[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALABAMA ASSOCIATION OF REALTORS®, *et al.*,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Columbia

REPLY IN SUPPORT OF EMERGENCY MOTION TO VACATE STAY PENDING APPEAL

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INTRODUCTION

Given that the government asks this Court to break with the Sixth Circuit, one would expect a robust defense of the district court's stay order. Instead, its opposition telegraphs a lack of confidence at every turn. Rather than seriously defend the key premise underlying the stay—the legitimacy of the sliding-scale approach—it relegates that point to a terse footnote. Opp.19 n.3.[1] Rather than justify the CDC's exercise of authority as an original matter, it principally argues that Congress excused the agency's overreach after the fact. Opp.12-14. Rather than provide contemporaneous declarations from public-health officials, it relies on months-old assertions about the state of the pandemic. Opp.21-22. And rather than rest with a defense of the stay order, it devotes several pages to a fallback request foreclosed by precedent. Opp.22-25. That halfhearted response confirms that the government "fails every prong of the showing required to obtain the extraordinary relief of a stay pending appeal." *CREW v. FEC*, 904 F.3d 1014, 1017 (D.C. Cir. 2018).

[1] This reply refers to plaintiffs' motion as "Mot." and the government's response as "Opp."

ARGUMENT

I. The Government Is Unlikely To Succeed On The Merits.

Given its position in other cases, the government understandably offers little defense of the sliding-scale approach on which the stay order hinged. *See* Mot.19; Opp.19 n.3. Instead, it dismisses the district court's conclusion—shared by the Sixth Circuit—regarding the moratorium's invalidity as having "no merit" at all. Opp.1; *see Tiger Lily, LLC v. HUD*, 992 F.3d 518 (6th Cir. 2021). The government fails to defend that remarkable assertion.[2]

A. Apart from the brief suggestion that the moratorium "facilitates compliance with" quarantines, Opp.16, the CDC never contends that its edict is remotely comparable to the targeted inspection and quarantine measures authorized by Section 361 of the Public Health Service Act. Rather, it maintains that the first sentence of that provision gives it "broad power" to adopt any and all "regulations necessary" to curb the spread of disease, Opp.14

[2] Contrary to the government's suggestion (Opp.15 n.2), the relevant holdings in *Tiger Lily* will bind future panels due to that order's published status. *See* 6th Cir. R. 32.1(b); *see, e.g.*, *SEIU v. Husted*, 531 F. App'x 755 (6th Cir. 2013) (describing published stay order as "precedential"). The case the government quotes concerned an unpublished order. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 581-83 (6th Cir. 2014).

(citation omitted)—with the balance of Section 361 serving only to comply with "Supreme Court precedent in effect" in 1944, Opp.17.

This Court should reject a reading that renders "more than half of th[e] text" of Section 361 a historical footnote. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (applying canon against superfluity to construction that would make text "'insignificant'"). The government contends that the district court's interpretation would conversely render Section 361(a)'s first sentence superfluous, but that is incorrect. Opp.16. The first sentence contains a grant of authority to "make and enforce" regulations, while the second identifies the means the CDC may use to "carry[] out and enforc[e] such regulations." 42 U.S.C. § 264(a); *see* Mot.11-12. The government tries to sever the link between those two sentences by insisting that the CDC's "quarantine authority is located in § 264(a)," Opp.16, but the more natural source of that power is Section 361(d), which states that "[r]egulations prescribed under this section may provide for the apprehension and examination" of certain contagious individuals. 42 U.S.C. § 264(d)(1); *see Tiger Lily*, 922 F.3d at 523-24; Mot.11-12; *see also* 42 U.S.C. § 264(b) (authorizing quarantine regulations based on executive orders).

Even if the CDC's interpretation could be harmonized with Section 361, it would run headlong into several clear-statement rules that the government makes no attempt to satisfy. *See* Mot.13-15. The government does not even mention the major-questions doctrine, while never denying that its theory would give the CDC "unbridled power to promulgate any regulation" aimed at checking contagion. *Merck & Co. v. HHS*, 962 F.3d 531, 540 (D.C. Cir. 2020). Whether measured by "the implications of the authority claimed" or "the specific application at issue," the "breadth of the Secretary's asserted authority"—encompassing school closures, worship limits, or nationwide lockdowns—constitutes a "staggering delegation of power." *Id.* at 540-41. And as the government acknowledges, this trove of authority is apparently a recent find, as Section 361(a) "has never been used to implement a temporary eviction moratorium, and has rarely been utilized for disease-control purposes" throughout its nearly-80-year history. App.30a (cleaned up).

Rather than contest the significance of the asserted delegation, the government insists that it is constitutional. Opp.17-19. But while the Supreme Court has upheld various delegations against facial challenges, Opp.14, it has also used "statutory interpretation" to "place constitutionally adequate 'limits on [an agency's] discretion.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123

(2019) (plurality opinion). That is all plaintiffs ask for here. In any event, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001). So while delegations concerning the approval of "railroad consolidations" may use phrases such as "in the 'public interest,'" more "substantial guidance" is needed where, as here, an agency claims authority to take measures "that affect the entire national economy." *Id.* at 474-75; *cf.* Opp.19.

Strike three is the federalism clear-statement rule, which the government apparently misunderstands. No one disputes that Section 361 "authorizes" *some* "actions necessary to prevent the interstate spread of communicable disease," Opp.18, such as the quarantine of contagious persons "about to move from a State to another State," 42 U.S.C. § 264(d)(1). But before the CDC can reorder *intrastate* landlord-tenant relationships, it must identify "a clear indication that Congress meant [it] to reach purely local" arrangements, and not merely "expansive language" that could be given an "improbably broad reach." *Bond v. United States*, 572 U.S. 844, 860 (2014).

B. Given all this, the government understandably does not rely on Section 361 alone. Rather, its lead argument is that *after* the CDC acted,

Congress "clarif[ied]" that provision to empower the agency to "extend its moratorium as public-health conditions required." Opp.12. But nothing in the 2021 Appropriations Act altered the scope of the CDC's authority under Section 361, much less did so with the clarity required here. The clear-statement rules discussed above undisputedly apply with at least as much force to the Appropriations Act as they do to Section 361. *See* Mot.17-18; *see, e.g.*, *Lincoln v. United States*, 202 U.S. 484, 498 (1906) (applying constitutional-avoidance canon to reject argument that Congress had ratified executive action). In fact, even greater clarity is necessary here, as the judicial "aversion to implied repeals is 'especially' strong 'in the appropriations context,'" *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020), and the government's understanding of the Appropriations Act would dramatically repeal Section 361's limits on the CDC's authority.

Nothing in the Appropriations Act indicates that Congress meant to take that step. In stating that the CDC issued the moratorium "under" Section 361, Opp.12 (citation omitted), Congress *acknowledged* "that the CDC claimed 42 U.S.C. § 264(a) as its authority," but did not *express agreement* with that claim of authority. *Tiger Lily*, 992 F.3d at 524; *see Kucana v. Holder*, 558 U.S. 233, 245 (2010) ("The word 'under' … 'must draw its meaning from its

context.'"). Rather, all the Act reveals is that Congress decided to extend the CDC's moratorium—but only until January 31, 2021.

Lacking a clear statement, the government turns to "context," suggesting that the Act implicitly authorized the CDC to extend the moratorium beyond January 31 on the theory that "Congress did not expect the pandemic to end" by that date. Opp.13. But that one-month extension could have been adopted to "facilitate[] the transition between presidential administrations" and give "the incoming administration the opportunity to determine its own policies for responding to the pandemic." *Skyworks, Ltd. v. CDC*, No. 20-cv-2407, 2021 WL 911720, at *12 (N.D. Ohio Mar. 10, 2021). Alternatively, it may have reflected a lack of votes for extending the moratorium any further. In all events, the relevant question is not what Congress *expected*, but what it *did*, and here, it extended the moratorium only "through January 31, 2021." Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2079 (2020). "These words clearly indicate that Congress intended for the statute's protections to expire by operation of law on a date certain," *AT&T Corp. v. FCC*, 369 F.3d 554, 560 (D.C. Cir. 2004), and the CDC offers no basis to unsettle that legislative choice. Nor does it explain why Congress would have

adopted a January 31 cutoff—or any cutoff at all—had it wanted to empower the CDC to "further extend the moratorium as necessary." Opp.13-14.

II. The Government Has Not Shown That The Equities Justify A Stay.

While the government's failure on the merits alone precludes a stay, it "fares no better on the second 'critical' factor—showing irreparable harm to its legal interests." *CREW*, 904 F.3d at 1019. The government continues to ignore that factor, *see* Mot.21, and its opposition confirms that a stay will harm the interests of both plaintiffs and the public.

A. The government does not seriously dispute that a stay will substantially (and irreparably) harm plaintiffs. It never denies that unrecoverable economic losses and unlawful occupation of property constitute irreparable injuries or that plaintiffs have suffered them. *See* Mot.22-23; *cf.* 86 Fed. Reg. 16,731, 16,736 (Mar. 31, 2021) (providing that landlords cannot evict covered tenants for "the crime of trespass"). Instead, it contends only that "temporary" economic losses are irreparable and that landlords "may" one day be made whole "in the future." Opp.20-21.

The government fails to substantiate that rosy prediction. To start, the suggestion that tenants on the verge of homelessness will somehow be able to repay nearly nine months of back rent cannot be taken seriously. *See* Opp.20.

And while Congress has dedicated $46.5 billion to rental assistance, that aid continues to be plagued with rollout difficulties. The government notes Georgia has "received $552 million," *id.*, but it has distributed only over "$4 million," Jersualem Demsas, *What Happened to the $45 Billion in Rent Relief?*, Vox (May 24, 2021), https://bit.ly/3fgJhq6. It is therefore unsurprising that neither the individual plaintiffs nor their companies, *cf.* Opp.21, have received a dime of congressional relief. And even if all of this money eventually finds its way to the nation's landlords, it would not come close to making them whole, given that they are losing between $13.8 and $19 billion each month. Mot.22. At that rate, Congress would at most have compensated them for a little more than three of the nearly nine months of the moratorium's existence.

B. The government does not deny that its ability to meet the public-interest prong rises and falls with the merits, *see* Mot.23-24, making much of its discussion here irrelevant. Nor does it offer reason to doubt that the CDC's continuation of the moratorium has more to do with economic policy than with public health. *See* Mot.24-25. Today, nearly half of the nation's eligible population is fully vaccinated—and thus free to dispense with masks and distancing indoors—and new infections and deaths are a fraction of what they were on September 4, 2020. *See* CDC, *COVID Data Tracker*, https://bit.ly/

3feqtro (last visited May 26, 2021); *cf.* 86 Fed. Reg. at 16,736 (defending the March 2021 extension of moratorium on the ground that "the number of deaths per day continues at levels comparable to or higher than when this Order was established in September 2020"). Given these developments, a stay largely serves to conscript landlords into providing free housing for those who have received vaccines or declined to get them.

The government neither disputes this data nor disowns the optimistic assessments of its own public-health figures. Instead, it asks this Court to defer to "the CDC's judgment that lifting the moratorium would be premature." Opp.21. But if the "government's experts were always entitled to deference concerning the equities … , substantive relief against federal government policies would be nearly unattainable, as government experts will likely attest that the public interest favors the federal government's preferred policy." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011).

In any event, the government offers little reason for deference here. It offers not a single contemporaneous declaration from a public-health official. If ending the moratorium truly posed a public-health emergency today, one would expect some official to say so. Likewise telling is the fact that "the politically accountable officials of the States"—the figures to whom "[o]ur

Constitution principally entrusts the safety and the health of the people"—have largely parted ways with the CDC. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (cleaned up). The majority of state eviction moratoria have already expired or will do so by the end of May. Emily A. Benfer et al., *COVID-19 Eviction Moratoria & Housing Policy: Federal, State, Commonwealth, and Territory*, THE EVICTION LAB, PRINCETON UNIV., https://bit.ly/2SlV0uu (last visited May 26, 2021). And to the extent that public-health concerns resurface or persist locally, the district court's judgment does not stop the States from reinstating or extending their own moratoria, as New York recently did.

III. The Government Has Not Justified Even A Partial Stay.

Finally, the government's fallback request—preservation of the stay as to "non-parties," Opp.22—runs headlong into binding precedent. Consistent with the APA's directive that courts are to "set aside" unlawful "agency action," 5 U.S.C. § 706(2), this Court has "made clear that 'when 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.'" *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*,

145 F.3d 1399, 1409 (D.C. Cir. 1998) (brackets omitted). The Supreme Court evidently agrees. In *DHS v. Regents of the University of California*, 140 S. Ct. 1891 (2020), it explained that its affirmance of an "order vacating" unlawful agency action under the APA made it "unnecessary to examine the propriety of the nationwide scope of the injunctions" entered by other courts. *Id.* at 1916 n.7. And that distinction between nationwide vacaturs and nationwide injunctions drew no objection from four dissenters, including those who had not been shy about criticizing nationwide injunctions.

The government has not identified a single case from this Court retreating from that approach. Nor has it offered a plausible basis to distinguish this Court's precedent, *see* Opp.24-25, as avoiding "a flood of duplicative litigation" was an added benefit of, and not the basis for, nationwide relief. *Nat'l Mining*, 145 F.3d at 1409; *see id.* at 1409-10. In any event, parallel litigation in other circuits does not eliminate the possibility that narrower relief here would cause "others affected by" the moratorium "to file separate actions for declaratory relief in this circuit." *Id.* at 1409. And on that note, nothing in the vacatur order here "bind[s]" other courts, "foreclose[s]" the possibility of circuit splits, or prohibits this Court from "extending comity." Opp.23-24 (citation omitted). While the district court's *remedy* extends to non-

parties, the *precedential effect* of its decision remains the same, leaving other courts free to consider the validity of the moratorium afresh. And because the government cannot succeed on the merits with respect to the remedy, its assertion that a partial stay would not injure plaintiffs is irrelevant. Opp.22.

CONCLUSION

This Court should vacate the stay no later than June 1, 2021.

Dated: May 26, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(C) and this Court's May 18, 2021 order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 2599 words.

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 26th day of May 2021, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate