No. 2022-1929

In the United States Court of Appeals for the Federal Circuit

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DARBY DEVELOPMENT COMPANY, INC., *ET AL.*
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 1:21-CV-01621-AOB (HON. ARMANDO O. BONILLA)

BRIEF OF NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTEREST

The undersigned counsel for *amicus curiae* certifies the following in accordance with Fed. Cir. R. 47.4 and Fed. R. App. P. 26.1. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus*:** *Amicus curiae* the New Civil Liberties Alliance states that it is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock. *Amicus curiae* the New Civil Liberties Alliance is a nonpartisan, nonprofit organization devoted to defending civil liberties. The New Civil Liberties Alliance was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy. All parties consent to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief.

***Counsel for Amicus*:** The New Civil Liberties Alliance is a nonpartisan, nonprofit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it. Gregory Dolin, Counsel of Record, is a Senior Litigation Counsel for the New Civil Liberties Alliance. John J. Vecchione on the brief is a Senior Litigation Counsel for the New Civil Liberties Alliance.

/s/ Gregory Dolin
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INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other forms of advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as free exercise of religion, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because executive agencies and even the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy a shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA represented, pro bono, many property owners in efforts to prevent the implementation of the Centers for Disease Control and Prevention ("CDC") Eviction

[1] No counsel for a party authored any part of this brief. No one other than the *Amicus Curiae*, its members, or its counsel financed the preparation or submission of this brief. The parties received notice of the filing of this Brief. The Plaintiffs-Appellants and Defendant-Appellee have consented to the filing of this brief.

Moratorium at issue here and supported other property owners through *amicus curiae* briefs.[2] NCLA is particularly disturbed by the possibility that the judgment below—dismissing the Fifth Amendment takings claims of property owners irreparably injured by a massive government-wide effort by all branches of the federal government to deny them access to their property—will encourage similar action in the future following this exact playbook. If this Court upholds the district court's ruling that an action approved and acquiesced in by all branches of the federal government to one extent or another makes it uncompensable as an *ultra vires* act, it will greenlight a strategy to take property, in the billions and trillions of dollars, from some Americans for public use without any of the redress the Fifth Amendment of the United States Constitution contemplates. The constitutional harms stemming from the Eviction Moratorium were substantial, but this Court could compound them by making this year-long exclusion of property owners from their property an unredressable loss.

[2] NCLA represented Appellant Regina Tillman who was a class representative in a class-action suit brought against the Eviction Moratorium. *Mossman v. CDC*, No. 21-CV-28, 2021 WL 5498746 (N.D. Iowa Nov. 23, 2021). That representation terminated shortly after that ruling.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[3]

NCLA attempted, by bringing suit and providing *amicus* support for others who had sued on similar theories, to enjoin the CDC's order entitled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*," which became effective upon publication in the Federal Register on September 4, 2020. 85 Fed. Reg. 55,292 (Sept. 4, 2020) (the "Eviction Moratorium" or "Order"). *See, e.g.*, *Brown v. HHS*, 4 F.4th 1220 (11th Cir. 2021) (affirming denial of preliminary injunction because money damages might be available in suit brought by NCLA), *vacated as moot by* 20 F.4th 1385 (11th Cir. 2021); *Mossman,* 2021 WL 5498746 (dismissing as moot though the Government never changed its position on the lawfulness of the Eviction Moratorium in a class-action suit brought by NCLA); *Tiger Lily, LLC v. HUD*, 5 F.4th 666 (6th Cir. 2021) (NCLA submitted an *amicus* brief in that matter). While NCLA agrees with the statement of facts as laid out by the Appellants, that statement does not capture the full breadth of the Federal Government's activities or the contribution of every branch to an almost year-long maintenance of the moratorium regime. The

[3] NCLA agrees with the Appellants' statement of facts and arguments regarding takings law and precedent, particularly the reading of *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), and the importance of the Supreme Court's recent teaching in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). It does not make those arguments solely to avoid repetition. This brief primarily takes aim at the district court's view that because the year-long, oft-extended Eviction Moratorium was not supported by the statute relied on by the CDC, Congress is not responsible for it and so the public fisc cannot be used to compensate the injury.

Legislative Branch, in the exercise of its Article I powers, extended the moratorium. Additionally, members of the Congressional majority used their position to exert political pressure on the Executive Branch to continue the policy. The Executive Branch, using (or at least claiming) its Article II powers, prolonged the moratorium by executive orders and defended these orders as lawful both in courts of law and the political arena. Finally, the courts that were called upon to adjudicate the lawfulness of these moratoria blessed the policies as lawful,[4] denying injunctive relief in part because they thought and assured litigants that there would be future opportunities to seek compensation.

In short, this is not a case where some rogue individual or agency is doing something Congress neither authorized nor had any knowledge of. Quite the opposite. As Leonard Cohen sang, this was a case where "everybody knows." Leonard Cohen, *Everybody Knows*, on I'M YOUR MAN (Columbia Records 1988). Not only did Congress know, but it both abetted and acquiesced in the Executive Branch's actions in carrying out the Eviction Moratorium. The rationale for protecting the

[4] Worse yet, sometimes the courts permitted the moratorium to continue even when they concluded that it was likely unlawful. *See, e.g.*, *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2320, 2320-21 (2021) ("*AAR III*") (Kavanaugh, J., concurring) (denying application to vacate a stay) (Justice Kavanaugh providing a fifth vote to deny vacating a stay while agreeing "that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium.").

public fisc from rogue *ultra vires*[5] actors ceased to apply when each branch of our tri-partite Government knowingly and purposefully contributed to and legally endorsed the taking of private property.

I. THE EXECUTIVE BRANCH ISSUED AND CONTINUOUSLY EXTENDED THE EVICTION MORATORIUM AND ALL BRANCHES KNEW IT

On March 27, 2020, then-President Donald Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020) ("CARES Act"). Among its many provisions, the Act imposed a 120-day eviction moratorium on properties participating in federal assistance programs or with federally backed financing. *See id.* § 4024. It is estimated that the provision "applied to between 28% and 46% of occupied rental units nationally." Maggie McCarty & Libby Perl, Cong. Rsch. Serv., IN11516, *Federal Eviction Moratoriums in Response to the COVID-19 Pandemic* (2021), *available at* https://bit.ly/3B6l53w. By its own terms, that legislatively authorized pause on evictions expired on July 24, 2020. In response to the initial moratorium expiration, on September 1, 2020, then-Acting CDC Chief of Staff Nina B. Witkofsky issued the Order, which became effective upon publication in the Federal Register on September 4, 2020. 85 Fed. Reg. 55,292.

[5] NCLA believes the Eviction Moratorium was unlawful in that it was not executive action in service of a constitutional law but that kind of wrongful act does not render it any less of a taking. Every part of the Federal Government did something to keep the Eviction Moratorium going, so while unlawful it was certainly an act of the entire Government.

The Order applied to all rental units nationwide (excepting properties in any local jurisdiction with similar eviction restrictions, *id.*), and thus was broader than the initial legislative moratorium which applied only to properties participating in federal assistance programs or with federally-backed financing. It prohibited "a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action," from "evict[ing] any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." *Id.*

The Order imposed draconian penalties for noncompliance, including a fine of up to "$250,000 or one year in jail, or both[,]" for any violations. *Id.* at 55296.

Although the Eviction Moratorium applied to all rental units nationwide, admittedly, not every tenant qualified. Instead, the Order set certain economic thresholds for tenants, and contained a proviso limiting its applicability to those tenants whose "eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options." *Id.* at 55,293. CDC claimed authority to issue the Order under Section 361 of the Public Health Service Act, 42 U.S.C. § 264, and 42 C.F.R. § 70.2. *Id.* at 55,297. It claimed criminal enforcement authority under 18 U.S.C. §§ 3559, 3571, 42 U.S.C. §§ 243, 268, 271, and 42 C.F.R. § 70.18. *Id.* at 55296.

CDC also set out a series of justifications and "findings." *Id.* at 55294-96. Because "[e]victed renters must move," the Order asserted that eviction "leads to multiple outcomes that increase the risk of COVID-19 spread." *Id.* at 55,294. Thus, the CDC "determined [that] the temporary halt in evictions in this Order constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 throughout the United States." *Id.* at 55,296.[6]

The Order was initially effective until December 31, 2020, "unless extended." *Id.* at 55,297. As the Order neared expiration, and with the change of Administrations following the 2020 Presidential Election looming, Congress legislatively extended the moratorium through January 31, 2021. *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 502. And when even that deadline expired, the CDC sprung into action once again. Thus, on February 3, 2021, CDC extended the Order until March 31, *see* 86 Fed. Reg. 8,020 (Feb. 1, 2021); then on April 1st, it extended it again through June 30, *see* 86 Fed. Reg. 16,731 (Mar. 31, 2021); and then again through July 31, *see* 86 Fed. Reg. 34,010 (June 28, 2021).

On August 3, 2021, despite being warned by the courts that although the prior orders were allowed to stand, they were on shaky legal grounds, *see, e.g.*, *Ala. Ass'n of Realtors v. HHS*, 539 F. Supp. 3d 29 (D.D.C. 2021) ("*AAR I*"); *AAR III*, 141 S. Ct.

[6] This statement alone demonstrates the taking was from the Appellants to others for a public purpose.

2320, CDC extended the Eviction Moratorium yet again, once more invoking 42 U.S.C. § 264 as the basis for its authority. *See* 86 Fed. Reg. 43,244 (Aug. 3, 2021) (extending the Eviction Moratorium through October 31, 2021). Based on the public statements following the issuance of this latest extension, it appears that it was personally approved by President Biden. *See Remarks by President Biden*, WHITE HOUSE (Aug. 5, 2021), *available at* https://bit.ly/2VVg7Gj ("And *I went ahead and did it*, but here's the deal: I can't guarantee you the Court won't rule … we don't have that authority, but at least we'll have the ability, if we have to appeal, to keep this going for a month at least—I hope longer than that." (emphasis added)).

The newly extended moratorium was nominally more narrow than the ones that preceded it because it applied only "in the U.S. count[ies] experiencing substantial or high levels or community transmission of SARS-CoV-2 as defined by CDC." *Ala. Ass'n. of Realtors v. HHS*, 557 F.Supp.3d 1, 4 (D.D.C. 2021) ("*AAR IV*") (quoting 86 Fed. Reg. at 43,245). Nevertheless, "[a]part from slightly narrowing the geographic scope, the new moratorium [was] indistinguishable from the old." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021) ("*AAR V*"). Indeed, given how "substantial or high levels of community transmission" was defined, even the geographic scope of the new moratorium differed little from previous versions. *See id.* at 2493 (Breyer, J., dissenting) (noting that "over 90% of counties are experiencing high transmission rates.").

What the above history makes evident is that the Eviction Moratorium was not a work of a rogue agency outside of Presidential control, much less a government official acting on his own initiative and *ultra vires*. Rather, the moratorium was coordinated at the highest levels of the Executive Branch, including involvement and approval by the President himself. This, in turn, strongly counsels against the application of the *Del-Rio* doctrine. *See Del-Rio*, 146 F.3d at 1362.

II. BY EXTENDING THE EVICTION MORATORIUM AND URGING ITS CONTINUOUS RENEWAL THROUGH EXECUTIVE ACTION, CONGRESS IMPLICITLY AUTHORIZED THE TAKING OF APPELLANTS' PROPERTY

The Eviction Moratorium was a logical and predictable outgrowth of the CARES Act, which, as discussed *ante*, was the first government action requiring private property owners to pause evictions. The CARES Act was a template for all future moratoriums regardless of branch of issuance. As the first Executive Branch-created Eviction Moratorium was set to expire in December of 2020, Congress (as already noted by the Appellants and the *amici*) "extended" it to January 31, 2021. What the Appellants did not note, is that the Congressional extension, unlike the initial CARES Act moratorium was an *explicit and wholesale endorsement* of the Presidential action. *See* Pub. L. 116-260, § 502 ("The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264), entitled 'Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19' (85 Fed. Reg. 55292 (September 4, 2020) is extended

through January 31, 2021, notwithstanding the effective dates specified in such Order."). The overall timeline of Congressional actions also demonstrates that Congress meant to aid, encourage, and embolden the Executive Branch to continue extending the moratorium as an exercise of the executive power, even absent explicit congressional authorization.

By the time Congress acted, the results of the 2020 Presidential election were known, and it was clear that the Administration was about to change. It should be noted that the outgoing Administration of President Trump, though it extended the moratorium, was criticized for doing so on a limited basis. *See, e.g.*, Kyle Swenson, *Renters Thought a CDC Order Protected Them from Eviction. Then Landlords Found Loopholes.*, Wash. Post, (Oct. 27, 2020), *available at* https://wapo.st/3dfeFao. In contrast, then-President-Elect Joseph Biden, argued strenuously for a broad moratorium extension, *see, e.g.*, Rep. Bill Foster, Statement on President-elect Biden's COVID-19 Relief Plan (Jan. 15, 2021), *available at* https://bit.ly/3U4lZpV (recognizing "President-elect Biden's plan to … extend the moratorium on evictions …."). By extending the moratorium through January 2021, Congress consciously and purposefully bridged the gap to allow the new Administration to take over, and to act on its announced policy. *See, e.g.*, Reps. Jimmy Gomez, Ayanna Presley, *et al.*, Letter to President-Elect Joseph R. Biden, Jr. (Jan. 15, 2021), *available at* https://bit.ly/3xaK30r (noting that the Consolidated Appropriations Act "immediately protect[ed] millions of renters who

faced eviction when the CDC moratorium," but urging the incoming Administration, in light of the rapidly advancing expiration date of the Congressional extension, to extend and strengthen the moratorium beyond its January 31, 2021 expiration date.).

Additionally, as each extension was nearing its expiration date, Congressional leaders urged the President to renew the Eviction Moratorium yet again. *See, e.g.*, *House Speaker Pelosi and Democratic Leaders Call on Biden to Extend Eviction Ban*, NPR (Aug. 1, 2021, 11:03 PM), *available at* https://n.pr/3qNBdlP.

This chronology shows that Congress and the Executive Branch worked hand-in-glove to create and thereafter extend the Eviction Moratorium. At all relevant points, Congress was not only aware of the Executive Branch's action, but also authorized the moratoriums both expressly and implicitly. Any claim this was an unauthorized action of just the Executive Branch is belied by the facts. At the very least, Congress endorsed and authorized the moratorium that lasted through January 31, 2021.

III. THE JUDICIARY ALLOWED THE EVICTION MORATORIUM TO CONTINUE EVEN AFTER DETERMINING ITS UNLAWFULNESS

For almost a year, the Judiciary also played a significant role in the uncompensated taking of Appellants' property. The Eviction Moratorium was challenged in multiple venues almost as soon as the CDC promulgated it. Yet, throughout its duration the courts refused to enjoin it, in part because they mistakenly concluded that the CDC orders were lawful. *See, e.g.*, *Skyworks, Ltd. v.*

CDC, 524 F. Supp. 3d 745 (N.D. Ohio 2021), and in part because they reasoned that Appellants and similarly situated individuals have sufficient monetary remedies. *See, e.g.*, *Tiger Lily LLC v. HUD*, 499 F. Supp. 3d 538, 551 (W.D. Tenn. 2020); *Brown*, 4 F.4th at 1222. And even when the courts correctly concluded that the CDC's action was unauthorized and could be enjoined, they stayed the injunction, thus permitting the government to continue enforcing the moratorium. *See Ala. Ass'n of Realtors v. HHS*, 539 F. Supp. 3d 211 (D.D.C. 2021) ("*AAR II*"). The Supreme Court took the same approach. *See AAR III*, 141 S. Ct. 2320.

Although Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett (constituting the majority of the Court) recognized that the CDC's Eviction Moratorium was unlawful, the Court nevertheless declined to vacate the *AAR II* stay order. The fifth vote for denying the vacatur motion came from Justice Kavanaugh, who explained his vote on the ground that the Eviction Moratorium was set to expire in two weeks on its own terms and therefore judicial intervention wasn't needed. *Id.* at 2321.

The year-plus-long judicial approach to challenges brought by multiple parties in multiple trial courts sent a clear and unmistakable message to the Executive Branch—the CDC Eviction Moratorium was legal, or to the extent that it suffered from any illegality, such illegality could be remedied through an after-the-fact award

of monetary damages. It would be extraordinarily unfair to now pull a bait and switch on the Appellants and other similarly situated parties.

CONCLUSION

For over a year, all branches of the Federal Government assured the Appellants and other property owners that the CDC Eviction Moratorium is lawful and that any damages would be compensated in due course. Now that the time has come to pay for the financial havoc that CDC wreaked, the Government, relying on *AAR V*, is taking the exact opposite position. Permitting such an about-face would incentivize the government to occupy private property, fight any attempts to enjoin continued occupation, to confess error before the Supreme Court at the last possible moment, and then argue that no compensation was due because the occupation was illegal all along. That is not what the *Del-Rio* doctrine was designed for, and that is why it should have no applicability here.

For all of the foregoing reasons, the Court of Federal Claim's order dismissing the present action should be reversed.

Respectfully submitted,

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September 13, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word. *See* Fed. R. App. P. 29(a)(4), (b)(4), 32(g)(1). This brief complies with the type-volume limitation of Rule 29(a)(5) because it contains 3,139 words, excluding the parts exempted under Rule 32(f).

/s/ Gregory Dolin

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2022 an electronic copy of the foregoing brief *amici curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Gregory Dolin