Case No. 21-5256

In the United States Court of Appeals for the Sixth Circuit

TIGER LILY, LLC, et al.,
Plaintiff-Appellees,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.
Defendant-Appellants.

On Appeal from the United States District Court
For the Western District of Tennessee

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 Halt Order"), the Centers for Disease Control ("CDC") asserted sweeping federal power over millions of private contracts and obviated basic common-law and statutory remedies across the country. The statute on which the CDC relies authorizes the agency to make and enforce regulations to prevent the transmission of communicable diseases and provides that purposes of such regulations the agency may "provide for inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human being, and other measures, as in [the agency's] judgment may be necessary." Public Health Service Act § 361, 42 U.S.C. § 264(a). Yet the CDC's authority to make and enforce housing policy—including criminal penalties—for the entire nation hangs on three little words: "And other measures." *Id*. Those three little words, however, cannot carry the load that the government places upon them.

As the district court, as well as the district courts in Cleveland and District of Columbia, held the CDC's claimed authority is odds with fundamental principles of statutory construction. *See Skyworks, Ltd. v. Centers for Disease Control & Prevention*, N.D.Ohio No. 5:20-CV-2407, 2021 WL 911720, *9, *order clarified*, N.D.Ohio No. 5:20-CV-24072021 WL 2228676; *Alabama Assn. of Realtors v. United States Dept. of Health & Human Services*, 2021 WL 1779282, *6.The

complementary principles of *ejusdem generis* and *noscitur a sociis*, as well as common sense, preclude the CDC's expansive reading.

This agency overreach has real world consequences. Allowing an administrative agency tasked with disease prevention to seize the reins of housing policy in fifty states based on an overbroad reading of catch-all phrase assigns to the agency decisions far outside its policy 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 statutory authority the CDC acted in issuing the Halt Order.

ARGUMENT

I. 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). Serious concerns have therefore been raised about the impact of administrative rulemaking on civil liberties. See, e.g., Robert Alt, *The Administrative Threat to Civil Liberties, 2018 Bradley Symposium Lecture* at 32:45 (May 15, 2018), available at https://tinyurl.com/AdminThreat (arguing that executive lawmaking, in addition to raising grave constitutional issues, poses unique challenges to civil liberties). 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 Halt Order epitomizes the kind of pandemic related executive overreach that concerned Justice Alito. The Halt Order's intrusion on 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 its authorizing statute admits to no limiting principle.

II. The CDC's Interpretation Violates the Canons of *Ejusdem Generis* and *Noscitur a Sociis*

The district court, as well as the district courts in Cleveland and the District of Columbia anchored their decisions on the twin principles of *ejusdem generis* and *noscitur a sociis*. *See Skyworks, Ltd. v. Centers for Disease Control & Prevention*, N.D.Ohio No. 5:20-CV-2407, 2021 WL 911720, *9, *order clarified*, N.D.Ohio No. 5:20-CV-24072021 WL 2228676; *Alabama Assn. of Realtors v. United States Dept. of Health & Human Services*, 2021 WL 1779282, *6. Commentors have long noted that "canons" of statutory construction are not always canonical. For example, Professor Karl Llewellyn famously argued that for every canon of statutory construction there exists an equal and opposite canon on "almost every point." Llewellyn, *Remarks on the Theory of Appellate Decision & the Rules or Cannons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). *But see*, Antonin Scalia, *A Matter of Interpretation*, at 27 (1997) (arguing that many of Llewellyn's "parries" do not contradict the corresponding canon, but only

demonstrate that the canon is "not absolute"). More cynical scholars have even argued that canons of statutory construction may simply act as cover for judges' "ideological predispositions." *See* James J. Brudney & Corey Ditslear, *Canons of Construction & the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6 (2005).

But the canons of construction on which the district court relied here cannot be written off as rules of convenience. To begin with, scholars trace the *ejusdem generis* canon "at least as far back as the early seventeenth century." Jay Wexler, *Fun with Reverse Ejusdem Generis*, 105 MINN. L. REV. 1, 38 (2020) (citing *Sir John Bingley's Case* (1619) 79 Eng. Rep. 1248 (KB)). And while some commentators have complained that canons of construction can be subject to change, they have identified *ejusdem generis* as "a practically immutable canon." Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 515 (2015). The principle that when general words follow a specific enumeration they are to be held as applying only to things of the same general kind or class as those specifically mentioned carries such weight because it is rooted in common sense and "simply reflects the context-based reasoning that ordinary readers would use even if the canon had never existed by name." *Id.* Likewise, *noscitur a sociis* is "erudite (or some would say antiquated) way of saying what common sense tells us to be true:

[A] word is known by the company it keeps." *James v. U.S.*, 550 U.S. 192, 222 (2007) (Scalia, J., dissenting) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307(1961))[1].

Indeed, in an empirical study of congressional staffers tasked with drafting legislation revealed that these two canons reflect how legislative drafters actually write. Abbe R. Gluck and Lisa Schultz Bressman interviewed 137 congressional counsels with drafting responsibility, equally divided between the House and Senate between both political parties. They found that "[w]ith respect to the general concept underlying both the noscitur and ejusdem rules, 71% of respondents (ninety-seven) said that terms in a statutory list always or often relate to one another, and only two respondents said they rarely or never did." Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, & the Canons: Part I*, 65 STAN. L. REV. 901, 932–33 (2013). And although "[t]he vast majority of respondents [ ] did not know those rules when asked by name (85% did not know *noscitur* and 65% did not know *ejusdem*)" they understood them intuitively. In other words, regardless of the reader's ability to translate Vergil, *ejusdem generis* and *noscitur a sociis* doctrines are potent and clear because they embrace common sense. *See Chiayu Chang v. United States*

[1] Notably, in his list of "Thrusts and Parries," Professor Llewellyn does not list noscitur a sociis as a canon for which an equal and opposite canon exists. See Llewellyn, *supra* at 402-05.

Citizenship & Immigration Services, 289 F.Supp.3d 177, 184 (D.D.C. 2018) ("*Ejusdem generis* is a well-worn, common-sense rule that mirrors how we speak and read.") (internal citations omitted); *California v. Brown*, 479 U.S. 538, 543 (1987) ("The doctrine of *noscitur a sociis* is based on common sense."), *holding modified by Boyde v. California*, 494 U.S. 370 (1990).

Further, judges and commentators from across the philosophical spectrum have embraced *ejusdem generis* and *noscitur a sociis* as obvious checks on agency overreach. For example, in *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019), the Northern District of California applied these principles of statutory construction to hold that the catch-all phrase "or other activity" in Sec. 84 of 10 U.S.C. § 284(a) did not authorize the Secretary of Defense to use funds appropriated for drug interdiction to build a border wall. 379 F.Supp.3d 883, 920, *aff'd*, 963 F.3d 874 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 618 (2020). Similarly in *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court held that the phrase "other concerted activities," which followed a list of topics related to organization and bargaining in the NLRA did not include arbitration procedures. 138 S. Ct. 1612 (2018).

In this case, the statute empowers the agency "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or

possession," and to accomplish those goals, "provide for inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human being, and other measures." 42 U.S.C. § 264(a). As the *Skyworks* court noted, although statute's first sentence would seem to delegate broad authority to the agency, "the statute's first sentence does not stand alone." *Skyworks*, 2021 WL 911720 *9. The second sentence and its illustrative examples relating to inspection, fumigation, etc. explain the types of action that the agency may take and the specific targets of that action. *Id.*

Applying the *ejusdem* and *noscitur* principles to the statute, the "other measures" included in the catch-all provision must be "reasonably of the type Congress contemplated in the statutory test—fumigation, disinfection, destruction of animals or other things . . . ." *Id.* at *10. A nationwide moratorium on certain evictions—superseding state contract and property law remedies—cannot be reasonably construed as the same type of activity Congress included by example in the statute.

In holding against agency reliance on vague and nonspecific statutory language to effect sweeping regulation, Justice Scalia pointed out that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). This observation is particularly apt here, where the regulatory

power asserted in the three little words is no ordinary pachyderm—but as set forth below—a prehistoric wooly mammoth.

III. 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 specific statutory authorization.

A. 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/press_releases_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.

B. 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% or 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

Administrative agencies can only regulate in the areas where Congress has granted them power to do so. The reason for this is not merely theoretical. When agencies exceed their statutory authority 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. Here, the CDC has asserted the power to regulate the U.S. rental housing market on the basis of a catch-all provision that—according to rules of statutory construction that were born out of common sense—relates to the "inspection, fumigation, disinfection, sanitation, pest

extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 U.S.C. §264(a). The statute gives no hint that "and other measures" might include a nationwide eviction moratorium. The CDC Halt Order thus exceeds its statutory authority. For all the foregoing reasons, the district court's decision should be AFFIRMED.

Respectfully submitted,

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June 18, 2021.

CERTIFICATE OF COMPLIANCE

Federal Rules of Appellate Procedure
Appendix 6

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June 18, 2021

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 18th day of June, 2021.

/s/ Jay R. Carson