No. 21-40137

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

---v.---

CENTER FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, in her official capacity as Director of the Centers for Disease Control and Prevention; SHERRI A. BERGER, in her official capacity as Acting Chief of Staff for the Centers for Disease Control and Prevention; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services; UNITED STATES OF AMERICA,

Defendants-Appellants.

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

BRIEF OF TEXAS APPLESEED AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT URGING REVERSAL

Texas Appleseed has received the consent of all parties to file this brief. *See* Fed. R. App. R. 29(a)(2).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Texas Appleseed submits the following corporate disclosure statement:

The Amicus Curiae herein is a not-for-profit organization. It has no parent corporation or any capital stock held by a publicly-traded corporation.

CERTIFICATE OF INTERESTED PERSONS

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

USDC No. 6:20-cv-00564

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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 OF IDENTIFICATION

Texas Appleseed[1] is a non-profit public interest justice center that promotes social and economic justice for all Texans. Its work includes a range of issues including criminal and juvenile justice reform, fair financial services, youth homelessness, education justice, and disaster recovery and fair housing. Access to safe and stable housing, particularly during the COVID-19 pandemic, is critical to all of Texas Appleseed's projects and the Texans they serve. Texas Appleseed is concerned that the district court's invalidation of the Center for Disease Control's temporary eviction moratorium will exacerbate homelessness and reduce access to safe and stable housing.

Texas Appleseed files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all parties to the appeal have consented to the filing of this brief.

Counsel for the Appellant did not author the brief in whole/in part. Appellant did not contribute financial support intended to fund the preparation or submission of this brief. No other individual(s) or organization(s) contributed financial support intended to fund the preparation or submission of this brief.

[1] Texas Appleseed's mission is to promote social and economic justice for all Texans by leveraging the skills and resources of volunteer lawyers and other professionals to identify practical solutions to difficult systemic problems. Texas Appleseed conducts data-driven research to uncover inequity in laws and policies and identify solutions for lasting, concrete change.

INTRODUCTION

Amicus supports the federal government's appeal of the district court's decision declaring that Department of Health and Human Services' temporary moratorium limiting evictions during the COVID-19 pandemic is not a regulation of "economic activity" and hence is beyond the federal government's power under the Commerce Clause. Not since the Supreme Court's discredited determination a century ago in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) that professional baseball was a mere "exhibition," and although "made for money would not be called trade or commerce," *id*. at 209, is amicus aware of a case in which a court has taken such an impermissibly narrow view of commercial activity. "Professional baseball," of course, "is a business and it *is* engaged in interstate commerce." *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (emphasis added). But while baseball's antitrust exemption – not applicable to any other professional sport – was upheld solely on *stare decisis* grounds, *id.* at 276-282, 284, both logic and *stare decisis* demand reversal here.

This brief focuses on three issues. First, we discuss the district court's dramatic departure from the settled Commerce Clause precedents of both this Circuit and the Supreme Court, in particular this Court's recognition in *Groome Resources Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000) that even local rental activity materially affects interstate commerce and is properly the subject of

regulation under the Commerce Clause. *See id*. at 206. Regulation of evictions is self-evidently a regulation of the rental market. Second, we discuss the broad implications for numerous other decades-old federal regulatory regimes covering service abandonments and foreclosures – clear analogs to eviction – the constitutional validity of which would be called into question if the district court's decision were upheld. Finally, and again as this Court has ruled in *Mesa Petroleum Co. v. Federal Power Comm'n*, 441 F.2d 182 (5th Cir. 1971), the remedial power an agency has been given to address problems within its Commerce Clause jurisdiction – a power Congress has plainly given the CDC to prevent the interstate transmission of disease that would harm the nation's economy – are "at zenith" when fashioning remedies. 441 F.2d at 187-88 (quoting *Niagara Mohawk Power Corp. v. Federal Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

ARGUMENT

I. The District Court's Declaration that the CDC's Temporary Eviction Moratorium Is Unconstitutional Ignores the Settled Commerce Clause Jurisprudence of Both the Supreme Court and this Circuit.

The district court's ruling that the CDC's eviction moratorium is not commercial activity subject to commerce clause regulation rests on two unsustainable premises: (1) that the "expressly regulated activity" was not rentals – which the district court acknowledges is commerce – but instead only evictions; *see* ROA.1675-77 (quoting *GDF Realty Invs., Ltd v. Norton*, 326 F.3d 622, 634 (5th Cir.

2003)); and (2) that evictions are not economic activity. ROA.1675-77. Both assertions conflict with controlling Supreme Court and Fifth Circuit precedent. These points are discussed below.

A. The district court's determination that evictions are not "economic activity" runs counter to this Court's clear Commerce Clause precedent. It conflates the economic activity being regulated – the commercial rental market – with the Constitutionally permissible means of regulation – an eviction moratorium.

In ruling that eviction was not "economic activity," and hence not properly subject to regulation under the Commerce Clause,[2] the district court conflates what

[2] The district court's decision also states that the eviction moratorium has no substantial effect on interstate commerce because it "regulates property rights in buildings" and "[r]esidential buildings do not move across state lines." ROA.1675. To the extent it relies on this rationale to support its finding of unconstitutionality, the court's ruling is without merit. Congress is not limited to regulation of things that cross state lines. Rather, Congress can regulate things that are purely intrastate, so long as regulation thereof is "an essential part of a larger regulation of economic activity." *See Gonzales v. Raich*, 545 U.S. 1, 24-25 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). And, as the Supreme Court held in *Russell v. United States*, 471 U.S. 858 (1985), "the rental of real estate is unquestionably such an activity." 471 U.S. at 862. "[T]he local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Id*. This Court's decision in *Groome,* makes plain that *Russell* was not case specific, but a general precedent that intrastate rental activity has a substantial effect on interstate commerce. *See* 234 F.3d at 206. Two other decisions of this Court come to the very same conclusion. *See United States v. Corona*, 108 F.3d 565, 571 (5th Cir. 1997), *as modified on denial of reh'g* (Apr. 7, 1997) (holding that regulation of a leased building was constitutionally permissible pursuant to the commerce power); *United States v. Ho,* 311 F.3d 589, 601 (5th Cir. 2002) (upholding EPA regulation of the removal of asbestos from commercial buildings when it involved "purely intrastate activities"); *see also Chambless Enters., LLC v. Redfield*, No. 3:20-cv-01455, 2020

both this court and the Supreme Court have said is the plainly permissible subject of the regulation – the rental market – with the *means* of regulation, in this case evictions. Limits on evictions are a form of regulation of rentals in the same way that regulation of price or the terms and conditions in a lease of rental property constitute regulation of the rental market. Indeed, as discussed in Section II, *infra*, if one accepted the district court's rationale it would call into question a wide swath of typical federal regulation of utilities.

Russell v. United States is directly on point with respect the permissibility of regulating the rental market. There, the defendant unsuccessfully challenged his conviction for attempted arson under federal law, arguing that there was no substantial connection to interstate commerce because the building he tried to burn down – an apartment complex that he rented out – was not commercial or business property. *See Russell v. United States*, 471 U.S. 858, 859 (1985). Rejecting that contention, the Supreme Court explained that Congress can "regulate the class of activities that constitute the rental market for real estate." *Id*. at 862. If prevention of arson to rental property – the ultimate form of eviction – is within Congress's authority under the Commerce Clause, *a fortiori*, limiting or delaying evictions from rental property are also. Under the district court's logic, however, prevention of

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WL 7588849 (W.D. La. Dec. 22, 2020) (denying plaintiff's motion for preliminary injunction on complaint similar to Terkel's and citing *Russell,* 471 U.S. 858).

arson to property would also be beyond Congress's reach because, like eviction, arson is not commercial activity. But, as *Russell* holds, the activity that falls with the Commerce Clause is rental, thus prohibiting arson and limiting evictions are permissible regulation of rental property. "The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." *Id*.

This Court's decision in *Groome*, too, is nearly dispositive. It cites *Russell* approvingly for the proposition "that renting and otherwise using housing for commercial purposes implicates the federal commerce power." 234 F.3d at 206 & n.21. *Groome* involved a challenge to provisions of the Fair Housing Act requiring "reasonable accommodations" for persons with disabilities, in that case, tenants suffering from Alzheimer's disease. *Id*. at 195.

Groome emphasizes that the Fifth Circuit, like other circuit courts of appeal, has "recognized a broad reading of commercial and economic activities under the Commerce Clause." *Id*. at 208. Just as the Supreme Court held in *Russell* that arson of rented property fell within "the class of activities that constitute the rental market," 471 U.S. at 862, this Court found that Congress's regulation of housing discrimination was a permissible regulation of property rental under the Commerce Clause. *Groome*, 234 F.3d at 205. "The activity being regulated," it stated, "is one that directly affects the commercial residential and rental housing market." *Id*. That

is, the decision to deny a reasonable accommodation "is directly tied to . . . the commercial activity of operating an Alzheimer's care facility." *Id*. at 205-06. In other words, renting a house is a "commercial transaction" and, "viewed in the aggregate, it implicates an entire commercial industry." *Id*. at 206. Prevention of housing discrimination, it added, "has a substantial effect on interstate commerce." Id. at 200 (quoting *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996)). Just as this court found that the reasonable accommodations provision of the Fair Housing Act constituted regulation of rentals, *Groome*, 234 F.3d at 205, so too does a moratorium on evictions during a pandemic constitute regulation of economic activity involving the rental of housing.[3]

[3] The district court's assertion that eviction – and not regulation of the rental market – is the "expressly regulated activity," relies upon, but misconstrues this Court's decision in *GDF Realty*, 326 F. 3d at 634. ROA.1676. *GDF* stands for the proposition, wholly inapplicable here, that Congress cannot invoke the Commerce Clause to regulate an activity that did not affect interstate commerce – solely because "those subjected to the regulation were entities which had an *otherwise* substantial connection to interstate commerce," in that case solely because the person engaged in the activity is *otherwise* engaged in interstate commerce. 326 F.3d at 634, 636. (emphasis added). Under such a test, this Court found, "there 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*. at 634 (emphasis added). But the moratorium on evictions is self-evidently not a regulation of landlords solely because they are engaged in *other* interstate commercial activity. Indeed, the Court in *GDF* expressly recognized that the "expressly regulated activity" in *Groome* was not accommodations for renters with Alzheimers, but "the sale and rental of housing." *GDF*, 326 F.3d at 634.

The district court dismissed *Russell* in a handful of sentences, offering the *non sequitur* that *Russell* involved the "meaning of an act of Congress" rather than "the scope of power granted by the Constitution." ROA.1676-77. But this Court rejected that very premise in *Groome* – invoking *Russell* to reject a Commerce Clause challenge to the power of Congress to enact the Fair Housing Amendments Act. *Groome*, 234 F.3d at 206 & n.21.

B. Even assuming "eviction" was the "expressly regulated activity" of the CDC's regulatory scheme, it was plainly economic activity affecting interstate commerce.

"To be sure," the district court acknowledges, "the market for rental housing consists of economic relationships between landlords and tenants." ROA.1676. But, as discussed in Section I. A, *supra*, the court erroneously maintains that evictions and not regulation of the rental market, is the "expressly regulated activity" to which it must look to ascertain whether the regulation is a valid exercise of Congress's Commerce Clause power. *Id*. Even accepting the validity of this approach however, the district court's conclusion that evictions are not themselves commercial activity defies common sense.

The district court's conclusion appears to rest on two dubious premises: First, it reasons that because eviction moratoria are valid exercises of a state's police power and because the federal government does not possess general police powers and has not previously regulated evictions, a federal eviction moratorium must not be a

regulation of commerce. *See* ROA.1681-1683. Second, it concludes that an eviction is not economic activity because it can only occur when "the tenant has no remaining legal or possessory interest." ROA.1675 (quoting *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 920 (Tex. 2013)).

As to the first of the district court's reasons, it cannot be that a state's exercise of its police powers means that federal regulation of the same activity is not regulation of commerce. Using their police powers, many states have enacted laws barring unfair methods of competition. *See, e.g., Tucker v. Sierra Builders*, 180 S.W.3d 109, 114-15 (Tenn. 2005).[4] But the same industry conduct that may violate a state law as an unfair method of competition may also violate the similar prohibition against "unfair methods of competition in or affecting commerce" under section 5 of the Federal Trade Commission Act, 5 U.S.C. § 45(a). Similarly, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States," and had been exercised for decades before the federal government began regulation under the Commerce Clause of the wholesale rates charged by public utilities under the Federal Power Act, 16 U.S.C § 824 *et seq. See Ark. Elec. Coop. Corp. v. Ark. Publ. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

[4] These statutes are often called "little FTC Acts." *Tucker*, 180 S.W.3d at 114-15.

And the very notion that evictions are not commercial activity flies in the face of economic reality. Having acknowledged that "the market for rental housing consists of economic relationships between landlords and tenants," ROA.1676, the district court ignores the obvious. As the government correctly notes in its brief, eviction, like money damages, is "part of the bargain": it is simply a remedy "for breach of a lease." Defs.-Appellants Br. at 14-15 (quoting *In re Stoltz*, 315 F.3d 80, 86 (2d Cir. 2002)).

II. The District Court's Holding, If Upheld, Would Call into Question a Broad Swath of Decades-Old Federal Regulatory Regimes.

As discussed previously, the district court's conclusion that evictions are not commercial activity rests on its decision to treat the eviction moratorium, not as a regulation of property rentals or rental services, but as an impermissible regulation of "property rights in buildings" and "the vindication of the property owner's possessory interest." ROA.1675. There are, however, numerous federal statutes of long-standing containing provisions that could similarly be characterized as governing the owner's possessory interest in property – particularly regulation of foreclosures, service terminations and abandonments. The district court's decision separates evictions, a "recourse to a remedy" affecting the landlord's property interest, from the underlying rental transaction, which it acknowledged was a "commercial transaction" within federal commerce authority. ROA.1676 (quoting *Groome*, 234 F.3d at 206, and its discussion of discrimination against certain would-

be tenants). If applied generally, this separation of remedy from commercial transaction would undermine federal agencies' authorities to use longstanding remedial powers to protect interstate commerce. Indeed, as discussed below, if the district court's crabbed definition of commercial activity subject to the Commerce Clause were adopted it would call into question the constitutionality of many of these longstanding regulatory regimes.

Consider, for example, the 1974 Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq*. RESPA creates remedies against home mortgage servicers who fail to timely inform borrowers about their options to avoid foreclosure. 12 U.S.C. § 2605(f), (k)(1)(C). Regulation X, promulgated thereunder, strictly regulates the foreclosure timeline, including requiring a 120-day waiting period after delinquency. *See* 12 C.F.R. § 1024.41(f)(1). RESPA and Regulation X are enforceable by the nation's banking regulators and the Consumer Financial Protection Bureau. This regulation of foreclosure procedure is unquestionably an action affecting the property owner's possessory interest. It is equally clear, however, that the federal regime is a means to regulate the operation of the real estate market. But if the district court's analysis were applied, such regulation of the possessory interest would be impermissible.

Similarly, the National Trails System Act Amendments' "rails-to-trails" provision bars state law abandonment rules from divesting a railroad of its right-of-

way based on its decision to cease rail operations and permit another party to use its right-of-way for recreational and conservational uses. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 5-8 (1990) (quoting 16 U.S.C. § 1247(d)). The Supreme Court held this limitation on divestment of a property interest was valid under the Commerce Clause. *See Presault*, 494 U.S. at 17-19. Further, and despite state law, the Supreme Court has held that the Interstate Commerce Commission has "'exclusive and plenary' jurisdiction to regulate abandonments, and to impose conditions affecting post-abandonment use of the property." *Presault*, 494 U.S. at 8 (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)); *see also Birt v. Surface Transp.* Bd., 90 F.3d 580 (D.C. Cir. 1996) (affirming Commission's determination that no abandonment occurred and its ability to extend the period to enter rail-to-trail agreements to bar an abandonment finding). Notably, this involves transfers of a property interest after economic activity ceases, *i.e.* the rail line falls out of use. *See, e.g., Presault*, 494 U.S. at 9, 19. But again, if the district court's analysis were applied, such regulation of the possessory interest would be impermissible.

Agencies also have authority to compel market participants to continue engaging in regulated conduct. For example, *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952), recognized that the Federal Power Commission (now the Federal Energy Regulatory Commission) could, under the

Federal Power Act's grant of authority to regulate public utilities, compel a power company to continue engaging in interconnection of its facilities with out-of-state power companies irrespective of whether it had any remaining contractual obligation to do so. *See id.* at 421-423 ("The duty of Penn Water to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts."); *see also id.* at 419-20 (holding the existing operation involved interstate commerce).

The Supreme Court recognized the Commission had a similar power over the operation of natural gas companies under the Natural Gas Act in *Sunray Mid-Continent Oil Co. v. Federal Power Comm'n*, 364 U.S. 137 (1960). The Court held the Commission could compel those engaged in the "service" of providing natural gas to continue doing so past the length of their sales contract, and prevent them from abandoning such services. *See id*. at 147-56 ("the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.'") (quoting *Att. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 389 (1959) and citing *Penn. Water & Power Co.*, 343 U.S. at 423-24). The Federal Communications Commission has similar authority under the Communications Act, 47 U.S.C. § 214(a): "No carrier shall discontinue, reduce, or impair service . . . unless and until . . . the Commission"

determines "that neither the present nor future public convenience and necessity will be adversely affected thereby."

In each of these instances, the agency's decision to compel the regulated party to continue providing its services will require that entity to use its property for that purpose, *i.e.* regulates the owner's property rights. Thus, it would be anomalous to uphold the district court's ruling that the CDC cannot compel landlords to continue providing rental services – an economic activity – to their tenants because evictions merely involve the landlord's property interest.

The above are all examples of the valid authority Congress has given to administrative agencies to regulate banking, real estate, transportation and transmission industries that affect interstate commerce. The subject of regulation in each of these instances is the transportation or transmission of products and services. And the inclusion of provisions regarding foreclosure, termination or abandonments are among the means of regulating these industries. The district court treats the eviction moratorium, not as a regulation of property rentals or rental services, but as an impermissible regulation of "property rights in buildings." ROA.1675. The well-established powers of regulators to limit terminations of service – even after a contract has expired – would all be treated as impermissible control of private property rights – in buildings, wires or pipes, or rail tracks – if this Court were to

uphold the district court's decision. This would mark a sea change in Commerce Clause jurisprudence at odds with both Supreme Court and this Circuit's precedent.

III. The CDC's Choice of a Temporary Eviction Moratorium as a Means to Curb the Spread of a Contagious Disease Fits Well Within the Bounds of Agency Remedial Authority Recognized by This Court.

In addition to declaring the CDC's temporary eviction moratorium as beyond Congress's power under the Commerce Clause, the district court's judgment was that the CDC failed to satisfy the Constitution's Necessary and Proper Clause as well. ROA.1686-87. As to this latter point, the Government's brief correctly points out that the "objective of the temporary eviction moratorium and the means that it employs fall well within Congress's authority 'to protect the nation's commerce' from the ravages of COVID-19." Defs.-Appellants' Br. at 7 (citing *Groome*, 234 F.3d at 202). Indeed, the moratorium fits comfortably, not only within the requirement that the government's action be "reasonably adapted" to exercise of its commerce-power objectives, *United States v. Comstock*, 560 U.S. 126, 134-35, 142, 148 (2010), but within the bounds of the enabling statute's own analog to the Necessary and Proper Clause.

The district court maintains, nonetheless that the eviction moratorium lacked evidence that it was carried out in pursuance of Congress' regulation of interstate commerce, *i.e.*, that it lacked a "jurisdictional element." ROA.1677-1678. The presence of a "jurisdictional element," however, is only required where, unlike the

link here between evictions and the interstate spread of disease and the resulting damage to the national economy, there is "no obvious interstate economic connection." See *Groome*, 234 F.3d at 211.

But even were a jurisdictional link needed, one need look no further than the Public Health Services Act to find it. The purpose of the eviction provisions – to mitigate dangers to health during a pandemic – is wholly aligned with the Public Health Services Act on which the regulations are based. The Act expressly authorizes the CDC "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C. § 264(a).

This analog to the Necessary and Proper Clause is found in the enabling statutes of numerous administrative agencies. Discussing language in section 16 of the Natural Gas Act similar to 42 U.S.C. § 264(a),[5] this court has held that an agency's remedial powers are "if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions,

[5] Section 16 of the Natural Gas Act, 15 U.S.C. § 717o gives the Federal Energy Regulatory Commission the "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." *Mesa Petroleum*, 441 F.2d at 187-88 (quoting *Niagara Mohawk Power*, 379 F. 2d at 159);[6] see also *Am. Telephone & Telegraph Co. v. Fed. Commc'n Comm'n*, 454 F.3d 329, 334 (D. Cir. 2006). The temporary eviction regulation falls comfortably – in fact, squarely – within that broad standard.

CONCLUSION

For the reasons discussed above, amicus Texas Appleseed urges this Court to reverse the decision of the district court.

Dated: May 3, 2021

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Respectfully submitted,

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[6] The *Niagara Mohawk* case involved the same Commission's remedial powers under "counterpart" § 309 of the Federal Power Act. *Mesa Petroleum*, 441 F.2d at 187.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 4,470 words, excluding the parts of the brief exempt 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 it was prepared using Microsoft Word 2016 in Times New Roman 14-point, proportionally spaced typeface.

Dated: May 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on May 3, 2021. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: May 3, 2021

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