx owners from accessing emergency loans. *See* Defy Ventures, Inc. v. United States SBA, No. CCB-20-1838, 2020 U.S. Dist. LEXIS 114047 (D. Md. June 29, 2020) (Compl. § 12, Exhibit D).

personal capital or employ members of their own families.[279] As a result, they are at particularly high risk of experiencing housing instability.

Second, small businesses are major employers and major players in a community. Even with growing consolidation in the business sector, small businesses still employed 47% of workers in 2017.[280] If a small business shutters, not only do the employees of that business lose their jobs but there are also larger ripple effects. Within communities, small businesses are often economic and social anchors, and their exit can devastate entire neighborhoods' commercial viability.[281] As a result, their failure can threaten entire local economies, especially in small towns—ultimately creating a ripple effect that leads to increased housing instability.[282]

b. Emergency Economic Injury Disaster Loan Grants

A second intervention to support employers is similarly unlikely to mitigate housing risk by propping up small businesses. Specifically, the

279 Tomaz Cajner et al., *The U.S. Labor Market During the Beginning of the Pandemic Recession* 41 (Becker Friedman Inst. for Econ. at U. Chicago Working Paper, Paper No. 2020-58, 2020), https://bfi.uchicago.edu/working-paper/2020-58 [https://perma.cc/5P8N-8MZF].

280 Heather Long, *Small Business Used to Define America's Economy. The Pandemic Could Change That Forever.*, WASH. POST (May 12, 2020, 2:00 PM), https://www.washingtonpost.com/business/2020/05/12/small-business-used-define-americas-economy-pandemic-could-end-that-forever [https://perma.cc/76BZ-CH94].

281 *Id.*; Cajner et al., *supra* note 279, at 41. Good restaurants, for example, can "support tourism and the neighborhood they are in" by increasing foot traffic to the local commercial sector writ large. Jennifer Steinhauer & Pete Wells, *As Restaurants Remain Shuttered, American Cities Fear the Future*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/2020/05/07/us/coronavirus-restaurants-closings.html [https://perma.cc/V7CG-32KR]. They employ about 9.7 million Americans. *Id.* But local restaurants have been underfunded by the PPP. While workers in food service and bars represent about 60% of nonfarm job losses in March 2020, the accommodation and food services sector received only 8.9% of the overall share of first-round PPP funds. Justin Lahart, *Federal Small-Business Aid: Too Little Bang, Too Few Bucks*, WALL ST. J. (Apr. 30, 2020, 12:22 PM), https://www.wsj.com/articles/federal-small-business-aid-too-little-bang-too-few-bucks-11588263751 https://perma.cc/RY4P-WBSK]. Notably, one survey indicates that restauranteurs estimate their survival at a rate of 15% if the crisis lasts six months. Alexander W. Bartik et al., *How Are Small Businesses Adjusting to COVID-19? Early Evidence from a Survey* (Nat. Bureau of Econ. Rsch. Working Paper, Paper No. 26989, 2020), http://www.nber.org/papers/w26989 [https://perma.cc/CB8P-58CH].

282 *See, e.g.*, Steinhauer & Wells, *supra* note 281 (noting that restaurants can often be major tourism generators and have other spillover effects into the local economy); Flitter, *supra* note 274 (noting that in light of a growing resurgence in cases and shifting guidance, many small business owners are just giving up).

CARES Act expanded the existing EIDL program.[283] The emergency loans are typically available to eligible employers in declared disaster areas that have suffered substantial economic injury and are unable to access capital through other sources.[284] As in the case of PPP loans, EIDLs limit eligible borrowers to employers with up to 500 employees, including sole proprietorships, cooperatives, Employee Stock Ownership Plans, and tribal small businesses.[285] Although EIDL amounts are limited to $2 million under the statute,[286] unconfirmed media reports indicate that these are reduced to $150,000 per applicant during the COVID-19 disaster.[287]

The CARES Act also provided for an additional $10 billion in EIDL grants—advances on EIDLs or other loans that small businesses and nonprofit employers may receive in the future.[288] Specifically, the CARES Act initially made EIDL grants of up to $10,000 available to small business and nonprofit employers.[289] The SBA reduced this grant from $10,000 per employer to $1,000 per employee up to 10 employees.[290] The SBA closed the EIDL application process on April 15—presumably because funds were exhausted and the SBA needed time to work through a backlog of applications—and reopened for new

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283 Small Business Act, Pub. L. No. 85-536 (codified as amended at 15 U.S.C. § 7(a) (1953)).

284 13 C.F.R. § 123.300 (2020) (describing eligibility requirements). The SBA's COVID-19 response follows reform efforts in recent years to improve the SBA Disaster Loan Program. *See* BRUCE LINDSEY, CONG. RSCH. SERV., R41309, THE SBA DISASTER LOAN PROGRAM: OVERVIEW AND POSSIBLE ISSUES FOR CONGRESS 3 (2015), https://nationalaglawcenter.org/wp-content/uploads/assets/crs/R41309.pdf [https://perma.cc/TZN5-8B8F]. SBA Disaster Loans can be implemented through one of five ways, including presidential disaster declaration or SBA Administrator declaration. *Id.* at 4.

285 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 1110(a), 134 Stat. 318 (2020). The interest rates for these EIDL loans are capped at 3.75% for businesses and 2.75% for nonprofits, and the loans have a maturity of up to thirty years. 13 C.F.R. § 123.302 (2020); *see also* Neil Hare, *Loan Forgiveness Under the PPP and the SBA EIDL Programs: 10 Things Small Businesses Need to Know*, FORBES (May 11, 2020, 10:08 AM), https://www.forbes.com/sites/allbusiness/2020/05/11/loan-forgiveness-ppp-sba-eidl-programs/#6f45c47f2e00 [https://perma.cc/8B8N-DX2H].

286 LINDSEY, *supra* note 284, at 3.

287 *See* Hare, *supra* note 285.

288 CARES Act § 1110(e)(7). The CARES Act makes these EIDL grants that do not need to be repaid. *Id.* § 1110(e)(5).

289 *Id.* § 1110(e)(3). Note that under the program, the covered period is broader than the PPP—it includes January 31, 2020, through December 31, 2020. *Id.* § 1110(a).

290 *See* Hare, *supra* note 285.

applications from U.S. agricultural businesses due to additional funds allocated by Congress.[291]

It is unclear how the SBA Disaster Loan Program, and EIDLs in particular, will perform during the pandemic.[292] However, the initial rollout suggests that the program's capacity to mitigate housing instability will be limited by the same factors that hindered PPP loans. For example, as seen in the case of PPP loans, application processing time may affect whether the program prevents business closures and layoffs.

Even before the pandemic, processing time was a significant issue with SBA Disaster Loans—including the EIDL.[293] Though the SBA has not released data on wait times for EIDL grant processing,[294] one data set of 18,920 EIDL grant applications indicates a median wait time

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291 U.S. SMALL BUS. ASS'N, CORONAVIRUS (COVID-19): SBA DISASTER ASSISTANCE IN RESPONSE TO THE CORONAVIRUS, https://www.sba.gov/funding-programs/disaster-assistance/coronavirus-covid-19 [https://perma.cc/8NRM-ZXSW].

292 From the available data, most SBA Disaster Loan Program loans tend to go toward rebuilding physical structures following natural disasters. It remains unlikely that a similar nonnatural disaster of the size and scope of COVID-19 offers a precedent for the SBA to follow in extending capital and credit through the EIDL. Thus, as applied to low-income and housing insecure populations, the EIDL is best viewed through a lens similar to that of the PPP: a tool designed to allow employers to keep workers employed if possible.

293 *See* LINDSEY, *supra* note 284, at 10. The SBA's goal in FY 2009 was to process EIDLs within eighteen days; though the SBA has reduced the standard processing time based upon application volume with the longest wait time at four-plus weeks for more than 500,000 applications per year. U.S. SMALL BUS. ADMIN., FY 2016 CONGRESSIONAL BUDGET JUSTIFICATION AND FY 2014 ANNUAL PERFORMANCE REPORT 87 (Oct. 23, 2015), https://www.sba.gov/sites/default/files/files/1-FY_2016_CBJ_FY_2014_APR_508.pdf [https://perma.cc/GX4S-PCDY]. To improve disaster loan processing, Congress adopted measures to improve coordination between the SBA and FEMA. Small Business Disaster Response and Loan Improvements Act of 2008, Pub. L. No. 110-234, 122 Stat. 1406. These reforms also required the SBA to establish the Immediate Disaster Assistance Program. Pub. L. No. 110-234, § 12084. Under this program, the SBA would provide interim "bridge loans" of up to $25,000 within thirty-six hours of receiving a loan application. *See* LINDSEY, *supra* note 284, at 12. As of a 2014 GAO report, the SBA had yet to pilot this new lending program. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-760, SMALL BUSINESS ADMINISTRATION: ADDITIONAL STEPS NEEDED TO HELP ENSURE MORE TIMELY DISASTER ASSISTANCE (2014), http://www.gao.gov/assets/670/666213.pdf [https://perma.cc/5EXU-GCKL]. The Immediate Disaster Assistance Program resembles the EIDL grants enacted under the CARES Act.

294 *See* Isaac Arnsdorf, *Thousands of Small Business Owners Have Not Gotten Disaster Loans the Government Promised Them*, PROPUBLICA (July 16, 2020, 7:00 AM), https://www.propublica.org/article/thousands-of-small-business-owners-have-not-gotten-disaster-loans-the-government-promised-them [https://perma.cc/MJF2-FP99] (noting that at a hearing on July 1, 2020, before the House Committee on Small Business, Associate Administrator James Rivera responded that while initially the average wait time for processing was forty-one days, it had dropped to five days. But other data cited conflicts with Mr. Rivera's statement).

to receive funds of seventeen days.[295] This wait time is significantly greater than the thirty-six-hour aspirational goal enacted in recent congressional reform. As of April 24, 2020, the SBA reported national EIDLs totaled 38,984 loans approved at a total dollar amount of $7,967,174,888.[296]

Also like the PPP loans, early evidence suggests that the EIDLs have not been disbursed evenhandedly. A May 8, 2020, SBA report indicated that 3,009,934 EIDL grants[297] were made totaling $9,883,210,000.[298] While the grants were supposed to be issued on a first-come, first-served basis, some reports indicate that some applications were "jumping the line" and being funded sooner than other applications despite a later application date.[299] As a result, there is some question as to whether the EIDL program may serve some businesses more effectively than others due to internal policies. Thus, EIDL grants are unlikely to mitigate housing instability for the same reasons that plague PPP loans.

C. Use of Tax Expenditures

The analysis in Part II demonstrated that tax expenditures are often inferior to direct grants during a crisis period. Setting aside more general debates comparing tax expenditure and direct grant approaches, an important reason to prefer grants during economic downturns is that many forms of tax preferences decrease in value as taxpayers' tax liability declines. As a result, the reduced size of the tax-based subsidy may render the tax preference ineffective as an incentive to engage in prosocial activities.

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295 COVID LOAN TRACKER, SMALL BUSINESS LOAN TRACKER, https://www.covidloantracker.com/ [https://perma.cc/6LJ5-ZN9M] (data as of May 13, 2020).

296 U.S. SMALL BUS. ADMIN., SBA DISASTER ASSISTANCE UPDATE NATIONWIDE ECONOMIC INJURY DISASTER LOANS COVID-19 (Apr. 24, 2020), https://www.sba.gov/sites/default/files/2020-04/EIDL%20COVID-19%20Loans%204.24.20.pdf [https://perma.cc/3KZ5-GF83].

297 The SBA terms them EIDL Advances.

298 U.S. SMALL BUS. ADMIN., DISASTER ASSISTANCE UPDATE EIDL ADVANCE (May 8, 2020), https://www.sba.gov/sites/default/files/2020-05/EIDL%20COVID-19%20Advance%205.8.20_0.pdf [https://perma.cc/29GN-7FBH]. This is up from 1,192,519 EIDL Advances processed totaling $4,805,897,000 as reported on April 24, 2020. U.S. SMALL BUS. ADMIN., *supra* note 296.

299 COVID Loan Tracker, *COVID Loan Tracker's Data Shows SBA Failing to Pay EIDL Advances on a First-Come, First-Served Basis*, PR NEWSWIRE (May 7, 2020), https://www.prnewswire.com/news-releases/covid-loan-trackers-data-shows-sba-failing-to-pay-eidl-advances-on-a-first-come-first-served-basis-301054635.html [https://perma.cc/86KN-BYEP].

The initial response to the COVID-19 pandemic has included several notable tax preferences, two of which are discussed here due to their particular relevance to the issue of housing instability: a refundable tax credit for employers and expanded tax deductions for charitable donations. As this section will explain, only the latter of these tax expenditures may decrease in value as taxpayers' income levels decline. However, neither tax expenditure is designed to promote any specific activity that would reduce housing instability.

1. Refundable Tax Credit for Employers

In addition to the relief to employers described in Section III.B.2, the CARES Act provides for a refundable tax credit for employers that are subject to closure due to COVID-19.[300] With two exceptions, all employers (including nonprofits)[301] are eligible for this tax relief, regardless of size. The excepted employers are (1) state and local governments and entities they control and (2) small businesses that borrow from the SBA, including through the PPP and EIDLs.[302] Eligible employers can claim a refundable credit against their employment taxes for up to 50% of qualified wages for each employee per quarter, up to $10,000.[303]

Significantly, this tax benefit is structured as a refundable credit.[304] Unlike nonrefundable tax credits, which are limited by taxpayers' tax

300 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 2301(a)–(b), (b)(3), 134 Stat. 318 (2020). The CARES Act also provides for payroll tax deferrals until December 31, 2021, for 50% of employment taxes owed before January 1, 2021, and the remaining employment taxes due by December 31, 2022. CARES Act § 2302(d)(3). This provision amounts to an interest-free loan of 6.2% of all wages paid for 2020 after approximately March 27. Lewis Horowitz & Eric Kodesch, *IRS CARES Enough to Give PPP Loan Recipients an Interest-Free Loan from Continued Deferral of the Employer Portion of the Social Security Tax*, LANE POWELL (Apr. 17, 2020), https://www.lanepowell.com/Our-Insights/202005/IRS-CARES-Enough-to-Give-PPP-Loan-Recipients-an-Interest-Free-Loan-From-Continued-Deferral-of-the-Employer-Portion-of-the-Social-Security-Tax [https://perma.cc/2AKA-ZZFY]. For employers receiving PPP loans, the delay of employer payroll taxes is only for amounts payable before PPP loans are forgiven, if at all. *Id.*

301 CARES Act § 2301(c)(2)(C).

302 Robert W. Wood, *3 Virus-Related Tax Credits IRS Pays in Cash Long Before Tax Time*, FORBES (May 11, 2020, 11:16 AM), https://www.forbes.com/sites/robertwood/2020/05/11/3-virus-related-tax-credits-irs-pays-in-cash-long-before-tax-time/#ae2b5b045e77 [https://perma.cc/8C2W-GNQN].

303 CARES Act § 2301(a)–(b), (b)(3); IR-2020-62, *IRS: Employee Retention Credit Available for Many Businesses Financially Impacted by COVID-19* (Nov. 9, 2020), https://www.irs.gov/newsroom/irs-employee-retention-credit-available-for-many-businesses-financially-impacted-by-covid-19 [https://perma.cc/K9SV-QMTP].

304 IR-2020-62, *supra* note 303.

liability, refundable tax credits can be claimed in full even if a business does not have current tax liability.[305] In this sense, the tax credit is similar to a cash grant in that its value does not depend on a taxpayer's tax liability.

As a result, the credit, paid in cash, can be a windfall for many businesses. However, this refundability feature does not increase the likelihood that this intervention will mitigate housing instability. This is because the tax credit is broadly available to all eligible employers and does not create an incentive for any particular behavior. Whether employers decide to use the cash from the credit to keep workers and those who are housing insecure employed—thereby helping to mitigate housing instability—remains to be seen.

2. Expanded Tax Deduction for Charitable Donations

The CARES Act also includes indirect support for nonprofits through an expanded tax deduction for donors.[306] Specifically, the law provides a deduction of up to $300, if made in cash, for charitable contributions made by those who do not itemize their deductions.[307] This provision is permanent and in effect for taxable years beginning after December 31, 2019.[308] For taxpayers who itemize their deductions, the limitation on charitable contribution deductions is increased.[309] The increase in the cap applies to contributions made in cash during the 2020 calendar year only.[310] The stated purpose of these provisions is to encourage taxpayers—including those who do not

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305 Unlike nonrefundable tax credits, which provide a dollar-for-dollar offset to taxes owed until the taxpayer's tax liability is reduced to zero, refundable tax credits are not limited by a taxpayer's tax liability. In other words, even a taxpayer that owes no taxes is entitled to the full credit amount delivered to the taxpayer as a cash "refund."

306 *See generally* Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010).

307 CARES Act § 2204(a) (codified at I.R.C. § 62(a)(22)), (b) (codified at I.R.C. § 62(f)(1), (2)(A), (2)(B)).

308 CARES Act § 2204(c).

309 *Id.* § 2205 (a), (c).

310 *Id.* § 2205(a)(3)(i). For individuals, the 50% AGI limitation in I.R.C. § 170(b)(1)(A) is increased to 100% of AGI. *Id.* § 2205(a)(2)(A)(i); I.R.C. § 170(b)(1). For corporations the limitation goes from the 10% taxable income limitation in I.R.C. § 170(b)(2)(A) to 25% of taxable income. CARES Act § 2205(a)(2)(B)(i); I.R.C. § 170(b)(2). For both individuals and corporations, any excess deductions over the limitation amount may be carried over to future years. CARES Act § 2205(a)(2)(A)(ii), (a)(2)(B)(ii). The law also increases the limits on contribution of food inventory from trades or businesses during 2020 from 15% of trade or business income to 25% of trade or business income. *Id.* § 2205(b).

itemize—to donate "to churches and charitable organizations in 2020."[311]

However, unlike the refundable tax credit available to employers, the value of these charitable deductions may decrease as taxpayers' income levels decline. This is because the value of a deduction is tied to a taxpayer's marginal tax rate, which may fall if income decreases due to unemployment. As a result, the deduction may no longer provide a sufficient incentive to donate.

That said, even if the deduction provides sufficient incentive to donate, it is still unlikely to help mitigate housing instability. This is because the deduction is not well targeted to charities that will meet the needs of people who are low income or housing insecure.[312] In theory, increasing donations to nonprofits may help subsidize expansion of homeless shelters or emergency affordable housing. But the deduction is intentionally broad, and donors can just as easily choose to donate to well-resourced private universities, for example, instead of community health clinics or other service organizations that serve the poor or homeless.[313] For this reason, it is unlikely that the deduction will effectively mitigate housing instability.

D. Omission of Place-Based Interventions

As discussed in Section II.D.3 above, there is likely to be a continued need for place-based investment in neighborhoods during and after a crisis period. However, the initial legislative response to the COVID-19 pandemic did not include any interventions to sustain affordable housing development or economic development in low-income communities. This omission may have significant long-term consequences for housing instability.

Thus, this part has demonstrated that the initial interventions during the COVID-19 pandemic are unlikely to effectively mitigate housing

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[311] *See Section-by-Section Summary of Appropriations in the CARES Act*, NOVOGRADAC, https://www.novoco.com/sites/default/files/atoms/files/section_by_section_summary_of_appropriations_in_the_cares_act_032520.pdf [https://perma.cc/T8BQ-7SMZ] [hereinafter *Section-by-Section Summary*].

[312] *Id.*

[313] Meanwhile, the charitable donation deduction may serve to undermine progressivity in the tax system by providing greater value to those with higher incomes than those with lower incomes. Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1, 70 (1996); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 723 (1970).

instability. The next part will provide an alternate vision of legislation that prioritizes mitigating housing instability.

IV
PRIORITIES FOR MITIGATING HOUSING INSTABILITY

A. Prioritizing Housing

A complete and successful policy response to COVID-19 must mitigate housing instability. This is a vital public health imperative. This part draws on the foregoing analysis to identify two broad priorities for effective mitigation of housing instability. In doing so, this analysis not only provides a baseline for evaluating subsequent legislation during the COVID-19 pandemic but it also serves as a set of recommendations for early policy responses to future crises.

The first priority is to include people-based interventions that provide relief directly to individuals who are unable to pay their rents or mortgages. These interventions should include direct housing assistance, as well as a civil right to counsel in eviction proceedings to help enforce eviction freezes. Such interventions are essential to mitigate housing instability during the crisis period. The second priority is to include place-based interventions that address ongoing affordable housing needs and mitigate geographic inequities exacerbated by the crisis. These interventions are necessary to mitigate housing instability in the months and years following the crisis. To this end, Part IV recommends direct people-based interventions and place-based interventions that are consistent with these principles.

B. Direct People-Based Interventions

We recommend that people-based interventions that provide relief directly to individuals facing housing instability should be a top legislative priority during a pandemic. This section draws on the foregoing analysis to identify two types of relief that should be included. The first—direct housing payment assistance—is necessary even when indirect assistance (like unemployment insurance) or nonmonetary direct interventions (like eviction freezes and foreclosure moratoriums) are available.

The second form of emergency relief is the implementation of effective and enforceable eviction freezes and foreclosure moratoriums. Advocates have devoted significant attention to the need to strengthen eviction freezes, specifically the need to cover larger populations of tenants and provide greater protection.[314] Such reforms could greatly increase the efficacy of such interventions to mitigate housing instability. However, problems with enforcement would remain. For this reason, this section recommends the creation of a civil right to counsel to help ensure that foreclosure moratoriums and eviction freezes are enforced. This section will elaborate upon both recommendations, beginning with housing payment assistance.

1. Housing Payment Assistance

This Article recommends both preventative policies that keep owners and renters in their homes and programs that provide a housing safety net to facilitate rapid rehousing of people who lose their homes due to foreclosure or eviction. Most importantly, the federal policy response must include housing-specific monetary assistance for renters or homeowners, such as rental vouchers and reinstatement of the Homelessness Prevention and Rapid Re-Housing program that successfully ran from 2009 to 2012.[315] HPRR could provide direct aid to struggling tenants and homeowners including financial assistance, housing relocation, and stabilization services.[316] Struggling homeowners should also be assisted by providing direct assistance with mortgage payments, property taxes, property insurance, utilities, and other housing-related costs.[317]

We recommend that lawmakers leverage existing tools, such as the Section 8 Housing Choice Voucher program to take advantage of established administrative frameworks that can help minimize problems and delays during the program rollout.[318] We believe that

314 *See, e.g.*, Eviction Lab, *COVID-19 Housing Policy Scorecard*, https://evictionlab.org/covid-policy-scorecard/ [https://perma.cc/H4XT-GBQ2]; Sacha Pfeiffer, *Health Justice Lawyer Argues for Nationwide Eviction Moratorium*, NPR (July 5, 2020, 5:20 PM), https://www.npr.org/2020/07/05/887465412/health-justice-lawyer-argues-for-nationwide-eviction-moratorium [https://perma.cc/8X9U-CC2Q].

315 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 2, 123 Stat. 115, 203.

316 This assistance could include short- and medium-term rental assistance, security and utility deposits, utility payments, moving cost assistance, motel and hotel vouchers case management, outreach, housing search and placement, legal services, and credit repair. DEP'T HOUS. & URB. DEV., HOMELESSNESS PREVENTION AND RAPID RE-HOUSING PROGRAM (HPRP): YEAR 3 & FINAL PROGRAM SUMMARY 28 (June 2016), https://files.hudexchange.info/resources/documents/HPRP-Year-3-Summary.pdf [https://perma.cc/FUY2-UQVC].

317 Please see the Postscript for a brief analysis of subsequent legislation that provided assistance to renters.

318 For one such proposal put forth by housing policy experts, see Kirk McClure & Alex Schwartz, *Renters Still Left Out in the Cold Despite Temporary Coronavirus Protection*,

such targeted interventions to prevent homelessness through tenant and homeowner assistance will be more effective than place-based strategies or indirect assistance programs to mitigate housing instability during a crisis.

2. Civil Right to Counsel in Evictions Proceedings

Eviction freezes and foreclosure moratoriums will likely continue to play a significant role in mitigating housing instability, so it is essential that lawmakers take steps to ensure such laws are enforced. Because low-income tenants are particularly vulnerable to enforcement failures, this Article recommends a program to provide a civil right to counsel in eviction proceedings during these extreme circumstances.[319] Recall that while many states have implemented eviction moratoriums to prevent a wave of evictions,[320] housing advocates nevertheless report a flood of wrongful eviction cases nationwide.[321] Housing instability will likely increase as unemployment rates continue to rise and foreclosure moratoriums and eviction freezes expire.[322] This will lead to a surge of eviction cases.[323] Unfortunately, eviction leads directly and indirectly to housing instability and homelessness.[324]

Low-income tenants are in the greatest jeopardy and can often be helped with modest resources. Most tenants in New York City threatened by eviction owe less than $600.[325] Studies show that a homeless individual can cost taxpayers over $35,000 in programs and services, including increased costs to the public health care system and

CONVERSATION (Apr. 23, 2020, 8:10 AM), https://theconversation.com/renters-still-left-out-in-the-cold-despite-temporary-coronavirus-protection-136550 [https://perma.cc/LKR2-ZL75].

319 For an in-depth discussion of a civil litigation right to counsel, see John Pollock & Michael S. Greco, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40 (2012) (arguing for a civil right to counsel mirroring Gideon-style right to counsel in criminal matters).

320 *See infra* Appendix A.

321 *See supra* notes 16–17.

322 *See supra* Section III.A.

323 Please see the Postscript for a brief analysis of subsequent legislation that provided rent payment assistance to tenants.

324 NAT'L L. CTR. ON HOMELESSNESS AND POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS (2018), https://nlchp.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf [https://perma.cc/W9NW-ZHNC] [hereinafter NLCHP].

325 Emily Badger, *Many Renters Who Face Eviction Owe Less than $600*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/12/upshot/eviction-prevention-solutions-government.html [https://perma.cc/W32Q-DW9X].

the cost of emergency housing.[326] Studies also show that right to counsel initiatives save huge amounts of resources by preventing the use of homeless services and programs simply by keeping people in their homes.[327] A cost-benefit analysis in New York City showed that a right to counsel program would reduce evictions by 77% and save $320 million each year.[328] Keeping people in their homes is also an important public health goal during this pandemic. A civil right to counsel in eviction proceedings program will help achieve this goal.

Landlords are almost always represented by attorneys in court, while most tenants are not represented.[329] Many tenants have meritorious cases but are unable to prove such without assistance.[330] In Chicago, having an attorney decreased tenants' "odds of getting an eviction order by about 25%."[331] In an evaluation of a legal assistance program for low-income tenants in New York City's housing court, the results demonstrated that having legal counsel produced large differences in outcomes for the low-income tenants.[332] "For example, only 22% of represented tenants had final judgments against them, compared with

326 NAT'L ALL. TO END HOMELESSNESS, ENDING CHRONIC HOMELESSNESS SAVES TAXPAYERS MONEY (2017), http://endhomelessness.org/wp-content/uploads/2017/06/Cost-Savings-from-PSH.pdf [https://perma.cc/JL5D-W97B].

327 STOUT RISIUS ROSS, INC., PRO BONO & LEGAL SERVS. COMM. OF THE N.Y.C. BAR ASS'N, THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A (Mar. 16, 2016), https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf [https://perma.cc/87XQ-TSGT].

328 NAT'L L. CTR. ON HOMELESSNESS AND POVERTY, *supra* note 324.

329 This representation imbalance between tenants and landlords likely explains courts' historic "award[ing] of relatively little compensation for . . . violations" of the warranty of habitability. Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J ON POVERTY L. & POL'Y 97, 136 (2019). "We can only imagine how the law and court culture might look if both parties had enjoyed decades of equality of representation." *Id.*

330 *Id.* Professor Franzese has demonstrated that a tenant's assertion of the defense of the implied warranty of habitability works but requires effective assistance of counsel as tenants are often unaware of their basic rights. Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 3–6 (2016).

331 LAW. COMM. FOR BETTER HOUS., OPENING THE DOOR ON CHICAGO EVICTIONS: LEGAL AID ATTORNEYS MAKE THE DIFFERENCE (May 2019), https://eviction.lcbh.org/sites/default/files/reports/chicago-evictions-3-attorney-represenation.pdf [https://perma.cc/7975-28YZ].

332 *See generally* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, LAW & SOC'Y REV. 419 (2001), https://www.rtctoolkit.org/docs/7/Impact%20of%20Counsel%20on%20Tenants%20(Seron%20NY%20study).pdf [https://perma.cc/62XC-PDFB]. "Similarly large advantages for tenants with an attorney also were found in eviction orders and stipulations requiring the landlord to provide rent abatements or repairs." *Id.*

51% of tenants without legal representation."[333] Harvard researchers have also empirically shown that Massachusetts case outcomes are materially improved for tenants when they have access to full legal representation.[334]

Currently, New York City, San Francisco, and Newark, New Jersey, have right to counsel programs for tenants in eviction.[335] Various pilot programs[336] have demonstrated that a targeted approach for serving low-income housing court litigants in danger of homelessness with legal, financial, and social service interventions can keep them from homelessness.[337] In New York City, when housing court eviction cases were "resolved by OCJ's legal services providers, 84% of households represented in court by lawyers were able to remain in their homes, not only saving thousands of tenancies, but also promoting the preservation of affordable housing and neighborhood stability."[338]

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333 *Id.*

334 "[A]t least in part because 'the inability of some self-represented litigants to understand and comply with court rules and procedures may make it impossible for their cases, however worthy, to be decided on the merits.'" BOS. BAR ASS'N, INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 18 (Oct. 2014), https://bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf [https://perma.cc/V8GV-5UJL].

335 Heidi Schultheis & Caitlin Rooney, *A Right to Counsel Is a Right to a Fighting Chance: The Importance of Legal Representation in Eviction Proceedings*, CTR. FOR AM. PROGRESS (Oct. 2, 2019, 12:00 PM), https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance/ [https://perma.cc/YV2N-E3M6]. Cleveland, Philadelphia, and Washington, D.C. have right to counsel in eviction programs. *Status Map*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/map [https://perma.cc/4NKA-9LKF].

336 Since September 2007, a "Task Force on the Civil Right to Counsel ('Task Force') convened by the Boston Bar Association" has focused on how to establish a right to counsel for households at risk of losing their homes. It recommended pilot projects to explore mechanisms for providing counsel and the ramifications of creating a right to counsel including the costs as well as the cost savings to Massachusetts. "Funding was obtained for two pilot projects involving eviction cases." BOS. BAR ASS'N, THE IMPORTANCE OF REPRESENTATIONS IN EVICTION CASES AND HOMELESSNESS PREVENTION (Mar. 2012), https://bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf/ [https://perma.cc/WAP9-W9ZG].

337 For example, in 2005, the United Way of NYC, in partnership with the NYC Civil Court and the NYC Department of Homeless Services, launched the Housing Help Program, a three-year pilot program to address the challenges facing families struggling to avoid eviction and homelessness. SEEDCO, HOUSING HELP PROGRAM: HOMELESSNESS PREVENTION PILOT FINAL REPORT (June 2010), https://www.rtctoolkit.org/docs/7/NYC%20Housing%20Help%20Program%20report.pdf [https://perma.cc/SYD2-ALVD].

338 N.Y.C. OFF. OF CIV. JUST., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR TWO OF IMPLEMENTATION IN NEW YORK CITY (2019), https://www1.nyc.gov

Many reports have concluded that the monetary benefits of representing eligible beneficiaries in eviction and foreclosure proceedings far outweigh the costs of providing these services.[339] Thus, to further stave off homelessness once the eviction and foreclosure forbearance measures have expired, we recommend a five-year Right to Counsel Program of civil legal aid in eviction and foreclosure cases. The Right to Counsel Program would be funded through competitively granting awards to governmental entities to help ensure low-income tenants and homeowners actually obtain housing benefits to which they are entitled and to assist them in housing courts when faced with losing their apartments or homes.[340] The award recipients' programs should focus on making full legal representation available to low-income homeowners facing foreclosure or low-income tenants facing eviction in housing court and in public housing authority termination of tenancy proceedings.[341]

C. Grant-Funded Place-Based Interventions

The second priority is to include place-based interventions that mitigate housing instability in the months and years after the crisis period. As explained in Section II.D above, the pandemic will likely create a need for additional interventions to increase the supply of affordable housing and to address problems associated with vacant properties. To ensure that the benefits of these interventions flow to neighborhood residents instead of investors, the law should prioritize affordable housing and development that is likely to benefit community residents.[342]

/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2019.pdf [https://perma.cc/Y487-DNQT].

339 For example, the Analysis Group "estimates that the total annual cost to represent all eligible beneficiaries in Massachusetts is $28.48 million, while the annual savings from representing this population is $76.52 million." BOS. BAR ASS'N, *supra* note 334, at 20.

340 Professor Sabbeth notes that the "[z]ealous use of counterclaims can increase a defendant's leverage in negotiation and potentially improve a poor tenant's bargaining power both inside and outside the courtroom. Counterclaims can also deter initiation of future litigation." Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. WOMEN'S L.J. 55, 113 (2018).

341 Proposals should target those below 200% of the federal poverty level. U.S. Senator Merkley's bill and U.S. Representative Clyburn's bill would distribute the funds through the Secretary of HUD, whereas U.S. Representative DeLauro's bill would authorize the Attorney General to make the grants to States and localities. Affordable HOME Act, S. 3452 § 108, 116th Cong. (2020); Legal Assistance to Prevent Evictions Act of 2020, H.R. 5884, 116th Cong. (2020); Eviction Prevention Act of 2019, H.R. 5298, 116th Cong. (2019).

342 Layser, *supra* note 148, at 55–59.

During the Great Recession, a significant barrier to advancing these objectives was the lack of resources. The Low-Income Housing Tax Credit program struggled to provide adequate incentives during a recession period, and the Neighborhood Stabilization Program received only modest funding.[343] The Tax Credit Assistance Program and Tax Credit Exchange Program helped sustain LIHTC investment during that period, and lawmakers should consider reinstating those grant programs during subsequent crises like the COVID-19 pandemic.

It may also be possible to tap into the large pool of capital created by the Opportunity Zone legislation to increase the supply of affordable housing. However, for this place-based tool to help distressed communities, there must be an affirmative effort for investments to reflect the affordable housing needs of the residents within these designated opportunity zones.[344] Ideally, place-based tax incentives would incorporate procedures for screening projects and approval would be required by an administering agency with expertise in the development of low-income communities.[345] For this reason, we propose a program of competitively awarded grants to certified Community Development Financial Institutions (CDFIs) and qualified nonprofit housing organizations that partner with qualified opportunity funds to develop affordable housing. Certified CDFIs are community lenders that often provide funding for affordable housing developments.[346]

The U.S. Treasury Department's Community Development Financial Institutions Fund (CDFI Fund)[347] would allocate these grants

343 *See supra* text accompanying notes 109–10 (describing struggles of LIHTC program) and text accompanying notes 114–16 (describing NSP funding).

344 *See supra* text accompanying notes 109–10 (describing struggles of LIHTC program) and text accompanying notes 114–16 (describing NSP funding).

345 Layser, *supra* note 148, at 39–40.

346 Certification is given by the CDFI Fund for "specialized financial institutions serving low-income communities." U.S. DEP'T OF TREASURY: CDFI FUND, CDFI CERTIFICATION: YOUR GATEWAY TO THE CDFI COMMUNITY (2016), https://www.cdfifund.gov/Documents/CDFI_PROGRAM_FACT_SHEET_CERTIFICATION_updatedJAN2016.pdf [https://perma.cc/V9CP-JKPL]. In a report released in June 2020, the Urban Institute also recommends, *inter alia*, that "reforms should be made to support CDFIs, which have a long track record of making substantial investments in low-income communities." Theodos et al., *supra* note 131, at 35. The Urban Institute recommends redesigning the OZ incentive to "encourage equity investments in CDFIs who set up QOFs." *Id.* at 36.

347 "The CDFI Fund was created for the purpose of promoting economic revitalization and community development through investment in and assistance to Community Development Financial Institutions (CDFIs). The CDFI Fund was established by the Riegle Community Development and Regulatory Improvement Act of 1994, as a bipartisan

through a competitive application process to certified CDFIs or qualified nonprofits with an affordable housing mission that are able to partner with a QOF on an affordable housing project.[348] The goal of partnering a QOF with a certified CDFI or qualified nonprofit would be to steer the approximately $10 billion of QOF equity into sorely needed affordable housing projects in opportunity zones in lieu of the hotel and luxury apartment projects that have tainted the Opportunity Zone tool's reputation. Direct grants to nonprofits are preferable to the nontargeted deductions included in the CARES Act.[349] By providing grants directly to nonprofits that will perform targeted activities—such as providing affordable housing or creating homeless shelters—the government can increase the likelihood that expenditures will support activities that are most necessary during the pandemic.

To implement this incentive, the IRS, CDFI Fund, and HUD would need to work together to coordinate the distribution and oversight of additional funds. All agencies need to have employees high enough on the chain communicate with each other and incentivize subordinates to coordinate.[350] Furthermore, line employees in each agency need to work together to analyze and manage the program and its outcomes.[351] However, it should be noted that these agencies are already called upon to coordinate the administration of tax incentives for affordable housing and community development, such as the New Markets Tax Credit. By taking advantage of established cross-agency administrative structures, lawmakers can minimize the administrative burdens associated with the new grant.

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initiative." *About Us*, U.S. DEP'T OF TREASURY: CDFI FUND, https://www.cdfifund.gov/about/Pages/default.aspx [https://perma.cc/J8D5-HHGV].

348 This program would be structured very similarly to the CDFI Fund's Capital Magnet Fund that competitively "award[s] grants to finance affordable housing" programs in low-income communities nationwide. *Capital Magnet Fund*, U.S. DEP'T OF TREASURY: CDFI FUND, https://www.cdfifund.gov/programs-training/Programs/cmf/Pages/default.aspx [https://perma.cc/FJ9K-JJUG]; *see also* U.S. DEP'T OF TREASURY: CDFI FUND, CAPITAL MAGNET FUND: SOLUTIONS FOR AFFORDABLE HOUSING IN LOW-INCOME COMMUNITIES (2020), https://www.cdfifund.gov/Documents/CMF%20Fact%20Sheet%20Feb2020.pdf [https://perma.cc/S8KP-VKPW].

349 *See supra* Section III.C.

350 *See* Saito, *supra* note 102, at 496–97. Note that having an office in charge of interagency coordination in the IRS could aid in coordinating with HUD to manage LIHTC and that in the implementation of the ACA, a dedicated office seemingly aided in the implementation of key provisions.

351 *See id.* at 494–95 (noting the importance of having joint teams of line-level employees administer the program).

CONCLUSION

In this Article, we have set forth two significant priorities: (1) direct mitigation of housing instability during the pandemic and (2) place-based interventions to mitigate housing instability and geographic inequality in the months and years that follow. These housing security objectives have been underemphasized despite their importance to a full policy response to controlling the health crisis and managing the economic fallout of the pandemic. We recommend that legislators take steps to provide direct rental assistance for tenants and mortgage payment assistance for homeowners, a new civil right to counsel in evictions, and specific place-based interventions to promote affordable housing development. Interventions like these, which are designed to mitigate housing instability, are not only essential to address the continuing threat from COVID-19 but also to prepare the United States for future pandemics.

POSTSCRIPT

The Consolidated Appropriations Act, signed into law on December 27, 2020, included more than $900 billion in COVID-19-related relief.[352] In addition to extending CARES Act unemployment assistance,[353] the bill included several emergency provisions and appropriations that addressed housing instability. These provisions included extended federal eviction freezes and foreclosure moratoriums, housing assistance payments to be distributed by state and local governments, increased funding for the federal Housing Choice Vouchers program, and increased funding for affordable housing and community development.[354] Overall, these initiatives improve upon the mitigation efforts included in the CARES Act by targeting assistance directly to housing programs. However, the amount of funding continues to fall short of the estimated need, and many tenants will remain vulnerable to eviction (legal and illegal) in the coming months.

Specifically, the law extended the Centers for Disease Control and Prevention eviction moratorium through January 31, 2021,[355] and it

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352 Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

353 *Id.* § 201.

354 *Id.*

355 *Id.* § 502. Furthermore, the CDC has authorized an extension of the eviction moratorium through March 31, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021).

allocated $25 billion in state grants for emergency rental assistance.[356] Unlike the state grants included in the CARES Act, these grants target rental assistance (not homeowner assistance) to renter households experiencing COVID-19-related housing instability who are below 80% of area median income.[357] Specifically, 90% of the funds must be used to provide financial assistance for rent, rental arrears, utilities and home energy costs and arrears, and other rental expenses.[358] State and local governments must prioritize renter households experiencing unemployment for more than ninety days and whose income is at or below 50% of area median income.[359]

This $25 billion in rental assistance is helpful, but it is insufficient to meet current needs. The National Low-Income Housing Coalition estimates that nearly $100 billion in direct rental assistance is required.[360] Moreover, the Act limits emergency housing assistance to three months of rent,[361] which may leave tenants at risk of eviction if the pandemic continues to disrupt employment. The Act also prohibits states from assisting applicants with prospective rental payments until they have helped reduce the household's rental arrears.[362] Because many tenants are currently in arrears due to a paucity of housing assistance under the CARES Act, this limitation implies that much of the new emergency assistance will be used to assist with rental obligations that accrued in 2020, and it may fail to cover new obligations that arise in 2021.

In addition to the emergency rental assistance, the Act included a $25.8 billion appropriation for the federal tenant-based rental assistance program (Housing Choice Vouchers),[363] which expanded the program by $1.9 billion above the 2020 enacted level.[364] Of that

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356 Consolidated Appropriations Act, 2021, § 501.

357 *Id.* § 501.

358 *Id.* § 501(c)(2).

359 *Id.* § 501(c)(2)–(4).

360 ANDREW AURAND, DAN EMMANUEL & DANIEL THREET, NLIHC RESEARCH NOTE: THE NEED FOR EMERGENCY RENTAL ASSISTANCE DURING THE COVID-19 AND ECONOMIC CRISIS 2 (2020), https://nlihc.org/sites/default/files/Need-for-Rental-Assistance-During-the-COVID-19-and-Economic-Crisis.pdf [https://perma.cc/R9YJ-LMJ3].

361 Consolidated Appropriations Act, 2021, § 501(c)(2)(B).

362 *Id.* § 501(c)(2)(B).

363 *Id.* div. L, tit. II (Department of Housing and Urban Development—Public and Indian Housing—Tenant-Based Rental Assistance).

364 HOUSE APPROPRIATIONS COMM., 116TH CONG., H.R. 133: DIVISION-BY-DIVISION SUMMARY OF APPROPRIATIONS PROVISIONS (Comm. Print 2021), https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/Summary%20of%20H.R.%20133%20Appropriations%20Provisions.pdf [https://perma.cc/PU5L-55GY].

amount, $43.4 million must be used to assist individuals and families who are homeless.[365] While these programs are essential parts of federal housing policy, the increase over nonemergency levels is relatively small, and the portion devoted to homelessness and rehousing is particularly low given the scale of the anticipated eviction crisis. The Consolidated Appropriations Act also includes $20 million in competitive grants for free legal assistance to low-income tenants facing eviction, but this remains insufficient given the enormity of the problem.[366]

Beyond assistance for individuals, the Consolidated Appropriations Act also included place-based initiatives aimed at supporting investment in affordable housing and neighborhoods disproportionately affected by COVID-19. The Act included a $7.8 billion appropriation to the federal Public Housing Fund,[367] which was $387 million above the 2020 enacted level.[368] It established a new floor for the Low-Income Housing Tax Credit (LIHTC) program used for rehabilitation of affordable housing or paired with other federal subsidies.[369] The LIHTC expansion is intended to promote private investment in affordable housing.[370] Finally, the legislation included $3 billion in funding to assist Community Development Financial Institutions that invest in neighborhoods disproportionately affected by the pandemic,[371] and it extended the New Markets Tax Credit program through 2025.[372] These programs may help address long-term affordable housing needs and the uneven geographic impact of the

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365 Consolidated Appropriations Act, 2021, § 8 (Department of Housing and Urban Development—Public and Indian Housing—Tenant-Based Rental Assistance).

366 *Id.* div. L, tit II (Department of Housing and Urban Development—Housing Counseling Assistance).

367 *Id.* div. L, tit. II (Department of Housing and Urban Development—Public and Indian Housing—Public Housing Fund).

368 HOUSE APPROPRIATIONS COMM., 116TH CONG., H.R. 133: DIVISION-BY-DIVISION SUMMARY OF APPROPRIATIONS PROVISIONS (Comm. Print 2021), https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/Summary%20of%20H.R.%20133%20Appropriations%20Provisions.pdf [https://perma.cc/PU5L-55GY].

369 Consolidated Appropriations Act, 2021, § 201 (amending 26 U.S.C. § 42(b) to provide that the applicable percentage shall not be less than 4% for 4% tax credit projects, which will increase the amount of tax credit equity that can be raised for such projects).

370 Memorandum from Nat'l Hous. L. Project, to Hous. Just. Network Advocs. (Dec. 23, 2020), https://www.nhlp.org/wp-content/uploads/NHLP-Relief-Package-Approps-Analysis.pdf [https://perma.cc/6JAH-BGB8] (claiming that the "4% floor should incentivize investment in 4% tax credit projects and thus advance subsidized housing preservation efforts and expand the supply of other LIHTC units").

371 Consolidated Appropriations Act, 2021, § 523.

372 *Id.* § 112.

pandemic, but it is likely that the number of impacted families far exceeds the relatively modest size of these programs.

In March 2021, Congress enacted and President Biden signed the American Rescue Plan Act of 2021, which includes $40 billion in essential housing and homelessness assistance, including at least $27.4 billion for rental assistance and $5 billion to assist people who are homeless.[373] This is another important step toward mitigating housing instability during the pandemic, but there remains much more to be done.

373 *COVID Relief Bill*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/coronavirus-and-housing-homelessness/covid-package-and-housing-provisions [https://perma.cc/H43D-HW73].

APPENDIX A
STATE-LEVEL INTERVENTIONS[374]

State	Mortgage Relief	Eviction Relief	Foreclosure Relief	Rent Relief	Assistance Programs ($$)	Utility Disconnection Relief
Alabama		•	•			•
Alaska		•	•			•
Arizona[375]		•	•			•
Arkansas		•	•			•
California		•	•			•
Colorado		•	•			•
Connecticut	•	•	•	•		•
Delaware		•	•		•	
Florida		•	•			
Georgia[376]						
Hawaii[377]		•	•			•
Idaho[378]		•	•			
Illinois		•	•			•
Indiana		•	•			•

374 Note that the form of these interventions varies across jurisdictions, with some offering stronger protections than others. Eviction Lab, *supra* note 198. For a detailed list of state law resources describing these interventions, please see Ill. Coll. of L. Libr., State Housing Relief Guide, https://libguides.law.illinois.edu/ld.php?content_id=54944160 [https://perma.cc/8VYD-BTB2].

375 Governor Doug Ducey instituted an agreement with banks to suspend evictions and foreclosures for 60 days.

376 Court order has suspended nonessential matters resulting in a de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.

377 Court order has limited in-person court proceedings likely resulting in a de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.

378 Court order has postponed civil court proceedings likely resulting in a de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.

State	Mortgage Relief	Eviction Relief	Foreclosure Relief	Rent Relief	Assistance Programs ($$)	Utility Disconnection Relief
Iowa		•	•			•
Kansas		•	•			•
Kentucky		•	•			•
Louisiana[379]		•	•			•
Maine		•	•	•		•
Maryland		•	•			•
Massachusetts	•	•	•			•
Michigan	•	•	•			•
Minnesota		•	•		•	
Mississippi		•				•
Missouri[380]		•	•			
Montana		•	•			•
Nebraska		•				
Nevada		•	•			
New Hampshire		•	•			•
New Jersey	•	•				•
New Mexico		•				•
New York	•	•	•			•
North Carolina		•	•			•
North Dakota		•				
Ohio						•

379 Executive Order suspending legal deadlines applicable to all legal proceedings. This would impact eviction and some foreclosure proceedings. There are no other state mandates regarding evictions and foreclosures.

380 Court order suspending in-person proceedings likely resulting in a de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.

State	Mortgage Relief	Eviction Relief	Foreclosure Relief	Rent Relief	Assistance Programs ($$)	Utility Disconnection Relief
Oklahoma[381]		•	•			
Oregon		•				•
Pennsylvania		•	•			•
Rhode Island		•				•
South Carolina		•	•			•
South Dakota						
Tennessee[382]		•	•			•
Texas[383]		•	•			•
Utah		•		•		
Vermont		•	•			•
Virginia[384]		•	•			
Washington		•				•
West Virginia[385]		•	•			
Wisconsin		•	•			•
Wyoming[386]		•	•			

381 Court ordered closure of all courts, suspension of trials, and extensions of deadlines likely resulting in a de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.

382 Court order suspending in-person proceedings. Courts are prohibited from taking an action to effectuate an eviction, ejectment, or other displacement from a resident based on failure to pay rent or loan. This results in a de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.

383 Court order suspending eviction trials, hearings, and other proceedings. This would impact judicial foreclosure proceedings and post-foreclosure evictions. Does not prohibit foreclosure sales.

384 Court order suspending nonemergency and nonessential court cases. This included new eviction cases and would also limit judicial foreclosure. There are no other state mandates regarding evictions and foreclosures.

385 Court order postponing all proceedings and court deadlines likely resulting in a de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.

386 Court order suspending all in-person proceedings resulting in de facto moratorium on evictions, judicial foreclosures, and post-foreclosure evictions. This would not prohibit foreclosure sales. There are no other state mandates regarding evictions and foreclosures.