

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

**APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION
TO DISMISS APPEAL VOLUNTARILY**

The Court should grant the government's motion to dismiss its appeal voluntarily, pursuant to Federal Rule of Appellate Procedure 42(b), and remove the case from the October 6 calendar.

1. The Acting Solicitor General determined that the government should voluntarily dismiss the appeal filed in this case, and the government so moved. A court cannot properly compel the Executive Branch to pursue an appeal that the Acting Solicitor General no longer authorizes, and we are unaware of any case in which a court of appeals has purported to do so.

2. Plaintiffs' opposition argues that Congress lacks the power to impose an eviction moratorium to curb the interstate spread of COVID-19. That is not a live issue. The eviction moratorium challenged in this case was vacated on other grounds in separate litigation, and Congress has not authorized a new eviction moratorium.¹

3. Plaintiffs' opposition asserts that they are prevailing parties entitled to fees. Fees are governed by the Equal Access to Justice Act (EAJA), which will require plaintiffs to show (*inter alia*) that the government was not substantially justified in defending Congress's Article I power to impose an eviction moratorium to curb the interstate spread of COVID-19. *See* 28 U.S.C. § 2412(d)(1)(A). That is an issue for the district court to decide in the first instance and has no bearing on the government's motion to dismiss its appeal voluntarily.

¹ Plaintiffs' suggestion that the government "renege[d]" on a "pledge" to the district court by "continu[ing] to enforce the moratorium that the district court had set aside," Opp. 3, is wrong. The supposed "pledge" from government counsel was a response to a question asking whether, if the district court were to enter declaratory relief, the government would "on its own accord stop enforcing the order *against the plaintiffs*, even if an injunction were not issued." ROA.1769 (emphasis added). Plaintiffs do not suggest that the government ever took steps to enforce the moratorium against plaintiffs.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

NICHOLAS J. GANJEI
Acting United States Attorney

ALISA B. KLEIN

s/ Brian J. Springer

BRIAN J. SPRINGER

*Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5446*

September 2021

CERTIFICATE OF COMPLIANCE

This reply complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 333 words. This reply also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer

Brian J. Springer

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2021, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brian J. Springer

Brian J. Springer