

[Not Scheduled For Oral Argument]  
No. 21-5093

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

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

v.

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

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

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**EMERGENCY MOTION FOR STAY PENDING APPEAL AND  
IMMEDIATE ADMINISTRATIVE STAY**

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## INTRODUCTION

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. On May 5, the district court vacated that moratorium nationwide but also granted an administrative stay. If the district court dissolves the stay, the government requests that this Court issue a stay pending appeal and an immediate administrative stay to prevent irreparable harm to public health.<sup>1</sup>

The moratorium temporarily bars the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thus increasing the spread of COVID-19. The moratorium does not excuse a tenant's obligation to pay rent, nor does it prevent a landlord from initiating eviction proceedings as long as the tenant is not physically removed while the moratorium is in place.

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

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<sup>1</sup> We will inform the Court promptly when the district court acts. Plaintiffs oppose this motion.



[CDC] under section 361 of the Public Health Service Act (42 U.S.C. 264).”

Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V,

§ 502, 134 Stat. 1182, 2078-79 (2020) (2021 Appropriations Act).

At the same time that Congress approved the eviction moratorium as a pandemic-control measure, Congress appropriated \$25 billion in emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent due to the pandemic. *See id.* § 501, 134 Stat. at 2070-78.

Congress has since appropriated an additional \$21.5 billion for that purpose.

*See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54.* These appropriations are meant to work together with the

eviction moratorium, which helps 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 7, 2021); *see also* 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”).

The district court nevertheless vacated the moratorium on the ground that it “is unambiguously foreclosed by the plain language of the Public Health Service Act.” Op. 19 (Dkt. No. 54). That ruling is clear legal error. By extending the date of the CDC’s original order, Congress ratified, in express statutory text, the CDC’s authority to issue such an order “under section 361 of the Public Health Service Act (42 U.S.C. 264).” That provision allows 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 one State or possession into any other State or possession.” 42 U.S.C. § 264(a). The CDC made that precise judgment in issuing and extending the moratorium, and Congress’s own action conclusively established that the eviction moratorium is a permissible exercise of the § 264 authority.

The balance of equities overwhelmingly favors a stay pending appeal. Undisputed scientific evidence amassed by the CDC shows that evictions exacerbate the spread of COVID-19, which has already killed more than half a million Americans, and research indicates that 30-40 million people could be at risk of eviction in the absence of a moratorium. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed.

Reg. 16,731, 16,733 (Mar. 31, 2021). Plaintiffs have identified no significant countervailing injury that could conceivably outweigh the importance of maintaining this vital public health measure, and they did not seek preliminary relief. Every court to consider the question has found that landlords suffer no irreparable injury as a result of the moratorium, which does not excuse a tenant's obligation to pay rent and which has been accompanied by tens of billions of dollars of federal rental assistance.

The Court should, at a minimum, stay the district court's order insofar as it grants relief to non-parties. Plaintiffs would suffer no prejudice from such a stay, and there is no sound reason to effectively preempt the similar cases now pending before the Fifth, Sixth, and Eleventh Circuits. Principles of equity and Article III jurisdiction require that relief be limited to the plaintiffs, and "[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) (quotation marks omitted). This Court's decision in *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), should not be understood to prohibit the judges in this Circuit from extending comity to the judges in other circuits.

## STATEMENT

### **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. 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 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).<sup>2</sup> *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 that the homeless population is at particular risk of requiring hospitalization from COVID-19, *see id.* at 55,295-96, burdening strained hospital systems.

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<sup>2</sup> 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).

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 7, 2021).

The CDC extended the moratorium in January 2021 and in March 2021. *See* 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*, § 3201(a)(1), 135 Stat. at 54. 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 (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, 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 7, 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. Proceedings Below**

Plaintiffs are several companies and individuals that own or manage rental properties in Georgia or Alabama, joined by trade associations in those States. *See* Compl. ¶¶ 16-22 (Dkt. No. 1). As relevant here, plaintiffs alleged that the temporary eviction moratorium exceeds the CDC’s statutory

authority. The district court accepted that argument and entered final judgment vacating the moratorium nationwide.

The district court recognized that, in extending the effective date of the CDC's original order, Congress specified that the order was issued by the CDC "under section 361 of the Public Health Service Act (42 U.S.C. 264)." Op. 18. However, the court declared that "[m]ere congressional acquiescence in the CDC's assertion that the [CDC Order] was supported by 42 U.S.C. § 264(a) does not make it so." *Id.* (quoting *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, 992 F.3d 518, 524 (6th Cir. 2021) (order denying stay)).<sup>3</sup> The court concluded that "the national eviction moratorium in the CDC Order is unambiguously foreclosed by the plain language of the Public Health Service Act." Op. 19. And the court understood this Court's precedent to compel it to vacate the CDC Order nationwide. Op. 20 (citing *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)); *see also* 5/5/2021 Minute Order (reiterating the district court's understanding of *National Mining*).

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<sup>3</sup> The motions panel's reasoning in *Tiger Lily* is "not strictly binding upon subsequent panels," *Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014), and the government's opening brief in *Tiger Lily* is due May 12.

## ARGUMENT

The standards for a stay pending appeal are readily satisfied. The government is likely to succeed on the merits, and the balance of equities and public interest overwhelmingly favor a stay. Every court to consider the question has found that landlords suffer no irreparable injury as a result of the moratorium. Indeed, plaintiffs here have never attempted to claim irreparable injury stemming from the moratorium, and Congress has appropriated more than \$46 billion in emergency rental assistance that benefits landlords such as plaintiffs. By contrast, undisputed scientific evidence shows that evictions exacerbate the spread of COVID-19, which has already killed more than half a million Americans, and the harm to the public that would result from unchecked evictions cannot be undone.

### **I. The Government Is Likely To Succeed On The Merits**

**A.** By order of March 31, 2021, the CDC extended the temporary moratorium through June 30 pursuant to its authority under 42 U.S.C. § 264, which is the provision that authorized the initial moratorium issued 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. Congress thus conclusively determined that the temporary eviction moratorium is a permissible action under § 264 to curb the interstate spread of COVID-19.

The district court incorrectly declared that “Congress merely extended the CDC Order for a limited 30-day duration.” Op. 18. 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 ensured that the CDC could extend the moratorium if its experts determined that public health conditions so required. Contrary to the district court’s suggestion, the CDC’s authority to extend the moratorium was not an “elephant” hidden in a “mousehole.”

Op. 16. Congress explicitly approved the moratorium as an exercise of the CDC's § 264(a) authority and—in the immediately adjacent provision of the same legislation—appropriated tens of billions of dollars that benefit landlords and that work in tandem with the moratorium.

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 this temporary action—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. 21, 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 suggested that the broad language in § 264(a)’s first sentence “would render the second sentence superfluous.” Op. 13. 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). 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* (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 Pub. Co. v. Walling*, 327 U.S. 186, 201-02 & nn.26, 27 (1946).

**B.** The district court incorrectly suggested that Congress’s extension and approval of the moratorium might exceed the limits of Congress’s Commerce Clause power. *See* Op. 14 (citing *Terkel v. CDC*, --- F. Supp. 3d ---, No. 20-cv-0564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), *appeal filed*, No. 21-40137 (5th Cir.)). Congress undoubtedly can act to control an “interstate epidemic” that has devastated domestic industries. *United States v. Comstock*, 560 U.S. 126, 148 (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 the March 2021 extension of the CDC order implicate the nondelegation doctrine, as the district court suggested. *See* Op. 14. As discussed above, Congress specifically approved the temporary eviction moratorium as an exercise of the § 264(a) authority, and thereby established that the CDC could extend the moratorium if evolving public health



conditions so required. No plausible nondelegation claim can be asserted under these circumstances.

Moreover, by its terms, § 264(a) permits only measures aimed at preventing 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 district court 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”).

## **II. The Balance Of Harms And The Public Interest Overwhelmingly Favor A Stay Pending Appeal**

Every federal court to consider the issue has found that landlords suffer no irreparable injury as a result of the temporary eviction moratorium.<sup>4</sup> The moratorium does not excuse a tenant’s obligation to pay

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<sup>4</sup> *See Brown*, 2020 WL 6364310 (denying preliminary injunction), *appeal filed*, No. 20-14210 (11th Cir. Nov. 9, 2020), *mot. for inj. pending appeal denied*, No. 20-14210 (11th Cir. Dec. 17, 2020); *Tiger Lily LLC v. U.S. Dep’t of Hous. & Urban Dev.*, --- F. Supp. 3d ----, No. 20-cv-2692, 2020 WL

rent, and temporary monetary harms are not irreparable. Plaintiffs here made no claim of irreparable injury. Any such assertion would be particularly untenable in light of Congress's appropriation of more than \$46 billion in rental assistance that directly benefits landlords. For example, the State of Georgia (where several plaintiffs do business) has explained that this money "will be distributed directly to landlords" and that "eligible applicants will receive up to 12 months of payment relief." Georgia Dep't of Cmty. Affairs, *State of Georgia's U.S. Treasury Emergency Rental Assistance Program*, <https://georgiarentalassistance.ga.gov/> (last visited May 7, 2021).

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7658126 (W.D. Tenn. Nov. 6, 2020) (denying preliminary injunction); *Chambless*, 2020 WL 7588849 (denying preliminary injunction), *appeal filed*, No. 21-30037 (5th Cir. Jan. 21, 2021); *Dixon Ventures, Inc. v Dep't of Health & Human Servs.*, No. 20-cv-1518, 2021 WL 1604250 (E.D. Ark. Apr. 23, 2021) (denying preliminary injunction); Order, *KBW Inv. Props. LLC v. Azar*, No. 20-cv-4852, Dkt. No. 16 (S.D. Ohio Sept. 25, 2020) (denying temporary restraining order). Three courts issued final judgments declaring the moratorium invalid, but those decisions did not apply nationwide and did not address irreparable harm or the public interest. *See Terkel*, 2021 WL 742877, *appeal filed*, No. 21-40137 (5th Cir.); *Skyworks*, 2021 WL 911720, *appeal filed* (6th Cir. May 7, 2021); *Tiger Lily LLC v. U.S. Dep't of Hous. & Urban Dev.*, --- F. Supp. 3d ---, No. 20-cv-2692, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021), *appeal filed*, No. 21-5256 (6th Cir. Mar. 18, 2021), *mot. for stay pending appeal denied*, 992 F.3d 518 (6th Cir. 2021).

By contrast, courts have consistently recognized that enjoining a temporary eviction moratorium during the pandemic is directly contrary to the public interest. *See, e.g., Brown*, 2020 WL 6364310, at \*22 (explaining that “undoing orders deemed necessary by public health officials and experts to contain a contagious and fast-spreading disease would result in comparatively more severe injury to the community”); *Chambless*, 2020 WL 7588849, at \*15 (same); *Apartment Ass’n of Los Angeles Cty., Inc. v. City of Los Angeles*, --- F. Supp. 3d ----, No. 20-cv-5193, 2020 WL 6700568, at \*11 (C.D. Cal. Nov. 13, 2020) (concluding that “[t]he economic damage the pandemic has wrought, if left unmediated by measures such as the City Moratorium, would likely trigger a tidal wave of evictions” that would “exacerbate a public health emergency”), *appeal filed*, No. 20-56251 (9th Cir. Nov. 27, 2020).

The CDC’s most recent extension of the order emphasized that the pandemic remains a significant threat, and that the moratorium remains necessary to mitigate the further spread of COVID-19. When that extension was issued, the “number of cases per day remain[ed] almost twice as high as the initial peak in April 2020 and transmission rates [were] similar to the second peak in July 2020.” 86 Fed. Reg. at 16,731, 16,732. Nearly 70 percent

of counties in the United States were experiencing “high” or “substantial” transmission, and “no counties [were] currently considered free of spread.” *Id.* at 16,733. Although vaccines were being distributed, the CDC found that maintaining COVID-19 precautions “remains critical” if the country is “to avoid further rises in transmission” and prevent “yet another increase in the rates of new infections,” particularly in light of new variants showing “increased transmissibility as well as possible increased mortality.” *Id.* Indeed, as of today, only 32.8 percent of the nation is fully vaccinated, and the country is averaging more than 45,000 new infections per day—more cases than were recorded in the initial April 2020 peak. *See* CDC COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker> (last visited May 7, 2021).

The public interest in protecting public health outweighs even serious economic harm. *See, e.g., League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125, 129 (6th Cir. 2020) (“Though Plaintiffs bear the very real risk of losing their businesses, the Governor’s interest in combatting COVID-19 is at least equally significant.”). Here, plaintiffs’ injuries “pale[] in comparison to the significant loss of lives” that “could occur should the Court block the [CDC] Order.” *Brown*, 2020 WL 6364310, at \*23.

### **III. At A Minimum, The Court Should Stay The Relief Granted To Non-Parties**

At a minimum, the Court should stay the district court's order to the extent that it provides relief to non-parties. Such a stay would cause plaintiffs no prejudice while protecting the public health.

The Supreme Court has emphasized that “[a] plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury,” *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and equitable relief “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). And it is axiomatic 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)).

“Nothing in the language of the [Administrative Procedure Act (APA)]” requires “an order setting aside [an unlawful] regulation for the entire country.” *Virginia Soc’y for Human Life, Inc. v. Federal Election Comm’n*, 263 F.3d 379, 393-94 (4th Cir. 2001). Nationwide relief creates “an absurd situation in which” the agency “must prevail in every single case brought

against [an agency action] in order for its interpretation to prevail.” *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 474 (6th Cir. 2021). Such orders “take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

This Court has recognized that “[a]llowing one circuit’s statutory interpretation to foreclose . . . review of the question in another circuit” would “squelch the circuit disagreements that can lead to Supreme Court review.” *Holland v. National Mining Ass’n*, 309 F.3d 808, 815 (D.C. Cir. 2002). That concern is acute here because challenges to the eviction moratorium are now before the Fifth, Sixth, and Eleventh Circuits. Indeed, oral argument before the Eleventh Circuit in *Brown* is set for May 14.

The district court understood this Court’s decision in *National Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), to leave it with no choice but to issue a nationwide vacatur. *See* Op. 20; 5/5/2021 Minute Order. However, that decision need not and should not be read to reject bedrock principles of standing and equity or to prohibit the judges in

this Circuit from extending comity to the judges of other circuits. Although *National Mining* described vacatur as the “ordinary result” of a successful APA action, 145 F.3d at 1409, the Court relied in part on the concern that limiting relief to the plaintiffs would trigger “a flood of duplicative litigation” in the District of Columbia, *id.* Assuming that such a concern could provide a basis to grant relief to non-parties, it is not present here. As noted above, some landlords have challenged the moratorium in their home circuits. Many others have not brought suit, perhaps because the government’s efforts to control the pandemic and its economic fallout have left them better off than they would be without the government’s interventions. In any event, there is no reason to anticipate a flood of new litigation.<sup>5</sup>

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<sup>5</sup> Indeed, in *Skyworks*, the parties agreed that members of the plaintiff trade association could claim the benefit of the district court’s March 10 judgment if they identified themselves. *See* Pls.’ Mem. 3 n.1, *Skyworks, Ltd. v. CDC*, No. 20-2407, Dkt. No. 58 (N.D. Ohio Apr. 7, 2021). To date, no landlord has done so.

## CONCLUSION

If the district court dissolves its stay, this Court should stay the district court's order pending appeal and issue an immediate administrative stay.

Respectfully submitted,

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*/s/ Alisa B. Klein*

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MAY 2021



**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 5,194 words. The motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word 2016 in proportionally spaced 14-point Century Expd BT typeface.

*/s/ Alisa B. Klein*

---

ALISA B. KLEIN

**CERTIFICATE OF SERVICE**

I hereby certify that on May 7, 2021, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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/ Alisa B. Klein*  
\_\_\_\_\_  
ALISA B. KLEIN

**ADDENDUM**

[Not Scheduled For Oral Argument]

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.

No. 21-5093

**CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES**

**A. Parties and Amici**

Plaintiffs-appellees are Alabama Association of Realtors; Danny Fordham; Fordham & Associates, LLC; H.E. Cauthen Land and Development, LLC; Georgia Association of Realtors; Robert Gilstrap; and Title One Management LLC.

Defendants-appellants are U.S. Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; U.S. Department of Justice; Merrick B. Garland, in his official capacity as Attorney General; Centers for Disease Control and

Prevention; Rochelle P. Walensky, in her official capacity as Director of Centers for Disease Control and Prevention; and Sherri A. Berger, in her official capacity as Acting Chief of Staff for Centers for Disease Control and Prevention.

There were no additional parties and no amici in district court.

### **B. Rulings Under Review**

The rulings of the district court (Friedrich, J.) under review are the court's Order of May 5, 2021 (Dkt. No. 53) and the court's Memorandum Opinion of May 5, 2021 (Dkt. No. 54).

### **C. Related Cases**

This case was not previously before this Court. Related issues are pending before the Fifth Circuit in *Chambless Enterprises, LLC v. Walensky*, No. 21-30037 (5th Cir.) (reply brief due May 12, 2021) and *Terkel v. CDC*, No. 21-40137 (5th Cir.) (response brief due May 26, 2021); before the Sixth Circuit in *Tiger Lily, LLC v. U.S. Department of Housing and Urban Development*, No. 21-5256 (6th Cir.) (opening brief due May 12, 2021) and *Skyworks, Ltd. v. CDC* (6th Cir.); and before the Eleventh Circuit in *Brown v. Azar*, No. 20-14210 (11th Cir.) (oral argument scheduled on May 14, 2021).

Respectfully submitted,

*/s/ Alisa B. Klein*

---

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**ATTACHMENTS**

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APPEAL,CLOSED,STAYED,TYPE-C

**U.S. District Court**  
**District of Columbia (Washington, DC)**  
**CIVIL DOCKET FOR CASE #: 1:20-cv-03377-DLF**

ALABAMA ASSOCIATION OF REALTORS et al v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES et al

Assigned to: Judge Dabney L. Friedrich

Case in other court: 21-05093

Cause: 05:0706 Judicial Review of Agency Actions

Date Filed: 11/20/2020

Date Terminated: 05/05/2021

Jury Demand: None

Nature of Suit: 890 Other Statutory Actions

Jurisdiction: U.S. Government Defendant

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Date Filed	#	Docket Text
11/20/2020	<a href="#"><u>1</u></a>	COMPLAINT against All Plaintiffs <i>against All Defendants</i> ( Filing fee \$ 400 receipt number ADCDC-7861856) filed by ROBERT GILSTRAP, FORDHAM & ASSOCIATES, LLC, TITLE ONE MANAGEMENT, LLC, DANNY FORDHAM, ALABAMA ASSOCIATION OF REALTORS, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC,

		GEORGIA ASSOCIATION OF REALTORS (Attachments: # <a href="#">1</a> Civil Cover Sheet, # <a href="#">2</a> Summons, # <a href="#">3</a> Summons, # <a href="#">4</a> Summons, # <a href="#">5</a> Summons, # <a href="#">6</a> Summons, # <a href="#">7</a> Summons, # <a href="#">8</a> Summons)(Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	<a href="#">2</a>	NOTICE OF RELATED CASE by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. Case related to Case No. 1:20-cv-3702-WMR (N.D. Ga.); 2:20-cv-02692-MSN-atc (W.D. Tenn.); 6:20-cv-00564 (E.D. Tex.); 5:20-cv-02407-JRA (N.D. Ohio). (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	<a href="#">3</a>	LCvR 26 1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by FORDHAM & ASSOCIATES, LLC (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	<a href="#">4</a>	LCvR 26.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by H.E. CAUTHEN LAND AND DEVELOPMENT, LLC (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	<a href="#">5</a>	LCvR 26 1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by TITLE ONE MANAGEMENT, LLC (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	<a href="#">6</a>	MOTION for Summary Judgment ( <i>Expedited</i> ) by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Memorandum in Support, # <a href="#">2</a> Declaration Fordham Declaration, # <a href="#">3</a> Declaration Gilstrap Declaration, # <a href="#">4</a> Declaration Cororaton Declaration, # <a href="#">5</a> Declaration Walker Declaration, # <a href="#">6</a> Declaration Junkin Declaration, # <a href="#">7</a> Proposed Order)(Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	<a href="#">7</a>	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Megan Lacy Owen, Filing fee \$ 100, receipt number ADCDC 7862927 Fee Status Fee Paid by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H E CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Declaration of Megan Lacy Owen, # <a href="#">2</a> Proposed Order)(Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	<a href="#">8</a>	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Autumn Hamit Patterson, Filing fee \$ 100, receipt number ADCDC-7862993. Fee Status: Fee Paid. by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Declaration of Autumn Hamit Patterson, # <a href="#">2</a> Proposed Order)(Shumate, Brett) (Entered: 11/20/2020)
11/23/2020		Case Assigned to Judge Dabney L Friedrich (zsb) (Entered: 11/23/2020)
11/23/2020	<a href="#">9</a>	SUMMONS (7) Issued Electronically as to ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY. (Attachment: # <a href="#">1</a> Notice and Consent)(adh, ) (Entered: 11/23/2020)
11/23/2020	<a href="#">10</a>	STANDARD ORDER for Civil Cases. See text for details. Signed by Judge Dabney L. Friedrich on November 23, 2020 (lcldf2) (Entered: 11/23/2020)
11/23/2020		MINUTE ORDER granting the plaintiffs' <a href="#">7</a> Motion for Admission Pro Hac Vice of

		Attorney Megan Lacy Owen. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). For instructions visit: <a href="https://www.dcd.uscourts.gov/sites/dcd/files/NextGEN_Tutorial_for_Registering_for_E-filing.pdf">https://www.dcd.uscourts.gov/sites/dcd/files/NextGEN_Tutorial_for_Registering_for_E-filing.pdf</a> . So Ordered by Judge Dabney L. Friedrich on November 23, 2020. (lcldlf2) (Entered: 11/23/2020)
11/23/2020		MINUTE ORDER granting the plaintiffs' <a href="#">8</a> Motion for Admission Pro Hac Vice of Attorney Autumn Hamit Patterson. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). For instructions visit: <a href="https://www.dcd.uscourts.gov/sites/dcd/files/NextGEN_Tutorial_for_Registering_for_E-filing.pdf">https://www.dcd.uscourts.gov/sites/dcd/files/NextGEN_Tutorial_for_Registering_for_E-filing.pdf</a> . So Ordered by Judge Dabney L. Friedrich on November 23, 2020. (lcldlf2) (Entered: 11/23/2020)
11/24/2020	<a href="#">11</a>	NOTICE of Appearance by Autumn Hamit Patterson on behalf of All Plaintiffs (Patterson, Autumn) (Main Document 11 replaced on 11/24/2020) (zeg). (Entered: 11/24/2020)
11/24/2020	<a href="#">12</a>	NOTICE of Appearance by Megan Lacy Owen on behalf of All Plaintiffs (Lacy Owen, Megan) (Main Document 12 replaced on 11/24/2020) (zeg). (Main Document 12 replaced on 11/24/2020) (zeg). (Entered: 11/24/2020)
12/03/2020	<a href="#">13</a>	CERTIFICATE OF SERVICE by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC re <a href="#">6</a> MOTION for Summary Judgment ( <i>Expedited</i> ) Amended Certificate of Service. (Shumate, Brett) (Entered: 12/03/2020)
12/03/2020	<a href="#">14</a>	NOTICE of Appearance by Leslie Cooper Vigen on behalf of All Defendants (Vigen, Leslie) (Entered: 12/03/2020)
12/03/2020	<a href="#">15</a>	Joint MOTION for Briefing Schedule by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY (Attachments: # <a href="#">1</a> Text of Proposed Order)(Vigen, Leslie) (Entered: 12/03/2020)
12/03/2020	<a href="#">16</a>	NOTICE of Appearance by Steven A. Myers on behalf of All Defendants (Myers, Steven) (Entered: 12/03/2020)
12/04/2020		MINUTE ORDER granting the parties' <a href="#">15</a> Joint Motion for Briefing Schedule. Accordingly, the defendants shall provide the administrative record to the plaintiffs and file a certified list of its contents on or before December 11, 2020; the defendants shall file their opposition to the plaintiffs' expedited summary judgment motion and their cross-motion for summary judgment on or before December 21, 2020; the plaintiffs shall file any reply in support of their motion and their opposition to the defendants' cross-motion for summary judgment on or before December 28, 2020; and the defendants shall file any reply in support of their cross-motion on or before January 6, 2021. It is FURTHER ORDERED that the defendants' obligation to answer shall be deferred to 30 days following resolution of the cross-motions, if the case remains pending. So Ordered by Judge Dabney L. Friedrich on December 4, 2020. (lcldlf2) (Entered: 12/04/2020)
12/04/2020	<a href="#">17</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. ALEX M. AZAR, II served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	<a href="#">18</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. WILLIAM P. BARR served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	<a href="#">19</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. CENTERS FOR DISEASE CONTROL AND PREVENTION served on 11/30/2020 (Shumate, Brett)



		(Entered: 12/04/2020)
12/04/2020	<a href="#">20</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES DEPARTMENT OF JUSTICE served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	<a href="#">21</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	<a href="#">22</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. ROBERT R. REDFIELD served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	<a href="#">23</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. NINA B WITKOFISKY served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/11/2020	<a href="#">24</a>	NOTICE of Filing by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY (Attachments: # <a href="#">1</a> Exhibit Administrative Record Certification & Index)(Vigen, Leslie) (Entered: 12/11/2020)
12/16/2020	<a href="#">25</a>	NOTICE of Filing by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY re <a href="#">24</a> Notice (Other), (Attachments: # <a href="#">1</a> Exhibit Administrative Record Recertification & Updated Index)(Vigen, Leslie) (Entered: 12/16/2020)
12/21/2020	<a href="#">26</a>	MOTION for Summary Judgment by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY (Attachments: # <a href="#">1</a> Text of Proposed Order)(Myers, Steven) (Entered: 12/21/2020)
12/21/2020	<a href="#">27</a>	Memorandum in opposition to re <a href="#">6</a> MOTION for Summary Judgment ( <i>Expedited</i> ) filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE. (Attachments: # <a href="#">1</a> Text of Proposed Order)(Myers, Steven) (Entered: 12/21/2020)
12/28/2020	<a href="#">28</a>	Memorandum in opposition to re <a href="#">26</a> MOTION for Summary Judgment filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Exhibit B)(Shumate, Brett) (Entered: 12/28/2020)
12/28/2020	<a href="#">29</a>	REPLY to opposition to motion re <a href="#">6</a> MOTION for Summary Judgment ( <i>Expedited</i> ) filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Exhibit B)(Shumate, Brett) (Entered: 12/28/2020)
12/31/2020	<a href="#">30</a>	NOTICE of Congressional Action by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED



		STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Vigen, Leslie) (Entered: 12/31/2020)
01/06/2021	<a href="#">31</a>	REPLY to opposition to motion re <a href="#">26</a> MOTION for Summary Judgment filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Vigen, Leslie) (Entered: 01/06/2021)
01/06/2021	<a href="#">32</a>	Partial MOTION to Dismiss by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # <a href="#">1</a> Memorandum in Support, # <a href="#">2</a> Text of Proposed Order)(Vigen, Leslie) (Entered: 01/06/2021)
01/07/2021	<a href="#">33</a>	Consent MOTION to Stay by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Text of Proposed Order) (Shumate, Brett) (Entered: 01/07/2021)
01/08/2021		MINUTE ORDER. Upon consideration of the plaintiffs' <a href="#">33</a> Consent Motion for a Temporary Stay, it is ORDERED that the motion is GRANTED. The plaintiffs' deadline to respond to the defendants' <a href="#">32</a> Partial Motion to Dismiss is STAYED. On or before February 8, 2021, the parties shall file a joint status report advising the Court as to how they wish to proceed in this case. So Ordered by Judge Dabney L. Friedrich on January 8, 2021. (lcdlf2) (Entered: 01/08/2021)
01/08/2021		Set/Reset Deadlines: Status Report due by 2/8/2021 (zjch) (Entered: 01/08/2021)
01/26/2021	<a href="#">34</a>	NOTICE of Appearance by Charlotte Taylor on behalf of All Plaintiffs (Taylor, Charlotte) (Entered: 01/26/2021)
02/01/2021	<a href="#">35</a>	NOTICE of Extension by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # <a href="#">1</a> Exhibit January 29, 2021 CDC Order)(Vigen, Leslie) (Entered: 02/01/2021)
02/08/2021	<a href="#">36</a>	Joint STATUS REPORT by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Shumate, Brett) (Entered: 02/08/2021)
02/10/2021		MINUTE ORDER. Upon consideration of the parties' <a href="#">36</a> Joint Status Report, it is ORDERED that the following schedule shall govern further proceedings: the plaintiffs shall file a response to the defendants' partial motion to dismiss on or before February 15, 2021; the defendants shall file a reply in support of their partial motion to dismiss on or before February 22, 2021; the defendants shall file an updated certified list of the contents of the administrative record on or before February 22, 2021; and the plaintiffs shall file an appendix pursuant to Local Civil Rule 7(n) on or before February 24, 2021. So Ordered by Judge Dabney L. Friedrich on February 10, 2021. (lcdlf2) (Entered: 02/10/2021)
02/10/2021		Set/Reset Deadlines: Administrative Record due by 2/22/2021. Appendix due by 2/24/2021. Dispositive Motions due by 2/15/2021. Reply to Dispositive Motions due by 2/22/2021. (zjch) (Entered: 02/10/2021)
02/15/2021	<a href="#">37</a>	Memorandum in opposition to re <a href="#">32</a> Partial MOTION to Dismiss filed by ALABAMA

		ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # <a href="#">1</a> Text of Proposed Order)(Shumate, Brett) (Entered: 02/15/2021)
02/22/2021	<a href="#">38</a>	REPLY to opposition to motion re <a href="#">32</a> Partial MOTION to Dismiss filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY. (Vigen, Leslie) (Entered: 02/22/2021)
02/22/2021	<a href="#">39</a>	NOTICE of Filing by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY (Attachments: # <a href="#">1</a> Affidavit Certification of Supplemental Administrative Record, # <a href="#">2</a> Supplement Index of Supplemental Administrative Record)(Vigen, Leslie) (Entered: 02/22/2021)
02/24/2021	<a href="#">40</a>	JOINT APPENDIX by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # <a href="#">1</a> Index of Joint Appendix, # <a href="#">2</a> Joint Appendix Part 1, # <a href="#">3</a> Joint Appendix Part 2, # <a href="#">4</a> Joint Appendix Part 3)(Shumate, Brett) (Entered: 02/24/2021)
02/26/2021	<a href="#">41</a>	NOTICE OF SUPPLEMENTAL AUTHORITY by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Opinion and Order, # <a href="#">2</a> Judgment)(Shumate, Brett) (Entered: 02/26/2021)
02/27/2021	<a href="#">42</a>	RESPONSE re <a href="#">41</a> NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY. (Myers, Steven) (Entered: 02/27/2021)
02/28/2021	<a href="#">43</a>	REPLY re <a href="#">41</a> NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Shumate, Brett) (Entered: 02/28/2021)
03/10/2021	<a href="#">44</a>	NOTICE OF SUPPLEMENTAL AUTHORITY by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Exhibit A)(Shumate, Brett) (Entered: 03/10/2021)
03/12/2021	<a href="#">45</a>	RESPONSE re <a href="#">44</a> NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY. (Vigen, Leslie) (Entered: 03/12/2021)
03/15/2021	<a href="#">46</a>	REPLY re <a href="#">44</a> NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES,

		LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H E CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Shumate, Brett) (Entered: 03/15/2021)
03/15/2021	<a href="#">47</a>	NOTICE OF SUPPLEMENTAL AUTHORITY by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Exhibit A)(Shumate, Brett) (Entered: 03/15/2021)
03/19/2021	<a href="#">48</a>	RESPONSE re <a href="#">47</a> NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALEX M. AZAR, II, WILLIAM P BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY. (Vigen, Leslie) (Entered: 03/19/2021)
03/22/2021	<a href="#">49</a>	NOTICE of Imminent Extension of Eviction Moratorium by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Exhibit B)(Shumate, Brett) (Entered: 03/22/2021)
03/29/2021	<a href="#">50</a>	NOTICE of Extension and Supplemental Authority by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H E CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # <a href="#">1</a> Exhibit A Extension of Eviction Moratorium, # <a href="#">2</a> Exhibit B Sixth Circuit Order)(Shumate, Brett) (Entered: 03/29/2021)
03/31/2021	<a href="#">51</a>	RESPONSE re <a href="#">50</a> Notice (Other), of Extension and Supplemental Authority filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY. (Vigen, Leslie) (Entered: 03/31/2021)
04/02/2021		NOTICE of Hearing Motion Hearing set for 4/14/2021 at 2 00 PM via video before Judge Dabney L. Friedrich. (zjch) (Entered: 04/02/2021)
04/07/2021	<a href="#">52</a>	NOTICE of Filing by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFISKY (Attachments: # <a href="#">1</a> Declaration Certification of Second Supplemental Administrative Record, # <a href="#">2</a> Supplement Index of Second Supplemental Administrative Record, # <a href="#">3</a> Supplement Supplement to Certified Administrative Record)(Vigen, Leslie) (Entered: 04/07/2021)
04/08/2021		Set/Reset Hearings Motion Hearing set for 4/29/2021 at 10 00 AM via video before Judge Dabney L. Friedrich. (zjch) (Entered: 04/08/2021)
04/29/2021		Minute Entry for proceedings held before Judge Dabney L. Friedrich: Motion Hearing held on 4/29/2021 re <a href="#">32</a> Partial MOTION to Dismiss filed by NINA B WITKOFISKY, CENTERS FOR DISEASE CONTROL AND PREVENTION, WILLIAM P. BARR, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF JUSTICE, ALEX M. AZAR, II, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, <a href="#">26</a> MOTION for Summary Judgment filed by NINA B WITKOFISKY, CENTERS FOR DISEASE CONTROL AND PREVENTION, WILLIAM P. BARR, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF JUSTICE, ALEX M. AZAR, II,

		UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. Court Reporter Sara Wick. (zjch) (Entered: 04/29/2021)
05/05/2021	<a href="#">53</a>	ORDER denying the defendants' <a href="#">26</a> Motion for Summary Judgment and <a href="#">32</a> Partial Motion to Dismiss, and granting the plaintiffs' <a href="#">6</a> Motion for Expedited Summary Judgment. See text for details. The Clerk of Court is directed to close this case. Signed by Judge Dabney L. Friedrich on May 5, 2021. (lclfl1) (Entered: 05/05/2021)
05/05/2021	<a href="#">54</a>	MEMORANDUM OPINION regarding the plaintiffs' <a href="#">6</a> Motion for Expedited Summary Judgment and the defendants' <a href="#">26</a> Motion for Summary Judgment and <a href="#">32</a> Partial Motion to Dismiss. See text for details. Signed by Judge Dabney L. Friedrich on May 5, 2021. (lclfl1) (Entered: 05/05/2021)
05/05/2021	<a href="#">55</a>	NOTICE OF APPEAL TO DC CIRCUIT COURT as to <a href="#">54</a> Memorandum & Opinion, <a href="#">53</a> Order on Motion for Summary Judgment,, Order on Motion to Dismiss,,, by WILLIAM P. BARR, ALEX M. AZAR, II, CENTERS FOR DISEASE CONTROL AND PREVENTION, NINA B WITKOFKY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, ROBERT R. REDFIELD. Fee Status: No Fee Paid. Parties have been notified. (Vigen, Leslie) (Entered: 05/05/2021)
05/05/2021	<a href="#">56</a>	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the appeal was filed by the government re <a href="#">55</a> Notice of Appeal to DC Circuit Court,. (eg) (Entered: 05/05/2021)
05/05/2021	<a href="#">57</a>	Emergency MOTION to Stay re <a href="#">54</a> Memorandum & Opinion, <a href="#">53</a> Order on Motion for Summary Judgment,, Order on Motion to Dismiss,,, ( <i>Emergency Motion for Stay Pending Appeal and Immediate Administrative Stay</i> ) by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFKY. (Attachments: # <a href="#">1</a> Text of Proposed Order)(Myers, Steven) (Entered: 05/05/2021)
05/05/2021		<p>MINUTE ORDER. Before the Court is the defendants' <a href="#">57</a> Emergency Motion for a Stay Pending Appeal of this Court's <a href="#">53</a> May 5, 2021 Order vacating the national eviction moratorium at 86 Fed. Reg. 16,731. In this emergency motion, the defendants request an immediate administrative stay to give this Court time to consider and rule upon its motion to stay this case pending appeal. Alternatively, the defendants request that the Court stay its <a href="#">53</a> May 5, 2021 Order as to all parties except for the plaintiffs. Defs.' Emergency Mot. for a Stay Pending Appeal at 1 n.1, 8-9, Dkt. 57. Although the plaintiffs have not yet filed an opposition to the defendants' motion, which was filed at 6:54 p.m. this evening, the defendants represent that the plaintiffs oppose the motion. Id. at 1 n.1. In order to give the Court time to consider the merits of the defendants' <a href="#">57</a> Emergency Motion for a Stay Pending Appeal, and the plaintiffs time to file an opposition to the motion, the Court will grant the defendants' request for a temporary administrative stay.</p> <p>This Minute Order should not be construed in any way as a ruling on the merits of the defendants' motion. The Court notes, however, that, as the Court has explained, see Mem. Op. at 19, Dkt. 54, the law in this Circuit is clear: where a court concludes that an agency has exceeded its statutory authority, as this Court has done here, see Mem. Op. at 17, vacatur of the rule is the proper remedy in this Circuit. See Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Based on this clear authority, courts in this Circuit do not restrict vacatur only to those plaintiffs before the Court. See, e.g., O.A. v. Trump, 404 F. Supp. 3d 109, 152-53 (D.D.C. 2019). Indeed, the government</p>

	<p>has been unable to point to a single case in which a court in this Circuit has done so. See Mot. Hr'g Rough Tr. at 31.</p> <p>Accordingly, it is ORDERED that the Court's <a href="#">53</a> May 5, 2021 Order is administratively STAYED. It is further ORDERED that the plaintiffs shall file any opposition to the defendants' motion on or before May 12, 2021, and the defendants shall file any reply within four days of the date the plaintiffs' opposition is filed. So Ordered by Judge Dabney L. Friedrich on May 5, 2021. (lcdlfl)</p> <p>(Entered: 05/05/2021)</p>
05/05/2021	Set/Reset Deadlines: Responses due by 5/12/2021 (zjch) (Entered: 05/06/2021)
05/05/2021	<p>USCA Case Number 21-5093 for <a href="#">55</a> Notice of Appeal to DC Circuit Court, filed by NINA B WITKOFKY, CENTERS FOR DISEASE CONTROL AND PREVENTION, WILLIAM P. BARR, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF JUSTICE, ALEX M. AZAR, II, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. (eg) (Entered: 05/06/2021)</p>

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
05/07/2021 08:40:44			
<b>PACER Login:</b>	bjspringer	<b>Client Code:</b>	
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:20-cv-03377-DLF
<b>Billable Pages:</b>	12	<b>Cost:</b>	1.20



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF  
REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

**NOTICE OF APPEAL**

PLEASE TAKE NOTICE that all Defendants (United States Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; United States Department of Justice; Merrick B. Garland, in his official capacity as Attorney General; Centers for Disease Control; Rochelle P. Walensky, in her official capacity as Director, Centers for Disease Control and Prevention; and Sherri A. Berger, in her official capacity as Acting Chief of Staff for Centers for Disease Control and Prevention), hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's Order of May 5, 2021, along with its Memorandum Opinion of May 5, 2021.

Dated: May 5, 2021

Respectfully submitted,

BRIAN M. BOYNTON  
Acting Assistant Attorney General

ERIC BECKENHAUER  
Assistant Director, Federal Programs Branch

*/s/ Leslie Cooper Vigen*

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF  
REALTORS, *et al.*,

*Plaintiffs,*

v.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES, *et al.*,

*Defendants.*

No. 20-cv-3377 (DLF)

**ORDER**

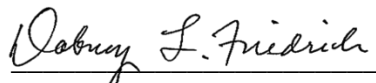
For the reasons stated in the accompanying Memorandum Opinion, it is

**ORDERED** that the defendants' Motion for Summary Judgment, Dkt. 26, and Partial Motion to Dismiss, Dkt. 32, are **DENIED**. It is further

**ORDERED** that the plaintiffs' Motion for Expedited Summary Judgment, Dkt. 6, is **GRANTED**. It is further

**ORDERED** that the nationwide eviction moratorium issued by the Centers for Disease Control and Prevention, and currently in effect at 86 Fed. Reg. 16,731, is **VACATED**.

May 5, 2021

  
DABNEY L. FRIEDRICH  
United States District Judge



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF  
REALTORS, *et al.*,

*Plaintiffs,*

v.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES, *et al.*,

*Defendants.*

No. 20-cv-3377 (DLF)

**MEMORANDUM OPINION**

As part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress enacted a 120-day eviction moratorium that applied to rental properties receiving federal assistance, *id.* § 4024(b). After that moratorium expired, the U.S. Department of Health and Human Services (HHS), through the Centers for Disease Control and Prevention (CDC), issued an order implementing a broader eviction moratorium that applied to all rental properties nationwide, 85 Fed. Reg. 55,292 (Sept. 4, 2020), which prompted this suit. Since then, Congress has granted a 30-day extension of the CDC Order, and the CDC has extended the order twice itself. The current order is set to expire on June 30, 2021.

In this action, the plaintiffs raise a number of statutory and constitutional challenges to the CDC Order. Before the Court is the plaintiffs' Motion for Expedited Summary Judgment, Dkt. 6, as well as the Department's Motion for Summary Judgment, Dkt. 26, and Partial Motion to Dismiss, Dkt. 32. For the reasons that follow, the Court will grant the plaintiffs' motion and deny the Department's motions.

## I. BACKGROUND

On March 13, 2020, then-President Trump declared COVID-19 a national emergency. *See generally* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). Two weeks later, he signed the CARES Act into law. *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). The CARES Act included a 120-day eviction moratorium with respect to rental properties that participated in federal assistance programs or were subject to federally-backed loans. *See id.* § 4024. In addition, some—but not all—states adopted their own temporary eviction moratoria. Administrative Record (“AR”) at 966–72, 986–1024, Dkt. 40. The CARES Act’s federal eviction moratorium expired in July 2020.

On August 8, 2020, then-President Trump issued an executive order directing the Secretary of HHS (“the Secretary”) and the Director of the CDC to “consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession.” Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Executive Order 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020).

Weeks later, on September 4, 2020, the CDC issued the “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19” (“CDC Order”), pursuant to § 361 of the Public Health Service Act, 42 U.S.C. § 264(a), and 42 C.F.R. § 70.2. 85 Fed. Reg. 55,292 (Sept. 4, 2020). In this order, the CDC determined that a temporary halt on residential evictions was “a reasonably necessary measure . . . to prevent the further spread of COVID-19.” 85 Fed. Reg. at 55,296. As the CDC explained, the eviction moratorium facilitates self-isolation for individuals

infected with COVID-19 or who are at a higher-risk of severe illness from COVID-19 given their underlying medical conditions. *Id.* at 55,294. It also enhances state and local officials' ability to implement stay-at-home orders and other social distancing measures, reduces the need for congregate housing, and helps prevent homelessness. *Id.* at 55,294.

The CDC Order declared that “a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action shall not evict any covered person.” *Id.* at 55,296. To qualify for protection under the moratorium, a tenant must submit a declaration to their landlord affirming that they: (1) have “used best efforts to obtain all available government assistance for rent or housing”; (2) expect to earn less than \$99,000 in annual income in 2020, were not required to report any income in 2019 to the Internal Revenue Service, or received a stimulus check under the CARES Act; (3) are “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) are “using best efforts to make timely partial payments”; (5) would likely become homeless or be forced to move into a shared residence if evicted; (6) understand that rent obligations still apply; and (7) understand that the moratorium is scheduled to end on December 31, 2020. *Id.* at 55,297.

Unlike the CARES Act's moratorium, which only applied to certain federally backed rental properties, the CDC Order applied to all residential properties nationwide. *Id.* at 55,293. In addition, the CDC Order includes criminal penalties. Individuals who violate its provisions are subject to a fine of up to \$250,000, one year in jail, or both, and organizations are subject to a fine of up to \$500,000. *Id.* at 55,296.

The CDC Order was originally slated to expire on December 31, 2020. *Id.* at 55,297. As part of the Consolidated Appropriations Act, however, Congress extended the CDC Order to

apply through January 31, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020). On January 29, 2021, the CDC extended the order through March 31, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021). In this extension, the CDC updated its findings to account for new evidence of how conditions had worsened since the original order was issued, as well as “[p]reliminary modeling projections and observational data” from states that lifted eviction moratoria “indicat[ing] that evictions substantially contribute to COVID-19 transmission.” *Id.* at 8022. The CDC later extended the order through June 30, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021).

#### **A. Procedural History**

The plaintiffs—Danny Fordham, Robert Gilstrap, the corporate entities they use to manage rental properties (Fordham & Associates, LLC, H.E. Cauthen Land and Development, LLC, and Title One Management, LLC), and two trade associations (the Alabama and Georgia Associations of Realtors)—filed this action on November 20, 2020. Compl., Dkt. 1. They challenge the lawfulness of the eviction moratorium on a number of statutory and constitutional grounds. The plaintiffs allege that the eviction moratorium exceeds the CDC’s statutory authority, *id.* ¶¶ 81–84 (Count III), violates the notice-and-comment requirement, *id.* ¶¶ 63–70 (Count I), and is arbitrary and capricious, *id.* ¶¶ 85–91 (Count IV), all in violation of the Administrative Procedure Act (APA). The plaintiffs further allege that the eviction moratorium fails to comply with the Regulatory Flexibility Act. *Id.* ¶¶ 71–78 (Count II). To the extent that the Public Health Service Act authorizes the eviction moratorium, the plaintiffs allege that the Act is an unconstitutional delegation of legislative power under Article I. *Id.* ¶¶ 92–95 (Count V). Finally, the plaintiffs allege that the eviction moratorium constitutes an unlawful taking of

property in violation of the Takings Clause, *id.* ¶¶ 96–103 (Count VI), violates the Due Process Clause, *id.* ¶¶ 96–110 (Count VII), and deprives the plaintiffs of their right of access to courts, *id.* ¶¶ 111–15 (Count VIII). The plaintiffs seek declaratory and injunctive relief, attorneys’ fees and costs, and any other relief the Court deems just and proper. *Id.* ¶¶ 116–20.

Before the Court is the plaintiffs’ expedited motion for summary judgment, Dkt. 6, and the Department’s cross-motion for summary judgment. Also before the Court is the Department’s partial motion to dismiss, Dkt. 32, in which the Department argues that Congress ratified the CDC Order when it extended the eviction moratorium in the Consolidated Appropriations Act of 2021. All three motions are now ripe for review.

### **B. Relevant Decisions**

This Court is not the first to address a challenge to the national eviction moratorium set forth in the CDC Order. In the last several months, at least six courts have considered various statutory and constitutional challenges to the CDC Order. Most recently, the Sixth Circuit denied a motion to stay a district court decision that held that the order exceeded the CDC’s authority under 42 U.S.C. § 264(a), *see Tiger Lily, LLC v. United States Dep’t of Hous. & Urb. Dev.*, No. 2:20-cv-2692, 2021 WL 1171887, at \*4 (W.D. Tenn. Mar. 15, 2021) (concluding that the CDC Order exceeded the statutory authority of the Public Health Service Act), *appeal filed* No. 21-5256 (6th Cir. 2021); *Tiger Lily, LLC v. United States Dep’t of Hous. & Urb. Dev.*, 992 F.3d 518, 520 (6th Cir. 2021) (denying emergency motion for stay pending appeal); *see also Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720, at \*12 (N.D. Ohio Mar. 10, 2021) (holding that the CDC exceeded its authority under 42 U.S.C. § 264(a)). Two other district courts, however, declined to enjoin the CDC Order at the preliminary injunction stage, *see Brown v. Azar*, No. 1:20-cv-03702, 2020 WL 6364310, at \*9–

11 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. 2020); *Chambless Enterprises, LLC v. Redfield*, No. 20-cv-01455, 2020 WL 7588849, at \*5–9 (W.D. La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. 2021). Separately, another district court declared that the federal government lacks the constitutional authority altogether to issue a nationwide moratorium on evictions. *See Terkel v. Ctrs. for Disease Control & Prevention*, No. 6:20-cv-564, 2021 WL 742877, at \*1–2, 10–11 (E.D. Tex. Feb. 25, 2021), *appeal filed*, No. 21-40137 (5th Cir. 2021).

## II. LEGAL STANDARD

Summary judgment is proper if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A fact is “material” if it has the potential to change the substantive outcome of the litigation. *See id.* at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). And a dispute is “genuine” if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

In a case reviewing agency action, summary judgment “serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.” *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). “[T]he entire case . . . is a question of law,” and the district court “sits as an appellate tribunal.” *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks and footnote omitted).

### III. ANALYSIS

#### A. Standing

Article III of the Constitution limits the “judicial Power” of federal courts to “Cases” and “Controversies.” U.S. Const. art. III, § 2, cl. 1. “[T]here is no justiciable case or controversy unless the plaintiff has standing.” *West v. Lynch*, 845 F.3d 1228, 1230 (D.C. Cir. 2017). To establish standing, a plaintiff must demonstrate a concrete injury-in-fact that is fairly traceable to the defendant’s action and redressable by a favorable judicial decision. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Since the CDC Order went into effect, the three real estate management company plaintiffs have each had tenants who have stopped paying rent, invoked the protections of the eviction moratorium, and would be subject to eviction but for the CDC Order. *See* Decl. of Danny Fordham ¶¶ 2–5, 9–17, Dkt. 6-2; Decl. of Robert Gilstrap ¶¶ 2, 4–12, Dkt. 6-3. At a minimum, these three plaintiffs have established a concrete injury that is traceable to the CDC Order and is redressable by a decision vacating the CDC Order. *See Summers*, 555 U.S. at 493. “[I]t is immaterial that other plaintiffs might be unable to demonstrate their own standing,” *J.D. v. Azar*, 925 F.3d 1291, 1323 (D.C. Cir. 2019), because “Article III’s case-or-controversy requirement is satisfied if one plaintiff can establish injury and standing,” *id.*

#### B. The Agency’s Statutory Authority

Section 361 of the Public Health Service Act empowers the Secretary to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases” either internationally or between states.<sup>1</sup> 42

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<sup>1</sup> “Although the statute states that this authority belongs to the Surgeon General, subsequent reorganizations not relevant here have resulted in the transfer of this responsibility to the Secretary.” *Skyworks*, 2021 WL 911720, at \*5.

U.S.C. § 264(a). “For purposes of carrying out and enforcing such regulations,” the Secretary is authorized to “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.” *Id.* The Secretary is also authorized to, within certain limits, make and enforce regulations to apprehend, examine, and, if necessary, detain individuals “believed to be infected with a communicable disease” or who are “coming into a State or possession” from a foreign country. *Id.* § 264(b)–(d).

By regulation, the Secretary delegated this authority to the Director of the CDC. 42 C.F.R. § 70.2. Pursuant to this regulation, when the Director of the CDC determines that the measures taken by health authorities of any state or local jurisdiction are insufficient to prevent the spread of communicable disease, “he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.” *Id.*

In determining whether the eviction moratorium in the CDC Order exceeds the Department’s statutory authority, the Department urges the Court to apply the familiar two-step *Chevron* framework. *See* Defs.’ Mot. for Summ. J. (“Def.’s Cross-Mot.”) at 8 (citing *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). While it is true that “the CDC did not follow APA notice-and-comment rulemaking procedures before issuing the Eviction Moratorium,” Pl.’s Mem. in Supp. of Expedited Mot. for Summ. J. (“Pl.’s Mem.”) at 21, Dkt. 6-1, “*Chevron* deference is not necessarily limited to regulations that are the product of notice-and-comment rulemaking,” *Pub. Citizen, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 332



F.3d 654, 660 (D.C. Cir. 2003). The *Chevron* framework applies where “Congress [has] delegated authority to the agency generally to make rules carrying the force of law” and “the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead*, 533 U.S. 218, 226–27 (2001); *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012). Here, the CDC Order was issued pursuant to a broad grant of rulemaking authority, *see* 42 U.S.C. § 264(a) (authorizing the Secretary to “make and enforce” regulations “to prevent the introduction, transmission, or spread of communicable diseases.”); 42 C.F.R. § 70.2 (delegating this authority to the Director of the CDC), and was “clearly intended to have general applicability.” *Kaufman v. Nielsen*, 896 F.3d 475, 484 (D.C. Cir. 2018). It was also issued “with a lawmaking pretense in mind,” *Mead*, 533 U.S. at 233, published in the Federal Register, *see Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007), and backed with the threat of criminal penalties, 85 Fed. Reg. 55,296. Because the CDC Order was clearly intended to have the force of law, the two-step *Chevron* framework applies.<sup>2</sup>

Applying *Chevron* and using the traditional tools of statutory interpretation, a court must first consider at Step One “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. “If Congress has directly spoken to [an] issue, that is the end of the

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<sup>2</sup> The fact that section 361 of the Public Health Service Act is administered by both the CDC and the FDA, *see* Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations, 65 Fed. Reg. 49,906, 49,907 (Aug. 16, 2000), does not preclude application of the *Chevron* framework. While courts “generally do not apply *Chevron* deference when the statute in question is administered by multiple agencies,” *Kaufman*, 896 F.3d at 483; *see also, e.g., DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 487 (D.C. Cir. 2013), the FDA and the CDC are both sub-agencies within HHS. Accordingly, “there is nothing special to undermine *Chevron*’s premise that the grant of authority reflected a congressional expectation that courts would defer” to reasonable agency interpretations of the statute, and there is little risk of “conflicting mandates to regulated entities.” *Loan Syndications & Trading Ass’n v. Sec. & Exch. Comm’n*, 882 F.3d 220, 222 (D.C. Cir. 2018) (summarizing instances where “*Chevron* is inapplicable due to the multiplicity of agencies”).

matter.” *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016) (citing *Chevron*, 467 U.S. at 837). “[T]he court, as well [as] the agency, must give effect to the unambiguously expressed intent of Congress.” *Lubow v. U.S. Dep’t of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) (quoting *Chevron*, 467 U.S. at 842–43). Only if the text is silent or ambiguous does a court proceed to Step Two. There, a court must “determine if the agency’s interpretation is permissible, and if so, defer to it.” *Confederated Tribes of Grand Ronde Cmty.*, 830 F.3d at 558. To determine “whether [an] agency’s interpretation is permissible or instead is foreclosed by the statute,” courts use “all the tools of statutory interpretation,” *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014), and “interpret the words [of a statute] consistent with their ordinary meaning at the time Congress enacted the statute,” *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (internal quotation marks and alteration omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) (“Words must be given the meaning they had when the text was adopted.”).

The first question, then, is whether the relevant statutory language addresses the “precise question at issue.” *Chevron*, 467 U.S. at 842. As noted, the Public Health Service Act provides, in relevant part:

The [CDC], 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 [Secretary] 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.

42 U.S.C. § 264(a). Other subsections of the Act authorize, in certain circumstances, the quarantine of individuals in order to prevent the interstate or international spread of disease. *See id.* § 264(b)–(d). Though the Public Health Service Act grants the Secretary broad authority to

make and enforce regulations necessary to prevent the spread of disease, his authority is not limitless.

Section 264(a) provides the Secretary with general rulemaking authority to “make and enforce *such regulations*,” *id.* § 264(a) (emphasis added), that “in his judgment are necessary” to combat the international or interstate spread of communicable disease, *id.* But this broad grant of rulemaking authority in the first sentence of § 264(a) is tethered to—and narrowed by—the second sentence. It states: “For purposes of carrying out and enforcing *such regulations*,” *id.* (emphasis added), the Secretary “may provide for such inspection, fumigation, disinfection, sanitation, pest extermination [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings.” *Id.*

These enumerated measures are not exhaustive. The Secretary may provide for “other measures, as in his judgment may be necessary.” *Id.* But any such “other measures” are “controlled and defined by reference to the enumerated categories before it.” *See Tiger Lily*, 992 F.3d at 522–23 (internal quotation marks and alteration omitted); *id.* at 522 (applying the *eiusdem generis* canon to interpret the residual catchall phrase in § 264(a)). These “other measures” must therefore be similar in nature to those listed in § 264(a). *Id.*; *Skyworks*, 2021 WL 911720, at \*10. And consequently, like the enumerated measures, these “other measures” are limited in two significant respects: first, they must be directed toward “animals or articles,” 42 U.S.C. § 264(a), and second, those “animals or articles” must be “found to be so infected or contaminated as to be sources of dangerous infection to human beings,” *id.*; *see Skyworks*, 2021 WL 911720, at \*10. In other words, any regulations enacted pursuant to § 264(a) must be directed toward “specific targets ‘found’ to be sources of infection.” *Id.*

The national eviction moratorium satisfies none of these textual limitations. Plainly, imposing a moratorium on evictions is different in nature than “inspect[ing], fumigat[ing], disinfect[ing], sanit[izing], . . . exterminat[ing] [or] destr[oying],” 42 U.S.C. § 264(a), a potential source of infection. *See Tiger Lily*, 992 F.3d at 524. Moreover, interpreting the term “articles” to include evictions would stretch the term beyond its plain meaning. *See Webster’s New International Dictionary* 156 (2d ed. 1945) (defining an “article” as “[a] thing of a particular class or kind” or “a commodity”); *see also Skyworks*, 2021 WL 911720, at \*10. And even if the meaning of the term “articles” could be stretched that far, the statute instructs that they must be “found to be so infected or contaminated as to be sources of dangerous infection to human beings.” 42 U.S.C. § 264(a). The Secretary has made no such findings here. The fact that individuals with COVID-19 can be asymptomatic and that the disease is difficult to detect, Mot. Hr’g Rough Tr. at 26,<sup>3</sup> does not broaden the Secretary’s authority beyond what the plain text of § 264(a) permits.

The Department reads § 264(a) another way. In the Department’s view, the grant of rulemaking authority in § 264(a) is not limited *in any way* by the specific measures enumerated in § 264(a)’s second sentence. Defs.’ Cross-Mot. at 18, 19 n.2. According to the Department, Congress granted the Secretary the “broad authority to make and enforce” *any* regulations that “in his judgment are necessary to prevent the spread of disease,” *id.* at 11 (internal quotation marks omitted), across states or from foreign countries. In other words, the grant of rulemaking authority in § 264(a)’s first sentence is a congressional deferral to “the ‘judgment’ of public

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<sup>3</sup> The official transcript from the motions hearing held on April 29, 2021 is forthcoming, and this opinion will be updated to include citations to that transcript when it becomes available.

health authorities about what measures they deem ‘necessary’ to prevent contagion.” *Id.* at 9 (quoting 42 U.S.C. § 264(a)).

The Department’s interpretation goes too far. The first sentence of § 264(a) is the starting point in assessing the scope of the Secretary’s delegated authority. But it is not the ending point. While it is true that Congress granted the Secretary broad authority to protect the public health, it also prescribed clear means by which the Secretary could achieve that purpose. *See Colo. River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 139 (D.C. Cir. 2006). And those means place concrete limits on the steps the Department can take to prevent the interstate and international spread of disease. *See supra* at 11. To interpret the Act otherwise would ignore its text and structure.

At *Chevron*’s first step, this Court must apply the “ordinary tools of the judicial craft,” *Mozilla Corp. v. Fed. Commc’ns Comm’n*, 940 F.3d 1, 20 (D.C. Cir. 2019), including canons of construction, *see ArQule, Inc. v. Kappos*, 793 F. Supp. 2d 214, 219–20 (D.D.C. 2011). These canons confirm what the plain text reveals. The Secretary’s authority does not extend as far as the Department contends.

*First*, “[i]t is... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). Applying that principle here, the Department’s broad reading of § 264(a)’s first sentence would render the second sentence superfluous. If the first sentence empowered the Secretary to enact *any* regulation that, in his “judgment,” was “necessary” to prevent the interstate spread of communicable disease, *id.*, there would be no need for Congress to enumerate the “measures” that the Secretary “may provide for” to carry out and enforce those regulations, *see id.* Though the surplusage canon “is not absolute,” *Lamie v.*

*U.S. Tr.*, 540 U.S. 526, 536 (2004); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006), like the plain language, it supports a narrow reading of the statute.

*Second*, the canon of constitutional avoidance instructs that a court shall construe a statute to avoid serious constitutional problems unless such a construction is contrary to the clear intent of Congress. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). An overly expansive reading of the statute that extends a nearly unlimited grant of legislative power to the Secretary would raise serious constitutional concerns, as other courts have found. *See, e.g., Skyworks*, 2021 WL 911720, at \*9 (noting that such a reading would raise doubts as to “whether Congress violated the Constitution by granting such a broad delegation of power unbounded by clear limitations or principles.”); *Tiger Lily*, 992 F.3d at 523 (same); *id.* (“[W]e cannot read the Public Health Service Act to grant the CDC power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress’s intent to do so”); *Terkel*, 2021 WL 742877, at \*4–6 (holding that the CDC’s eviction moratorium exceeds the federal government’s power under the Commerce Clause). Congress did not express a clear intent to grant the Secretary such sweeping authority.

And *third*, the major questions doctrine is based on the same principle: courts “expect Congress to speak *clearly* if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (emphasis added)); *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021) (collecting cases). There is no question that the decision to impose a nationwide moratorium on evictions is one “of vast economic and political significance.” *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted).

Not only does the moratorium have substantial economic effects,<sup>4</sup> eviction moratoria have been the subject of “earnest and profound debate across the country,” *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (internal quotation marks omitted). At least forty-three states and the District of Columbia have imposed state-based eviction moratoria at some point during the COVID-19 pandemic, *see* 86 Fed. Reg. 16,731, 16,734, though, as the CDC noted in its most recent extension of the CDC Order, these protections either “have expired or are set to expire in many jurisdictions,” *id.* at 16,737 n.35. Congress itself has twice addressed the moratorium on a nationwide-level—once through the CARES Act, *see* Pub. L. No. 116-136, § 4024, 134 Stat. 281 (2020), and again through the Consolidated Appropriations Act, *see* Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020).

Accepting the Department’s expansive interpretation of the Act would mean that Congress delegated to the Secretary the authority to resolve not only this important question, but endless others that are also subject to “earnest and profound debate across the country.” *Gonzales*, 546 U.S. at 267 (internal quotation marks omitted). Under its reading, so long as the Secretary can make a determination that a given measure is “necessary” to combat the interstate or international spread of disease, there is no limit to the reach of his authority.<sup>5</sup>

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<sup>4</sup> In their briefing, the parties dispute the economic impact of the CDC order, *see, e.g.*, Pl.’s Mem. at 2 (estimating the nation’s landlords will suffer “\$55-76 billion” in losses as a consequence of the initial moratorium); Def.’s Cross-Mot. at 15 n.4 (disputing these figures). Regardless, the economic impact of the CDC Order is substantial. Indeed, the CDC itself estimates that “as many as 30-40 million people in America could be at risk of eviction” absent the CDC’s moratorium as well as other State and local protections, 85 Fed. Reg. at 55,294–95. The CDC Order also qualifies as “a major rule under the Congressional Review Act,” *id.* at 55,296, which means it is expected to have “an annual effect on the economy of \$100,000,000 or more,” 5 U.S.C. § 804(2).

<sup>5</sup> The only other potential limitation, imposed by regulation, is that the Director of the CDC would need to conclude that state and local health authorities have not taken sufficient measures to prevent the spread of communicable disease. *See* 42 C.F.R. § 70.2.



“Congress could not have intended to delegate” such extraordinary power “to an agency in so cryptic a fashion.” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159. To be sure, COVID-19 is a novel disease that poses unique and substantial public health challenges, *see* Def.’s Cross-Mot. at 14, but the Court is “confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole.” *Loving.*, 742 F.3d at 1021; *see also* *Brown & Williamson*, 529 U.S. at 160.

It is also telling that the CDC has never used § 264(a) in this manner. As the Department confirms, § 264(a) “has never been used to implement a temporary eviction moratorium,” and “has rarely [been] utilized . . . for disease-control purposes.” *See* Defs.’ Cross-Mot. at 13–15, 23. “When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy,” the Court must “greet its announcement with a measure of skepticism.” *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted).

The Department advances one final counterargument. It notes that subsequent subsections of the statute, § 264(b)–(d), contemplate that the Secretary may, under certain carefully prescribed circumstances, provide for the “apprehension, detention, or conditional release of individuals” who are arriving in the United States from abroad or who are “reasonably believed to be infected with a communicable disease,” 42 U.S.C. § 264(b)–(d). And it stresses that enforced quarantines are not listed in—and are different in kind from—the measures enumerated in § 264(a). Defs.’ Cross-Mot. at 10–11. Accordingly, the Department contends that the presence of these subsequent subsections demonstrates that the list of means in the second sentence of § 264(a) imposes *no* limits on the Secretary’s authority under § 264(a). *Id.*



This argument is not persuasive. No doubt, Congress intended to give the Secretary—and, by extension, health experts in the CDC—the discretion and flexibility to thwart the spread of disease. But the quarantine provisions in § 264(b)–(d) are structurally separate from those in § 264(a). *Tiger Lily*, 992 F.3d at 524 (noting that the provisions in § 264(b)–(d) restrict individual liberty interests, while § 264(a) is concerned exclusively with property interests). And regardless, like the enumerated measures in § 264(a), the quarantine provisions are cabined and directed toward individuals who are either entering the United States or “reasonably believed to be infected,” 42 U.S.C. § 264(c)–(d), and “not to amorphous disease spread” more generally, *Skyworks*, 2021 WL 911720, at \*10. The quarantine provisions in § 264(b)–(d) therefore do not provide support for the eviction moratorium.

In sum, the Public Health Service Act authorizes the Department to combat the spread of disease through a range of measures, but these measures plainly do not encompass the nationwide eviction moratorium set forth in the CDC Order.<sup>6</sup> Thus, the Department has exceeded the authority provided in § 361 of the Public Health Service Act, 42 U.S.C. § 264(a).

### **C. Ratification of the CDC Order**

In its partial motion to dismiss, the Department argues that Congress ratified the agency’s action when it extended the moratorium in the Consolidated Appropriations Act.<sup>7</sup> *See* Defs.’ Partial Mot. at 7–9. The initial CDC Order was set to expire on December 31, 2020, *see* 85 Fed.

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<sup>6</sup> Because the CDC Order exceeds the Secretary’s authority, the Court need not address the plaintiffs’ remaining challenges to the eviction moratorium.

<sup>7</sup> The Department initially argued in its partial motion to dismiss that Counts I–V of the complaint were moot in light of Congress’s extension of the CDC Order. Defs.’ Mem. in Supp. of Partial Mot. to Dismiss (“Defs.’ Partial Mot.”) at 1, Dkt. 32-1. But this congressional extension of the CDC Order has since expired, so the Department has withdrawn this argument. *See* Joint Status Report at 2, Dkt. 36.

Reg. at 55,297, but Congress extended the expiration date until January 31, 2021, by including § 502 in the Consolidated Appropriations Act. Section 502 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.

Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020).

“Congress ‘has the power to ratify the acts which it might have authorized’ in the first place,” *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *United States v. Heinszen & Co.*, 206 U.S. 370, 384 (1907)), “and give the force of law to official action unauthorized when taken,” *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–02 (1937). To do so, however, Congress must make its intention explicit. *Heinszen*, 206 U.S. at 390.

Congress did not do so here. When Congress granted a temporary extension of the eviction moratorium by enacting § 502, it acknowledged that the CDC issued its order pursuant to the Public Health Service Act. It did not, however, expressly approve of the agency’s interpretation of 42 U.S.C. § 264(a) or provide the agency with any additional statutory authority. *See Tiger Lily*, 992 F.3d at 524; *Skyworks*, 2021 WL 911720, at \*12. Instead, Congress merely extended the CDC Order for a limited 30-day duration.

“[C]ongressional acquiescence to administrative interpretations of a statute” is “recognize[d]. . . with extreme care.” *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 160 (2001). “[M]ere congressional acquiescence in the CDC’s assertion that the [CDC Order] was supported by 42 U.S.C. § 264(a) does not make it so.” *Tiger Lily*, 992 F.3d at 524. Because Congress withdrew its support for the CDC Order on January 31, 2021, the order now stands—and falls—on the text of the Public Health Service Act alone. For

all the reasons stated above, *supra* Part III.B., the national eviction moratorium in the CDC Order is unambiguously foreclosed by the plain language of the Public Health Service Act.

#### **D. Remedy**

Both parties agree that if the Court concludes that the Secretary exceeded his authority by issuing the CDC Order, vacatur is the appropriate remedy. *See* Mot. Hr’g Rough Tr. at 13, 30–31. Nonetheless, the Department urges the Court to limit any vacatur order to the plaintiffs with standing before this Court. Defs.’ Partial Mot. to Dismiss at 23. This position is “at odds with settled precedent.” *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019).

This Circuit has instructed that when “regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted); *see also O.A.*, 404 F. Supp. 3d at 109. Accordingly, consistent with the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and this Circuit’s precedent, *see Nat’l Mining Ass’n*, 145 F.3d at 1409, the CDC Order must be set aside.

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The Court recognizes that the COVID-19 pandemic is a serious public health crisis that has presented unprecedented challenges for public health officials and the nation as a whole. The pandemic has triggered difficult policy decisions that have had enormous real-world consequences. The nationwide eviction moratorium is one such decision.

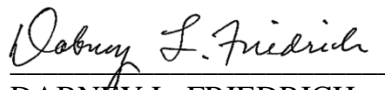
It is the role of the political branches, and not the courts, to assess the merits of policy measures designed to combat the spread of disease, even during a global pandemic. The question for the Court is a narrow one: Does the Public Health Service Act grant the CDC the legal authority to impose a nationwide eviction moratorium? It does not. Because the plain

language of the Public Health Service Act, 42 U.S.C. § 264(a), unambiguously forecloses the nationwide eviction moratorium, the Court must set aside the CDC Order, consistent with the Administrative Procedure Act, *see* 5 U.S.C. § 706(2)(C), and D.C. Circuit precedent, *see National Mining Ass'n*, 145 F.3d at 1409.

### CONCLUSION

For the foregoing reasons, the plaintiffs' motion for expedited summary judgment is granted and the Department's motion for summary judgment and partial motion to dismiss are denied. A separate order consistent with this decision accompanies this memorandum opinion.

May 5, 2021

  
DABNEY L. FRIEDRICH  
United States District Judge