



Health, housing, and ‘direct threats’ during a pandemic

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ABSTRACT

The COVID-19 pandemic brought into stark relief the intimate nexus between health and housing. This extraordinary infectious disease outbreak combined with the astounding lack of a clear, coordinated, prompt, and effective public health response in the U.S. created conditions and introduced practical challenges that left many disoriented—not only health care providers but also housing providers. Innumerable issues are worth examination, such as implications of moratoria on evictions and foreclosures, force majeure contract clauses, insurability of pandemic-related damages and disruptions, holdover tenancies and delayed occupancies, and possible abatement of rent or homeowner/condominium association dues in light of closed common facilities (such as fitness areas) or reduced benefits to be enjoyed with residential property; however, this article focuses on fair housing law and the “direct threat” exemption; finds it unlikely that COVID-19 is a disability, likely that the “direct threat” defense is available, and both determinations to be case-specific inquiries dependent upon rapidly-changing scientific understanding of this disease. By highlighting adequate housing as a human right for which the government has primary responsibility for ensuring its achievement, this

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article underscores the importance of finding a holistic solution to public health and housing problems before the next public health emergency arises.

KEYWORDS: bioethics, infectious disease, public health, landlord–tenant rights, property law

I. INTRODUCTION

The first confirmed case of COVID-19, an infectious disease caused by a virus initially referred to as 2019-nCoV and later as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),¹ in the USA was announced by the Centers for Disease Control and Prevention (CDC) on January 21, 2020 along with messages downplaying the risk of the disease to the US public.² By the end of February, there were already five dozen confirmed cases in the USA,³ and by March 11, 2020, the outbreak was officially characterized as a pandemic by the World Health Organization (WHO).⁴ By March 21, 2020—exactly two months after the first announced case—the CDC’s position had shifted dramatically, with the CDC acknowledging ‘widespread transmission of COVID-19 in the United States will occur’ and ‘most of the US population will be exposed to this virus.’⁵ Meaningful federal contributions to the public health response were slow to materialize and by many accounts either wholly absent or counter-productive.⁶ Notwithstanding the embarrassing and inexcusable delay and shortage

- 1 Martin Enserink, *Update: ‘A Bit Chaotic.’ Christening of New Coronavirus and Its Disease Name Create Confusion*, SCIENCE, Feb. 12, 2020, <https://www.sciencemag.org/news/2020/02/bit-chaotic-christening-new-coronavirus-and-its-disease-name-create-confusion> (accessed Mar. 24, 2020); World Health Organization, *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It*, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (accessed Mar. 24, 2020).
- 2 CDC, *Press Release: First Travel-Related Case of 2019 Novel Coronavirus Detected in United States*, Jan. 21, 2020, <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> (stating “CDC continues to believe the risk of 2019-nCov to the American public at large remains low”) (accessed Mar. 24, 2020).
- 3 Jon Cohen, *The United States Badly Bungled Coronavirus Testing—but Things May Soon Improve*, SCIENCE, Feb. 28, 2020, <https://www.sciencemag.org/news/2020/02/united-states-badly-bungled-coronavirus-testing-things-may-soon-improve> (accessed Mar. 24, 2020).
- 4 WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19—March 11, 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020> (accessed Mar. 24, 2020).
- 5 CDC, *Coronavirus Disease 2019 (COVID-19): Situation Summary*, last updated Mar. 21, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html#severity> (accessed Mar. 24, 2020).
- 6 President Trump did not invoke emergency declarations until March 13, 2020 [*Transcript: Trump’s Coronavirus News Conference*, N.Y. TIMES, Mar. 13, 2020, <https://www.nytimes.com/2020/03/13/us/politics/trump-coronavirus-news-conference.html> (accessed Mar. 24, 2020)]. See also Elizabeth Goitein, *Trump’s Reasonable—and yet Still Worrisome—Emergency Declaration*, THE ATLANTIC, Mar. 16, 2020, <https://www.theatlantic.com/ideas/archive/2020/03/trumps-emergency-declaration-coronavirus/608083/> (accessed Mar. 24, 2020)]. The White House Coronavirus Task Force merely issued guidance to encourage social distancing to ‘Slow the Spread’ of COVID-19 in 15 days on Mar. 16, 2020 [White House, *15 Days to Slow the Spread*, Mar. 16, 2020, <https://www.whitehouse.gov/articles/15-days-slow-spread/> (accessed Mar. 24, 2020)]. Before March was even over, President Trump was delivering worrisome comments undermining social distancing measures, including, ‘America will again and soon be open for business. Very soon’ [Caitlyn Oprysko and Quint Forgey, *Our Country Wasn’t Built to be Shut Down: Trump Pushes Back Against Health Experts*, POLITICO, Mar. 23, 2020, <https://www.politico.com/news/2020/03/23/trump-coronavirus-lockdown-skepticism-143800> (accessed Mar. 24, 2020)] and ‘I’d love to have it open by Easter [April 12, 2020]’ [Miriam Elder, *Trump Said He Wants People ‘Back to Work’ by Easter. His medical advisors pushed back*, BUZZFEED, Mar. 24, 2020, <https://www.buzzfeednews.com/article/miriamelder/coronavirus-trump-easte>

of diagnostic tests, the USA exceeded 50,000 confirmed cases across all 50 states as well as the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands by March 24, 2020.⁷ State and local authorities took a variety of actions to try to control a pandemic transcending their borders, including issuing ‘stay at home’ orders⁸ to close non-essential businesses and limit travel as well as imposing moratoria on evictions to promote housing stability during this public health emergency.⁹ Even with extensive social distancing measures being observed, by April 30, 2020, there were more than 1,000,000 confirmed cases and more than 60,000 deaths reported.¹⁰

Without question, SARS-CoV-2 wreaked havoc and caused considerable damage (physical and mental health, familial, economic, social, political, etc.) during the first three months of its presence in the USA. Healthcare providers scrambled for ways to procure personal protective equipment for employees;¹¹ to develop and implement clinical triage policies for the responsible and fair allocation of scarce critical care resources to COVID-19 and non-COVID-19 patients;¹² and to make ethically and

[r-covid-19-economy](#) (accessed Mar. 24, 2020)]. See also *America’s Bioethicists: Government Must Use Federal Powers to Fight COVID-19*, HASTINGS CENTER NEWS, Mar. 24, 2020, <https://www.thehastingscenter.org/news/americas-bioethicists-government-must-use-federal-powers-to-fight-covid-19/> (accessed Apr. 19, 2020); Lawrence O. Gostin, James Hodge Jr., Lindsay F. Wiley, *Presidential Powers and Response to COVID-19*, JAMA, Mar. 18, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2763423> (accessed Apr. 16, 2020).

- 7 Mitch Smith et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, Updated March 24, 5:23 PM ET, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#g-cases-over-time> (reporting 52,215 total confirmed cases of COVID-19 and at least 675 deaths) (accessed Mar. 24, 2020).
- 8 For example, Sarah Mervosh, Denise Lu, and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES, Apr. 7, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (accessed Apr. 17, 2020); Jiachuan Wu et al., *Stay-at-Home Orders Across the Country*, NBC NEWS, Mar. 25, 2020 (last updated Apr. 15, 2020), <https://www.nbcnews.com/health/health-news/here-a-re-stay-home-orders-across-country-n1168736> (accessed Apr. 17, 2020).
- 9 For example, Darwin Bond Graham, *To Stop the Spread of Coronavirus, California Officials and Attorneys Call for Eviction Bans: Experts Say Evictions Cause a ‘Downward Spiral’ of Health Problems for Renters, and That Housing Security is Necessary to Slow the Spread of the Pandemic*, THE APPEAL, Mar. 13, 2020, <https://theappeal.org/to-stop-the-spread-of-coronavirus-california-officials-and-attorneys-call-for-eviction-bans/> (accessed Apr. 16, 2020); Jacob Passy, *U.S. Cities Temporarily Ban Evictions as Coronavirus Outbreak Worsens*, MARKET WATCH, Mar. 17, 2020, <https://www.marketwatch.com/story/us-cities-are-temporarily-banning-e-victions-as-coronavirus-outbreak-worsens-2020-03-14> (accessed Apr. 16, 2020).
- 10 The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, Updated April 30, 2020, 4:35 AM ET, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (reporting 1,045,300 total confirmed cases of COVID-19 and at least 60,900 deaths) (accessed Apr. 30, 2020). See also Elena Renken and Daniel Wood, *Tracking the Pandemic: How Quickly is the Coronavirus Spreading State by State?* Updated Apr. 17, 2020 at 9:00 PM ET, <https://www.npr.org/sections/health-shots/2020/03/16/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s> (accessed Apr. 18, 2020) (reporting 699,554 total cases; 31,905 new cases on April 17; 36,773 total deaths; and 3857 new deaths on Apr. 17).
- 11 For example, Andrew Jacobs, Matt Richtel, and Mike Baker, *‘At War with No Ammo:’ Doctors Say Shortage of Protective Gear Is Dire*, N. Y. TIMES, Mar. 19, 2020, <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html> (accessed Apr. 18, 2020); Andrew W. Artestein, *In Pursuit of PPE*, N. ENG. J. MED., Apr. 17, 2020, https://www.nejm.org/doi/full/10.1056/NEJMc2010025?fbclid=IwAR2J0r-2TW64Yd_d9nhCHc6PFFKv_Ei2s0DjdsAiy_QyEVLhg5dIWkcPswc (accessed Apr. 18, 2020).
- 12 Ezekiel J. Emanuel et al., *Fair Allocation of Scarce Medical Resources in the Time of Covid-19*, N. ENG. J. MED., Mar. 23, 2020, <https://www.nejm.org/doi/full/10.1056/NEJMs2005114> (accessed Apr. 18, 2020); Mike Baker and Sheri Fink, *At the Top of the Covid-19 Curve, How Do Hospitals Decide Who Gets Treatment?* N. Y. TIMES, Mar. 31, 2020, <https://www.nytimes.com/2020/03/31/us/coronavirus-covid-triage-rationing-ventilators.html> (accessed Apr. 18, 2020); Amy L. McGuire et al., *Ethical Challenges Arising in the COVID-19*

scientifically sound decisions regarding the conduct of research during the pandemic.¹³ Concurrently, housing providers scrambled to make sense of their own ethical and legal responsibilities as they encountered localized and statewide ‘stay at home’ orders (frequently deeming matters affecting real property to be non-essential and therefore shutdown),¹⁴ an increasingly negative economic forecast (with roughly 22 million Americans filing for unemployment in a four-week period¹⁵), and several distinct moratoria on evictions limiting their potential ability to enforce leases or attempt to mitigate their own losses if tenants are unable to pay rent.¹⁶ Anecdotal reports suggested

Pandemic: An Overview from the Association of Bioethics Program Directors (ABPD) Task Force, AM. J. BIOETHICS (forthcoming 2020).

- 13 Personal communications with Michelle Meyer (Geisinger Health) and Kayte Spector-Bagdady (University of Michigan); Beatriz Da Costa Thome, *Research in the Time of Coronavirus: Keep It Ethical*, STAT NEWS, Mar. 2, 2020, <https://www.statnews.com/2020/03/02/research-public-health-emergencies-ethics/> (accessed Apr. 19, 2020); Gregory E. Simon, Richard Platt, Adrian F. Hernandez, *Evidence from Pragmatic Trials during Routine Care—Slouching toward a Learning Health System*, 382 N. ENG. J. MED. 1488 (2020). James Brian Byrd, Natalie Bello, Michelle N. Meyer, *Pandemic Pandemonium: Pausing Clinical Research owing the COVID-19 Outbreak*, CIRCULATION (2020), <https://www.ahajournals.org/doi/pdf/10.1161/CIRCULATIONAHA.120.047347> (accessed Apr. 24, 2020).
- 14 For example, Pa. Sup. Ct. Order, Mar. 18, 2020, <http://www.pacourts.us/assets/files/page-1305/file-8634.pdf> (accessed Apr. 19, 2020) (closing the Pennsylvania courts to the public; issuing a specific directive on landlord/tenant matters that for the duration of the judicial emergency no officer, official, or person employed by the judiciary is to ‘effectuate an eviction, ejection, or other displacement from residence based upon the failure to make a rent, loan, or other similar payment’; and explaining nothing precludes landlords with a judgment for possession from filing requests for orders of possession by mail but execution on those orders is postponed); PA Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that Are Not Life Sustaining*, Mar. 19, 2020, <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order-with-Industry-Operation-Guidance>, available at <https://www.scribd.com/document/452553026/UPDATED-4-00pm-April-1-2020-Industry-Operation-Guidance> (accessed Apr. 19, 2020) (closing non-essential businesses and denoting as non-essential ‘Lessors of Real Estate,’ ‘Offices of Real Estate Agents and Brokers,’ and ‘Activities Related to Real Estate’); Pa. Sup. Ct. Order, *Second Supplemental Order*, Apr. 1, 2020, <http://www.pacourts.us/assets/files/page-1305/file-8846.pdf> (accessed Apr. 19, 2020) (extending the judicial emergency and reiterating directives related to ‘Dispossession of Property’); PA Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, Apr. 1, 2020, <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf> (accessed Apr. 19, 2020) (amending all previous county-by-county ‘stay at home’ orders and extending the ‘stay at home’ orders to all individuals in the Commonwealth except in limited enumerated circumstances through Apr. 30, 2020).
- 15 Katia Dmitrieva, *U.S. Jobless Claims Top 5.2 Million, Erasing Decade of Job Gains*, BLOOMBERG, Apr. 16, 2020, <https://www.bloomberg.com/news/articles/2020-04-16/u-s-jobless-claims-total-5-25-million-in-week-four-of-lockdown> (accessed Apr. 18, 2020).
- 16 The judicial emergency declared by the Pa. Sup. Ct. imposed a moratorium on court proceedings for and execution of evictions/ejections that specifically are based on nonpayment (leaving open the possibility for evictions/ejections based on other reasons and allowing the filing of new cases and new requests for possession, which would enable such matters to resume expeditiously once the judicial emergency has ended). Section 4024 of The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 imposed a 120-day moratorium on evictions involving specific types of housing also due to nonpayment and also not affecting evictions for reasons other than nonpayment. The closure of the courts to the public seems to be the only limiting factor preventing evictions and ejections based on issues other than nonpayment of rent (such as holding over beyond the lease term; violating lease conditions, rules, and regulations; or perhaps even posing a ‘direct threat’ to others at the rental property). While self-help evictions are prohibited in Pennsylvania, there does not seem to be any executive or judicial order precluding landlords from delivering notices to quit or requesting possession from tenants for reasons other than nonpayment of rent. Nevertheless, because residential leases are considered consumer contracts, it is notable that PA Attorney General Josh Shapiro publicly called upon housing providers ‘to go beyond the Supreme Court’s order and pledge not to

a host of housing-related problems emerging,¹⁷ including tenants planning mass rent strikes,¹⁸ healthcare providers being evicted from apartments or having their Airbnb reservations cancelled due to fears that they would spread the infectious disease,¹⁹ and homeowner associations (HOA) asking residents to report their COVID-19 status²⁰ and sending HOA violation notices to residents who have parked recreational vehicles in their driveways in anticipation of potential self-quarantining or isolation without proper permission.²¹ Even compassionate and health-conscious housing providers are anxious about the possibility that the COVID-19 pandemic, the governmental orders (resulting in job losses and suspending evictions) might, in effect, require them to subsidize housing (with necessary utilities) indefinitely.²²

institute any eviction proceedings against your [their] tenants or mortgage holders who have been impacted by this crisis, either medically or financially, for some additional time period after our courts are reopened for eviction proceedings'. PA Attorney General, *Letter to Mr. Berger, Mr. Vitali, Mr. Stivale, and Ms. Stancato*, Mar. 30, 2020, <https://www.attorneygeneral.gov/wp-content/uploads/2020/03/03.30.20-Eviction-Letter.pdf> (accessed Apr. 19, 2020). This hints that housing providers moving aggressively to recover possession (even if empathetic to tenants' predicaments) could be considered acting contrary to general consumer protection laws.

- 17 For example, Chris Arnold, *It's the 1st of the Month. Renters Are in a Much Tougher Spot than Homeowners*, NPR MORNING EDITION, Apr. 1, 2020, https://www.npr.org/2020/04/01/825056974/renters-get-less-protection-from-covid-19-economic-disruptions?utm_term=nprnews&utm_campaign=npr&utm_medium=social&utm_source=facebook.com (accessed Apr. 16, 2020); Jeff Ernsthansen, Ellis Simani, and Justin Elliott, *Despite Federal Ban, Landlords Are Still Moving to Evict People during the Pandemic*, PROPUBLICA, Apr. 17, 2020, <https://www.propublica.org/article/despite-federal-ban-landlords-are-still-moving-to-evict-people-during-the-pandemic> (accessed Apr. 17, 2020); Kevin G. Hall and Rene Rodriguez, *Evicting Tenants Is Illegal Right Now. This Company Tried It Anyway—and Got Caught*, MIAMI HERALD, Apr. 16, 2020, <https://www.miamiherald.com/news/business/real-estate-news/article242023636.html> (accessed Apr. 19, 2020).
- 18 For example, Jim Salter, *Rent Strike Idea Gaining Steam during Coronavirus Crisis*, ASSOCIATED PRESS, Mar. 30, 2020, <https://apnews.com/1bd0dcca3f84e380af62b3dd91ee26e> (accessed Apr. 18, 2020); Caroline O'Donovan, *A Coronavirus Rent Strike Could Leave Renters Vulnerable*, BUZZFEED, Mar. 27, 2020, <https://www.buzzfeednews.com/article/carolineodonovan/coronavirus-rent-strike-risks-tenants> (accessed Apr. 18, 2020); Rachel Sandler, *Rent Strike: What Happens if You Do Not Pay Rent on April 1 Because of the Coronavirus*, FORBES, <https://www.forbes.com/sites/rachelsandler/2020/03/31/rent-strike-what-happens-if-you-dont-pay-rent-on-april-1-because-of-the-coronavirus/#16bf0776d4ff> (accessed Apr. 18, 2020); Lam Thuy Vo, *A Management Company Emailed Hundreds of Tenants, Demanding They Pay Rent. It Backfired*, BUZZFEED, Apr. 3, 2020, <https://www.buzzfeednews.com/article/lamvo/coronavirus-update-rent-strike-landlord-management-organized> (accessed Apr. 18, 2020); Noah Buhayar, *New York Housing Groups Call for 'Massive Wave' of Rent Strikes*, BLOOMBERG, Apr. 16, 2020, <https://www.bloomberg.com/news/articles/2020-04-16/new-york-housing-groups-call-for-massive-wave-of-rent-strikes> (accessed Apr. 18, 2020).
- 19 Emily Shugerman, *Coronavirus Heroes Are Getting Tossed from Their Homes by Scared Landlords*, DAILY BEAST, Mar. 26, 2020, <https://www.thedailybeast.com/coronavirus-nurses-face-eviction-housing-discrimination-from-scared-landlords> (accessed Apr. 16, 2020); Jessie Yeung and Swati Gupta, *Doctors Evicted from Their Homes in India as Fear Spreads Amid Coronavirus Lockdown*, CNN, Mar. 25, 2020, <https://www.cnn.com/2020/03/25/asia/india-coronavirus-doctors-discrimination-intl-hnk/index.html> (accessed Apr. 16, 2020).
- 20 Matt Flener, *HOA Members Receive Letter Asking Them to Report Positive COVID-19 Cases*, KMBC NEWS, Apr. 2, 2020, <https://www.kmbc.com/article/hoa-members-receive-letter-asking-them-to-report-positive-covid-19-cases/32020136> (accessed Apr. 16, 2020).
- 21 Jason Torchinsky, *In Case You Forgot HOAs Are Terrible, a Florida HOA Reminds Us by Demanding a Nurse Remove Her Quarantine RV*, JALOPNIK, Apr. 3, 2020, <https://jalopnik.com/in-case-you-forgot-hoas-are-terrible-a-florida-hoa-rem-1842645009> (accessed Apr. 16, 2020).
- 22 This raises important and complex legal questions about whether the temporary use of private housing for purposes of offsetting the lack of public housing and social safety net alternatives during a pandemic constitutes a government taking for which property owners must be compensated. See, eg, *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960) (holding, "The Fifth Amendment's guarantee that private

II. HOUSING AS A HUMAN RIGHT

The importance of adequate housing has long been recognized, having been included in several key international human rights instruments,²³ including, eg, Article 25 of the Universal Declaration of Human Rights (UDHR),²⁴ Article 5 of the International Convention for the Elimination of All Forms of Racial Discrimination,²⁵ Article 11 of the International Covenant on Economic, Social and Cultural Rights,²⁶ Article 14 of the International Convention on the Elimination of All Forms of Discrimination Against Women,²⁷ Article 27 of the International Convention on the Rights of the Child,²⁸ Article 28 of the International Convention on the Rights of Persons with Disabilities,²⁹ and Article 43 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.³⁰ As articulated in UDHR Article 25(1), ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’³¹ Article XI of the American Decla-

property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’); *Penn Central Transp. Co v. NYC*, 438 U.S. 104, 98 S.Ct. 2646 (1978); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2388 (1987) (noting ‘...“temporary” takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation’); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895 (1992) (explaining ‘We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.’); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); *Caquelin v. United States*, 140 Fed. Cl. 564, 574 (2018) (explaining ‘Whether the government exercises permanent or temporary control is only relevant for the calculation of compensation, not whether a taking occurred.’). See also, eg, André LeDuc, *Twilight of the Idols: Philosophy and the Constitutional Law of Takings*, 10 ALA. C.R. & C.L.L. REV. 201 (2019). But see *Friends of Danny Devito, Kathy Gregory, B&J Laundrey, LLC, Blueberry Hill Public Golf Course & Lounge, and Caledonia Land Company v. Tom Wolf, Governor, and Rachel Levine, Secretary of PA Department of Health*, No. 68 MM 2020 (PA Sup Ct, 2020), <http://www.pacourts.us/assets/opinions/Supreme/out/68MM2020mo%20-%2010439399799476700.pdf?cb=1> (accessed Apr. 24, 2020) and concurring and dissenting opinion available at <http://www.pacourts.us/assets/opinions/Supreme/out/68MM2020cdo%20-%2010439399799476708.pdf?cb=1> (accessed Apr. 24, 2020).

23 United Nations Office of the High Commissioner, *The Core International Human Rights Instruments and Their Monitoring Bodies*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed Apr. 15, 2020).

24 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

25 International Convention for the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (Dec. 21, 1965); S. Exec. Doc. C, 95–2 (1978); S. Treaty Doc. 95–18; 660 U.N.T.S. 195, 212.

26 International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); 993 U.N.T.S. 3; S. Treaty Doc. No. 95–19; 6 I.L.M. 360 (1967).

27 International Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (Dec. 18, 1979); 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

28 International Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989); 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989).

29 International Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (Dec. 13, 2006), Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (Dec. 13, 2006); 46 I.L.M. 443.

30 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, Dec. 18, 1990, 2220 U.N.T.S. 93 (1991).

31 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

ration of the Rights and Duties of Man articulates the right similarly, ‘Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.’³² As human rights ‘are interdependent, indivisible and interrelated’,³³ adequate housing (comprising distinct concepts such as affordability, habitability, accessibility, and tenure security) is essential to the realization of other human rights including health and well-being.³⁴ Respecting, protecting, and fulfilling the right to adequate housing³⁵ are challenging under the best of circumstances (eg, there is not even an international consensus on the definition of homelessness)³⁶ and are particularly complex in the midst of a pandemic for which a government was ill-prepared. Acknowledging that COVID-19 is ‘a colossal test of leadership’ and of ‘our systems, values and humanity’³⁷ and noting ‘[n]ow is the time for solidarity and cooperation’,³⁸ the United Nations Office of the High Commissioner issued guidance calling upon governments to take action to ensure adequate housing, which as a matter of ‘good practice’ would include providing emergency housing with services for those affected by the virus and preventing people from becoming homeless.³⁹ Public health and law experts similarly have called for health justice strategies⁴⁰ and have outlined components for emergency housing responses to COVID-19, emphasizing that housing stability is critical for both an effective public health response that involves

32 American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./1123, doc. 12 rev.6 (1948).

33 United Nations Office of the High Commissioner, *The Right to Adequate Housing*, Fact Sheet No. 21 (Rev. 1), 2014, https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf (accessed Apr. 18, 2020), at 9.

34 For example, Emily Bergeron, *Adequate Housing Is a Human Right*, HUMAN RIGHTS MAGAZINE, Oct. 01, 2019, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol-44-no-2--housing/adequate-housing-is-a-human-right/ (accessed Apr. 18, 2020).

35 United Nations Office of the High Commissioner, *The Right to Adequate Housing*, Fact Sheet No. 21 (Rev. 1), 2014, https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf (accessed Apr. 18, 2020). At 32 (noting States have obligations to respect the right [ie, avoid interfering with the right], to protect the right [ie, prevent third parties from interfering with the right], and to fulfill the right [ie, progressively prevent and address inadequate housing]).

36 United Nations Office of the High Commissioner, *The Right to Adequate Housing*, Fact Sheet No. 21 (Rev. 1), 2014, https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf (accessed April 18, 2020), at 22.

37 United Nations Office of the High Commissioner, *COVID-19 and Its Human Rights Dimensions*, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx> (accessed Apr. 18, 2020).

38 United Nations Office of the High Commissioner, *COVID-19 Guidance*, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx> (accessed Apr. 18, 2020).

39 United Nations Office of the High Commissioner, *COVID-19 Guidance*, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx> (accessed Apr. 18, 2020). (Additionally, the guidance underscored the importance of combatting the stigmatization and racism that has accompanied the spread of the coronavirus and cautioned about privacy concerns implicated by public health surveillance and monitoring of individuals’ behavior and movements).

40 For example, Emily A. Benfer and Lindsay F. Wiley, *Health Justice Strategies to Combat COVID-19: Protecting Vulnerable Communities During a Pandemic*, Health Affairs Blog, Mar. 19, 2020, <https://www.healthaffairs.org/doi/10.1377/hblog20200319.757883/full/> (accessed Apr. 16, 2020); See also, Wendy E. Parmet and Michael S. Sinha, *Covid-19: The Law and Limits of Quarantine*, 328N, ENG. J. MED., e28 (2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2004211> (accessed Apr. 16, 2020) (for general discussion on quarantines).

social distancing, quarantining, and isolation and economic resilience.⁴¹ ‘Housing is’, as Justice Holmes penned for the Supreme Court of the United States, ‘a necessary of life.’⁴²

III. FAIR HOUSING IN THE USA

While there is a recognized international human right to adequate housing (and, correspondingly, a governmental obligation to ensure that right can be achieved), there is no legal obligation in the USA that any specific individual or private entity become a housing provider. In the midst of a pandemic wherein housing stability becomes a central topic within the public health response discussions,⁴³ it is understandable for there to be some confusion and anxiety not only among economically vulnerable individuals who rent their homes but also among housing providers—many of whom are economically vulnerable individuals⁴⁴ or small businesses. COVID-19 has presented many questions for landlords about what their rights and obligations are. There are several applicable laws to ensure that housing is provided fairly (ie, free from discrimination) and that housing is safe, including the Fair Housing Act that prohibits discrimination by housing providers,⁴⁵ the Americans with Disabilities Act that prohibits discrimination in public accommodations (including, eg, hotel rooms),⁴⁶ and Section 504 of the Rehabilitation Act of 1973 that prohibits discrimination in federally assisted housing programs and activities.⁴⁷ Federal

41 Georgia Housing and Legal Scholars (Elora Raymond, Lauren Sudeall, Frank S. Alexander, Michael Rich, Dan Pasciuti, John Travis Marshall, Prentiss Dantzler, Allen Hyde), *Towards an Emergency Housing Response to COVID-19 in Georgia*, Medium, Mar. 20, 2020, <https://medium.com/@elora.raymond/towards-an-emergency-housing-response-to-covid-19-in-georgia-8f05c54f26d3> (accessed Apr. 17, 2020).

42 *Block v. Hirsh*, 256 U.S. 135, 156, 41 S.Ct. 458, 460 (1921) (finding ‘[a]ll the elements of a public interest justifying some degree of control are present’ and upholding rent controls in post-war housing shortage in Washington, DC).

43 Section 4024 of The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136 (The CARES Act), which became law on March 27, 2020, imposes a 120-day moratorium on evictions to protect tenants residing in enumerated specific types of housing from losing their homes due to an inability to pay their rent. It does not, however, apply to all landlords or preclude evictions for reasons other than nonpayment. Prior to the CARES Act, HUD had suspended all foreclosures and evictions for 60 days for single-family properties with mortgages insured by the Federal Housing Administration. U.S. Department of Housing and Urban Development, *HUD Provides Immediate Relief for Homeowners Amid Nationwide Coronavirus Response*, HUD No. 20-042, Mar. 18, 2020, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_042 (accessed Apr. 18, 2020).

44 Individuals who are not professional housing providers become ‘reluctant landlords’ for a wide variety of reasons. For example, individuals often rent rooms in their homes to make financial ends meet, which can be long-term rentals as well as short-term rentals using platforms such as Airbnb. Individuals who relocate for a new job often have difficulty selling their homes and end up leasing them to cover their financial losses while also paying rent or a mortgage for their home near their new job. Individuals who inherit neglected or functionally obsolete homes from deceased relatives (ie, devisees) might not be able to find a buyer and take on tenants to cover expenses of ownership.

45 Fair Housing Act of 1968, Pub. L. No. 90–284, Ti. VIII, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619); Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3610–3614, 3614a). (Prohibitions on discrimination include those who lease and sell housing as well as those who finance, appraise, broker, insure, advertise, and manage real estate.)

46 Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C. §12101–12213); Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553.

47 Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701–796l).

fair housing laws set the baseline for housing provider conduct, which may be supplemented by additional state and local requirements (such as the Pennsylvania Human Relations Act, PHRA).⁴⁸ Due to their similarities on the protection of individuals with disabilities, courts often analyze the statutes (such as the FHA, ADA, and PHRA) together as involving the same standard.⁴⁹

Focusing on the FHA requirements (which apply to most but not all housing providers),⁵⁰ housing providers are prohibited from discriminating against individuals on the basis of race, color, religion, sex, familial status, national origin, or disability.⁵¹ The FHA bans (i) landlord decisions from being made because of a disability of the person seeking to rent the housing, a person intending to reside in that housing, or any person associated with that person;⁵² (ii) landlord refusals to make a ‘reasonable accommodation...necessary to afford such person equal opportunity to use and enjoy a dwelling’;⁵³ and (iii) disability-related inquiries by landlords.⁵⁴ Nothing in the FHA, however, requires a housing provider to lease property to someone ‘whose tenancy would constitute a direct threat to the health and safety of other individuals...’⁵⁵ This is known as the ‘direct threat’ exemption, which is intended to provide landlords with an affirmative defense (ie, a shield) from claims against them alleging FHA-based discrimination⁵⁶ whether or not a disability exists.⁵⁷ Unlike those for the ADA’s direct

48 For example, Pennsylvania Human Relations Act, Act of 1955, P.L. 744, No. 222 (codified as amended at 93 P.S. §§ 951-963) (see specifically 93 P.S. §§55(h)); Pennsylvania Landlord-Tenant Act of 1951, P. L. No. 69 (codified as amended at 68 P.S. §§250.101-250.602); State College Borough Fair Housing and Public Accommodations Ordinance, Ch. V, Pt. E, §5-504 (Ord. 1407, 3/9/1993, sec. 6, as amended by Ord. 1965, 4/18/2011, sec. 1). Residential leases are also considered consumer contracts and subject to state/territorial attorney general oversight of unfair and deceptive acts and practices. See, eg, *Com., by Creamer v. Monumental Properties, Inc.*, 459 PA 450, 329 A.2d 812 (1974); Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1 to §201-9.3.

49 For example, *Caron Foundation of Florida, Inc. v. City of Delray Beach*, 879 F.Supp.2d 1353 (S.D. Fla. 2012); *Erdman v. Nationwide Ins. Co.*, 510 F.Supp.2d 363 (M.D. Pa. 2007), *on reconsideration in part* 621 F.Supp.2d 230, *affirmed* 582 F.3d 500, *on remand* 2010 WL 235112; *Macfarlan v. Ivy Hill SNE, LLC*, 675 F.3d 266 (3d Cir. 2012).

50 FHA obligations do not apply to any single-family house so long as the landlord/seller does not own more than three similar properties or to any owner-occupied dwellings containing four or fewer units. 42 U.S.C. § 3603(b).

51 42 U.S.C. § 3604; Note the FHA uses the disfavored term ‘handicap’ rather than disability, but both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). See also U.S. Department of Justice and U.S. Department of Housing and Urban Development, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Modifications under the Fair Housing Act*, Mar. 5, 2008, https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf (accessed Apr. 18, 2020) (discussing the usage of ‘disability’ in lieu of ‘handicap’ even within HUD guidance on FHA).

52 42 U.S.C. § 3604(f)(2)(A)-(C).

53 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204.

54 24 U.S.C. § 100.202(c). Inquiries are permissible in a few specific instances (even if they might elicit disability-related information) enumerated in 24 U.S.C. § 100.202 (c)(1)-(5).

55 42 U.S.C. § 3604(f)(9); 24 C.F.R. § 100.202(d).

56 For example, *Township of West Orange v. Whitman*, 8 F.Supp.2d 408, 428 (D. NJ 1998) (finding that the direct threat exemption was not intended to be used as a sword by neighbors or municipal authorities, eg, to enjoin the location of group homes for individuals with mental illnesses in residential neighborhoods). A similar ‘direct threat’ exemption is found in the ADA. See 42 U.S.C. § 12182(b)(3); 29 C.F.R. § 1630.2(r).

57 United States Department of Justice, *The Fair Housing Act*, last updated Dec. 21, 2017, <https://www.justice.gov/crt/fair-housing-act-1> (accessed Apr. 18, 2020) (explaining, ‘The Fair Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the persons or property of others.’ Emphasis added).

threat exemption,⁵⁸ the FHA regulations for the direct threat exemption do not articulate a specific standard to make the determination. Because the FHA is administered and enforced by the U.S. Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ), courts typically give deference to their guidance on the direct threat exemption.⁵⁹ Invocation of the direct threat exemption to exclude individuals from housing cannot be based upon ‘fear, speculation, or stereotype’ but requires an individualized assessment⁶⁰ based on ‘objective evidence...and not from unsubstantiated inferences.’⁶¹ As per joint guidance from HUD/DOJ issued in 2004, a housing provider is to consider ‘(1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat’ and should also consider ‘whether the individual has received intervening treatment or medication that has eliminated the direct threat (ie, a significant risk of substantial harm).’⁶² A subjective good-faith belief that there is a significant risk is insufficient, as the risk assessment ‘must be based on medical or other objective evidence.’⁶³ Moreover, when reviewing a direct threat determination, courts have indicated ‘the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority.’⁶⁴

IV. FAIR HOUSING AND COVID-19

Applying fair housing law principles to the unsettling circumstances of the COVID-19 pandemic raises a number of distinct questions,⁶⁵ including whether COVID-19 status might confer protection as a disability and, regardless of whether COVID-19 status is a disability, whether landlords can rely upon the direct threat exemption during the COVID-19 pandemic to make housing decisions that might otherwise violate FHA.

Communicable, infectious diseases have been considered previously with regard to nondiscrimination protection. The Supreme Court had noted in 1987 in an employ-

58 42 U.S.C. § 12182(b)(3); 29 C.F.R. § 1630.2(r) (which instructs the assessment should be made using ‘reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence’ and should consider at least four factors: ‘(i) the duration of the risk; (ii) The nature and severity of the potential harm; (iii) The likelihood that the potential harm will occur; and (iv) The imminence of the potential harm’). See also *School Bd of Nassau Cty. v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987).

59 For example, *Simmons v. T.M. Assocs. Mgmt., Inc.*, 287 F. Supp. 3d 600, 605 (W.D. Va. 2018).

60 U.S. Department of Justice and U.S. Department of Housing and Urban Development. *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations under the Fair Housing Act*. May 17, 2004, at 4, <https://www.hud.gov/sites/documents/huddojstatement.pdf> (accessed Apr. 18, 2020).

61 For example, *United States v. Massachusetts Indus. Fin. Agency*, 910 F. Supp. 21, 27 (D. Mass. 1996) (quoting H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988) reprinted in 1988 U.S.C.C.A.N. 2173, 2191).

62 U.S. Department of Justice and U.S. Department of Housing and Urban Development. *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations under the Fair Housing Act*, May 17, 2004, at 4, <https://www.hud.gov/sites/documents/huddojstatement.pdf> (accessed Apr. 18, 2020).

63 *Bragdon v. Abbott*, 524 U.S. 624, 649, 118 S.Ct. 2196, 2210, 141 L.Ed.2d 540 (1998) (involving the direct threat exemption under the ADA rather than the FHA).

64 *Id.* at 650, 118 S.Ct. at 2211.

65 See, eg, Scott P. Moore, *Fair Housing Issues and COVID-19*, BAIRDHOLM, Mar. 17, 2020, <https://www.bairdholm.com/publications/entry/fair-housing-issues-and-covid-19-1.html> (accessed Apr. 18, 2020).

ment discrimination case involving an individual with tuberculosis, ‘few aspects of a [disability] give rise to the same level of public fear and misapprehension as contagiousness.’⁶⁶ Providing nondiscrimination protections for individuals with HIV/AIDs was prominent in advocacy for the passage of the ADA in 1990.⁶⁷ As Webber and Gostin observed, ‘Attempts by critics of the proposed ADA to exclude persons with infectious or communicable diseases from coverage were unsuccessful, which again emphasizes congressional intent in extending protection.’⁶⁸ While chronic conditions (regardless of asymptomatic or symptomatic status) such as tuberculosis and HIV/AIDs are squarely within the legal definition of disabilities, it is unlikely that COVID-19 would be a recognized disability. Temporary or intermittent conditions—even if substantially limiting major life activities or major bodily functions—have not typically risen to the level of disability afforded protection by nondiscrimination statutes.⁶⁹ While amendments made to the ADA in 2008 have lowered the level of impairment required for recognition of an ‘actual disability’ or ‘record of disability’ for episodic conditions, the ADA statute and regulations explicitly reject impairments that are ‘transitory and minor’ with ‘an actual or expected duration of 6 months or less’ from legal protection for ‘being regarded as’ having a disability.⁷⁰ While analogous text is not present within the FHA regulations,⁷¹ FHA cases have been handled similarly. For example, a 21-day respiratory infection occurring near the end of a lease term that affected the tenant’s ‘ability to plan, search, and make arrangements to move out’ was not sufficient to qualify as a disability under FHA and require the landlord to agree to the tenant’s request of a three-month lease extension as an accommodation.⁷² All individuals, regardless of their COVID-19 status, are deserving of adequate housing. Nevertheless, while the pandemic continues to spread in the absence of any proven treatments and vaccines,

66 *Arline*, *Supra* note 58, at 284, 107 S.Ct., at 1129 (explaining at FN12, ‘The isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness. Tuberculosis is no exception. See R. DUBOS & J. DUBOS, *The White Plague* (1952); S. SONTAG, *Illness as Metaphor* (1978)’).

67 David W. Webber and Lawrence O. Gostin, *Discrimination Based on HIV/AIDS and Other Health Conditions: “Disability” As Defined Under Federal and State Law*, 3 J HEALTH CARE L. & POL’Y 266, 274–275 (2000).

68 *Id.* at 274.

69 For example, *Rinehimerv. Cemcolift, Inc.*, 292 F.3d 375, 380 (3d Cir. 2002) (involving pneumonia); *Macfarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, (3d Cir. 2012) (involving a four-month inability to lift); *West v. Palo Alto Housing Corporation*, 2019 WL 2549218 (N.D. CA. 2019) (involving a 21-day respiratory infection); *Land v. Baptist Medical Center*, 164 F.3d 423 (8th Cir. 1999) (wherein the court rejected a claim that a severe peanut allergy substantially limits eating and breathing noting the impairment is only present when exposed to the allergen).

70 42 U.S.C. § 12102(3)(B); Amendments of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53204–53243 (Final Rule, Aug. 11, 2016), codified in relevant part at 28 C.F.R. §§ 35.108(d)(1)(ii); 36.105(d)(1)(ii); 36.105(d)(1)(ix); 35.108(f); and 36.105(f) (clarifying that whether an impairment meets the meaning of disability is if it substantially limits a major life activity in comparison to most people in the general population, that a condition in remission would be a disability if substantially limiting major life activity when active, and that the ‘transitory and minor’ exception applies to the third prong of the disability definition). The ‘transitory and minor’ exception was added by Congress to prevent disabilities from being interpreted too broadly and specifically to eliminate from disability protection ‘common ailments like the cold or flu’ 81 Fed. Reg. at 53239. Time will tell if COVID-19 becomes a common ailment.

71 24 U.S.C. § 100.201 (Definitions of handicap and is regarded as having an impairment lack text regarding duration of the impairment).

72 *West v. Palo Alto Housing Corporation*, 2019 WL 2549218 (N.D. CA. 2019).

it seems at least plausible that—in the context of who, if anyone, should be in a statutorily protected class entitled to reasonable accommodation—those individuals with ‘unknown’ COVID-19 status and individuals who test ‘negative’ for the SARS-CoV-2 virus or antibodies are more in need of legal protection (given their chronic susceptibility to the infection, which substantially limits their ability to engage in major life activities) than those who are temporarily COVID-19 ‘positive’. While temporary stigma and fear of contagiousness are foreseeable, many who contract COVID-19 (perhaps as high as 80 per cent) will remain asymptomatic or experience mild symptoms⁷³ and, as a result, not experience a substantial limitation to major life activities or major bodily functions (at least not beyond the period of acute illness) for which disability protections would be apt. It is possible that those who experience lingering problems from COVID-19 might have a disability for which a reasonable accommodation is required. What is reasonable, however, will be context-specific for the individuals involved and as our biomedical understanding of COVID-19 improves. A specific accommodation is not ‘necessary’ just because it would ameliorate a disability.⁷⁴ Housing providers responding to the public health emergency might initiate new policies and procedures, including enhanced infection control and social distancing measures (ranging from closing common facilities and increasing cleaning schedules to restricting visitors and encouraging symptom monitoring and self-quarantine reporting). In the context of the COVID-19 pandemic, housing providers are uncertain as to which measures are necessary to meet baseline, general responsibilities to offer safe and sanitary housing facilities for any tenants; which might be considered optional; and which additional, specific measures might be required upon request as reasonable accommodations to ensure equal opportunity.

To date, HUD has issued only minimal guidance on COVID-19 regarding fair housing obligations,⁷⁵ referring housing providers generally to CDC guidelines⁷⁶ and indicating simply, ‘Exigencies associated with important and timely response to issues surrounding COVID-19 are not the basis for unlawful discrimination on race, color, religion, national origin, sex, disability, or familial status.’⁷⁷ As of April 30, 2020, neither HUD nor DOJ has issued guidance directly regarding the direct threat exemption; however, the Equal Employment Opportunity Commission updated its ADA technical assistance document a month earlier⁷⁸ and indicated in relevant part:

73 See, eg, Tenu Avafia et al., *A Rights-Based Response to COVID-19: Lessons Learned from HIV and TB Epidemics*, HEALTH HUM RIGHTS J, Mar. 24, 2020, <https://www.hhrjournal.org/2020/03/a-rights-based-response-to-covid-19-lessons-learned-from-hiv-and-tb-epidemics/> (accessed Apr. 15, 2020).

74 *Vorchheimer v. Philadelphian Owners Association*, 903 F.3d 100, 107–109 (3d Cir. (PA) 2018) (explaining landlords are not required to provide a tenant with a disability with the ‘best possible’ or their ‘preferred’ accommodations).

75 FHA Office of Multifamily Housing Stakeholders: Coronavirus (COVID-19) March 16, 2020, https://www.hud.gov/sites/dfiles/Housing/documents/MF_Corona_QA_FINAL_3-12-20.pdf (accessed Apr. 30, 2020).

76 *Id.* at 2.

77 *Id.* at 3 (answer to Q3, which was last updated Mar. 12, 20).

78 U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, Mar. 21, 2020, https://www.eeoc.gov/facts/pandemic_flu.html (accessed Apr. 17, 2020). See also, Henry T. Greely, *Covid-19 ‘Immunity Certificates’: Practical and Ethical Conundrums*, STAT NEWS, Apr. 10, 2020, <https://www.statnews.com/2020/04/10/immunity-certificates-covid-19-practical-ethical-conundrums/> (accessed Apr. 17, 2020).

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.

Paradoxically, this suggests that individuals who have been diagnosed with COVID-19 or exhibit symptoms could also be a direct threat for FHA purposes and, as a result, experience a reduction in housing protections during the precise time when their housing stability is needed most to protect the health of the public (as well as their own). It is an unsettled legal question as to whether individuals who, while not having a COVID-19 confirmed diagnosis or symptoms, could be considered a direct threat by virtue of their occupation in a sector of the economy deemed ‘essential’ or life-saving (eg, as a healthcare provider, mail carrier, sanitation worker, bank teller, grocery store associate, mechanic, meatpacker, flight attendant, etc.) ‘Associated with’ discrimination in housing has long been forbidden, but it is unclear whether a blanket ‘direct threat’ statement by governmental agencies (such as HUD) would open the door to a ‘direct threat’ defense if a housing provider made decisions against individuals who are ‘associated with’ COVID-19 positive individuals through their occupations.⁷⁹ An individualized assessment would still be warranted to focus not only on the positive COVID-19 status itself (and objective medical evidence about the associated transmission likelihood) but also the individual’s relevant conduct and behaviors that could exacerbate or mitigate their risk of harming others.⁸⁰ While one might argue that ‘essential’ workers have increased exposures and increased risk of becoming infected and spreading COVID-19 to others, healthcare providers also have increased training and might engage in enhanced infection control behaviors that sufficiently neutralize any ‘direct threat’ they might pose. An individualized assessment might remain difficult for housing providers to implement, as the best available scientific and medical understanding of COVID-19 continues to be hampered by inadequate testing.⁸¹ For example, the

79 ‘Associated with’ discrimination has been rarely litigated. It seems unlikely that the defense would be applicable. See, eg, *Castro-Ramirez v. Dependable Highway Express, Inc.*, 207 Cal. Rptr. 3d 120, 33 A.D. Cases 39 (Cal. App. 2 Dist. 2016); *Larimer v. IBM Corp.*, 370 F.3d 698 (7th Cir. 2004).

80 That an individual is infected is not enough to warrant absolute ‘direct threat’ determinations. The conduct or behavior of the individual (including infection control behaviors and adherence to proper treatment, when available) is relevant to determine whether he/she/they pose a ‘direct threat’ to others. See, eg, *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, NY*, 808 F.Supp. 120, 137 (N.D. NY 1992) (finding HIV positive status is not, by itself, sufficient to support a finding of direct threat).

81 Robinson Meyer and Alexis C. Madrigal, *A New Statistic Reveals Why America’s COVID-19 Numbers Are Flat*, THE ATLANTIC, Apr. 16, 2020, <https://www.theatlantic.com/technology/archive/2020/04/us-coronavirus-outbreak-out-control-test-positivity-rate/610132/> (accessed Apr. 17, 2020); Amy Harmon, *Why We Do Not Know the True Death Rate for Covid-19*, N.Y. TIMES, Apr. 17, 2020 <https://www.nytimes.com/2020/04/17/us/coronavirus-death-rate.html> (accessed Apr. 17, 2020).

infection fatality rate is unknown and unknowable under current conditions,⁸² and it remains unclear whether what (if any) immunity from reinfection antibodies might confer and for how long such benefits might last.⁸³ Other case-by-case considerations might be if housing providers know that other tenants are immunocompromised or otherwise at high risk, in which case they might be faced with competing obligations to provide safe, healthful housing. For the time being, it seems likely that housing providers will be given some leeway so long as they act reasonably under the circumstances and base their decisions on objective, reliable, and current scientific information about COVID-19.

V. CONCLUSION

Health and housing problems require a holistic solution—and not just during a pandemic. The idea of adequate housing as a ‘wrap around’ healthcare service had been suggested⁸⁴ even before the COVID-19 pandemic brought to clearer light the precarious ways in which housing stability affects health and well-being of individuals, families, and communities. The determination of fair housing obligations in the midst of the COVID-19 pandemic (ie, is COVID-19 status a disability and, nevertheless, is a ‘direct threat’ defense available to shield housing providers from discrimination claims) is highly dependent upon the rapidly changing scientific understanding⁸⁵ of the disease, its typical duration and severity, and its yet-to-be-determined long-term health impacts. The problems highlighted by this outbreak are too complex for fair housing alone to handle and underscore the need to acknowledge that ‘[l]egal patches and ethical aspirations alone do not administer vaccines, conduct disease surveillance, provide basic treatments, or assure other core public health services.’⁸⁶ Rather than try to force-fit COVID-19 into the framework of legal obligations of nondiscrimination and reasonable accommodation of disabilities, we must press for more comprehensive affirmative duties on our government (at federal, state, and local levels) to respect, protect, and fulfill a right (embodied by the interdependent rights already articulated not only in the U.S. Constitution but also in core international human rights instruments) to public health.

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82 See, eg, Max Roser et al., *Coronavirus Disease (COVID-19) Statistics and Research*, OUR WORLD IN DATA, Apr. 17, 2020, <https://ourworldindata.org/coronavirus#what-do-we-know-about-the-risk-of-dying-from-covid-19> (accessed Apr. 17, 2020).

83 For example, Jennifer Abbasi, *The Promise and Peril of Antibody Testing for COVID-19*, JAMA, Apr. 17, 2020, https://jamanetwork.com/journals/jama/fullarticle/2764954?fbclid=IwAR0sjyMc6xdUcnwLR3hMVHtu53_gI3Mg328luQe3SVmdLpw47q8ITf0uQDQ (accessed Apr. 18, 2020).

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