

Case No. 21-40137

In the United States Court of Appeals for the Fifth Circuit

LAUREN TERKEL, et al.,
Plaintiff-Appellees,

v.

CENTER FOR DISEASE CONTROL AND PREVENTION, et al.
Defendant-Appellants.

**On Appeal from the United States District Court
For the Eastern District of Texas,
Case No. 6:20-cv-00565**

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE

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INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the state and federal level. The staff at The Buckeye Institute accomplishes the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute’s Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. Increasingly, that government overreach comes in the form of agency rules and regulations imposed by unelected bureaucrats.

The Buckeye Institute has taken the lead in Ohio and across the country in advocating for the roll-back of government regulations that unnecessarily burden and discourage private industry and initiative.

SUMMARY OF THE ARGUMENT

In its March 2021 eviction moratorium order (“the Order”), the Center for Disease Control (“CDC”) purports to exercise sweeping federal power over intrastate contractual relationships and intrudes upon states’ sovereignty to manage their own internal affairs during the pandemic. Yet the Order’s expansive reach stands in stark contrast to the meager constitutional justification that the CDC offers to support it.

The district court applied the four-part substantial effects test set forth in *United States v. Morrison*, 529 U.S. 598, 612 (2000). Under that test, the court examined (1) whether the local activity had an economic character, (2) whether the challenged order contained a “jurisdictional element” that would establish that “the enactment was in pursuance of Congress’ regulation of interstate commerce”, (3) whether there were any formal findings regarding the substantial burdens that an activity has on interstate commerce, and (4) the extent of attenuation between interstate commerce and the regulated activity. ROA.1677, at 12-15. Applying the Morrison factors, the district court held that the CDC’s Order “exceeds the power granted to it by the federal government ‘to regulate Commerce . . . among the several States’ and to ‘make all law Laws which shall be necessary and proper for carrying into Execution’ that power.” *Id.* at 20 (internal citations omitted).

In addition to the four factors analyzed by the district court, the CDC's interpretation violates what has been dubbed the non-infinity principle, because the CDC's position admits of no limiting principle, and would eviscerate the limits on the national government established by the Constitution.

This constitutional infirmity has real world consequences. Allowing an administrative agency tasked with disease prevention to take the reins of housing policy in fifty states without articulating its authority to do so assigns to the agency policy decisions far outside its expertise. The eviction moratorium—in its several administrative and legislative iterations—has already created unintended consequences in the housing market. Rather than protect the most vulnerable, the eviction moratorium is likely to lead to fewer and more expensive housing options. In addition, the moratorium has already inflicted significant economic hardship on small landlords, who must continue to maintain their properties and pay mortgages and taxes without receiving rental income. While unintended consequences do not, by themselves, render an action unconstitutional, the damage done to the housing market is regrettably unsurprising given how far beyond its competence and constitutional authority the CDC acted in issuing the Order. The Constitution does not require that the federal government's actions be prudent or wise. But it does require that those actions find root in one of the federal government's enumerated powers.

ARGUMENT

A. The CDC's Order and the Expansion of the Regulatory State

In his November 2020 address to the Federalist Society, Justice Samuel Alito noted that “[t]he pandemic has resulted in previously unimaginable restrictions on individual Liberty.” Justice Samuel Alito, Address to the Federalist Society 2020 National Lawyers Convention, Nov.12, 2020, <https://fedsoc.org/conferences/2020-national-lawyers-convention?#agenda-item-address-8>. Justice Alito likened the COVID crisis to a “sort of constitutional stress test” that highlighted “disturbing trends that were already present before the virus struck.” *Id.* Foremost among those disturbing trends that Justice Alito identified was “the dominance of lawmaking by executive fiat, rather than legislation.” *Id.*

Concern over the expanding regulatory state is nothing new. In the 1970s, critics raised concerns of Congressional “delegation as abdication,” arguing that “an unaccountable and headless fourth branch of government—the bureaucrats—had come to run American politics” Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANNU. REV. POLITICAL SCI. 37, 39 (2019) (internal citations omitted). In the mid-1980s, commentators observed that “[a]dministrative agencies today have enormous power to make fundamental policy decisions that the Constitution assigns to Congress as the branch of government most representative of the majority's views.” *Id.* “More and more legislation has been originating with

the executive branch of government.” *Id.*

Independent agencies “hold enormous power over the economic and social life of the United States.” *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Administrative law “constrain[s] Americans in all aspects of their lives, political, economic, social, and personal,” having become “the government’s primary mode of controlling Americans.” Philip Hamburger, *IS ADMINISTRATIVE LAW UNLAWFUL?* 1 (2014). Administrative processes intrude upon many facets of American life that may well have been thought the proper province of private life and business, including brushing one’s teeth, 606 C.M.R. § 7.11(11)(d); selling fresh milk, Stephen Dinan, *Feds Shut Down Amish Farm for Selling Fresh Milk*, WASH. TIMES (Feb. 13, 2012); or filling holes on one’s land, see *Sackett v. EPA*, 566 U.S. 120, 124-25 (2012). With literally “hundreds of federal agencies poking into every nook and cranny of daily life,” “the danger posed by the growing power of the administrative state cannot be dismissed.” *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

The CDC’s Order epitomizes the kind of executive overreach that concerned Justice Alito. The Order’s substantial impact on intrastate private contractual arrangements—superseding millions of intrastate lease agreements and curtailing the fundamental state property rights of millions of landlords—is

particularly troubling because the CDC’s reading of the Commerce Clause does not admit to any limiting principle.

The Commerce Clause is “one of the most prolific sources of national power,” *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534 (1949). In keeping with the Supreme Court’s decisions in *United States v. Lopez*, 514 U.S. 549 (1996) and *United States v. Morrison*, 529 U.S. 598 (2000), this Court has recognized that while broad, federal authority under the Commerce Clause “is cabined within constitutionally determined “outer limits.” *Groome Resources Ltd. v. Parrish. of Jefferson*, 234 F.3d 192, 202–03 (5th Cir. 2000) (internal citations omitted).

B. The Non-Infinity Principle

The CDC’s view of the Commerce Clause imposes virtually no limits on the CDC’s regulatory power. This view runs afoul of what commentators have labeled “the non-infinity principle.” See David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez & the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (1997). The non-infinity principle arose out of *Lopez* and focuses on the scope of the arguments made:

Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 564.

Simply put, “for a Commerce Clause rationale to be acceptable under *Lopez*, it must not be a rationale that would allow Congress to legislate on everything. In a sense, this principle is a restatement of the holding of *Lopez*, since the case holds that the commerce power is not unbounded.” Kopel & Reynolds, *supra* at 69. Likewise, the *Morrison* court’s statement that it could not accept a rationale for Congressional authority under the Commerce Clause so broad that it would permit Congress to regulate any activity imaginable so long as it somehow touched upon interstate commerce rests on the non-infinity principle. *See* Robert A. Klink, *Pain Relief Promotion Act*, 38 HARV. J. ON LEGIS. 249, 260 (2001) (identifying the non-infinity principle in *Morrison*).

The non-infinity principle is thus particularly applicable here, where the CDC has asserted that its power to regulate housing under the mantle of disease prevention is plenary and not tied to COVID-19 pandemic. *See*, ROA.1671, Hr’g Tr. (Doc. 21) at 56:11-23. Under the rationale advanced by the CDC here, it is difficult to imagine any activity that it could not regulate. Health is inextricably tied to economics. Economic distress correlates to less access to health care and more acute and chronic health problems. *See, e.g.*, Angus Deaton, *Health, Inequality, and Economic Development*, 41 JOURNAL OF ECON. LIT. 113-15 (2003); Ralph Catalano, *The Health Effects of Economic Insecurity*, 81 AM. J. PUBLIC HEALTH, VOL. 1148 (1991). And health problems can prevent people from working, which in the aggregate

affects the ability to engage in interstate commerce and the national fisc. With no limiting principle, the CDC could conceivably require everyone in the country to get an annual medical check-up, have certain medical tests performed, or have certain vaccines administered. Setting aside the wisdom of these policies or whether they might violate other constitutional protections, the Framers' promise of a limited federal government exercising only enumerated powers becomes meaningless.

C. The Moratorium's Unintended Consequences

Ironically, the CDC's regulation of intrastate contractual relations ignores Hippocrates' admonition to "first, do no harm." And while this court is not charged with assessing the wisdom of the CDC's eviction moratorium, the constitutional defect of an administrative agency exercising national police power over intrastate contractual relationships manifests itself—predictably—through a host of unintended consequences that may in fact undermine low-income Americans' ability to find housing. These unintended consequences highlight the danger of allowing administrative agencies to set national policy in areas beyond their core competencies without establishing a substantial effect on interstate commerce.

1. The moratorium will make it more difficult for low-income Americans to find housing.

According to the 2018 Rental Housing Finance Survey from the U.S. Census, almost 20 million rental units of a little over 48 million in the country are owned by individual owners rather than corporations. U.S. Department of Housing and Urban

Development, *HUD AND CENSUS BUREAU RELEASE FINDINGS OF RENTAL HOUSING FINANCE SURVEY: Survey Finds Nearly Half of Rental Units are in Rental Properties with Four or Fewer Units*, https://www.hud.gov/press/pressreleases_media_advisories/HUD_No_20_071 (last visited June 2, 2021).

Roughly 86 percent of all rental properties contain only one rental unit. *Id.*

As Harvard University’s Joint Center for Housing Studies explained over a year ago, the inability of small landlords to collect rent or re-let their properties to rent-paying tenants will result in fewer housing options:

If too many rent payments are missed, there will be ripple effects in the form of unpaid property taxes, deferred maintenance, and mortgage delinquencies. Some small landlords may have to leave the market, opening the possibility of more corporate landlords and loss of rental units to owner-occupancy. The loss of small landlords, who own more than half of the stock renting for less than \$750, may also threaten the already dwindling low-rent stock.

Whitney Airgood-Obrycki and Alexander Herman, *Covid-19 Rent Shortfalls in Small Buildings*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, March 26, 2020, <https://www.jchs.harvard.edu/blog/covid-19-rent-shortfalls-in-small-buildings>.

Further, scholars at the Cato Institute predict that landlords feeling the squeeze may resort to steps that make quality affordable housing harder to find, particularly for Americans with lower-incomes or poor credit, including:

- Imposing new fees or high interest rates (which the CDC order permits) that existing tenants will have to pay—along with past-due rent . . . ;

- Stop[ping] . . . routine maintenance or other “amenities” to affected properties;
- Decid[ing] not to bring new rental supply into the market (e.g., by simply keeping a basement unrented, selling off a rental property, not investing in new properties, or converting a multifamily rental building to condos or Airbnbs); or
- Impos[ing] new and more stringent financial requirements on new tenants (e.g., proof of income or a “good” job, or a higher deposit).

Scott Lincicome, *The CDC Eviction Moratorium: An Epic Case Study in Very Bad Policy*, CATO INSTITUTE, Sept. 18, 2020, <https://www.cato.org/commentary/cdc-eviction-moratorium-epic-case-study-very-bad-policy>. Similarly, writers at Forbes note that [i]n the near term, we can expect to see increases in security deposits, required higher credit scores and more employment verifications for all affordable housing” and predict that “[i]f a prospective renter does in fact have an eviction in [his or her] rental history, that will likely be a nonstarter.” Atticus LeBlanc, *Eviction Moratoriums May Negatively Impact Affordable Housing Supply*, FORBES, Jan, 12, 2021, <https://www.forbes.com/sites/forbesrealestatecouncil/2021/01/12/eviction-moratoriums-may-negatively-impact-affordable-housing-supply/>.

The Brookings Institution notes the moratorium’s impact on at-risk communities, explaining that if “landlords are unable to pay their property taxes, mortgages, workers and contractors, this spiral will worsen already declining economic conditions.” Jenny Schuetz, *Halting Evictions During the Coronavirus*

Crisis Isn't as Good as it Sounds, The Avenue (2020), <https://www.brookings.edu/blog/the-avenue/2020/03/25/halting-evictions-during-the-coronavirus-crisis-isnt-as-good-as-it-sounds/> (last visited Jun 2, 2021). Writing for the progressive Brookings Institution, Schuetz concluded, “[r]ent checks don’t just line the pockets of fat cat landlords—they also contribute to essential government services and other workers’ wages. If many households are simultaneously unable to pay rent, the economic impacts will be felt throughout the local economy.” *Id.* These microeconomic local impacts were plainly not part of the CDC’s calculus. Regardless of the wisdom of the moratorium, these impacts demonstrate what happens when a federal medical research agency takes charge of local housing policy.

2. The Moratorium’s Adverse Economic Impact on Small Landlords.

When considering the relationship between renters and landlords, policymakers too often engage in stereotyping landlords as corporate “fat-cats” better positioned to bear the brunt of an economic downturn by foregoing rent. But as noted above, nearly 40% of rental units are owned by individuals. Further research shows that:

- Among landlord households, about 30 percent are low- to moderate-income (earning annual household incomes of less than \$90,000).
- Property income comprises a greater proportion of low- to moderate-income landlord households’ total income than it does for higher income landlord households.

- Property income for landlord households earning less than \$50,000 provides nearly 20 percent of their total household income.

Kristen Broady, Wendy Edelberg, and Emily Moss, *An Eviction Moratorium Without Rental Assistance Hurts Smaller Landlords, Too*, BROOKINGS, Sept. 21, 2020. For “many mom and pop landlords,” the cost of keeping up a property and paying property taxes can “consume more than half of their property income.” *Id.* As such, “[a] federal ban through year end would ensure what would amount to confiscatory outcomes, such as foreclosure and loss of properties, for some landlords that did no wrong.” Walter Olson, *Citing Public Health Authority, Feds Decree Nationwide Eviction Moratorium*, CATO INSTITUTE, Sept. 2, 2020.

None of this is to downplay the severe economic pain that the pandemic has inflicted on renters. Yet questions remain regarding whether the moratorium is necessary to prevent the wave of evictions that the CDC fears. The Buckeye Institute’s Economic Research Center recently published an article showing that “even when the labor market was at its worst in mid-2020, evictions showed little sign of spiking.” Rea S. Hederman, Jr., *Eviction Moratorium Dubious Impact*, The Buckeye Institute, May 12, 2021, <https://www.buckeyeinstitute.org/blog/detail/eviction-moratorium-dubious-impact> (citing Salim Furth, *When the Moratorium Expires: Three Quick Steps to Reduce Eviction*, Mercatus Center, June 19, 2020). Buckeye’s review of the economic literature further shows that the scope

of any potential eviction wave is unclear, noting that “[t]he Federal Reserve Bank of Philadelphia found that renters are \$8.4 billion behind on their rent, but other research estimates rent arrears between \$13 and \$25 billion in January 2021. And none of these studies measure the effects of President Trump’s \$25 billion in emergency assistance that will help renters catch up on past-due rent.” *Id.* On the other hand, as CNN reported earlier this year, millions of small landlords are at risk of foreclosure because they cannot collect rent or relet their properties. Anna Bahney, *Unpaid Rent Is Piling Up. Landlords Can’t Hold On Forever*, CNN Business, Feb. 27, 2021, <https://www.cnn.com/2021/02/09/success/eviction-moratorium-landlord-plans/index.html>.

CONCLUSION

Over two centuries ago, Chief Justice Marshall observed that in a government of enumerated powers, “the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.” *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). More recently, the *Lopez* court put proof to Justice Marshall’s prediction, stating that “[t]he Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.” Here, however, the CDC’s proposed Commerce Clause interpretation dispenses with any

uncertainty to embrace a federal plenary police power incompatible with a government of enumerated powers.

And while the discussions of the scope enumerated powers can tend toward the abstract, the damage done when agencies jump the Constitution's guardrails creates is rarely theoretical. There are real world consequences. To be clear, The Buckeye Institute is not asking this Court to base its decision on the constitutionality of CDC's Order on the adverse policy outcomes it has created or may yet create. The adverse policy outcomes are merely the symptom of the underlying disease. And while the Court should refrain from treating the policy symptoms, it is obligated to address their underlying cause. For all the foregoing reasons, the district court's decision should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Federal Rules of Appellate Procedure Appendix 6

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Amicus Brief was served on all counsel of record via the Court's electronic filing system this 2nd day of June, 2021.

/s/ Jay R. Carson _____