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May 04, 2021

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No. 21-40137 Terkel v. Centers for Disease Control  
USDC No. 6:20-CV-564

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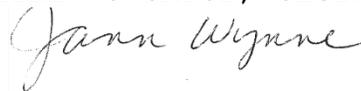
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Case No. 21-40137

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

No. 21-40137

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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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.

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On Appeal from the United States District Court  
for the Eastern District of Texas, Tyler Division

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**BRIEF FOR *AMICI CURIAE*  
PROFESSOR MATTHEW DESMOND,  
NATIONAL LOW INCOME HOUSING COALITION,  
CONNECT COMMUNITY, and COME DREAM COME BUILD  
IN SUPPORT OF DEFENDANTS-APPELLANTS.**

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**SUPPLEMENTAL CERTIFICATE  
OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities, as described in 5<sup>th</sup> Circuit Rule 28.2.1, have an interest in the outcome of this case. This representation, supplemental to that of the parties, is made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Matthew Desmond, National Low Income Housing Coalition, Connect Community, Come Dream Come Build, *Amici Curiae*
2. Martin J. Siegel, Law Offices of Martin J. Siegel, P.C., Attorney for *Amici Curiae*

s/ *Martin J. Siegel*  
Martin J. Siegel  
Attorney for *Amici Curiae*

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## ***AMICI'S STATEMENT OF IDENTITY AND INTEREST***

*Amici* are experts in and advocates for affordable and stable housing, as well as nonprofits directly serving low income renters. What they have in common is a mission to understand housing insecurity and help build lasting and healthy homes and communities through research, advocacy, and direct engagement.<sup>1</sup>

Matthew Desmond is the Maurice P. Daring Professor of Sociology at Princeton University and the author of *Evicted: Poverty and Profit in the American City* (New York: Crown 2016), which won the Pulitzer Prize and other awards. Desmond received a MacArthur “Genius grant” Fellowship and now studies poverty, urban life, housing, public policy, racial inequality, and ethnography. He is also the principal investigator of the Eviction Lab, a team of researchers, students, and computer experts who drew on tens of millions of records to publish the first ever data set of evictions in America, going back to 2000.

Founded in 1974, the National Low Income Housing Coalition is a national nonprofit with hundreds of individual and organizational members working to secure decent, accessible, and affordable housing for the lowest income Americans. NLIHC has responded to the pandemic by pressing Congress and responsible federal agencies to keep low income renters housed through a national

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<sup>1</sup> No party’s counsel authored this brief in whole or in part; no party, counsel, or other person contributed funding for its preparation or submission; and all parties have consented to its filing.

eviction moratorium and emergency rental assistance. It has also led the Disaster Housing Recovery Coalition of more than 850 local, state, and national groups collaborating to address pandemic-related housing insecurity; conducted original research and produced widely used reports on housing conditions over the last year and before; and worked to educate renters about eviction moratoria.

Connect Community is a nonprofit serving Houston's Gulfton and Sharpstown neighborhoods. It aims to link local leaders with resources and partner organizations to improve residents' lives and end intergenerational poverty. Its "Impact Zone" serves over 18,000 people, 95% of whom are renters, 88% of whom speak English as a second language, and 48% of whom fall below the poverty line. The area has five times the urban density of any other Houston neighborhood and has suffered far more COVID-19 cases and deaths per capita than the city as a whole.

Come Dream Come Build is one of the largest nonprofit producers of single-family housing in Texas. In the last nine months alone, it has disbursed nearly \$1 million in rental aid and is currently administering \$12.7 million in federal rental assistance funds for Cameron County, Texas. Since 2016, CDCB and the Rio Grande Valley Multibank have extended \$23,826,060 in small dollar loans, \$31,564,239 in mortgage loans, and \$5,537,951 in financing for affordable rental and owner-occupied units throughout South Texas.

## INTRODUCTION

If affirmed by this Court, the district court’s decision threatens to cause the evictions of tens or even hundreds of thousands of people in the states covered by this Circuit. Nationwide, millions of renters live in households that have suffered COVID-19-related financial loss, while census data from March 2021 indicates that over 20% of renters fear being unable to pay next month’s rent.<sup>2</sup>

Nonetheless, the district court saw this case as one chiefly about landlords’ property rights. *See* [ROA 1675](#) (“the challenged order regulates property rights in buildings – specifically, whether an owner may regain possession of property from an inhabitant.... Eviction is fundamentally the vindication of the property owner’s possessory interest”). Yet eviction isn’t only about property owners – it also affects tenants, including many served by *Amici* in economically vulnerable communities. Indeed, a growing body of research suggests that terminating the moratorium would exact a grim and substantial human toll.

For example, not only would ending the CDC’s eviction moratorium likely increase the prevalence of COVID-19 with its associated illnesses and deaths, as

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<sup>2</sup> National Low Income Housing Coalition, *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, August 7, 2020, 3, available at [nlihc.org/sites/default/files/The\\_Eviction\\_Crisis\\_080720.pdf](https://nlihc.org/sites/default/files/The_Eviction_Crisis_080720.pdf). The most recent census data as of this briefing is available at U.S. Census Bureau, Week 27 Household Pulse Survey: March 17 – March 29, Household Table, Table 2b, *Confidence in Ability to Make Next Month’s Payment for Renter Occupied Housing Units, by Select Characteristics*, available at [census.gov/data/tables/2021/demo/hhp/hhp27.html](https://census.gov/data/tables/2021/demo/hhp/hhp27.html).

data in the order itself documents, it would also yield more quotidian harm. One study reported in 2018 found that “[e]victions cause large and persistent increases in the risk of homelessness, elevate long-term residential instability, and increase emergency room use.”<sup>3</sup> Another published last year concluded that evictees “are more likely to report being in poor general health or experiencing mental health concerns, even many years after an eviction.”<sup>4</sup> A third analysis conducted by *Amicus* Professor Matthew Desmond associated evictions during pregnancies “with worse birth outcomes, including reduced birth weight, shorter gestation, increased probability of being classified as [low birth weight] or premature, and a trend toward increased infant mortality.”<sup>5</sup> Desmond found in a different study published last year that, “[c]ompared to matched mothers who were not evicted, mothers who were evicted in the previous year experienced more maternal hardship, were more likely to suffer from depression, reported worse health for themselves and their children, and reported more parenting stress.”<sup>6</sup>

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<sup>3</sup> Robert Collison and David Reed, *The Effects of Eviction on Low-Income Households*, in revision for resubmission to THE QUARTERLY JOURNAL OF ECONOMICS, Oct. 2018, Abstract, available at [economics.nd.edu/assets/303258/jmp\\_rcollison\\_1\\_.pdf](https://economics.nd.edu/assets/303258/jmp_rcollison_1_.pdf).

<sup>4</sup> Megan E. Hatch and Jinhee Yun, *Losing Your Home is Bad for Your Health: Short- and Medium-Term Effects of Eviction on Young Adults*, HOUSING POLICY DEBATE, Oct. 20, 2020, Abstract, available at [nlihc.org/sites/default/files/MEMO\\_Health\\_Effects\\_of\\_Eviction\\_on\\_Young\\_Adults.pdf](https://nlihc.org/sites/default/files/MEMO_Health_Effects_of_Eviction_on_Young_Adults.pdf).

<sup>5</sup> Grace Himmelstein and Matthew Desmond, *Association of Eviction with Adverse Birth Outcomes Among Women in Georgia, 2000 to 2016*, JAMA PEDIATRICS, March 1, 2021, available at [jamanetwork.com/journals/jamapediatrics/fullarticle/2776776](https://jamanetwork.com/journals/jamapediatrics/fullarticle/2776776).

<sup>6</sup> Matthew Desmond and Rachel Tolbert Kimbro, *Eviction’s Fallout: Housing Hardship and Health*, SOCIAL FORCES, February 24, 2015, Abstract, available at [scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015\\_2\\_.pdf](https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015_2_.pdf).

Of course, the district court was charged with deciding the moratorium’s constitutionality, not weighing social science data. But there, too, its analysis was one-sided. The court’s decision turned largely on its conclusion that evictions aren’t economic events. In fact, eviction is a multi-step process that entails and can scarcely be performed without commercial transactions by both landlords and tenants. These typically include retention of counsel, payment of filing fees, arrangement of service of process, transportation to court, payment for removal or storage of belongings, and other transactions. Eviction also immediately and directly causes other spinoff commerce by landlords and tenants, such as transactions necessary to re-rent the dwelling, find new housing, and so on. The district court therefore erred in viewing eviction as noneconomic and should not have invalidated the CDC order under the Commerce Clause. This Court should reverse the judgment below, as the CDC urges.

## **ARGUMENT**

### **I. Evictions Are Economic Events**

The district court conceded that “the market for rental housing consists of economic relationships between landlords and tenants,” but it went on to describe evictions themselves as not “economic in character.” [ROA 1676](#). This conclusion was central to its Commerce Clause analysis because the first factor under *Lopez* and *Morrison* for assessing whether the government’s regulation substantially

affects interstate commerce asks whether the regulated “activity in question has been some sort of economic endeavor.” *United States v. Morrison*, 529 U.S. 598, 611 (2000); *see also United States v. Lopez*, 514 U.S. 549, 561 (1995) (“Section 922(q) is a criminal provision that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”). Similarly, under the fourth *Lopez/Morrison* factor – the degree of attenuation between the regulated activity and interstate commerce – the district court’s view of evictions as noneconomic led it to hold that “their effects cannot be aggregated under the *Wickard* principle.” ROA 1680.

The district court’s conception of evictions ignores the legal and practical realities of how landlords remove tenants for nonpayment of rent. Eviction is a prolonged, multi-step process that typically entails multiple commercial transactions by both landlord and tenant. It is most accurately regarded, therefore, as an economic event. This is especially true considering the broad construction given the term “commerce” under Article I, § 8.<sup>7</sup> To temporarily halt evictions,

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<sup>7</sup> *See, e.g., Morrison*, 529 U.S. at 611 (regulated activity need only be “some sort of economic endeavor”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 254 (1964) (quoting *Gibbons v. Ogden*, 9 Wheat 1 (1824)) (“these words comprehend every species of commercial intercourse.... No sort of trade can be carried on... to which this power does not extend”); *Groome Resources, Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192, 208 (5<sup>th</sup> Cir. 2000) (“This circuit has also recognized a broad reading of commercial and economic activities under the Commerce Clause”); *United States v. Bailey*, 115 F.3d 1222, 1228 n. 7 (5<sup>th</sup> Cir. 1997) (“The construction of the term ‘commerce’ is a practical one and embraces economic activity beyond that which is traditionally considered economic”), *cert. denied*, 522 U.S. 1082 (1998).

therefore, is to regulate commerce. *See Gonzalez v. Raich*, [545 U.S. 1, 39-40 \(2005\)](#) (Scalia, J., concurring) (“the power to regulate interstate commerce ‘extends not only to those regulations which aid, foster and protect commerce, but embraces those which prohibit it,’” *quoting United States v. Darby*, [312 U.S. 100, 113 \(1941\)](#))).

Under Texas law (as everywhere), evicting a tenant depends on executing a series of mandatory steps in the statutorily required sequence: service of notice to vacate the premises, filing a subsequent suit to evict in justice court, service of notice of the suit and a prescribed notice regarding the consequence of default, judicial determination of the suit, possible appeal by the tenant, applying for a writ of possession, posting a warning of impending eviction no sooner than 24 hours later, and physical removal of the tenant and any belongings. [TEX. PROP. CODE ANN. §§ 24.005, 24.0051, 24.0061](#).

For landlords, completing this process will entail entering into commercial transactions. First and foremost, many will hire lawyers or other quasi-legal specialists to draft the necessary documents, perfect the required service, appear in court, and generally oversee the process, though representation by counsel isn’t legally required. *Id.* § 24.011. One recent study of eviction cases in Chicago found that 75% of landlords were represented by counsel, while other studies have

noted similar results.<sup>8</sup> Innumerable for-profit firms and services specialize in evicting tenants. Thus, “Kick’em Out Quick Evictions and Collections” notes its “years of experience in the Landlord Services Industry” and maintains an online directory of “member eviction attorneys,” including in Texas. *See* [Kickemoutquick.com/about.html](http://Kickemoutquick.com/about.html) (last accessed April 30, 2021). A firm called “Texas Eviction” advertises to landlords that it will “make evicting a tenant as fast, easy, and inexpensive as possible for you. Our eviction services eliminate as much of your involvement as possible and our cost includes all associated fees from the courts.” *See* [Texaseviction.com/eviction-services](http://Texaseviction.com/eviction-services) (last accessed April 30, 2021). It charges fees for individual services like sending a notice or fighting the tenant’s appeal, or will price the whole eviction depending on the location and case. *See id.*

Even a landlord determined not to hire a lawyer or eviction service will have to pay to evict a tenant. In Houston, for instance, justice court filing and service fees for the eviction petition, a writ of execution, and a writ of possession total \$401.00.<sup>9</sup> The landlord or an employee will have to pay to go down to the

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<sup>8</sup> John Eric Humphries, Nicholas S. Mader, Daniel I. Tannenbaum, Winnie L. van Dijk, *Does Eviction Cause Poverty? Quasi-Experimental Evidence from Cook County, IL*, NAT’L BUREAU OF ECONOMIC RESEARCH WORKING PAPER SERIES, Aug. 2019, 6, *available at* [nber.org/system/files/working\\_papers/w26139/w26139.pdf](http://nber.org/system/files/working_papers/w26139/w26139.pdf); *see also* Collison and Reed, note 3 *supra*, 7 (based on observation of courts in New York City: “Landlords are usually represented by an attorney, while the vast majority of tenants are self-represented”).

<sup>9</sup> *See* Harris County Justice Court, *Court Costs for Eviction Cases, Repair and Remedy Cases, Tow Hearing Cases and Harris County Constable Civil Process Service Fees*, *available at* [http://www.jp.hctx.net/info/WebPages\\_2013/HC%20JP%20Eviction\\_Repair%20Remedy\\_Tow%20Court%20Cost.pdf](http://www.jp.hctx.net/info/WebPages_2013/HC%20JP%20Eviction_Repair%20Remedy_Tow%20Court%20Cost.pdf).

courthouse for the eviction hearing – either the cost of gas or paid transportation – and wait for the case to be heard, deferring other paid work. When the day of eviction arrives, the landlord will likely hire help to move any possessions left behind by the tenant, such as furniture, in order to defray eviction costs and recover unpaid rent. *See, e.g.*, [Barkerhillrealty.com/landlord-guide/how-to-evict-a-tenant-in-texas/](https://www.barkerhillrealty.com/landlord-guide/how-to-evict-a-tenant-in-texas/) (last accessed April 30, 2021) (“Most standard leases will state that the landlord can sell the property in order to recoup past rent and the cost of removal.... If there is no lease, or this isn’t stated specifically in the lease, you will have to cover the cost of removal yourself, and you probably have no right to sell the property or bill the tenant for its removal”). These may all be modest costs, but they are certainly “economic in character.” [ROA 1676](#). To the landlord, they are “business activities,” that is, standard expenses of completing an eviction and operating a real estate business more generally. *GDF Realty Invest., Ltd. v. Norton*, [326 F.3d 622, 629](#) (5<sup>th</sup> Cir. 2003) (quoting *Black’s Law Dictionary* defining commerce as “business activities”), *cert. denied*, [545 U.S. 1114](#) (2005).<sup>10</sup>

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<sup>10</sup> Because, as the CDC points out, the moratorium permits landlords to begin but not complete eviction proceedings, *see* CDC Brief at 6, some of the transactions early in the eviction process highlighted herein may continue to occur despite the CDC’s order. However, many landlords will undoubtedly refrain from this commerce as a result of the order, even though it is allowed as before, because they will have no interest in paying now to begin an eviction they can’t complete until after the moratorium ends, or may never carry out at all if the tenant can later make up any deficiency in rent.

Eviction also entails financial costs for tenants. Because the vast majority of tenants are unrepresented by counsel in eviction proceedings, they will rarely incur legal fees fighting eviction. *See* authorities in n. 8, *supra*. They may appear at eviction hearings, however, which necessitates payment for transportation to and from court and often results in lost wages. To comply with eviction orders, tenants must disconnect or transfer utilities and move or store their belongings – further economic transactions forced on them by eviction. As Desmond writes: “It was often the case, too, that families lost many of their possessions after being evicted. Some could not afford to move larger, more expensive items (*e.g.*, furniture, appliances) and could not take many of their possessions with them as they bounced from place to place. Others paid to store their things only to lose them later after missing payments.”<sup>11</sup> And tenants are often saddled with late fees and court costs during eviction if there have been previous eviction attempts; as Desmond has documented, many landlords use serial eviction filings as a tool of “tenant discipline” if rent is late or there are other perceived violations of the lease.<sup>12</sup> As with owners, then, the process of eviction will typically include financial transactions for renters.

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<sup>11</sup> Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIOLOGY 88, 119, July 2012.

<sup>12</sup> Lillian Leung, Peter Hepburn, Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management and the Threat of Displacement*, SOCIAL FORCES, Sept. 11, 2020, available at [academicoup.com/sf/advance-article/doi/10.1093/sf/soaa089/5903878](https://academicoup.com/sf/advance-article/doi/10.1093/sf/soaa089/5903878).

Despite these basic facts, the district court seemed to view eviction as an isolated legal event divorced from the realities of even minor litigation. It described eviction as merely the use of “recourse to a remedy under state law,” [ROA 1676](#), with no acknowledgement of what that entails for the parties involved. But as Judge Posner once wrote in a different context, “[l]itigation is not a free good.” *Lumbert v. Illinois Dept. of Corrections*, [827 F.2d 257, 259](#) (7<sup>th</sup> Cir. 1987). Those engaged in it usually have no choice but to transact with lawyers, courts, and other outside service providers. Indeed, members of the legal industry such as attorneys, paralegals, and process servers – as well as the clients unhappily faced with their legal bills – would all be surprised to hear litigation described as something apart from commerce rather than the object of it. The district court therefore erred in characterizing eviction as non-economic.

## **II. Evictions Also Directly Cause and Suppress Other Closely Related Commerce**

Not only is eviction itself an inevitably commercial process, it immediately affects other commerce. Action that serves as an impetus or “gateway” to interstate commerce can also be regulated under the Commerce Clause. *See, e.g., United States v. Lindsay*, [931 F.3d 852, 863](#) (9<sup>th</sup> Cir. 2019) (upholding criminalization of non-commercial sex with minors abroad because it leads to the commercial kind: “By serving as a ‘gateway,’ non-commercial conduct can fuel commercial demand”), *cert. denied*, [140 S. Ct. 1288](#) (2020).

Renters will have to engage in commerce immediately after eviction. Above all, the pressing and immediate need to find a new place to live will lead many to transact with new landlords or with the current residents of congregate housing. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, [85 Fed. Reg. 55,292, 55,293 \(Sept. 4, 2020\)](#) (“Covered Person” Definition (5) providing that, for eligibility, tenant must declare eviction will result in homelessness or a move into “a new congregate or shared living setting”). These renters will also have to transact to set up or join in payment for utility services – water, electricity, and the like. Further, they may need to sell or buy furniture and other household objects consistent with terminating one residence and joining a new one. All these purchases are the direct and necessary result of eviction and are often unavoidable.

By the same token, eviction can directly suppress commerce. Desmond notes that “[t]he energy and resources that evicted tenants dedicate to securing subsequent housing and restoring a household often require them to forego other basic necessities, like warm clothing, food or medical care.”<sup>13</sup> Employment also suffers: “If [an evicted mother] is employed, the turmoil set off by eviction may affect her work performance and absenteeism, causing her to lose her job.”<sup>14</sup> One

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<sup>13</sup> Desmond and Kimbro, *Eviction’s Fallout* at 5.

<sup>14</sup> *Id.*

2019 study found that eviction generally reduces the purchasing power of affected renters; “durable consumption declines as a result of an eviction.”<sup>15</sup> It may also cause evicted tenants to transact for high interest payday loans at greater rates.<sup>16</sup>

Conversely, the eviction moratorium spurs commerce by freeing funds for other purchases. One study published in April 2021 found that “moratoria in eviction and related deferral of rent may have provided treated households with financial and mental relief in the form of positive shocks to household liquidity. Renters benefitting from such intervention could re-direct scarce resources to other immediate consumption needs, notably including food purchases.”<sup>17</sup> As a result, “the imposition of rental eviction moratoria served to boost household spending, notably as regards food and grocery spending and among targeted renter share and high unemployment neighborhoods.”<sup>18</sup>

Eviction is also a gateway to other commerce by landlords. First, simply threatening eviction or filing initial papers often stimulates informal commerce with affected and other tenants behind on rent, such as the renter’s partial payment of rent or provision of services in lieu of rent. Alternately, landlords sometimes pay tenants to leave in order to avoid the more formal and expensive

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<sup>15</sup> Humphries, *et al.*, *Does Eviction Cause*, 24.

<sup>16</sup> *Id.*

<sup>17</sup> Xudong An, Stuart A. Gabriel, and Nitzan Tzur-Ilan, *More than Shelter: The Effects of Rental Eviction Moratoria on Household Well-Being*, Working Paper, UCLA, April 6, 2021, 1, available at [Anderson.ucla.edu/documents/areas/ctr/ziman/2021-05WP.pdf](https://Anderson.ucla.edu/documents/areas/ctr/ziman/2021-05WP.pdf).

<sup>18</sup> *Id.* at 24

headache of eviction. As Desmond observed in his groundbreaking study of eviction in Milwaukee: “Joe Parazinski, a white building manager who lived and worked in the majority-black inner city – and who preferred paying tenants \$200 to leave over taking them to eviction court, as the former option was cheaper – once told me, ‘For every eviction I do that goes through the courts, there are at least 10 that don’t.’”<sup>19</sup>

When formal eviction does proceed, the landlord will engage in commerce needed to re-rent the house or apartment, such as refurbishing, advertisement, and so on. As one study of eviction in Baltimore, Dallas, and Cleveland commented, “executing an eviction in any state results in costs for the landlord. Franklin, a middle-aged White landlord in Baltimore who rents almost exclusively to voucher holders, outlined a few of the direct costs associated with any property turnover. ‘Right, because then you’ve got to pay somebody to come and clean the house out and you’ve got to go in and maybe paint and replace the carpet, replace this, fix that, it’s a ton of stuff.’”<sup>20</sup> Put another way, “[k]icking out a tenant means being ready to absorb the cost of turning over the unit.”<sup>21</sup> From the perspective of landlords, in other words, it is

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<sup>19</sup> Desmond, *Eviction and the Reproduction of Urban Poverty*, 95.

<sup>20</sup> Phillip ME Garboden and Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, CITY & COMMUNITY, April 2019, 9.

<sup>21</sup> *Id.* at 10.

misguided to view eviction in isolation rather than as one more commercial tool or step in the never-ending cycle of renting and re-renting the same property.

In short, not only is eviction itself a commercial process that is essentially impossible to complete without transacting, it is also a gateway to and directly responsible for significant spinoff commerce by both renters and landlords.

### **III. Because Evictions Are Economic Events, the CDC's Moratorium is a Valid Exercise of Congress' Power Under the Commerce Clause**

When evictions are properly regarded as the economic events they are, the constitutionality of the CDC's moratorium becomes clear.

First, there is no basis to analogize the CDC moratorium to the type of regulation of noneconomic, intrastate activity struck down in *Lopez* and *Morrison*. As the Supreme Court observed in *Morrison*: “in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor” 529 U.S. at 610; *see also Lopez*, 514 U.S. at 559 (“We have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce”). Indeed, in the post-New Deal era, the Supreme Court has not invalidated any law or regulation of intrastate economic activity that the government defended as substantially affecting interstate commerce. *See, e.g.*,

*Gonzalez*, [545 U.S. at 25](#) (upholding federal prohibition of intrastate manufacture and possession of marijuana for medical use: “Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic”).

The first of the *Morrison/Lopez* factors therefore supports upholding the moratorium, as it regulates a “sort of economic endeavor.” *Morrison, supra*.

Properly viewing the moratorium as economic regulation also highlights this case’s similarity to this Court’s decision in *Groome*. There, the Court upheld the constitutionality of nondiscrimination provisions of the Fair Housing Act because they were economic in the sense of removing obstacles to the commerce of residential leasing. See [234 F.3d at 205-06](#) (discrimination “directly interferes with a commercial transaction, and is an act that can be regulated to facilitate economic activity”); see also *Winningham v. United States Dept. of Housing and Urban Development*, [512 F.2d 617, 622-23](#) (5<sup>th</sup> Cir. 1975) (federal housing subsidies within Commerce Clause power because they were intended to “stimulate housing construction and employment”). More generally, this Court noted in *Groome* that “it is a transparently commercial action to buy, sell, or rent a house.” [234 F.3d at 206](#).

Nonetheless, the district court waved away *Groome* because the CDC order leaves tenants liable for unpaid rent despite the pause in evictions. [ROA 1676](#). But this hardly nullifies the moratorium’s broad effect on commerce.

Notwithstanding renters' continuing financial obligations to their landlords, the CDC's order halts hundreds of thousands of evictions – economic events – across the country. It freezes a major segment of the national housing market and prevents innumerable individual re-rentings of property. It causes all the closely related economic effects discussed herein, like fewer moving expenses, more grocery purchases, and so on. Tenants may still owe their landlords, but the moratorium spurs and suppresses other commerce regardless. Nor does it matter that the CDC's order governs commerce by “regulating only recourse to a remedy under state law,” ROA 1676. See, e.g., *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11<sup>th</sup> Cir. 2008) (preemption of states' strict liability rules for rental car companies within Congress' Commerce Clause power because it facilitates rental car market), *cert. denied*, 555 U.S. 1174 (2009).

Second, recognizing the CDC's moratorium as economic means that the fourth *Morrison/Lopez* factor also supports its constitutionality. Analyzing that factor – the degree of attenuation between the regulated activity and interstate commerce – the district court held: “Because evictions are not themselves economic activity, their effects cannot be aggregated under the *Wickard* principle.” ROA 1680. Since evictions *are* economic events, however, the district court should have considered how interstate commerce would be affected by *all* evictions halted by the moratorium, not simply those the plaintiff would like to

carry out. ROA 1679 (“the eviction of one person from a dwelling does not alone have a self-evident substantial effect on interstate commerce”); *Morrison*, 529 U.S. at 613 (aggregation proper for activity that is “economic in nature”); *GDF Realty*, 326 F.3d at 630 (“In the light of *Lopez* and *Morrison*, the key question for purposes of aggregation is whether the nature of the regulated activity is economic”). When the cessation of tens or hundreds of thousands of evictions across the country is considered together, there is no doubt the CDC moratorium substantially affects interstate commerce, and the district court did not decide otherwise. *See, e.g., Russell v. United States*, 471 U.S. 858, 862 (1985) (“We need not rely on the connection between the market for residential units and ‘the interstate movement of people,’ to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties”).

## CONCLUSION

Contrary to the district court’s conclusion, evictions are “economic in character.” The CDC’s moratorium should therefore be upheld as constitutional – a decision that will have the added benefit of preventing the increasingly well-known medical, psychological, and financial miseries of mass eviction.

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Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day of May 4, 2021, seven copies of the foregoing Appellant's Brief were sent via third-party commercial carrier, overnight service, to the Clerk of the Court, and two copies were sent via First Class U.S. mail to the following:

*Counsel for Plaintiffs-Appellees*

*s/ Martin J. Siegel* \_\_\_\_\_  
Martin J. Siegel

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 4,380 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that 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 is printed in a proportionally spaced typeface using the Microsoft Word 2004 for Mac, Version 11.5.6, program in 14 point, Times New Roman font in body text and 12 point, Times New Roman font in footnote text.

*s/ Martin J. Siegel*  
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Martin J. Siegel

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