United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 02, 2021

Mr. Anthony T. Caso
174 W. Lincoln Avenue
Suite 620
Anaheim, CA 92805

No. 21-40137 Terkel v. Centers for Disease Control
USDC No. 6:20-CV-564

Dear Mr. Caso,

The following pertains to your brief electronically filed on June 2, 2021. You must make the following corrections within the next 14 days.

You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with **FED. R. APP. P.** 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below)

Record citations required.

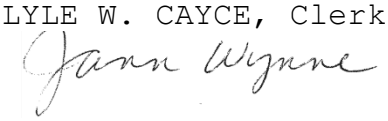
Statement of the case required.

Signature was not found in Certificate of Compliance.

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Jann M. Wynne, Deputy Clerk
504-310-7688

cc: Mr. Michael Philip Aigen
Mr. Joseph Aaron Barnes Sr.
Mr. Eric Gregory Dunn
Mr. Eric L. Hawkins
Mr. Robert E. Henneke
Ms. Kimberly S. Hermann
Ms. Alisa Beth Klein
Mr. Brian Klosterboer
Ms. Savannah Kumar
Mr. Steven Andrew Myers
Mrs. Celia Howard O'Leary
Ms. Sandra Park
Ms. Adriana Cecilia Pinon
Mr. Harvey L. Reiter
Mr. Chad Michael Ruback
Mr. John Paul Schnapper-Casteras
Mr. Alan E. Schoenfeld
Mr. Martin Jonathan Siegel
Mr. Brian James Springer
Mr. Kevin St. George
Mr. Aleksandr Sverdlik
Mr. Eliot Fielding Turner
Ms. Leslie Cooper Vigen
Ms. Vanisha Weatherspoon
Mr. Chance Weldon
Mr. Paul Reinherz Wolfson
Ms. Dayna Zolle

Case No. 21-40137

Lauren Terkel; Pineywoods Arcadia Home Team, Limited; Lufkin Creekside Apartments, Limited; Lufkin Creekside Apartments II, Limited; Lakeridge Apartments, Limited; Weatherford Meadow Vista Apartments, L.P.; MacDonald Property Management, L.L.C.,

Plaintiffs - Appellees

v.

Centers for Disease Control and Prevention; Rochelle P. Walensky, in her official capacity as Director of the Centers for Disease Control and Prevention; Sherri A. Berger, in her official capacity as Acting Chief of Staff for the Centers for Disease Control and Prevention; United States Department of Health and Human Services; Xavier Becerra, Secretary, U.S. Department of Health and Human Services; United States of America,

Defendants - Appellants

No. 21-40137

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAUREN TERKEL, *et al*.,
Plaintiffs-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION, *et al*.,
Defendants-Appellants,

On Appeal from the United States District Court
for the Eastern District of Texas

BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT PLAINTIFFS-APPELLEES

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
174 W. Lincoln Ave., #620
Anaheim, CA 92805
Telephone: (916) 601-1916
E-Mail: tom@caso-law.com

Counsel for Amicus Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant Fifth Circuit Rule 29.2, the undersigned counsel of record for amicus Center for Constitutional Jurisprudence certifies that the Center for Constitutional Jurisprudence is a project of the Claremont Institute, a nonprofit organization. Counsel is not aware of any person or entity interested in the outcome of this case other than those listed in the parties' certificates. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

s/Anthony T. Caso

Attorney for Amicus Curiae
Center for Constitutional Jurisprudence

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

IDENTITY AND INTEREST OF AMICUS

As required by Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. No counsel for any of the parties authored any portion of this brief in whole or in part. No person or entity other than amicus, its members, or its counsel has contributed any money for the preparation or filing of this brief.

Amicus, Center for Constitutional Jurisprudence, is dedicated to upholding the principles of the American Founding, including the vertical separation of powers between state and federal governments. The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court and many other courts, including the United States Supreme Court.

SUMMARY OF ARGUMENT

Government-imposed restrictions during the Covid-19 pandemic resulting in severe economic dislocation. The desire of the federal government to address that problem is commendable. The federal government is not one of unlimited power, however, and it may only act within the limits of its enumerated powers. Here, the federal government rests its authority for acting on Congress's power to regulate

commerce between the states. But the regulation at issue does not concern regulation of interstate commerce. Instead, the challenged regulation prohibits property owners from using state law legal procedures to reclaim lawful possession of their own property.

A prohibition on using state law eviction remedies to recover lawful possession of real property is not the regulation of an interstate commercial activity. As Justice Thomas has noted, "real estate [is] the quintessential asset that does not move in interstate commerce." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting). Eviction proceedings are only concerned with recovery of lawful possession. They do not govern who may rent or how much rent can be charged. There is no interstate commercial activity to regulate. Yet the federal government argues in this case that it has power under the Commerce Clause to regulate who has the right to use state legal remedies to recover the possession of real property. A nation that claims power so sweeping in scope "is not the country the Framers of our Constitution envisioned." *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 554 (2012) (opinion of Roberts, C.J.). The Constitution does not grant Congress (or the Executive Branch) the power to regulate the use of state law legal proceedings for the recovery of possession of real property.

ARGUMENT

I. The Power to Regulate Commerce Between the States Is Limited to the Regulation of Commercial Activity.

The federal government is one of limited, enumerated powers. *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). This grant of enumerated powers means that Congress "can exercise only the powers granted to it." *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). The enumerated power at issue in this case is the power to "regulate Commerce … among the several States." U.S. Const., art. I, § 8. This power, while broad, is not a police power. *NFIB*, 567 U.S. at 536 (opinion of Roberts, CJ).

For our nation's Founders, "commerce" was trade, and "commerce among the states" was interstate trade, not the ordinary activities of business enterprises in a single state or community. *See*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *United States* v. *Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach the Supreme Court, it

was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 9 Wheat. at 190; *see also Corfield,* 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

Even when the Supreme Court expanded the scope of the Commerce Clause beyond the original understanding of that provision in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress.

Thus, in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, the Supreme Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized

government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *U.S. v. Morrison*, 529 U.S. 598, 608 (2000)). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." *ALA Schecter Poultry Corp. v. United States*, 294 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S. at 567; *Morrison,* 529 U.S. at 616 n.6).

These reservations were key to the Supreme Court's decisions in *NFIB*, *Lopez*, and *Morrison*. *See NFIB*, 567 U.S. at 536 (opinion of Roberts, CJ); *Lopez*, 514 U.S. at 566; *Morrison*, 529 U.S. at 608. As in those cases, the attempt here to regulate use of state legal procedures to reclaim lawful possession of property does not regulate the channels or the instrumentalities of interstate commerce. Instead, the federal government argues here that there might conceivably be an impact on commerce if a chain of hypothetical events take place as a result of an eviction. But as the Supreme Court has made clear, rationales for the exercise of Commerce Clause power that have no stopping point, and that as a result would displace State policy-making authority, cannot be sustained. *See Lopez,* 514 U.S. at 567 (rejecting an "inference upon inference" assertion of power that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *Morrison,* 529 U.S. at 615.

Thus, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the claim of authority to overrule state rules and legal procedures for recovery of lawful possession of real property is what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people. As demonstrated below, the regulation at issue does not address interstate commercial activity but instead attempts to usurp a traditional state power.

II. The Prohibition on Evictions Does Not Regulate Commercial Activity

An action for eviction ("forcible detainer" under Texas law) is not even a commercial transaction or activity, much less an interstate one. "The only issue in a forcible-detainer action is who has the right to immediate possession of the premises." *Jelinis, LLC v. Hiran*, 557 S.W.3d 159, 172 (Tex. App. 2018); *Aguilar v. Weber*, 72 S.W.3d 729, 732 (Tex. App. 2002). Indeed, the court in an eviction proceeding does not even adjudicate who holds title to the property. *Mendoza v. Bazan*, 574 S.W.3d 594, 602 (Tex. App. 2019), review denied (Aug. 23, 2019). Legal proceedings on who holds title *might conceivably* be related to a commercial transaction if the dispute related to the purchase of the property. Even then, however, the federal government would still have to prove a connection to interstate commerce. *Jones v. United States*, 529 U.S. 848, 854 (2000). Nonetheless, an

eviction proceeding only considers who is entitled to lawful possession under state law. Nor is this a regulation prohibiting discrimination by the landlord against a class of consumers. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964).

There is no commercial transaction associated with an eviction proceeding that can be subject to congressional regulation. In such a proceeding, the only issue is who has the right to immediate possession, and the tenant only loses the right of possession when he has ceased paying rent. In other words, any commercial transaction was terminated sometime before landlord commences eviction proceedings. Congress's power under the Commerce Clause "presupposes the existence of commercial activity to be regulated." *NFIB*, 567 U.S. at 550 (opinion of Roberts, CJ). In the absence of such activity, there is nothing for Congress to regulate. *Id*. at 551. This Court should not countenance the federal government's attempt to stretch the power to regulate interstate commerce into a general police power that allows the regulation of individual behavior unconnected to interstate commercial activity.

This is especially true here where the regulation at issue seeks usurp a traditional state function. Regulation of land use is a traditional power of state, not federal, control. *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391,

402 (1979); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994); *see Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). That regulation of use must certainly include the determination of who has the right of possession under state law.

This Court should not countenance the intrusion on traditional state functions that would occur under this regulation. The eviction prohibition intrudes on traditional state functions and does not regulate interstate commercial activity.

CONCLUSION

The use of Texas legal procedures to obtain possession of real property is not a commercial activity, much less an interstate commercial activity. Thus, a prohibition on using that procedure cannot be a regulation of interstate commerce and is beyond the authority of the Centers for Disease Control and Prevention.

DATED: June 2, 2021.

Respectfully submitted,

ANTHONY T. CASO

s/ Anthony T. Caso
ANTHONY T. CASO

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE
Federal Rules of Appellate Procedure
Appendix 6

1. This document complies with the word limit of Fed. R. App. Rule 29(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

X this document contains 1,755 words, **or**
□ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type-style requirements of Fed. R. App. R. 32(a)(6) because:

X this document has been prepared in a proportionally spaced typeface using Microsoft Word for the most current version of Office 365 in 14-point type, Times New Roman, **or**

□ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

(s) Anthony T. Caso

Attorney for Amicus Curiae, Center for Constitutional Jurisprudence

Dated: June 2, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 2, 2021.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Anthony T. Caso
ANTHONY T. CASO