

# THE CDC ORDER: EXTENDED THROUGH JUNE 30, 2021 AND ITS CHALLENGES

JUNE 9, 2021

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# ABOUT THE SPEAKER

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- Kevin S. Rabin is a senior staff attorney with Three Rivers Legal Services, Inc. in Gainesville, FL. He has litigated hundreds of eviction, debt collection, wage garnishment, foreclosure, and affirmative consumer, fair housing, and tenants' rights suits to completion in his seven years of practice across North-Central Florida. He is currently a co-chair of the Florida Housing Umbrella Group. He is a graduate of the University of Missouri (B.A. Political Science 2010) and the University of Florida Levin College of Law (J.D. *cum laude* 2013). He is a member of the Florida Bar, and is admitted in the United States District Courts for the Middle and Northern Districts of Florida and the U.S. Court of Appeals for the Eleventh Circuit.

# OUTLINE OF TOPICS FOR TODAY

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- The Centers for Disease Control and Prevention (CDC) Order – Extension and Modifications
- Challenges to the CDC Order – Current State of Play

## Media Statement from CDC Director Rochelle P. Walensky, MD, MPH, on Extending the Eviction Moratorium

### Media Statement

For Immediate Release: Monday, March 29, 2021

Contact: [Media Relations](#)

(404) 639-3286

CDC Director Dr. Rochelle Walensky has signed an extension to the eviction moratorium further preventing the eviction of tenants who are unable to make rental payments. The moratorium that was scheduled to expire on March 31, 2021 is now extended through June 30, 2021.

The COVID-19 pandemic has presented a historic threat to the nation's public health. Keeping people in their homes and out of crowded or congregate settings — like homeless shelters — by preventing evictions is a key step in helping to stop the spread of COVID-19.

# ORIGINS OF THE CDC ORDER

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- August 8, 2020 – Former President Trump issues executive order requesting broad protective action for tenants facing eviction and homeowners facing foreclosure (Exec. Order No. 13,945, 80 Fed. Reg. 49,935 (Aug. 8, 2020) – “It is the policy of the United States to minimize, to the greatest extent possible, residential evictions and foreclosures during the ongoing COVID-19 national emergency.”
- September 1, 2020 – CDC responds and enact CDC eviction moratorium effective Sept. 4.
  - Potentially applies to all residential dwellings nationwide – no exceptions except by territory (American Samoa, any state wherein the state provided a greater set of protections –
    - Florida did not have greater protections, and its sole protections expired on September 30, 2021 (Fla. Exec. Order 20-211 expired, and Governor’s office stated it was to avoid any confusion about application of CDC Order).
  - “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 State. . . in which there are documented cases of COVID-19 that provides a level of public-health protections below the requirements listed in this Order.*” 85 Fed. Reg. 55,294, 55,296 (emphasis added).
  - Who gets the protections? “Covered persons” - any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action,” a declaration under penalty of perjury contains 5 specific statements.

# CDC DECLARATION FORM

- CDC Declaration Form – OMB Control No. 0920-1303 - [FORM] Declaration Under Penalty of Perjury for the Centers for Disease Control and Prevention’s Temporary Halt in Evictions to Prevent Further Spread of COVID-19 (CDC Form Declaration) - [https://www.cdc.gov/coronavirus/2019-ncov/downloads/EvictionDeclare\\_d508.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/EvictionDeclare_d508.pdf).
- Now a check box form, has been modified at each extension.

**Eviction Protection Declaration**

The Centers for Disease Control and Prevention (CDC) has issued an order that may protect you from being evicted or removed from where you are living. **This means that you may be able to stay at the place where you live through JUNE 30, 2021, if you qualify.**

**How to use this form**

1. See if you qualify for eviction protection under the CDC order. If you'd like help from an expert, contact (800) 569-4287 or go to <https://www.hudexchange.info/programs/housing-counseling/rental-eviction/> to get contact information for a local HUD-approved housing counselor.
2. Sign the declaration that you qualify, on the next page.
3. Give the signed declaration page to the individual or company you rent from (for example, building management, landlord, etc.). Keep a picture or copy for your records and call your expert back if there's a problem.

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**1. Do I qualify?**  
*If you can check at least one box in each column, you qualify.*

<b>Column A</b>	<b>AND</b>	<b>Column B</b>
<input type="checkbox"/> I received a stimulus check (Economic Impact Payment) in 2020 or 2021		I cannot pay my full rent or make a full housing payment because:
<input type="checkbox"/> I was not required to report any income to the IRS in 2020		<input type="checkbox"/> My household income has gone down substantially
<input type="checkbox"/> In 2020 or 2021, I earned (or expect to earn) <b>less than \$99,000</b> as an individual or <b>less than \$198,000</b> as a joint filer		<input type="checkbox"/> I have been laid off from work
You are likely to have earned under <b>this amount if you receive any</b> of the following benefits:		<input type="checkbox"/> My work hours or wages have been cut
<ul style="list-style-type: none"><li>• Supplemental Nutrition Assistance Program (SNAP)</li></ul>		<input type="checkbox"/> I have extraordinary out-of-pocket medical expenses!
		<b>None of the above — You do not qualify.</b>

# EXTENSIONS OF THE CDC ORDER

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- The CDC Order was extended by Consolidated Appropriations Act of 2021 (Pub. L. 116-260, § 502) until January 31, 2021, and again by two reauthorization CDC Orders: the first on January 29, 2021 extending until March 31, 2021 (86 Fed. Reg. 8020 (Feb. 3, 2021), and the second on March 29, 2021, extending until June 30, 2021 (no federal register citation available).
  - The 2 newer CDC Orders cover American Samoa, but are otherwise substantially similar to the Sept. 4, 2020 original CDC Order.
  - March 29, 2021 CDC Order had several small modifications worth noting:
    - No new declaration required – any declaration served after Sept. 4, 2020 by a “covered person” has the same effect. CDC Order at 10 (Mar. 29, 2021) (“A signed declaration submitted under a previous order remains valid notwithstanding the issuance of this extended and modified order, and covered persons do not need to submit a new declaration under this Order.”).
      - Tenants DO NOT have to use the form – any written document containing the same information along with a perjury statement is sufficient.
    - Order does not prohibit evictions for criminal activity but clarifies that a “covered person” may not be evicted “on the sole basis that they are alleged to have committed the crime of trespass (or similar state-law offense) where the underlying activity is a covered person remaining in a residential property despite nonpayment of rent.”
      - Does this apply to section 83.58, Florida Statutes and holdover tenants?
    - Order addresses some of the arguments raised in certain court challenges – CDC Order at 10 (Mar. 29, 2021) (“Even if a particular eviction, standing alone, would not always result in interstate displacement, the mass eviction that would occur in the absence of this Order would inevitably increase the interstate spread of COVID-19. Moreover, increases in *intrastate* spread further facilitate *interstate* spread in the context of communicable disease spread.”) (emphasis added).

# WHAT DOES THE CDC ORDER ACTUALLY PREVENT?

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- <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf>
- “Subject to the limitations under ‘Applicability,’ a **landlord, owner of 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 this Order.” CDC Order at 1 (Mar. 29, 2021).
  - “Evict” and “residential property” are both defined terms, the CDC also has FAQs on how it interprets those definitions.
  - It does not remove liability for rent or other housing payments, and does not preclude actions to collect those charges outside of an eviction from the property (i.e. breach of contract suit).
  - Does not prohibit evictions in 5 explicit situations:
    - Criminal activity on the premises;
    - Threatening health or safety of other residents (does not include COVID-19 if the person complies with legal requirements, or refusal to be tested);
    - Damaging or posing an immediate and significant risk of damage to the property;
    - Violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or
    - Violating any other contractual obligation, other than timely payment of rent or similar housing-related payment (i.e. late fees, penalties, or interest).
  - So, it restricts nonpayment eviction and any other type of eviction that is closely tied to it (like eviction for nonpayment of pet fees, late fees, utilities, or other financial charges imposed for housing itself) – may also prohibit holdover tenancy evictions if the non-renewal is premised on nonpayment (see Modifications).
  - Many state courts have limited the “eviction” to only judgment or the issuance and execution of a writ of possession – little doubt that a writ of possession is restricted if the tenant is a “covered person.”

# CDC ORDER CHALLENGES

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- Six major federal district court decisions to date (one new case – all six are on appeal):
  - Brown v. Azar, No. 1:20-CV-03702, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020), *appeal docketed*, No. 20-14210 (11th Cir. Nov. 9, 2020).
  - Chambless Enterprises, LLC v. Redfield, No. 3:20-CV-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020) *appeal docketed*, No. 21-30037 (5th Cir. Jan. 22, 2021).
  - Terkel v. Ctr. for Disease Control and Prev., No. 6:20-CV-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), *appeal docketed*, No. 21-40137 (5th Cir. Mar. 3, 2021).
  - Skyworks, Ltd. v. Ctr. for Disease Control and Prev., No. 5:20-CV-2407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021), *appeal docketed*, No. 21-3443 (6th Cir. May 7, 2021).
  - Tiger Lily, LLC v. U.S. Dep’t of Hous. and Urban Dev., No. 2:20-CV-02692, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021), *appeal docket and stay denied*, No. 21-5256, 2021 WL 1165170 (6th Cir. Mar. 29, 2021).
  - Alabama Ass’n of Realtors v. Dep’t of Health & Human Services, No. 1:20-CV-3377 (D.D.C. May 5, 2021), *appeal docketed* No. 21-5093 (D.C. Cir. May 5, 2021).
  - Other relevant challenges:
    - KBW Investment Properties LLC v. Azar, No. 2:20-CV-04852 (S.D. Ohio) (voluntarily dismissed after denial of preliminary injunction); Dixon Ventures, Inc. v. USA, 4:20-CV-1518 (E.D. Ark.) (filed on Dec. 30, 2020); Mossman v. CDC, 1:21-CV-00028 (N.D. Iowa) (filed on Mar. 18, 2021); and Fla. Ass’n of Realtors v. Ctr. for Disease Control and Prev., No. 8:21-CV-1196 (M.D. Fla.) (filed on May 17, 2021).

# BROWN V. AZAR

NO. 1:20-CV-03702, 2020 WL 6364310 (N.D. GA. OCT. 29, 2020), *APPEAL DOCKETED*, NO. 20-14210 (11TH CIR. NOV. 9, 2020).

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- Plaintiffs include the National Apartment Association (NAA), procedural posture was preliminary injunction (almost all these cases have been decided at that stage)
  - Four elements – (1) substantial likelihood of success on the merits; (2) irreparable injury without injunction; (3) threatened injury to the movant outweighs prejudice to opposing party; and (4) injunction, if issued, is not adverse to the public interest.
- Three challenges (substantial likelihood prong) – (1) CDC Order lacks statutory and regulatory basis; (2) even if authorized by Congress, action is arbitrary and capricious per APA; and (3) violates right of access to the courts.
  - (1) Statutory and regulatory basis – Court holds that Congress’s delegation was broad (42 U.S.C. § 264) and its intent was clear – “Congress gave the Secretary of HHS broad power to issue regulations necessary to prevent the introduction, transmission and spread of communicable diseases. Because . . . the Order is necessary to control the COVID-19 pandemic, the CDC was authorized to issue it.” *Id.* at \*7.
    - Court looked further at the second sentence of 42 U.S.C. § 264(a), and concluded that, when read with the other companion provisions of 264(b) (detention of individuals), 264(c) (limiting detention to those coming from abroad generally), and 264(d) (permitting detention of those traveling between States in limited situations), the list in 264(a) is not exhaustive.
    - Cited to Independent Turtle Farmers of La. v. U.S., 703 F. Supp. 2d 604 (W.D. La. 2010) – common case cited by all opinions
    - “In sum, the clear and broad delegation of authority in the first sentence of § 264(a); the context provided by the subsequent subsections; the parroting language of § 70.2, which specifically uses the term including—a term of enlargement; and persuasive authority from the Independent Turtle Farmers court all point to the same conclusion: the Order has statutory and regulatory authority, and the CDC may take those measures that it deems reasonably necessary to prevent the spread of disease, so long as it determines that the measures taken by any state or local government are insufficient to prevent the spread of the disease.”
    - Discussion of several statutory canons, concluding none sufficiently support the plaintiffs.

# BROWN (CONT.)

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- (2) APA arbitrary and capricious – Court finds no issue, given APA requires “exceedingly deferential” review for agency conclusions based on its specialized expertise. Id. at \*11.
  - Court rejects the arguments largely because of the CDC Order’s specific and tailored findings, citing that “the CDC need not show that the eviction moratorium is the only measure that will prevent the spread of COVID-19 or the most pressing concern.” Id.
  - Court also rejects that CDC did not show sufficient evidence that measures taken by States were insufficient – though not raised, the reaction by States like Florida to remove their restrictions in favor of the CDC’s is probative.
- (3) Right of access to the courts – Court rejects this argument because (a) the eviction moratorium narrowly applies to only a subset of evictions (nonpayment of rent and only where the tenant is a “covered person”) and is temporary, (b) it does not preclude other remedies (suit for money damages from breach of contract), and (c) “[a]s clarified by the CDC, under the Order, landlords are therefore not precluded from serving their tenants with any required non-payment notices, commencing court proceedings, attending trials or obtaining judgments. The Order only delays the actual eviction.”
- Irreparable injury – Court rejects three grounds, largely based on plaintiffs’ ability to receive compensation through monetary damages.
- Remaining factors – Court finds that plaintiffs failed to devote any real discussion to weight of injunction vs. harm to the public, and any harm alleged by plaintiffs is insufficient to outweigh the public interest of avoiding additional COVID-19 infection.
- SUMMARY – Court denies plaintiffs’ motion for preliminary injunction, finding in favor of CDC Order at preliminary stage.
- On appeal, oral argument conducted before 11th Circuit Court of Appeals.
  - Panel features Judges Grant, Tjoflat, and Branch.
  - Full recording is available on the 11th Circuit’s website: [https://www.ca11.uscourts.gov/system/files\\_force/oral\\_argument\\_recordings/20-14210.mp3?download=1](https://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/20-14210.mp3?download=1)
  - Irreparable harm appears a big sticking point; procedural posture appears more favorable for the government.

# CHAMBLESS ENTERPRISES, LLC V. REDFIELD

NO. 3:20-CV-01455, 2020 WL 7588849 (W.D. LA. DEC. 22, 2020), *APPEAL DOCKETED*, NO. 21-30037 (5TH CIR. JAN. 22, 2021).

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- Plaintiffs include the Apartment Association of Louisiana, Inc., procedural posture was preliminary injunction.
- Three challenges (substantial likelihood prong) – (1) CDC Order lacks statutory and regulatory basis (like Brown); (2) non-delegation doctrine; (3) even if authorized by Congress, action occurred without notice and comment rulemaking procedures required by APA.
  - (1) Statutory and regulatory basis – Court concurs with Brown court that the CDC Order falls within the scope of delegated authority - “This Court finds that the plain text of the statute is unambiguous and evinces a legislative determination to defer to the ‘judgment’ of public health authorities about what measures they deem ‘necessary’ to prevent contagion. Congress’s use of the phrase ‘such regulations as in his judgment are necessary’ shows that it intended to defer to agency expertise, as ‘Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.’” Id. at \*5 (citations omitted).
    - Court relies, in part, on the persuasive guidance of Turtle Farmers, and highlights that, contrary to plaintiffs’ arguments, the examples in the list in 264(a) actually demonstrates that breadth of Congressional delegation – showing that it may infringe on both personal liberties and property rights where appropriate to protect public health. Id.
    - Like the Brown court, it rejected canons of construction as unneeded against the demonstration of Congressional intent.
  - (2) Non-delegation doctrine – Court finds no violation of the non-delegation doctrine, as Congress clearly provided an “intelligible principle” to guide the agency in its actions. Id. at \*10.
  - (3) APA – Court finds against APA notice and comment violation, since the CDC Order is not a “rule” per APA and rather, an emergency action; Court reminds that CDC can dispense with notice and comment under the APA when good cause exists – where “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” Id. at \*11.
- Other prongs – Court largely mirrors Brown court reasoning.
- SUMMARY – Court denies plaintiffs’ motion for preliminary injunction, finding in favor of CDC Order at preliminary stage.
- Appellant’s brief filed March 22, 2021; appellee’s brief filed April 21, 2021; reply brief filed May 13, 2021; ready to be set for oral argument.
  - Amici Curiae include Disability Rights Texas, the Constitutional Accountability Center, American Academy of Pediatrics, American Medical Association, Center for Health Policy and Law at Northeastern University School of Law, Children's Healthwatch, George Consortium, GLMA, Health Professionals Advancing LGBTQ Equality, Louisiana Fair Housing Action Center, National Hispanic Medical Association, National Medical Association, Public Health Law Watch, Southeast Louisiana Legal Services, Southern Poverty Law Center, and the National Housing Law Project.
- Joined with Terkel for purposes of appeal.

# TERKEL V. CTR. FOR DISEASE CONTROL AND PREV.

NO. 6:20-CV-00564, 2021 WL 742877 (E.D. TEX. FEB. 25, 2021), *APPEAL DOCKETED*, NO. 21-40137 (5TH CIR. MAR. 3, 2021)

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- First decision to hold the CDC Order unconstitutional, and an anomaly relative to the other two decisions ([Tiger Lily](#) and [Skyworks](#)).
- Plaintiffs sought declaratory relief, and filed motion for preliminary injunction – Plaintiffs invited the Court to construe the preliminary injunction motion as a motion for summary judgment on declaratory claims – Plaintiff limited its challenges accordingly.
- Challenges – CDC Order exceeds Commerce Clause power and Necessary and Proper clause power.

Case 6:20-cv-00564-JCB Document 45 Filed 02/25/21 Page 1 of 21 PageID #: 1744

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS

No. 6:20-cv-00564

**Lauren Terkel et al.,**

*Plaintiffs,*

v.

**Centers for Disease Control and Prevention et al.,**

*Defendants.*

## OPINION AND ORDER

This lawsuit presents the question whether the federal government has authority to order property owners not to evict specified tenants. Plaintiffs argue that this authority is not among the limited powers granted to the federal government in Article I of the Constitution, and thus the decision whether to enact an eviction moratorium rests with a given State. Disagreeing, the federal government argues that a nationwide eviction moratorium is within Article I's grant of

# TERKEL (CONT.)

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- Court determines that regulating evictions is beyond the power of Congress (citing Lopez, Morrison, Raich, and Wickard) - “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. 86 Fed. Reg. at 8,021 (defining “eviction” as any action “to remove or cause the removal of a covered person from a residential property”). Real estate is inherently local. Residential buildings do not move across state lines. And eviction is fundamentally the vindication of the property owner’s possessory interest.” Id. at \*6.
  - But see Chambless Enterprises, 2020 WL 7588849 at \*7 (“Indeed, the federal government has a long history of regulating the rental housing market, including, most recently, in the form of a similar temporary eviction moratorium enacted as part of the CARES Act.”) (citation omitted).
  - Court used the test set forth in Morrison – (1) Whether the regulated activity involves “‘commerce’ or any sort of economic enterprise;” (2) whether the regulation contains an “express jurisdictional element” limiting its reach to circumstances connected with interstate commerce;” (3) whether there are explicit legislative findings linking the regulated activity to effects on interstate commerce; and (4) whether the proffered link between the regulated activity and interstate commerce is attenuated.
  - However, note the Court’s characterization – the Court focuses on what the CDC Order does, not what the statute at issue provides the CDC the authority to regulate – the Public Health Services Act is a comprehensive statute that regulates a specific aspect of interstate commerce (public health emergency response) and it is immaterial that some purely local activities may be swept up in public health order issued pursuant to the Act. Gonzalez v. Raich, 545 U.S. 1, 22 (2005) (“That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.”); see id. at 37 (Scalia, J., concurring) (“The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself ‘substantially affect’ interstate commerce.”).
- Commentary – Congress has routinely and regularly regulated residential rental markets and housing purchase markets – the Terkel Court’s ruling is incredibly audacious and re-characterizes the action taken in order to sever it from the comprehensive authority provided by the statute.
  - The next three cases demonstrate where the actual disputes lie.
- Appellant’s brief filed April 26, 2021; appellee’s brief filed May 26, 2021; nearly ready to be set for oral argument.
  - Amici Curiae include the Constitutional Accountability Center, Come Dream Come Build, Connect Community, the National Low Income Housing Coalition, Mr. Matthew Desmond (Professor at Princeton University and Author of Evicted), Texas Appleseed, American Civil Liberties Union Foundation of Texas and the ACLU, the NAACP, the COVID-19 Eviction Defense Project, the National Housing Law Project, and the American Academy of Pediatrics.
- Joined with Chambless Enterprises for purposes of appeal.

# SKYWORKS, LTD. V. CTR. FOR DISEASE CONTROL AND PREV.

## NO. 5:20-CV-2407, 2021 WL 911720 (N.D. OHIO MAR. 10, 2021), APPEAL

### DOCKETED, NO. 21-3443 (6TH CIR. MAY 7, 2021)

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- Parties, like in Terkel, agreed to expedite merits determination to summary judgment-like review.
- Challenges – (1) CDC Order lacks statutory and regulatory basis (like Brown and Chambless Enterprises); (2) non-delegation doctrine; (3) even if authorized by Congress, action occurred without notice and comment rulemaking procedures required by APA and is arbitrary and capricious in violation of the APA.
  - “The most natural and logical reading of the statute as a whole does not extend the CDC's power as far as Defendants maintain. Such a broad reading of the statute, and the term ‘other measures’ in particular, would authorize action with few, if any, limits—tantamount to creating a general federal police power. . . . But the text does not authorize such boundless action or depend on the judgment of the Director of the CDC or other experts for its limits. The eviction moratorium in the CDC's orders exceeds the statutory authority Congress gave the agency.” Id. at \*10.
  - Court acknowledges Brown and Chambless Enterprises, but notes that it believes the “decisions have the feel of adopting strained or forced readings of the statute, stretching to rationalize the governmental policy at issue.” Id. at \*11.
    - Court notes “the CDC moratorium is not [narrowly] tailored . . . It allows some evictions to proceed, including those based on criminal conduct, damage to property, or reasons other than nonpayment of rent. Such evictions have as much chance of spreading Covid-19 as those subject to the moratorium.”
  - Since this decision occurred after Congressional action that extended the CDC Order (Consolidated Appropriations Act of 2021), Court considered whether this was an expression of Congressional ratification. “Put another way, ‘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.’” Id. at \*12 (citing Swayne & Hoyt v. United States, 300 U.S. 297, 301 – 02 (1937)).
    - “But Congress did not speak to the merits of the policy at issue, as it did in the CARES Act. Nor did Congress amend the organic statute, Section 361 of the Public Health Services Act, either to create a new subsection authorizing an eviction moratorium or add such an action to the list of permissible agency actions in subsection (a). All Congress did was change the expiration date of the first order. In context, such a limited action makes sense.” Id.
  - Court sets aside CDC Order under APA, avoids discussion of non-delegation doctrine challenge; declines to issue injunction, grants only declaratory relief.
- Rule 59(e) Motion to Alter or Amend Judgment to extend to plaintiff's members nationwide docketed on April 7, 2021; reply in opposition filed April 29, 2021 and supplemented on May 7, 2021 (appeal stayed pending resolution of underlying motion).
  - Ruling could come at any time.
- Outcome will be unlikely to vacate order nationwide to all landlords, since that exceeds the scope of the requested alteration or amendment, but could be extended beyond the named plaintiffs to members nationwide.
- Any such order likely to generate a request for stay in the 6th Circuit.

# TIGER LILY, LLC V. U.S. DEPT' OF HOUS. AND URBAN DEV.

NO. 2:20-CV-02692, 2021 WL 1171887 (W.D. TENN. MAR. 15, 2021), *APPEAL DOCKETED AND STAY DENIED*, NO. 21-5256, 2021 WL 1165170 (6TH CIR. MAR. 29, 2021).

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- Note: On Appeal (No. 21-5256) – 6th Circuit – stay of decision below denied by 6th Circuit panel, citing gov't's lack of likely success on the merits.
- Same general procedural posture as Terkel and Skyworks – judgment effectively on pleadings/summary judgment (but here, motion for preliminary injunction had been denied – denied on lack of irreparable harm).
- Challenges – (1) CDC Order lacks statutory and regulatory basis (like Brown, Chambless Enterprises, and Skyworks); (2) violation of constitutional due process; (3) even if authorized by Congress, action occurred without notice and comment rulemaking procedures required by APA and is arbitrary and capricious in violation of the APA.
- “Though much has recently been made by other litigants in other courts concerning similarly alleged constitutional violations or the absence of same, this Court seeks to avoid constitutional entanglement altogether by construing the statute narrowly at the outset as it was written for the limited purpose for which it was designed.” Id. at \*5.
- “The CDC was given broad authority to make and enforce regulations, and the statute specifically identifies the measures to be taken. To hold otherwise would be to construe the statute so broadly as to grant this administrative agency unfettered power to prohibit or mandate anything, which would ignore the separation of powers and violate the non-delegation doctrine.” Id. at \*8.
- Court finds that the time-limited extension of the CDC Order in the Consolidated Appropriations Act of 2021, while it may constitute Congressional ratification, is “moot” since there was a temporal extension. Id. at \*10.
  - Note: this is a flimsy rationale – ratification would mean that the CDC Order is a valid exercise of delegated authority, so why would the time limitation be relevant? Could Congress allow for impermissible regulation as long as it's only as short as Congress decides?
- Appellant government's brief filed May 12, 2021, appellee's brief due soon.
- Only amicus is the Constitutional Accountability Center.
- Underlying order extended in the Western District of Tennessee only, unlikely to affect Florida in any notable way.

# ALABAMA ASS'N OF REALTORS V. DEPT. OF HEALTH & HUMAN SERVICES

NO. 1:20-CV-3377, 2021 WL 1779282 (D.D.C. MAY 5, 2021), *APPEAL DOCKETED*  
NO. 21-5093 (D.C. CIR. MAY 5, 2021)

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- May 5, 2021 – District court sides with the analyses in Skyworks and Tiger Lily, but goes further by ordering a nationwide vacatur of the CDC Order.
  - Statutory text did not extend to the actions taken by the CDC, therefore it is unlawful agency action.
  - District court gives extremely little attention to the Congressional ratification argument, joining the rationale that, somehow, Congress could extend unlawful agency action under the Public Health Services Act without actually ratifying that the action was legitimate. Memo. Op. 17 – 19.
- Government moved for stays in the district court and D.C. Circuit Court of Appeals – administrative stay granted by the district court for a limited time while considering the full stay pending appeal.
- May 14, 2021 – District court grants stay pending appeal granted – 2021 WL 1946376
  - District court says there is no likelihood of success on the merits...but the other factors – irreparable harm, risk of injury to the plaintiffs, and public interest – weigh in favor of the CDC.
- Emergency motion to lift stay filed May 17, 2021, government response on May 24, 2021, reply on May 26, 2021 – major implications if D.C. Circuit lifts the stay imposed by the district court – would reinstate nationwide immediate vacatur of CDC Order.

FLA. ASS'N OF REALTORS V. CTR. FOR DISEASE CONTROL AND PREV.  
NO. 8:21-CV-01196 (M.D. FL.) (FILED MAY 17, 2021)

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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

FLORIDA ASSOCIATION OF  
REALTORS®, and

R.W. CALDWELL INC.,

*Plaintiffs,*

v.

CENTERS FOR DISEASE CONTROL  
AND PREVENTION, and

ROCHELLE P. WALENSKY, in her official  
capacity as Director of the Centers for  
Disease Control and Prevention, and

U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, and

XAVIER BECERRA, in his official capacity

Civil Case No.: 8:21-cv-1196

**COMPLAINT WITH  
DECLARATORY AND  
INJUNCTIVE RELIEF  
REQUESTED**

# CDC ORDER CHALLENGES

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- So what's the focus? – the Public Health Service Act, 42 U.S.C § 264 (“Regulations to control communicable disease), and specifically, § 264(a) – “For purposes of carrying out and enforcing such regulations, the Surgeon General may 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.**”
- Brown and Chambless Enterprises hold that the list is not exhaustive, and that the delegation must be read as a whole with the rest of § 264, whereas Skyworks, Tiger Lily, and Alabama Association of Realtors hold that the list modifies the broad “and other measures” language, thus limiting it to actions akin to the enumerated list.
  - The five decisions split on the statutory grant of authority, avoiding constitutional questions (or answering them without hesitation) to tackle the real issue at hand.
  - Only Terkel and minor dicta in Skyworks suggest that Congress lacks the authority to regulate public health by imposing an eviction moratorium, and the decision rests on a re-characterization of what Congress provided by statute by what the CDC did with the delegated authority (i.e. it conflated two separate concepts entirely).
    - Terkel remains the hotly-contested anomaly.
  - 6th Circuit’s decision in denying stay pending appeal seems to agree with Tiger Lily court’s rationales; we’ll see what happens in Skyworks.
  - Congressional ratification given short-shrift by Tiger Lily, Skyworks, and Alabama Association of Realtors courts – any extension implies Congress approved of the nature of the action underlying the CDC Order.

# CDC ORDER CHALLENGES (CONT.)

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- Scope of rulings:
  - **In effect**, only applies to the litigants involved in those cases and, in the case of Tiger Lily, throughout the Western District of Tennessee; the Skyworks plaintiffs have filed a motion to amend or alter judgment to apply to their members nationwide; Alabama Association of Realtors has nationwide implications.
  - Declaratory judgments from federal district courts have no binding effect on any state court anywhere in the United States *except* where the parties involved are the same. U.S. ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970) (“On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.”); 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.”).
  - No constitutional or statutory ruling binding any Florida courts to date – stay in Alabama Association of Realtors
    - Some county courts have found the CDC Order unconstitutional (including for grounds unrelated like Takings Clause violations or otherwise), but are of limited persuasive value (several have been appealed).
    - Most other county court have simply applied the CDC Order in case-by-case situations.
- So what is the take away?
  - CDC Order in effect through June 30, 2021 unless a party to one of these decisions or in the Western District of Tennessee.
  - Landlords can challenge constitutionality either through declaratory relief (federal or state court) or in individual eviction cases, but likely must implead the United States to defend itself (there would certainly be no effect beyond a single case unless the United States is a party).
  - CFPB and FTC may still take action against landlords who violate the CDC Order: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-acting-director-uejio-and-ftc-acting-chairwoman-slaughter-issue-joint-statement-on-preventing-illegal-evictions/>. Implications under debt collection laws at issue.
    - CFPB Interim Rule has been challenged, unclear if it will have any real impact.
  - Fast moving, and these cases evade review to an extent – judicial minimalism.

# QUESTIONS? COMMENTS? CONCERNS?

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