

No. 21-40137

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

LAUREN TERKEL, PINEYWOODS ARCADIA HOME TEAM LTD.; LUFKIN  
CREEKSIDE APARTMENTS, LTD.; LUFKIN CREEKSIDE APARTMENTS II,  
LTD.; LAKERIDGE APARTMENTS, LTD.; WEATHERFORD MEADOW  
VISTA APARTMENTS, LP; and MACDONALD PROPERTY MNGMT., LLC  
Plaintiffs – Appellees

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P.  
WALENSKY, in her official capacity as Director of the CDC; Sherri A. Berger, in  
her official capacity as Acting Chief of Staff of the CDC; U.S. DEPARTMENT  
OF HEALTH AND HUMAN SERVICES; XAVIER BECARRA, Secretary of  
Health and Human Services, and the UNITED STATES OF AMERICA  
Defendants – Appellants

On Appeal from the United States District Court  
for the Eastern District of Texas, Cause No. 6:20-CV-564  
Hon. J. Campbell Barker, District Judge

---

**BRIEF OF AMICUS CURIAE NATIONAL HOUSING LAW  
PROJECT IN SUPPORT OF REVERSAL**

---

Eric Dunn  
National Housing Law Project  
919 E. Main Street, Suite 610  
Richmond, Virginia 23219  
Telephone: (415) 546-7000  
Fax: (415) 546-7007  
edunn@nhlp.org

## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for amicus curiae National Housing Law Project (NHLP) hereby certifies that the following listed persons and entities as have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. All persons and entities identified in the certificates of interested persons filed by the parties and other amici;
2. Amicus curiae National Housing Law Project;
3. Eric Dunn, counsel for the National Housing Law Project.

s/Eric Dunn  
Attorney for NHLP

## TABLE OF CONTENTS

Certificate of Interested Persons .....	ii
Table of Contents .....	iii
Table of Authorities .....	iv
Introduction .....	1
Statements of Interest of Amicus Curiae .....	2
Argument .....	4
A. Congress ratified the CDC eviction halt order in Section 502 of the Consolidated Appropriations Act of 2021 .....	4
B. Congressional ratification made the CDC eviction halt order effective regardless whether the order was authorized when first issued .....	6
C. Context makes clear Congress approved CDC’s authority to issue the eviction halt order and further extend that order as pandemic circumstances required.....	8
D. No evidence suggests Congress intended to extend the eviction halt order to January 31, 2021, without confirming CDC’s authority to issue or extend it .....	11
E. Congressional ratification of the CDC eviction halt order did not exceed Congressional authority under the Commerce Clause .....	15
Conclusion .....	21
Certificate of Compliance with Length and Style Limits .....	22
Certificate of Service .....	22

## TABLE OF AUTHORITIES

### Cases

<i>Brown v. Azar</i> , No. 1:20-CV-03702, - F.Supp.3d -, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020) .....	4-6, 10
<i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver</i> , 511 U.S. 164 (1994) .....	14
<i>Chambless Enterprises, LLC v. Redfield</i> , - F.Supp.3d -; No. 3:20-CV-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020) .....	4-6, 10, 19
<i>Forest Grove School Dist. v. T.A.</i> , 557 U.S. 230 (2009) .....	6
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005) .....	16-17
<i>Isbrandtsen–Moller Co. v. United States</i> , 300 U.S. 139 (1937) .....	7-9
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978) .....	6, 11, 13, 15
<i>Louisiana v. Mathews</i> , 427 F. Supp. 174 (E.D. La. 1977) .....	6
<i>Mattingly v. District of Columbia</i> , 97 U.S. 687 (1878) .....	7
<i>Russell v. United States</i> 471 U.S. 858 (1985) .....	19
<i>Schism v. U.S.</i> , 316 F.3d 1259 (Fed.Cir. 2002) .....	9, 13

<i>Skyworks, Ltd. v. CDC</i> , No. 5:20-CV-2407, - F.Supp.3d -, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021) .....	7, 9-10, 13, 16
<i>Solid Waste Agency v. U.S. Army Corps of Engineers</i> , 531 U.S. 159 (2001) .....	14
<i>Swayne &amp; Hoyt v. U.S.</i> , 300 U.S. 297 (1937) .....	7-9
<i>Taylor v. United States</i> , 136 S. Ct. 2074; 195 L. Ed. 2d 456 (2016) .....	15
<i>Terkel v. CDC</i> , No. 6:20-CV-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021) .....	16, 20-21
<i>Tiger Lily LLC v. HUD.</i> , 992 F.3d 518, 523 (6th Cir. 2021) .....	7, 11-12, 16
No. 220CV02692MSNATC, - F.Supp.3d -, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021) .....	7, 12
No. 2:20-CV-2692-MSN-ATC, - F.Supp.3d -, 2020 WL 7658126 (W.D. Tenn. Nov. 6, 2020) .....	5
<i>U.S. v. Lopez</i> , 514 U.S. 549 (1995) .....	18-19
<i>U.S. v. Morrison</i> , 529 U.S. 598 (2000) .....	18-19
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942) .....	15-17
<b><u>Statutes</u></b>	
Consolidated Appropriations Act, 2021, Pub.L. 116-260, § 502 ...	4, 6, 8, 11- 12, 15
42 U.S.C. § 264(a) .....	6, 17-18, 20

**Other Authorities**

42 C.F.R.. § 70.2 ..... 19-20

85 Fed.Reg. 55292 (Sept. 4, 2020) ..... 10, 13,15-18, 20-21

86 Fed.Reg. 16731 (Mar. 31, 2021) ..... 1

## INTRODUCTION

The question of whether the Public Health Services Act authorized the Centers for Disease Control & Prevention to issue a quarantine order restricting residential evictions on September 4, 2020, is one constitutional scholars may debate for decades into the future. But there is no question that order has spared communities throughout the United States from the chaos and ruin that mass evictions during the Covid-19 pandemic would have caused, slowed the spread of disease, and saved significant numbers of lives.<sup>1</sup> And once Congress ratified that critical order in the 2021 Consolidated Appropriations Act, the legal question became moot: no matter what other powers the CDC may or may not have to counteract infectious disease outbreaks under the Public Health Services Act, upon

---

<sup>1</sup> See 86 Fed.Reg. 16731, 16734 (Mar. 31, 2021) (discussing study that found “nationally, over 433,000 cases of COVID-19 and over 10,000 deaths could be attributed to lifting state moratoria”); see also Kay Jowers et al., “Housing Precarity & the COVID-19 Pandemic: Impacts of Utility Disconnection and Eviction Moratoria on Infections and Deaths Across U.S. Counties,” National Bureau of Economic Research at 11-12 (January 2021), [https://www.nber.org/system/files/working\\_papers/w28394/w28394.pdf](https://www.nber.org/system/files/working_papers/w28394/w28394.pdf) (“[W]e estimate that if none of the policies had been enacted, the average cumulative death rate at the end of our sample period would have gone from 76.69 to 94 per 100,000 – an increase of 22.6%. Eliminating only local eviction moratoria would have raised cumulative deaths per 100,000 to 83.7 [whereas] adopting local eviction moratoria in all counties starting on the first day of the study period would have reduced deaths to 55.6– a reduction of 40.9%).

ratification the agency has at least had the power to re-issue or extend its order halting certain residential evictions so long as public health exigencies so demand.

That specific Congressional authorization of the CDC eviction halt order fell clearly within the Commerce Clause power, both because the order was issued in accordance with a comprehensive federal regulatory scheme that protects interstate commerce from the dangers posed by infectious disease outbreaks, and because the specific order itself is closely tethered to the impacts Covid-19 has already had on interstate commerce and continues to inflict. The trial court ruling should be reversed forthwith.

#### **STATEMENT OF INTEREST OF AMICUS CURIAE**

The National Housing Law Project (NHLP) is a nonprofit organization that works to advance tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. NHLP pursues these goals primarily through technical assistance and support to legal aid attorneys and other housing advocates. Throughout the Covid-19 pandemic, NHLP has worked to prevent widespread evictions by advocating at the federal level and in multiple states for eviction moratoria and other housing protections and relief funding, creating resources to help tenants and advocates learn about and exercise rights and protections, supplied training to a broad array



of stakeholders, and provided leadership through national workgroups, communications, and media.

For over 40 years, NHLP has also coordinated the Housing Justice Network, which now includes more than 1,600 legal aid lawyers and other housing advocates throughout the United States. Members of the Housing Justice Network regularly meet with and advise tenants facing lease termination or eviction proceedings, represent tenants in unlawful detainer cases, and advocate for tenants in many other settings—whether applications for rental assistance funds, admission to new housing, recovery of security deposits or other lingering legal issues from prior tenancies, or opposing discrimination, retaliation, substandard housing conditions, or other violations of core tenant protections.

The legal uncertainty around the CDC eviction halt order deeply complicates the work of HJN members as they strive to help tenants understand their rights and options and make good, responsible decisions regarding their housing, their health, and their financial affairs in the waning, yet still dangerous weeks of a 100-year pandemic. NHLP and the Housing Justice Network hope this Court will do what it can to reduce that harmful uncertainty—reversing the trial court and making clear the CDC order was validly issued and remains in full effect.

Amicus NHLP is a nonprofit organization; NHLP has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. No

party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person or entity other than Amicus NHLP, its staff, and its counsel contributed money that was intended to fund the preparation or submission of this brief.

NHLP submits this brief under Federal Rule of Civil Procedure 29(a)(2). All parties have consented to the submission of this brief, and NHLP has moved for leave to file in an accompanying motion.

## **ARGUMENT**

### **A. Congress ratified the CDC eviction halt order in Section 502 of the Consolidated Appropriations Act of 2021.**

At the time of the 2021 Consolidated Appropriations Act, only two federal courts had considered whether the CDC had authority under the Public Health Services Act to restrict residential evictions, and both uniformly concluded that it did (or very likely did). *See Chambless Enterprises, LLC v. Redfield*, - F.Supp.3d -, No. 3:20-CV-01455, 2020 WL 7588849, at \*7 (W.D. La. Dec. 22, 2020) (“CDC’s determination that a ‘temporary halt in evictions’ is a ‘reasonably necessary measure ... to prevent the further spread of COVID–19 throughout the United States’ is well supported and falls firmly within the scope of its authority”) (internal citations omitted); *see Brown v. Azar*, No. 1:20-CV-03702, - F.Supp.3d -,

2020 WL 6364310, at \*9, (N.D. Ga. Oct. 29, 2020) (“the implementing statute (and derivative regulation) demonstrate Congress’ unambiguous intent to delegate broad authority to the CDC to enter an order such as the one at issue here”). Not a single court had even expressed doubt as to the constitutionality of the CDC halt order as of then, let alone declared the order unlawful.<sup>2</sup>

The driving rationale of the *Chambless Enterprises* and *Brown* courts was that CDC’s eviction halt order fell within the authority Congress originally conveyed through the Public Health Services Act to enable public health experts to take urgent, and sometimes far-reaching, measures to control the spread of an infectious disease when an outbreak occurs. *See Chambless Enterprises* at \*5 (provision authorizing Secretary of Health & Human Services “to make and enforce such regulations as in his judgment are necessary to prevent the [interstate] introduction, transmission, or spread of communicable diseases” reflected a “legislative determination to defer to the ‘judgment’ of public health authorities about what measures they deem ‘necessary’ to prevent contagion;” *see also Brown v. Azar* at \*7. Rather than constrain such public health orders qualitatively, in the PHSA Congress instead relied on the judgment of medical and scientific experts to

---

<sup>2</sup> In the only other known case as of that time, a court had denied a motion to preliminarily enjoin the CDC halt order without reaching the merits. *See Tiger Lily LLC v. HUD.*, No. 2:20-CV-2692-MSN-ATC, - F.Supp.3d -, 2020 WL 7658126, at \*10 (W.D. Tenn. Nov. 6, 2020).

impose only those measures made necessary by public health conditions and the lack of adequate state or local action. *See Chambless Enterprises* at \*5, quoting *Louisiana v. Mathews*, 427 F. Supp. 174, 176 (E.D. La. 1977) (in 42 U.S.C. § 264, “Congress has granted broad, flexible powers to federal health authorities who must use their judgment in attempting to protect the public against the spread of communicable disease.”).

“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.” *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Congress explicitly extended the CDC halt order, entirely unchanged except as to its expiration date, in Section 502 of the 2021 Consolidated Appropriations Act. *See* Pub.L. 116-260, § 502. In so doing, Congress adopted the CDC’s view of the PHSA as carrying the authority to halting certain residential evictions as necessary to control the spread of Covid-19, as well as the *Chambless Enterprises & Brown* courts which had affirmed that view. *See Lorrillard* at 580.

**B. Congressional ratification made the CDC eviction halt order effective regardless whether the order was authorized when first issued.**

Three different federal courts later disagreed with *Chambless Enterprises* and *Brown v. Azar*, ruling that the Public Health Services Act did not convey authority for restricting evictions to the CDC, even if to contain a transmissible

disease. *See Tiger Lily, LLC v. HUD*, 992 F.3d 518, 523 (6th Cir. 2021); *Skyworks, Ltd. v. CDC*, No. 5:20-CV-2407, - F.Supp.3d -, 2021 WL 911720 at \*11 (N.D. Ohio Mar. 10, 2021); *see also Tiger Lily LLC v. HUD*, No. 220CV02692MSNATC, - F.Supp.3d -, 2021 WL 1171887 at \*9 (W.D. Tenn. Mar. 15, 2021). But the question of whether the CDC had original authority under the Public Health Services Act to issue the eviction halt order is now of no moment: Congressional ratification made that order effective even if it had not been authorized at the time of issuance. *See, e.g., Swayne & Hoyt v. U.S.*, 300 U.S. 297, 301-02 (1937) (“It is well settled that Congress may, by enactment not otherwise inappropriate, ‘ratify acts which it might have authorized,’ and give the force of law to official action unauthorized when taken.”), *quoting Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878) *and collecting cases*.

The seminal case on Congressional ratification, *Isbrandtsen–Moller Co. v. U.S.*, involved a presidential order that dissolved a preexisting federal “Shipping Board” and transferred its powers to the Secretary of Commerce. *See Isbrandtsen–Moller Co. v. United States*, 300 U.S. 139, 141-42 (1937). Later, a shipping company challenged a subpoena it had received from the Secretary, arguing that Congress had neither authorized the President to dissolve the Shipping Board nor transfer its powers, and thus the Secretary had no authority to issue the subpoena. *See Isbrandtsen-Moller* at 146. A recent appropriations act had reorganized the

Shipping Board, and the company argued Congress would not have undertaken such reorganization had it intended to allow the President simply to dissolve the Shipping Board. *See Id.* at 147. Yet the Supreme Court found this irrelevant in light of subsequent Congressional actions. *See Id.* at 149.

Specifically, after the executive order dissolved and transferred the Shipping Board's powers, Congress appropriated funds to the Department of Commerce to exercise the Shipping Board's functions, then passed legislation (the Merchant Marine Act of 1936) fully vesting the Shipping Board's former powers in the Department of Commerce. *See Id.* at 147-48. These actions showed Congress "recognized the validity of the transfer and ratified the President's action," and rendered immaterial the question of whether the executive order was valid when issued. *See Id.* at 149.

Like the order dissolving the Shipping Board in *Isbrandtsen-Moller*, the CDC eviction halt order may or may not have embodied a valid exercise of the agency's powers at the time of first issuance. But that is irrelevant now. When Congress referenced and extended the CDC halt order in the Appropriations Act, it ratified the agency's action and left no doubt of its continuing validity. *See Pub.L. 116-260, § 502; see Swayne* at 302.

**C. Context makes clear Congress approved CDC's authority to issue the eviction halt order and further extend that order as pandemic circumstances required.**

Since the ability of Congress to ratify agency actions and interpretations is well-established, *see Swayne* at 302, relevant jurisprudence tends to center on whether Congress actually did so in a particular case. Ratification of agency action can be shown through evidence that Congress recognized, adopted, or acquiesced in the agency’s action, as discerned from the relevant Congressional enactment (or lack thereof) itself as well as the context in which it was taken. *See Isbrandtsen-Moller* at 147; *see also Schism v. U.S.*, 316 F.3d 1259, 1289-90 (Fed.Cir. 2002) (discussing various ways by which Congressional ratification may be evaluated or established).

As the court in *Skyworks v. CDC* correctly observed, the most likely reason Congress extended the CDC eviction halt order to January 31, 2021, in the Appropriations Act was to “facilitate[] the transition between presidential administrations and, effectively, gave the incoming administration the opportunity to determine its own policies for responding to the pandemic.” *Skyworks* at \*12. Daily Covid-19 infections were then reaching their highest U.S. peak ever and few vaccines had yet been administered—public health officials were not suggesting the pandemic could foreseeably be brought under control by January 31, 2021.<sup>3</sup>

---

<sup>3</sup> On the same day as the Appropriations Act, CDC stated publicly: “As 2020 draws to a close, COVID-19 cases and deaths continue to rise across the United States” and that the “U.S. is entering a pivotal phase of the COVID-19 response.”

Hence, the context shows that Congress extended the CDC order for a short time to preserve the status quo through the presidential transition period, after which the new administration could decide whether to extend the halt order further, modify its terms, replace it with something else, or simply allow the order to expire.

Extending the CDC order to January 31 would not have actually enabled the new administration to make such choices, however, unless Congress viewed the CDC as already having the authority to issue (or extend) the order. Otherwise, Congress would have needed either to amend the PHSA or enact other substantive new language empowering CDC to restrict evictions. *C.f. Skyworks* at \*12. Since Congress did not do so, the only way to reconcile a purpose of enabling the incoming administration to establish its own pandemic response policies with the brief, bare extension of the CDC eviction halt order is as a ratification of CDC’s view—bolstered by the only two substantive federal court opinions then on-point—that CDC already had authority to restrain evictions under the preexisting PHSA when such a measure is reasonably necessary to control a communicable disease outbreak. *See* 85 Fed.Reg. 55292, 55293 (Sept. 4, 2020); *see also Chambless Enterprises* at \*7, *Brown v. Azar* at \*9.

---

CDC, “CDC 2020 in Review,” (Dec. 29, 2020), <https://www.cdc.gov/media/releases/2020/p1229-cdc-2020-review.html>



Accordingly, the conclusion in *Skyworks* does not square with that court's own reasoning; it should have found, as should this Court, that ratification did occur because in extending the CDC order unchanged Congress signaled approval and agreement with the court decisions holding that the eviction restrictions were already authorized. *See Lorillard* at 580 (“where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”).

**D. No evidence suggests Congress intended to extend the eviction halt order to January 31, 2021, without confirming CDC's authority to issue or extend it.**

In *Tiger Lily*, the Sixth Circuit determined that Congress did not ratify CDC's authority to restrict evictions in the Appropriations Act because nothing in that Act expressly granted CDC that power. *See Tiger Lily*, 2021 WL 1165170, at \*4 (“[N]othing in § 502 expressly approved the agency's interpretation. All § 502 did was congressionally extend the agency's action until January 31, 2021.”). Yet that court's reasoning turns the entire concept of ratification on its head; Congress had no need to enact new statutory text empowering the CDC to restrict evictions because, at the time Congress extended the CDC order, the only courts to have analyzed whether CDC already had that power concluded that it did. *See Lorillard* at 580. Ratification thus required Congress only to approve that already-prevailing

interpretation of CDC’s authority—not grant CDC new powers to do something it had already done. Congress did so by extending the CDC’s halt order, necessarily implying that the original CDC order was valid and in effect.

Unlike *Skyworks*, the *Tiger Lily* opinions did not even examine the context or purpose for which Congress extended the CDC eviction halt order, and dismissed without analysis the lingering significance of that extension beyond its expiration. *See, e.g., Tiger Lily*, 992 F.3d at 524. Neither the District Court nor the Sixth Circuit offered any rationale for why Congress would extend the CDC order only until January 31 if it did not intend to allow further extensions thereafter, and neither court attempted to reconcile its conclusions with the rule that Congress is presumed to be aware of and adopt existing the pre-existing legal interpretations of the PHS Act to authorize the CDC order. *See Tiger Lily*, 992 F.3d at 524, *see also Tiger Lily*, 2021 WL 1171887 at \*10.

In the absence of context, the *Tiger Lily* courts treated the Congressional extension as a wild, unexplained, and temporary legislative whim: “All § 502 did was congressionally extend the agency’s action until January 31, 2021. After that date, Congress withdrew its support[.]” *Tiger Lily*, 992 F.3d at 524. But, as discussed above, the Congressional extension was intended to preserve the status quo through January 2021, and then return further decisions about pandemic-

related eviction restrictions back to public health experts in the new presidential administration. *See Skyworks* at \*12.

By its very text and structure, the CDC order was designed to be extended in short increments tied to the status of the pandemic—as is fully consistent with Congress’ original intent, in the PHSA, for public health experts determine and take only those steps reasonably necessary to control the spread of an infectious disease. *See* 85 Fed.Reg. at 55296 (imposing temporary halt on evictions “subject to further extension, modification, or rescission, is appropriate.”). By extending the specific order CDC had issued, Congress not only signaled approval of the CDC’s claim of authority to restrict evictions further (i.e., beyond January 31) as consistent with the needs of the pandemic. *See Lorillard* at 580.

The Sixth Circuit also mischaracterized the Appropriations Act extension as “mere acquiescence” in the CDC’s issuance of the eviction halt order. *See Tiger Lily*, 992 F.3d at 524. But Congressional acquiescence occurs when Congress fails (or chooses not) to overturn an agency action of which it is aware. *See Schism*, 316 F.3d at 1294 (“The doctrine of acquiescence is premised upon Congress’ failure to act in response to an action it might view as previously unauthorized, unlike the ratification context where Congress affirmatively acted to demonstrate its approval of an agency action.”). Establishing ratification through acquiescence, rather than affirmative Congressional action, tends to be more difficult because

“[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others,” making “failed legislative proposals ... ‘a particularly dangerous ground on which to rest an interpretation of a prior statute.’” *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001), quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). This is particularly true when the agency interpretation or action in question arises from a statute passed by a prior Congress. See *Solid Waste Agency* at 170 (“The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing [the statute giving rise to the agency action] is also considerably attenuated”).

The CDC eviction halt order could not likely be sustained under a theory of ratification-by-acquiescence. The interests and intentions of the current (and 116<sup>th</sup>) Congress likely bear little connection to those of Congress in 1944 (when the Public Health Services Act was enacted), and if Congress had not enacted any legislation concerning the CDC order, numerous conflicting explanations could undoubtedly have been advanced to explain why—thus making perilous any finding of acquiescence. But this is simply not what happened. Congress did not merely refrain from overruling the CDC—or, for that matter, the multiple federal court decisions affirming the CDC order; on the contrary, Congress passed an affirmative act approving the CDC’s determination that it could halt evictions to

control the spread of Covid-19. *See* Pub.L. 116-260, § 502; *see also Lorillard* at 580. The Sixth Circuit’s invocation of the acquiescence standards was entirely inappropriate, and ought not be emulated here.

**E. Congressional ratification of the CDC eviction halt order did not exceed Congressional authority under the Commerce Clause.**

There does not appear to be any disagreement that the original Public Health Services Act provision authorizing the Secretary of Health & Human Services to promulgate regulations to control the interstate spread of communicable diseases fell within the Commerce Clause power—after all, as the Covid-19 pandemic has shown, infectious disease outbreaks have a substantial relation to interstate commerce. *See generally Taylor v. United States*, 136 S. Ct. 2074, 2080; 195 L. Ed. 2d 456 (2016) (activities that “‘substantially affect’ commerce—may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal.”), *quoting Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

The CDC then interpreted that PHSA provision, and an HHS regulation promulgated thereunder, to authorize imposition of an eviction moratorium—effective in any states or territories without equal or greater eviction restrictions—upon finding that measure necessary to control the further spread of Covid-19. *See* 85 Fed.Reg. at 55296. At the time of issuance, the eviction halt order posed an administrative law question—i.e., whether had Congress actually authorized CDC

to restrict evictions. The constitutional question arose only when Congress ratified the CDC order— an action Congress could only have taken if allowed by the Commerce Clause. *C.f. Tiger Lily*, 992 F.3d at 523 (narrow construction of Public Health Services Act appropriate to avoid finding of constitutional overbreadth).

*Skyworks* and *Tiger Lily* avoided this question by ruling, incorrectly as discussed above, that Congress simply had never ratified the CDC order. *See Skyworks* at \*10, *see Tiger Lily*, 992 F.3d at 524. The trial court below did reach the question,<sup>4</sup> but incorrectly found that the broad grant of authority to CDC through the Public Health Services Act exceeded the Commerce Clause power insofar as it authorized a nationwide eviction moratorium. *See Terkel v. CDC*, No. 6:20-CV-00564, 2021 WL 742877, at \*10 (E.D. Tex. Feb. 25, 2021).

The trial court’s ruling was incorrect because evictions contribute to the spread of Covid-19 and thus produce substantial downstream effects on interstate commerce. *See* 85 Fed.Reg. 55294 (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID-19 spread.”); *see Gonzales v. Raich*, 545 U.S. 1, 19 (2005), *discussing Wickard*, 317 U.S. at 126. Whether displaced renters move across state lines or not<sup>5</sup> is immaterial, as increased Covid-

---

<sup>4</sup> In this way, the trial court’s opinion may plausibly be viewed as giving backhand recognition to the fact of the ratification.

<sup>5</sup> The CDC noted that about 10% of the U.S. population moves each year, with about 15% of moves being interstate. *See* 85 Fed.Reg. at 55295.

19 infections in one state pose a threat to other states. *See* 85 Fed.Reg. at 55294 (“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.”).

In the *Gonzales* case, the Supreme Court upheld federal laws restricting the personal, intrastate cultivation and use of marijuana for medical purposes under the Commerce Clause because those laws form an essential part of a comprehensive regulatory scheme for narcotics and other drugs, which would be undercut if local, personal cultivation was exempted. *See Gonzales* at 24. The opinion drew heavily from the classic case of *Wickard v. Filburn*, which similarly held that individual, local cultivation of wheat could frustrate federal regulations aimed at controlling wheat prices (through the aggregate impacts on supply and demand of all exempted farmers). *See Gonzales* at 17, *discussing Wickard*, 317 U.S. at 125.

The Public Health Services Act is a similarly comprehensive regulatory scheme to address a matter substantially affecting interstate commerce—that of public health and infectious disease response.<sup>6</sup> *See* 42 U.S.C. § 264. The ability to

---

<sup>6</sup> “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

impose those measures necessary to respond to disease outbreaks is an essential part of that scheme. *See* 42 U.S.C. § 264(a). Were an outbreak to occur that called for a countermeasure CDC lacked the authority to impose, the scheme would fail. The Commerce Clause thus allows Congress to authorize whatever measures might reasonably be necessary to control an outbreak—including eviction restrictions. *See Gonzales* at 24; *see also* 85 Fed.Reg. at 55296.

Moreover, the ratification of the CDC order fulfills all four of the substantial effects (on interstate commerce) factors identified in the *U.S. v. Lopez* line of cases for evaluating federal laws untethered to comprehensive regulatory schemes: (i) whether the regulated activity is economic in nature, (ii) whether the regulation is expressly limited to circumstances touching to interstate commerce, (iii) whether explicit legislative findings link the regulated activity to interstate commerce, and (iv) whether the link to interstate commerce is attenuated. *See U.S. v. Morrison*,

---

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.” U.S. Dept. of Health & Human Services, “Legal Authority – Public Health Services Act,”

<https://www.phe.gov/Preparedness/planning/authority/Pages/default.aspx>



529 U.S. 598, 609-612 (2000); *see also* *U.S. v. Lopez*, 514 U.S. 549, 560-61 (1995). Evictions are inseparable from residential leasing, and thus economic in nature—especially evictions for nonpayment of rent, to which the CDC order is limited.<sup>7</sup> *See* *Chambless Enterprises*, 2020 WL 7588849 at \*8 (“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”), *quoting* *Russell v. United States*, 471 U.S. 858, 862 (1985). The CDC’s authority to restrict evictions is jurisdictionally limited to circumstances where the failure to do so would allow a communicable disease to spread across state lines and disrupting interstate commerce. *See* 42 C.F.R. § 70.2. The original CDC order, which Congress ratified, contained extensive findings drawing clear, unattenuated links between eviction, the spread of Covid-19, and the impacts on interstate commerce:

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 best efforts, COVID-19 continues to spread and further action is needed. In the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the

---

<sup>7</sup> “The Order temporarily halts residential evictions of covered persons for nonpayment of rent during September 4, 2020, through June 30, 2021.” Centers for Disease Control and Prevention, Frequently Asked Questions at 1, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/Eviction-Moratoria-Order-FAQs-02012021-508.pdf>, last visited April 30, 2021.

spread of communicable disease. Eviction moratoria facilitate self-isolation by people who become ill or who are at risk for severe illness from COVID-19 due to an underlying medical condition. They also allow State and local authorities to more easily implement stay-at-home and social distancing directives to mitigate the community spread of COVID-19. Furthermore, housing stability helps protect public health because homelessness increases the likelihood of individuals moving into congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19.

85 Fed.Reg. at 55292. All roads thus lead to the conclusion that the Congressional ratification of the CDC order was permissible under the Commerce Clause.

The trial court's opposite decision was largely based on the misplaced concern that interpreting the Commerce Clause to allow for a federal eviction moratorium during a public health emergency would "begin to resemble, in operation, a prohibited federal police power." *Terkel*, 2021 WL 742877 at \*10. Yet both the Public Health Services Act provision and Health & Human Services regulation on which the CDC eviction halt order was based allows federal health officials to impose quarantine measures only under sharply limited circumstances: (i) where a communicable disease threatens to spread between states, (ii) where the CDC Director reasonably determines that particular measures are necessary to prevent that transmission, and (iii) where state and local health authorities have failed to take sufficient steps on their own. *See* 42 C.F.R. § 70.2; *see also* 42 U.S.C. § 264(a). The CDC eviction halt order that Congress ratified adhered to these parameters, which do not realistically enable CDC to impose eviction restrictions or other quarantine measures untethered to active public health threats.

Whether or not Congress may authorize a “nationwide eviction moratorium long after the COVID-19 pandemic ends,” as the trial court feared,<sup>8</sup> Congress may certainly authorize such a moratorium before the pandemic ends when public health experts have found such a moratorium critical to bringing that pandemic under control. *See* 85 Fed.Reg. at 55296.

### **CONCLUSION**

For all of the foregoing reasons, the Court should REVERSE the trial court’s decision below.

Respectfully submitted this 3<sup>rd</sup> Day of May, 2021,

#### **National Housing Law Project**

By: /s/Eric Dunn  
Eric Dunn, Attorney  
National Housing Law Project  
919 E. Main Street, Suite 610  
Richmond, Virginia 23219  
Telephone: (415) 546-7000  
Fax: (415) 546-7007  
edunn@nhlp.org

---

<sup>8</sup> *Terkel* at \*10.

## **CERTIFICATE OF COMPLIANCE WITH LENGTH AND STYLE LIMITS**

This brief was prepared using Microsoft Word with Times New Roman font, monospaced and in 14-point type size. This font and spacing complies with Federal Rule of Appellate Procedure 32(a)(5-6). A word count conducted on the final brief, save for items excluded under Rule 32(f), reported 4,948 words

s/Eric Dunn  
Attorney for NHLP

## **CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2021, I electronically filed the Motion for Leave and attached proposed Brief of Amicus Curiae using the CM/ECF system, which will automatically send copies to all counsel of record. There are no parties unrepresented by counsel and not being served through the CM/ECF system.

s/Eric Dunn  
Attorney for NHLP