Regarding the declaratory judgment in *Terkel v. CDC* declaring the CDC eviction halt order unconstitutional

On February 25, 2021, U.S. District Judge J. Campbell Barker issued a ruling in *Terkel v. Centers for Disease Control & Prevention,* No. 6:20-CV-00564, __ F.Supp.3d __, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), that declares the CDC eviction halt order unconstitutional. The Department of Justice has already filed its notice of appeal and announced that the moratorium "remains in effect" for all landlords other than the specific parties to *Terkel*.[1] For at least the time being, however, the ruling poses difficult concerns, both legal and practical, for advocates and pro se tenants who have been relying on the CDC halt order to avoid eviction.

1. Overview of *Terkel* and suggested responses

Previous challenges to the CDC eviction halt order had largely taken for granted that, under the Commerce Clause, Congress could constitutionally authorize the CDC to prohibit residential evictions as a public health measure during a pandemic. *See Chambless Enterprises, LLC v. Redfield,* 2020 WL 7588849 at *8 (W.D.La. 2020); *see also Brown v. Azar,* __ F.Supp.3d __, 2020 WL 6364310 (N.D.Ga. 2020). Those cases centered on claims that Congress had not granted the CDC the authority to suspend residential evictions—or alternatively, if it had, that the statute from which CDC claimed the authority to impose the moratorium[2] conveyed such generalized and unrestrained rulemaking powers that it amounted to an impermissible transfer of Congressional legislative power.[3]

Terkel, however, went much further. Rather than challenging the CDC's order as beyond the agency's authority or as an impermissible delegation of Congressional power to the agency, the issue in *Terkel*

[1] Department of Justice, "Department of Justice Issues Statement Announcing Decision to Appeal *Terkel v. CDC*" (Feb. 27, 2021), https://www.justice.gov/opa/pr/department-justice-issues-statement-announcing-decision-appeal-terkel-v-cdc (hereafter "DOJ Statement").

[2] *See* 42 U.S.C. § 264; *see* 42 C.F.R. § 70.2.

[3] Landlord challengers additionally argued that the CDC order violated the constitutional rights of landlords (e.g., by impermissible infringing on their rights to file lawsuits or by taking property without just compensation), though identical arguments had already repeatedly failed in a prolonged series of federal court challenges to state eviction moratoria. *See, e.g., Auracle Homes, LLC v. Lamont,* 478 F.Supp.3d 199 (D.Conn. 2020); *HAPCO v. City of Philadelphia,* 482 F.Supp.3d 337 (E.D. Pa. 2020); *Elmsford Apartment Assocs., LLC v. Cuomo,* 469 F.Supp.3d 148 (S.D.N.Y. 2020); *Baptiste v. Kennealy,* No. 1:20-CV-11335-MLW, 2020 WL 5751572 (D.Mass. Sept. 25, 2020); *Heights Apartments, LLC v. Walz,* No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818 (D.Minn. Dec. 31, 2020); *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles,* No. CV2005193DDPJEMX, 2020 WL 6700568 (C.D.Cal. Nov. 13, 2020); *El Papel LLC v. Inslee,* No. 220CV01323RAJJRC, 2020 WL 8024348 (W.D.Wash. Dec. 2, 2020), report and recommendation adopted, No. 220CV01323RAJJRC, 2021 WL 71678 (W.D.Wash. Jan. 8, 2021).

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was whether even Congress itself has the authority to prohibit evictions (under the Commerce Clause) during a pandemic. *See Terkel* at *2.

The court in *Chambless Enterprises* had ruled that Congress did have such authority. *See Chambless,* 2020 WL 758849 at *8. Without even discussing *Chambless*, however, *Terkel* reached the opposite conclusion and declared the CDC order unconstitutional:

> "the CDC order exceeds the power granted to the federal government to 'regulate Commerce... among the several States' and to 'make all Laws which shall be necessary and proper for carrying into Execution' that power. U.S. Const. art. I, § 8. The challenged order is therefore held unlawful as "contrary to constitutional . . . power." 5 U.S.C. § 706(2)(B)."

Notably, the court declined to enter an injunction prohibiting enforcement of the CDC halt order, at least for the time being. See *Terkel* at *11 ("Given defendants' representations to the court … it is 'anticipated that [defendants] would respect the declaratory judgment.' So the court chooses not to issue an injunction at this time. Plaintiffs may, of course, seek an injunction should defendants threaten to depart from the declaratory judgment.") (internal citations omitted). This means the *Terkel* ruling is, technically, a declaratory judgment that determines only the rights of the parties before the court. *See* 28 U.S.C. § 2201(a). As the DOJ made clear in a statement accompanying its notice of appeal, the CDC is prohibited from enforcing the order against the specific plaintiffs in *Terkel* but no other parties or other tenants asserting the CDC order as a defense to eviction are bound by the decision. *See* DOJ Statement ("The decision, however, does not extend beyond the particular plaintiffs in that case, and it does not prohibit the application of the CDC's eviction moratorium to other parties); *see also U.S. v. Mendoza,* 464 U.S. 154, 160 (1984) (nonmutual collateral estoppel inapplicable to constitutional claims against federal government).

Nevertheless, the existence of the *Terkel* decision is all but certain to confuse and deter tenants from relying on the CDC order, embolden landlords to pursue evictions with renewed vigor, and confound many advocates and tribunals. And while not legally binding on other cases or courts, the *Terkel* opinion supplies legal cover to state eviction judges—many of whom have reflected disagreement or outright antipathy toward pandemic-related eviction restrictions—who may follow it as persuasive authority. Advocates for individual tenants should be familiar with the flaws in *Terkel* and prepared to explain why state judges in eviction cases should decline to follow the opinion.

2. Recent Commerce Clause jurisprudence relevant to *Terkel*

The starting point for recent Commerce Clause analysis is *U.S. v. Darby,* a New Deal-era challenge to the federal minimum wage established in the Fair Labor Standards Act. See *U.S. v. Darby,* 312 U.S. 100, 109 (1941). In *Darby*, a manufacturer being prosecuted for FLSA violations argued that the regulation of wages and hours for employees (who work in a fixed, intrastate location) is a matter reserved to state control and thus was not a matter on which Congress could regulate under the Commerce Clause. *See Darby* at 113. The court rejected the manufacturer's argument, declaring that the Commerce Clause broadly authorized Congress to regulate intrastate or local activity so long as those activities "so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby* at 118. Under *Darby*, "[w]hatever their motive and purpose,

regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Darby* at 115.

Over time, however, the Supreme Court has retracted the expansive Congressional authority under the Commerce Clause the *Darby* court recognized. By 1995, when the landmark case of *U.S. v. Lopez* was decided, Commerce Clause authority had been narrowed to three general categories: (i) "use of the channels of interstate commerce," (ii) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (iii) "activities having a substantial relation to interstate commerce … *i.e.,* those activities that substantially affect interstate commerce." *U.S. v. Lopez,* 514 U.S. 549, 558-59 (1995). Relevant for our purposes is the third category, "substantial effects."

Traditionally, the substantial effects category supports federal legislation that affects even purely local activities if they result in substantial "downstream effects" on interstate commerce—with perhaps the most classic example being a farmer's cultivation of wheat to feed his own animals. *See Wickard v. Filburn*, 317 U.S. 111 (1942). Much later, in *Lopez*, the federal government relied on this theory to support a statute restricting the possession of firearms in school zones—arguing such activity caused downstream effects on interstate commerce both through fostering violent crime and by negatively impacting the educational process.[4] *See Lopez,* 514 U.S. at 563-64. The majority (5-4) acknowledged that guns in schools could indeed have such effects, but concluded that accepting such reasoning would effectively create a general federal police power:

> "The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. 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 at 564.

Accordingly, the *Lopez* court narrowed the circumstances under which Congress may regulate purely intrastate activities because of their downstream effects on interstate commerce to activities that are "economic" in nature. *See Lopez* at 560-61 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. . . It can hardly be denied that a factor of such volume

[4] *See Lopez*, 514 U.S. at 563-64 ("The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being.") (internal citations omitted).

and variability as home-consumed wheat would have a substantial influence on price and market conditions.").

Lopez was the first decision to invalidate a federal law under the Commerce Clause since 1937, but not the last. In *U.S. v. Morrison,* the Supreme Court invalidated parts of the Violence Against Women Act on the rationale that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *U.S. v. Morrison,* 529 U.S. 598, 613 (2000). The majority opinion in *Morrison* recounted the key factors on which the post-*Lopez* substantial effect analysis should be conducted:

- Whether the regulated activity involves "'commerce' or any sort of economic enterprise;"
- Whether the regulation contains an "express jurisdictional element" limiting its reach to circumstances connected with interstate commerce;"
- Whether there are explicit legislative findings linking the regulated activity to effects on interstate commerce;
- Whether the proffered link between the regulated activity and interstate commerce is attenuated.

Morrison at 609-612, discussing *Lopez*, 514 U.S. 549.

In 2005, the Supreme Court heard a challenge to provisions of the Controlled Substances Act that prohibit the local cultivation and possession of marijuana. *See Gonzales v. Raich,* 545 U.S. 1, 5 (2005). This time, the Supreme Court upheld the regulation, with the majority opinion finding "striking" similarities between the local cultivation of marijuana for personal use and the growth of wheat for personal consumption in *Wickard*. *See Gonzales* at 19 ("In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."). In considering the *Lopez/Morrison* factors, the court found that marijuana cultivation is a distinctly economic activity with a clear link to interstate commerce, and that the lack of a specific Congressional "finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market" was immaterial. *See Gonzales* at 21, 23-25.

But perhaps most significantly, the *Gonzales* court viewed the federal regulation of marijuana as just one part in a comprehensive federal regulatory scheme for narcotics and other drugs:

> "[T]he CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242–1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.' Most of those substances—those listed in Schedules II through V—'have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.' 21 U.S.C. § 801(1). The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project. While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. 84 Stat. 1248. Marijuana was listed as the 10th item in the 3d subcategory."

Gonzales at 24. This was one key factor distinguishing the regulation of marijuana under the CSA from the regulation of firearm possession in school zones that the court had struck down in *Lopez*. See *Id.* at 24 (federal marijuana regulation "is at the opposite end of the regulatory spectrum" from the gun restriction in *Lopez,* which was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"). Another was that the cultivation of marijuana—unlike the possession of guns in schools—involved the production of commodities that, as in *Wickard*, affects supply and demand curves whether taken to market or not. *See Gonzales* at 19.

Thus, while *Lopez* and *Morrison* establish that a Congressional regulation of a purely local activity must be "economic" in nature for it to satisfy the substantial effects test, *Gonzales* make clear that when Congress enacts comprehensive legislation affecting a particular form of interstate commerce, "[t]hat the regulation ensnares some purely intrastate activity is of no moment." *Gonzales* at 22 ("As we have done many times before, we refuse to excise individual components of that larger scheme.").

3. Application of modern substantial effects jurisprudence to CDC eviction halt order

A provision of the Public Health Services Act that authorizes the Secretary of Health & Human Services "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." 42 U.S.C. § 264(a). One such regulation promulgated thereunder delegates that function to the Director of the CDC:

> "Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."

This was the regulation under which the CDC issued the eviction halt order. See 85 Fed.Reg. 55293 ("Under 42 CFR 70.2, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order.").

The Public Health Services Act is a comprehensive federal statute that addresses numerous aspects of public health emergency response:

> "The PHS Act forms the foundation of [the U.S. Department of Health & Human Services] legal authority for responding to public health emergencies. Among other things, it authorizes the HHS Secretary to lead all Federal public health and medical response to public health emergencies and incidents covered by the National Response Framework; to direct the U.S. PHS and other components of the Department to respond to a public health emergency; to declare a public health emergency (PHE) and take such actions as may be appropriate to respond to the PHE consistent with existing authorities; to assist states in meeting health emergencies; to control communicable diseases; to maintain the Strategic National Stockpile; to provide for the

> operation of the National Disaster Medical System; to establish and maintain a Medical Reserve Corps; and to potentially provide targeted immunity for covered countermeasures to manufacturers, distributors, certain classes of people involved in the administration of a program to deliver covered treatments to patients, and their employees."[5]

There can be no serious question that Congress had authority under the Commerce Clause to enact the Public Health Services Act. A significant portion of these regulated activities entail the production and distribution of good and services, such as medical services, health equipment, treatments, and vaccines. Moreover, the broader subject of the regulation—public health emergencies—have clear and direct impacts on interstate commerce. This is especially true for infectious diseases, many of which spread easily across state (and national) lines—including Covid-19. See 85 Fed.Reg. at 55293 ("The virus that causes COVID-19 spreads very easily and sustainably between people who are in close contact with one another [within about 6 feet], mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks.")

Limited the ability of the CDC to take some specific action to control infectious disease outbreaks would undercut its ability to respond when an outbreak occurs. Communicable diseases spread through different means and at different rates, and the types of measures that might be effective and adequate to control some diseases may not be sufficient for others. The Public Health Services Act and 42 C.F.R. § 70.2 gave the CDC director the authority to order whatever reasonable measures may be needed in response to a disease outbreak. The necessary responses may not be foreseeable ahead of time and some infectious diseases spread so quickly that Congress may not have an opportunity to consider or authorize new procedures in response to a fast-moving, deadly virus. Taking away CDC's ability to prohibit evictions would prevent CDC from comprehensively and effectively responding to any outbreak that, like Covid-19, is significantly propagated through evictions and the surrounding interpersonal contacts and behaviors.

The Public Health Services Act is a comprehensive regulation on a specific aspect of interstate commerce (i.e. public health emergency response), and it is immaterial that some purely local activities may be swept up in public health orders issued pursuant to that act. *See Gonzales* at 22. Rather than excise such an individual component, this observation alone should end the commerce clause analysis. *See Id.* at 22.

Probably the strongest counterargument here is that public health emergencies, like gender-based violence, are not "economic activities" and thus 42 U.S.C. § 264 should be evaluated under the *Lopez/Morrison* factors rather than the *Gonzales* formulation applicable to comprehensive regulatory schemes concerning commodities and distinct forms of commerce. *See Morrison* at 613. If so, this does not change the result.

There is no question that 42 U.S.C. § 264 involves commerce and economic activity. The statute specifically authorizes HHS officials to "provide for such 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, and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a). Certainly, this could include inspection, detention, sanitation, or even

[5] U.S. Dept. of Health & Human Services, "Legal Authority – Public Health Services Act," https://www.phe.gov/Preparedness/planning/authority/Pages/default.aspx

destruction of vehicles or cargo moving between states, of workers carrying out interstate commercial activities, and so forth. *See, e.g., State of Louisiana v. Mathews,* 427 F.Supp. 174, 176 (E.D.La. 1977) (upholding restrictions on the regulations, promulgated under 42 U.S.C. § 264, prohibiting sale and distribution of small turtles).

The statute also contains an express jurisdictional element, authorizing the promulgation of regulations "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." 42 U.S.C. § 264(a) (underline mine). This limitation is further reflected in the resulting regulation, allowing the CDC director to prescribe quarantine orders only where "the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession[.]" 42 C.F.R. § 70.2.

This author has not reviewed the original Congressional record on 42 U.S.C. § 264 to determine whether specific findings showed recognition of the link between communicable disease and interstate commerce at the time of its initial passage—though it seems inconceivable both from the statutory text itself that Congress would not have recognized such a link. But Congress ratified the original CDC order in enacting the Consolidated Appropriations Act, 2021, Pub.L. 116-260, Sec. 502 (Dec. 27, 2020), and can thus be presumed to have been aware of the initial CDC order and its contents. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

That original CDC order was undoubtedly just one of many materials making clear that infectious disease—and Covid-19 in particular, affects interstate commerce by causing high levels of illness and death…

> There is currently a pandemic of a respiratory disease ("COVID-19") caused by a novel coronavirus (SARS-COV-2) that has now spread globally, including cases reported in all fifty states within the United States plus the District of Columbia and U.S. territories (excepting American Samoa). As of August 24, 2020, there were over 23,000,000 cases of COVID-19 globally resulting in over 800,000 deaths; over 5,500,000 cases have been identified in the United States, with new cases being reported daily and over 174,000 deaths due to the disease.

… resulting in significant disruptions of interstate economic activity:

> To respond to this public health threat, the Federal, State, and local governments have taken unprecedented or exceedingly rare actions, including border closures, restrictions on travel, stay-at-home orders, mask requirements, and eviction moratoria. Despite these significant efforts, COVID-19 continues to spread and further action is needed.

85 Fed.Reg. 55292, 55293-94 (Sept. 4, 2020). Hence there is ample information in the Congressional record from which to determine that infectious disease substantially affects interstate commerce. The subsequent order extending the CDC eviction halt through March 31, 2021, contained even more such evidence—though it does not appear the *Terkel* court considered the contents of later order. *See* 86 Fed.Reg. 8020 (Feb. 3, 2021). The standard of review is a mere rational basis for Congress to determine

that an activity substantially affects interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 19 (2005) ("In assessing the scope of Congress' authority under the Commerce Clause [the court] need not determine whether [regulated] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."), *citing U.S. v. Lopez,* 514 U.S. 549, 557 (1995).

Not only did the original CDC order establish that infectious disease significantly affect interstate commerce, it also explained why a national eviction moratorium could be necessary to control an infectious disease: "[e]victed renters must move, which leads to multiple outcomes that increase the risk of COVID-19 spread." 85 Fed.Reg. 55294. These outcomes included:

- that "many evicted renters move into close quarters in shared housing or other congregate settings. According to the Census Bureau American Housing Survey, 32% of renters reported that they would move in with friends or family members upon eviction, which would introduce new household members and potentially increase household crowding;"

- that "COVID-19 transmission occurs readily within households; household contacts are estimated to be 6 times more likely to become infected by an index case of COVID-19 than other close contact;" and

- that "[a]pproximately 15% of moves [by U.S. residents] are interstate."

85 Fed.Reg. 55294-95. These facts supply a rational basis to believe that an eviction moratorium could be necessary to control the spread of an infectious disease—i.e., unless evictions were restrained, some significant percentage of evicted renters would move across state lines into others household or shared living settings, and thereby spread or be infected by Covid-19.

Finally, the link between public health response and interstate commerce cannot credibly be described as "attenuated." As we have seen in the present pandemic, the direct impacts on communicable disease outbreak can cause on commerce are profound—including, extensive business closures and event cancelations, travel restrictions, job losses, and so on. Indeed, Covid-19 has disrupted interstate economic activity to a degree arguably more extensive than any other event in living memory.

Hence, either path of recent Commerce Clause analysis (i.e., *Gonzales* or *Lopez/Morrison*) shows that the CDC order derives from a proper Congressional exercise of Commerce power. Whether as one component of a broad regulatory scheme for addressing interstate public health threats or as an isolated provision targeted to controlling communicable diseases, the statutory basis on which Congress authorized CDC to order a temporary halt on residential evictions was sound.

4. Summary of *Terkel* reasoning and decision

The Court in *Terkel* did not evaluate whether Congress had authority under the Commerce Clause to enact the Public Health Services Act generally, or even to enact the provision authorizing federal public health officials to make (otherwise unspecified) regulations and orders to control infectious disease transmission (*i.e.,* 42 U.S.C. § 264(a)). Rather, *Terkel* considered only whether the Commerce Clause authorized Congress to impose an eviction moratorium, treating the CDC order itself as the regulation.

Applying the *Lopez/Morrison* factors, the *Terkel* decision first ruled that evictions are not "economic" in nature. *See Terkel* at *6 ("although a person's residence in a property may have a commercial origin, that alone is not enough to make the regulated activity itself economic in character"). Second, *Terkel* found there was no jurisdictional limitation because the CDC order does not apply only to circumstances where an evicted tenant would move out of state or where some other apparent connection to interstate commerce exists. *See Terke*l at *7. Third, *Terkel* declared that "neither Congress nor the agency made findings that a broader regulation of commerce among the States would be undercut without the order." *Terkel* at *8.

Fourth, *Terkel* found "the relationship between interstate commerce and an eviction criminalized by the order is attenuated in several dimensions." *Terkel* at *8. These included (i) that evictions did not have a "self-evidence substantial effect on interstate commerce," (ii) that "the eviction moratorium is not a backstop in a larger regulation of commerce," (iii) that the order applies to tenants irrespective of their infection with or exposure to Covid-19 or propensity to move across state lines, and (iv) that landlord-tenant regulations are traditionally an area of state, not federal, regulation. See *Terkel* at *8.

The remainder of the opinion explores past federal measures to deal with other crises, and draws the dubious further conclusion that the fact Congress never previously imposed an eviction moratorium (such as in response to the 1918 influenza pandemic) proves it cannot constitutionally do so now. *See Terkel* at *9 ("The absence of an historical analog here calls to mind the Supreme Court's instruction that '[p]erhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent."), *citing Free Enter. Fund v. PCAOB,* 561 U.S. 477, 505 (2010).

On this analysis, *Terkel* concluded that residential evictions did not have sufficient downstream effects on interstate commerce to justify federal regulation and therefore the CDC eviction halt order is in excess of constitutional authority. *See Terkel* at 10.

5. Legal ramifications of the *Terkel* decision

The federal Declaratory Judgment Act provides that:

> "In a case of actual controversy within its jurisdiction … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2201(a). "Section 2201(a) empowers the court to declare the rights or legal relations 'of any interested party'" meaning the determination of rights is specific to the parties, but it cannot speak to the law or its enforceability in the abstract." Howard M. Wasserman, "Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent," 91 U. Colorado L. Rev. 999, 1015 (2020).

The CDC was a party to *Terkel* and hence is bound by the result—which does not appear geographically or otherwise limited. *See Terkel* at *11 ("Given defendants' representations to the court … it is 'anticipated that [CDC] would respect the declaratory judgment.'"), *citing Poe v. Gerstein,* 417 U.S. 281, 281 (1974). The declaratory judgment "establishes that a constitutionally invalid law cannot be enforced against the plaintiff by the defendant but says nothing about the enforceability of that law by

or against nonparties." Wasserman at 1014, *citing* John Harrison, "Severability, Remedies, and Constitutional Adjudication," 83 Geo. Wash. L. Rev. 56, 87-88 (2014) ("When a court declares that a statutory rule is not applicable to a party because the rule is unconstitutional, the declaratory judgment again resembles a judicial act of invalidation with respect to the parties involved.").

The most direct effect of the judgment would thus appear to bar the CDC (or any person or entity acting on CDC's behalf) from enforcing the criminal sanctions in the order. Of course, DOJ has already stated that "[t]he decision, however, does not extend beyond the particular plaintiffs in that case, and it does not prohibit the application of the CDC's eviction moratorium to other parties." See DOJ Statement. And the DOJ Statement is correct under long-settled federal precedent. *See U.S. v. Mendoza,* 464 U.S. 154, 160 (1984).

Under the doctrine of nonmutual collateral estoppel, ordinarily "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *U.S. v. Mendoza,* 464 U.S. at 158. But the U.S. Supreme Court has long held that nonmutual collateral estoppel does not apply to the federal government:

> "Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at governmental action, many constitutional questions can arise only in the context of litigation to which the government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues. A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.

Mendoza, 464 U.S. at 160.

Individual tenants who rely on the order (except, perhaps, for tenants of the specific plaintiffs in that case—a question outside the scope of this analysis) to preserve their housing were not parties to the *Terkel* case, and are thus not bound by the ruling.[6] "A district court opinion as to the validity of a law has persuasive force for the next court, including for judges within that district, but no binding force." Wasserman at 1022, *citing Camreta v. Greene,* 563 U.S. 692, 709 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."), *quoting* 18 J. Moore et al., *Moore's Federal Practice* §134.02(1)(d), at 134–26 (3d Ed. 2011). Tenants of other landlords, both within and outside the Eastern

[6] Were it not for the *Mendoza* rule, there could be some risk that individual tenants--though not parties to the *Terkel* case—might be bound by the *Terkel* ruling because they may be found to have substantially the same interest (i.e., not being evicted) as the CDC advocated for (i.e., not allowing evictions). *See, e.g., State Farm v. Fullerton,* 118 F.3d 374, 384 (5th Cir. 1997) (upholding Texas law that allows application of collateral estoppel to third-parties if doing so would not be unfair in light of four factors: "Whether the use of collateral estoppel will reward a plaintiff who could have been joined in the earlier suit but chose to "wait and see." ... 2. Whether the defendant in the first suit had the incentive to litigate that suit fully and vigorously.... 3. Whether the second suit will afford the defendant procedural opportunities available in the first suit that could cause a different result.... 4. Whether the judgment in the first suit is inconsistent with any other earlier decision…").

District of Texas, may still assert the CDC order as a valid protection against eviction and, if necessary, independently litigate questions of its constitutionality. For them, the more significant concern is whether other courts will nonetheless follow *Terkel* as persuasive authority and thereby decline to block an eviction under the CDC order.

6. Eviction courts should not follow *Terkel*

Practically, the impact of *Terkel* will undoubtedly be far worse than its limited legal effect suggests. The ruling has already been widely-reported in the media and many tenants relying on the CDC halt order will be uncertain about their status and deterred from asserting it. The CDC order was already difficult for unrepresented tenants to assert; expecting unrepresented tenants to effectively litigate the constitutionality of the order is scarcely realistic. Beyond that, even where tenants do have counsel or otherwise advance the proper constitutional arguments, many state court eviction judges can be expected to consider *Terkel* as persuasive authority and might still defer to it. Skilled advocacy will be critical to prevent this from happening.

a. Terkel conflicts with other federal decisions, especially Chambless Enterprises

Advocates should be prepared to discuss the previous federal district court decisions that rejected landlord challenges to the CDC halt order (especially the two that substantially considered the merits—*Chambless Enterprises, LLC v. Redfield,* 2020 WL 7588849 (W.D.La. 2020); *Brown v. Azar,* __ F.Supp.3d __, 2020 WL 6364310 (N.D.Ga. 2020). In particular, *Chambless* expressly held that residential leasing is an activity that Congress may regulate under the Commerce Clause:

> "it is well established that, under the Commerce Clause, the federal government may regulate activity that has a 'substantial effect on interstate commerce.' *Gonzales v. Raich,* 545 U.S. 1, 16–17 (2005). And the Supreme Court has explicitly held that the commercial activity regulated here—'rental of real estate'—is 'unquestionably' an activity that substantially affects interstate commerce. *Russell v. United States,* 471 U.S. 858, 862 (1985)."

Chambless Enterprises, 2020 WL 7588849, at *8.

Residential leasing is clearly an economic activity and has substantial downstream effects on interstate commerce. For instance, many rental properties are operated by companies that operate in multiple states, housing policies friendly or hostile to tenants can affect interstate commerce by attracting tenants from nearby states or repelling local tenants to other states, and so on. Even *Terkel* itself recognized one such aspect of rental housing that Congress may permissibly regulate under the Commerce Clause. *See Terkel* at 16 (regulation of unfair discrimination in rental housing permission under Commerce Clause as "a backstop in a larger regulation of commerce"

The *Chambless* court's recognition that Congress may regulate residential leasing independent of pandemic conditions rendered unnecessary any further Commerce Clause analysis of whether the Public Health Services Act could authorize the CDC to impose an eviction moratorium as a response to a public health emergency. *See Chambless* at *8. The government took this position in *Terkel*, which the court highlighted from the outset:

> "The government admits that nothing about its constitutional argument turns on the current pandemic:

> THE COURT: [T]here's nothing special about COVID 19? Congress could do the same thing, the same temporary suspension of tenant evictions, if there was an inability to pay rent because of some other reason that Congress finds important? My example was cohabitating spouses sent to prison, but there could be others. That is your Commerce Clause argument; correct?
>
> MS. VIGEN: That is our Commerce Clause argument, correct.
>
> … The federal government thus claims authority to suspend residential evictions for any reason, including an agency's views on 'fairness.'"

Terkel at *1.

Critical to the *Terkel* court's reasoning was the idea that, while residential leasing might be an economic activity, eviction is not. *See Terkel* at *6 ("To be sure, the market for rental housing consists of economic relationships between landlords and tenants. But courts applying the substantial-effects test must look "only to the expressly regulated activity" itself. *GDF Realty Invs., Ltd. v. Norton,* 326 F.3d 622, 634 (5th Cir. 2003). Here, that is only eviction."). This is a highly-dubious notion that the court reaches simply by fiat, declaring that "the eviction of one person from a dwelling does not alone have a self-evident substantial effect on interstate commerce" and that "because evictions are not themselves economic activity, their effects cannot be aggregated under the *Wickard* principle." *Terkel* at *8.

Yet the large majority of evictions are driven by economic causes—such as nonpayment of rent or other charges or a tenant's inability to pay an increased amount of rent. A major function of eviction, and the threat thereof, is its tendency to coerce tenants into paying rent—even if by prioritizing rent over other needs. Most landlords hire attorneys to represent them in eviction court, and may utilize other services to facilitate and carry out an eviction (such as process servers, movers or other laborers, locksmiths, etc.). And evictions drive other commercial activities (such as the rental of storage units or moving vans, applications to other apartments or housing opportunities, motel or other transient lodging stays, use of social service agencies and shelter resources, and so on). It is not so clear that the eviction of one person from a dwelling is without a substantial effect on <u>interstate</u> commerce—but even assuming that is true, one eviction definitely has a substantial local effect on commerce and the collective interstate impacts of eviction are vast and well-documented. *See, e.g.,* Matthew Desmond, *Evicted: Poverty and Profit in the American City* (2016).

To the extent *Terkel* considered any evidence of the interestate economic aspects of evictions, at all, it did not apply a rational basis standard. *See Terkel* at *10. The opinion rejected it as unpersuasive…

> "[T]he government's briefing argued that evictions covered by the CDC order may be rationally viewed as substantially affecting interstate commerce because 15% of changes in residence each year are between States. Of course, people change residences for many reasons other than eviction. So that statistic does not readily bear on the effects of the eviction moratorium here."

…and then, ruled the findings did not show a "appropriate means to the attainment of a legitimate end," a standard misappropriated from the 1942 case of U*.S. v. Wrightwood Dairy. See Terkel* at *10 ("The focus of the challenged order is people moving into congregate housing, irrespective of whether those moves are between or within States. The incidental fact that some moves are between States, while the

bulk are not, does not show that the order is an 'appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."), *citing U.S. v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942).

These facts alone could easily have supported a finding that evictions are a fundamentally economic in character. Alternatively, these facts could easily support a *Chambless*-style conclusion that evictions are part and parcel of the broader activity of renting housing, which Congress may regulate as interstate commerce even apart from any public health circumstances. *See Chambless* at *8

b. The effect of infectious diseases on interstate commerce supplies the authority to impose a federal eviction moratorium during a pandemic

As alluded to above, however, the deeper analytical flaw in *Terkel* is that the CDC eviction moratorium did not arise from a Congressional regulation pertaining to rental housing or evictions specifically—but rather from a statute giving federal public health authorities powers to take whatever measures are necessary to control the interstate spread of infectious diseases when an outbreak occurs. *See* 42 U.S.C. § 264; *see* 42 C.F.R. § 70.2. An eviction moratorium turned out to be one necessary measure under the circumstances of one particular outbreak—indeed, a 100-year pandemic. Hence, whether or not Congress has authority under the Commerce Clause to regulate evictions generally (as part of its established authority to regulate rental housing) was not truly at issue in *Terkel*. Instead, the questions for the Terkel court were only whether the Commerce Clause authorizes Congress to make laws regulating infectious disease response and, if so, whether a national eviction moratorium might conceivably be necessary to control the spread of such diseases.

As discussed above, the Commerce Clause authorizes the Public Health Services Act either as a comprehensive regulation on a specific interstate commercial activity (public health emergency response), or as a non-economic activity substantially affecting interstate commerce under the *Lopez/Morrison* factors. The *Terkel* opinion failed to recognize this because the court conflated the CDC order itself (which must be authorized by a permissible statute) with the act of Congress authorizing CDC to issue the order (which must be authorized by the U.S. Constitution). See *Terkel* at *6 ("Here, the regulated activity is not the production or use of a commodity that is traded in an interstate market. Rather, the challenged order regulates property rights in buildings—specifically, whether an owner may regain possession of property from an inhabitant.").

Instead of analyzing whether Congress could properly have given CDC the power to impose an eviction moratorium as part of a broader statutory scheme for enabling comprehensive and effective responses to public health threats, the *Terkel* court improperly treated the CDC order as though it reflected a stand-alone Congressional restriction on residential evictions unrelated to public health circumstances. *See Terkel* at *10 ("The government's argument would thus allow a nationwide eviction moratorium long after the COVID-19 pandemic ends. The eviction remedy could be suspended at any time based on fairness as perceived by Congress or perhaps an agency official delegated that judgment."). Yet the very statute on which the CDC order was predicated applies only to the extent they "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." 42 U.S.C. § 264(a).

In summary, then, advocates may present local courts with at least four persuasive grounds for declining to follow *Terkel*:

- The *Chambless* court correctly determined that rental housing is already well-established as having substantial effects on interstate commerce and therefore residential evictions would be a proper subject for Congressional regulation at any time;

- Whether or not Congress has plenary authority to regulate evictions under the Commerce Clause, evictions are significantly economic in character and in the aggregate have substantial effects on interstate commerce;

- The CDC eviction halt order was not based on a Congressional regulation of evictions but a comprehensive statute for responding to interstate public health threats, and incidental agency regulations (such as a temporary eviction restriction) on purely local activity are permissible in fulfillment of the broader statutory scheme;

- The CDC eviction halt order was adopted pursuant to a specific portion of the Public Health Services Act that is dedicated to controlling the interstate spread of communicable diseases, and which has a clear connection to interstate commerce based on the *Lopez/Morrison* factors.

In addition, while not a separate ground not to follow *Terkel* in its own right, advocates may properly characterize *Terkel* as an extreme outlier by pointing to the extensive line of cases upholding not only state eviction moratoria but also the CDC eviction halt order—including on Commerce Clause grounds.[7]

7. Other responses and strategies for advocates coping with the fallout of *Terkel*

The CDC eviction halt order was already plagued by serious problems and shortcomings even before the *Terkel* decision was issued, such as the practical difficulties of informing tenants about the CDC order and how to take advantage of it, problematic interpretations by local courts that denied protection to tenants intended to be covered, and abusive challenges landlords have made to the veracity of tenant declarations. The *Terkel* decision will likely multiply all of these problems in addition to creating new challenges of its own, causing the efficacy of the CDC halt order to dwindle even further.

a. Possible Congressional responses

The *Terkel* order finds that Congress itself lacks the authority to impose an eviction moratorium under the Commerce Clause. However, a critical component of the *Terkel* reasoning is predicated on the lack of Congressional findings drawing the links between eviction and interstate commerce. Were Congress

[7] Again, *Chambless* specifically discusses the Commerce Clause authority to regulate residential rental housing transactions. *See Chambless Enterprises, LLC v. Redfield, 2020 WL 7588849* at *8 (W.D.La. 2020). *Brown* rejects constitutional and APA challenges to the CDC order without examining Congressional authority under the Commerce Clause. *See Brown v. Azar,* __ F.Supp.3d __, 2020 WL 6364310 (N.D.Ga. 2020). *Tiger Lily* denies a motion to preliminarily enjoin the CDC order due to the lack of irreparable harm to landlords. *See Tiger Lily LLC v. United States Dep't of Hous. & Urban Dev.,* No. 2:20-CV-2692-MSN-ATC, 2020 WL 7658126 (W.D.Tenn. Nov. 6, 2020). Several federal cases upholding state eviction moratoria are listed at FN 3, *supra*.

to re-issue or re-extend the CDC order with explicit findings drawing that connection, the Act would presumably supersede the *Terkel* opinion.[8]

Alternatively, NHLP has long argued that Congress has authority to restrict evictions during the Covid-19 pandemic under the 14th Amendment Due Process Clause. The added legal complexity and procedural challenges of hearing and deciding unlawful detainer cases during pandemic conditions significantly increase the risk of erroneous eviction, the stakes to renters and families are even higher during pandemic conditions than otherwise, and the public interest in speedy and efficient eviction hearings must give way to the massive public health interest. These circumstances prevent courts from consistently affording due process of law to tenants facing eviction. Predicating the moratorium on 14th Amendment authority rather than the Commerce Clause would render *Terkel* a moot point.

b. Possible agency responses

The Department of Justice has already issued a strong statement affirming that the *Terkel* order is binding only against the specific *Terkel* plaintiffs and that the CDC eviction halt order remains operational in the balance of the country. See DOJ Statement. This will hopefully help reassure tenants and increase the ability of likelihood of individual judges deciding for themselves whether to adhere to the CDC halt order rather than blindly follow *Terkel*.

The CDC has also appealed *Terkel* to the Fifth Circuit Court of Appeals, which gives unlawful detainer courts further reason to pause before relying on *Terkel* as persuasive authority. At this time it appears DOJ and CDC have taken the best possible steps to mitigate the impacts of *Terkel*.

c. Possible advocate responses

The task of responsibly advising tenants about their rights and protections has now become almost impossibly complicated. Undoubtedly many tenants will choose to leave rental properties even if they qualify for protection under the CDC order, for fear the protection could be lifted at any moment by a judge adopting the *Terkel* analysis. This danger appears especially acute for tenants in jurisdictions that have continued to allow eviction filings and enter eviction judgments despite the CDC halt order—as tenants may receive little or no notice and may not have an opportunity to respond before a physical eviction is commenced.

Accordingly, advocates may wish to bring affirmative motions (particularly in friendly jurisdictions) seeking orders affirming that tenants who have invoked the CDC order will not be evicted until the order expires (assuming they remain in compliance with the requirements), notwithstanding the *Terkel* decision.

The added layer of wicked complexity that *Terkel* now adds to pandemic-era eviction defense cases seems to even further bolster any contention that a tenant facing eviction during Covid-19, who claims protection under the CDC order, should have counsel if the tenant so desires. Though advocates are urged not to mount such claims without first coordinating with the National Coalition for a Civil Right to Counsel, *pro se* tenants can hardly be expected to effectively advance the kinds of arguments discussed

[8] This could be as simple as affirming the more recent CDC order extending the eviction moratorium, which cites studies that even more clearly draw the connections between evictions and the spread of Covid-19. *See, e.g.,* 86 Fed.Reg. at 8022. The *Terkel* court does not appear to have considered the most recent CDC order in its analysis.

in this memorandum, and few jurisdictions can supply sufficient numbers of legal services attorneys or pro bono counsel to meet the need.