No. 21-40137

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAUREN TERKEL; PINEYWOODS ARCADIA HOME TEAM, LIMITED; LUFKIN CREEKSIDE APARTMENTS, LIMITED; LUFKIN CREEKSIDE APARTMENTS II, LIMITED; LAKERIDGE APARTMENTS, LIMITED; WEATHERFORD MEADOW VISTA APARTMENTS, L.P.; MACDONALD PROPERTY MANAGEMENT, L.L.C.,
Plaintiffs-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, in her official capacity as Director of the Centers for Disease Control and Prevention; SHERRI A. BERGER, in her official capacity as Acting Chief of Staff for the Centers for Disease Control and Prevention; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services; UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas

REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

No. 21-40137, Terkel v. Centers for Disease Control and Prevention

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Barker, J. Campbell, U.S. District Court Judge

Barnes, Sr., Joseph Aaron

Becerra, Xavier

Beckenhauer, Eric

Berger, Sherri A.

Boynton, Brian M.

Ganjei, Nicholas J.

Henneke, Robert Earl

Hermann, Kimberly S.

Klein, Alisa B.

Lakeridge Apartments, Ltd.

Lufkin Creekside Apartments, Ltd.

Lufkin Creekside Apartments II, Ltd.

MacDonald Property Management, LLC

Myers, Steven A.

O'Leary, Celia Howard

Pineywoods Arcadia Home Team, Ltd.

Southeastern Legal Foundation

Springer, Brian J.

Terkel, Lauren

Texas Public Policy Foundation

U.S. Centers for Disease Control and Prevention

U.S. Department of Health and Human Services

United States of America

Vigen, Leslie Cooper

Walensky, Rochelle P.

Walters, Ryan Daniel

Weatherford Meadow Vista Apartments, LP

Weldon, Chance Dean

s/ Brian J. Springer
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INTRODUCTION

Plaintiffs and their amici do not dispute that the COVID-19 pandemic has devastated domestic industries, killed more than 600,000 Americans, and caused unprecedented restrictions on interstate and foreign travel. They nevertheless insist that Congress lacked authority to authorize or extend a temporary moratorium on residential evictions as a means to curb the interstate spread of COVID-19. As our opening brief explained, that argument is foreclosed by Supreme Court precedent, which leaves no doubt that the eviction moratorium is a permissible means of protecting interstate commerce. Unsurprisingly, the landlords in other cases involving the same eviction moratorium—including in a filing before the Supreme Court—have not defended the reasoning of the district court in this case.

ARGUMENT

I. The Temporary Eviction Moratorium Is A Permissible Means Of Protecting Interstate Commerce From The Devastation Caused By The COVID-19 Pandemic

A. Plaintiffs and their amici do not dispute that COVID-19 has taken a devastating toll on interstate commerce. *See, e.g.*, Texas Br. 16 ("No one disputes the impact that COVID-19 has had on the national economy."). As our opening brief explained, the pandemic has decimated domestic industries, overwhelmed healthcare providers, and interfered with interstate and foreign travel. Gov't Br. 10-12. For example, ten months after the initial wave of closures due to COVID-19, more than 16% of the hospitality and leisure sector's labor force was unemployed. Temporary

Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,733 (Mar. 31, 2021). Interstate travel has been subject to novel restrictions, such as testing prior to travel and quarantining after travel. *Id.*

Faced with that dire threat, Congress was unquestionably empowered "to protect the nation's commerce by enacting such laws as it deems 'necessary and proper.'" *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000) (quoting *United States v. Robinson*, 119 F.3d 1205, 1209 (5th Cir. 1997) (quoting U.S. Const. art. I, § 8, cls. 3, 18)). Indeed, the Supreme Court regarded it as self-evident that Congress can adopt measures that are "reasonably adapted" to controlling an "interstate epidemic." *United States v. Comstock*, 560 U.S. 126, 142-43 (2010) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause)); *see also* Tr. of Oral Arg. at 29, *Comstock*, 560 U.S. 126 (No. 08-1224) (Justice Scalia: "[I]f anything relates to interstate commerce, it's communicable diseases, it seems to me.").

The eviction moratorium easily satisfies that standard. As a motions panel of the D.C. Circuit recently explained, the moratorium is "carefully targeted . . . to the subset of evictions . . . determined to be necessary to curb the spread of the deadly and quickly spreading [COVID]-19 pandemic." *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646, at *2 (D.C. Cir. June 2, 2021) (*AAR*), *application to vacate stay denied*, No. 20A169, 2021 WL 2667610 (S. Ct. June 29, 2021). Due to the pandemic's economic impact, a wave of evictions was expected on a scale unprecedented in modern times. *See* Temporary Halt in

Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,295 (Sept. 4, 2020). Absent the moratorium, a significant portion of those evicted would likely have been forced to move into congregate living settings, such as homeless shelters, where it is difficult to adhere to disease-control measures like isolation, quarantine, and social distancing. 86 Fed. Reg. at 16,733-34. The moratorium that Congress approved and extended was therefore judged "necessary to prevent the introduction, transmission, or spread of communicable diseases . . . *from one State or possession into any other State or possession*." 42 U.S.C. § 264(a) (emphasis added).

The emphasized language is not, as plaintiffs declare, a "fleeting reference" to interstate commerce. Pls. Br. 11. Plaintiffs note (Br. 41) that the federal government had not imposed an eviction moratorium prior to the COVID-19 outbreak, but as the D.C. Circuit motions panel explained, "no public health crisis even approaching the scale and gravity of this one has occurred since the Public Health Service Act was passed in 1944," *AAR*, 2021 WL 2221646, at *3. COVID-19 does not respect state borders, and the people of the United States are not dependent on any individual State to protect them from the interstate transmission of communicable disease. Accordingly, the landlords in *AAR* acknowledged in their recent Supreme Court filing that "Congress *can* adopt an eviction moratorium in response to a pandemic." Reply

in Support of Emergency Application at 5, *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20A169 (S. Ct. June 14, 2021) (the landlords' emphasis).[1]

B. Plaintiffs' objections rest on multiple independent errors. First, contrary to plaintiffs' premise, Congress can protect interstate commerce through means other than the direct regulation of economic activities. Indeed, plaintiffs do not dispute that Congress can rely on measures such as the quarantine of individuals, 42 U.S.C. § 264(b)-(d), and the destruction of property, *see id.* § 264(a), to curb the interstate spread of communicable disease. As Justice Scalia explained in the concurring opinion on which plaintiffs rely (Br. 16), "the commerce power permits Congress . . . to facilitate interstate commerce by eliminating potential obstructions," and the "relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Gonzales v. Raich*, 545 U.S. 1, 35, 37 (2005) (Scalia, J., concurring in the judgment). That the eviction moratorium protects human life and public health "does not detract from the overwhelming evidence of the disruptive effect" that the pandemic "has had on commercial intercourse." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

[1] Similarly, in a merits brief recently filed in the Sixth Circuit, the landlords did not defend the motions panel's suggestion that the eviction moratorium "pushed the limits of Congress's Commerce Clause authority," *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, 992 F.3d 518, 523 (6th Cir. 2021). *See* Brief for the Plaintiffs-Appellees, *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, No. 21-5256 (6th Cir. June 11, 2021).

Second, "the nature of the regulated activity is economic." *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 630 (5th Cir. 2003). The eviction moratorium falls within Congress's "well-established authority to regulate rental housing transactions." *AAR*, 2021 WL 2221646, at *3. The Supreme Court has explained on more than one occasion that the "rental of real estate" is "unquestionably" an activity affecting interstate commerce. *Jones v. United States*, 529 U.S. 848, 856 (2000) (quoting *Russell v. United States*, 471 U.S. 858, 862 (1985)). As this Court has observed, those cases "make clear that renting and otherwise using housing for commercial purposes implicates the federal commerce power." *Groome*, 234 F.3d at 206.

Evictions are an integral part of that economic activity because they serve as a remedy for violations of the contract that governs the rental arrangement. *See* Gov't Br. 14-15. As plaintiffs' own complaint explains, plaintiffs are in the business of renting residential properties, and the eviction remedy generally enables them "to replace tenants that failed to pay their rent with others that would fulfill their obligations in exchange for occupying the property." ROA.14. That is quintessential economic activity. Plaintiffs' attempt to reframe this case as involving only the "simple possession of a piece of property," Pls. Br. 20, ignores the fact that their tenants' occupancy of the premises is the result of commercial rental arrangements.

Plaintiffs' remaining commerce-power arguments fail for the reasons discussed in our opening brief.[2]

II. Plaintiffs' Other Issues Are Not Properly Before This Court

Other issues that plaintiffs attempt to raise are not properly before this Court. For example, plaintiffs assert in a footnote (Br. 14 n.5) that "any alleged public health emergency has largely evaporated" as the result of the vaccines that were developed with federal funding. However, the only claim asserted in the complaint was the allegation that the eviction moratorium exceeded Congress's powers under the Commerce Clause and the Necessary and Proper Clause. ROA.25-29. Plaintiffs did not challenge the moratorium as arbitrary and capricious or unsupported by substantial evidence, and they cannot raise such a claim for the first time on appeal.

Likewise, plaintiffs' passing assertion (Br. 9 n.4) that the district court should have granted relief to third parties is not properly before this Court. Plaintiffs did not cross-appeal the scope of relief and, in any event, arguments raised only in a footnote are waived. *See Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 339 n.4 (5th Cir. 2016).

[2] The eviction moratorium is set to expire on July 31, 2021. Although the Order "is subject to revision based on the changing public health landscape, absent an unexpected change in the trajectory of the pandemic, [the agency] does not plan to extend the Order further." Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010, 34,013 (June 28, 2021).

CONCLUSION

For the foregoing reasons and the reasons set out in our opening brief, this Court should reverse the district court's judgment.

Respectfully submitted,

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June 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brian J. Springer
Brian J. Springer

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,519 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer
Brian J. Springer