

No. 21-5256

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TIGER LILY, LLC, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et
al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Tennessee

OPENING BRIEF FOR APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

The Centers for Disease Control and Prevention (CDC) has extended, through June 30, 2021, a moratorium on certain residential evictions as a critical component of the country's ongoing fight against COVID-19. The CDC initiated the moratorium in September 2020 pursuant to its authority under 42 U.S.C. § 264. In December 2020, Congress extended, through January 31, 2021, the effective date of “[t]he order issued by the [CDC] under section 361 of the Public Health Service Act (42 U.S.C. 264).” In the adjacent section of the same legislation, Congress appropriated \$25 billion in emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent. That rental assistance—which Congress recently increased by \$21.5 billion—is meant to work in tandem with the eviction moratorium, which helps to ensure that renters are not evicted while waiting for these federal funds to be distributed.

The question presented is whether the district court erred in ruling that the CDC lacked authority to extend the eviction moratorium that Congress itself approved as an exercise of the CDC's authority under § 264. Given the importance of the case, the government respectfully requests oral argument, which should assist the Court in understanding the issues.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Compl., RE 1, Page ID # 11, ¶ 22. The district court entered final judgment on March 16, 2021. Judgment, RE 104, Page ID # 2907. The government filed a timely notice of appeal on March 17, 2021. Notice of Appeal, RE 105, Page ID # 2908-2909. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In March 2021, the Centers for Disease Control and Prevention (CDC) extended, through June 30, 2021, an Order that placed a temporary moratorium on certain evictions as part of the federal government's multi-pronged efforts to control the spread of COVID-19. The question presented is whether the district court erred in ruling that the CDC lacked authority to extend the Order that Congress itself explicitly approved as an exercise of the CDC's authority under 42 U.S.C. § 264 and that is meant to work in tandem with the billions of dollars that Congress appropriated to help pay rent and rental arrears. *See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, §§ 501, 502, 134 Stat. 1182, 2070-79 (2020) (2021 Appropriations Act).*

STATEMENT OF THE CASE

I. The Temporary Eviction Moratorium And Related Appropriations For Emergency Rental Assistance

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

The measure at issue here—a moratorium on certain evictions—forms a crucial part of a multi-pronged effort to address evictions and their impact on the spread of COVID-19. The moratorium temporarily bars the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thereby increasing the spread of COVID-19. The CDC first issued the moratorium in September 2020, pursuant to its authority to “make and enforce such regulations as in [the agency’s] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or

possession into any other State or possession,” Public Health Service Act, Pub. L. No. 78-410, § 361(a), 58 Stat. 682, 703 (1944) (codified at 42 U.S.C. § 264(a)); *see also* 42 C.F.R. § 70.2 (delegating enforcement authority to the CDC).¹ *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

In issuing the moratorium, the CDC discussed research indicating that as many as 30 to 40 million people in the United States could be at risk of eviction in the absence of state and local protections and that “mass evictions would likely increase the interstate spread of COVID-19.” 85 Fed. Reg. at 55,295. The CDC explained how congregate living situations, such as homeless shelters, exacerbate the spread of COVID-19. *See id.* at 55,294-95. Maintaining social distance is difficult in these settings, and “[e]xtensive outbreaks of COVID-19 have been identified in homeless shelters,” including in Seattle, Boston, and San Francisco. *Id.* at 55,295. The CDC also explained

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

that the homeless population is at particular risk of requiring hospitalization from COVID-19, *see id.* at 55,295-96, burdening strained hospital systems.

In December 2020, Congress extended the moratorium through January 31, 2021. In relevant part, that legislation provided:

The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264), entitled “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID–19” (85 Fed. Reg. 55292 (September 4, 2020)) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

2021 Appropriations Act, § 502, 134 Stat. at 2078-79.

In the immediately preceding section of the same legislation, Congress appropriated \$25 billion in emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent due to the pandemic. *See* 2021 Appropriations Act, § 501, 134 Stat. at 2070-73. This appropriation works together with the moratorium, helping to “ensure that millions of renters across America are not evicted while waiting to receive assistance.” U.S. House Comm. on Fin. Servs., *COVID-19 Stimulus Package: Temporary Extension of the CDC Eviction Moratorium & Emergency Rental Assistance*, <https://go.usa.gov/xss3y> (last visited May 12, 2021).

The CDC extended the moratorium in January 2021 and in March 2021. *See* Temporary Halt in Residential Evictions to Prevent the Further

Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021); 86 Fed. Reg. 16,731. Also in March 2021, shortly before the CDC's most recent extension of the moratorium, Congress appropriated an additional \$21.5 billion in rental assistance designed to reach landlords whose tenants have fallen behind in rent due to the pandemic. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (American Rescue Plan Act). Like the \$25 billion provided by the 2021 Appropriations Act, this additional funding is meant to work together with the moratorium to help ensure that renters are not evicted (exacerbating the spread of the virus) before emergency assistance is received. *See, e.g.*, 167 Cong. Rec. H1281 (daily ed. Mar. 10, 2021) (statement of Rep. Waters) (urging the CDC to “again extend the federal eviction moratorium that expires on March 31, 2021 so that grantees have time to distribute assistance to renters in need”).

In extending the moratorium through June 30, 2021, the CDC emphasized the ongoing need to “maintain COVID-19 precautions to avoid further rises in transmission and to guard against yet another increase in the rates of new infections,” “[e]ven as COVID-19 vaccines continue to be distributed.” 86 Fed. Reg. at 16,733. As of March 25, 2021, at the time of the extension, nearly 30 million COVID-19 cases, resulting in more than 540,000

deaths, had been reported in the United States. *Id.* at 16,732. Continued vigilance is particularly warranted, the CDC explained, because new variants of the virus show “increased transmissibility as well as possible increased mortality.” *Id.* at 16,733. In light of “the persistent and dynamic nature of the pandemic,” the CDC found that there was an urgent need to continue the protections of the eviction moratorium to control the spread of COVID-19, “subject to revision based on the changing public health landscape.” *Id.* at 16,733-34.

B. While the temporary eviction moratorium remains in effect, landlords may not evict covered persons from residential properties for the nonpayment of rent. *See* 85 Fed. Reg. at 55,292, 55,297. The moratorium applies only to individuals who, if evicted, would likely become homeless or be forced to live in close quarters in a congregate or shared living setting. *Id.* at 55,293. To qualify as a “[c]overed person,” a tenant must provide a sworn declaration to her landlord indicating that she (1) “has used best efforts to obtain all available government assistance for rent or housing”; (2) satisfies certain income requirements; (3) “is unable to pay the full rent . . . due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses”;

(4) “is using best efforts to make timely partial payments that are as close to the full payment as . . . permit[ted]”; and (5) “has no other available housing options” and therefore would likely become homeless or be forced to “live in close quarters in a new congregate or shared living setting” if evicted. *Id.* (footnote omitted).

Although the moratorium temporarily protects covered persons from eviction for failure to pay rent, it does not excuse their obligations to pay rent or to comply with other obligations of their lease. 85 Fed. Reg. at 55,294. And even if a tenant qualifies as a covered person, the moratorium does not bar a landlord from commencing a state-court eviction proceeding, provided that actual physical removal does not occur while the moratorium remains in effect. *See id.* at 55,293 (defining “[e]vict” as “to remove or cause the removal of”); *see also* CDC, *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions* 1, <https://go.usa.gov/xHvzV> (last visited May 12, 2021) (stating that landlords are not prevented from “starting eviction proceedings, provided that the actual physical removal of a covered person for non-payment of rent does NOT take place during the period of the Order”).

II. Prior Proceedings

A. Plaintiffs are an individual and six companies that own or manage residential rental properties within the Western District of Tennessee. First Amended Compl., RE 21, Page ID # 199-200, ¶¶ 1-8. The complaint challenged the eviction moratorium on various grounds.

The district court denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs failed to demonstrate irreparable harm. *See* Order, RE 69, Page ID # 981. Subsequently, in the ruling at issue here, the district court declared that the extension of the CDC Order exceeded the agency's statutory authority and is unenforceable in the Western District of Tennessee. *See* Op., RE 103, Page ID # 2905.

In so ruling, the district court did not "minimize the gravity" or the "exigency" of "the worst pandemic in more than a century." Op., RE 103, Page ID # 2894-2895, 2898. The court acknowledged that, in December 2020, Congress itself extended the CDC Order as an exercise of the agency's authority to control the spread of COVID-19 under 42 U.S.C. § 264(a). Op., RE 103, Page ID #2895. However, the court declared that "any such ratification was of limited duration." *Id.*

B. The government moved for an emergency stay pending appeal, which this Court denied. *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, 992 F.3d 518 (6th Cir. 2021). The motions panel acknowledged that, in extending the effective date of the CDC Order, Congress explicitly referenced the CDC's authority under 42 U.S.C. § 264. *See Tiger Lily*, 992 F.3d at 524. But the motions panel described the legislative action as “mere congressional acquiescence in the CDC's assertion that the Halt Order was supported by 42 U.S.C. § 264(a)” and concluded that “the plain text of that provision indicates otherwise.” *Tiger Lily*, 992 F.3d at 524. In concluding that the plain text of § 264(a) could not encompass the temporary eviction moratorium, the motions panel focused on that provision's second sentence but did not analyze its first sentence. *See Tiger Lily*, 992 F.3d at 522-23. The motions panel also suggested that allowing the CDC to extend the moratorium “pushed the limits of Congress's Commerce Clause authority,” *id.* at 523, and implicated the nondelegation doctrine, *see id.*²

² The order of the motions panel is “not strictly binding upon subsequent panels.” *Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014); *see also R.E. Dailey & Co. v. John Madden Co.*, No. 92-1397, 1992 WL 405282, at *1 n.1 (6th Cir. Dec. 15, 1992) (“we are not bound to follow the decision of the motions panel”). Because the motions panel's reasoning largely tracked the reasoning of the district court, our argument below focuses on the district court's analysis.

SUMMARY OF ARGUMENT

The CDC’s March 2021 extension of the temporary moratorium on certain evictions is within its statutory authority. The CDC initiated the moratorium in September 2020 pursuant to its authority under 42 U.S.C. § 264 to curb the interstate spread of COVID-19. In December 2020, Congress extended, through January 31, 2021, the effective date of “[t]he order issued by the [CDC] under section 361 of the Public Health Service Act (42 U.S.C. 264).” 2021 Appropriations Act, § 502, 134 Stat. at 2078-79.

Through this explicit reference to the CDC’s statutory authority, Congress ensured that the agency could further extend the moratorium if the evolving conditions of the pandemic so required. The CDC’s ability to extend the moratorium was particularly important to Congress because the moratorium works in tandem with the \$25 billion in emergency rental assistance that Congress appropriated in the adjacent provision of the same legislation, *see* 2021 Appropriations Act, § 501, 134 Stat. at 2070-73, and that Congress later increased by \$21.5 billion, *see* American Rescue Plan Act, § 3201(a)(1), 135 Stat. at 54. The CDC’s extension of the moratorium helps to ensure that renters are not evicted—exacerbating the spread of the virus—while awaiting this rental assistance. *See, e.g.*, 167 Cong. Rec. H1281

(statement of Rep. Waters) (urging the CDC to “again extend the federal eviction moratorium that expires on March 31, 2021 so that grantees have time to distribute assistance to renters in need”).

The motions panel mistakenly suggested that, by allowing the CDC to extend the moratorium, Congress “pushed the limits” of its “Commerce Clause authority” and implicated the nondelegation doctrine. *Tiger Lily*, 992 F.3d at 523. Congress undoubtedly can act to control an “interstate epidemic” that has devastated domestic industries. *United States v. Comstock*, 560 U.S. 126, 142 (2010) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause)). And the moratorium regulates contracts for the “rental of real estate,” which is “unquestionably” an activity affecting interstate commerce. *Jones v. United States*, 529 U.S. 848, 856 (2000) (quoting *Russell v. United States*, 471 U.S. 858, 862 (1985)).

Likewise, no plausible nondelegation claim can be asserted against an agency action that Congress ratified. And in any event, § 264(a) permits only actions necessary to prevent the introduction or spread of communicable disease from State to State or from foreign countries into the United States. That standard is at least as intelligible as the standards upheld by the Supreme Court in other cases, which the motions panel did not discuss.

STANDARD OF REVIEW

This appeal presents questions of law that are subject to de novo review. *See Smith v. Thomas*, 911 F.3d 378, 381 (6th Cir. 2018).

ARGUMENT

I. The March 2021 Extension Of The Temporary Eviction Moratorium Was Within The CDC's Statutory Authority

A. Congress Expressly Approved The Moratorium As An Exercise Of The CDC's Authority Under 42 U.S.C. § 264

By order of March 31, 2021, the CDC extended, through June 30, 2021, the temporary eviction moratorium pursuant to its authority under 42 U.S.C. § 264, which is the provision that authorized the initial moratorium issued by the CDC on September 4, 2020. *See* 86 Fed. Reg. at 16,732-33. Before the CDC issued any extension, Congress had not only extended the initial moratorium (through January 31, 2021) but also specified that it was extending the order issued by the CDC “under section 361 of the Public Health Service Act (42 U.S.C. 264).” 2021 Appropriations Act, § 502, 134 Stat. at 2078-79. Through this explicit reference to the agency's statutory authority, Congress conclusively determined that the temporary eviction moratorium is a permissible measure under § 264 to curb the interstate spread of COVID-19. *See, e.g., Branch v. Smith*, 538 U.S. 254, 281 (2003)

(plurality op.) (explaining that statutory interpretation includes “later-enacted statutes”).

The district court incorrectly declared that Congress’s “ratification was of limited duration.” Op., RE 103, Page ID # 2895. That overlooks *how* Congress accomplished the extension. Congress did not impose a 30-day moratorium itself, and it did not grant the CDC any new authority. Instead, Congress extended the effective date of the order that the CDC had issued under § 264. The essential premise of that legislative action was that the original order was valid: An extension of the order would have had no legal effect if the CDC had lacked authority to issue the order in the first place. This Court should reject an interpretation that renders a statute such “an exercise in futility.” *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003).

By approving the eviction moratorium as an exercise of the CDC’s § 264 authority, Congress thereby confirmed that the CDC could extend the moratorium if its public health experts determined that the pandemic’s evolving conditions so required. The CDC’s ability to do so was crucial for Congress, because the moratorium was meant to work in tandem with the \$25 billion in emergency rental assistance that Congress appropriated in the immediately adjacent provision of the same legislation, *see* 2021

Appropriations Act, § 501, 134 Stat. at 2070-73, and that Congress later increased by an additional \$21.5 billion, *see* American Rescue Plan Act, § 3201(a)(1), 135 Stat. at 54. By endorsing the CDC’s exercise of its § 264(a) authority, Congress ensured that the CDC could “again extend the federal eviction moratorium that [was set to expire] on March 31, 2021 so that grantees have time to distribute assistance to renters in need.” 167 Cong. Rec. H1281 (statement of Rep. Waters).

B. The District Court Misunderstood The Statutory Authority That Congress Ratified

A court cannot properly disregard Congress’s explicit recognition of the statutory authority for the CDC’s moratorium. That would be true even if the scope of the underlying authority were unclear. “Congress ‘has the power to ratify the acts which it might have authorized’ in the first place, so long as the ratification ‘does not interfere with intervening rights.’” *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *United States v. Heinszen*, 206 U.S. 370, 384 (1907)).

In any event, the CDC reasonably determined that the temporary eviction moratorium—in the face of an unprecedented pandemic—was “necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State

or possession.” 42 U.S.C. § 264(a). As other courts have recognized, “Congress’ intent, as evidenced by the plain language” of the first sentence of § 264(a), “is clear: Congress gave the [agency] broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases.” *Chambless Enters., LLC v. Redfield*, --- F. Supp. 3d ---, No. 20-cv-1455, 2020 WL 7588849, at *5 (W.D. La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. Jan. 22, 2021) (quoting *Brown v. Azar*, --- F. Supp. 3d ---, No. 20-cv-3702, 2020 WL 6364310, at *7 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. Nov. 9, 2020)).

As those decisions explained, that authority is not confined to the actions enumerated in the second sentence of § 264(a), which indicates that, “[f]or purposes of carrying out and enforcing . . . regulations” promulgated under the first sentence, the agency “may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of [infected or contaminated] animals or articles . . . , and other measures, as in [its] judgment may be necessary.” Other subsections of § 264 show that this enumerated list does not exhaust the authority conferred by the first sentence of § 264(a). For example, subsections (b), (c), and (d) of § 264—which do not contain affirmative grants of authority—restrict the

circumstances in which the CDC may provide for the “apprehension, detention, examination, or conditional release of individuals.” “The presence of the additional sub[s]ections governing detainment of individuals means that the list contained in the first sub[s]ection is not an exhaustive list of the permissible measures available” to the agency. *Chambless*, 2020 WL 7588849, at *7 (quoting *Brown*, 2020 WL 6364310, at *8); accord *Independent Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 619-20 (W.D. La. 2010).

The district court here suggested that the broad language in § 264(a)’s first sentence makes the second sentence “superfluous.” Op., RE 103, Page ID # 2899. Even if that were correct, “the canon against superfluity” assists “only where a competing interpretation gives effect ‘to every clause and word of a statute.’” *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 106 (2011) (citation omitted). Here, the district court’s interpretation would make the first sentence of § 264(a) superfluous. See *Skyworks, Ltd. v. CDC*, --- F. Supp. 3d ---, No. 20-cv-2407, 2021 WL 911720, at *9 (N.D. Ohio Mar. 10, 2021) (acknowledging that § 264(a)’s “first sentence sweeps broadly and appears to support [the government’s] argument”), *appeal filed*, No. 21-3443 (6th Cir. May 7, 2021).

In any event, the government’s position results in no superfluity. Under the Supreme Court precedent that was in effect when the Public Health Service Act was enacted, explicit statutory text was required to authorize measures implicating the Fourth Amendment, such as inspections of private land. *See, e.g., Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 201-02 & nn.26, 27 (1946).

C. Congress’s Approval Of The CDC’s Authority To Extend The Moratorium Did Not Exceed Congress’s Commerce Clause Power Or Implicate The Nondelegation Doctrine

The motions panel incorrectly suggested that, by allowing the CDC to extend the temporary eviction moratorium, Congress “pushed the limits” of its “Commerce Clause authority” and implicated the nondelegation doctrine. *Tiger Lily*, 992 F.3d at 523.

Congress undoubtedly can act to control an “interstate epidemic” that has devastated domestic industries. *United States v. Comstock*, 560 U.S. 126, 142 (2010) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause)). And the moratorium regulates contracts for the “rental of real estate,” which is “unquestionably” an activity affecting interstate commerce. *Jones v. United States*, 529 U.S. 848, 856 (2000) (quoting *Russell v. United States*, 471 U.S. 858, 862 (1985)). Evictions, which serve as a contractual remedy for failure to

abide by the terms of rental arrangements, are as much a part of that economic activity as the other transactions associated with the rental market.

Nor does Congress's approval of the moratorium as an exercise of the CDC's § 264 authority implicate the nondelegation doctrine. No plausible nondelegation claim can be asserted under an agency action that Congress specifically approved. And in any event, § 264(a) permits only actions necessary to prevent the introduction or spread of communicable disease from State to State or from foreign countries into the United States. That standard is at least as intelligible as the standards upheld by the Supreme Court in other cases, which the motions panel did not discuss. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.) (explaining that the Supreme Court has “over and over upheld even very broad delegations,” including delegations to agencies to regulate in the “public interest”; to set “fair and equitable’ prices and ‘just and reasonable’ rates”; and to issue air quality standards as “requisite to protect the public health”).³

³ In a ruling that largely adopted the reasoning of the district court and the motions panel in this case, the District Court for the District of Columbia recently entered an order vacating the moratorium nationwide. *See Alabama Ass'n of Realtors v U.S. Dep't of Health & Human Servs.*, --- F.

II. The District Court’s Judgment Should Have Been Limited To The Parties

The district court issued a declaratory judgment stating that the temporary eviction moratorium is “unenforceable in the Western District of Tennessee.” Judgment, RE 104, Page ID # 2907. Even assuming that there was a basis for the court to issue any relief, the relief should have been limited to the parties.

It is settled that “[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. Moore et al., *Moore’s Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed. 2011)). Accordingly, this Court has observed, “given the general rule that district court judges are not bound by other judges within the district, it is dubious that a lone district

Supp. 3d ---, No. 20-cv-3377, 2021 WL 1779282 (D.D.C. May 5, 2021). The same day, the district court granted the government’s motion for an administrative stay to allow the court to consider the government’s motion for a stay pending appeal. *See id.*, 5/5/21 Minute Order. The government separately moved in the D.C. Circuit for a stay pending appeal and administrative stay. *See Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Servs.*, No. 21-5093 (D.C. Cir.) (stay motion filed May 7, 2021). We will update this Court on developments in that case when we file our reply brief here.

judge can single-handedly proclaim that all precedent within the district is horizontally binding.” *Ohio A. Philip Randolph Inst. v. Larose*, 761 F. App’x 506, 513 n.4 (6th Cir. 2019) (noting that “if there is a federal district court standard, it must come from the Court of Appeals, not from the [many] district court judges in [each district], each of whom sits alone and renders decisions not binding on the others” (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 469 n.10 (1996))). We recognize, however, that a merits ruling by this Court will establish circuit precedent that renders the scope of the district court’s judgment an academic question.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,241 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Expd BT 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer

Brian J. Springer

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brian J. Springer

Brian J. Springer

**DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	Page ID # Range
RE 1	Complaint for Declaratory Judgment and Injunctive Relief	1-44
RE 21	First Amended Complaint for Declaratory Judgment, Vacatur, and Injunctive Relief	192-243
RE 69	Order Denying Plaintiffs' Motion for Preliminary Injunction	960-982
RE 103	Order Granting Plaintiffs' Motion for Judgment on the Administrative Record	2886-2905
RE 104	Judgment	2906-2907
RE 105	Defendants' Notice of Appeal	2908-2910

ADDENDUM

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42 U.S.C. § 264A1

42 U.S.C. § 264

§ 264. Regulations to control communicable diseases

(a) Promulgation and enforcement by Surgeon General

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his 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. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

(b) Apprehension, detention, or conditional release of individuals

Regulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General.

(c) Application of regulations to persons entering from foreign countries

Except as provided in subsection (d), regulations prescribed under this section, insofar as they provide for the apprehension, detention, examination, or conditional release of individuals, shall be applicable only to individuals coming into a State or possession from a foreign country or a possession.

(d) Apprehension and examination of persons reasonably believed to be infected

(1) Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State. Such regulations may provide that if upon examination any such individual is

found to be infected, he may be detained for such time and in such manner as may be reasonably necessary. For purposes of this subsection, the term “State” includes, in addition to the several States, only the District of Columbia.

(2) For purposes of this subsection, the term “qualifying stage”, with respect to a communicable disease, means that such disease—

(A) is in a communicable stage; or

(B) is in a precommunicable stage, if the disease would be likely to cause a public health emergency if transmitted to other individuals.

(e) Preemption

Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title.