No. 21-40137

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAUREN TERKEL; PINEYWOODS ARCADIA HOME TEAM, LIMITED; LUFKIN CREEKSIDE APARTMENTS, LIMITED; LUFKIN CREEKSIDE APARTMENTS II, LIMITED; LAKERIDGE APARTMENTS, LIMITED; WEATHERFORD MEADOW VISTA APARTMENTS, L.P., MACDONALD PROPERTY MANAGEMENT, L.L.C.

Plaintiffs-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION; SHERRI A. BERGER, IN HER OFFICIAL CAPACITY AS ACTING CHIEF OF STAFF FOR THE CENTERS FOR DISEASE CONTROL AND PREVENTION; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; 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

APPELLEES' BRIEF

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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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STATEMENT REGARDING ORAL ARGUMENT

The CDC's Eviction Moratorium Order makes it a federal crime to remove unlawfully present individuals from private property. The district court rightly held that such a novel expansion of federal power into the traditional police powers of the states exceeded federal authority under the Commerce Clause and Necessary and Proper Clause. To avoid that outcome, the CDC asks this Court to adopt a significantly more deferential approach to Commerce Clause claims than has previously been applied by this Court. Given the importance of the issues and the novelty of the government's argument, Appellees agree that oral argument would assist the Court in resolving the case.

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STATEMENT OF JURISDICTION

The district court had jurisdiction to hear Appellees' claims 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 PRESENTED FOR REVIEW

Whether the district court correctly held that a federal moratorium on local evictions exceeded the Federal Government's constitutional authority to "make all laws which shall be necessary and proper" to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes?"

INTRODUCTION

The CDC Order marks the first national eviction moratorium in United States history. While the CDC claims the Order is a temporary measure justified by the COVID-19 pandemic, the "temporary" moratorium is now in its eighth month and third extension and is in no way limited to battling COVID-19 pandemic. According to the CDC, its basis for the CDC Order would apply with equal force to justify federal restrictions on evictions for any reason, including "fairness." Moreover, despite multiple opportunities, the CDC has failed to articulate any limiting principle that would prevent its theory of federal power from justifying federal regulation of

numerous traditional local matters, including family law and divorce—an approach to the Commerce Clause that the United States Supreme Court has repeatedly rejected.

Faced with this expansive claim of federal authority, the district court applied the well-established, multi-part framework for analyzing a federal exercise of power under the Commerce Clause and Necessary and Proper Clause and entered final judgment declaring that the CDC Order was unconstitutional and setting it aside.

The government now asks this Court to abandon the traditional multi-part framework for evaluating Commerce Clause claims and replace it with a single-step form of rational basis scrutiny. However, such a broad approach to federal power is inconsistent with the text and history of the Constitution and the binding precedents of both this Court and the United States Supreme Court.

The well-reasoned judgment of the District Court holding the CDC Order unconstitutional and setting it aside should therefore be affirmed.

STATEMENT OF THE CASE

Background

On September 4, 2020, the CDC enacted a standalone agency action (hereafter the "CDC Order" or the "Order") entitled "*Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*." 85 Fed. Reg. 55292 (Sept. 4, 2020).[1]

[1] *Available at* https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf

The allegedly temporary order has since been renewed three times and currently remains in effect. *See*, Section 502 of Title V, Division N of the Consolidated Appropriations Act, 2021 (first extension); 86 Fed. Reg. 8020 (Feb. 3, 2021) (second extension); 86 Fed. Reg. 16731 (March 31, 2021) (third extension).

While the Order is ostensibly designed to prevent the interstate spread of COVID-19, it does not regulate interstate travel or disease transmission directly. Instead, the Order focuses solely on local property owners' common law and statutory eviction rights. Under the Order, it is unlawful for "a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action" to "evict any covered person from any residential property" in any covered jurisdiction. 85 Fed. Reg. at 55296. "Evict" is defined broadly enough to include not only the actual removal of the unlawfully present person from the property, but also the invocation of state legal proceedings that would directly cause such removal. *Id.* at 55293. In particular, "'Evict' and 'Eviction' means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property." *Id*.

The term "covered person" is not limited to individuals who have contracted or have been exposed to COVID-19 or those that may relocate across state lines. *Id*. Instead, "covered person" refers to any individual who submits a declaration that

includes the following five qualifications:

> (1) The individual has used best efforts to obtain all available government assistance for rent or housing;
>
> (2) The individual either (i) expects to earn no more than $99,000 in annual income for Calendar Year 2020 (or no more than $198,000 if filing a joint tax return), (ii) was not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;
>
> (3) the individual is unable to pay the full rent or make a full housing payment 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) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses; and
>
> (5) eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options.

Id. at 55293. The Order includes an attachment with model language for the required declaration. *Id*. at 55297. Notably, the Order explicitly leaves all economic obligations between landlords, tenants, and former tenants in place. The Order makes clear that it "has no effect on the contractual obligations of renters to pay rent and shall not preclude charging or collecting fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under the terms of any applicable contract." *Id*. If a property owner attempts to remove or cause the removal of any covered person from their property for the non-payment of rent, the

CDC Order threatens punishment of up to $250,000 and a year in prison for individual property owners and a fine of up to $500,000 for corporate property owners. *Id*. at 55296.

The CDC has also taken the position that the Order does not prevent the initiation or conclusion of eviction proceedings establishing that an individual no longer has any lawful right to possess the property, provided that the property owner does not complete a subsequent writ proceeding to have the individual removed. ROA.152.[2] Accordingly under the CDC's own interpretation, the sole effect of the Order is to prevent owners from removing covered persons, or initiating proceedings to remove covered persons, who are unlawfully present from the property.

Appellees' Injuries

Appellees are landlords and property managers subject to the CDC Order's prohibition on removing persons unlawfully present on their private property. Ms. Lauren Terkel owns a house that she inherited from her father and converted to a four-plex rental property in 2019. ROA.81. Appellees Pineywoods, Creekside, Creekside II, and Lakeridge are Texas limited partnerships that own multifamily properties in the Texas cities of Center, Lufkin, and Texarkana, respectively. ROA.87, 91. Appellee MacDonald is a Texas limited liability company that manages

[2] In Texas, once an eviction is final, the court separately may grant a "writ of possession." The writ of possession allows the removal of the former tenant. Tex. Prop. Code § 24.0061.

41 rental properties across the state of Texas. ROA.96

Appellees each had tenants who were covered by the CDC Order and refused to pay rent. ROA.82, 88, 92, 96. Ms. Terkel attempted to have her non-paying former tenant evicted, but the eviction was placed in abeyance by the state Justice of the Peace court solely due to the CDC Order. ROA.82. Despite being forced to maintain non-paying former tenants on their properties, Appellees continued to pay property taxes, pay their mortgages, maintain the properties, pay staff, and provide services and utilities to other renters. ROA.83, 88-89, 92-93, 97. Unable to exercise their basic property rights under state law, Appellees filed suit in the federal district court challenging the CDC Order. ROA.13.

The District Court Proceedings

Appellees brought suit under 5 U.S.C. § 706(2)(B) of the Administrative Procedure Act (the "APA"), which requires that a district court "shall . . . hold unlawful and set aside . . . agency action found to be . . .contrary to constitutional right, power, privilege, or immunity." ROA.28. Appellees argued that the CDC Order exceeded federal authority under the Commerce Clause and Necessary and Proper Clause and therefore must be declared unlawful and set aside under § 706(2)(B). *Id.*

Appellees sought three distinct remedies: (1) a declaration under 28 U.S.C. § 2201 that the CDC Order was unlawful; (2) an order under 5 U.S.C. § 706(2)(B)

holding that the CDC was contrary to the Constitution and therefore setting it aside; and (3) a permanent injunction under 28 U.S.C. § 2202 preventing the CDC from taking action to bar evictions now or in the future. ROA.30-31. Appellees also separately moved for a preliminary injunction.

During oral argument on Appellees' motion for preliminary injunction, Appellees asked that, given the purely legal nature of the merits question, the court proceed to consideration of summary judgment rather than preliminary relief. *Id.*; ROA.1671. The government requested an opportunity to file the administrative record and submit additional merits briefing. *Id.* The court accepted both requests, gave notice that it would consider summary judgment in accordance with Federal Rule of Civil Procedure 56(f), and allowed submission of the original and supplemental administrative records as well as 45 more pages of briefing per side. *Id.* After consideration of these additional materials, the court issued a final judgment.

The District Court's Opinion and Judgment

On summary judgment, the court first held that the CDC Order must be analyzed under the substantial effects test as articulated in *Lopez* and *Morrison*. ROA.1672. Second, the court held that the substantial effects test was governed by the Necessary and Proper Clause, rather than the Commerce Clause alone. ROA.1673-75. Third, the court applied the four considerations articulated in *United*

States v. Lopez, 514 U.S. 549 (1995), and *United States v. Morrison,* 529 U.S. 598 (2000), in finding that the CDC Order was unconstitutional. ROA.1673. In particular, the court concluded that the CDC Order: (1) regulated non-economic activity because removing individuals from private property is not commercial activity, and the Order explicitly leaves all the economic aspects of the landlord-tenant relationship in place (ROA.1675-76); (2) does not contain a "jurisdictional element" limiting its application to evictions involving interstate commerce (ROA.676-77); (3) does not contain findings connecting the Order to interstate commerce (ROA.1678-79); and (4) could only be justified by the government piling inference upon inference in a manner that could also justify a federal police power akin to that of the states. ROA.1679-84.

The court then proceeded to issue a final judgment granting two of the three remedies requested by Appellees. First, the judgment declared under 28 U.S.C. § 2201 that the CDC Order "exceeds the power granted to the federal government to 'regulate Commerce . . . among the several States' and to 'make all Laws which shall be necessary and proper for carrying into Execution' that power[.]" ROA.1686. Second, the court specifically held the Order "unlawful as 'contrary to constitutional . . . power' [under] 5 U.S.C. § 706(2)(B)" and therefore set the Order aside. *Id*.

Because the government represented at oral argument that it would abide by any judgment entered by the court, the court chose not to issue an injunction. *Id.*

ROA.1684-85. Appellants have since publicly taken the counter-precedential position that the district court judgment setting aside the CDC Order under 5 U.S.C. § 706(2)(B) vacated the CDC Order only as to Appellees.[3] [4]

SUMMARY OF THE ARGUMENT

This case presents a single question: is the federal moratorium on local residential evictions through the CDC Order authorized by the Commerce Clause and the Necessary and Proper Clause? The district court faithfully applied the various considerations required to analyze such claims under *Lopez*, *Morrison*, and *NFIB v. Sebelius*, 567 U.S. 519 (2012) and declared the CDC Order unconstitutional. That well-reasoned opinion should be affirmed.

On appeal, the CDC presents two main arguments. First, the CDC argues that the Order regulates economic activity. Second, the CDC argues that once the court determines that an action regulates economic activity, the additional considerations of *Lopez*, *Morrison*, and *NFIB* are effectively irrelevant. But these arguments are

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[3] *See* https://www.justice.gov/opa/pr/department-justice-issues-statement-announcing-decision-appeal-terkel-v-cdc.

[4] DOJ's position that a successful facial challenge under 5 U.S.C. § 706(2)(B) is limited to the parties is contrary to significant precedent and the plain text of the APA. *See E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857 (9th Cir. 2020) (noting that the text of the APA mandates that unlawful actions be vacated, "not that their application to the individual petitioners is proscribed."); *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."); *Ala. Ass'n of Realtors v. United States HHS*, No. 20-cv-3377 (DLF), 2021 U.S. Dist. LEXIS 85568, at *25 (D.D.C. May 5, 2021) (noting that the CDC's position as to vacatur in this case "is 'at odds with settled precedent.'"); 5 U.S.C. § 706(2)(B) (requiring that the court "*shall* . . . hold unlawful *and* set aside" agency actions found unconstitutional) (emphasis added).

contrary to binding precedent and inconsistent with the text and history of the Constitution.

The CDC's counterargument is wrong for two main reasons. First, the CDC Order does not regulate economic activity. As both the district court and now the Sixth Circuit Court of Appeals correctly held, the CDC Order regulates the right to invoke state court remedies to exercise a possessory interest in property—which is not an economic activity. *Tiger Lily, LLC v. United States HUD*, 992 F.3d 518 (6th Cir. 2021) (agreeing with the district court in this case that "eviction is fundamentally the vindication of the property owner's possessory interest"). The federal government nonetheless claims that evictions are inherently economic because they are "related" to renting property, are undertaken for an economic purpose, or have economic effects. But this Court made clear in *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003) that, in determining whether an act regulates economic activity under *Morrison*, the court must look only to the regulated activity itself—in this case the removal of trespassers from private property—not to the purpose or effect of that activity. The district court correctly applied these binding precedents.

Second, even if the CDC Order did regulate economic activity, that would not end the analysis. As the text of the Constitution commands and the Supreme Court has repeatedly noted, not all economic activity may be reached by the Commerce

Clause. Indeed, the enumeration of a power over *interstate* commerce presupposes that there is some commerce that is "the exclusively internal commerce of a State" and therefore beyond federal control. *Morrison*, 529 U.S. at 616 n.7 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)). As such, this Court regularly evaluates the other *Morrison* considerations even after it has concluded that the activity regulated is economic. *See, e.g.*, *Groome Res., Ltd. v. Parish of Jefferson*, 234 F.3d 192, 211-15 (5th Cir. 2000).

Applying those additional considerations, the CDC Order is clearly unconstitutional. First, the district court rightly concluded that the CDC Order has no "jurisdictional element" that limits its application on a case-by-case basis to evictions involving interstate commerce. The CDC agrees that the Order itself contains no jurisdictional element but nonetheless argues that a fleeting reference to the Commerce Clause in the statute that authorizes the CDC to impose regulations is sufficient to pass muster. But as the district court rightly recognized, the only relevant question for this *Morrison* consideration is whether there is any legal restriction that limits the application of the Order on a case-by-case basis to only those evictions that actually affect interstate commerce. The CDC admits that no such limitation exists.

Second, the CDC admits that the Order contains no findings that it is essential to a broader regulation of interstate commerce or that evictions substantially affect

interstate commerce. CDC Br. at 17. Indeed, the CDC has updated the findings supporting the Order several times since the beginning of this litigation but has still been unable to marshal even a single reference to commerce, trade, or economics.

Third, the CDC's theory of federal power requires the court to pile inference upon inference in a way that would justify a federal police power. The CDC argues that lifting the Order would lead to a significant number of evictions → which would lead to more individuals living in shared housing → which will lead to the spread of COVID-19 → and thus to significant economic impacts. But, as the district court rightly noted, this same chain of inferences would justify federal regulation of traditional state functions like responding to local crime, family law, and divorce. Local activities do not become interstate commerce merely because they might, in the aggregate, "diminish[] national productivity, increas[e] medical and other costs, and decreas[e] the supply of and the demand for interstate products." *Morrison*, 529 U.S. at 615.

Fourth, the CDC Order also runs afoul of the additional considerations relevant to the Necessary and Proper Clause. For example, a regulation may not be "proper" under the Necessary and Proper Clause when it "violates a constitutional principle of state sovereignty," "undermine[s] the structure of government established by the Constitution," or marks a novel or "substantial expansion of federal authority" into areas traditionally reserved to individuals or to the states.

NFIB, 567 U.S. at 559 (Roberts, C.J.); *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring). The CDC Order runs afoul of each of these considerations. It is the first assertion of a novel federal power over local evictions; it is not cabined by any limiting principle that would allow the court to distinguish between that which is national and that which is local; and it involves a substantial expansion of federal authority into matters of traditional state concern. The district court correctly held that the CDC Order exceeds federal authority granted by the Commerce Clause and the Necessary and Proper Clause.

Finally, the CDC's brief could be read to raise an argument, not raised below, that the CDC Order is justified as a necessary and proper regulation in furtherance of Congress' spending power. But, this poorly developed argument falls victim to the same issues as the CDC's Commerce Clause justifications—namely, it would create a general police power akin to that of the states.

STANDARD OF REVIEW

Appellees agree that the summary judgment issued below is reviewed *de novo*. *See Groome*, 234 F.3d at 198.

ARGUMENT

In the name of protecting the public health from COVID-19, the CDC Order makes it a federal crime for property owners to remove unlawfully present individuals from their property, whether they remove those individuals themselves

or invoke state court legal proceedings to do so. 85 Fed. Reg. at 55293. The public policy basis for that regulation is not before this Court.[5] Rather, the sole question in this case is whether the federal government has constitutional authority to enact such a restriction. It does not.

Unlike state governments, the federal government lacks any general power to regulate private property, public health, or state court civil remedies. *See Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 44 (1994) ("Regulation of land use [is] a function traditionally performed by local governments."); *Lopez*, 514 U.S. at 594 (Thomas, J. concurring) (writing that the power to pass "[i]nspection laws, quarantine laws, [and] health laws of every description" was withheld from the federal government and reserved to the states) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 203; *Tiger Lily*, 992 F.3d at 518 ("Regulation of the landlord-tenant relationship is historically the province of the states.") (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)); The Federalist No. 17 (Alexander

[5] Even if it were, any alleged public health emergency has largely evaporated. Vaccines have been available for all American adults since April 19, 2021; the CDC has announced that fully vaccinated individuals may dispense with masks and social distancing indoors in light of "the continuing downward trajectory of cases" and "the performance of our vaccines"; and the President has hailed this development as a "great milestone" made possible "by the extraordinary success we've had in vaccinating so many Americans." *See* The White House, *Remarks by President Biden on the COVID-19 Response and the Vaccination Program* (May 13, 2021), https://bit.ly/2RcuR 17; The White House, *Press Briefing by White House COVID-19 Response Team and Public Health Officials* (May 13, 2021), https://bit.ly/3uY1EFw; Erin Schumaker, *All US Adults Now Eligible for COVID-19 Vaccines*, ABC NEWS (Apr. 19, 2021), https://abcn.ws/3yj21wI.

Hamilton) ("The administration of private justice between the citizens of the same State . . . [is] proper to be provided for by local legislation [and] can never be desirable cares of a general jurisdiction.").

Thus, if the federal government seeks to regulate the public health by infringing upon private property rights or limiting access to state court legal remedies, it must point to some "discrete, enumerated" power delegated by the Constitution which may be read broadly enough to authorize such restrictions. *See Printz v. United States*, 521 U.S. 898, 919 (1997). To date, the CDC has pointed to only one source for its alleged authority to regulate this local conduct—the Commerce Clause.[6] But, as explained below, neither the Commerce Clause nor the Necessary and Proper Clause may be read broadly enough to authorize a federal moratorium on evictions through the CDC Order.

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[6] At times, the CDC points to *United States v. Comstock*, 560 U.S. 126, 142 (2010) in a manner that could imply it is claiming Congress has a standalone power to regulate an "interstate epidemic." CDC Br. at 8, 9. Assuming such an argument has been raised, *Comstock* did not make such a bold claim. Rather, the Court noted in *dicta* that the Necessary and Proper Clause allows the federal government to imprison individuals for violating laws passed pursuant to an enumerated power, and that when the federal government is acting as ***jailer and caretaker*** to those prisoners, it has authority under the Necessary and Proper Clause to take actions to stop the spread of disease. *Comstock*, 560 U.S. at 142. Viewing the snippet the CDC pulls from that case in its full context makes this clear:

> If a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government to take action, ***pursuant to its role as federal custodian***, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, § 8, cl. 3).

Comstock, 560 U.S. at 142 (emphasis added).

I. THE DISTRICT COURT CORRECTLY APPLIED THE COMMERCE CLAUSE AND NECESSARY AND PROPER CLAUSE PRECEDENTS OF THIS COURT.

The "power to regulate commerce, though broad indeed, has limits." *NFIB*, 567 U.S. at 554. In *Lopez*, the Supreme Court articulated three categories of activities that fell within the Commerce power: (1) activities involving "the channels of interstate commerce"; (2) activities involving "the instrumentalities of interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." 514 U.S. at 558-59. The Court would later clarify that the third category—the "substantial effects test"—is derived from the Necessary and Proper Clause rather than the Commerce Clause alone. *Gonzales v. Raich*, 545 U.S. 1, 5, 22 (2005) (majority opinion); *see also id.* at 34 (Scalia, J., concurring) (more fully explaining the relationship between the substantial effects test and the Necessary and Proper Clause).[7]

[7] In the district court, the CDC unsuccessfully argued that it was inappropriate to view the substantial effects test through the lens of the Necessary and Proper Clause. The CDC appears to have wisely abandoned that objection. *See, Br*. at 8, 9 (citing necessary and proper language.) The Supreme Court has referred to *Raich*, *Lopez*, and *Morrison* as Necessary and Proper Clause cases. *See, e.g.*, *Comstock*, 560 U.S. at 135, 148. Moreover, the Supreme Court and multiple appellate courts, including this circuit, have cited Justice Scalia's *Raich* concurrence as authority for understanding the interplay between the Necessary and Proper Clause and the substantial effects test. *See id.* at 135; *United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009). Therefore, like the district court below, we apply that framework here.

Here, there is no reasonable dispute regarding the first two *Lopez* categories. The CDC Order does not regulate roads, train tracks, or rivers—*i.e.*, the channels of interstate commerce—nor who or what may travel on them—*i.e.*, the instrumentalities of interstate commerce. Instead, the CDC Order attempts to regulate the spread of COVID-19 indirectly by prohibiting the removal of unlawfully present individuals from private property existing entirely in one state. 85 Fed. Reg. 55296. Such restrictions would only be justified under the Commerce Clause through the substantial effects test, which is governed by the Necessary and Proper Clause.

The Necessary and Proper Clause allows the federal government to "make all Laws which shall be necessary and proper for carrying into Execution [its enumerated powers]." U.S. Const. art. I, § 8, cl. 18. With regard to the Commerce Clause, the Supreme Court has held that the Necessary and Proper Clause allows the federal government to regulate some purely intrastate activities as a means of carrying into execution its authority over interstate commerce, provided that the intrastate activity substantially effects interstate commerce or that its regulation is essential to some broader regulation of interstate commerce. *See Raich*, 545 U.S. at 36 (Scalia, J. concurring) (quoting *Lopez*, 514 U.S., at 561)).

However, any invocation of this implied power must be examined "carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567

U.S. at 536 .[8] If a court determines that the relationship to commerce is too tenuous, or that the invocation of the commerce authority is simply a "pretext" to pass laws for other purposes, that court has the "painful duty" of ruling that the government's exercise of power is unsupported by the Necessary and Proper Clause and thus unconstitutional. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

To meet this burden, a restriction on intrastate activity must be both necessary— *i.e.,*"plainly adapted" to the regulation of interstate commerce—and proper— *i.e.,* consistent "with the letter and spirit of the constitution." *NFIB*, 567 U.S. at 537 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

As explained by Justice Scalia, the plainly adapted standard largely tracks the evidence-based, federalism-sensitive considerations applied in *Lopez* and *Morrison*. *See Raich*, 545 U.S. 1, 35-36 (Scalia, concurring); *see also Comstock*, 560 U.S. 126, 135, 148 (referring to *Raich*, *Lopez*, and *Morrison* as Necessary and Proper Clause cases). Those considerations include: (1) the economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the statute, which limits its application to matters affecting interstate commerce; (3) any congressional findings

[8] The opinion in *NFIB* was fractured, leading to some dispute about what portions of Chief Justice Roberts' opinion were controlling. However, this Court recently observed that a majority of the justices in that case found that the individual mandate could not be supported under either the Commerce Clause or the Necessary and Proper Clause. Accordingly, because the underlying reasoning of Justice Roberts' lone opinion and that of the four joint dissenters mirrored each other, *NFIB*'s treatment of the Commerce Clause and Necessary and Proper Clause should be applied to this case. *See Texas v. United States*, 945 F.3d 355, 388 (5th Cir. 2019).

in the statute or its legislative history concerning the effect that the regulated activity has on interstate commerce; and (4) the attenuation of the link between the intrastate activity and its effect on interstate commerce. *Morrison*, 529 U.S. at 610-12. While no one of these considerations alone is dispositive, they each play an important role in ensuring that that the government, through clever argument, does not convert the Commerce Clause into a grant of a general police power. *See Lopez*, 514 U.S. at 567-68.

This list is not exhaustive. As Justice Scalia explained, there are "other restraints" under the Necessary and Proper Clause. *Raich*, 545 U.S. at 39 (Scalia, J., concurring). For example, restrictions "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Id*. As discussed in section, III.D *infra*, these additional considerations were elaborated on in *NFIB* and would independently be dispositive here. However, because the district court rightly disposed of this case on the four *Morrison* considerations alone, we begin there.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE REMOVAL OF UNLAWFULLY PRESENT INDIVIDUALS FROM PRIVATE PROPERTY IS NOT ECONOMIC ACTIVITY UNDER *MORRISON*.

To "figure out whether an activity substantially affects interstate commerce, the first question we must ask is whether the regulated activity is an activity economic in nature." *Groome Res., Ltd. v. Par. of Jefferson*, 234 F.3d 192, 205 (5th Cir. 2000). Because the CDC and its amici view this first consideration as effectively

the only *Morrison* consideration that matters, the overwhelming majority of their briefing is dedicated to this issue. As discussed in section III *infra*, this monomaniacal focus on the first *Morrison* consideration is misplaced. More importantly, the CDC is simply wrong that the Order regulates economic activity.

To determine whether the regulated activity is "economic," courts look "only to the expressly regulated activity" itself—*i.e.*, the activity that would trigger federal penalties. *GDF Realty*, 326 F.3d at 634. The motivations for the activity or its potential economic effects are immaterial for this part of the analysis. *See id.* at 633. While there is no bright line between what is and is not an "economic activity," the Court has provided some useful guidelines. *See Lopez*, 514 U.S. at 567 (noting the line drawing problem). For example, the Court in *Raich* defined economic activity as "the production, distribution, and consumption of commodities." 545 U.S. at 25. This Court has sometimes taken a broader view, holding that a regulation targets economic activities when it regulates "the exchange of goods and services," *GDF Realty*, 326 F.3d at 629, or prohibits activities that prevent classes of individuals from engaging in commerce. *See Groome,* 234 F.3d at 205-06.

On the other end of the spectrum, simple possession of a piece of property has never been considered economic activity, even if it may be subject to regulation for other purposes. *See, e.g.*, *GDF Realty*, 326 F.3d at 634 (exercise of possessory interest in property by removing unwanted species was not economic activity);

Raich, 545 U.S. 1, 40 (Scalia, J., concurring) ("simple possession" was not economic activity); *Lopez*, 514 U.S. 549 (possession of a firearm was not economic activity). Here, the regulated activity is not the production or use of a commodity that is traded in an interstate market. Nor does the CDC Order regulate any terms of an economic transaction or the financial obligations of the parties. Indeed, the Order makes this clear by stating that "[n]othing in this Order precludes the charging or collecting of fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under the terms of any applicable contract." 86 Fed. Reg. 8020, 8022. Instead, the Order regulates *only* whether an owner may regain possession of property from an inhabitant who no longer has any lawful right to be there. 86 Fed. Reg. at 8021 (defining "eviction" as any action "to remove or cause the removal of a covered person from a residential property"); *Coinmach Corp. v. Aspenwood Apartment Corp*., 417 S.W.3d 909, 920 (Tex. 2013) (noting that under Texas law "eviction is allowed *only* if the tenant has no remaining legal or possessory interest") (emphasis added); *see also Tiger Lily, LLC*, 992 F.3d at 518 (agreeing with the district court in this case that "eviction is fundamentally the vindication of the property owner's possessory interest"). This exercise of a traditional possessory interest in property is not economic activity. *GDF Realty*, 326 F.3d at 634. The CDC raises four arguments in response, each of which fail.

A. A non-economic activity does not become economic under *Morrison* simply because it is tangentially related to economic activity or may have an economic purpose or effect.

First, the federal government argues that the Order regulates economic activity because evictions are related to the "rental of real estate," and the rental of real estate is "unquestionably an activity affecting interstate commerce." CDC Br. at 12. But this fundamentally misunderstands the nature of the inquiry for the first *Morrison* consideration. As explained above, the only relevant question for the first *Morrison* consideration is whether the regulated activity *itself* is economic—not whether the activity is "related" to other economic activity or might have downstream economic "effects." *See GDF Realty*, 326 F.3d at 633.

For example, the individual charged with violating the Gun Free Schools Act in *Lopez* had been paid $40 to bring the gun to school. *Lopez*, 2 F.3d at 1345. But this clear economic purpose did not prevent the Court from concluding that the Act's prohibition on guns in school zones was a regulation of noneconomic activity. *Id.* Similarly, *Morrison* featured reams of congressional findings establishing that violence against women had significant economic effects. 529 U.S. at 614. But these effects, while relevant to other portions of the analysis, were wholly irrelevant to the analysis of whether the Violence Against Women Act regulated economic activity. As then-D.C. Circuit Judge John Roberts later wrote, "looking primarily beyond the regulated activity [to its purpose or effects] would effectually obliterate the limiting

purpose of the Commerce Clause, and, under such an approach, the facial challenges in *Lopez* and *Morrison* would have failed." *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from the denial of rehearing *en banc*) (quoting *GDF Realty*, 326 F.3d at 634-35) (cleaned up).

This Court came to the same conclusion in *GDF Realty*. 326 F.3d at 634-35. In that case, a developer wanted to build on a commercial property. That commercial development was stopped, however, by the presence of an endangered species, the Bone Cave Harvestman. Under the Endangered Species Act, the disturbance or "take" of an endangered species is prohibited. The developer argued that because the Harvestman only lived in Texas, federal regulation of the Harvestman exceeded congressional authority under the Commerce Clause. Misapplying the first *Morrison* factor, the district court held that the prohibition on species takes was a regulation of economic activity because the take had an economic purpose—commercial development—and because species takes could have economic effects. *Id.* at 633. This Court explicitly rejected that holding, noting that a court "may not look beyond the regulated conduct" (in that case, cave species takes) to determine whether the activity regulated is economic. *Id*. at 634. The removal of an endangered species from private property—even for an economic purpose—was therefore *not* economic activity. *Id*. Similarly, the removal of unlawfully present individuals from private property is not economic activity, regardless of any purpose or effect.

B. The identity of the regulated party does not transform non-economic activity into economic activity under *Morrison.*

Second, the CDC argues that the Order regulates economic activity because the plaintiffs in this case were "commercial actors whose business is the rental of residential properties." CDC Br. at 14. But this argument is likewise barred by precedent. In *GDF Realty*, the plaintiff was a commercial developer engaged in the development of a commercial property. Yet, this Court held that fact to be insufficient to convert a non-economic activity into an economic one. *GDF Realty*, 326 F.3d at 634. To hold otherwise, this Court explained, would "allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors." *Id*. Under that standard "[t]here would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id*. The district court faithfully applied that precedent here.

C. The right to remove unlawfully present individuals from private property is not a right created by the lease agreement.

Third, the CDC argues that eviction is a right that is created by a residential lease and is therefore part of an economic transaction. CDC Br. at 14-15. But the right to remove unlawfully present *former* tenants from private property is not a right "created" by a lease agreement. To the contrary, the right to remove others is one of the most fundamental property rights in our legal tradition, predating and

undergirding any rental agreement, and existing whether any economic transaction ever takes place. *See Loretto*, 458 U.S. at 435-36 (right to exclude other is fundamental aspect of property ownership); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (inability of property owner to restrict pond use to paying members implicated the fundamental right to exclude). If anything, a lease agreement *limits* that pre-existing right (often by requiring that certain procedural requirements be met).[9] It does not create it. To refer to eviction as a new right bargained for by landlords as part of an economic transaction simply puts the cart before the horse.

D. The government's reliance on *Russell*, *Jones*, and *Groome* is misplaced.

Finally, the CDC argues that the district court's judgment on whether the order regulates economic activity is contrary to the Supreme Court's judgments in *Russell v. United States*, 471 U.S. 858 (1985) and *Jones v. United States*, 529 U.S. 848 (2000), as well as this Court's holding in *Groome*, 234 F.3d 192. But as the district court correctly noted, *Russell* and *Jones* were statutory interpretation cases, not cases involving the Commerce Clause.[10] Accordingly, neither *Russell* nor *Jones* are binding here. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("Cases cannot be

[9] For example, Tex. Prop. Code § 24.005 sets the notice requirements for removing a non-paying tenant, but provides that those provisions may be modified if "the parties have contracted for a shorter or longer notice period in a written lease or agreement."

[10] Indeed, the vast majority of *Russell*—which is only a few pages long—is devoted to reviewing the legislative history of the relevant statute to determine legislative intent. *Russell*, 471 U.S. at 860-62.

read as foreclosing an argument that they never dealt with."); *Brecht v. Abrahamson*, 507 U.S. 619, 631, (1993) (explaining an opinion is not binding precedent on an issue "never squarely addressed"); *De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015) ("[A]ccording to black letter law, 'a question not raised by counsel or discussed in the opinion of the court' has not 'been decided merely because it existed in the record and might have been raised and considered.'"). Indeed, this Court's precedent confirms as much. *See Groome*, 234 F.3d at 208 (noting that *Russell* and *Jones* were "not dispositive" on whether something is economic activity under *Morrison*.)

Moreover, neither *Russell* nor *Jones* considered whether removing unlawfully present individuals from private property was "economic activity." Those cases involved the interpretation of the federal arson statute, which prohibits the destruction of a building "being used in an activity affecting commerce." *Jones*, 529 U.S. at 853 (emphasis added) (quoting *Russell*). In *Russell*, the Court concluded that renting property "affected commerce" as that term was used in the statute. *Russell*, 471 U.S. at 862.

But as the Supreme Court later explained in *Lopez*, there is a hard distinction between activities which simply "affect" commerce—like those regulated by the statute in *Russell* and *Jones*—and those which "*substantially* affect" interstate commerce as required by the Constitution. *Lopez*, 514 U.S. at 559 (emphasis added).

And there is an even greater distinction between activities that "affect commerce" and those activities properly characterized as "economic" pursuant to the first *Morrison* consideration. As the Supreme Court has made clear, even non-economic activities may affect commerce. *Morrison*, 529 U.S. at 611. Whether an activity "affects commerce" is therefore not dispositive on whether the activity is "economic" under *Morrison*.

Moreover, even if this Court could (1) conflate "affecting commerce" with "substantially affecting commerce" and (2) conflate "substantially affecting commerce" with "economic activity," *Russell* and *Jones* still do not apply. In those cases, the Court held that the *rental* of a real estate "affected commerce." But the CDC Order explicitly states that it does not regulate rental of real estate.[11] To the contrary, the Order only prohibits the removal of unlawfully present individuals after all renting has ceased. Therefore, the Court's holding in *Russell* that renting property "affected commerce" does nothing to establish whether removing unlawfully present individuals not engaged in commerce from a rental property is "economic activity" here.

[11] 86 Fed. Reg. 8020, 8022 ("This Order does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract. Nothing in this Order precludes the charging or collecting of fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under the terms of any applicable contract.")

The CDC's reliance on *Groome* is also misplaced. In that case, the plaintiff challenged the anti-discrimination provisions of the Fair Housing Act as exceeding congressional authority under the Commerce Clause. *Groome*, 234 F.3d 192. This Court concluded that discrimination in the sale or rental of property was economic activity because it "directly interferes with a commercial transaction" by limiting an "individual's ability to buy, sell, or rent housing." *Id*. at 205-06. But unlike refusing to rent to someone due to their inclusion in a protected class, evictions under the CDC Order do not interfere with an "individual's ability to buy, sell, or rent housing." *Cf. Groome*, 234 F.3d at 205-06. To the contrary, as defined by the Order, evictions only occur *after* an individual has ceased to engage in commercial activity (the payment of rent) and is illegally squatting on the property. Indeed, the CDC has made clear that removal of former tenants remains prohibited even after a state court has entered an eviction order establishing that the rental contract has been breached, is now void, and that the former tenant has no lawful right to be on the property. *See* ROA.152, 260 (noting that former tenants remained protected by the order, even if they have been adjudicated to be trespassers due to the non-payment of rent). And because no commercial relationship exists, removing a trespasser from one's private property cannot be said to interfere with the no-longer-existent commercial transaction. *Groome* is therefore inapposite.

However, even if this Court were persuaded that the CDC Order regulates economic activity, that would not be the end of the analysis. As explained below, the additional factors from *Lopez*, *Morrison*, and *NFIB* independently render the Order unconstitutional.

III. EVEN IF THE CDC ORDER REGULATES ECONOMIC ACTIVITY, THIS COURT MUST STILL APPLY THE ADDITIONAL CONSIDERATIONS MANDATED BY *LOPEZ*, *MORRISON*, AND *NFIB*.

Perhaps the biggest distance between the parties in this case is the application of the *Lopez/Morrison* test. According to the CDC, the various considerations required in *Lopez*, *Morrison*, and other Necessary and Proper Clause cases are only relevant if the activity regulated is not economic. CDC Br. 16-18. If the regulated activity is economic, then the CDC argues that the court simply applies rational basis scrutiny. *Id*. In doing so, the CDC effectively collapses all Commerce Clause cases into a single question—does the law regulate economic activity. Such an approach is contrary to law.

First, the CDC's single-step approach is contrary to the practice of this Court. In *Groome,* for example, this Court faithfully applied the remaining three *Morrison* considerations even *after* concluding that the activity regulated was economic in nature. *Groome*, 234 F.3d at 211- 215.

Second, the Supreme Court has repeatedly rejected the application of a single-step rational basis test in its treatment of the Commerce power, choosing instead a multi-consideration approach. Indeed, the single-step rational basis approach proposed by the CDC here is nearly indistinguishable from that proposed by the *Lopez* and *Morrison* dissents, and soundly rejected by the majorities in those cases. *See Lopez,* 514 U.S. at 608 (Souter, J., dissenting) (arguing that the application of what would become the four *Lopez/Morrison* considerations was an inappropriate departure from the dissent's preferred single-step rational basis scrutiny); *Morrison*, 529 U.S. at 637 (Souter, Ginsburg, Stevens, Breyer, JJ., dissenting) (complaining that the *Morrison* considerations were "supplanting rational basis scrutiny with a new criterion of review").

Finally, the CDC's proposed test is contrary to the text of the Constitution. The enumeration of a power over *interstate* commerce presupposes that there is some commerce that is "the exclusively internal commerce of a State" and therefore beyond federal control. *Morrison*, 529 U.S. at 616 n.7 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 195). But under the CDC's test, this plain text reading of the Commerce Clause would be impossible.

As the Supreme Court has repeatedly noted, all economic activity bears some rational connection to interstate commerce. *Id*. at 611. Therefore, if not for the application of the various other *Morrison* factors, a rational basis approach would

subject even the most insulated intrastate economic endeavor to federal authority under the Commerce Clause. Indeed, the CDC effectively admitted as much at oral argument below, where it refused to concede that *any* economic activity would be beyond the scope of the Commerce Clause.[12] In the absence of binding Supreme Court precedent to the contrary, this Court may not give the Commerce Clause a meaning so contrary to its "text, structure, and original understanding." *Preterm-Cleveland v. McCloud*, No. 18-3329, 2021 U.S. App. LEXIS 10520, at *72-73 (6th Cir. Apr. 13, 2021) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring in the judgment)); *accord Texas v. Rettig*, No. 18-10545, 2021 U.S. App. LEXIS 10294, at *3-4 (5th Cir. Apr. 9, 2021) (Ho, Jones, Smith, Elrod, Duncan, JJ., dissenting). With this in mind, we turn to the remaining considerations from *Lopez*, *Morrison*, and *NFIB*.

A. The CDC Order does not contain a jurisdictional element that limits its application to evictions involving interstate commerce.

Following the determination of whether the Order regulates economic or noneconomic activity, the court must next consider whether the law has an "express jurisdictional element which might limit its reach to a discrete set of [activities] that

[12] *See* ROA.1737-39 (unable to articulate any intrastate commercial activity that would be beyond the scope of federal power); ROA.1740 (noting that the distinction between permissible regulation and impermissible regulation is whether the regulations is "based on economic activity"); ROA.1744 (claiming that "the fact that [it] regulates economic activity and has direct economic effect is sufficient under *Morrison* and *Lopez"*); ROA.1748 (listing economic activity as the only relevant factor); ROA.1749 (noting that anything "related to economic activity...would be within Congress's authority").

additionally have an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611-12. A common example of such a "jurisdictional element" is a law that allows federal regulation only where the regulated item or person has traveled across state lines. *Id*. at 613 n.5. The CDC admits that the Order itself does not contain a "jurisdictional element" and that it "does not limit its application based on a connection to interstate commerce." ROA.1677-78. Indeed, the Order applies on its face to any eviction that meets the criteria, regardless of whether the individual has been exposed to COVID-19, and regardless of whether the individual travels or intends to travel across state lines.

The only argument the CDC can muster under this consideration is to reference an unrelated statute that generically grants the CDC authority to pursue "actions to prevent the spread of disease 'from one state or possession into any other state or possession.'" CDC Br. at 16-17. But this fundamentally misunderstands the relevant inquiry under *Morrison*. A jurisdictional element is one that "ensure[s], through case-by-case inquiry," that all applications of the regulation *at issue* "have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 561-62. The CDC admits that its cited authority does not impose such a case-by-case limitation on its enforcement of the Order. The mere fact that the CDC has been granted authority to pass rules regulating interstate commerce does not mean that it

did so here. Thus, Congress's authorization for the CDC to regulate does not constitute the requisite jurisdictional element.

B. The CDC Order contains no findings tying the eviction moratorium to interstate commerce or suggesting that it is essential to a broader economic regulatory scheme.

The Court must next consider the extent to which the government regulation is supported by findings. When, as in this case, the regulation is of non-economic activity, these findings should show that the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. By contrast, if the regulation is directed at economic activity, the findings should show that the regulated activity substantially affects interstate commerce. *Morrison*, 529 U.S. at 612. Whether this Court finds the activity to be economic or noneconomic here, the CDC Order falls far short of meeting the requirement for findings under *Morrison*.

The CDC admits that the government did not issue *any* findings connecting the Order to interstate commerce or any broader regulation of interstate commerce. CDC Br. at 17.[13] Indeed, despite updating its findings multiple times after this

[13] The CDC repeatedly points to the irrelevant fact that the Order is just one of several actions that the federal government has taken to address the effects of COVID-19. *See* CDC Br. at 2, 15. But the CDC does not argue—nor could it—that the Order is part of a larger statutory scheme regulating interstate commerce that would be undercut if the federal government was unable to regulate local evictions. The Order is instead a standalone public health measure adopted unilaterally by the CDC. Neither the CDC nor Congress have adopted any broader regulation

lawsuit was filed, the CDC Order's findings still fail to reference commerce, economics, or trade even a single time.[14] Instead, the "findings" in the Order largely pertain to the public health concerns allegedly raised by evictions. But government findings are only relevant under the Commerce Clause or Necessary and Proper Clause to the extent they are "findings regarding the effects *upon interstate commerce*." *See Morrison*, 529 U.S. at 612 (emphasis added). Information about the non-commercial impacts of evictions is irrelevant.

For example, in *Lopez,* there was substantial evidence in the congressional record about the negative effects of gun violence at schools. 514 U.S. at 619 (Breyer, J., dissenting). Yet, the Supreme Court held these findings immaterial in determining whether a federal ban on gun possession at local schools was justified under the Commerce Clause. The only relevant inquiry regarding findings was whether there were "express . . .findings regarding the effects *upon interstate commerce* of gun possession in a school zone." *Id*. at 562 (emphasis added).

Similarly, the Supreme Court explicitly discounted any findings regarding whether a federal ban on medicinal marijuana was a good public health policy in *Raich*. 545 U.S. at 9. Instead, the Court cited extensive congressional findings

prohibiting travel between the states by those infected with COVID-19 that the CDC Order is inherently connected to.

[14] *See generally*, 85 Fed. Reg. 55292 (Sept. 4, 2020); Section 502 of Title V, Division N of the Consolidated Appropriations Act, 2021 (first extension); 86 Fed. Reg. 8020 (Feb. 3, 2021), (second extension); 86 Fed. Reg. 16731 (March 31, 2021), (third extension).

showing that marijuana was a fungible commodity and that it was difficult to distinguish between intrastate and interstate marijuana in the law enforcement context. *Id*. at 22; *id*. at 12 n.20 (laying out additional congressional findings in support of this claim). Based on these findings, the Court concluded that the government's ability to regulate the interstate sale of marijuana would be substantially undercut without the ability to regulate possession of intrastate marijuana. *Id*.[15] The Court therefore held that federal regulation of local marijuana possession could be justified under the Necessary and Proper Clause. *Id*.

Finally, in *Groome,* this Court did not rely on findings that housing discrimination was unjust or immoral to justify its holding that the Fair Housing Act was constitutional. 234 F.3d at 216. Instead, this Court noted that the "legislative record is replete with informal findings connecting direct discrimination against the disabled with the larger and more subtle effects on the *interstate supply of housing*." *Id.* at 213 (emphasis added). It noted further the significant congressional testimony involving "instances of discrimination that placed burdens on the *interstate* movement of persons and *commerce*" as well as evidence that "[t]his discrimination

[15] This line of reasoning would also justify the ban on racially discriminatory evictions. *See Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982)). While eviction itself is not an economic activity, a ban on discriminatory renting (which is a regulation of economic activity) would be wholly undercut if tenants could be evicted for discriminatory reasons as soon as the lease was signed.

clearly depressed spending on *interstate housing*, and imposed an artificial restriction on *the market*." *Id.* (emphasis added).

There are no similar findings here. Instead, the CDC's findings solely focus on whether an eviction moratorium is good COVID-19 policy. The district court therefore correctly concluded that the third *Morrison* consideration cuts in favor of finding the CDC Order unconstitutional.

C. The CDC's theory of federal power piles inference upon inference in a manner that would justify a federal police power.

The next factor the court must consider is the level of fit between the facts in the record and any alleged substantial effect on interstate commerce. If the fit is too tenuous or requires the court to "pile inference upon inference" to arrive at the government's conclusions, then the regulation lacks the requisite substantial effect. *Lopez*, 514 U.S. at 567.

In *Lopez,* the Court considered the constitutionality of the Gun Free School Zones Act under the substantial effects test. The government argued that regulating firearms in schools had a sufficient connection to interstate commerce because: (1) "possession of a firearm in a school zone may result in violent crime"; (2) violent crime can be expected to affect the functioning of the national economy by raising insurance rates; and (3) violent crime reduces the willingness of individuals to engage in interstate travel to places that are deemed unsafe. *Lopez*, 514 U.S. 563-64. The Court held that this chain of causation was too tenuous to justify regulation

under the Commerce Clause. In our modern economy, the Court noted, almost anything can have some effect on commerce. If this "view of causation" were sufficient to justify federal regulation under the Commerce Clause, it "would obliterate the distinction between what is national and what is local in the activities of commerce." *Id*. at 567.

Similarly, in *Morrison*, the government argued that gender-motivated violence had sufficient effects on interstate commerce to justify the Violence Against Women Act. In that case, the government argued that violence against women substantially affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Morrison*, 529 U.S. at 615. Once again, the Court rejected the government's extended theories of causation. As the Court explained, the government's theory of causation would justify regulating virtually anything—including traditional state matters such as family law and divorce—because local issues such as family law and divorce have equal or greater effects in the aggregate on interstate travel and the national economy than does domestic violence. *Id*. 615-16

Lopez and *Morrison* are dispositive here. The CDC's position, in short, is that the federal government may ban evictions because: (1) evictions may lead to more individuals living in group settings; (2) this transition to group settings will lead to increased spread of COVID-19; and (3) the increased spread of COVID-19 will have negative impacts on interstate commerce. But as in *Morrison,* that tenuous, multi-step causal connection to interstate commerce would likewise justify a federal moratorium on divorce—a type of regulation that the Supreme Court listed as wholly beyond federal control. *See Morrison*, 529 U.S. at 615 (specifically rejecting a reading of the substantial effects test that would allow the federal government to regulate divorce); ROA.1683. Like evictions, divorce proceedings involve the allocation of resources, which certainly have economic effects. *See id*. Moreover, like evictions, it is not difficult to imagine that divorce will cause a non-zero number of divorcees to move into congregate settings, move in with family, or move to another state, whether to be closer to remaining family or just to get away from their ex-spouse. In fact, the same data relied on in the CDC Order shows that changes in marital status result in almost ten times more residential moves than do evictions and foreclosures. ROA.1683. Thus, if the CDC's theory is correct, even divorce would be subject to federal control under the Commerce Clause—an outcome rejected both in *Morrison* and by the district court below. *Id*.

Indeed, the CDC's theory of federal power would justify not only the federal regulation of divorce but also the regulation of a vast array of local crimes. Domestic violence often causes women to move to new homes or shelters with congregate living arrangements. Crime in certain neighborhoods may incentivize individuals to move to safer areas that they can only afford by taking on roommates, which would likewise facilitate the spread of COVID-19. And as the Supreme Court noted in *Morrison*, all these things "diminish[] national productivity, increas[e] medical and other costs, and decreas[e] the supply of and the demand for interstate products." *Morrison*, 529 U.S. at 615. But the Supreme Court has repeatedly held that these sorts of local activities are beyond the scope of the commerce power. *Id*. The district court therefore rightly concluded that the connection between the CDC Order and interstate commerce was too tenuous to pass constitutional muster. ROA.1684.

D. Even if the CDC Order were found to be Necessary, it is not Proper.

Even if the government could show that the regulation at issue here was "necessary" under the four considerations above, this Court would still need to evaluate whether the regulation was "proper." *NFIB*, 567 U.S. at 560; *see also Raich*, 545 U.S. at 39 (Scalia, J., concurring) (adding the "proper" analysis as an additional consideration after the *Morrison* factors). To be "proper," a regulation of intrastate conduct "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Raich*, 545 U.S. at 39 (quoting *McCulloch*, 17 U.S.

(4 Wheat.) at 421-22). These "phrases are not merely hortatory," but reflect a solemn command to the court. *Id*. (citing *Printz*, 521 U.S. 898, and *New York v. United States*, 505 U.S. 144 (1992)). Among other things, a regulation is not "proper for carrying into Execution the Commerce Clause when it violates a constitutional principle of state sovereignty," *Raich,* 545 US at 39, "undermine[s] the structure of government established by the Constitution," *NFIB*, 567 U.S. at 559, or marks a novel or "substantial expansion of federal authority" into areas traditionally reserved to individuals or to the states, *id.*

In *NFIB*, the Court demonstrated that the "proper" prong of the Necessary and Proper Clause has teeth. That case involved the constitutionality of the Affordable Care Act's national individual mandate to purchase health insurance. The government argued that the mandate was essential to its broader regulatory scheme to drive down the cost of health insurance and therefore justified as necessary and proper to its regulation of interstate commerce. A majority of the members on the Court disagreed: "Even if the individual mandate [were] 'necessary' to the Act's insurance reforms" the Court concluded, such an expansion of federal power into traditional matters of state concern was "not a 'proper' means for making those reforms effective." *Id*. at 560 (Roberts, C.J.); *id*. at 653 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) ("[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States

but also when it violates the background principle of enumerated [and hence limited] federal power.").

The same reasoning applies here. First, the CDC Order is, as conceded by Appellants, the first of its kind. ROA.1681. While not dispositive, "sometimes 'the most telling indication of a severe constitutional problem . . . is the lack of historical precedent'" for the federal action. *Id*. at 549 (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)). "At the very least, we should 'pause to consider the implications of the Government's arguments' when confronted with such new conceptions of federal power." *Id*. at 550 (quoting *Lopez, supra*, at 564.)

Second, the CDC Order marks a substantial expansion of federal power into matters of traditional state concern, with significant effects on state sovereignty. On its face, the Order regulates private property rights and state legal proceedings—both of which are traditional state functions. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."); The Federalist No. 17 (Alexander Hamilton) ("The administration of private justice between the citizens of the same State . . . [is] proper to be provided for by local legislation [and] can never be desirable cares of a general jurisdiction.").

Finally, there is simply no limiting principle to the CDC's theory of federal authority in this case that would prevent the Commerce Clause from becoming a general police power akin to that held by the states. *See NFIB*, 567 U.S. at 536. As explained *supra*, the CDC relies on the claim that evictions may have some non-zero effect on individuals moving across state lines as the basis for its authority here. But the Supreme Court has recognized that almost any intrastate activity can have such an effect. *Morrison*, 529 U.S. at 611. Divorce, local crime, classroom curriculum in public schools, and countless other intrastate matters all have effects on when and whether individuals move. *See Lopez*, 514 U.S. at 565. But those sorts of activities have traditionally been viewed as the exclusive domain of the state. *Id*. Thus, an expansion of federal power such as the one attempted here cannot be said to be "proper."

Indeed, when asked at oral argument below whether she could articulate any limiting principle that would prevent such an expansion of federal authority, the only principle that CDC's counsel could offer was the disputed allegation that evictions are economic whereas other state law issues like divorce are not. ROA.1737-40. But even assuming arguendo that was accurate, that distinction would not be sufficient. As noted *supra*, the text of the Commerce Clause necessarily implies that there is some intrastate economic activity that is beyond federal authority. It is the Interstate Commerce Clause, after all, not the "economic activity" clause.

IV. THE CDC ORDER IS NOT A NECESSARY AND PROPER EXERCISE OF THE SPENDING POWER.

Throughout its briefing both to this Court and below, the CDC has only specifically referenced the Commerce Clause in attempting to justify its exercise of power. However, the CDC now raises an argument that, while labeled a Commerce Clause argument, could better be described as invoking the spending power in connection with the Necessary and Proper Clause. CDC Br. at 15-16. In particular, the CDC claims that the Order is permissible because Congress has spent "more than $5 trillion" on COVID relief, including "more than $46 billion in emergency assistance for rent and rental arrears"; and the eviction moratorium is merely a temporary stop-gap measure designed to make that spending effective by keeping people in their homes while that federal money is distributed. *Id.*

But this argument fails for two reasons. First, it is disingenuous. The "temporary" moratorium has been in place for eight months, long after rental assistance became available and stimulus payments were sent out. And the CDC made clear below that nothing about its theories of federal power were limited to pandemic relief, but could be exercised for any reason, including "fairness." ROA.1683. Any argument that these measures are limited by either time or circumstance therefore falls flat. More importantly, the CDC's argument would require this Court to uphold the very portions of the Gun Free Schools Act held unconstitutional in *Lopez*. The Federal Government spends significant amounts of

money on education. Certainly, that funding will be more effective if there is less gun violence in schools. Thus, under the CDC's theory, a federal ban on guns in schools is permissible.

Indeed, under the CDC's theory, the federal government would have *carte blanche* to regulate private conduct in virtually any arena in which it spends money—which at this point, encompasses virtually every aspect of private life. For example, it is undisputed that divorce has significant nationwide effects and therefore affects the "general welfare" of the country.[16] And one of the primary causes of divorce is stress over financial problems.[17] It follows that Congress could invoke its spending power to provide funding to impoverished individuals to help prevent divorce. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *United States v. Butler*, 297 U.S. 1, 66 (1936) (noting that Congress may spend for the "general welfare" and that spending is not limited to enumerated powers)). Under the CDC's theory, a government agency could then impose a separate moratorium on divorce for all couples under the rationale that such a measure is a necessary and proper means of ensuring the arrival of those federal dollars prior to divorce. But the Supreme Court has specifically foreclosed such a broad interpretation of the

[16] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4240051/ (outlining the negative impacts of divorce).

[17] *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4012696/ (noting that 50% of couples list financial problems as a cause of divorce).

government's powers under the Necessary and Proper Clause. *See Morrison*, 529 U.S. at 615. The CDCs last minute spending clause argument therefore fails.

CONCLUSION

At its core, this case is about limits. The judicial interpretations of the Commerce Clause and Necessary and Proper Clause might have shifted over time. But under any constitutional framework, their definitions cannot be allowed to encompass an unlimited view of federal power.

Like any powerful entity that wise prudence has constrained, the federal government wishes to have this Court cast those limitations aside. The government and its amici invoke public health, fairness, equity, and a whole host of policy considerations in service of that effort. But the structural limitations enshrined in the Constitution are not mere abstractions to be discarded whenever the latest purportedly wise and noble policy innovation cannot be validly authorized. To the contrary, it is for moments like these that the Constitution was written. Its drafters understood that "troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866).

The limits imposed here are modest. The lower court did not revert to the original meaning of the Commerce Clause, or even to those cases written before the role of government was expanded by the New Deal. It did not have to. The court merely applied the various considerations laid out in recent binding precedent to find that the government's novel and wide-ranging expansion of power into areas of local concern transgressed even the most lenient interpretation of the constitutional text.

As one might expect, the federal government chafes at this modest limitation on its power. But the alternative it proposes would bring any activity with even the faintest relation to economics within the purview of the federal leviathan. Such an approach is not only contrary to precedent, but to the very idea of a written constitution. This Court should therefore fully affirm the district court's judgment holding that the CDC Order is unlawful and setting it aside under 5 U.S.C. § 706(2)(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 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.

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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 11,439 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 in Times New Roman 14-point font, a proportionally spaced typeface.

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