

DISTRICT COURT OF APPEAL OF FLORIDA  
FIRST DISTRICT

CASE NO. 1D21-0092  
L.T. No. 2020 CC 3778,  
2020 AP 000014

STEVEN COWLEY,

Appellant,

v.

SPICLIFF, INC.

Appellee.

\_\_\_\_\_/

**BRIEF AMICUS CURIAE OF FLORIDA LEGAL FOUNDATION**  
**IN SUPPORT OF APPELLEE, SPICLIFF, INC.**

Frank A. Shepherd, Esq.  
frank.shepherd@gray-robinson.com  
GRAYROBINSON, P.A.  
333 S.E. 2nd Avenue  
Suite 3200  
Miami, Florida 33131  
(305) 416-6880

Paul Bailey, Esq.  
paul@weltonlawfirm.com  
WELTON LAW FIRM, LLC  
1020 Ferdon Boulevard South  
Crestview, Florida 32536  
(850) 682-2120

Attorneys for Amicus Curiae

RECEIVED, 04/08/2021 10:59:27 PM, Clerk, First District Court of Appeal

## **TABLE OF CONTENTS**

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
IDENTITY AND INTEREST OF AMICUS CURIAE .....	1
STATUS OF CASE.....	1
SUMMARY OF ARGUMENT .....	6
ARGUMENT.....	6
A.    The County Court Misread the CDC Stay .....	6
B.    The CDC Lacks Authority to Order the State Court to Stay the Eviction in this Case.....	9
C.    The <i>Sua Sponte</i> Order Granting A Stay Based Upon the Filing by Appellant of the Pre-printed Declaration Supplied by the CDC Constituted a Violation of Spicliff, Inc.’s Right to Due Process of Law.....	12
D.    The CDC Agency Order Exceeds the Statutory Authority Congress Delegated to the Agency in Section 361 of the Public Health Services Act, 42 U.S.C. § 64.....	15
E.    The CDC Agency Order Exceeds the Powers Granted to the Federal Government Under the United States Constitution.....	18
CONCLUSION.....	21
CERTIFICATE OF SERVICE .....	23
CERTIFICATE OF COMPLIANCE.....	24

## TABLE OF AUTHORITIES

### CASES

<i>Applegate v. Barnett Bank</i> , 377 So. 2d 1150 (Fla. 1979). .....	9
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971).....	13
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986).....	11
<i>Brown v. Azar</i> , 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020).....	15, 17
<i>Chambless Enters., LLC v. Redfield</i> , 2020 WL 7588849 (W.D. La. Dec. 22, 2020). .....	15, 17, 20
<i>Home Bldg. Ass’n v. Blaisdell</i> , 290 U.S. 398 (1924).....	18, 21
<i>Mistretta v. United States</i> , 488 U.S. 361 (1980).....	11
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306 (1950).....	13
<i>Mungin v. State</i> , No. SC18-635, (February 13, 2020).....	9
<i>Peoples Bank of Indian River County v. State Dep’t of Banking &amp; Fin.</i> , 395 So. 2d 521 (Fla. 1981).....	13
<i>Ryan v. Ryan</i> , 277 So. 2d 266 (Fla. 1973).....	11
<i>Scholastic Sys., Inc. v. LeLoup</i> , 307 So. 2d 166 (Fla. 1974).....	13

<i>Skyworks, Ltd. v. CDC</i> , 2021 WL 911720 (N.D. Ohio Mar. 10, 2021).....	15, 16, 17
<i>Terkel v. Centers for Disease Control and Prevention</i> , 2021 WL 742877 (E.D. Tex. February 25, 2021).....	17, 19, 20
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	19
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942).....	20
<i>Williams v. Ladera Apartments</i> , 2021, WL 949480 (E.D. Tex. Mar. 12, 2021).....	15

## **CONSTITUTIONS AND STATUTES**

28 U.S.C. § 2283 .....	12
42 U.S.C. § 264 .....	15, 16
Art. III, § 1 U.S. Const. ....	10
Pub. L. No. 116-136, 134 Stat. 281 (2020). ....	4

## **OTHER AUTHORITIES**

First Amended Special Order <i>In Re</i> Addendum to Residential Eviction Summons, Fla. Admin. Order (10th Cir. January 11, 2021) (on file with Clerk, Fla. 10th Cir. Ct.).....	8
Fla. Admin. Order No. 20-15f.1 (Fla. 12th Cir. April 1, 2021) (on file with Clerk, Fla. 12th Cir. Ct.); FLF App. ....	7
Fla. Exec. Order No. 20-94 (May 14, 2020).....	4
Fla. Exec. Order No. 20-211 (August 31, 2020). ....	4

HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions, at 1, <a href="https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf">https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf</a> . . . . .	8
James Madison <i>Federalist No. 45</i> , at 236 (Garry Wills ed., Bantam 1982). . . . .	10, 18
James Madison <i>Federalist No. 46</i> , at 237 (Garry Wills ed., Bantam 1982). . . . .	10
Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). . . . .	4, 7
Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,021 (Feb. 3, 2021). . . . .	5, 7
Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16737 (March 28, 2021). . . . .	5, 7, 14

## **IDENTITY AND INTEREST OF AMICUS CURIAE**

Florida Legal Foundation, Inc. is a 501(c)(3) non-profit, non-partisan organization founded in 1992, reorganized in 2020, that exists to participate in matters of interest to the people of the State of Florida. Its areas of interest include the preservation and promotion of economic liberty, and specifically the right of all persons to own, use, and possess their private property.

## **STATUS OF CASE**

This brief is being filed while this case is in an unusual posture. A brief explanation is necessary.

This is an appeal by Steven Cowley, a tenant in an apartment building owned by Spicliff, Inc., from an order of the County Court of Escambia County finding that an Agency Order of the Centers for Disease Control and Prevention that prohibits a landlord from evicting certain “covered persons” from any residential property for a specified time as a result of the COVID-19 pandemic is unconstitutional. App001-006.<sup>1,2</sup> The effect of the order of the

---

<sup>1</sup> The order on appeal was rendered on November 24, 2020. The Notice of Appeal was filed on December 10, 2020. Pursuant to a change in the appellate jurisdiction of the circuit court appellate divisions of the state, the appeal was transferred to this Court on

County Court was to lift a *sua sponte* stay issued by that Court ninety minutes after the filing of a pre-printed form supplied by the CDC which incants the requirements for a tenant to be a “covered person” under the CDC Agency Order. See App009-013.<sup>3</sup>

The stay order reads as follows:

ORDER GRANTING STAY

The court received notice from the tenant in this eviction for non-payment of rent that the tenant served the landlord with a CDC declaration affidavit. Therefore the case must be stayed until January 1, 2021, or until the CDC rescinds their Agency Order.

ORDERED AND ADJUDGED that the case is stayed pursuant to the Agency Order.

DONE AND ORDERED in Chambers, Pensacola, Escambia County, Florida.

/s/ County Court Judge Pat Kinsey  
10/27/2020 11:52:50 [a.m.]

---

January 8, 2021. See Order Discharging Order to Show Cause issued February 17, 2021.

<sup>2</sup> Citations to App\_\_ are to the record as supplied by Appellant, Steven Cowley, in the Appendix to the Initial Brief. The Appendix to this Brief will be cited as “FLF App., Exhibit \_\_.”

<sup>3</sup> The appellate division of the Circuit Court for the First Circuit has stayed execution of the order lifting the stay pending resolution of the appeal. See Order Modifying Stay issued on December 17, 2020, attached hereto as FLF App., Exhibit A. Thus, Mr. Cowley presently remains in possession of his apartment unit.

App013 (hereinafter sometimes referred to as “the Stay Order”). Amicus Curiae agrees that the issuance of the *sua sponte* stay was unlawful. It is unlawful on both federal and state constitutional grounds. However, the order lifting the stay can be affirmed on non-constitutional grounds. As will be shown below, the County Court misunderstood the effect of the CDC declaration it received. The Stay Order was also issued without Spicliff, Inc. being accorded due process before its entry.

That aside, Spicliff has filed an answer brief that states, “Due to unfair statements made by the media and our not having the comparable media access to rebut those claims, we will not comment further on this case.” It is unfortunate in a nation created for the purpose of escaping oppression, any remnant of such oppression, public or private, should still exist. Of course, Amicus did not know at the time it sought leave to file an amicus brief that Spicliff would elect not to file a full-throated defense of its legal and constitutional rights. It is noteworthy, however, that Spicliff, Inc. did not confess error. Rather, it appears that Spicliff, Inc. has effectively done what appellees of all stripes do on occasion, simply elect not to file a brief.



The federal moratorium prohibiting owners of residential property from evicting tenants for non-payment of rent went into effect on March 27, 2020, upon the signing by the President into law of the Coronavirus Aid, Relief, and Economic Security Act. Pub. L. No. 116-136, 134 Stat. 281 (2020). That law included a 120-day prohibition on the initiation of eviction proceedings for “covered properties,” defined as those participating in specified federal programs or with specified federally backed loans. *Id.* § 4024, 134 Stat. at 492-93. With the exception of approximately one month from July 27, 2020 to September 4, 2020,<sup>4</sup> the prohibition against residential evictions has been continuously maintained by federal law or CDC Agency Orders for over a year.<sup>5</sup> The current expiration

---

<sup>4</sup> As was true of many states, an Executive Order issued by the Governor of the State of Florida prohibited evictions during the interim period not covered by the federal moratorium. See Fla. Exec. Order No. 20-94 (May 14, 2020); see also Fla. Exec. Order No. 20-211 (August 31, 2020) (extending the state moratorium as other prior executive orders). The state moratorium on evictions ended on October 1, 2020 when Governor elected not to extend the prior order. See Fla. Exec. Order No. 20-211 (August 31, 2020).

<sup>5</sup> The initial CDC Agency Order was issued on September 4, 2021. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). This order was originally set to expire on December 31, 2020. *Id.* at 55,297. The order was extended by Act of Congress to January 31, 2021. 134 Stat. 1182, 2078-79 (2020). The CDC then further

date is June 30, 2021, with no suggestion that the current Agency Order will be the last. *See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 16738 (March 28, 2021). By any reckoning, the actions of the CDC are not temporal in nature, but rather indefinite.

This amicus brief has been prepared without any communication or consultation with Spicliff, Inc. It is submitted at this time out of concern that this Court may misconstrue the import of Spicliff, Inc.'s filing, or issue an opinion contrary to law and inconsistent with the preservation and promotion of economic liberty, a primary interest of Amicus. It is Amicus Curiae's hope that this brief will assist this Court in the proper disposition of this case.

---

extended the order to March 31, 2021. *See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 8,021 (Feb. 3, 2021). On March 28, 2021, the CDC issued its most recent extension effective through June 30, 2021. *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 16738 (March 28, 2021). For the convenience of the Court, copies of the CDC Agency Orders are attached hereto as FLF App., Exhibits B, C, and D.

## **SUMMARY OF ARGUMENT**

The County Court correctly lifted the *sua sponte* stay entered by the Court. The County Court misread or misunderstood the CDC Agency Order. As a constitutional matter, the CDC lacks the authority to order the state court to stay the eviction in this case. The Agency Order also exceeds the statutory authority Congress delegated to the Agency in Section 361 of the Public Health Services Act, 42 U.S.C. § 264. Finally, the application of the order to Spicliff, Inc. in this case violates Spicliff, Inc.'s right to due process under the state and exceeds the powers granted to the federal government under the United States Constitution.

## **ARGUMENT**

### **A.**

#### **The County Court Misread the CDC Stay Order.**

The stay order that is the subject of this case was issued based upon the September 4, 2020 CDC Agency Order. Neither that order nor its extensions imposes any obligation on a state court. Rather all three Agency Orders, including the present one, state as follows:

*Findings and Action*

\* \* \*

[A] landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action shall not evict any covered person from any residential property in any state or U.S. territory in which there are documented cases of COVID-19 that provides a level of public-health protections below the requirements of this Order.

See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55296 (September 4, 2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,025 (Feb. 3 2021) (extending the September 4, 2020 Order to March 31, 2021); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16737 (March 28, 2021) (extending the moratorium to June 30, 2021). The Agency Order does not and, for reasons next shown, cannot purport to require or command a state court to enjoin a landlord from evicting a “covered person.” The Agency Order by its terms does not bind or purport to bind the County Court.<sup>6</sup>

---

<sup>6</sup> In fairness to the County Court, Amicus points out that the County Court is not the only court that appears to have misread or misunderstood the CDC Agency Orders. It appears that the Circuit Court for the Twelfth Judicial Circuit also misunderstood the import of the CDC Agency Orders. See Fla. Admin. Order No. 20-15f.1 (Fla. 12th Cir. April 1, 2021) (on file with Clerk, Fla. 12th Cir.

Guidance issued by the CDC after the issuance of the CDC Agency Order confirms that the County Court misread the order. In its own answers to a “Frequently Asked Questions” advisory document issued shortly after the first Agency Order, the CDC stated that “[t]he [Agency] Order is not intended to **terminate or suspend the operations of any state or local court.**” See HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions, at 1, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>, attached hereto as Exhibit G (emphasis added). Rather, the CDC stated, albeit in what a judge or lay person might be forgiven if read as possessing an *in terrorem* connotation, only that “courts **should take into account** the Order’s instruction not to evict a covered person from rental properties[.]” *Id.* (emphasis added).

---

Ct.); FLF App., Exhibit E; *see also* First Amended Special Order *In Re* Addendum to Residential Eviction Summons, Fla. Admin. Order (10th Cir. January 11, 2021) (on file with Clerk, Fla. 10th Cir. Ct.); FLF App., Exhibit F.

This reason alone is sufficient ground for affirmance of the order lifting the stay.<sup>7</sup>

**B.**  
**The CDC Lacks Authority to Order the State Court to Stay the Eviction in this Case.**

Although the CDC seems to admit in its Agency Orders and pronouncements that it cannot directly order a state court to stay an eviction proceeding, Amicus submits, in view of the apparent confusion on the subject in the trial court in this case and in other courts in the state, see n. 6, *supra*, that it is worthy of a brief pause to refresh ourselves as to why that is so. The answer lies in the basic structure of our government.

The founding bargain, expressed in the Constitution of the United States, is that the federal government would be a government of limited, enumerated powers, “whose powers will be exercised principally on external objects, as war, peace, negotiation,

---

<sup>7</sup> Amicus recognizes that this ground and others discussed herein were not raised by Spicliff, Inc. as grounds to lift the *sua sponte* stay in this case. However, as the Florida Supreme Court has stated on more than on occasion, it is “the decision of the trial court that primarily matters, not the reasoning used.” *See Mungin v. State*, No. SC18-635, (Fla. Feb. 13, 2020) (citing *Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979) (“[T]he decision of the trial court is primarily what matters, not the reasoning used.”)).

and foreign commerce” while state powers would extend “to all of the objects which in the ordinary course of affairs, concern the lives, liberties and properties of the people....” James Madison *Federalist No. 45*, at 236 (Garry Wills ed., Bantam 1982). As Madison later wrote in *Federalist No. 46*: “The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.” James Madison *Federalist No. 46*, at 237 (Garry Wills ed., Bantam 1982). This is the principle of federalism. The other foundational pillar of our democratic form of government, existing at both the state and federal level, is the doctrine of separation of powers. In our federal government, the Centers for Disease Control and Prevention, is housed in the Executive Branch of government. It has no judicial power. Instead, our constitutional structure at the federal level commands that “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Art. III, § 1 U.S. Const. Together with a separate legislative branch, the Framers regarded this tripartite form of federal government as a self-executing safeguard “essential to the

preservation of liberty.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Under this political scheme, each department of the federal government is independent of the other and entirely free from the control or coercion of the other in their respective spheres. See *Bowsher v. Synar*, 478 U.S. 714, 725 (1986). Our own Supreme Court has similarly written eloquently on this doctrine:

It is more important that the basic separation of powers in our independent branches of government be preserved than it is that we project our own concept of the public good by reaching beyond the traditional judicial limitations of these protective boundaries of the separate, independent divisions of government. Otherwise, we would more seriously, erode our basic principles of the democratic process which has proved in its ups and downs, its changes and reversions, still to be the most successful form of free government ever conceived by mankind.... Better we weep over questioned legislation, or judicial decisions for that matter, and strive within the proper channels for desired change, than destroy the system, for whatever well intended purpose. Such is the reasoning behind the oft-mentioned reference to our legal system as one ‘of laws, not of men.’ Sometimes it is not easy, but it is imperative to the survival of the democratic process.

*Ryan v. Ryan*, 277 So. 2d 266, 274-75 (Fla. 1973) (internal citations omitted). The fundamental necessity of maintaining both the division of powers between the states and the federal government,



and the separation of the departments of government in each has often been stressed and is hardly open to question.

In issuing the *sua sponte* order granting the stay based upon an executive branch order, the trial court forgot these basic principles. The CDC lacks any authority to require or command a state court to act or to refrain from acting in **any** field.<sup>8</sup>

### **C.**

#### **The Sua Sponte Order Granting A Stay Based Upon the Filing by Appellant of the Pre-printed Declaration Supplied by the CDC Constituted a Violation of Spicliff, Inc.'s Right to Due Process of Law.**

It should be equally obvious that the *sua sponte* order was entered in violation of Spicliff, Inc.'s right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution. The United States Supreme Court has described the due process clause of the

---

<sup>8</sup> Of course, basic principles of federalism and the doctrine of separation of powers also severely restrain the ability of the federal judicial branch to issue a stay order to a state court. This structural restraint has prompted Congress, on occasion to attempt to articulate the contours of the relationship between the state and federal courts. See, e.g. 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments").

Fourteenth Amendment as a “root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.” *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *see also*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“[T]here can be no doubt that at a minimum [the due process clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”). Not surprisingly, the law in Florida is the same. *See Peoples Bank of Indian River County v. State Dep’t of Banking & Fin.*, 395 So. 2d 521, 524 (Fla. 1981) (stating at a minimum, due process involves “reasonable notice and a fair opportunity to be heard before rights are decided”); *Scholastic Sys., Inc. v. LeLoup*, 307 So. 2d 166, 169 (Fla. 1974) (“Due process requires that no one shall be personally bound until he has had his ‘day in court.’”).

In this case, the pre-printed notice was sent by Steven Cowley directly to the County Court judge assigned to this case on the morning after it was signed by him. App009-013. It was not served on Spicliff, Inc. Approximately ninety minutes later, the County Court entered a stay of the eviction proceeding without notice.

App013. Among the grounds alleged by Spicliff, Inc. in its Motion to Lift the *sua sponte* stay was that the stay violated “the Due Process Clause” of the Fifth and Fourteenth Amendment to the United States Constitution and the law of the State of Florida. App014-015. The Order Granting Plaintiff’s Motion to Lift Stay recognized the failure of due process that occurred in the entry of the *sua sponte* order. App002 (“Permitting tenants to avoid eviction by merely signing a pre-printed form, which is then notarized and delivered [to] their landlord deprives landlords of due process as landlords have no recourse but to ‘house’ tenants without compensation . . . further Notice.”). Each of the CDC Agency Orders recognized that, at a minimum, property owners have the right to a hearing before a stay is entered. *See, e.g.*, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16737 (March 29, 2021) (recognizing that landlords should be able to challenge “the truthfulness of a tenant’s, lessee’s, or resident’s declaration in court....”). It is beyond cavil that the entry of the *sua sponte* stay order without notice and an opportunity to be heard violated fundamental principles of due process.

**D.**

**The CDC Agency Order Exceeds the Statutory Authority  
Congress Delegated to the Agency in Section 361 of the Public  
Health Services Act, 42 U.S.C. § 264.**

There exists a difference of views among the courts concerning whether the Agency Order exceeds the statutory authority delegated to it by Congress. Electronically assisted research by Amicus revealed three cases where federal courts have weighed in on the issue of whether the CDC Agency Order exceeds the statutory authority Congress delegated to the agency: *Skyworks, Ltd. v. CDC*, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021); *Chambless Enters., LLC v. Redfield*, 2020 WL 7588849 (W.D. La. Dec. 22, 2020); and *Brown v. Azar*, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020).<sup>9</sup>

The Agency Orders in this case were issued under Section 361 of the Public Health Service Act, enacted in 1994 (42 U.S.C. § 264) and 42 Code of Federal Regulations 70.2. The Court in *Skyworks Ltd.* performed a detailed analysis of the authority under which the CDC claims it has the authority to proceed in this matter. The Court began by recognizing that the first sentence of 42 U.S.C. §

---

<sup>9</sup> *Williams v. Ladera Apartments*, 2021 WL 949480, at \*2 (E.D. Tex. Mar. 12, 2021), also poses the question, but with minimal analysis.

264(a) would seem to authorize the issuance of the Agency Order.

That sentence reads:

The [CDC] with the approval of the [Secretary of the Department of Health and Human Services], is authorized to make and enforce such regulations as **in his judgment are necessary** to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.

*Skyworks*, 2021 WL 911720 at \*9 (emphasis in original). However, as the Court stated, “the statute’s first sentence does not stand alone.” *Id.* Section 264(a) continues:

For purposes of carrying out and enforcing such regulations, the [Secretary] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction **of animals or articles found** to be so infected or contaminated as to be sources of dangerous infection to human beings, **and other measures, as in his judgment may be necessary.**

*Id.* (emphasis in original). Focusing, as did the parties, on the final words of this subsection of the statute, “and other measures, as in his judgment may be necessary,” the court found that the meaning of the phrase could not be divorced from its context and concluded that “[t]he most natural and logical reading of the statute as a whole” was that the phrase “‘other measures’ must be reasonably of

the type Congress contemplated in the statutory text – fumigation, disinfection, destruction of animals or things, or other measures reasonably of this type.” *Id.* at \*10. The fact that the regulation adopted in support of the statute omits the phrase “other measures” was also of significance to the Court in reaching its decision. *Id.* at \*5.

In contrast to the reasoning of *Skyworks*, neither the *Brown* nor the *Chambless* decisions considered the limiting language “animals or articles.” As the *Skyworks* Court pointed out, Congress plainly “directed the actions set forth in Section 361 to certain animals or articles, those so infected as to be a dangerous source of infection to people.” *Id.* at \*10. Disease spread does not fall into either category. In its own critique of the *Brown* and *Chambless* decisions, the *Skyworks* Court concluded that these decisions “have the feel of adopting strained or forced readings of the statute, stretching to rationalize the governmental policy at issue.... [However,] that is not the proper role of the courts.” *Id.* Nor is it a proper methodology of statutory interpretation. Although the pandemic persists, so does the Constitution. *Terkel v. Centers for Disease Control and Prevention*, 2021 WL 742877 \*10 (E.D. Tex.

February 25, 2021). The CDC Agency Order exceeds the statutory authority Congress delegated to the Agency.

**E.**

**The CDC Agency Order Exceeds the Powers Granted to the Federal Government Under the United States Constitution<sup>10</sup>**

Because real property is fixed and does not move across state lines, it was natural at the founding, and has remained so to this day, that regulation of its ownership, use and possession is a uniquely local matter within the constitutional design. See James Madison *Federalist No. 45*, at 236 (Garry Wills ed., Bantam 1982). The fundamental purpose of an eviction is to vindicate the owner's possessory interest in that property. The process falls naturally into the State's police power. See *Home Bldg. Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1924) (describing the police power as "an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people.").

Based upon this understanding, one Court has recently held that the CDC nationwide moratorium on evicting tenants is

---

<sup>10</sup> Rather than re-arguing the takings portion of the opinion in which the trial court found the Agency Order in this case unconstitutional, Amicus here will, in the interest of brevity, supplement the decision of the trial court with additional reasons in support of that decision.

“contrary to [the federal] constitutional ... power.” *Terkel*, 2021 WL 742877 at \*11. In *Terkel*, the federal government argued that the CDC moratorium fell within the Constitution’s Article I grant of federal authority to regulate commerce among the states. *Id.* at \*1. The Court examined the three categories of activity within which regulation of commerce is allowed under the commerce clause, and concluded that the only category under which the moratorium might pass muster was the category of “activities [that] have a substantial relationship to interstate commerce – e.g., those activities that substantially affect interstate commerce.” *Id.* at \*4 (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). The Court found that the CDC Agency moratorium did not qualify as such an activity. While recognizing that “[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence . . .,” *Id.* at 10 (citing *Lopez*, 514 U.S. at 580), the Court found that the Agency Order was uniquely local in its effect. As the Court explained, “The fact that an activity has some ultimate tie or correlation to national-employment or socio-economic statistics, as noted in the administrative record here, is not enough of a nexus under the constitutional test.” *Id.* at \*8. The



Court also dismissed the oft argued claim of “aggregation” in federal commerce cases, famously enunciated in the case of *Wickard v. Filburn*, 317 U.S. 111 (1942), as inapplicable to this case. The Court explained:

First, the eviction of one person from a dwelling does not alone have a self-evident substantial effect on interstate commerce, and the government has not pointed to any findings demonstrating such a substantial effect. Because evictions are not themselves economic activity, their effects cannot be aggregated under the *Wickard* principle.

*Terkel* at \*8 (internal citations omitted). In fact, as the government conceded, “[I]ts view of constitutional authority would allow [or permit the suspension of] a federal eviction moratorium for any reason, including views on ‘fairness.’” *Id.* at \*10.<sup>11</sup>

Finally, as the *Terkel* court observed, “the federal government has never before invoked its commerce power to impose a nationwide eviction moratorium.” *Terkel*, 2021 WL 742877 at \*9. “Nor was the government able to provide the court with any “analogous use of federal power.” *Id.* That, of course, is because evictions are

---

<sup>11</sup> This admission by the government also raises constitutional concerns under the non-delegation doctrine. See *Chambless Enters., LLC*, 2020 WL 7588848 at \*10. (stating that the legislative branch cannot leave the duty to carry out declared legislative policy “to be dealt with as [the agency] please[s]”).

reserved powers to the states. Should the court reach the federal constitutional issue, the Agency Orders should be declared unconstitutional.

## **CONCLUSION**

The lifting of the stay in this case can be affirmed without reaching any state or federal constitutional issue. However, if the Court finds it necessary to reach the constitutional issues in the case, then Amicus respectfully submits the CDC Agency Orders should be declared unconstitutional. As was stated by the United States Supreme Court during the course of an earlier emergency in the nation's history:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

*Blaisdell*, 290 U.S. at 425–26.

Amicus respectfully submits that this Court should affirm the lifting of the stay in this case.

Respectfully submitted,

GRAY ROBINSON, P.A.  
333 S.E. Second Avenue,  
Suite 3200  
Miami, Florida 33131  
(305) 416-6880

/s/ Frank A. Shepherd  
Frank A. Shepherd  
Florida Bar No. 152620  
frank.shepherd@gray-robinson.com

WELTON LAW FIRM, LLC  
1020 Ferdon Boulevard  
South  
Crestview, Florida 32536  
(850) 682-2120

/s/ Paul Bailey  
Paul Bailey  
Florida Bar No. 112829  
paul@weltonlawfirm.com

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8th day of April, 2021, a true and correct copy of the foregoing Amicus Brief was furnished by e-mail to all parties listed below.

Christine A. Kelley Fausel, Esq.  
Legal Services of North Florida  
1741 North Palafox Street  
Pensacola, Florida 32501  
christine@LSNF.org  
*Attorney for Appellant,  
Steven Cowley*

Stephen M. Guttmann, Esq.  
314 South Baylen Street  
Suite 203  
Pensacola, FL 32502  
guttmannsteve@aol.com  
*Attorney for Appellee,  
Spicliff, Inc.*

/s/ Paul Bailey  
Paul Bailey, Esq.

## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is Bookman Old Style fourteen-point font and complies with the font and word count requirements of Florida Rules of Appellate Procedure 9.045(b)(e) and 9.370(b).

/s/ Paul Bailey  
Paul Bailey