No. 21-40137

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.

On Appeal from the United States District Court for the Eastern District of Texas
Honorable John Campbell Barker, U.S. District Judge

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

Elizabeth B. Wydra
Brianne J. Gorod
Dayna J. Zolle
Miriam Becker-Cohen
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
dayna@theusconstitution.org

Counsel for Amicus Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: May 3, 2021

/s/ Dayna J. Zolle
Dayna J. Zolle

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Commerce Clause and the Necessary and Proper Clause are read, consistent with their text and history, as granting the federal government the necessary power and flexibility to regulate behaviors that require a national response. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two centuries ago, Chief Justice John Marshall cautioned that a "narrow construction" of Congress's authority to regulate interstate commerce would "cripple the government, and render it unequal to the object for which it is declared to be instituted." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824). The court below failed to heed that warning: amidst perhaps the greatest global public health crisis of our time, the COVID-19 pandemic, it declared the federal government powerless to

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief.

stem the tide of evictions on a national scale, despite overwhelming and undisputed evidence that evictions exacerbate the interstate spread of this deadly virus by forcing low-income individuals into homeless shelters and other congregate living settings. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,732-33 (Mar. 31, 2021). The district court's crabbed view of the scope of Congress's authority to address this crisis is at odds with the Constitution's text and history, and its decision should be reversed.

When the Framers gathered in Philadelphia to draft the Constitution, they were living under a central government that had proved incapable of addressing issues of national concern. With this experience fresh in their minds, delegates at the Constitutional Convention voted overwhelmingly in favor of the Virginia Plan as a blueprint for our nation's charter, creating a robust and empowered federal government. 1 *The Records of the Federal Convention of 1787* at 313 (Max Farrand ed., rev. ed. 1966) [hereinafter *Federal Convention Records*]. The centerpiece of the Virginia Plan was Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 *Federal Convention Records*, *supra*, at 131-32.

Tasked with translating the principle of Resolution VI into specific provisions, the Committee of Detail wrote Article I to grant Congress the sweeping power to, among other things, "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8, cl. 3. As used in this Clause, the word "commerce" meant more than economic activity or trade—it carried a much broader meaning encompassing "interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation." Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 15-16 (2010). In Chief Justice Marshall's words, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse." *Gibbons*, 22 U.S. at 189.

Similarly inspired by the text and principle of Resolution VI, the Framers wrote the Necessary and Proper Clause to grant Congress the broad power to "make all Laws which shall be necessary and proper for carrying into Execution" the explicitly enumerated powers, including the Commerce Clause power. U.S. Const. art. I, § 8, cl. 18. As Alexander Hamilton later explained to President Washington, "[t]he means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means." Letter from Alexander Hamilton to George Wash-

ington, Opinion on the Constitutionality of an Act to Establish a Bank (1791), *reprinted in The Papers of George Washington Digital Edition* (Theodore J. Crackel ed., 2008) [hereinafter *Washington Papers*]. Like the frequently used "sweeping clauses" in wills, contracts, and other legal documents at the time, the Necessary and Proper Clause was intended to "cancel[] any implication that the previous enumeration of powers was exhaustive." John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1121 (2014).

The opinion of the court below is at odds with this constitutional text and history. Under a proper construction of the Commerce Clause, Congress plainly possesses the power to impose a federal eviction moratorium in response to the COVID-19 pandemic: evictions themselves prompt people to cross state lines, contributing to the interstate spread of COVID-19, and the interstate spread of COVID-19 has massive spillover effects, devastating the national economy. Moreover, each rental relationship maintained due to the eviction moratorium "is merely an element of a much broader commercial market in rental properties," *Russell v. United States*, 471 U.S. 858, 862 (1985). That market, and the transactions constituting it, has a substantial effect on interstate commerce under this Court's precedents. *See Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000) (holding that the "culmination" of many instances of "the commercial

activity of operating a rental-based [residential] facility" could "rationally be determined to have a substantial effect on the national housing market"); *id.* at 206 ("[I]t is a transparently commercial action to buy, sell, or rent a house. Not only is it quite literally a 'commercial transaction,' but viewed in the aggregate, it implicates an entire commercial industry."). This Court could end its analysis there.

But when the Necessary and Proper Clause is also taken into account, the constitutionality of the eviction moratorium only becomes more obvious. The Necessary and Proper Clause, embodying the principle of Resolution VI, gives Congress "broad authority to enact federal legislation," *United States v. Comstock*, 560 U.S. 126, 133 (2010), in recognition of the fact that the Framers could not possibly anticipate every future scenario requiring a federal response. Thus, a law is considered "necessary and proper" if it is "rationally related to the implementation of a constitutionally enumerated power." *Id.* at 134. Here, the eviction moratorium is rationally related to the implementation of Congress's power to regulate interstate commerce because, as described above, it fits squarely within the authority delegated by the Commerce Clause. But if this Court finds the moratorium's connection to the Commerce Clause power too attenuated—which it should not—the Necessary and Proper Clause provides sufficient authority for the moratorium.

If the court below had taken account of the text and history of these two critical provisions of our national charter, it would have recognized that the eviction

moratorium falls squarely within the federal government's power. This Court should correct that error and uphold the moratorium.

ARGUMENT

I. The Framers Designed the Constitution to Grant the Federal Government Broad Power to Address Issues of National Concern.

The Framers drafted the Constitution "in Order to form a more perfect Union," U.S. Const. preamble—more perfect, that is, than the flawed Articles of Confederation that deprived the central government of sufficient power to do its job. The result was a federalist system that gives Congress the power to act in circumstances in which a national approach is necessary or preferable, while reserving a primary role for the states in matters of purely intrastate concern.

By the time the Framers began drafting the Constitution in 1787, they had spent years under the defective Articles of Confederation. Those Articles, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built upon a mere "firm league of friendship" between thirteen independent states, Arts. of Confed. of 1781, art. III, with Congress as the single branch of national government, *id.* art. V. Although the Articles of Confederation delegated certain discrete powers to Congress, they gave the national government no means to execute its powers. *See* 1 Joseph Story, *Commentaries on the Constitution of the United States* § 246 (1833) (Congress could "declare everything but do nothing"). For example, Congress could not directly tax individuals or legislate upon them; it

had no express power to make laws that would be binding in state courts and no general power to establish national courts; and it could raise money only by "requisitioning" contributions from the states. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1447 (1987).

This scheme created such an ineffective central government that it nearly cost Americans victory in the Revolutionary War. In the midst of several American setbacks during the war, George Washington lamented that "unless Congress speaks in a more decisive tone; unless they are vested with powers by the several States competent to the great purposes of War . . . our Cause is lost." 18 *The Writings of George Washington* 453 (John C. Fitzpatrick ed., 1931) (Letter to Joseph Jones, May 31, 1780). Washington believed that the inability of the central government to address common concerns such as the maintenance of an army could bring disaster: "The sufferings of a complaining Army on the one hand, and the inability of Congress and tardiness of the States on the other are the forebodings of evil." Letter from George Washington to Alexander Hamilton (March 1783), *Founders Online*, https://founders.archives.gov/documents/Washington/99-01-02-10767. Thus, as the war approached its end, he announced in a circular sent to state governments that it was "indispensible to [their] happiness" that "there should be lodged somewhere, a Supreme Power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of long duration." Letter from George

Washington to the States (June 1783), *Founders Online*, https://founders.archives.gov/documents/Washington/99-01-02-11404.

The delegates to the Constitutional Convention shared Washington's conviction that the Constitution must establish a federal government with sufficient powers to enable it to function effectively. *See, e.g.*, James Madison, *Vices of the Political System of the United States* (April 1787), *Founders Online*, https://founders.archives.gov/documents/Madison/01-09-02-0187 (identifying a key shortcoming under the Articles as "want of concert in matters where common interest requires it," a "defect" that was "strongly illustrated in the state of our commercial affairs").

In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 *Federal Convention Records*, *supra*, at 131-32. Resolution VI was part of a group of provisions collectively referred to as the Virginia Plan. *See* Balkin, *supra*, at 8. The delegates overwhelmingly approved the Virginia Plan and rejected the alternative New Jersey Plan, which proposed a much weaker national government. *Id.* at 8-9.

Although Resolution VI was part of the Virginia Plan, which was crafted primarily by James Madison, the most likely source of Resolution VI itself was a Pennsylvanian: James Wilson, widely regarded as the most skilled and accomplished lawyer at the Constitutional Convention. *See* Mikhail, *supra*, at 1071-72. The concept of a "national power for national purposes," *id.* at 1074, embodied in Resolution VI, closely aligns with Wilson's 1785 essay, *Considerations on the Bank of North America*, *see id.* In that essay, Wilson explained that "[t]he United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole." James Wilson, *Considerations on the Bank of North America* (1785), *reprinted in* 1 *Collected Works of James Wilson* 64 (Kermit L. Hall and Mark David Hall eds., 2007). Because some "powers" and "obligations" "result[ed] from the union of the whole," it followed that "[w]henever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled." *Id.* at 64. The Framers adopted that structural constitutional principle in approving Resolution VI.

Once its language was finalized, the delegates passed Resolution VI along to the Committee of Detail, led by Wilson, to transform this general principle into an enumerated list of powers in Article I of the Constitution. *Id.* The process of translating Resolution VI into enumerated powers was "an effort to identify particular

areas of governance where there were 'general Interests of the Union,' where the states were 'separately incompetent,' or where state legislation could disrupt the national 'Harmony.'" Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 178 (1996). The enumerated powers, in other words, were intended to capture the idea that "whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia* 424 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*] (Statement of James Wilson).

Critically, the enumeration of powers was not intended to displace the fundamental principle of Resolution VI that Congress should have the general ability to legislate in matters of national concern. *See* Balkin, *supra*, at 11 (explaining that although Resolution VI does not appear in the final text of the Constitution, it "was the *animating purpose* of the list of enumerated powers that appeared in the final draft, and it was the key explanation that Framer James Wilson offered to the public when he defended the proposed Constitution at the Pennsylvania Ratifying Convention"). As Wilson put it, "though th[e] principle [of Resolution VI] be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary

latitude of construction of the principle." 2 *Elliot's Debates*, *supra*, at 424. He continued: "In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care." *Id.* at 424-25. Thus, the powers listed in Article I cannot be construed in isolation, but must be interpreted in light of the general principle underlying them—that Congress has the power to regulate matters of national concern. As Chief Justice Marshall later put it, "the powers expressly granted to the government of the Union" must not be "contracted by construction, into the narrowest possible compass," as doing so would "explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use." *Gibbons*, 22 U.S. at 222.

II. Focused on More than Just Trade or Economic Transactions, the Commerce Clause Allows the Federal Government to Address Problems that Require a Federal Response.

With Resolution VI as a guiding structural principle, the Framers wrote the Commerce Clause to empower Congress to legislate on issues requiring a federal response. The Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The text "yokes together" foreign, Indian, and interstate commerce in a single clause because all of these "sets of concerns might

require the United States to speak with a single voice." Balkin, *supra*, at 13; *see also* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149 (2003) (explaining that the terms "regulate" and "commerce" must have the same meaning with respect to all three categories delineated). Therefore, "Congress's power to regulate commerce 'among the several states' is closely linked to the general structural purpose of Congress's enumerated powers as articulated by the Framers: to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action." Balkin, *supra*, at 6.

The original meaning of "commerce" in the Constitution was not limited to economic activity or trade—it carried "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." Akhil Reed Amar, *America's Constitution: A Biography* 107 (2005). At the Founding, "commerce" meant "'intercourse'—that is, interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation." Balkin, *supra*, at 15-16; *see also* Samuel Johnson, *A Dictionary of the English Language* (9th ed. 1790) (defining "commerce" as "Intercourse: exchange of one thing for another, interchange of anything; trade; traffick," or "common or familiar intercourse").

Use of this broad term effectuated the Framers' agreement that Congress should have authority to "legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 *Federal Convention Records*, *supra*, at 131-32. To the Framers, a federal issue—properly under the authority of the federal government—arose whenever the states could not solve a problem on their own, such as when a matter had spillover effects or when a collective action problem prevented individual states from acting effectively. The broad reach of the Commerce Clause effectuated that understanding.

Again, Chief Justice Marshall's seminal decisions in the early days of our republic reflect this principle. In *Gibbons v. Ogden*, the Chief Justice defined "commerce" as "intercourse," 22 U.S. at 189, and, writing for a unanimous Court, held that interstate navigation of waters by steamboat constituted "commerce . . . among the several States," *id.* at 197 (quoting U.S. Const. art. I, § 8, cl. 3). He observed that if commerce were limited merely to the trade of goods, Congress would not be able to regulate in keen areas of federal interest, such as navigation to and from foreign nations. *See id.* at 193-94.

While the meaning of "commerce" in the Constitution is broad, the text of the Commerce Clause does place an important limit on federal regulation: Congress can

act only if a given problem genuinely spills across state lines or requires a cohesive federal response. As Chief Justice Marshall explained in *Gibbons*, the Commerce Clause uses the phrase "commerce among the States" to mean "commerce which concerns more States than one." *Id.* at 194. If commerce within a single state has external effects on other states or on the nation as a whole, then it falls under Congress's Commerce Clause authority; if the effects of commerce are "completely internal" to a state, then Congress has no power to regulate. *Id.*

Reading the Commerce Clause with this broad definition of "commerce" is faithful not only to the contemporary understanding of that term, *see Groome Resources*, 234 F.3d at 208 (recognizing that "a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority" (quoting *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000))), but also to the underlying principle that animated the enumeration of Congress's powers in the first place—the concept, embodied in Resolution VI, that the federal government must be empowered to act whenever a matter affects national interests or cannot effectively be addressed by the states on their own.

III. The Necessary and Proper Clause Gives the Federal Government Additional Power to Achieve Lawful Objects or Ends of the Federal Government.

As discussed above, the drafters of our Constitution described the enumerated powers of Congress broadly because they agreed that the federal government should

have the ability to respond to matters of national concern. Perhaps nowhere in the Constitution is that understanding more manifest than in the Necessary and Proper Clause, which gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. As Hamilton explained to President Washington in 1791, reflecting on the constitutionality of a national bank, "[t]he whole turn of the [Necessary and Proper Clause] indicates that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers." Letter from Hamilton to Washington, Opinion on the Constitutionality of an Act to Establish a Bank (1791), *reprinted in Washington Papers*, *supra*. While the government obviously has no right "to do merely what it pleases," in Hamilton's view, "[i]f the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution; it may safely be deemed to come within the compass of the national authority." *Id.*

Both President Washington and the Supreme Court agreed with Hamilton's exegesis of the constitutional powers of the federal government. Washington approved the bill to establish a national bank over the objections of other members of his cabinet, and the Supreme Court endorsed Hamilton's views in the landmark case

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), upholding Congress's power to incorporate a national bank. In *McCulloch*, Chief Justice Marshall explained that Congress should be afforded significant deference in determining which laws are appropriate for carrying out its constitutional duties. *Id.* at 421. In language very similar to Hamilton's, the Chief Justice wrote, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*; *see id.* at 406 (explaining that "there is no phrase in the [Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described").

To be sure, the powers of the federal government under our Constitution are not unlimited. "[A]s Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution." *Comstock*, 560 U.S. at 135 (quoting *McCulloch*, 17 U.S. at 421). And as the Tenth Amendment affirms, "all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941), giving the states a vital role in our federalist system. But "[e]ven the 10th amendment . . . omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;' thus leaving the question, whether

the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on *a fair construction of the whole instrument*." *McCulloch*, 17 U.S. at 406 (emphasis added).

In sum, through particular enumerated powers, as well as through the enforcement tool provided by the Necessary and Proper Clause, the Constitution realizes the Framers' design for a federal government able "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 *Federal Convention Records*, *supra*, at 131-32.

IV. The Eviction Moratorium Is Constitutional, Whether Assessed Under the Commerce Clause Alone, or Under the Commerce Clause and the Necessary and Proper Clause Together.

Under a proper construction of the Commerce Clause, faithful to binding precedent and the Constitution's text and history, the federal eviction moratorium is constitutional. This Court's analysis could start and end there. *See* Balkin, *supra*, at 18 ("We do not have to . . . bring in the Necessary and Proper Clause[] if we adopt the actual eighteenth-century definition of commerce as 'intercourse.'"). But if an analysis of the Commerce Clause were to leave any doubt as to the constitutionality of the moratorium, the Necessary and Proper Clause easily resolves that doubt.

A. The Eviction Moratorium Fits Squarely Within Congress's Power to Regulate "Activities that Substantially Affect Interstate Commerce."

The Supreme Court has held that Congress has the authority under the Commerce Clause to regulate the "channels of interstate commerce," the "instrumentalities of interstate commerce, and persons or things in interstate commerce," and, relevant here, "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (citing *Perez v. United States*, 402 U.S. 146, 150 (1971), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). The third category includes "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17; *see Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (holding that wheat grown solely for consumption by a farmer's family affected interstate commerce because the choice to grow, rather than buy, wheat had an impact on the interstate market—particularly when considered in the aggregate); *see also United States v. Bird*, 124 F.3d 667, 676 (5th Cir. 1997) (noting that the Supreme Court has "expressly reaffirmed[] the proposition set forth in *Wickard v. Filburn* concerning congressional regulation of intrastate, noncommercial activity").

In assessing whether a law is authorized by the Commerce Clause, this Court must grant the law a "presumption of constitutionality," *United States v. Morrison*, 529 U.S. 598, 607 (2000), and assess only whether the government has provided a

"rational basis" for concluding that the regulated activity substantially affects interstate commerce, *Raich*, 545 U.S. at 22. Accordingly, the question in this case is not whether evictions of individuals covered by the moratorium, considered in the aggregate, *in fact* would have a substantial effect on interstate commerce; it is whether a rational basis exists for that conclusion. *See id.* ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.").

To answer that question, this Court need only look to binding precedent. In *Russell v. United States*, the Supreme Court held that "[t]he rental of real estate" is "unquestionably" "an 'activity' that affects commerce." 471 U.S. at 862. The Court explained that it did not need to "rely on the connection between the market for residential units and 'the interstate movement of people,' to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Id.* Simply put, when someone is "renting [an] apartment building to tenants," that rental property is "being used in an activity affecting commerce." *Id.*

Although *Russell* involved the question whether the rental of real estate "affected commerce" within the meaning of a statute using that language, *see id.* at 859 (quoting 18 U.S.C. § 844(i)), this Court has since extended *Russell*'s reasoning to

the context of the Commerce Clause, holding that a federal statute prohibiting discrimination in the rental of housing *substantially* affected interstate commerce. *See Groome Resources*, 234 F.3d at 215. This Court explained that "it is a transparently commercial action to buy, sell, or rent a house. Not only is it quite literally a 'commercial transaction,' but viewed in the aggregate, it implicates an entire commercial industry." *Id.* at 206. This straightforward logic, combined with the lengthy congressional record "connecting direct discrimination against the disabled with the larger and more subtle effects on the interstate supply of housing," *id.* at 213, prompted this Court to reject the contention that Congress lacked the authority to prohibit discrimination in the rental market.

The court below attempted to distinguish these precedents, stating that they did not decide "[w]hether evictions themselves are economic in nature for the sake of constitutional analysis." ROA.1676. But that logic quickly falls apart: if maintaining a rental relationship has a substantial effect on interstate commerce, as this Court has recognized it does, *see Groome Resources*, 234 F.3d at 216, certainly severing that relationship does as well—it redirects funds that the tenant would use to pay rent to other market resources and permits the landlord to re-rent the vacant unit, perhaps at a different rate, to a new tenant. In any event, by temporarily *preventing* landlords from severing the rental relationship through the eviction process, the mor-

atorium is properly considered a regulation of the national rental market itself. Under the moratorium, landlords must temporarily permit qualified tenants to remain in their homes, where they will continue to incur monthly rent charges, "an element of a much broader commercial market in rental properties," *Russell*, 471 U.S. at 862; *see* 86 Fed. Reg. at 16,736 ("This order does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract.").

Moreover, the federal government has plainly provided a rational basis to justify the eviction moratorium under its Commerce Clause power. According to data compiled by the Centers for Disease Control and Prevention, "an eviction may lead the evicted members of a household to move across state lines." *Id.* at 16,735. Approximately 15% of the 35 million Americans who move each year cross state lines to do so—that amounts to well over 5 million interstate moves, many of which are prompted by evictions. *See id.* Moreover, "even if a particular eviction, standing alone, would not always result in interstate displacement, the mass evictions that would occur in the absence of [the eviction moratorium] would inevitably increase the interstate spread of COVID-19." *Id.*; *cf. Wickard*, 317 U.S. at 127-28 ("That [the farmer's] own contribution to the demand for wheat may be trivial by itself is not

enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

Although the district court did not question that the moratorium prevents the interstate spread of COVID-19, it suggested that these "findings about public health" do not "explain[] how a broader federal regulation of commerce among the States is undercut without the order." ROA.1679. But as the moratorium makes clear, the interstate spread of COVID-19 has a direct and substantial effect on interstate commerce: it has devastated the national economy by forcing "Federal, state, and local governments [to] take[] unprecedented or exceedingly rare actions" like "border closures," "stay-at-home orders," and other "unprecedented restrictions on interstate and foreign travel." 86 Fed. Reg. at 16,733. Certainly, according to the federal government's record of factual findings, the spread of COVID-19 burdens interstate commerce at least as much as discrimination in housing does.

Taking into account the original meaning of the Commerce Clause only reinforces the constitutionality of the eviction moratorium. As explained above, the principle behind enumerated powers such as the Commerce Clause is to give Congress the ability "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent." 2 *Federal Convention Records*, *supra*, at 131. Here, the spillover effects caused by mass evictions

during the height of an economic downturn affect the nation as a whole. Relatedly, the moratorium addresses a potential collective action problem in the states: without a *federal* eviction moratorium, vulnerable people in states without equivalent protections would face homelessness and related COVID-19 risk factors upon eviction from their homes, thus contributing to the spread of COVID-19. That spread, particularly due to people's movement across state lines and the extremely contagious nature of COVID-19, could drive up infection rates even in those states that *did* enact their own eviction moratoria. The eviction moratorium prevents that scenario by regulating in those instances in "which the States are separately incompetent." 2 *Federal Convention Records*, *supra*, at 131.

B. The Eviction Moratorium Is a Necessary and Proper Means of Regulating Commerce Among the Several States.

Although this Court can and should uphold the eviction moratorium as a permissible exercise of Congress's Commerce Clause authority, this Court could also uphold the moratorium as a measure that is "necessary and proper for carrying into execution" Congress's power to regulate commerce among the states.

The Supreme Court has repeatedly emphasized that "the Necessary and Proper Clause grants Congress broad authority." *Comstock*, 560 U.S. at 133; *see, e.g.*, *Jinks v. Richland Cty.*, 538 U.S. 456, 462 (2003); *McCulloch*, 17 U.S. at 408. Indeed, it has explained that under the Necessary and Proper Clause, Congress has the "broad power to enact laws that are 'convenient, or useful' or 'conducive' to the

authority's 'beneficial exercise.'" *Comstock*, 560 U.S. at 133-34 (quoting *McCulloch*, 17 U.S. at 413, 418). This characterization of the Clause accords with its text and history, grounded in the Framers' recognition that they could not anticipate every future scenario requiring federal action. Consistent with this characterization, the Supreme Court "long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely necessary*' to the exercise of an enumerated power," *Jinks*, 538 U.S. at 462 (citing *McCulloch*, 17 U.S. at 414-15); rather, a law is authorized by the Necessary and Proper Clause if it "is rationally related to the implementation of a constitutionally enumerated power," *Comstock*, 560 U.S. at 134 (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)).

The court below misinterpreted this analytical framework. It viewed the Commerce Clause's "substantial-effects test . . . 'through the lens of the Necessary and Proper Clause,'" ROA.1673-74, and declined to interpret the Necessary and Proper Clause as doing any independent work beyond that point. Of course, as described above, that independent work is not necessary if this Court holds, as it should, that the moratorium regulates "local activities that are part of an economic class of activities that have a substantial effect on interstate commerce," *Raich*, 545 U.S. at 17 (quotation marks omitted). But to the extent that this Court agrees with the district court that evictions—or more specifically, the prevention of evictions

through the temporary moratorium—are not part of such a class, it should still uphold the moratorium as a "necessary and proper" exercise of the federal government's authority under the Commerce Clause.

The Supreme Court's decision in *Comstock* demonstrates why. In that case, the respondents argued that their federal civil confinement based on "sexual dangerousness" under a federal statute "exceeded [Congress's] powers granted . . . by Article I, § 8, of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause." *Comstock*, 560 U.S. at 132. Yet the Court upheld the statute under the Necessary and Proper Clause without ever assessing whether civil confinement is associated with economic activity. It reached this conclusion because preventing community danger is necessary and proper to carrying out the nation's criminal laws, and those laws are based on Congress's "implied power to criminalize any conduct that might interfere with the exercise of an enumerated power," *id.* at 147, including the Commerce Clause power.

The fact that the civil confinement statute was several steps removed from one of the specifically enumerated powers made no difference. "Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution." *Id.* at 137. Notwithstanding that, "Congress . . . possesses broad authority to do each of those things in the course of 'carrying into

Execution' the enumerated powers 'vested by' the 'Constitution in the Government of the United States,' Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause." *Id.*; *see also id.* at 150 (Kennedy, J., concurring in the judgment) ("When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.").

Under this rationale, it is clear that there is nothing "improper" about the eviction moratorium, regardless of whether it is considered an economic regulation. The moratorium is plainly consistent with Congress's power under the Commerce Clause, and it constitutes an appropriate means for the execution of that power.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

/s/ Dayna J. Zolle
Elizabeth B. Wydra
Brianne J. Gorod
Dayna J. Zolle
Miriam Becker-Cohen
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
dayna@theusconstitution.org

Counsel for Amicus Curiae

Dated: May 3, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on May 3, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 3rd day of May, 2021.

/s/ Dayna J. Zolle
Dayna J. Zolle

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,157 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 3rd day of May, 2021.

/s/ Dayna J. Zolle
Dayna J. Zolle

Counsel for Amicus Curiae