

**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.

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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Appeal from the United States District Court  
for the Eastern District of Texas

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**BRIEF OF AMICUS CURIAE TEXAS APARTMENT  
ASSOCIATION IN SUPPORT OF APPELLANTS LAUREN  
TERKEL ET AL.**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A) and Fifth Circuit LAR 26.1.1, *Amicus Curiae* Texas Apartment Association states, to the extent disclosure is required, it does not have a parent corporation and there is no publicly held corporation that holds 10 percent or more of its stock.

June 2, 2020

/s/ Nicole Leonard Cordoba

Nicole Leonard Cordoba

**STATEMENT OF CONSENT TO FILE AMICUS BRIEF**

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amicus* certifies that all parties have consented to the filing of this brief.

June 2, 2021

*/s/ Nicole Leonard Cordoba*  
Nicole Leonard Cordoba

## TABLE OF CONTENTS

	<i>Page</i>
CORPORATE DISCLOSURE STATEMENT .....	ii
STATEMENT OF CONSENT TO FILE AMICUS BRIEF.....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> .....	vii
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	3
I. The Commerce Clause does not infinitely extend federal power.....	3
A. The substantial effects test distinguishes between economic and noneconomic activity. ....	4
B. The Commerce Clause allows regulation of commerce, not inactivity. ....	5
II. The eviction moratorium does not regulate economic activity.....	6
A. The eviction moratorium regulates eviction, a state statutory remedy. ....	6
1. The regulated activity is eviction.....	7
2. Eviction is a judicial remedy to prove a property owner’s superior possessory rights against a party wrongfully possessing real property. ....	7
3. Judicially ousting a trespasser is a possessory activity.....	9
4. State governments regulate eviction procedures. ....	11
B. The eviction moratorium does not regulate the “rental of real estate”—it compels possession. ....	14
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE.....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bockelmann v. Marynick</i> , 788 S.W.2d 569 (Tex. 1990) .....	9, 14
<i>Coinmach Corp. v. Aspenwood Apt. Corp.</i> , 417 S.W.3d 909 (Tex. 2013).....	<i>passim</i>
<i>Geldard v. Watson</i> , 214 S.W.3d 202 (Tex. App.—Texarkana 2007, no pet.) .....	7
<i>Goodman–Delaney v. Grantham</i> , 484 S.W.3d 171 (Tex. App.—Houston [14th Dist.] 2015, no pet.).....	7
<i>Gym–N–I Playgrounds, Inc. v. Snider</i> , 220 S.W.3d 905 (Tex. 2007) .....	9
<i>Marshall v. Hous. Auth.</i> , 198 S.W.3d 782 (Tex. 2006) .....	8
<i>Nat’l Fed. of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012).....	5, 15
<i>Shields L.P. v. Bradberry</i> , 526 S.W.3d 471 (Tex. 2017) .....	8
<i>United States v. Corona</i> , 108 F.3d 565 (5th Cir. 1997) .....	4
<i>United States v. Lopez</i> , 514 U.S. 549 (2001) .....	<i>passim</i>
<i>United States v. Morrison</i> , 529 U.S. 598 (2000) .....	<i>passim</i>
<i>Wood v. Kennedy</i> , 473 S.W.3d 329 (Tex. App.—Houston [14th Dist.] 2014, no pet.).....	9
<b>Rules</b>	
TEX. R. CIVIL PROC. 742a .....	12
<b>Statutes</b>	
TEX. PROP. CODE, ch. 24 .....	11
TEX. PROP. CODE § 24.001 .....	2

TEX. PROP. CODE § 24.002 ..... 8, 11, 14  
TEX. PROP. CODE § 24.002(b).....12  
TEX. PROP. CODE § 24.004.....12  
TEX. PROP. CODE § 24.005.....12  
TEX. PROP. CODE § 24.0051(a).....12  
TEX. PROP. CODE § 92.331 .....12  
TEX. PROP. CODE § 92.335 .....12

**Other Authorities**

THE FEDERALIST NO. 17 (Alexander Hamilton) (J.R. Pole, ed., 2005) .....13  
*Temporary Halt in Residential Evictions to Prevent the Further  
Spread of COVID-19*, 85 Fed. Reg. 55292 (Sept. 4, 2020) ..... 7

**STATEMENT OF INTEREST OF *AMICUS CURIAE***

*Amicus Curiae* Texas Apartment Association (“TAA”) provides this Statement of Interest pursuant to Federal Rules of Appellate Procedure 29(a)(4)(D), (E) and Fifth Circuit Local Operating Rule 29.2, regarding this brief, which TAA files as *amicus curiae* in support of Appellees (collectively, “Property Owners”).

TAA is a non-profit, statewide trade association that has been serving the rental housing industry in Texas for more than 50 years. TAA has 24 affiliated local chapters and more than 11,000 members, which include property owners, builders, developers, property management firms, and service providers. TAA member companies are responsible for approximately 2.2 million residential homes and units across Texas that house roughly 4 million Texans.

The Property Owners’ lawsuit and this appeal present a critically important question that greatly affects TAA members and all other Texas property owners—can they exercise their only judicial remedy when wrongfully dispossessed of their real property?

*Amicus Curiae* hereby certifies that no party’s counsel authored this brief in whole or in part. TAA paid the fees for the preparation of this brief. While Appellees Lufkin Creekside Apartments, Ltd., Lufkin Creekside

Apartments II, Ltd., Lakeridge Apartments, Ltd., Weatherford Meadow Vista Apartments, L.P., and MacDonald Property Management, L.L.C. are members of TAA, the fees for the preparation of this brief are paid by the TAA and ultimately by all of its members.

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH  
CIRCUIT:

The Property Owners’ Response Brief correctly demonstrates the correctness of the district court’s opinion that found the eviction moratorium exceeds Congress’s Commerce Clause power.

TAA will focus on the character of the activity regulated by the moratorium: judicial eviction. The district court correctly held that the moratorium on judicial evictions does not regulate the production or use of a commodity traded in an interstate market. Instead, it regulates “whether an owner may regain possession of property from an inhabitant.” ROA.1675.

To prevail, the Government must, therefore, blur the clear distinction between the specific activity regulated by the moratorium—the judicial remedy of eviction—and the broad notion of “rental of real estate.” But under modern Supreme Court Commerce Clause doctrine stemming from *United States v. Lopez*, 514 U.S. 549 (2001), the district court’s analysis clearly delineating the actual activity regulated here—eviction—was correct.

TAA thus asks this Court to affirm the district court’s opinion enforcing the Constitutional limits on the federal government’s power to regulate non-economic activity under the Commerce Clause.

## SUMMARY OF THE ARGUMENT

The Government attempts to justify the CDC’s overreaching eviction moratorium by arguing that it is a regulation of activities that “substantially affect interstate commerce.” *See* Appellants’ Br. at 12 (citing *Lopez*, 514 U.S. at 558–559). To determine whether activity substantially affects interstate commerce, the Court must aggregate *only* the effects of individual economic activities—not those of noneconomic activities traditionally regulated by states. *See United States v. Morrison*, 529 U.S. 598, 613 (2000). Importantly, the Commerce Clause only permits Congress to regulate existing economic activities—it cannot compel commerce, interstate or no. But that is exactly what the eviction moratorium does.

The Government’s premise, that eviction constitutes economic activity because it is “a *contractual remedy* for failure to abide by the terms of . . . rental arrangements,” is as inaccurate as it is cursory. Appellants’ Br. at 15 (emphasis added). In Texas (as in many other states) eviction is a statutory remedy established and regulated by state and local laws, *independent* from contractual agreements like leases. *See, e.g.*, TEX. PROP. CODE § 24.001 *et seq.*

Eviction is only available when the person in possession has already lost his or her contractual right to possess the property. The lease agreement has already terminated, and the parties are no longer engaged in any

commercial activity. The Supreme Court of Texas has squarely held that “eviction is allowed only if the tenant has no remaining legal or possessory interest, which makes the tenant a tenant at sufferance.” *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 920 (Tex. 2013)

Because the eviction moratorium does not regulate economic activity, its status and impact as an “intrastate activity” must be evaluated on a case-by-case basis. It cannot be viewed as an aggregate, as the Government argues. *See Morrison*, 529 U.S. at 613.

The Government’s attempt to reframe the eviction moratorium as a regulation of real estate rentals also fails. Simply put, property owners attempting to evict tenants have ceased commercial, rental activity. Instead, eviction can only occur *after* the lease has terminated and the tenant has no possessory interest or legal right to occupy the property.

## **ARGUMENT**

### **I. The Commerce Clause does not infinitely extend federal power.**

TAA generally agrees with and adopts the Property Owners’ description of the legal framework governing the Commerce Clause as it relates to this matter. We provide a brief overview of the precedents relevant to the discussion in Part II of this brief.

For three decades, the Supreme Court has established principles of federalism by demarcating the Commerce Clause’s reach. Congress may regulate, under its commerce authority, three categories of activity:

- (1) “the channels of interstate commerce,”
- (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and
- (3) “those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”

*Lopez*, 514 U.S. at 558–559 (internal citations omitted). This case involves only the third category, sometimes called the “substantial effects” test. *See, e.g., United States v. Corona*, 108 F.3d 565, 571 n.2 (5th Cir. 1997).

**A. The substantial effects test distinguishes between economic and noneconomic activity.**

When the regulated activity is noneconomic, such as possessing a gun near a school zone or committing gender-motivated violence against women, the affects on interstate commerce cannot be aggregated, but rather must be measured on a case-by-case basis. *Morrison*, 529 U.S. at 613. By contrast, economic activities whose impact can be aggregated include intrastate coal mining, credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate travelers, and the production

and consumption of homegrown wheat. *Lopez*, 514 U.S. at 559–560 (citing cases).

**B. The Commerce Clause allows regulation of commerce, not inactivity.**

Though economic activity is a touchstone of the substantial effects test, not all laws that touch economic activity can be upheld under the Commerce Clause. Congress may only regulate existing commercial activity; it cannot mandate that a party participate in a market in which he or she is not actively participating. *See Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552–553 (2012). That distinction is dispositive.

In *Sebelius*, the Court analyzed whether Congress could mandate that individuals purchase health insurance by imposing a penalty on those who did not purchase insurance. *Id.* at 542. The Court explained that the “power to *regulate* commerce presupposes the existence of commercial activity to be regulated.” *Id.* at 550. It does not, however, allow Congress to *create* commerce by “compel[ling] individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.” *Id.* at 552. For that reason, the individual mandate could not be upheld on the basis of the Commerce Clause. *Id.* at 550.

## **II. The eviction moratorium does not regulate economic activity.**

The Government argues that the eviction moratorium is a regulation of economic activity that, in aggregate, substantially affects interstate commerce. But the Government misapprehends what eviction is and its underlying principles, including the legal bases for pursuing eviction, the procedures governing the process, and, at bottom, the definition and purpose of eviction.

A searching and more nuanced analysis of eviction quickly reveals that, in regulating eviction, the moratorium does not regulate economic activity and, therefore, cannot be supported by aggregating the impact on interstate commerce of thousands of evictions. Nor can the eviction moratorium be upheld by characterizing it as a regulation of renting real estate. To the contrary, by state law eviction cannot occur until the parties no longer are participating in commerce with each other. In reality, the regulation does what it must not do—it compels a rental transaction rather than regulating it.

### **A. The eviction moratorium regulates eviction, a state statutory remedy.**

The impacts of individual evictions on interstate commerce cannot be aggregated to create a substantial effect on interstate commerce precisely because the moratorium regulates inherently non-economic activity.

**1. The regulated activity is eviction.**

The Government’s premise requires a mischaracterization of the focus of the substantial effects test—the activity regulated by the eviction moratorium. *See, e.g., Morrison*, 529 U.S. at 610–611 (focusing on whether possessing a gun near a school was an economic endeavor).

Here, the eviction moratorium only prohibits eviction. *See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55292 (Sept. 4, 2020). It does not regulate any other activity, nor a class of activities that relate to the rental of real estate. Accordingly, the mandated inquiry is whether eviction itself is an economic activity. It is not.

**2. Eviction is a judicial remedy to prove a property owner’s superior possessory rights against a party wrongfully possessing real property.**

Eviction, also called “forcible detainer,” is a “summary, speedy, and inexpensive proceeding to determine who has the right to immediate possession of [real] property.” *Goodman–Delaney v. Grantham*, 484 S.W.3d 171, 174 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Geldard v. Watson*, 214 S.W.3d 202, 206 (Tex. App.—Texarkana 2007, no pet.)). To succeed in an eviction action, the property owner must prove:

- (1) it owns the property;
- (2) the tenant is a tenant at will or tenant at sufferance, or the tenant is willfully holding over after the termination of his or her right of possession;
- (3) proper notice to vacate; and
- (4) tenant refused to vacate.

*Shields L.P. v. Bradberry*, 526 S.W.3d 471, 478 (Tex. 2017) (citing TEX. PROP. CODE § 24.002).

“The only issue in a forcible detainer [eviction] action is the right to actual possession of the premises.” *Marshall v. Hous. Auth.*, 198 S.W.3d 782, 785 (Tex. 2006).

The eviction statute does not grant tenants any legal rights or property interest. Instead, a property owner must prove the tenant does not have such rights and interest. *Coinmach*, 417 S.W.3d at 920.

Hence, the eviction statute merely “provides procedural protections that apply once the tenant has lost, or allegedly lost, all legal interests and possessory rights.” *Id.* “Eviction is allowed *only if* the tenant has no remaining legal or possessory interest, which makes the tenant a tenant at sufferance.” *Id.* (emphasis added).

A “tenant at sufferance” is a holdover tenant—a “tenant who continues to occupy leased premises after expiration or termination of the lease”—who

does not have the landlord's consent to continue occupying the property. *Wood v. Kennedy*, 473 S.W.3d 329, 335 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Gym–N–I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 908 (Tex. 2007) & *Bockelmann v. Marynick*, 788 S.W.2d 569, 571 (Tex. 1990)). Even during the time before an eviction action finally concludes that a tenant does not have a legal right to possess the property, the “tenant at sufferance *remains a trespasser* on the property.” *Coinmach*, 417 S.W.3d at 920 (emphasis added).

**3. Judicially ousting a trespasser is a possessory activity.**

Simply put, eviction necessarily occurs *after* economic activity has ceased. Termination of possession may occur upon either expiration of the lease period or breach of lease terms, such as failure to pay rent. Once that occurs, the lease terms no longer control the parties' relationship. *Wood*, 473 S.W.3d at 335 (citing *Coinmach*, 417 S.W.3d at 916–917).

Any doubt about whether eviction involves economic activity or a tenant's economic interest in the property is dispelled by *Coinmach's* holding that a tenant at sufferance is a trespasser even before the eviction action concludes in court. Trespassing is not an economic activity.

The Government contends that the Property Owners assert “monetary harms” (Appellants' Br. at 14), but this argument misdirects the inquiry.

Whether or not the Property Owners suffer financially from the eviction moratorium is irrelevant to whether the activity being regulated—eviction of trespassers—is economic. It does not matter whether a property owner wrongfully dispossessed of his or her property may plainly claim monetary harm as a result. Indeed, a victim of gender-based violence will likely suffer and may claim economic damages (such as medical costs or lost wages), but that harm does not render the violence itself economic. *See Morrison*, 529 U.S. at 613. Likewise, a prohibition on evictions may cause property owners to suffer from their inability to put their property to use while a tenant continues to trespass, but the eviction proceeding against a trespasser remains a judicial remedy, not commerce.

Thus, the eviction is wholly separate from the original, voluntary rental transaction. Eviction is merely the exclusive judicial remedy by which the property owner can vindicate and recover its property rights, halting the ongoing tortious trespass against its property. *See Coinmach*, 417 S.W.3d at 912. A regulation prohibiting pursuit of a judicial remedy for a trespasser's interference with property rights must not be construed as a regulation of economic activity.

**4. State governments regulate eviction procedures.**

Remedies for wrongful possession of real property are inherently subject to state law. It follows that these legal proceedings to determine possession are governed by state and local laws that both provide procedural protections to tenants and dictate the manner in which the eviction must be carried out. The CDC’s eviction moratorium does just what *Morrison* prohibits—distort the “distinction between what is truly national and what is truly local” by regulating an activity that “has always been the province of the states.” *See* 529 U.S. at 617–618.

**a. The Texas Property Code governs eviction proceedings in Texas.**

Texas state law provides a comprehensive regime governing evictions. Texas Property Code chapter 24 sets out the requirements for an eviction action, in which the property owner pursues a cause of action titled “forcible detainer.” Section 24.002 provides:

- (a) A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person:
  - (1) Is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant’s right of possession;
  - (2) Is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant’s lease; or

- (3) Is a tenant of a person who acquired possession by forcible entry.
- (b) The demand for possession must be made in writing by a person entitled to possession of the property and must comply with the requirements for notice to vacate under Section 24.005.

The suit must be brought in a justice court in the precinct where the property is located. *Id.* § 24.004.

**b. The Texas Property Code provides tenants with procedural and substantive protections during the eviction process.**

The Property Code protects tenants beginning with notice requirements. *Id.* §§ 24.002(b), 24.005, 24.0051(a). A property owner seeking eviction based on unpaid rent may personally serve the tenant or provide service on the tenant under Texas Rule of Civil Procedure 742a. *Id.* § 24.0051(a) (citation must include a notice stating that failure to appear for trial may result in default judgment, that the suit involves immediate deadlines, that certain legal protections may apply, and that the tenant may seek help by calling the State Bar of Texas).

State law also provides tenants statutory defenses to eviction. For example, a property owner may not seek eviction against a tenant for various protected activities, including exercising legal remedies under the lease, municipal ordinances, or state statutes or complaining about necessary repairs or code violations in good faith. *Id.* §§ 92.331, 92.335.

**c. The eviction moratorium impermissibly encroaches on power reserved for the states.**

The careful and longstanding state regulation of eviction and protections for tenants should not be surprising: such protections of property rights lie within the traditional province of state governments, not the federal government. The United States Constitution carefully balances powers between the federal and state governments, enumerating the powers of the federal government and reserving all else to the states.

In particular, “the ordinary administration of criminal and civil justice” “belong[s] to the province of the state governments.” THE FEDERALIST NO. 17, at 88 (Alexander Hamilton) (J.R. Pole, ed., 2005). The state governments were formulated to be closest to the citizens and the “immediate and visible guardian of life and property.” *Id.* Regulation of a judicial remedy geared toward guarding property rights and halting the civil injustice of ongoing tortious trespass falls squarely within this sphere.

The reservation of these matters for the states serves an important and legitimate purpose. As the Court recognized in *Lopez*, other, more practicable means to provide relief to those struggling to meet rent obligations as a result of Covid-19 “may be thought of by the citizens of some States to be preferable for the [relief] of the [tenants and property owners] those States are charged with maintaining.” 514 U.S. at 581–582.

**B. The eviction moratorium does not regulate the “rental of real estate”—it compels possession.**

The moratorium cannot be upheld, even looking more broadly (as Appellants suggest) at the eviction moratorium as regulating “rental of real estate.” To the contrary, ordering landlords to participate in the real estate rental market by leasing to individuals who are not paying rent and who have no ongoing right to possess the rental property does not regulate the activity of renting real estate—it creates economic inactivity by compelling noneconomic possession after the economic activity of renting real estate has ceased.

Again, an eviction action, or lawsuit for “forcible detainer,” only serves to establish the person or entity with the immediate right to possession of the property. *Coinmach*, 417 S.W.3d at 920. The procedure applies only *after* the tenant has lost the right to possess the property—that is, that the lease has terminated. *See id.* It applies to tenants at sufferance, which include those who remain[] in possession of the premises *after the termination of the lease.*” *Bockelmann*, 788 S.W.2d at 571 (emphasis added); *see also* TEX. PROP. CODE § 24.002 (applies to tenant at sufferance). Such tenants occupy the premises “wrongfully” and may be liable in tort. *Coinmach*, 417 S.W.3d at 912; *Bockelmann*, 788 S.W.2d at 571.

A tenant against whom an eviction suit is brought is not, therefore, participating in commerce: he or she is tortiously committing trespass against the property owner. By this time, the parties' lease agreement has terminated, and they are no longer actively participating in a commercial transaction. By prohibiting the property owner from recovering the property, the eviction moratorium creates commerce by forcing the property owner to rent the property via a mandated tenancy at sufferance—without any assurance of actual payment.

The Supreme Court's discussion of the individual mandate in *Sebelius* instructs that Congress cannot “*compel*” commerce; it may only regulate commerce that already exists. 567 U.S. at 550. “[T]he Government's logic,” here, as in *Sebelius*, “would justify a mandatory purchase [or sale] to solve almost any problem.” *Id.* Congress cannot require individuals to opt in to the insurance market, even if they will one day likely participate in the health care market. *Id.*

Similarly, “[a]n individual who bought a car two years ago and may buy another in the future is not ‘active in the car market’ in any pertinent sense.” *Id.* at 556. Such an individual is analogous to a property owner who previously leased its property by a lease now terminated, and who now cannot prevent a trespasser from continuing to dispossess it of its rightful

property possession—particularly without any payment. Even if the property owner intends to lease the premises again in the future, at present, no commercial activity exists.

Extending the Government’s position to its logical conclusion would, as the Supreme Court has recognized, allow Congress virtually unlimited power. It could mandate an employer continue paying an employee who has simply stopped coming to work. Or it could mandate that a gym continue providing services to members who stop paying. It might even mandate that a grocery store provide food to a weekly customer who, one week, decides to abscond with her groceries rather than paying as usual (perhaps with a requirement that she is still liable for the cost). Each of these circumstances involves only former participation in commerce—employment, gym membership, grocery purchases.

Such regulations of inactivity—compulsions to participate in commerce where one is not otherwise participating—are altogether beyond the scope of the Commerce Clause, without regard to their connection to interstate commerce. Accordingly, the eviction moratorium cannot be upheld on the basis that it is a regulation of the “rental of real estate” because it compels parties to participate in such conduct when they are not actively participating in it.

## CONCLUSION

While the Commerce Clause permits the federal government to regulate intrastate economic activities that substantially affect interstate commerce, it does not permit regulation of non-economic activities that, taken on a case-by-case basis, do not. Nor does it permit the federal government to compel commerce. As demonstrated here and in the Property Owners' Response Brief, the eviction moratorium does not regulate economic activity that substantially affects interstate commerce.

Instead, the moratorium preempts a non-economic judicial remedy for obtaining possession of real property from trespassers. The Commerce Clause cannot countenance usurping judicial determination of possessory interests in real property from the states that have always prescribed the orderly transfer of possession of the real property within their boundaries.

For the foregoing reasons, *Amicus Curiae* respectfully requests the Court affirm the district court's decision.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(g) and 32(g)(1), I certify this brief complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because this brief contains 3,392 words, exclusive of the corporate disclosure statement, table of contents, table of authorities, statement of interest, certificates of counsel, and other items exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in Microsoft Word in a proportionally spaced typeface using a plain, roman-style, 14-point font.

/s/ Charles "Skip" Watson  
Charles "Skip" Watson

**CERTIFICATE OF SERVICE**

I certify that a copy of **BRIEF OF AMICUS CURIAE TEXAS APARTMENT ASSOCIATION IN SUPPORT OF APPELLANTS LAUREN TERKEL, ET AL.** was served on counsel of record by using the Court's CM/ECF system on the 2nd day of June, 2021, addressed as follows:

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