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; NORRIS COCHRAN, ACTING SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Eastern District of Texas
in Case No. 6:20-CV-564

BRIEF FOR AMICI CURIAE CIVIL LIBERTIES ORGANIZATIONS AND CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLANTS

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Terkel v. Centers for Disease Control and Prevention, No. 21-40137

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Under Federal Rule of Appellate procedure 26.1 and 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

1. American Civil Liberties Union, amicus curiae, is a nonpartisan, not-for-profit organization. No publicly held corporation owns 10% or more of its stock.

2. American Civil Liberties Union Foundation of Texas, amicus curiae, is a nonpartisan, not-for-profit organization. No publicly held corporation owns 10% or more of its stock;

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Terkel v. Centers for Disease Control and Prevention, No. 21-40137

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s/ Eliot Turner
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici curiae are civil liberties organization and constitutional law scholars.[1]

The ACLU is a nationwide, nonprofit, nonpartisan organization of over four million members, activists, and supporters dedicated to preserving the Constitution and protecting civil liberties. The ACLU Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, has been a leader in efforts to eliminate barriers to women's full equality in American society. The ACLU has engaged in housing advocacy and litigation across the country. These efforts include challenging housing discrimination experienced by women, people of color, and people with disabilities, with a focus on advancing fair housing rights to obtain and maintain safe and secure housing. During the COVID-19 pandemic, the ACLU and many of its state affiliates supported national, state, and local eviction moratoria and rental assistance programs for landlords and tenants. These measures are

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[1] The undersigned counsel for amici authored this brief. No party authored the brief or paid for its preparation, and no person other than amici curiae contributed money that was intended to fund preparing or submitting the brief.

vital to mitigate the racial and gender impact of evictions, which disproportionately impose dire economic and health consequences on women of color.

The American Civil Liberties Union of Texas is a nonpartisan organization with approximately 60,000 members across the State. Founded in 1938, the ACLU of Texas is one of the largest ACLU affiliates in the nation. The ACLU of Texas is the foremost defender of the civil liberties and civil rights of all Texans as guaranteed by the U.S. Constitution and our nation's civil laws. The ACLU of Texas has often appeared before the U.S. Court of Appeals for the Fifth Circuit in cases involving constitutional questions, both as direct counsel and as amicus curiae.

Amici constitutional law scholars teach at law schools throughout the country and have substantial experience studying, teaching, and applying the constitutional questions this appeal presents.

Amici offer this brief to assist the Court in its understanding of the history, scope, and application of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

Based on amici's expertise and understanding of the Commerce Clause and its application to challenged statute, regulations, and the facts, they support reversing the district court's judgment.

All parties to the appeal consent to amici filing this brief. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUE

Did the district court err when it concluded that a landlord's ability to seek eviction is not an "economic" activity – and thus beyond the reach of the Commerce Clause – even though that remedy is only available because of a commercial transaction between the landlord and tenant in an area where the Supreme Court and this Court have recognized Congress's power under the Commerce Clause?

SUMMARY OF THE ARGUMENT

To prevent the further spread of COVID-19 during the ongoing pandemic, the Centers for Disease Control and Prevention (CDC) implemented a nationwide moratorium on evictions from rental housing for tenants who meet certain criteria. Congress passed legislation adopting the moratorium in late 2020, and since then the CDC has extended the moratorium several times.

The CDC's order prevents landlords from "evict[ing] any covered person from any residential property" in the United States and its territories. Those protected from eviction are tenants who meet certain economic criteria and who have been unable to pay the full amount of their rent due to lost income or wages or "extraordinary out-of-pocket medical expenses." Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021). In short, the CDC's order limits one party to a contract's ability to seek eviction of a tenant when the tenant fails to pay rent in full and meets certain other criteria.

The district court invalidated the CDC's order, concluding that "eviction" is not "economic" and thus cannot be regulated under the Commerce Clause.

The district court's decision is faulty for at least two reasons.

First, it contradicts the Supreme Court and Fifth Circuit's broad understanding of what is "economic." Indeed, the district court's parsimonious definition of what is "economic" can't be squared with the Supreme Court's understanding that destroying rental properties through arson, collecting even intrastate loans through violence, and

discriminating in public accommodations, restaurants, and housing are all "economic" activities that Congress can regulate under the Commerce Clause. This broad understanding of what is "economic" also encompasses evictions – a remedy a landlord has when a tenant fails to meet its obligation to pay the landlord under a contract.

Second, the Supreme Court and the Fifth Circuit have recognized Congress's ability to regulate transactions to buy, sell, or rent homes and apartments under the Commerce Clause. That power necessarily extends to Congress's ability to regulate evictions and similar proceedings – were it otherwise it would greatly diminish Congress's power to regulate these important, interstate markets.

ARGUMENT

The Constitution gives Congress the "Power . . . To regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court recognizes three ways Congress can exercise its Commerce Clause power.

First, "Congress may regulate the use of the channels of interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995). Second, Congress may "regulate and protect the instrumentalities of interstate

commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* And finally, Congress can "regulate those activities . . . . that substantially affect interstate commerce." *Id.* at 558-59.

The district court addressed the third way Congress can exercise its Commerce Clause power. Under this third category, the Supreme Court has recognized that Congress has the "power to regulate purely local activities that are part of an *economic* 'class of activities' that have a substantial effect on interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (emphasis added). The district court held that the CDC's moratorium violated the Commerce Clause because it did not think eviction is an "economic" activity. But the district court's narrow reading of what is an "economic" activity departs from the Supreme Court and this Court's broad understanding of that term.

I. Courts broadly interpret what activity is "economic" and subject to regulation under the Commerce Clause.

In *Lopez*, the Court recognized that it had upheld a "wide variety" of Congressional regulation of activities, including intrastate activity, that would substantially affect interstate commerce. *Lopez*, 514 U.S. at 560.

Among the examples the Court in *Lopez* cited in which it sustained Congress's power to regulate "economic" activity were *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Perez v. United States*, 402 U.S. 146 (1971). The Court described the regulated activity in all these cases as "economic," and that broad interpretation shows why the district court's conclusion that evictions are not "economic" activity should be rejected.

In *Heart of Atlanta*, the Court upheld Title II of the Civil Rights Act of 1964. 379 U.S. at 243-44. Title II prohibits "discrimination or segregation on the ground of race, color, religion, or national origin" in public accommodations. *Id.* at 247. Although the Court recognized that Congress was "dealing with what it considered a moral problem" in outlawing racial discrimination, it still concluded that given the "disruptive effect that racial discrimination has had on commercial intercourse" Congress's power under the Commerce Clause "was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." *Id.* at 257.

The Court reached the same result in the companion case *McClung*, when it held that the Commerce Clause allowed Congress to prohibit racial discrimination at restaurants that served food "that has come from out of the State." 379 U.S. at 304.

And in *Perez*, the Court approved of Congress's ability to regulate intrastate commercial transactions, as well as the remedies available to the parties to those transaction. There the defendant was convicted under a federal statute that prohibited "extortionate credit transactions," that is, loans "characterized by the use or threat of the use of 'violence or other criminal' means" in collection efforts. 402 U.S. at 147. Put simply – loan sharking. Even though the activity was "purely intrastate," the Court held Congress could still prohibit efforts to collect on loans through violence (or threats of violence) under the Commerce Clause because such loans could have a substantial effect on interstate commerce. *Id.* at 156.

Thus, although the Court in *Lopez* invalidated the challenged statute because the regulated activity was "not economic," it still acknowledged that the Commerce Clause allows Congress to regulate activities that might be viewed as moral or social issues, like racial

discrimination or loan sharking, because they "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561; *see also id.* at 573-74 (Kennedy, J., concurring) (noting *Heart of Atlanta, McClung,* and *Perez* as "examples of the exercise of federal power where commercial transactions were the subject of regulation" and that these "authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today").

In sum, the Court in *Lopez* and the cases following it understood that the Commerce Clause allows Congress to regulate commercial "actors" and "conduct [that] has a commercial character." *United States v. Morrison*, 529 U.S. 598, 611 (2000) (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

In contrast, the Court viewed the statute challenged in *Lopez* – which made it illegal to possess a firearm within 1,000 feet of a school – differently. It observed that the statute did not regulate "a commercial activity" and that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere,

substantially affect any sort of interstate commerce." 514 U.S. at 551, 567; *see also United States v. Morrison*, 529 U.S. at 598, 610 (2000) ("[T]he noneconomic, criminal nature of the conduct at issue was central to our decision in [*Lopez*]"); *Raich*, 545 U.S. at 23 (describing *Lopez* and noting that Gun-Free School Zones Act of 1990 "did not regulate any economic activity").

The Court had the same view in *Morrison*, where it invalidated a provision of the Violence Against Women Act of 1994 that provided a civil remedy to victims of gender-motivated violence. 529 U.S. at 601-02. It held that the statute exceeded Congress's Commerce Clause power because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613.

But eviction is not like possessing a gun in a school zone or committing an act of violence against someone because of their gender. Unlike eviction, neither of those activities is necessarily connected to a commercial transaction. Indeed, in reaching the decision here, the district court divorced its analysis from the commercial context that allows a landlord to pursue eviction in the first place.

The district court did so even though it recognized that "a person's residence in a property may have a commercial origin," and that "the market for rental housing consists of economic relationships between landlords and tenants." ROA.21-40137.1676. Those facts can't be ignored and they distinguish the regulation here from the statutes in *Lopez* and *Morrison*.

Evictions are a remedy that landlords have when tenants breach their leases – usually, though not always, for failing to pay rent. Indeed, that was the reason the plaintiffs here sought to evict some of their tenants. ROA.21-40137.1670 (noting some plaintiffs "own or manage residential properties and seek to evict some residents there for nonpayment of rent"). Put another way, eviction is a remedy a commercial actor has against a contractual counter-party for breaching a commercial agreement. It is also no doubt motivated by commercial considerations – evicting a tenant allows a landlord to rent out an apartment again and generate more revenue.

Unlike possessing a gun in a school zone or committing a gender-motivated crime of violence, eviction is, in every sense of the phrase, an economic activity. Like discriminating as to who is served in hotels and

restaurants or threatening violence to collect a loan, eviction is inextricably linked to the commercial transaction between a landlord and a tenant. The Commerce Clause allows Congress to regulate "conduct that has a commercial character" between "commercial actors," which is what the CDC has done here.

The district court's highly formalistic analysis sought to distinguish between eviction (which the district court characterized as a possessory right to a premises) and the commercial agreements between landlords and tenants, even though eviction is a remedy for breach of those agreements. But under the district court's analysis, the transactions in *Heart of Atlanta*, *McClung*, and *Perez* could also be separated into non-commercial and commercial components. *Heart of Atlanta* and *McClung*, after all, involved similar rights to occupy particular premises (motels and restaurants) that were part of commercial transactions (paying for a service). *Perez* likewise involved verbal or physical threats and uses of force, on one hand, and commercial agreements on the other: In that case, people used threats and force as remedies for breaches of commercial agreements.

Yet the Court characterized all of those cases as involving economic activities. The Court has never defined economic activities with anything like the district court's divide-and-conquer approach. Nor is it how the Court has defined economic activities in later cases like *Lopez* and *Morrison*. Rather, the Court has been careful to acknowledge that economic activities include those that relate to commercial transactions – like evictions, which may provide the remedy for breach of a commercial agreement between landlord and tenant.

II. Congress may regulate activities related to buying, selling, and renting houses and apartments under the Commerce Clause.

The Supreme Court's reasoning about what activity is economic in *Lopez* and *Morrison* alone shows that the district court's reasoning should be rejected. But so too do the many cases holding that Congress can regulate activities related to housing markets. These cases, from both the Supreme Court and this Court, confirm that "eviction" is an "economic" activity properly regulated under the Commerce Clause.

For example, in *Russell v. United States*, 471 U.S. 858 (1985), the Supreme Court upheld a defendant's federal conviction for arson under 18 U.S.C. § 844(i). That statute prohibits, among other things,

damaging or destroying any "building . . . used . . . in any activity affecting interstate or foreign commerce." The defendant challenged his conviction arguing that the apartment building he tried to set on fire was "not commercial or business property" and thus beyond the scope of the Congress's power to regulate under the Commerce Clause. The Court disagreed because "rental of real estate is unquestionably" an "activity that affects commerce." *Id.* at 862. It also recognized that "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Id.* Because that was so "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." *Id. See also Jones v. United States*, 529 U.S. 848, 850 (2000) (concluding arson statute upheld in *Russell* did not apply to buildings not used "for any commercial purpose").

After *Lopez* and *Morrison*, this Court likewise held that Congress can regulate activities related to buying, selling, and renting real estate under the Commerce Clause – and that Congress can exercise that power to prohibit discrimination against people with disabilities in the

buying, selling, and rental of real estate. *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205 (5th Cir. 2000).

In *Groome*, Jefferson Parish argued that Congress exceeded its Commerce Clause powers in enacting the Fair Housing Amendments Act of 1988, which outlawed housing discrimination against people with disabilities because "the activity being regulated" – Jefferson Parish's failure to make reasonable housing accommodations to people with disabilities – was "'wholly non-economic.'" *Id.* at 205.

This Court disagreed.

It held that the statute's prohibition of discrimination "affected the commercial transaction of purchasing a home and the commercial rental of housing, and, therefore, fits well within the broad definition of economic activity established by the Supreme Court . . . . " *Id.* at 205. Such discrimination "affects a disabled individual's ability to buy, sell, or rent housing" and "directly interferes with a commercial transaction." *Id.* And because the plaintiff in that case, which operated a group home for people with Alzheimer's, "was both a rental property charging monthly rent to its clients and a commercial operation" it found "that the home's commercial use 'unquestionably' is an 'activity

that affects commerce.'" *Id.* at 207. Thus, Congress could prohibit discrimination that affected the plaintiff's operation. *Id.*

The district court acknowledged *Groome*'s holding but concluded that eviction differed from discrimination in refusing to sell or rent because discrimination *interfered* with a prospective commercial transaction, while, according to the district court, eviction doesn't. ROA.21-40137.1670. That conclusion ignores that eviction can – and often does – interfere with a commercial transaction. That is why the Fair Housing Act prohibits not just refusing to rent an apartment or sell a home based on discriminatory reasons, but also eviction when it is discriminatory. *See Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1223 (11th Cir. 2016) ("[T]he FHA protects renters not only from eviction, but also from discriminatory actions that would lead to eviction but for an intervening cause"). Were it otherwise, landlords could avoid liability under the FHA simply by renting first and discriminating later.

Indeed, the district court's proposed distinction only highlights the flaws in its analysis. *Groome*, the district court held, was concerned with the potential for interference in a yet-to-be consummated commercial transaction. In this case, however, the commercial

transaction is already in effect, and obligations to make (economic) payments of rent were incurred every month. Regulating what landlords can do (and what they cannot do) to enforce the commercial obligations incurred by tenants is a prototypical regulation of economic activity. Indeed, in their Complaint the plaintiffs refer to the economic harm their inability to evict tenants has caused them – from their inability to use rental payments for upkeep or to service mortgages. *See, e.g.*, ROA.21-40137.20 ("One tenant is two months' delinquent on rent to Ms. Terkel, with a past due amount being approximately $1,700. Ms. Terkel's monthly expenses for upkeep of the Tyler Property are approximately $1,190."); ROA.21-40137.20 ("Pineywoods has a mortgage on the Pineywoods Property and makes monthly payments of approximately $3,745 for the mortgage principal and interest. One tenant is delinquent on rent to Pineywoods at least one month, with the past due amount owed being approximately $616.").

Eviction is a remedy that results from a commercial relationship between commercial actors. It occurs in a commercial market that the Supreme Court and this Court have recognized is interstate even though the activities within that market themselves might be "local."

Groome, 234 F.3d at 211 ("[T]hat the act of discrimination takes place on a local stage is of no moment, because when Congress has chosen a national arena to regulate, every actor that affects commerce is subject to regulation"). And "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." *Russell*, 471 U.S. at 862. That includes eviction.

CONCLUSION

For all these reasons, this Court should reverse the district court's judgment.

May 3, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD VOLUME LIMITATION

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 3,251 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Supra typeface.

Dated: May 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I filed this document through the Court's CM-ECF system, which served the brief on counsel for the parties.

I also certify that on May 3, 2021, I mailed 7 copies of the brief using a third-party commercial carrier for overnight delivery to the Clerk of Court and sent two copies by first class mail to the counsel of record for the parties listed below:

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