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FEDERAL COURT RULES THAT CDC EVICTION MORATORIUM IS UNCONSTITUTIONAL

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The Center for Disease Control and Prevention's Order declaring a national moratorium on residential evictions effective January 31, 2021 through March 31, 2021, was declared unconstitutional by a U.S. District Court in Texas. A copy of the court's order can be found HERE.

In a case brought by seven Texas landlords against the CDC, the court ruled that the Federal government does not have the authority under the U.S. Constitution's Commerce Clause to impose a moratorium on evictions. The Federal government argued that the order was within the government's authority to regulate commerce pursuant to Article I of the Constitution; the government did not assert any executive authority under Article II of the Constitution and did not rely upon the pandemic as a source of authority indicating that its constitutional argument did not turn on the current pandemic. The court used a four-part test under the Commerce Clause to determine if the CDC order was within the Federal government's authority to regulate activities that substantially affect interstate commerce:

1. The economic character of the intrastate activity.
2. Whether the regulation contains a "jurisdictional element" that may "establish whether the enactment is in pursuance of Congress' regulation of interstate commerce."
3. Any congressional findings regarding the effect of the regulated activity on commerce among the States; and
4. Attenuation in the link between the regulated intra-state activity and commerce among the States.

Applying the test, the court looked at the effects of the activity sought to be regulated, evictions in state court, and found that evictions are not "economic activity" in the interstate commerce realm, explaining as follows:

> Here, the regulated activity is not the production or use of a commodity that is traded in an interstate market. Rather, the challenged order regulates property rights in buildings—specifically, whether an owner may regain possession of property from an inhabitant. 86 Fed. Reg. at 8,021 (defining "eviction" as any action "to remove or cause the removal of a covered person from a residential property"). Real estate is inherently local. Residential buildings do not move across state lines. And eviction is fundamentally the vindication of the property owner's possessory interest.

The court distinguished the CARES Act's moratorium, which was limited to dwellings that received federal funding. It recognized the states' police powers in this area, stating that "the lawsuit does not question that the States may regulate residential evictions and foreclosures, as they have long done."
Despite the ruling, several open questions remain, including:

1. Whether the CDC or other courts will consider the ruling to apply in other jurisdictions.
2. Whether the CDC, which indicated it would respect the declaratory judgment which resulted in the court not issuing an injunction, will appeal the ruling.

3. Whether other courts will adopt the same reasoning.

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