IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SKYWORKS, LTD., CEDARWOOD VILLAGE APARTMENTS I & II OWNER B, LLC; MONARCH INVESTMENT AND MANAGEMENT GROUP, LLC; TOLEDO PROPERTIES OWNER B, LLC; and NATIONAL ASSOCIATION OF HOME BUILDERS,

Plaintiff,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, in her official capacity as Director, Centers for Disease Control and Prevention; SHERRI A. BERGER, in her official capacity as Acting Chief of Staff, Centers for Disease Control and Prevention; DEPARTMENT OF HEALTH AND HUMAN SERVICES; NORRIS COCHRAN, in his official capacity as acting Secretary of Health and Human Services; MONTY WILKINSON, in his official capacity as Acting Attorney General of the United States,

Defendants.

Case No. 5:20-cv-02407-JPC

JUDGE J. PHILIP CALABRESE

MAGISTRATE JUDGE CARMEN E. HENDERSON

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO CLARIFY OR AMEND

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INTRODUCTION

On March 12, 2021, this Court held that the CDC's Orders imposing a nationwide eviction moratorium exceeded the agency's authority under the relevant statute and regulation. Opinion and Order at 30 (ECF #54). Consistent with that holding, the Court concluded, as section 706 of the APA requires, that the CDC's Orders must be set aside, and it issued a declaratory judgment holding the Orders invalid. *Id*. at 29-30.

The Court's ruling was clear on its face. It did not hold that the CDC's moratorium was invalid only as it applied to the Plaintiffs, but that the moratorium was invalid and thus set aside, which necessarily means vacated as to any and all affected parties. As the D.C. Circuit has stated, "'When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" *Nat. Mining Assoc. v. U.S. Army Corp of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir.1989)). The Sixth Circuit has followed this approach. *See, e.g.*, *Montgomery Cty., Maryland v. FCC*, 863 F.3d 485, 491–92 (6th Cir. 2017) (vacating an agency order that did not sufficiently justify its interpretation of a statute as arbitrary and capricious, pursuant to 5 U.S.C. 706). And it makes sense here, as both Plaintiffs and Defendants have recognized throughout the case that the validity of the CDC's Orders does not turn on any particular facts or circumstances, but on whether the relevant statute and regulation—42 U.S.C 264(a) and 42 C.F.R. 70.2—authorize the CDC to impose a nationwide eviction moratorium.

Defendants, however, disagree with the Court's ruling and have decided to read it as narrowly as possible. They contend that it applies only to the Plaintiffs and "does not prohibit the application of the CDC's eviction moratorium to other parties. For other landlords who rent to covered persons, the CDC's eviction moratorium remains in effect." Press Release, Department of

Justice, Department of Justice Issues Statement Regarding Decision in Skyworks v. CDC (March 12, 2021) (available at https://www.justice.gov/opa/pr/department-justice-issues-statement-regarding-decision-skyworks-v-cdc). This approach is consistent with recent Department of Justice policy concerning decisions that set aside agency action under the APA. *See* Memorandum from the Office of the Att'y Gen. to the Heads of Civil Litigating Components U.S. Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 7-8 (Sept. 13, 2018) ("DOJ Memorandum") (available at https://www.justice.gov/opa/press-release/file/1093881/download).

While it is, of course, true that the Court's ruling applies to the Plaintiffs (including members of the National Association of Homebuilders, as Defendants have conceded),[1] Defendant's conclusion that the ruling applies only to the Plaintiffs is wrong. Notwithstanding their disagreement with this Court's ruling, three courts—including a panel of the Sixth Circuit—have now agreed with this Court that the CDC's eviction moratorium is unlawful. *See Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, No. 21-5256, 2021 WL 1165170 (6th Cir. Mar. 29, 2021); *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, No. 220CV02692MSNATC, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021); *Terkel v. Centers for Disease Control & Prevention*, No. 6:20-CV-00564, 2021 WL 742877, (E.D. Tex. Feb. 25, 2021).

[1] There is no dispute between the parties about the impact of the Court's ruling on NAHB and its national membership. This Court held in its March 10 Order that NAHB has standing in this case to represent the interests of its members. Order at 17. That that necessarily means the Court's ruling applies to all of NAHB's members who are affected by the CDC's Orders. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) (explaining that when an "association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured"). Plaintiffs have confirmed that the Department of Justice agrees the Court's ruling applies to those who were NAHB members at the time the complaint was filed, who identify themselves, and who rent residential properties to covered persons who submit CDC declarations.

These decisions make clear that the CDC lacks authority to continue enforcing its eviction moratorium—indeed, that doing so is lawless agency action. And Defendants' position that this Court's ruling applies only to the Plaintiffs defies the text, history, and common-sense application of APA section 706 to the CDC's eviction moratorium.

Accordingly, this Court should make clear that its March 10 ruling necessarily means that the CDC Orders are vacated not only to the Plaintiffs, but to all affected parties nationally, or, at the very least, to the Plaintiffs as well as affected parties within the Northern District of Ohio.

ARGUMENT

As an action challenging the CDC's statutory authority, this one is necessarily a facial attack on the CDC's Orders, and the Court's ruling necessarily invalidated the moratorium as to anyone to whom the Orders apply. These conclusions follow from two basic premises about agency action and the APA. First, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). If that authorization is absent, the agency's action is necessarily null and void, not only as it applies to the parties who challenged it, but to all parties. Second, the APA exists to establish the terms and procedures by which agencies are authorized to act, and "courts are charged with . . . ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess., 16 (1946)). If an agency violates those rights and procedures, the typical result is that the agency action is void. *See, e.g.*, *id*. ("Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act").

To be sure, there are some circumstances in which a given agency action may apply only to particular parties or where it may be appropriate for a court to remand an action to the agency so it can fix its mistakes. But that is not true where, as here, a court concludes that an agency lacks the statutory authority to act. In short, vacatur is the ordinary result when agency action is found to lack statutory authority because it is the logical consequence of such a conclusion and, indeed, the only result that makes sense. It is also reflected in the clear language of APA section 706, which directs courts to "set aside" agency action that is, among other things, contrary to statute. That language is not qualified in any way that would suggest "set aside" refers only to particular parties, and courts—including the Supreme Court—have held that "set aside" means "vacate."

While Plaintiffs believe that universal (which is to say, national) vacatur is the proper interpretation of this Court's remedy, the Court can clarify that its ruling applies to the Plaintiffs as well as to affected parties within the Northern District of Ohio. Courts possess the inherent discretion to limit the scope of their remedies, and the district court in *Tiger Lily*, mentioned above, recently exercised that discretion to limit the reach of its declaration setting aside the CDC's moratorium to the Western District of Tennessee. *See* 2021 WL 1171887, at *10 (holding the eviction moratorium "ultra vires and unenforceable in the Western District of Tennessee"). Although "set aside" under section 706 necessarily means "vacate"—and Plaintiffs submit that the Court has no discretion on that question—the Court can nonetheless limit the reach of its declaration vacating the moratorium to the Plaintiffs as well as all affected individuals within this district.

I. Section 706 of the APA Requires Courts to Vacate Agency Action Such as the CDC Eviction Moratorium When it is Set Aside as Contrary to Law

A. The Text and History of the APA Make Clear That Vacatur is the Proper Remedy Where Agency Action is Found Unlawful

Section 706 of the APA states that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity . . . ." 5 U.S.C. § 706(2)(A), (2)(B). "Shall" is a command. *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). "Set aside" means vacate. *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To 'vacate,' … means 'to annul; to cancel …; to set aside."). *See also Nuñez v. United States*, 554 U.S. 911 (2008) (Scalia, J., dissenting from GVR order) ("In my view we have no power to set aside (vacate) another court's judgment unless we find it to be in error."). The Supreme Court has used the term "set aside" many times to mean invalidating or vacating a regulation as to all affected parties. *See, e.g.*, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 n.18 (1979) ("[We affirm the lower court's determination to set aside the amalgam of rules . . . ."); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Courts enforce this principle [requiring rational agency decision-making] with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce."); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 364 (1986) ("The Court of Appeals set aside both . . . aspects of the Board's regulation."). *See also* Mila Sohoni, *The Power to Vacate A Rule*, 88 Geo. Wash. L. Rev. 1121, 1138 (2020) (collecting cases).

The practice immediately preceding the APA's passage, along with the act's legislative history, confirm this interpretation of section 706. Prior to the adoption of the APA in 1946, Congress passed several statutes authorizing lawsuits to set aside orders adopted by certain

agencies. *See* Urgent Deficiencies Act of 1913, 32 Stat. 208, 219 (1913); Communications Act of 1934, Pub. L. No. 73- 416, 48 Stat. 1064, 1093 (1934). The Supreme Court interpreted those statutes to authorize courts to set aside regulations and orders from those agencies beyond the parties challenging them. For example, in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), the Supreme Court addressed a challenge to regulations issued by FCC prohibiting the issuance of broadcasting licensing to companies that entered into certain kinds of affiliation agreements with other broadcasters. *Id*. at 408-410. Recognizing that the regulation had the "force of law" and was "addressed to and sets a standard of conduct for all to whom its terms apply," the Court concluded that the broadcasters could assert a pre-enforcement challenge on their own behalf and on behalf of other broadcasters who were also affected by the regulation. *Id*. at 418. The proper object of the suit, according to the Court, was the regulation itself, and the challenge therefore did not turn on the specific circumstances of any broadcaster, but on whether the regulations were valid. *Id*. at 420-21. "Such a cause of action obviously can arise only because of the operation of the regulations. The regulations are the effective implement by which the injury complained of is wrought, and hence must be the object of the attack." *Id*. at 421-22. The broadcasters could therefore bring an action challenging the validity of the regulation under the Urgent Deficiencies Act as a "plenary suit in equity." *Id*. at 415. The Court therefore reversed the lower court's dismissal of the suit and continued a stay of the regulation as to all broadcasters. *Id*. at 425.

Thus, when Congress passed the APA, the practice of courts vacating unlawful agency action was well established. *See* Sohoni, *The Power to Vacate A Rule*, 88 Geo. Wash. L. Rev at 1147-52 (explaining that in the years preceding passage of the APA, courts often set aside or enjoined agency action universally). With the passage of the APA, Congress intended to codify

and unify administrative procedure and judicial review of that procedure. Pub. L. No. 79-404, 60 Stat. 237, 237 (1946) ("AN ACT To improve the administration of justice by prescribing fair administrative procedure."). In the words of Representative Francis Walter, the leading sponsor of the APA in the House, the APA contains "a comprehensive statement of the right, mechanics, and scope of judicial review" of agency actions. 92 Cong. Rec. 5654 (1946). This includes mandating when a court must vacate agency action. 5 U.S.C. § 706. *See also* Evan D. Bernick, Envisioning Administrative Procedure Act Originalism, 70 Admin. L. Rev. 807, 855 (2018) (observing that the APA "specifically enumerates contexts in which judges must 'hold unlawful and set aside agency action . . .'").

The DOJ Memorandum argues that universal remedies—for example, nationwide injunctions—are improper because, among other reasons, traditional principles of equity generally prohibit a court from issuing relief to anyone beyond the parties to a case. *See* DOJ Memorandum at 3-4. This may be a valid argument against nationwide injunctions, but it has no application to a suit challenging agency action for lack of statutory authority under APA section 706. That is so for two reasons. First, as noted above, in the context of challenges to agency action, the practice at the time the APA was passed was indeed to issue universal vacatur in appropriate cases. Second, the APA altered the legal landscape at least with respect to suits challenging agency action. Traditional principles of equity "take a court only so far" because Congress can override those principles through legislation. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Section 706 is a clear statement on how courts should conduct their judicial review of agency action. *Cf. Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (recognizing that Congress can dictate how courts review agency action). *See also* Jonathan Mitchell, The Writ of Erasure Fallacy, 104 Va. L. Rev. 933, 1012-13 (2018) (contrasting a court's power to

strike down statutes with their power to "set aside" agency action and arguing that the latter is "more than a mere nonenforcement remedy. It is a veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions—in the same way that an appellate court formally revokes an erroneous trial-court judgment").

In sum, section 706 establishes the scope of review of agency action and explicitly states what courts should do when an agency violates the law. The APA states "in the clearest possible terms" that a court "'shall'—not may—'hold unlawful and set aside'" illegal agency action. *Checkosky v. S.E.C.*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring) (quoting 5 U.S.C. §v 706(2)(A)). "Setting aside means vacating; no other meaning is apparent." *Id*.

B. Vacatur is the Proper Remedy Where, As Here, a Court Invalidates Agency Action for Lack of Statutory Authorization

Because "set aside" in section 706 means "vacate," a decision setting aside agency action for lack of statutory authority necessarily implies that the agency action is vacated ab initio and that the court's judgment applies to any party affected by the action. In *Nat. Mining Association*, the D.C. Circuit explained the logic of this conclusion by referring to Justice Blackman's dissent in *Lujan v. Nat. Wildlife Federation,* 497 U.S. 871, 913 (1990). *See* 145 F.3d at 1409. As Justice Blackman explained,

> The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court. On the other hand, if a generally lawful policy is applied in an illegal manner on a particular occasion, one who is injured is not thereby entitled to challenge other applications of the rule.

Lujan, 497 U.S. at 913. *See also Nat. Mining Assoc.*, 145 F.3d at 1409 (explaining that Justice Blackman "apparently express[ed] the view of all nine Justices on this question").

Vacatur follows naturally from a decision invalidating agency action under the APA, for such an action is typically directed to the agency action itself, not any particular application of the agency action. *See, e.g.*, *Chrysler Corp.*, 441 U.S. at 313 (holding that regulations subject to the APA cannot be afforded the 'force and effect of law' if not lawfully created); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2018) (explaining that the APA's statutory remedy is based on a review of the agency action, not a particular application of that action and therefore the remedy is addressed at the agency action itself) *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019); *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect"). Vacatur is especially appropriate here, because the Court properly concluded that the CDC lacked the statutory authority to impose an eviction moratorium. Both sides in this case recognized that the issue was a purely legal one and turned, not on the circumstances of any application of the eviction moratorium, but on whether the CDC possessed the authority to impose an eviction moratorium at all. The Court's decision thus logically results in a vacatur.

The DOJ policy memo does not really take issue with the logic of this conclusion in cases such as this. First, it argues that in some cases, challenges will be to the application of particular agency action. DOJ Memorandum at 7. This could occur, for example, where a court concludes that agency action is arbitrary and capricious, as it sometimes makes sense to remand to the agency so it can fix its mistakes. *See, e.g.*, *Maple Drive Farms Ltd. P'ship v. Vilsack*, 781 F.3d 837 (6th Cir. 2015) (remanding arbitrary order to the agency for proper review). But this is not such a case. Second, the DOJ policy memo argues that traditional principles of equity limit even a court's remedy under section 706. DOJ Memorandum at 7. As noted, however, the APA displaced traditional principles of equity, at least in cases such as this one, where a court

determines that an agency lacks statutory authority for its action. The DOJ memo offers nothing to suggest otherwise.

This Court should therefore clarify that its March 10 decision necessarily vacated the CDC's Orders ab initio. Plaintiffs believe that this should mean the Court's order applies nationally. However, as the next section shows, the Court still retains the discretion to limit the reach of its decision to the Plaintiffs as well as to affected parties within the Northern District of Ohio.

II. If This Court Does Not Set Aside the CDC Eviction Moratorium Nationally, It Should Set Aside the Moratorium as to the Plaintiffs and Affected Parties Within The Northern District of Ohio

Federal courts have "inherent authority and discretion to fashion an appropriate remedy . . ." *Rowe v. Reg.*, No. 1:07-CV-20, 2008 WL 2009186, at *24 (E.D. Tenn. May 8, 2008). *See also Mitan v. Int'l Fid. Ins. Co.*, 23 F. App'x 292, 298 (6th Cir. 2001) (affirming the "inherent power to protect the orderly administration of justice . . ."). While, as argued above, the proper remedy in this case is vacatur—and that necessarily follows from this Court's March 10 ruling—whether the CDC's Orders are vacated nationally or only with respect to the Plaintiffs and otherwise to all affected parties within the Northern District of Ohio is, Plaintiffs believe, within the discretion of the Court. *See Am. Farm Bureau Fed'n v. U.S. Env't Prot. Agency*, No. 3:15-CV-00165, 2018 WL 6411404, at *2 (S.D. Tex. Sept. 12, 2018) (considering the character of the agency action in declining to provide nationwide relief); *Tiger Lily, LLC*, 2021 WL 1171887 at *10 (declaring the CDC's Order "ultra vires and unenforceable in the Western District of Tennessee."). Although Plaintiffs submit that the proper remedy in this case is to vacate the CDC's Orders nationally, Plaintiffs recognize that there may be prudential reasons for a court to limit its order to the parties before it and the district in which it sits. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that

when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.")

CONCLUSION

For the forgoing reasons, this Court should clarify that its March 10 Opinion and Order vacated the CDC's eviction moratorium nationally, or, in the alternative, with respect to the Plaintiffs and affected parties within the Northern District of Ohio.

DATED: April 7, 2021

Respectfully submitted:

/s/ Steven M. Simpson
STEVEN M. SIMPSON*
DC Bar No. 462553
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA, 22201
Tel: (202) 888-6881
SSimpson@pacificlegal.org

MAURICE A. THOMPSON
(0078548)
1851 Center for Constitutional Law
122 E Main St.
Columbus, OH 43215
Tel: (614) 340-9817
Mthompson@ohioconstitution.org

LUKE A. WAKE*
DC Bar No. 1009181
ETHAN W. BLEVINS*
Washington State Bar No. 48219
HANNAH SELLS MARCLEY*
Washington State Bar No. 52692
Pacific Legal Foundation
930 G Street
Sacramento CA 95814
Tel: (916) 419-7111
Fax: (916) 419-7747
LWake@pacificlegal.org
EBlevins@pacifclegal.org
HMarcley@pacificlegal.org

**Pro Hac Vice*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2021, I electronically filed the foregoing document with the Clerk of the Court via the CM/ECF system, which will cause a copy to be served upon counsel of record.

By /s/ *STEVEN M. SIMPSON*
Steven M. Simpson