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

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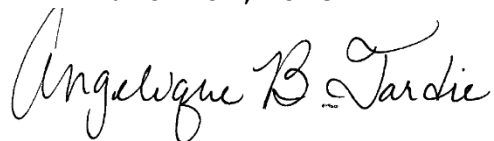
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Case No. 21-40137

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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**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.

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,*

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On Appeal from the United States District Court for  
the Eastern District of Texas, Case No. 6:20-cv-564

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**BRIEF FOR NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE  
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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May 3, 2021

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## **SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

*Amicus curiae* National Association for the Advancement of Colored People is a non-profit organization with no parent corporations or publicly traded stock. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1, in addition to those disclosed in the parties' certificates of interested persons, 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.

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/s/ Paul R.Q. Wolfson  
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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Founded in 1909, the National Association for the Advancement of Colored People (NAACP) is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used legal process to champion equality and justice for all persons, including in landmark cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958), among many others.

This litigation implicates two of the NAACP's core issue areas: health and economic opportunity. The mission of the NAACP, as well as its state and local affiliates, includes a focus on the right of African Americans and other people of color to have optimal health outcomes. The NAACP also aims to address the challenging economic realities facing our country, including poverty, disproportionate high unemployment, lack of affordable housing, and evictions and foreclosures. The NAACP is committed to eliminating the racial and ethnic inequities that exist within our health care and economic systems and undermine

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus or its counsel made a monetary contribution for its preparation or submission.

communities of color, their life opportunities, and their ability to contribute fully to the common good.

### **SUMMARY OF ARGUMENT**

The district court’s decision vacating the Center for Disease Control’s Agency Order titled “*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*,” 86 Fed. Reg. 8020 (Feb. 3, 2021) (hereinafter “CDC Order”), is wrong on the merits, as the government explains, Appellants’ Br. 7-18. The NAACP files this brief to highlight two potentially grave consequences if the district court’s decision is not reversed.

First, the practical effects of wrongly divesting the government of the authority to pause evictions during the COVID-19 pandemic would be dire and far-reaching—especially for people of color. Communities of color have already borne significantly disproportionate consequences of the ongoing pandemic, which has laid bare and exacerbated existing disparities in housing security and access to health care. People of color are more likely than white people to occupy rental housing, and in turn are more likely to be evicted than white renters. Increasing the rate of evictions during the pandemic will aggravate these disparities and exacerbate the spread of the virus that causes COVID-19 among communities already disproportionately affected.

Second, the district court’s decision casts a needless shadow over Congress’s power to enact civil rights and other laws that protect tenants in many ways, including from eviction. Congress has the constitutional authority, based in the Commerce Clause of Article I, to regulate landlord-tenant transactions, including eviction, and it has exercised that power for more than a half century, if not longer. This Court, the Supreme Court, and other courts of appeals have consistently upheld Congress’s power to regulate landlord-tenant transactions—for example, in the Fair Housing Act—in order to address the profound and national effects of denying fair housing opportunities to renters of all races and backgrounds. The CDC Order breaks no new ground in this respect. To reach the opposite conclusion, the district court adopted a cramped reading of Commerce Clause jurisprudence that, if allowed to stand, could frustrate both Congress’s power to protect tenants from discriminatory actions by landlords and the government’s public health efforts to combat a devastating global pandemic.

## **ARGUMENT**

### **I. EVICTIONS EXACERBATE THE COVID-19 PANDEMIC—ESPECIALLY FOR COMMUNITIES OF COLOR**

The practical consequences of the district court’s conclusion are potentially dire. As explained in the CDC Order and in the government’s brief (at 3, 10-11), evicting tenants from their homes during the COVID-19 pandemic poses a serious

public health risk. And, as with the COVID-19 pandemic generally, the effects of these evictions disproportionately affect people of color.

Housing insecurity is at desperate levels. Between 2000 and 2016, more than 61 million eviction cases were filed in the United States. *See On the Brink of Homelessness: How the Affordable Housing Crisis and the Gentrification of America Is Leaving Families Vulnerable: Hearing Before the H. Comm. on Financial Services*, 116th Cong. 6-7, 80-85 (2020) (statement of Prof. Matthew Desmond). In 2016 alone, 3.7 million eviction cases were filed, representing approximately eight percent of all renter households. *Id.* Evictions, in turn, cause additional poverty. They lead to job loss, schooling gaps, and health problems. Desmond & Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 *Social Problems* 46 (2016); Desmond & Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 *Social Forces* 295 (2015).

These effects are disproportionately seen in communities of color. People of color are twice as likely as white people to be renters and are disproportionately likely to be low-income and rental cost-burdened. Benfer et al., *The COVID-19 Eviction Crisis: an Estimated 30-40 Million People in America Are at Risk*, Aspen Institute (Aug. 7, 2020). Even before the onset of COVID-19, people of color, particularly Black and Latinx people, constituted the vast majority of people facing eviction. *Id.*; *see also* Greenberg et al., *Discrimination in Evictions: Empirical*

*Evidence and Legal Challenges*, 51 Harv. C.R.-C.L. L. Rev. 115, 133 (2016).

Eviction rates are, on average, significantly higher for Black renters than for white renters. Hepburn et al., *Racial and Gender Disparities among Evicted Americans*, Eviction Lab (Dec. 16, 2020). Black individuals make up about 20% of all adult renters but nearly 33% of all eviction-filing defendants. *Id.*

The COVID-19 pandemic and its economic fallout have predictably exacerbated this crisis. According to the Census Bureau, as of December 2020, more than ten million households were behind on their rent payments, placing them at heightened risk of eviction over the coming months. Parrott & Zandi, *Averting an Eviction Crisis*, Moody's Analytics (Jan. 2021). Approximately 20% of adult renters reported not paying the previous month's rent, according to a March 2021 survey conducted by the Census Bureau. U.S. Census Bureau, *Week 25 Household Pulse Survey: February 17–March 1* (Mar. 10, 2021); *see also* Nova, *CDC will extend national eviction ban through June 30*, CNBC (Mar. 29, 2021). Black and Hispanic households were more than twice as likely to report being behind on their payments than white households, with a third of Black renters reporting a recent missed payment. *Id.*; CFPB, *Housing insecurity and the COVID-19 pandemic* 3, 8, 15 (Mar. 2021). And during the pandemic, Black renters continue to be at the receiving end of a disproportionate share of eviction filings—in one study, they made up 21% of all renters, but received 36% of

evictions. Lemmerman et al., *Preliminary Analysis: Who is being filed against during the pandemic?*, Eviction Lab (Dec. 21, 2020).

During the pandemic, evictions lead not just to displacement and hardship for the affected renters, but also to significant health risk to the public. Specifically, as the CDC noted in promulgating the Order, evictions frequently lead to outcomes—such as homelessness or living in close quarters in shared housing and shelters—that increase the risk of COVID-19 spread. 86 Fed. Reg. at 8022. According to the CDC, modeling projections indicate that evictions substantially contribute to COVID-19 transmission. *Id.* Moreover, an analysis of observational data from state-based eviction moratoria showed significant increases in COVID-19 incidence and mortality following the lifting of such restrictions. *Id.* Researchers found that lifting moratoria and allowing evictions to proceed caused as many as 400,000 excess cases of COVID-19 and upwards of 10,000 additional deaths in the United States between March and September 2020, when the CDC ban went into effect nationwide. Leifheit et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality* 4-5 (pre-print Nov. 30, 2020).

Increased spread of COVID-19 is, in turn, a threat to the health and safety of all Americans. *See* Stevens, *Why outbreaks like coronavirus spread exponentially, and how to “flatten the curve”*, Wash. Post (Mar. 14, 2020). To date, more than

2,000,000 Americans have been hospitalized with confirmed COVID-19, and more than 560,000 have lost their lives to the virus. COVID Data Tracker, CDC.

Black and Latinx people have been three times as likely to become infected as white people, and nearly twice as likely to die from the virus. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. Times (July 5, 2020).

And that same population has received disproportionately fewer vaccines relative to its share of infections and death, and relative to its share of the total population in most states. Ndugga et al., *Latest Data on COVID-19 Vaccinations Race/Ethnicity*, KFF Organization (Apr. 28, 2021).

Blocking public health officials' temporary pause on evictions is likely to bring tragic consequences for public health, especially for communities of color. And these potential consequences are problems of national scope, to which a national response has been necessary.

## **II. THE FEDERAL GOVERNMENT HAS LONG REGULATED EVICTIONS UNDER ITS COMMERCE POWER**

As the government explains in its brief, the district court's reasoning is flawed in its unduly grudging approach to Congress's commerce power. One flaw in particular stands out—the fundamental premise from which the court began and on which it rested its reasoning: “The federal government has not claimed such a power at any point during our Nation’s history until last year.” ROA.1666. The district court returned to this premise throughout its decision, concluding that the



“absence of an historical analog” suggests constitutional weakness, and again noting that “no historical practice of analogous federal regulation has been cited.” ROA.1681-1682. But that premise is both historically inaccurate and overly restrictive of Congress’s authority, in contravention of long settled precedent.

*First*, there can be no serious doubt that the Commerce Clause allows the federal government to regulate the rental housing market, including individual housing transactions. Indeed, the Supreme Court has already decided that question. In *Russell v. United States*, 471 U.S. 858, 862 (1985), the Court considered whether a federal criminal statute—18 U.S.C. § 844(i), which prohibits arson with respect to “any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce”—extends to arson committed against a “two-unit apartment building that is used as a rental property.” 471 U.S. at 858-859. In reasoning that rented residential real estate was covered by the statute, the Court stressed that “local rental of an apartment unit is merely an element of a much broader commercial market in rental properties,” and it concluded that “[t]he congressional power [under the Commerce Clause] 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.* at 862. The Court subsequently reaffirmed this conclusion

in *Jones v. United States*, 529 U.S. 848, 856 (2000), holding that the rental of real estate is “unquestionably” an activity affecting interstate commerce.

*Russell* and *Jones* thus confirm that the CDC Order reflects a permissible exercise of the Commerce Clause power. The Order applies to “evictions” of “[c]overed person[s],” defined as any “tenant, lessee, or resident of a residential property who provides to their landlord . . . a legal right to pursue eviction,” 86 Fed. Reg. at 8020—in other words, it applies to the “rental market for real estate.” *Russell*, 471 U.S. at 862. Because Congress has the “power to regulate individual activity within” that rental market, it necessarily has the power to regulate (or delegate to an agency the power to regulate) evictions. This Court has recognized as much, holding in *Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 206-207 (5th Cir. 2000), that *Russell* “make[s] clear that renting and otherwise using housing for commercial purposes implicates the federal commerce power.”

The district court reasoned that, because *Russell* concerned “the meaning of an act of Congress,” it does not necessarily resolve “the scope of power granted by the Constitution” or whether a given regulated sector “substantially” affects interstate commerce for purposes of the Commerce Clause analysis. ROA.1677. But *Russell* itself rejected that distinction. Immediately after quoting the relevant statutory language, *Russell* held that Congress’s use of the phrase ““in any activity

affecting interstate or foreign commerce’ expressed an intent by Congress to *exercise its full power under the Commerce Clause*,” and thereby “cover[ed] all activity *substantially affecting interstate commerce*.” 471 U.S. at 859-860 & n.4 (emphasis added). There is, therefore, no daylight between *Russell’s* interpretation of the scope of 18 U.S.C. § 844(i) and “the scope of power granted by the Constitution,” ROA.1677, and the district court erred in discerning one. Because 18 U.S.C. § 844(i) can validly regulate local activity affecting the rental market, so too can the CDC Order.

The administrative record compiled by the agency further belies any notion that COVID-19 related evictions are problems of purely local concern beyond the reach of the federal government to address. As the government explains (Br. 2-4), the CDC Order makes specific findings illustrating how eviction-related increased spread of COVID-19 affects interstate commerce. It explains that the “statistics on interstate moves show that mass evictions would likely increase the *interstate* spread of COVID-19,” and that “over 35 million Americans, representing approximately 10% of the U.S. population, move each year”—approximately 15% of which are “*interstate*.” 86 Fed. Reg. at 8023 (emphasis added). Indeed, the CDC’s express justification for acting was precisely *because* “measures by states, localities, or territories” did not meet the minimum protections that the CDC determined are necessary to “prevent the *interstate* spread of COVID-19.” *Id.* at

8024 (emphasis added). By its very nature, the COVID-19 pandemic is a question of quintessential national concern with profound interstate effects, and national steps to combat the pandemic are necessarily steps substantially related to interstate commerce.

*Second*, the federal government has a long history of using its Commerce Clause power to regulate evictions and other aspects of housing, public accommodations, and travel. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 258-259 (1964), for example, the Supreme Court concluded that Congress's Commerce Clause power extended to anti-discrimination laws prohibiting discrimination by motels, "however 'local' their operations may appear." The Supreme Court extended this holding to restaurants in *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964), reaffirming what this Court has described as the "strong tradition of civil rights enforced through the Commerce Clause," *Groome*, 234 F.3d at 209.

The Fair Housing Act of 1968 (FHA) likewise demonstrates that the CDC's Order is not a novel or unprecedented regulation of rental housing transactions, including evictions. The FHA prohibits discrimination in the rental of housing based on race, color, national origin, religion, sex, familial status, and disability. 42 U.S.C. § 3604. The discriminatory housing actions prohibited specifically include eviction. *E.g.*, *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir.

1982); *Miller v. Towne Oaks E. Apartments*, 797 F. Supp. 557, 561 (E.D. Tex. 1992).<sup>2</sup> The FHA reflects a constitutional exercise of Congress’s power to prohibit evictions—precisely the power at issue here. As such, “the question [of] whether the federal government has authority to order property owners not to evict specified tenants,” is, in fact, already settled. ROA.1665.

Again, this Court has already addressed whether rental housing transactions fall within Congress’s commerce power, and has settled the question. In *Groome*, the Court considered whether Congress has the power under the Commerce Clause to define “housing discrimination to include a refusal to make reasonable accommodations for handicapped individuals.” 234 F.3d at 195; *see* 42 U.S.C. § 3604(f)(3)(B). This Court, like three other circuits at that time, concluded that Congress does have such authority—and at each step of its analysis, it rejected the reasoning employed by the district court below.

For example, the district court concluded that evictions are insufficiently “economic” in character because they pertain to “property rights in buildings.” ROA.1675. But *Groome* rejected that contention, holding that the challenged

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<sup>2</sup> Congress’s measures to prohibit racial discrimination in real estate transactions go back even farther than the FHA—to the Civil Rights Act of 1866. Section 1982 of Title 42, which descends from that statute, prohibits racial discrimination in evictions from rental housing. *Woods-Drake*, 667 F.2d at 1201; *see also* *Bills v. Hodges*, 628 F.2d 844, 845 (4th Cir. 1980).

statute “affected the ... commercial rental of housing and, therefore, fits well within the broad definition of economic activity established by the Supreme Court and other circuits.” 234 F.3d at 205. Similarly, the district court found that national regulation of evictions “suggest[s] a breakdown in the demarcation of traditional areas of state concern.” ROA.1682. But *Groome*, citing a “long lineage in the Supreme Court’s jurisprudence,” reached the opposite conclusion, noting Congress’s prerogative to “act[] in response to the recognition that in a mobile society in which people and families move within states and localities, and where local land use laws affect the movement of people, there is a national effect on housing materials, economic development, and growth of certain restricted areas.” 234 F.3d at 210. Thus, because in *Groome* a certain discriminatory activity affected the “commercial activity of operating a rental-based ... care facility, and the culmination of many such activities could rationally be determined to have a substantial effect on the national housing market, [this Court concluded] that under the *Lopez-Morrison* rational basis test, Congress acted within its Commerce Clause authority.” *Id.* at 211.

This Court’s decision in *Groome* does not stand alone. The Eighth Circuit, for example, considering a Commerce Clause challenge to an FHA amendment, had no trouble concluding that “Congress had a rational basis for deciding that housing discrimination ... has a substantial effect on interstate commerce.” *Oxford*

*House—C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996). Neither did the Tenth Circuit, which rejected a Commerce Clause-based challenge to FHA amendments prohibiting discrimination on the basis of familial status, concluding that the “legislative record, when viewed against a backdrop of the legislative history of the 1968 Fair Housing Act, provides a rational basis for finding that the sale *and rental* of residential housing ... concerns more than one state and has a real and substantial relation to the national interest.” *Morgan v. HUD*, 985 F.2d 1451, 1455 (10th Cir. 1993) (emphasis added) (quotation marks omitted). And the Eleventh Circuit reached a similar conclusion in *Seniors Civil Liberties Association v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992) (per curiam), finding “no merit in plaintiffs’ argument that, because the real estate market involves private intrastate transactions, no interstate commerce is involved in residential sales *and rentals*.” (emphasis added).

The district court acknowledged that a “law barring landlords from refusing to lease property for a prohibited reason could likewise bar landlords from evicting tenants for the same prohibited reason, lest the equal-leasing rule be readily undermined.” ROA.1680. But if Congress may, in fact, “bar landlords from evicting tenants” for a “prohibited reason”—which Congress has done in the FHA, in a manner consistently blessed by courts as constitutional—then the CDC Order,

which likewise bans landlords from evicting tenants for a specific “prohibited reason,” is also a valid exercise of Congressional power.

The only way to distinguish the CDC Order from Congress’s historical prerogative to combat discrimination in housing (including by barring evictions in certain circumstances) is to insist that public health and discrimination are distinct and incomparable issues. Indeed, the district court offered this purported distinction, suggesting that the CDC Order is aimed to combat ills associated with “public health,” rather than the “discrimination in housing” that justified the invocation of the Commerce Clause in *Groome* and the other cases discussed above. ROA.1679 (stating that “public health” is a “quintessential concern of the police power”).

The fact that the CDC Order may have been promulgated primarily to address public health does not undercut its constitutionality; public health, especially the prevention and mitigation of a pandemic that by its very nature transcends state boundaries, is surely a legitimate matter for federal attention under the Commerce Clause. *See United States v. Comstock*, 560 U.S. 126, 142 (2010) (assuming, without deciding, that the Commerce Clause would justify federal action to curb an “interstate epidemic.”). But in any event, the line between “public health” and “discrimination” cannot be so firmly drawn as the district court suggested.



In fact, civil rights and public health are inextricably linked. Patterns of public health in the United States reflect decades of discrimination in access to health care and other resources. Civil rights laws and their enforcement are social determinants of health; they causally affect the societal distribution of resources that in turn affect disease, injury, and health. Hahn et al., *Civil rights as determinants of public health and racial and ethnic health equity: Health care, education, employment, and housing in the United States*, 4 SSM-Population Health 17, 17-18 (2018). For minority populations—particularly African Americans, Native Americans, and Hispanics—the longstanding lack of civil rights in U.S. history is linked with persisting health inequities. *Id.* at 23.

In short, COVID-19 *is* a civil rights issue. As explained in Part I, *supra*, neither COVID-19 nor housing insecurities fall on all communities equally. People of color are twice as likely as white people to be renters. Benfer, *The COVID-19 Eviction Crisis*, *supra*. Black renters are also evicted at higher rates than their white counterparts. Hepburn, *Racial and Gender Disparities among Evicted Americans*, *supra*; Lemmerman, *Preliminary Analysis*, *supra*. And Black and Latinx people have been three times as likely to become infected as their white neighbors—and nearly twice as likely to die. Oppel Jr., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, *supra*. Increasing rates of eviction as a result of the pandemic—which the CDC Order both observed has happened and predicted

will continue—will inevitably exacerbate these disparate evils, with the same effects on interstate commerce as was found constitutionally sufficient to justify Congressional action in *Heart of Atlanta Motel*, 379 U.S. 241 at 258-259, and its storied progeny. *See also* DOJ, *Statement by the Principal Deputy Assistant Attorney General for Civil Rights Leading a Coordinated Civil Rights Response to Coronavirus* (Apr. 2, 2021) (“COVID-19 has magnified social, economic, and environmental inequalities that we cannot ignore.”).

Congress’s use of the commerce power to enforce civil rights law is thus not a relic of the past without application to the COVID-19 pandemic. The Supreme Court has long recognized that commerce powers “keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.” *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1878). Much as preventing discrimination was “a national concern that substantially affects the economic health of the nation” and thus required federal action in the 1960s, *see Groome*, 234 F.3d at 215, today’s pressing national concern is stopping the spread of COVID-19. And given the undeniable racial inequities that persist in the United States housing market and have grown worse as a result of the pandemic, the CDC’s Order is not a novel invention of federal power, but merely an outgrowth of the “strong tradition of civil rights enforced

through the Commerce Clause” which this and other courts have long protected.

*Id.* at 209.

### CONCLUSION

The judgment of the district court should be reversed.

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## CERTIFICATE OF SERVICE

I electronically filed the foregoing on May 4, 2021, using the Court's appellate CM/ECF system, which effected service on all counsel of record.

/s/ Paul R.Q. Wolfson

PAUL R.Q. WOLFSON

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5).

1. Exclusive of the exempted portions of this brief, as provided in Fed. R. App. P. 32(f), the brief contains 3,889 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font, as provided in Fed. R. App. P. 32(a)(5)-(6). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Paul R.Q. Wolfson

PAUL R.Q. WOLFSON