

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 19, 2021

Lyle W. Cayce
Clerk

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,

versus

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.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-564

No. 21-40137

Before JONES, SMITH, and HAYNES, *Circuit Judges*.

PER CURIAM:*

The appellants moved to dismiss this appeal under Federal Rule of Appellate Procedure 42(b). We GRANT that motion and dismiss this appeal subject to the terms articulated below.

This case involves the constitutionality of the Centers for Disease Control and Prevention’s nationwide eviction moratorium, which prevented landlords from exercising their state law eviction rights. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). The most recent iteration of the moratorium expired October 3, 2021. Temporary Halt in Residential Eviction to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244 (Aug. 6, 2021). Moreover, another court’s judgment invalidating the CDC’s eviction moratorium on the grounds that the moratorium exceeded the CDC’s authority under the Public Health Service Act, 42 U.S.C. § 264, is now final. *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Services*, No. 20-CV-3377, 2021 WL 1779282 (D.D.C. May 5, 2021).

The government contends that the expiry of the most recent version of the CDC’s eviction moratorium renders the present controversy moot. It also contends that the dispute is moot because it voluntarily ceased enforcement of the eviction moratorium even before October 3, the formal expiration date, acceding to the finality of *Alabama Association of Realtors* by dismissing its pending appeal in that case. *Alabama Ass’n of Realtors*, No. 21-5093, Doc. Nos. 1912768, 1912769 (D.C. Cir. Sept. 3, 2021). Nevertheless, the government maintains that the CDC has constitutional authority to issue the moratorium.

* Judge Haynes joins only in dismissing this appeal.

No. 21-40137

Appellees respond that the appeal is not moot because the parties still dispute whether the government has constitutional power under the Commerce Clause to invade individual property rights by limiting landlords' use of state court eviction remedies. The government maintains it has such authority. And in the government's view, espoused at oral argument, that constitutional power is in no way limited to combatting the ongoing pandemic; the government asserts it can wield that staggering constitutional authority for any reason. Appellees further contend the proposed dismissal is a pretext to avoid appellate review of the constitutional question.

After considering the record and the parties' oral arguments, we find it unnecessary to decide mootness. Instead, we grant the motion to dismiss the appeal "on terms . . . fixed by the court." Fed. R. App. P. 42(b). To be precise, our dismissal does not abrogate the district court's judgment or opinion, both of which remain in full force according to the express concession of the government during oral argument and in briefing.

IT IS ORDERED that appellant's voluntary motion to dismiss is GRANTED subject to the forgoing condition.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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October 19, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

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

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that defendants-appellants pay to plaintiffs-appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk



By: Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Michael Philip Aigen
Mr. Robert Alt
Ms. Megan Heuberger Berge
Mr. Jay R. Carson
Mr. Anthony T. Caso
Ms. Nicole Leonard Cordoba
Mr. Eric Gregory Dunn
Mr. David Brendan Goode
Ms. Brianne Jenna Gorod
Mr. Eric L. Hawkins
Mr. Robert E. Henneke
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Ms. Adriana Cecilia Pinon
Mr. Harvey L. Reiter
Mr. Chad Michael Ruback
Mr. John Paul Schnapper-Casteras
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Mr. Ilya Shapiro
Mr. Martin Jonathan Siegel
Mr. Brian James Springer
Mr. Kevin St. George
Mr. Judd Edward Stone II
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Ms. Leslie Cooper Vigen
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