CASE 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.

CENTER 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, 6:20-CV-564
(Hon. J. Campbell Barker)

BRIEF OF THE CATO INSTITUTE, PROFESSOR RANDY E. BARNETT, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Josh Blackman
1303 San Jacinto Street
Houston, TX 77002
(202) 294-9003
josh@joshblackman.com

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
Wells Fargo Center
333 S. Grand Ave., Ste. 4200
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

June 3, 2021

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

David B. Kopel
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, CO 80203
(303) 279-6536
david@i2i.org

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 21-40137

Lauren Terkel, et al. v. CDC, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Ilya Shapiro	Counsel to *amici*
Trevor Burrus	Counsel to *amici*
Josh Blackman	Counsel to *amici*
Manuel S. Klausner	Counsel to *amici*
David B. Kopel	Counsel to *amici*
Cato Institute	*Amicus curiae*
Randy E. Barnett	*Amicus curiae*
Reason Foundation	*Amicus curiae*
Individual Rights Foundation	*Amicus curiae*
Independence Institute	*Amicus curiae*

Amicus Cato Institute is a Kansas nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

Amicus Professor Randy E. Barnett is the Patrick Hotung Professor of Constitutional Law at the Georgetown University Law Center.

Amicus Reason Foundation is a California nonprofit corporation that publishes *Reason* magazine and the Reason TV website. It has no parent companies or any other subsidiaries or affiliates, and does not issue shares to the public.

Amicus Individual Rights Foundation is a California nonprofit corporation that is the legal arm of the David Horowitz Freedom Center. It has no other subsidiaries or affiliates, and does not issue shares to the public.

Amicus Independence Institute is a Colorado nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

/s/ Ilya Shapiro
June 3, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

Professor Randy E. Barnett is the Patrick Hotung Professor of Constitutional Law at the Georgetown University Law Center. He argued *Gonzales v. Raich* (2005) and was counsel for the petitioners in *NFIB v. Sebelius* (2012).

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles. Reason advances its mission by publishing *Reason* magazine, website commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus* in cases raising significant constitutional issues.

The **Individual Rights Foundation** was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF opposes attempts from anywhere

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amici* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

along the political spectrum to undermine fundamental rights, and it participates as *amicus curiae* in cases to combat overreaching governmental activity.

The **Independence Institute** is a nonprofit Colorado corporation founded in 1985 on the eternal truths of the Declaration of Independence. The scholarship and briefs of the Institute's Professors David Kopel and Robert Natelson have been cited in 12 Supreme Court opinions, including three last term. They have also been cited by 26 federal circuit opinions, and 44 state appellate opinions in 22 states.

This case is important to *amici* because it involves constitutional structures of vital importance to individual liberty: federalism and the separation of powers. The federal government lacks the power to regulate the process of eviction in state courts.

STATEMENT OF THE CASE

During the COVID-19 pandemic, the CDC imposed a moratorium on evictions for certain tenants. Plaintiffs-Appellees are owners of leased residential properties who filed suit against the moratorium, alleging violations of the Commerce and Necessary and Proper Clauses. *Amici* incorporate by reference the Statement of the Case in Appellants' Opening Brief (No. 00515837209).

SUMMARY OF THE ARGUMENT

During the pandemic, the CDC criminalized eviction. This unprecedented executive action was premised on an inferential house of cards: if people are evicted, they will live in closer quarters, potentially spreading COVID-19. To avoid this

speculative problem, the government banned landlords nationwide from using legal processes to remove tenants. The government literally made it a crime to file a petition in state court. To the CDC, there is no real line "between what is truly national and what is truly local." *United States v. Lopez*, 514 U.S. 549, 567–568 (1995) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). But that line still exists, and it must be preserved.

A quarter-century after *United States v. Lopez*, the federal government still has not learned its lesson. The Justice Department continues to advocate for the same limitless conception of federal power that it advanced in this Court a generation ago. *United States v. Lopez*, 2 F.3d 1342, 1367 (5th Cir. 1993). The CDC's attenuated reasoning, which "pile[s] inference upon inference," mirrors the federal government's losing argument in *Lopez*. 514 U.S. at 567.

The eviction moratorium is unconstitutional. First, eviction is not an "economic" activity. *Cf. United States v. Morrison*, 529 U.S. 598, 613 (2000). It is a remedy ordered by a judge, not a fungible commodity that can be sold, exchanged, or bartered. *Cf. Gonzales v. Raich*, 545 U.S. 1, 18 (2005) (analogizing the interstate market for marijuana to that for wheat in *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is thus irrelevant whether the legal process of eviction, in the aggregate, has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 560. Second, the mortarium is not "an essential part of a larger regulation of economic activity, in

which the regulatory scheme could be undercut unless the intrastate [noneconomic] activity were regulated." *Id.* at 561. Third, even if this order is "necessary" to stop the spread of COVID-19, it is not a "proper" exercise of federal power. The moratorium denies access to state courts, intrudes on state judiciaries, and distorts political accountability. It should meet the same fate as the Gun-Free School Zones Act; states, not the federal government, retain the police power over local affairs.

ARGUMENT

I. THE FEDERAL EVICTION MORATORIUM CRIMINALIZES THE LEGAL PROCESS OF EVICTION, WHICH IS THE ONLY METHOD TO REMOVE A RESIDENTIAL TENANT IN TEXAS

The federal eviction moratorium is not a conventional regulation of intrastate activity. It does not regulate the landlord-tenant relationship. Nor does it control how landlords maintain their properties. The proverbial bundle of sticks remains intact. Instead, the CDC eliminated landlords' ability to enforce those property rights in court: the federal moratorium criminalizes the legal process of eviction. In Texas, self-help is prohibited. The *only* way to remove a residential tenant is through the courts, but now it is a federal offense to file an eviction petition.

A. In Texas, Eviction Is the Sole Legal Process to Remove a Residential Tenant Because Self-Help is Prohibited

At "common law, a landlord entitled to possession could resort to self-help without fear of civil liability—so long as he used no more force than reasonably necessary." Jesse Dukeminier & James E. Krier, et al., *Property* 506 (9th ed. 2018).

"The modern view (and majority rule)," however, have rejected self-help as a remedy for residential leases. *Id.* at 506–07. Most states have adopted so-called summary proceedings that expedite eviction. *Id.* at 507. Today, eviction is the "process of legally dispossessing a person of . . . rental property." Black's Law Dictionary (11th ed. 2019). Texas adheres to that view. *See Russell v. Am. Real Est. Corp.*, 89 S.W.3d 204, 208–09 (Tex. App. 2002). In Texas, this legal process is the *only* way to remove a tenant. That property-centric understanding of eviction is essential to this case.

B. The Moratorium Criminalizes the Right of Landlords to Exercise the Legal Process of Eviction

The CARES Act, passed in March 2020, criminalized the legal process of eviction: for 120 days, a landlord could not "make, or cause to be made, any *filing* with the *court of jurisdiction* to initiate a *legal action* to recover possession" of the covered property. 15 U.S.C. § 9058(b)(1) (emphasis added). Congress did not ban evictions via self-help, however, nor regulate lease terms. Instead, it banned landlords from exercising legal rights. The CARES Act prohibited landlords from filing eviction suits in civil justice courts. *See* Tex. Prop. Code Ann. § 24.004 (West).

In September 2020, the CDC adopted an even more explicit regulation: a landlord "with a *legal right* to pursue eviction or possessory action, shall not evict" covered tenants. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020) (emphasis added). This

rule defined "eviction" in terms of legal process: "any *action* by a landlord, owner of a residential property, or other person with a *legal right* to pursue eviction or a possessory action." *Id.* at 55,293 (emphasis added). The CDC made it a crime for landlords to exercise their "legal right" of evictions in court. Again, the government did not regulate self-help, or the landlord-tenant relationship. The moratorium simply stopped the landlord from filing a brief in court.

The CDC's subsequent regulations in February 2021 and March 2021 used identical language. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,020, 8,021 (Feb. 3, 2021); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,732–33 (Mar. 31, 2021). From the CARES Act to now, the moratoria criminalized one activity: a landlord's exercising his right to legal process.

C. The District Court Recognized That the Moratorium Criminalizes the Right of Landlords to Exercise the Legal Process of Eviction

The moratorium can be characterized in two complimentary ways. The first describes its consequences. For example, the district court observed that the order "regulates property rights in buildings." *Terkel v. CDC*, No. 6:20-CV-00564, 2021 WL 742877 at *6 (E.D. Tex. Feb. 25, 2021). In effect, the order controls "whether an owner may regain possession of property from an inhabitant." *Id.* And the order may "criminalize[] the possession of one's property." *Id.* Without question, the

moratorium causes the violation of property rights. These "potential economic consequences," however, are secondary effects. *See Lopez*, 514 U.S. at 565.

The federal order does not *directly* regulate property rights. Indeed, the district court recognized that the "order does not [directly] change a landlord's or tenant's financial obligations." *Id*. [2] The proverbial bundle of sticks remains intact. What changed was the landlord's ability to enforce those rights in court. The lease terms could only be "effectuated by voluntary adherence." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Alternatively, the moratorium would not prohibit a landlord in Mississippi from exercising peaceable self-help. *See Bender v. N. Meridian Mobile Home Park*, 636 So. 2d 385, 389 (Miss. 1994) ("[W]here the lease provided for reentry by the landlord for tenant's failure to pay rent, the landlord may exercise such reentry if done so without breaking in, violence or threats of violence."). But if the tenant refuses to peaceably vacate, eviction can be "secured only by judicial enforcement by state courts." *Shelley*, 334 U.S. at 13–14. And the CDC criminalized the use of legal process to effectuate "the right to exclude," which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (cleaned up).

[2] The CDC erred when it stated that "the moratorium regulates the terms of contracts for 'rental of real estate.'" Appellants Br. at 8 (quoting *Jones v. U.S.*, 529 U.S. 848, 856 (2000)) (quoting *Russell v. U.S.*, 471 U.S. 858, 862 (1985)).

The moratorium's second characterization describes the specific regulated activity: the legal eviction process. The district court explained that the moratorium "criminalizes the *use of state legal proceedings* to vindicate property rights." *Terkel*, 2021 WL 742877 at *9 (emphasis added). Specifically, the order "regulat[es] only recourse to a *remedy under state law*." *Id.* at *7 (emphasis added). The CDC describes eviction in similar terms: a "contractual *remedy* for failure to abide by the terms of such rental arrangements." Appellants' Br. at 14 (emphasis added).

This second, more precise characterization reflects Plaintiff Lauren Terkel's declaration. In September 2020, she "brought an eviction suit against the non-paying tenant for his refusal to pay rent." Terkel Dec. at ¶ 7. Terkel sued before the justice of the peace, who was "overseeing the eviction suit." *Id.* at ¶ 9. But when the justice of the peace was "informed about the [tenant's moratorium] declaration," he halted proceedings. The J.P. "entered an order that cited the CDC Order, attached the non-paying tenant's declaration, and abated the eviction proceedings until January 18, 2021." *Id.* As a result, he "den[ied Terkel] the eviction relief that [she] sought and [was] entitled to under state law." *Id.* Terkel claims that "[b]ut for the CDC Order, I would have exercised my legal rights under state law to evict the non-paying tenant from my property." *Id.* at ¶ 16. She did not, and indeed could not, physically remove their tenants. Under Texas law, Lauren Terkel could remove a holdover tenant through one method—legal process—which the federal government criminalized.

II. THE FEDERAL GOVERNMENT LACKS THE ENUMERATED POWERS TO CRIMINALIZE THE LEGAL PROCESS OF EVICTION, WHICH IS NOT AN "ECONOMIC ACTIVITY"

Under modern jurisprudence, Congress can rely on the implied power to regulate intrastate *economic* activity that, in the aggregate, has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 560. That so-called substantial effects test, however, does not apply to *noneconomic* activity. The Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

Lopez recognized a judicially administrable principle to distinguish between intrastate activities that are proximate to interstate commerce from those intrastate activities that are too remote from Congress's regulatory authority. That limiting principle is premised on drawing a line between economic activity and noneconomic activity. It ensures that Congress's power "may not be extended so as to embrace effects upon interstate commerce *so indirect and remote* that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin*, 301 U.S. at 37 (emphasis added).

The legal process of eviction is not economic in nature. An eviction cannot be produced, distributed, or consumed. *See Gonzales v. Raich*, 545 U.S. at 26; *id.* at 40 (Scalia, J., concurring). It cannot be sold, exchanged, or bartered on any

marketplace. Indeed, it would be insulting to describe a judicial process as having an "apparent commercial character." *Morrison*, 529 U.S. at 611 n.4. You can buy wheat and weed, but you cannot buy a writ of possession. Congress lacks the power to criminalize this legal process of eviction, which is not an "economic activity."

A. Congress Can Regulate Certain Intrastate *Economic* Activity

The Constitution empowers Congress to regulate "Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *Gibbons v. Ogden*, Chief Justice Marshall observed that this authority embraces the power to regulate "commerce which concerns more States than one." 22 U.S. 1, 194 (1824). However, the Commerce Clause does not give Congress the power to regulate the "exclusively internal commerce of a state." *Id.* at 195. Such "exclusively internal commerce," Marshall added, "may be considered as reserved for the State itself." *Id.*

Since *Gibbons*, the Supreme Court's interpretation of the phrase "commerce among . . . the several states" has not changed much. Randy E. Barnett & Josh Blackman, *An Introduction to Constitutional Law: 100 Supreme Court Cases Everyone Should Know* 51 (2019). To this day, Congress's authority to regulate interstate commerce is still largely confined to trade and transportation of people and things from one state to another. *Cf. United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (holding that "commerce" includes insurance).

Yet, the Supreme Court has sanctioned Congress's implied power to regulate what Marshall dubbed "exclusively internal commerce." Pursuant to the Necessary and Proper Clause, Congress can regulate wholly intrastate "economic activity [that] substantially affects interstate commerce." *Lopez*, 514 U.S. at 560. In *Raich*, Justice Scalia explained that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." 545 U.S. at 34 (Scalia, J., concurring). Critically, the Supreme Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is *economic in nature*." *Morrison*, 529 U.S. at 613 (emphasis added).

If Congress attempts to regulate *noneconomic* intrastate activity, it is irrelevant whether that activity, in the aggregate, substantially affects interstate commerce. In *Lopez*, "the possession of a gun in a school zone" was not an economic activity. 514 U.S. at 560. The Court thus refused to "pile inference upon inference" about how "[t]he possession of a gun in a local school zone . . . might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. Likewise, *Morrison* held that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. So the Court declined to "aggregat[e] the effects of [this] noneconomic activity" on interstate commerce. *Id.* By contrast, Roscoe Filburn's commercial farming "involved

economic activity." *Lopez*, 514 U.S. at 560. And the Controlled Substances Act "regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26. Accordingly, the Court considered the substantial effects, in the aggregate, of the *economic* activities in both *Wickard* and *Raich*. *Id.* at 19, 22.

B. The Legal Process of Eviction Is Not an "Economic Activity"

Legal eviction is not "commerce . . . among the several states." It isn't even "commerce" as that term has been understood since *Gibbons*. The legal process of eviction is wholly intrastate. Thus, the "first question" for this Court is whether "the regulated activity is an [intrastate] activity [that is] economic in nature." *See Groome Res., Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205 (5th Cir. 2000).

The Supreme Court's leading precedents provide guidance to distinguish between economic and noneconomic activity. *Lopez* held that "[t]he possession of a gun in a local school zone is in no sense an economic activity." 514 U.S. at 567. *Morrison* held that "[g]ender-motivated crimes of violence" were not economic activity. 529 U.S. at 613. *Raich* adopted the definition of "economics" from *Webster's Third New International Dictionary*: "the production, distribution, and consumption of commodities." 545 U.S. at 26. The Court concluded that the Controlled Substances Act "directly regulates economic, commercial activity," unlike the gender-motivated crimes of violence at issue in *Morrison*. *Id.*

In light of these precedents, the legal process of eviction is not an economic activity. First, a landlord cannot "produce" an eviction, like Filburn cultivated wheat; a writ of possession can *only* be entered by a court. Second, a landlord cannot "distribute" an eviction. A writ of possession is limited to the specific contractual relationship between the landlord and the tenant, so an eviction cannot be sold, exchanged, or bartered on a marketplace. Third, an eviction cannot be personally "consumed"—whatever that would even mean. Indeed, the landlord can't even perform the eviction herself. Self-help is illegal in Texas. The justice of the peace, the sheriff, and other state officers execute evictions. The legal process of eviction does not resemble "[d]rugs like marijuana [that] are fungible commodities." *Id.* at 40 (Scalia, J., concurring).

Circuit precedent doesn't help the government here. "[R]enting and otherwise using housing for commercial purposes [may] implicate[] the federal commerce power." *See Groome*, 234 F.3d at 206 (holding that the "denial of reasonable accommodations" is an economic activity, because that denial "affects a disabled individual's ability to buy, sell, or rent housing"). More broadly, "[t]he rental of real estate," may "unquestionably [be] such an [economic] activity." *See Russell v. United States*, 471 U.S. 858, 862 (1985). But the moratorium does not "regulate the class of activities that constitute the rental market" or "include[] the power to

regulate individual activity within that class." *Id.* Instead, it criminalizes the legal process of eviction.

The CDC concedes that eviction is a "contractual *remedy* for failure to abide by the terms of such rental arrangements." Appellants' Br. at 14 (emphasis added). This concession is fatal to the government's theory of the case. A legal remedy is not some sort of widget that can be bought or sold. It is a potential consequence of a deliberative legal process. Again, the government's constitutional argument puts the cart before the horse. First, the Court should decide if an intrastate activity is economic in nature. Second, if that activity *is* economic in nature, then and only then should the Court identify the "potential economic consequences flowing from" it. *See Lopez*, 514 U.S. at 565.

Admittedly, an eviction is not free. In Smith County, Texas, the cost of filing for eviction is $136. Smith County, Tex., Just. Peace Ct. R. 510, https://bit.ly/3c42YiW. But this payment does not render the legal process itself an economic activity. No one can *buy* an eviction. These court fees are merely used to defray the county's administrative costs. Instead, a justice of the peace determines if eviction is warranted. In any event, court costs are likely irrelevant, because the moratorium makes no reference to the fees associated with eviction; the CDC's position would be unlikely to change even if the state waived all process fees.

If pressed during oral argument, the government would have to maintain that a free legal eviction process would *still* be economic activity. But it's not, so Congress lacks the power to criminalize it.

III. THE CRIMINALIZATION OF THE LEGAL PROCESS OF EVICTION IS NOT A PROPER EXERCISE OF FEDERAL POWER

Congress cannot regulate intrastate noneconomic activity under the substantial effects test. But it may be able to regulate intrastate noneconomic activity if that regulation is "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561; *Raich*, 545 U.S. at 36 (Scalia, J., concurring). Still, this regulation of intrastate noneconomic activity must be *both* a necessary *and* a proper exercise of federal power. The Constitution "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB v. Sebelius*, 567 U.S. 519, 559 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819)). The unprecedented moratorium is not proper because it denies access to the state courts, intrudes on the sovereignty of state judiciaries, and distorts political accountability. This federal order cannot be saved by the Necessary and Proper Clause, "the last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997).

A. Congress Can Sometimes Regulate Intrastate Noneconomic Activity as "Part of a Larger Regulation of Economic Activity"

Congress lacks the power to regulate an intrastate noneconomic activity by itself. But Congress can regulate an intrastate noneconomic activity if that regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate [noneconomic] activity were regulated." *Lopez*, 514 U.S. at 561. The Gun-Free School Zones Act was not such a law. *Id. Morrison* "did not even discuss the possibility that" the federal cause of action in the Violence Against Women Act was part of a larger regulation of economic activity. *Raich*, 545 U.S. at 39 (Scalia, J., concurring).

A Court majority found that criminalizing the possession of locally grown marijuana satisfied the *Lopez* test. *Id.* at 24–25. In his *Raich* concurrence, Justice Scalia agreed that "the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce." *Id.* at 34–35 (Scalia, J., concurring). Instead, he explained, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 36. Justice Scalia recognized that "simple possession [of marijuana] is a noneconomic activity," but that fact "is immaterial to whether it can be prohibited as a necessary part of a larger regulation." *Id.* at 40.

Amici disagree with Justice Scalia's application of the Necessary and Proper Clause in *Raich*. Still, the district court correctly applied that framework: the CDC moratorium is not "part of a larger regulation of economic activity." *Terkel*, 2021 WL 742877, at *7–8. But even if it were otherwise, there's a backstop to the *Lopez* exception: if Congress purports to regulate noneconomic activity as "part of a larger regulation of economic activity," that regulation still must be a "proper" exercise of federal power.

B. The Regulation of Intrastate Activity Must Be Both a Necessary and a Proper Exercise of Federal Power

The Constitution empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art I, § 8, cl. 18. As its conjunctive names suggests, the Necessary and Proper Clause has two components. A law premised on Congress's implied powers must be *both* a necessary *and* a proper exercise of federal power. *McCulloch v. Maryland* presented the Supreme Court's first authoritative construction of the clause. 17 U.S. 316. Much of Chief Justice Marshall's decision focused on the word "necessary," but the Court offered a separate test to determine if a federal law is also "proper." Specifically, the Constitution "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (quoting *McCulloch*, 17 U.S. at 411).

The Supreme Court has found that several categories of laws run afoul of the Sweeping Clause's "proper" principle. For example, federal laws that commandeer the states are improper. In *Printz*, Justice Scalia explained that when a law "'for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923–24 (quoting Federalist No. 33 (Hamilton) (emphasis added)). The challenged Brady Act provision may have been a "necessary" means of regulating interstate firearms sales. But forcing local sheriffs to perform background checks was not a "proper" exercise of federal power. Such a law violated the state sovereignty reflected in the Tenth Amendment and other structural provisions of our Constitution. *Printz* made explicit what Justice O'Connor implied in *New York v. United States*: federal laws that command states to regulate interstate commerce are not proper exercises of federal power. 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *see also* Josh Blackman, *Improper Commandeering*, 21 U. of Pa. J. Const. L. 959, 974 (2019).

This "proper" analysis also applies in enumerated-powers cases. "Congress may not regulate certain 'purely local' activity within the States based solely on the

attenuated effect that such activity may have in the interstate market." *Raich*, 545 U.S. at 38 (Scalia, J., concurring). When Congress relies on its implied powers to regulate intrastate noneconomic activity as "part of a larger regulation of economic activity," that regulation must be *both* "necessary to *and* proper for the regulation of interstate commerce." *Id.* at 35 (emphasis added). In *Bond v. United States*, Justice Scalia further explained that "[n]o law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'" 572 U.S. 844, 879 (2014) (Scalia, J., concurring). Once again, the "proper" principle turned on due respect for state sovereignty.

Chief Justice Roberts also used the "proper" principle in *NFIB v. Sebelius*. He wrote that "[e]ven if the [Affordable Care Act's] individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective." *NFIB*, 567 U.S. at 560. The joint opinion of Justices Scalia, Kennedy, Thomas, and Alito agreed with the chief justice on the Necessary and Proper Clause and elaborated on his framework. They explained that a federal law is improper "not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power." *Id.* at 653 (joint dissent).

That principle provides the rule of decision here: even if the moratorium is "necessary" for regulating the interstate rental market, the criminalization of the intrastate eviction process is not a proper exercise of federal power.

C. The Unprecedented Moratorium Is Not Proper Because It Denies Access to the State Courts, Intrudes on the Sovereignty of State Judiciaries, and Distorts Political Accountability

The moratorium has "work[ed] a substantial expansion of federal authority." *See NFIB*, 567 U.S. at 560. First, Congress has never tried to suspend all evictions. This lack of any "historical precedent," should give the Court "pause to consider the implications of the Government's arguments." *Id.* at 550 (citations omitted).

Second, the moratorium deprives landlords of a fundamental right of citizenship: access to the courts. Courts should be especially suspicious of novel exercises of federal power that intrude on individual fundamental rights. *See Printz*, 521 U.S. at 937 (Thomas, J., concurring).

Third, the moratorium divests state courts of their jurisdiction over a deeply rooted aspect of the state police power. And there is no other forum in which such an eviction claim could be filed.

Fourth, the moratorium "blurs the lines of political accountability." *NFIB*, 567 U.S. at 678 (joint dissent). All levels of the Texas judiciary were drawn into this elaborate regime, while landlords and tenants were confused about whom to praise or blame. Accordingly, the moratorium was an improper exercise of federal power.

1. The "novelty" of this unprecedented executive action should give this Court "pause."

Congress has enacted many laws that regulate the landlord-tenant relationship. *See, e.g.*, *Groome*, 234 F.3d at 205 (prohibiting discrimination under the Fair Housing Act). Congress has also regulated how landlords manage their own properties. *Russell*, 471 U.S. at 862 (prohibiting arson of commercial properties). But "at [no] point during our Nation's history" has the "federal government . . . claimed such a power" to "impose a residential eviction moratorium." *Terkel,* 2021 WL 742877, at *1.

The moratorium presents a "new conception[] of federal power." *See NFIB* 567 U.S. at 549–50. "Legislative novelty is not necessarily fatal," but an unprecedented executive action—not even a statute—without any "historical precedent," should give the Court "'pause to consider the implications of the Government's arguments.'" *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010); *Lopez*, 514, U.S. at 564). And this pause should be extra-long to account for how this restriction intrudes on a fundamental right: access to the courts.

2. The moratorium criminalizes access to the courts, which is a "fundamental" right of citizenship.

During the pandemic, judges nationwide performed valiant efforts to keep the courthouse doors open. But the CDC slammed those doors shut. The moratorium

made it a crime to file a brief in state court. It is a federal offense for a "person with a *legal right* to pursue eviction." Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,732.

This audacious federal action is without precedent. Beyond its novelty, the moratorium deprived millions of landlords with a fundamental right: access to the judiciary. Even the *Slaughter-House Cases* recognized that the "right of free access to . . . [the] courts of justice in the several States" was a "privilege[] and immunit[y]" that "ow[s its] to the Federal government, its National character, its Constitution, or its laws." 83 U.S. 36, 79 (1872). *See* Barnett & Blackman, *supra*, at 182 (observing that "Congress, too, is barred from abridging the privileges of national citizenship."). Landlords can no longer go to court to vindicate their property rights. The CDC has no problem with self-help—changing a tenant's locks apparently won't spread COVID-19—but it is a crime to file an eviction petition.

This novel exercise of federal power that intrudes on fundamental rights warrants even closer scrutiny. "The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas," such as the First and Second Amendments, "outside the reach of Congress' regulatory authority." *See Printz*, 521 U.S. at 937 (Thomas, J., concurring). So too, state courts are beyond the reach of Congress's grasping hand.

3. The moratorium intrudes on state judicial sovereignty.

Much like "family law and [the] direct regulation of education," *Lopez*, 514 U.S. at 565, eviction law has historically been the province of the state courts. "[T]he [federalism] concerns brought to the fore in *Lopez*" are especially pressing in this case. *See Jones v. United States*, 529 U.S. 848, 858 (2000). The eviction process is "'traditionally local'" conduct. *See id.* (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). It would be "appropriate to avoid the constitutional question that would arise" under the government's capacious reading of federal power. *See id.*

Still, the mere fact that the moratorium intrudes on state prerogatives does not make it improper. In *Raich*, Justice Scalia stated that "regulat[ing] an area typically left to state regulation" does not alone make a rule "inappropriate." 545 U.S. at 41 (Scalia, J., concurring). There must be more than a claim of "state-sovereignty." *Id.* at 41–42. The moratorium presents that extra oomph: it intrudes on *judicial* sovereignty. *Erie R. Co. v. Tompkins* teaches that the Constitution "recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments." 304 U.S. 64, 78–79 (1938). Justice Brandeis recognized that "[s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States." *Id.*

In Texas, "eviction suits" can only be brought in the jurisdiction of the "justice court in the precinct in which the real property" exists. Tex. Prop. Code Ann. § 24.004 (West). And Texas has granted the "Justice courts . . . *exclusive jurisdiction* over [eviction] suits." *In re Damian*, No. 03-11-00816-CV, 2012 WL 43365, at *1 (Tex. App. Jan. 4, 2012) (emphasis added). But the moratorium makes it a crime to invoke that "exclusive jurisdiction." So long as this federal edict is in effect, Texas courts cannot exercise the jurisdiction granted to them. Indeed, a state court judge that granted an eviction petition could potentially face accomplice liability: aiding-and-abetting an illegal eviction.

Congress can force state courts of competent jurisdiction to hear federal causes of action. *Testa v. Katt*, 330 U.S. 386, 394 (1947). Congress can also grant federal courts exclusive jurisdiction over certain federal matters. *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). Moreover, the "Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907; *see* U.S. Const. art. VI, cl. 2 ("the Laws of the United States . . . shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby*" (emphasis added)). The moratorium does something very different: it divests state courts of jurisdiction over a deeply rooted aspect of the state police power. And there is no other forum in which such an eviction claim could be filed.

The moratorium's intrusion on the state courts is not a proper exercise of federal power. *See* Josh Blackman, *State Judicial Sovereignty*, 2016 U. Ill. L. Rev. 2033, 2035 (2016) ("[I]f Congress attempts to divest state courts of a jurisdiction long associated with the state police power—domestic law, for example—the Necessary and Proper Clause may not afford such a 'great substantive and independent power.'"); *id.* at 2125–26 (illustrating the problems inherent in federal meddling with state courts).

In short, however essential the moratorium may be to a broader regulatory scheme, such "interference" is not a *proper* law for carrying into execution the power to regulate commerce among the several states.

4. The moratorium forces state judicial officers to assume the political accountability of enforcing a controversial federal policy.

An important, but underappreciated thread runs through the Supreme Court's federalism jurisprudence: improper expansions of federal power distort political accountability in the states. "[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168. Moreover, "when the State has no choice" but to comply with a condition, "the Federal Government can achieve its objectives without accountability." *NFIB*, 567 U.S. at 578. In these cases, the people may blame state officers for federal orders. Three decades ago, Justice O'Connor presciently predicted that "where the Federal Government directs the States to regulate, it may

be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169. The eviction moratorium has had this exact effect in Texas.

Unlike other states, the Texas legislature did not impose an eviction moratorium during the pandemic. The federal government, however, did impose one. Although the federal order did not commandeer the state courts, the nature of the moratorium required all levels of the Texas judiciary to respond. In January 2021, the Texas Supreme Court entered an emergency order: "if a [tenant] provides the CDC Declaration or a similar declaration to the [landlord] after a petition is filed . . . the justice court must abate the eviction action." Thirty-Fourth Emergency Ord. Regarding COVID-19 State of Disaster, No. 21-9011, 2021 WL 1031675, at *1 (Tex. Jan. 29, 2021). The Texas legislature did not disturb this jurisdiction, but the Texas Supreme Court was forced to divest the justice courts of jurisdiction to resolve eviction petitions. This emergency order may have been popular among tenants, but it was unpopular among landlords—including the plaintiffs here. Proving Justice O'Connor's point, the members of the state's highest court were forced to assume accountability for a federal moratorium. And the decision was not unanimous.

Three months later, the Texas Supreme Court allowed its emergency order to expire. And once again, the members of the state judiciary bore the responsibility

for letting this protection lapse. *See* Juan Pablo Garnham, "Despite Federal Moratorium, More Texas Renters Face Eviction as State Protection Lapses," Tex. Trib., Apr. 3, 2021 ("Texans behind on their rent are at increasing risk of losing their homes despite a federal moratorium on evictions, according to housing attorneys, because a Texas Supreme Court order aimed at forestalling evictions has expired."). In turn, justices of the peace were also forced to resume unpopular evictions in the face of the federal moratorium.

Justice O'Connor's prediction was apt. The federal moratorium "blurs the lines of political accountability." *NFIB*, 567 U.S. at 678 (joint dissent). All levels of the Texas judiciary were drawn into this scheme. Landlords and tenants were left confused, but ultimately, state officers will be stuck holding the bag.

* * *

Once again, the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action." *Printz*, 521 U.S. at 923. This unprecedented moratorium is not proper because it denies access to the state courts, intrudes on the sovereignty of state judiciaries, and distorts political accountability. Despite the federal government's never-ending quest to aggrandize its own authority at the expense of state autonomy, there still exists a line "between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567–68 (citing *Jones &*

Laughlin, 301 U.S. at 30). And the legal process of eviction in state court is deeply rooted on the "truly local" side of that line.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

DATED: June 3, 2021

/s/ Ilya Shapiro

Josh Blackman
1303 San Jacinto Street
Houston, TX 77002
(202) 294-9003
josh@joshblackman.com

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
Wells Fargo Center
333 S. Grand Ave., Ste. 4200
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

David B. Kopel
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, CO 80203
(303) 279-6536
david@i2i.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,480 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This 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 in Times New Roman, 14-point font.

/s/ *Ilya Shapiro*
June 3, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
June 3, 2021