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, Tyler Division

BRIEF FOR AMICUS CURIAE THE STATE OF TEXAS

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No. 21-40137

Lauren Terkel; Pineywoods Arcadia Home Team, Limited; Lufkin Creekside Apartments, Limited; Lufkin Creekside Apartments II, Limited; Lakeridge Apartments, Limited; Weatherford Meadow Vista Apartments, L.P.; MacDonald Property Management, L.L.C.,

Plaintiffs-Appellees,

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.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, amicus curiae the State of Texas, as a governmental party, need not furnish a certificate of interested persons.

/s/ Judd E. Stone II
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Interest of Amicus Curiae

Amicus curiae the State of Texas has "special solicitude" to participate in cases challenging unlawful federal Executive Branch actions. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). This is such a case. Regulating private property rights has long been a special area of concern for States. Nevertheless, citing vague concerns over public health, the Centers for Disease Control has usurped that role. It has issued an unprecedented order that forbids all Americans from exercising a right over private property that was centuries old at the Founding: the right to regain possession of property from a tenant who fails to comply with the terms of his tenancy. The "institutional injury to Texas from the inversion of . . . federalism principles enshrined" in the defendants' actions "constitute[s] irreparable injury." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016). The challenged order prevents the State "from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The State seeks to vindicate this interest not for its own sake but because the "ultimate purpose" of the state sovereignty "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

Introduction

For more than 200 years, our Constitution has "ensure[d] the protection of 'our fundamental liberties,'" by dividing power between the state and federal governments. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Knowing that a national government would

grow distant from the people, from whom sovereignty in a democratic republic is derived, the Framers provided that "[t]he powers delegated by the [federal] Constitution are few and defined." *The Federalist* No. 45, at 289 (Clinton Rossiter ed., 1961) (James Madison). By contrast, "[t]hose which . . . remain in the State governments," which are far more in tune with and accountable to local communities, "are numerous and indefinite." *Id.*

Defendants, led by the CDC, seek to "effectually obliterate" the line "between what is national and what is local," paving the way to "a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). The CDC was founded in the 1940s with the "primary mission" to "prevent malaria from spreading across the nation."[1] Never before has that mission been considered to include the power to regulate land use or landlord-tenant relations. Yet the CDC has issued a nationwide moratorium on evictions under its authority to "make and enforce such regulations . . . to prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a); 42 C.F.R. § 70.2. Defendants justify that action based on the federal government's purported power "to protect the nation's commerce." CDC Br. 7.

But a commerce power enabling a federal agency to "regulate" the least mobile, least interstate of all activity—that of the use of fixed structures situated in precisely one State—is no commerce power at all; it is a police power. The Constitution specifically denies the federal government that power. Indeed, real-property law has

[1] *Our History - Our Story*, CDC (Dec. 4, 2018), https://tinyurl.com/2z3adbfv.

always been a matter of special concern for state regulation. Since *United States v. Lopez*, 514 U.S. 549 (1995), it has been clear that the federal government may not displace state laws based entirely upon the impact of noncommercial activity on interstate commerce—whether that activity be unlawful possession of a gun in a school zone or the transmission of a virus. Allowing the CDC's order to stand would enable unelected public-health officials to alter the balance in our federal system based on their own decidedly nonexpert views of how the States' police power should be exercised. The district court was correct to refuse defendants that power.

ARGUMENT

I. The Commerce Power Must Be Interpreted in Its Historical Context and in the Light of the States' Traditional Regulation of Real Property.

The Supreme Court has repeatedly "warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government.'" *Id.* at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37). At the Founding, the British Parliament held plenary power to regulate economic activity; the Framers, well aware of this arrangement, deliberately rejected it. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1692-99 (2012). Instead, they gave Congress the specific 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. This "enumeration presupposes something not enumerated," including "exclusively internal commerce of a State," *Gibbons v. Ogden*, 22 U.S. 1, 194-95 (1824), as well as activities that do not amount to "commerce"

at all, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 666-68 (2013) (Thomas, J., concurring).

Leasehold interests in residential property are not commercial activities as that term has traditionally been understood but rights in real property, which have long been regulated by the States. The extent to which federal authorities may regulate such rights must be read in the light of this traditional understanding of federal-state relations.

A. At the Founding, "commerce" was synonymous with "trade."

At the Founding, "commerce" had a defined meaning linked to the colonies' role in Great Britain's global trading network. England had chartered many of its American colonies as corporations, hoping they would supply the raw materials needed to compete with Spain for control over global trade. Adam Winkler, *We the Corporations* 6-19 (2018). New England timber built the British merchant marine; New York and Philadelphia ran global shipping networks; the Carolinas fed much of the empire on their rice. Arthur Meier Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776* 15-25 (1918); *see also* Gordon S. Wood, *The American Revolution: A History* 12-13 (2002). And in return the American colonists secured low-interest loans, subsidies, monopolies, and the Royal Navy's protection at sea. Schlesinger, *supra*, at 25-32.

This notion of international trade in goods and commodities is inherent in the very language of "commerce." "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring) (collecting late

18th Century dictionaries). Indeed, the word "commerce" itself "literally means 'with merchandise.'" *Id.* (quoting 3 *Oxford English Dictionary* 552 (2d ed. 1989) ("com—'with'; merci—'merchandise'")). And when delegates to the Constitutional Convention discussed "commerce"—something that happened thirty-four times—they always used the term to refer to the trade of goods. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 114 (2001). The authors of *The Federalist Papers* used the term "commerce" another sixty-three times, again uniformly to discuss trade. *Id.* at 115-16 (noting that *The Federalist* Nos. 11, 12, and 17 were particularly clear on this point); *see also Lopez*, 514 U.S. at 586 (Thomas, J., concurring) ("[W]hen Federalists and Anti–Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably.").

B. At the founding, leasehold interests were *not* commerce.

Rights in real property, by contrast, were *not* considered commerce. For centuries, the ownership of property—particularly of land—has been seen as the most "changeless and timeless" right in the "pantheon of British liberty." John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 27 (1986). Half of the Magna Carta was dedicated to protecting property rights and setting those rights at a par with subjects' right to life. *See* Gottfried Dietze, *In Defense of Property* 55-59 (1963). Colonists brought their views of the importance of land

ownership and property rights with them to the New World.[2] Indeed, many in the Founding generations considered the right to property as foundational to other rights, and protection of that right as the chief aim of government. *See* Jack Rakove, *Revolutionaries: A New History of the Invention of America* 78-79 (2010); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 Am. J. Legal Hist. 464, 475 (1993).

The correlative rights of a leaseholder to possess property during his tenancy and of a landowner to retake that possession upon failure by the tenant to satisfy the terms of his tenancy are each property rights in the land itself. To be sure, leaseholds have long had contractual elements. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. Rev. 503, 505 (1982). But by the fifteenth century, as farming was increasingly conducted on leased land, the lease itself was firmly considered to be a right that is similar in degree but not in kind from land ownership. *Id.* at 505-06. "In Blackstone's eighteenth-century scheme," such a lease "was, if not real property, an estate *in* real property." *Id.* at 506; *see also* 2 William Blackstone, *Commentaries on the Laws of England* *140-47. This understanding became the predominant view in most American jurisdictions, including in Texas. *E.g.*, *Marine Indem. Ins. Co. of Am. v. Lockwood Warehouse & Storage*, 115 F.3d 282, 286

[2] *See* Bernard Bailyn, *Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution* 3-4, 24-26, 195-97 (1988); *see also* Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898* 194 (1999); Rhys Isaac, *The Transformation of Virginia, 1740-1790* 20-30 (1982).

(5th Cir. 1997); *Holcombe v. Lorino*, 79 S.W.2d 307, 310 (Tex. 1935); Tex. Prop. Code § 24.005; Tex. Prop. Code ch. 92.

C. The Founders left regulation of property—including leases—to the States.

Property rights were left to the States to preserve the liberty of the citizen. In forming their new republic, the Founding Fathers sought the form of government most likely to restrain itself and thereby to protect the rights of citizens. *The Federalist* No. 10 (James Madison). In this undertaking, they were heavily influenced not only by their study of ancient civilizations, Bernard Bailyn, *The Ideological Origins of the American Revolution* 24-25 (2017), but also by their own experiences during the pre-revolutionary period.

Until 1763, England's policy towards its North American colonies was largely one of salutary neglect. Schlesinger, *supra*, at 25-32. Colonial assemblies became accustomed to regulating property within their borders, including guarding colonists' property from the overreach of royal tax collectors before the American Revolution. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 192 (Rita & Robert Kimber trans., 1973). And within a few years of independence, seven States incorporated an inalienable right to property into their constitutions. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 152 (1985).

Americans enshrined this notion of local control over private property rights in the Constitution. Besides control over the territories and the future federal district, the delegates proposed no reallocation of this "valuable and powerful appendage[]

of sovereignty" from the States to the national government. 16 *The Documentary History of the Ratification of the Constitution* 50-51 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (Tench Coxe); *see* James W. Ely, Jr., *The Guardian of Every Other Right* 47-78 (3d ed. 2008). Thus, "real property law is"—and always has been—"a matter of special concern to the States." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Even Congress's power to restrict evictions must be read in the light of this unbroken history of state control over property rights—let alone the CDC's power to do so. *Lopez*, 514 U.S. at 564-65.

II. The CDC's Eviction Moratorium Exceeds Congress's Power Under Article I.

The Commerce Clause does not empower the CDC to do *anything*, let alone to invade the State's prerogative to regulate leasehold interests in real property. And by making it a crime for a citizen of Texas to access Texas's own courts, Defendants have effectively commandeered the state government apparatus in violation of the Tenth Amendment.

A. The Commerce Clause does not empower an agency of the Executive Branch to create an eviction moratorium.

To begin, the Commerce Clause empowers *Congress*—and not the Executive Branch—to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. In March 2020, Congress imposed a 120-day eviction moratorium that was limited to "covered properties"—namely those participating in specific federal programs or with specified federally backed loans. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492-94 (2020). This restriction to

only properties otherwise voluntarily connected to federal aid in some salient way reflected Congress's recognition of the limits of its own power. The CDC, *a fortiori*, cannot claim a broader power under Article I than even Congress did. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

B. Congress cannot order a nationwide moratorium on residential evictions under the Commerce Clause.

Even assuming the CDC could exercise the full power of the federal government to promulgate the challenged eviction moratorium—and it cannot, *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495, 537-38 (1935)—the Commerce Clause does not extend so far. The Supreme Court has acknowledged that its "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time." *Gonzales v. Raich*, 545 U.S. 1, 15-16 (2005). But it has never allowed the federal government to take whatever action it wants "to protect the nation's commerce." CDC Br. at 7 (quoting *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000)).

1. Early decisions of the Court held that "[a]s used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states." *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936) (quoting *Welton v. Missouri*, 91 U.S. 275, 280 (1875)); *see also* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol'y 849, 865-66 (2002). A lease in real property is not a commodity. It has economic value but cannot be traded or transported.

To the contrary, as the district court noted, "[r]eal estate is inherently local," and "[r]esidential buildings do not move across state lines." Op. 11.

2. Though the federal courts' view of the commerce power has expanded over time, even this expansion cannot justify the CDC's extraordinary action here. When asked by the district court, the federal government could not "say that it has ever before invoked its power over interstate commerce to impose a residential eviction moratorium." Op. 2 (citing Hr'g Tr. 52:3-8, 55:9-17). Even during the Great Depression—when the Court permitted Congress to regulate a farmer's production of wheat for his own personal consumption, *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)—Congress did not prohibit evictions. By contrast, more than half of States provided such protections. Geoff Walsh, *The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, 44 Suffolk U.L. Rev. 139, 139-43 (2011). That the federal government has never attempted to take this action in more than 200 years is strong evidence that it is not constitutional. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (*NFIB*); *Printz v. United States*, 521 U.S. 898, 905 (1997).

3. The Court's current understanding of the Commerce Clause as announced by *Lopez* and its progeny explains the government's prior reluctance to assert such a sweeping power. It is now well established that Congress may regulate "three general categories" of activity: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities having a substantial relation to interstate commerce. *Raich*, 545 U.S. at 16-17; *see also United States v. Morrison*, 529 U.S. 598, 509 (2000).

The district court concluded that only the third category is at issue here, Op. 8, and the CDC does not disagree, *cf.* CDC Br. 12-18. To determine the propriety of the CDC's actions under this category, the Court considers: (1) whether the *regulated activity* is economic; (2) whether the regulation of that activity contains a "jurisdictional element" tying the activity to Congress' regulation of interstate commerce; (3) congressional findings regarding the effect of the regulated activity on interstate commerce; and (4) the degree of attenuation between the activity and commerce. *Morrison*, 529 U.S. at 609-13. Each of these factors suggests that the moratorium exceeds federal power under the Commerce Clause.

First, while the eviction moratorium has an economic impact, the regulated activity is insufficiently connected to commerce to meet the Supreme Court's modern test under the Commerce Clause. The district court correctly noted that this third category "should be viewed through the lens of the Necessary and Proper Clause." Op. 9-10 (quotation marks omitted). Because the Court must look "only to the expressly regulated activity" itself, the analysis begins by identifying the regulated activity. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). Only then may the Court examine if regulating that activity is an "appropriate means to the attainment of a legitimate end,"—namely, "the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *see also Raich*, 545 U.S. at 34 (Scalia, J., concurring); *Wickard*, 317 U.S. at 124; *accord NFIB*, 567 U.S. at 558-59 (opinion of Roberts, C.J.); *id.* at 652-53 (joint dissent).

Here, the regulated activity is an "eviction." Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,020, 8,021 (Feb. 3, 2021). The parties disagree over the definition of "eviction": plaintiffs treat it as the cause of action to repossess real property, Terkel Br. 3, 5; the CDC defines it more narrowly to include the actual removal of the tenant, CDC Br. 6. For this purpose, the distinction is irrelevant. Whether defined as the physical possession of an apartment or the cause of action to obtain that possession, the regulated activity is not a commercial activity by itself. Nor is there a larger market that it serves to regulate: though people can and do move between States, there is no interstate trade in either residential housing or lawsuits. After all, an apartment in Des Moines is useless to someone who must reside in Daytona. And champertous contracts have long been held unenforceable for public policy reasons in many jurisdictions. *See, e.g.*, *Roberts v. Cooper*, 61 U.S. 467, 474 (1857); *PDVSA US Litig. Tr. v. Lukoil Pan Ams. LLC*, 991 F.3d 1187, 1192 (11th Cir. 2021) (collecting cases); *Restatement of Contracts* § 540(2) (1932) (defining champerty to be effectively the sale of a lawsuit); *id.* § at 542(1) (stating that champerty "is illegal").

The CDC seeks to shift the focus of the inquiry (at 14-15) to the larger impact of the COVID-19 pandemic, but this Court has recognized that "[l]ooking primarily beyond the regulated activity in such a manner would 'effectually obliterate' the limiting purpose of the Commerce Clause." *GDF Realty*, 326 F.3d at 634-35. The cases on which the CDC relies (at 12-13) are not to the contrary. *Jones v. United States*, 529 U.S. 848 (2000), and *Russell v. United States*, 471 U.S. 858 (1985), answer a different question: whether an apartment building "affect[ed] commerce" within the

meaning of a statute. That statute does not include the word "substantially," which is a significant aspect of the constitutional test. Put simply, Congress may not use "*de minimis* connections to interstate commerce [to] legitimate federal legislative powers." *United States v. Corona*, 108 F.3d 565, 569 (5th Cir. 1997), *as modified on denial of reh'g* (Apr. 7, 1997). An activity can *affect* interstate commerce without *substantially affecting* interstate commerce.[3]

Second, the moratorium lacks a "jurisdictional element" that limits its application to evictions that affect interstate commerce. *Morrison*, 529 U.S. at 612. The presence of such a limitation does not guarantee that the statute will satisfy *Raich*. *United States v. Ho*, 311 F.3d 589, 600 (5th Cir. 2002). But the absence of such an element cuts against the conclusion that the regulation is constitutional. *Lopez*, 514 U.S. at 561-62. The CDC admitted below that no such jurisdictional element exists, Op. 13, and does not seek to back away from that admission here, CDC Br. 16-17 (arguing that such an element is *unnecessary*). The district court was correct to conclude that this factor weighs in favor of finding the moratorium unconstitutional. Op. 13.

Third, the district court also properly concluded the agency's findings regarding COVID-19's impact on the economy fail to show that this regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The quintessential example of how this factor works is *Raich*, which addressed

[3] In any event, both *Russell* and *Jones* predate *Raich* and *NFIB*. To the extent that they conflict with the Supreme Court's more recent Commerce Clause jurisprudence, they are no longer good law.

whether regulation of marijuana grown at home for personal use would undercut enforcement of the Controlled Substances Act of 1970 (CSA). 545 U.S. at 15. "Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA." *Id.* at 20. Comparing these findings against its own appraisal of the interstate market for marijuana, the Court concluded that it did not take a "degree in economics to understand" that failure to regulate local marijuana would have a "substantial impact on the interstate market" for a fungible commodity. *Id.* at 28. As a result, the Court held that this factor weighed in favor of holding the CSA constitutional. *Id.*

Here, there are no relevant findings that the challenged order will affect an interstate commercial market in evictions (or anything else). The CDC certainly made findings that the absence of a moratorium might impact the spread of *COVID-19*. 85 Fed. Reg. at 55,292-97; 86 Fed. Reg. at 8,020-25. But these findings are not actually relevant to the United States' position. To the contrary, defendants have conceded that their position is not limited to or dictated by the circumstances surrounding the COVID-19 pandemic. Hr'g Tr. at 56:13-21. This moratorium applies even if the covered individual has had no exposure to or has been vaccinated for COVID-19. *See* 86 Fed. Reg. at 8,020-21 (defining "covered person" as "any" person who declares only that he or she meets five criteria unrelated to infection or vaccination). Moreover, defendants have insisted that the federal government could impose a similar moratorium even if the pandemic did not exist based on policymakers' subjective views of fairness. Hr'g Tr. 53:11-23. Given these concessions, the CDC's findings are not "helpful" in determining whether the noneconomic activity at which this

regulation is nominally aimed falls within the scope of federal power. *Ho*, 311 F.3d at 600.

Even absent that concession, the findings do not support a conclusion that this regulation substantially impacts interstate commerce. This "is ultimately a judicial rather than a legislative question." *Morrison*, 529 U.S. at 614. Transmission of COVID-19 may indirectly impact the economy, but it is not itself an economic activity. And defendants have not identified "a larger regulation of economic activity" of which a moratorium is an "essential part." *Lopez*, 514 U.S. at 561. The Court has "reject[ed] the argument that Congress may regulate noneconomic . . . conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 610-12 (Souter, J., dissenting) (rejecting that aggregation of noneconomic activity can be considered).

Moreover, as the district court correctly noted, these "are findings about public health, a quintessential concern of the police power." Op. 15; *see also, e.g.*, *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). There is a well-established presumption that matters touching on the "historic police powers of the States" are "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Hillsborough County*, 471 U.S. at 715. And the Court has "*always* . . . rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Lopez*, 514 U.S. at 584 (Thomas, J., concurring); *see also Morrison*, 529 U.S. at 618.

Fourth, even if this moratorium had some tangential impact on an interstate activity that falls within the scope of the Commerce Clause, it would be too attenuated

to sustain the CDC's order. Because this third variant of the *Lopez* analysis is driven by the Necessary and Proper Clause, *supra* at 11, to be justified by this test, a regulation must be "incidental to" an exercise of the enumerated power. *Lopez*, 514 U.S. at 554, 560. Moreover, here more than any other factor, this Court is required to consider the "implications of the Government's argument." *Id.* at 564.

For example, in *NFIB*, Chief Justice Roberts recognized that insurance reform is an appropriate topic of regulation under the Commerce Clause. 567 U.S. at 554 (opinion of Roberts, C.J.). And he acknowledged both that "failure of [a] group to have a healthy diet increases health care costs," and that "[t]hose increased costs are borne in part by other Americans who must pay more." *Id.* at 553-54. Nevertheless, he concluded that these economic realities do not empower Congress to force Americans to change their diets as part of an overall regulation of the insurance market. *Id.* To hold otherwise, he explained, "would justify" a federal solution "to solve almost any problem," and thereby upend our dual system of government. *Id.* at 553.

This Court should invalidate the moratorium for similar reasons. No one disputes the impact that COVID-19 has had on the national economy. But the Supreme Court has repeatedly stated that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. Because the challenged order implicates a core police power and "is not directed at the instrumentalities, channels, or goods involved in interstate commerce," this Court should hold that it remains "the province of the States." *Id.* at 618; *see also NFIB*, 567 U.S. at 533-37.

4. Defendants cannot avoid the conclusion that their actions fall outside the three categories of permissible congressional regulation recognized by the Supreme Court by inventing a fourth. The CDC insists (at 12) that "the temporary eviction moratorium" is lawful "because it helps to protect interstate commerce from the interstate spread of COVID-19." No such category exists; indeed, the Supreme Court rejected *ad hoc*, it's-good-for-the-economy-eventually arguments in *Lopez* and *Morrison*, where Congress had concluded that banning guns in school zones and providing a civil remedy to gender-motivated violence were necessary to protect national productivity. *Morrison*, 529 U.S. at 615 (discussing *Lopez*, 514 U.S. at 564). The argument is entitled to no more constitutional weight when the villain to be protected against is a microbe rather than a criminal.

C. The CDC's order violates the Tenth Amendment.

The CDC's order also exceeds the scope of federal power because it directly commandeers state courts and instructs them to ignore state procedural rules. Under the Supremacy Clause, state courts must always apply federal law, even where it conflicts with state substantive law. *Testa v. Katt*, 330 U.S. 386, 394 (1947). But typically, States may apply their own procedural rules to actions brought in state court. *See Haywood v. Drown*, 556 U.S. 729, 740 (2009). And this Court has recently reaffirmed that Congress cannot compel state courts to apply or ignore certain procedural rules for state causes of action. *See Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam); *see* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 Yale L.J. 1104, 1164 (2013). Like other variants of the anti-commandeering doctrine, this principle ensures that lines of accountability—at both

federal and state levels—remain clear to voters. Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 Notre Dame L. Rev. 351, 358 (2020).

The CDC order violates these principles. As an initial matter, the order does not merely require state courts to apply federal law in the same manner that a federal court would. Instead, it directly targets state courts because most eviction proceedings cannot be litigated in federal court. *Cf. African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 799-800 (5th Cir. 2014). The CDC appears to acknowledge (at 6) that landlords may *initiate* eviction proceedings in state court. But it has created a federal regime under which *federal* prosecutors can enforce a criminal penalty if state courts comply with state procedures in state causes of action following a final judgment in an eviction hearing. *See* 85 Fed. Reg. 55,292, 55,293. This creates a situation where state courts must hear cases for which they can afford no remedy—an outcome that is entirely inconsistent with the law in many States, including Texas. *E.g. Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933). This outcome might be justifiable if the order were incidental to some other regulation, or an evenhanded regulation that affects state and private actors. *Reno v. Condon*, 528 U.S. 141, 151 (2000). But it is not. Instead, it is a command directly to the state courts about how they will manage their proceedings that is inconsistent with our system of dual sovereignty. *Cf. Printz*, 521 U.S. at 915.

III. Accepting the United States' Position Would Functionally Grant Police Powers to the Federal Government.

This departure from our federal system is all the more troubling because defendants have admitted that it has no limiting principle: they maintain that they could take the same action based on federal authorities' current views of "fairness" or "the economic desirability" of particular conduct. Hr'g Tr. 53. For more than 200 years, *States* have been understood to have the power to "promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Chi. B & Q Ry. v. Illinois*, 200 U.S. 561, 592 (1906). Thus, the States "can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name a few." *NFIB*, 567 U.S. at 535.

But defendants' position in this case, if accepted, would upend these bedrock principles of federalism and authorize a federal agency to intrude on purely local, noncommercial matters under the guise of regulating "commerce." *Supra* at II.B. Indeed, if followed to its logical conclusion, it is hard to see what limits would remain on the federal government's powers under the Commerce Clause.

Looking just to the current public-health crisis, under the federal government's view, Congress could circumscribe the ability of state courts to resolve child-custody disputes on the theory that shuffling children between households could contribute to the spread of COVID-19. *But cf. Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the [S]tates and not to the laws of the United States."). It could

shutter local public schools to prevent commingling of persons from different families. *But cf. Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as . . . education[,] where States historically have been sovereign."). It could limit the hours of operations for grocery stores on the theory that sufficient time must be allowed for sanitization. *But cf. Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (observing that the Court "has distinctly recognized" that among the States' police powers is "the authority of a state to enact quarantine laws and 'health laws of every description[]'"). And it could set national standards governing nursing-home visitation rights for elderly individuals to protect them from infection. *But cf. Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'").

Nor is the federal government's view of the Commerce Clause limited to the domain of public-health emergencies, as the government has conceded. Hr'g Tr. 56:13-21. To take one example, consider the EPA's longstanding view that greenhouse gases present a paramount risk to economic development, public health, and even national security.[4] Under defendants' view, the EPA could leverage that view to regulate city bus schedules and rates. After all, the bus driver must obtain some

[4] *E.g.*, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,523-36 (Dec. 15, 2009); *accord* Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document* 15 (Feb. 2021).

sort of fuel, and typically individuals must pay a fare to ride—both forms of "economic activity," though only one would fall within the traditional definition of interstate commerce. *Supra* at I.A. The riders *could* use the bus to travel to the airport and catch an interstate flight or to visit a post office to send mail to another State, which in the aggregate have a "substantial" effect on "interstate commerce." CDC Br. at 12. We know that is not the case; otherwise, *Heart of Atlanta Motel, Inc. v. United States*, would have been a much shorter opinion because there would have been no need for the Court to explain how the operation of a single 216-room hotel affected the interstate market for travel. 379 U.S. 241 (1964).

In short, to uphold the CDC's actions here truly turn the limited power to regulate interstate commerce into a "Hey, you-can-do-whatever-you-feel-like Clause." Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. Pub. Pol'y 1, 5 (1995). The Court should reject such a view and adhere—as the Supreme Court has done for more than two centuries—to the understanding that "[t]he enumeration [of Article I powers] presupposes something not enumerated." *Gibbons*, 22 U.S. at 195. Nothing in Article I permits the federal government to regulate real property within the jurisdiction of a sovereign State, so the federal government lacks that power.

Conclusion

The Court should hold that the CDC's eviction moratorium exceeded the federal government's powers under the Commerce Clause.

Respectfully submitted.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,778 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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