

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

OPENING BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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

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.

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Lufkin Creekside Apartments II, Ltd.

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O'Leary, Celia Howard

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Springer, Brian J.

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Texas Public Policy Foundation

U.S. Centers for Disease Control and Prevention

U.S. Department of Health and Human Services

United States of America

Vigen, Leslie Cooper

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s/ Brian J. Springer

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STATEMENT REGARDING ORAL ARGUMENT

The district court ruled that a temporary moratorium on certain evictions—which was put in place in order to prevent the interstate spread of COVID-19—exceeds Congress’s power to protect interstate commerce. That ruling rests on a fundamental misunderstanding of the controlling precedent of the Supreme Court and this Court. Given the importance of the case, the government respectfully requests oral argument, which should assist the Court in understanding the issues.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. ROA.17. The district court entered final judgment on February 25, 2021. ROA.1686-1687. The government filed a timely notice of appeal on February 27, 2021. ROA.1688-1690. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in ruling that a temporary moratorium on certain evictions—which was put in place to prevent the interstate spread of COVID-19—exceeds Congress's power to protect interstate commerce.

STATEMENT OF THE CASE

I. The Temporary Eviction Moratorium and Related Appropriations

A. The COVID-19 pandemic has killed more than half a million Americans, devastated industries that depend on the movement of people, and resulted in unprecedented restrictions on interstate and foreign travel. *See, e.g.*, H.R. Rep. No. 116-420, at 2-3 (2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,732-33 (Mar. 31, 2021). To curb the pandemic and its economic fallout, the federal government has deployed an array of measures, including trillions of dollars of emergency spending. Recognizing that the pandemic has made it difficult for many individuals and families to continue to make regular rental payments, Congress has appropriated more than \$46 billion to

help pay rent and rental arrears, thus assisting landlords and reducing the number of renters who might face eviction.

The measure at issue here—a temporary moratorium on certain evictions—forms another part of the multi-pronged effort to address evictions and their impact on the spread of COVID-19. The moratorium temporarily bars the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thereby increasing the spread of COVID-19. The Centers for Disease Control and Prevention (CDC) first issued the moratorium in September 2020 pursuant to its longstanding statutory authority to “make and enforce such regulations as in [the agency’s] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession,” Public Health Service Act, Pub. L. No. 78-410, § 361(a), 58 Stat. 682, 703 (1944) (codified at 42 U.S.C. § 264(a)); *see also* 42 C.F.R. § 70.2 (delegating enforcement authority to the CDC).¹ *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

¹ The Public Health Service Act assigned authority to the Surgeon General, but these statutory powers and functions were later transferred to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services. *See* Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966), *reprinted in* 80 Stat. 1610 (1966); *see also* 20 U.S.C. § 3508(b).

In issuing the moratorium, the CDC discussed research indicating that as many as 30 to 40 million people in the United States could be at risk of eviction in the absence of state and local protections, and that “mass evictions would likely increase the interstate spread of COVID-19.” 85 Fed. Reg. at 55,295. The CDC explained how congregate living situations, such as homeless shelters, exacerbate the spread of COVID-19. *See id.* at 55,294-95. Maintaining social distance is difficult in these settings, and “[e]xtensive outbreaks of COVID-19 have been identified in homeless shelters,” including in Seattle, Boston, and San Francisco. *Id.* at 55,295. The CDC also explained that the homeless population is at particular risk of requiring hospitalization from COVID-19, *see id.* at 55,295-96, and later noted that “increases in unsheltered homelessness may lead to further strains on the healthcare system,” Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020, 8023 (Feb. 3, 2021) (citing estimates that homeless persons use the emergency department at nearly five times the rate of the general population).

In December 2020, Congress extended the moratorium and, in the same legislation, appropriated \$25 billion in emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent. *See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, §§ 501, 502, 134 Stat. 1182, 2070-79 (2020) (2021 Appropriations Act).* This appropriation works in tandem with the moratorium, helping to “ensure that millions of renters across America are not evicted while waiting to receive assistance.” U.S. H. Comm. on Fin. Servs., *COVID-19*

Stimulus Package: Temporary Extension of the CDC Eviction Moratorium & Emergency Rental Assistance, <https://go.usa.gov/xss3y> (last visited Apr. 26, 2021).

The CDC extended the moratorium in January 2021 and again in March 2021. *See* 86 Fed. Reg. 8020; 86 Fed. Reg. 16,731.

Also in March 2021, Congress appropriated an additional \$21.5 billion in funding for emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent due to the pandemic. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54. Like the \$25 billion provided by the 2021 Appropriations Act, this additional funding is meant to work together with the temporary eviction moratorium, to help ensure that renters are not evicted before emergency assistance is received. *See, e.g.*, 167 Cong. Rec. H1281 (daily ed. Mar. 10, 2021) (statement of Rep. Waters) (urging the CDC to “again extend the federal eviction moratorium that expires on March 31, 2021 so that grantees have time to distribute assistance to renters in need”).

In extending the moratorium, the CDC emphasized the ongoing need to “maintain COVID-19 precautions to avoid further rises in transmission and to guard against yet another increase in the rates of new infections,” even as “vaccines continue to be distributed.” 86 Fed. Reg. at 16,733. As of March 25, 2021, nearly 30 million COVID-19 cases, resulting in more than 540,000 deaths, had been reported in the United States. *Id.* at 16,732. Although transmission has decreased since a peak in January 2021, the number of cases per day have remained almost twice as high as the

initial peak in April 2020 and transmission rates are similar to the second peak in July 2020. *Id.* Elevated rates of transmission are continuing, with 37% of U.S. counties experiencing “high” transmission, 30% of counties experiencing “substantial” transmission, and no counties free of spread as of the moratorium’s most recent extension. *Id.* at 16,733. The CDC emphasized that new variants of the virus make continued vigilance especially important. *Id.*

B. While the temporary eviction moratorium remains in effect, landlords may not evict covered persons from residential properties for the nonpayment of rent. *See* 85 Fed. Reg. at 55,292, 55,297. The moratorium applies only to individuals who, if evicted, would likely become homeless or be forced to live in close quarters in a congregate or shared living setting. *Id.* at 55,293. To qualify as a “[c]overed person,” a tenant must provide a sworn declaration to her landlord indicating that she (1) “has used best efforts to obtain all available government assistance for rent or housing”; (2) satisfies certain income requirements; (3) “is unable to pay the full rent . . . due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses”; (4) “is using best efforts to make timely partial payments that are as close to the full payment as . . . permit[ted]”; and (5) “has no other available housing options” and therefore would likely become homeless or be forced to “live in close quarters in a new congregate or shared living setting” if evicted. *Id.* (footnote omitted).

Although the moratorium temporarily protects covered persons from eviction for failure to pay rent, it does not excuse their obligations to pay rent or to comply with other obligations of their lease. 85 Fed. Reg. at 55,294. And even if a tenant qualifies as a covered person, the moratorium does not bar a landlord from commencing a state-court eviction proceeding, provided that actual eviction does not occur while the moratorium remains in effect. *See id.* at 55,293 (defining “[e]vict” as “to remove or cause the removal of”); *see also* CDC, *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions* 1, <https://go.usa.gov/x7dhh> (last visited Apr. 26, 2021) (stating that landlords are not prevented from “starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order”).

II. District Court Proceedings

Plaintiffs own or manage residential rental properties in Texas. ROA.16-17. Their complaint relied on a single legal theory, claiming that the temporary eviction moratorium exceeds Congress’s powers under the Commerce Clause and the Necessary and Proper Clause. ROA.25-29. Plaintiffs moved for a preliminary injunction, which the district court treated as a motion for summary judgment after giving notice to the parties. ROA.1671.

The district court dismissed two plaintiffs for lack of standing, ROA.1670, 1686, and entered a declaratory judgment in favor of the remaining five plaintiffs,

ROA.1684, 1686. The court recognized that the moratorium was issued to prevent the “spread of communicable diseases . . . *from one State or possession into any other State or possession.*” ROA.1678 (quoting 42 U.S.C. § 264(a)) (court’s emphasis). The court did not question the CDC’s findings that the eviction moratorium would reduce the spread of COVID-19 and that, absent a moratorium, 30 to 40 million people in the United States could be at risk of eviction, with a significant portion likely forced to move into the types of congregate housing that have seen extensive outbreaks of COVID-19. *See* 85 Fed. Reg. at 55,294-95. Nonetheless, the court ruled that the moratorium is not an “appropriate means” of curbing a raging national pandemic, ROA.1682-1683 (quotation marks omitted), declaring that “[r]eal estate is inherently local” and that the remedy of eviction for breach of real-estate rental agreements is not “economic in nature,” ROA.1675-1676.

SUMMARY OF ARGUMENT

In the midst of a pandemic that has killed more than half a million Americans and decimated domestic industries, the district court declared that a temporary moratorium on certain evictions—which Congress ratified by overwhelming majority—exceeds Congress’s powers under the Commerce Clause and Necessary and Proper Clause. That ruling is clear legal error. The objective of the temporary eviction moratorium and the means that it employs fall well within Congress’s authority “to protect the nation’s commerce” from the ravages of COVID-19. *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000).

The COVID-19 pandemic has devastated industries that depend on the movement of people, imposed critical strains on the healthcare system, and resulted in unprecedented restrictions on interstate and foreign travel. There is no doubt that Congress can act to control such an “interstate epidemic.” *United States v. Comstock*, 560 U.S. 126, 134-35, 142, 148 (2010) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause)). And there should be no doubt that the temporary eviction moratorium is a means “reasonably adapted” to that legitimate commerce-power end. *Id.* at 135 (quotation marks omitted).

The district court erred in likening the moratorium to the statutes at issue in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), which regulated noneconomic activities—the possession of a gun in a school zone and gender-motivated violence—that formed no part of any broader protection of interstate commerce. By contrast, the moratorium regulates the terms of contracts for “rental of real estate,” which, the Supreme Court has held, is “unquestionably” an activity affecting interstate commerce. *Jones v. United States*, 529 U.S. 848, 856 (2000) (quoting *Russell v. United States*, 471 U.S. 858, 862 (1985)); accord *Groome*, 234 F.3d at 206 (recognizing that “rent[ing] a house” is “a transparently commercial action”). The moratorium regulates these economic activities for the specific purpose of curbing the spread of a deadly disease that respects no state’s boundaries. And the moratorium forms part of the broader federal effort to control the COVID-19 pandemic and its economic fallout. The judgment of the district court should be reversed.

STANDARD OF REVIEW

Constitutional challenges to the application of a federal statute are reviewed de novo. *See Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 198 (5th Cir. 2000).

ARGUMENT

I. The Temporary Eviction Moratorium Is An Appropriate Means To Protect Interstate Commerce From The Devastation Caused By The COVID-19 Pandemic

The Constitution vests Congress with the authority “to regulate Commerce . . . among the several states,’ and [the] concomitant power to protect the nation’s commerce by enacting such laws as it deems ‘necessary and proper.’” *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000) (ellipsis in original) (quoting *United States v. Robinson*, 119 F.3d 1205, 1209 (5th Cir. 1997) (quoting U.S. Const. art. I, § 8, cls. 3, 18)). That authority plainly encompasses the temporary eviction moratorium. The moratorium—which Congress specifically approved and extended—temporarily bars the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thereby increasing the interstate spread of COVID-19. There is no doubt that Congress can act to control an “interstate epidemic,” and the temporary eviction moratorium is a means “reasonably adapted” to that legitimate commerce-power end. *United States v. Comstock*, 560 U.S. 126, 134-35, 142, 148 (2010) (quotation marks omitted) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause)).

COVID-19 is highly contagious and extraordinarily deadly, and it respects no state’s boundaries. The pandemic has killed more than half a million Americans, and its impact on interstate commerce is well documented. The pandemic has “devastated industries that depend on the movement of people.” 86 Fed. Reg. at 16,733; *see* H.R. Rep. No. 116-420, at 2-3. Its effects on the travel, leisure, and hospitality industries have been especially damaging. Indeed, ten months after the initial wave of closures due to COVID-19, more than 16% of the hospitality and leisure sector’s labor force was unemployed. 86 Fed. Reg. at 16,733 & n.24.

Surges in COVID-19 cases have imposed critical strains on the healthcare system. 86 Fed. Reg. at 8023-24, 8024 n.38. And the pandemic has “triggered unprecedented restrictions on interstate and foreign travel.” 86 Fed. Reg. at 16,733. For example, many states imposed conditions on entry from other states, mandating that travelers obtain negative test results and quarantine for extended periods. *Id.* at 16,733 & n.20 (citing CDC, *Domestic Travel During COVID-19*, <https://go.usa.gov/xHDTx> (last updated Apr. 2, 2021)). Similar checks have been put in place for international travel: before boarding a flight to the United States from abroad, for example, all passengers age two and older—including U.S. citizens—must obtain a negative test result or show proof of recovery. *Id.*; *see* CDC, *Testing and International Air Travel*, <https://go.usa.gov/xH9nV> (last updated Feb. 18, 2021).

The temporary eviction moratorium has been an important part of the federal government’s multi-pronged effort to limit a surge in evictions and the resulting

acceleration in the spread of the virus. Absent the moratorium, 30 to 40 million people in the United States could be at risk of eviction, and a significant portion of that population would likely be forced to move into new congregate living situations, such as housing shelters, where people are in close contact and prophylactic measures are often difficult to implement. 85 Fed. Reg. at 55,294-95.

The importance of the federal eviction moratorium is highlighted by the experience in states that imposed their own eviction moratoria and then rescinded the restrictions. Data comparing COVID-19 spread in states that lifted eviction moratoria with states that maintained eviction moratoria “showed significant increases in COVID-19 incidence and mortality approximately 2-3 months after eviction moratoria were lifted.” 86 Fed. Reg. at 8022. The data indicated that “over 433,000 cases of COVID-19 and over 10,000 deaths could be attributed to lifting state moratoria.” *Id.* And based on mathematical modeling, the CDC estimated that lifting eviction moratoria led to a 40% increased risk of contracting COVID-19 among evicted persons and family or friends with whom they shared housing after eviction. *Id.* Those models also predicted an increase in overall community transmission even among those who did not share housing when evictions occur. *Id.*

The CDC’s analysis underscored the extent to which state and local measures have insufficiently addressed the spread of COVID-19. Even where states have imposed some forms of moratoria, many of those restrictions have lapsed, and a state-by-state analysis indicated that “eviction moratoria and other protections from

eviction have expired or are set to expire in many jurisdictions.” 85 Fed. Reg. at 55,296 n.36.

Contrary to the district court’s premise, ROA.1681, the federal government is not required to rely on state and local eviction moratoria to curb the spread of COVID-19. The impact of the pandemic is not limited to persons or activities within a state—instead, because of the nature of the COVID-19 virus, the effects are quickly felt by individuals and enterprises across the nation. Congress has ample authority to protect interstate commerce from the devastating impact of the pandemic.

II. The District Court’s Ruling Rests On A Basic Misunderstanding Of Controlling Precedent

The district court’s decision reflects a fundamental misunderstanding of the governing precedent. “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and also to regulate intrastate economic activities that “substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). As discussed above, the temporary eviction moratorium is easily sustained under this framework because it helps to protect interstate commerce from the interstate spread of COVID-19. Moreover, it regulates a class of economic activities (evictions) that substantially affect interstate commerce.

A. The moratorium regulates the “rental of real estate,” which, the Supreme Court has held, is “unquestionably” an activity affecting interstate commerce. *Jones v.*

United States, 529 U.S. 848, 856 (2000) (quoting *Russell v. United States*, 471 U.S. 858, 862 (1985)). In *Russell*, the defendant unsuccessfully challenged his conviction for attempted arson, arguing that there was no substantial connection to interstate commerce because the building he tried to burn down—an apartment complex that he rented out—was not commercial or business property. 471 U.S. at 859. Rejecting that contention, the Supreme Court explained that Congress can “regulate the class of activities that constitute the rental market for real estate.” *Id.* at 862. The Supreme Court later reaffirmed these principles, highlighting the “dispositive fact” that the defendant in *Russell* “was renting his apartment building to tenants at the time he attempted to destroy it by fire.” *Jones*, 529 U.S. at 853 (quotation marks omitted).²

This Court has relied on these cases to uphold, as a valid exercise of Congress’s commerce power, a federal statute that prohibits discrimination in the rental of housing. *Groome*, 234 F.3d at 216. This Court had no difficulty concluding that “it is a transparently commercial action to buy, sell, or rent a house,” and that “viewed in the aggregate, [this action] implicates an entire commercial industry.” *Id.* at 206. In so holding, this Court noted that the Supreme Court’s decisions in *Russell* and *Jones*

² The district court incorrectly dismissed these Supreme Court cases on the theory that they addressed the “meaning of an act of Congress” rather than “the scope of power granted by the Constitution.” ROA.1676-1677. But the Supreme Court interpreted the federal statute at issue as “express[ing] an intent by Congress to exercise its full power under the Commerce Clause,” *Russell*, 471 U.S. at 859, and this Court thus invoked those cases to reject a Commerce Clause challenge to a federal statute, *see Groome*, 234 F.3d at 206.

“make clear that renting and otherwise using housing for commercial purposes implicates the federal commerce power.” *Id.* Accordingly, this Court held that the provision at issue in *Groome* fell within the commerce power because regulating discriminatory policies in the rental of property “directly affects the housing industry and the economy.” *Id.* at 215.

The same reasoning applies to the temporary eviction moratorium, which regulates the terms of housing-rental contracts. As in *Groome*, plaintiffs here are “commercial actor[s]” whose business is the rental of residential properties, *Groome*, 234 F.3d at 206; *see* ROA.16-17, and they assert monetary harms, ROA.20-25. Their rental contracts are subject to the temporary eviction moratorium, which addresses the contractual relationship between “any tenant, lessee, or resident of a residential property” who meets certain criteria and “their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action.” 85 Fed. Reg. at 55,293.

The district court acknowledged that the landlord-tenant relationship has a “commercial origin” and is “economic” in nature, ROA.1676, but mistakenly regarded evictions as divorced from that economic activity, ROA.1675-1676. Landlords and tenants typically enter into a financial arrangement in which the tenant may occupy a property in exchange for periodic rental payments. *See, e.g.*, 49 Tex. Jur. 3d *Landlord and Tenant* § 1 (3d ed. 2021). Evictions are a part of the bargain, serving as a contractual remedy for failure to abide by the terms of such rental arrangements. *See*

In re Stoltz, 315 F.3d 80, 86 (2d Cir. 2002) (describing “eviction” as a remedy “for breach of lease”). Thus, evictions are as much a part of the economic activity as the other transactions associated with the rental market.

The temporary eviction moratorium also forms part of the broader federal efforts to control the COVID-19 pandemic and its economic fallout. These efforts include more than \$5 trillion dollars of federal spending that Congress authorized in a series of enactments. *See* Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); 2021 Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182; American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

As particularly relevant here, the 2021 Appropriations Act and the American Rescue Plan Act together appropriated more than \$46 billion in emergency assistance for rent and rental arrears. These massive appropriations are intended to work in tandem with the eviction moratorium, which helps to “ensure that millions of renters across America are not evicted while waiting to receive assistance.” U.S. H. Comm. on Fin. Servs., *COVID-19 Stimulus Package: Temporary Extension of the CDC Eviction Moratorium & Emergency Rental Assistance*, <https://go.usa.gov/xss3y> (last visited Apr. 26, 2021); 167 Cong. Rec. H1281 (statement of Rep. Waters) (urging the CDC to

“again extend the federal eviction moratorium that expires on March 31, 2021 so that grantees have time to distribute assistance to renters in need”); *see also, e.g.*, Texas Dep’t of Hous. and Cmty. Affairs, *Texas Rent Relief*, <https://texasrentrelief.com> (last visited Apr. 26, 2021) (noting that funds remain available and encouraging landlords and tenants to apply).

B. The district court clearly erred in likening the temporary eviction moratorium to the statutes at issue in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000). Those statutes regulated noneconomic activities—possession of a gun near a school (*Lopez*) and gender-motivated violence (*Morrison*)—and formed no part of any broader protection of interstate commerce. The Supreme Court “emphasized the noneconomic nature of the regulated conduct,” commenting in *Lopez*, for example, that the statute had ““nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms.”” *Sabri v. United States*, 541 U.S. 600, 607 (2004) (quoting *Lopez*, 514 U.S. at 561). By contrast, the temporary eviction moratorium regulates economic activities (evictions) in order to curb a pandemic that has shuttered major sectors of the domestic economy.

The district court was likewise wrong to suggest that Congress needed to enact a “jurisdictional element” tying the temporary eviction moratorium to interstate commerce. ROA.1677-1678. As discussed above, the moratorium was first issued pursuant to the Public Health Service Act, which authorizes actions to prevent the spread of disease “from one State or possession into any other State or possession.”

42 U.S.C. § 264(a). Congress expressly cross-referenced that statutory authority when it extended the moratorium. *See* 2021 Appropriations Act, § 502, 134 Stat. at 2078-79 (extending the moratorium issued “under section 361 of the Public Health Service Act (42 U.S.C. 264)”). When, as here, a federal statute regulates economic activity with a substantial effect on interstate commerce, there is no need for a jurisdictional element to establish a nexus to commerce on a case-by-case basis. *See United States v. Ho*, 311 F.3d 589, 602-04 (5th Cir. 2002) (upholding criminal asbestos-related statutes with no jurisdictional element because of the “commercial purpose” of “asbestos removal projects”); *Groome*, 234 F.3d at 211 (upholding housing discrimination provision with no jurisdictional element because of “the explicit economic nature of commercial housing used for rental purposes”).

The district court’s pronouncement that evictions are “local,” ROA.1675, is also immaterial. “Congress is empowered to regulate and protect . . . interstate commerce . . . *even though the threat may come only from intrastate activities.*” *Lopez*, 514 U.S. at 558 (emphasis added); *see also Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) (noting that the commerce power extends to “attempts to affect even the intrastate sale of marijuana grown within the State,” and upholding a federal conviction for attempting to steal marijuana from a local drug dealer’s private home).

Finally, it is irrelevant that Congress did not make “formal findings” tying pandemic-control measures to interstate commerce. ROA.1678-1679 (quotation marks omitted). The Supreme Court has emphasized that “Congress need [not] make

particularized findings in order to legislate.” *Lopez*, 514 U.S. at 563 (quoting *Perez v. United States*, 402 U.S. 146, 156 (1971)). In any event, the pandemic’s effects on interstate commerce “are ‘visible to the naked eye.’” *Ho*, 311 F.3d at 603 (quoting *Lopez*, 514 U.S. at 563). Stemming the spread of a highly contagious disease that has killed more than half a million Americans and has ravaged major industries “is a national concern that substantially affects the economic health of the nation.” *Groome*, 234 F.3d at 215.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court’s judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brian J. Springer

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,375 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer

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