No. 21-30037

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBLESS ENTERPRISES, L.L.C.;
APARTMENT ASSOCIATION OF LOUISIANA, INCORPORATED,

Plaintiffs – Appellants,

v.

ROCHELLE WALENSKY; SHERRI BERGER;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MERRICK GARLAND, U.S. Attorney General; XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services;
CENTERS FOR DISEASE CONTROL AND PREVENTION,

Defendants – Appellees.

On Appeal from the United States District Court
for the Western District of Louisiana
Honorable Terry A. Doughty, District Judge

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

If the Government's interpretation of the relevant statute and regulation is correct, the CDC has the power to control any human interaction in the nation. This conclusion is unavoidable given the nature of communicable disease. Diseases spread through human contact and become widespread because some people inevitably cross state lines. Indeed, that is the reason COVID-19 became a pandemic. If CDC can ban evictions because of their possible connection to disease spreading across state lines, the agency can control any human interaction on the same grounds. Never once has the Government denied this implication of its position. But Congress did not give the CDC the sweeping power to decide whether to control so much of American life.

In arguing otherwise, the Government focuses only on that language it finds helpful—divorcing that text from the broader statutory scheme. Consequently, the Government's interpretation is at odds with the plain meaning of the statute. Moreover, the canons of construction counsel strongly against the Government's construction. The Government treats the canons as formalistic talismans that should only be invoked grudgingly in unusual cases. Instead, the canons should be

employed as useful tools for contextualizing statutory text. The Government's construction must also be rejected because the nondelegation doctrine prohibits Congress from conferring regulatory powers without a guiding principle.

Because the CDC lacks any constitutional authority to enforce its eviction moratorium and, alternatively, because the Government's construction would violate the Constitution, this Court should reverse the District Court.[1] Indeed, only injunctive relief can protect against unconstitutional ultra vires regulation because there is no possibility of monetary relief against the Government. And it is always in the public interest to enforce constitutional precepts with injunctive relief.

[1] The Government urges the Court to affirm without oral argument on the grounds that Appellants cannot show irreparable harm. This is wrong on both counts. Appellants have shown irreparable harm. AOB at 56–63. And oral argument would be helpful to the Court in resolving what is obviously an important case with nationwide implications.

ARGUMENT

I. Appellants Are Likely To Prevail on the Merits

A. The Statute Does Not Authorize the CDC To Do Whatever It Deems Best in Furtherance of the Statute's Goals

The Government plucks one sentence from the statute, isolates it from the surrounding language, and then accuses the courts that have rejected this myopic approach of ignoring the language of the statute. *See* Appellees' Br. at 20. This is not statutory interpretation.

As three federal courts and a Sixth Circuit panel have now held, 42 U.S.C. § 264(a), when read in its entirety and considered in context, does not authorize the CDC to bar evictions. This reading comports with the text of the statute, canons of construction, and common sense. *See Tiger Lily, LLC v. U.S. Dep't of Housing and Urban Development*, 992 F.3d 518 (6th Cir. Mar. 29, 2021); *Alabama Ass'n of Realtors v. U.S. Dep't of Health and Human Services*, No. 20-cv-3377(DLF), 2021 WL 1779282 (D.D.C. May 5, 2021); *Tiger Lily, LLC v. U.S. Dep't of Housing and Urban Development*, No. 2:20-cv-02692-MSN-atc, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021); *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, No. 5:20-cv-2407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021).

1. This Court should reject the Government's myopic view of the statute

The Government urges this Court not to look past this sentence: "The [CDC] is authorized to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C. § 264(a). "But the first rule of … statutory interpretation is: Read on." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012).

The Government discounts the next sentence: "For purposes of carrying out and enforcing such regulations, the [CDC] may provide 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 [its] judgment may be necessary." 42 U.S.C. § 264(a).

Read in its entirety, the statute's meaning is plain: the CDC has authority to take certain actions it deems necessary to prevent disease, all of which are linked to "specific, tangible things on which the agency may act." *Skyworks*, 2021 WL 911720 *9.

The canons of construction confirm the plain meaning. Reading the residual phrase "other measures," the Sixth Circuit panel applied the *ejusdem generis* canon and concluded: "Plainly, government intrusion on property to sanitize and dispose of infected matter is different in nature from a moratorium on evictions." *Tiger Lily, LLC*, 992 F.3d at 522–23. *See also Alabama Ass'n of Realtors*, 2021 WL 1779282 *5 ("These 'other measures' must [] be similar in nature to those listed in § 264(a)."); *Tiger Lily*, 2021 WL 1171887 *8 ("[T]hose 'other measures' are limited by the specific examples listed."). Moreover, if the second sentence does not limit the discretion granted in the first sentence, then both sentences mean the same thing. *See Yates v. United States*, 574 U.S. 528, 543 (2015) ("We resist a reading … that would render superfluous an entire provision passed in proximity as part of the same Act."); *Alabama Ass'n of Realtors*, 2021 WL 1779282 *6 ("[T]he Department's broad reading of § 264(a)'s first sentence would render the second sentence superfluous."); *Tiger Lily*, 2021 WL 1171887 *7 ("Defendants' theory renders the limitations of the statute . . . superfluous or surplusage . . .").

The Government does not argue that its order is permissible if this Court applies the canons of construction; instead it urges this Court to

lay aside the canons because the statute is unambiguous. But canons of construction are applied *before* a court concludes that a statute is ambiguous. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019) (stressing that courts "must exhaust" the canons to determine if there is ambiguity); Accord *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Service*, 968 F.3d 454, 460 (5th Cir. 2020) (same). *E.g.*, *Yates*, 574 U.S. at 537 (applying *ejusdem generis* before determining whether the text was ambiguous).

The cases cited by the Government do not say otherwise. *Sebelius v. Cloer*, 569 U.S. 369, 380–81 (2013), held that policy-focused canons creating a presumption of a particular outcome (*e.g.*, a presumption against waiver of sovereign immunity), do not apply where the statutory language is unambiguous, not *linguistic* canons used to interpret language. And *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), simply says that canons of construction are "guides" rather than "mandatory rules," *id.* at 94, a principle that the Government flouts by urging a formalistic rule that this Court cannot utilize tools of interpretation unless the statute is ambiguous.

Additionally, the Government claims that 42 U.S.C. §§ 264(b)–(d) have no bearing on how this Court should analyze 264(a); however, this

Circuit holds that "interpretation 'must account for both the specific context in which language is used and the broader context of the statute as a whole.'" *Gulf Fishermens Ass'n*, 968 F.3d at 460 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014)). Sections 264(b)–(d) grant the agency limited authority to apprehend and detain those who present a disease risk. By separating these agency actions into independent sections rather than as subparts of section (a), the statute indicates that "other measures" do not include the power to detain and apprehend individuals. The reason is straightforward: "other measures" are those measures similar to the enumerated list, and apprehension of individuals is not akin to those measures. Nor is an eviction moratorium.

2. The Government's interpretation flouts the federalism and avoidance canons

The avoidance doctrine applies when there are "competing plausible interpretations of a statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This Court need only ask whether it is plausible that "other measures" are informed by the list of permitted activities that precede that phrase. If the answer is yes, then this Court must adopt that reading to avoid "serious constitutional doubts," *id.*, with regard to the Commerce Clause as discussed in *Terkel v. CDC*, No. 6:20-cv-00564, 2021

WL 742877 (E.D. Tex. Feb. 25, 2021), and the nondelegation doctrine, as discussed in Appellants' Opening Brief, pages 40–51. *See Alabama Ass'n of Realtors*, 2021 WL 1779282 *7 (employing the avoidance canon).

The federalism canon points to the same interpretation. The Sixth Circuit panel invoked this canon in refusing 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" because "[r]egulation of the landlord-tenant relationship is historically the province of the states." *Tiger Lily*, 992 F.3d at 523.

The Government misunderstands this canon in arguing that the federal government has the power to prevent interstate spread of disease if local or state efforts are inadequate.[2] The federalism canon does not question whether the federal government *can* intrude on state prerogatives; the canon merely presumes that Congress did not intend to do so absent "exceedingly clear language." *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849–50 (2020).

[2] The assurance that the agency will not intrude upon areas of local concern unless it decides the states' efforts are inadequate is part of the regulation, not the statute. It is therefore irrelevant in determining the CDC's statutory authority.

The question is whether authority to fumigate, inspect, sanitize, and to take "other measures" to prevent interstate spread of disease is an "exceedingly clear" grant of power to intrude on state concerns. It is not.

3. Congress's COVID-19 relief measure bill is irrelevant

The Government raises a supposed ratification argument with reference to the 2021 Appropriations Act. But this argument boils down to an assertion that the Appropriations Act interpreted Section 264(a), and that this Court should defer. The argument lacks merit.

According to the Government, the 2021 Appropriations Act "confirmed that a temporary eviction moratorium is a permissible exercise of the CDC's authority under § 264." Appellees' Br. at 23. The Government refers to this as ratification. But ratification occurs where an agency's unauthorized action is approved by Congress after the fact. By contrast, the Government argues that the Appropriations Act somehow constitutes a binding interpretation of Section 264(a).

The distinction is significant. If Congress merely ratified what the agency had already done, such ratification would have only authorized the CDC's original September order, but not future extensions of the order because Congress cannot ratify an agency action that has yet to

occur. But if the Government can spin the Appropriations Act as a binding interpretation of Section 264(a) then the agency can claim Congress has authorized it to continue extending the Order.

But the Appropriations Act neither ratified nor interpreted Section 264(a). It simply passed its own one-month moratorium and incorporated the substance of the Order by reference. The Appropriations Act says, "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) . . . is extended through January 31, 2021, notwithstanding the effective dates specific in such Order." 2021 Appropriations Act, div. N, tit. V, § 502, 134 Stat. at 2078–79 (internal citation omitted). At most, the Act simply acknowledges that the CDC relied on § 264(a) as the basis for its authority. It does not state or imply that this was a lawful exercise of authority under that section. Indeed, the opposite conclusion is just as likely—that the Appropriations Act means Congress did not think the CDC possessed the authority under § 264 to ban evictions. Why else pass a law that does precisely what the Order already did if the CDC could lawfully renew the Order itself?

Even if the Appropriations Act is the 117th Congress's interpretation of a law passed by the 78th Congress, that interpretation does not bind the courts, whose "province and duty" is "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). "[T]he legislature cannot [] indirectly control the action of the courts, by requiring of them a construction of the law according to its own views." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 225 (1995) (quoting Thomas Cooley, Constitutional Limitations 94–95 (1868)).

A genuine ratification argument likewise fails. Congress can render at least some prior executive actions lawful, but only by expressly and unambiguously approving what has already taken place. *See United States v. Heinszen*, 206 U.S. 370, 389 (1907) (ratification must be "unambiguous, and manifests, as explicitly as can be done, the purpose of Congress to ratify").

Courts should hesitate to find ratification, moreover, for agency actions of great economic or political significance. Ratification prevents the government from being "defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Graham v. Goodcell*, 282 U.S. 409, 430 (1931) (quoting *Charlotte Harbor & Northern*

Railway Co. v. Welles, 260 U.S. 8, 11–12 (1922)). Hence, ratification can cure a "slight technical defect," *Forbes Pioneer Boat Line v. Bd. of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 339 (1922), not a deliberate and aggressive exercise of federal power akin to legislative action. *See Van Emmerik v. Janklow*, 454 U.S. 1131, 1133 (1982) ("*Heinszen* and *Forbes* appear to stand for the proposition that administrative, procedural, and technical defects *unrelated to the underlying policy* may be remedied by curative legislation, *while legislative policy may not be changed retroactively*.") (White, J., dissenting from denial for lack of jurisdiction) (emphasis added).

The Appropriations Act does not unambiguously ratify the CDC Order. It says nothing about congressional approval of what the agency had done. Instead, it simply incorporated the order by reference with no further comment. There is nothing on the face of the law that suggests ratification. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001) ("[C]ongressional acquiescence to administrative interpretations of a statute" is "recognize[d] with extreme care.").

Moreover, the agency action here is far more audacious and deliberate than a "slight technical defect." *Forbes*, 258 U.S. at 339. This is a total national preemption of state eviction laws for an uncertain period, with serious consequences for property rights and the national housing industry. *See Alabama Ass'n of Realtors*, 2021 WL 1779282 *7 (observing the moratorium is of "vast economic and political significance.") (cleaned up). Such a rule cannot be ratified by implication.

B. The Government's Reading Violates the Nondelegation Doctrine

The Government dismissively implies that the nondelegation doctrine is a relic that should remain buried. Not so. The entire Supreme Court affirmed the doctrine as recently as 2019 in *Gundy v. United States*, 139 S. Ct. 2116 (2019). While the four-justice plurality rejected the nondelegation challenge, it reaffirmed that legislative power is vested in Congress and there still exists a "bar on its further delegation." *Id.* at 2123. And the plurality agreed that if the dissent's reading of the statute were correct, "we would face a nondelegation question." *Id.* The other justices who did not join the majority, meanwhile, all expressed an interest in revisiting the doctrine. *See id.* at 2131 (Alito, J., concurring); *id.* at 2139–40 (Gorsuch, J., dissenting).

Simply because caselaw finding unlawful delegations is old "does not mean . . . that we must rubber-stamp all delegations of legislative power." *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 443 (5th Cir. 2020). The fact that three federal district courts and a Sixth Circuit panel have recognized nondelegation concerns with the Government's interpretation indicates that the doctrine still imposes a meaningful limit. *See Tiger Lily*, 992 F.3d at 523 ("[T]he broad construction of § 264 the government proposes raises . . . concerns about the delegation of legislative power to the executive branch."); *Alabama Ass'n of Realtors*, 2021 WL 1779282 *7 ("An overly expansive reading of the statute that extends a nearly unlimited grant of legislative power to the Secretary would raise serious constitutional concerns . . ."); *Tiger Lily*, 2021 WL 1171887 *8 (concluding the Government's interpretation would "violate the non-delegation doctrine"); *Skyworks*, 2021 WL 911720 *10 (concluding the Government's reading "would likely raise a serious question whether Congress violated the Constitution by granting such a broad delegation of power unbounded by clear limitations or principles").

If the Government's reading of the statute prevails, then the CDC would have authority to impose any of the state COVID-19 measures

across the nation at the agency's discretion whenever and for however long the agency sees fit. This is no exaggeration. The Government has said that the CDC could impose "border closures, travel restrictions, business closures, and stay-at-home orders." D.'s Memo. in Opp. to P.'s Mot. for Prelim. Inj., Dkt #22 at 21–22. As states begin to reopen, if the CDC deems more liberal COVID restrictions "insufficient," it could simply wrestle those states back into lockdown by federal decree.

This is the inevitable outcome of the Government's interpretation. The Government says the first sentence of § 264(a), which allows the CDC to adopt regulations "as in [its] judgment are necessary" to prevent cross-border spread of disease, "is not implicitly narrowed by the provision's second sentence," which lists actions the CDC may take. Appellees' Br. at 20. Hence, the only sentence in the statute that guides the CDC is the first one, which bears repeating here: "The [CDC] is authorized to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." And, given the Government's position that the language regarding cross-border

transmission does not limit the agency to regulating interstate activity, Appellees' Br. at 25–28, the Government's interpretation whittles the statute down to this phrase: "The [CDC] is authorized to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." That terse phrase is what the Government claims is an "intelligible principle."

The Government, however, also posits that the purpose of the statute—protecting public health—offers an intelligible principle. Appellees' Br. at 31. But the Government cannot rely on "a mere general reference to public welfare without any standard to guide determinations." *New York Cent. Securities Corp. v. United States*, 287 U.S. 12, 24 (1932). In *Panama Refining v. Ryan*, 293 U.S. 388 (1935), the dissent would have upheld the statute because "a reference, express or implied, to the policy of Congress as declared" in a section describing Congress's purpose "is a sufficient definition of a standard to make the statute valid." *Id.* at 440 (1935) (Cardozo, J., dissenting). The majority denied that the general purpose underlying the statute could save it, noting that the statute "speaks in general terms of the conservation of natural resources, but it prescribes no policy for the achievement of that

end." *Id.* at 418. And in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the National Industrial Recovery Act had a much more detailed purpose than the generic "public health" purpose relied on by the Government here, yet that statute did not survive. *See Schechter*, 295 U.S. at 536. Hence, it is not enough for Congress to simply state an objective; it must also "prescribe[] the method of achieving that objective." *Yakus v. United States*, 321 U.S. 414, 423 (1944).

The Government misinterprets *Big Time Vapes*, 963 F.3d 436, in arguing that purpose serves as an intelligible principle. That case involved a nondelegation challenge to the FDA's authority to determine which products are subject to the Family Smoking Prevention and Tobacco Control Act. While this Court emphasized that the statute had a clearly defined purpose, the Court relied on other concrete guidance in the statute, such as the "controlling definition of 'tobacco product,' which necessarily restricts the Secretary's power to only products meeting that definition." *Id.* at 445. The Court also noted the myriad other policy choices made by Congress rather than the agency, from data disclosure to preauthorization requirements for new tobacco products. *Id.* at 445–

46. Thus, "Congress painted much of the regulatory canvas, leaving the finishing touches to the FDA." *Id.* at 446.

By contrast, § 264(a), as interpreted by the Government, leaves the canvas blank. Unlike in *Big Time Vapes*, key language like "communicable disease" is left undefined, and Congress has not laid out any major policy choices with respect to disease control, leaving the agency with far more to fill in than "finishing touches."

Likewise, all the other cases cited by the Government entailed much more detail guiding federal agencies than would § 264(a) under the Government's construction. For example, the Government cites *Yakus*, 321 U.S. at 420, where the Emergency Price Control Act authorized a Price Administrator to fix commodity prices based on what "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." As with its interpretation of § 264(a), the Government would have the reader stop there. But the Emergency Price Control Act went on to impose a fact-finding trigger before price-fixing could occur, where prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act." *Id.* And the Act listed numerous factors the Administrator had to consider in setting a

price, such as distribution, transportation, and changes in the costs of production and profits. *See id.* at 421. Unlike here, "the boundaries of the field of the Administrator's permissible action [were] marked by the statute." *Id.* at 423. By contrast, § 264(a) does not list factors that the agency must consider and does not condition the exercise of the agency's authority on the existence of certain facts, such as the presence of a public health crisis.

Likewise, the Sentencing Reform Act challenged in *Mistretta v. United States*, 488 U.S. 361 (1989), is a model of detail compared to the vacuous phrase that the Government plucks from § 264(a). The Act charged a commission with creating sentencing guidelines; however, the statute required the commission to consider seven factors regarding the nature of the offense and eleven factors regarding the type of defendant, in addition to numerous other details established in the statute regarding statutory maximums, repeat offenses, aggravating or mitigating factors, and so on. *Id.* at 375. There is no such guidance here.

C. CDC's Moratorium Order Is Not Exempt from the APA's Notice and Comment Requirements

The Government does not contest Appellants' argument that a nationwide eviction moratorium constitutes a legislative rule. Instead, it

argues, without citation (aside from the District Court's opinion), that the moratorium was exempt from the APA because it was imposed under authority of previously promulgated regulation. But that improperly assumes an exception from notice and comment requirements for a class of legislative rules; it would enable agencies to exempt themselves from the rigors of the APA by promulgating open-ended regulations and then later issuing impactful regulation without opportunity for public input.

Appellants acknowledge that the CDC could carry out measures like fumigation of railcars or inspection of potentially compromised commodities without going through notice and comment. Such limited actions do not constitute legislative rules. But a sweeping rule disrupting contractual relations for landlords nationwide is unquestionably a legislative rule. AOB at 51–52.

The Government insists that it could not have judged state and local measures insufficient to prevent the spread of COVID-19 until after evaluating state and local eviction moratoria following the expiration of the CARES Act's temporary moratorium. Yet the CDC knew all along that the CARES Act moratorium would expire in July. The only "new" development was that certain state moratoria had recently expired;

however, there was no analysis in the September eviction moratorium order explaining how exactly the CDC's public health judgment hinged on specific states lifting their moratoria, which illustrates that this is really an ex post facto argument. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,296 (Sept. 4, 2020). Indeed, if evictions were understood to contribute to the spread of COVID-19 then the CDC could have assessed the need for a nationwide moratorium at the outset.

Finally, the Government fails to provide any real explanation as to why notice-and-comment would not have been possible in advance of the recent moratorium extension orders. They argue "the landscape remained dynamic[,]" considering Congressional action in December. But an agency cannot delay notice-and-comment and then declare such procedures are impracticable simply because Congress fails to take legislative action. The fact that one of the Defendant agencies finalized a rule with notice and comment procedures in this time demonstrates that there was time to seek public input. The Government seeks to distinguish the Health and Human Services rule noted in the opening brief, AOB at 53–54, because it did not concern COVID-19. But the fact that the HHS

was able to comply with APA procedures on *less urgent* matters is telling.[3]

D. The Eviction Moratorium Is Arbitrary and Capricious

The APA requires that agencies proceed in a reasoned and deliberative process when issuing rules. Yet, as Appellants showed in their opening brief, the CDC considered only one side of the equation. The Government responds that it had no obligation to consider the impact of the moratorium on the housing market because it "was not enacting housing policy…" Appellees' Br. at 35. But this is semantics. Whether an eviction moratorium may result in less housing and thereby contribute to the spread of COVID-19 is "an important aspect of the problem" the CDC was trying to solve—*i.e.*, impact on the national housing stock. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

[3] As demonstrated by the HHS Rule, the entire rulemaking process, including review at the Office of Information and Regulatory Affairs and a 30-day notice and comment period, can take a little as 76 days. *See* An Overview of Federal Regulation and the Rulemaking Process, Congressional Research Service, https://fas.org/sgp/crs/misc/IF10003.pdf.

The moratorium is also arbitrary and capricious because the CDC has reissued the eviction moratorium order in short-term increments without ever providing an objective standard guiding its decisions. The Government argues that there is no requirement to spell out objective criteria guiding an agency's forward-looking decisions. But establishing objective criteria for future action is the essence of reasoned decision-making. *See Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015) (stressing that "[f]ederal administrative agencies are required to engage in 'reasoned decisionmaking.'").

II. Appellants Are Suffering Irreparable Harm

A. Ultra Vires Regulation Violates the Separation of Powers

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Thus, if Appellants are correct that the CDC lacks the statutory authority to impose an eviction moratorium, then the CDC *is making law* in violation of separation of powers. The Government responds that not every statutory violation is a constitutional violation. That is true. But

an agency is most definitely violating separation of powers when it lawlessly imposes regulatory burdens on the American people.

The Government cites only, *Dalton v. Specter*, 511 U.S. 462 (1994), a case where federal bureaucrats were alleged to have fumbled certain procedural requirements. Yet there is a world of difference between that sort of statutory violation and a case where an agency is ***lawlessly changing the legal landscape***—and coercing compliance with threat of jail-time or ruinous civil liabilities. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,296 (Sept. 4, 2020) (imposing up to $200,000 in penalties and criminal sanctions). *Compare Harmon v. Brucker*, 355 U.S. 579 (1958) (concerning an allegation that that the Secretary of Army violated a statute in withholding an honorable discharge); with *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374–77 (1986) (holding ultra vires regulation violates the foundational principle that only Congress may make law).

Yet the Government argues that even if the CDC is acting lawlessly there is no irreparable harm and that it should be allowed to continue enforcing the moratorium in the short-term. That approach is repugnant

to the rule of law. It belies an indifference to the foundational principle that *only Congress* may make law in our constitutional system.

Dalton is also inapposite because in that case the "Respondents [had] not alleged that the [statute] in itself amount[ed] to an unconstitutional delegation of authority to the [Executive Branch]." 511 U.S. at 473, n.5. Here Appellants allege the statute amounts to unconstitutional delegation, at least under the Government's interpretation. As such, the Court need not hold that the statute is invalid in order to find a constitutional problem; even if this case is resolved purely on statutory grounds, the nondelegation issue is intrinsically bound in the analysis. *E.g., Tiger Lily, LLC,* 992 F.3d at 523 (rejecting the Government's interpretation because it would raise non-delegation concerns). If Appellants are correct that the Government's construction violates the nondelegation doctrine and that the eviction moratorium cannot be upheld otherwise, then there is necessarily a constitutional injury in so far as the Government is allowed to continue enforcing the moratorium under its ***unconstitutional construction***. *See* Ilan Wurman, *As-Applied Nondelegation*, 96 Tex. L. Rev. 975, 990 (2018) (defending as-applied applications of the nondelegation doctrine).

The Government argues that only First Amendment violations effect irreparable injuries. But there is nothing about First Amendment injuries that are uniquely irreparable. *E.g., Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (finding a Dormant Commerce Clause violation caused irreparable harm). The Government says those injuries are "intangible [in] nature[.]" Yet separation of powers claims are likewise intangible. Constitutional violations effect intangible injuries precisely because the Constitution represents theoretical constructs that are inherently esoteric. They have practical application only when courts provide injunctive relief.

B. Appellants Are Suffering Irreparable Harm to Their Property Rights

The right to exclude is often described as the "most essential stick[] in the bundle of [real property] rights . . ." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Abrogation of that right—even temporarily—effects an irreparable injury. The Government misses the point in responding that the Appellants are speculating "that some landlords may wish to 'renovate a unit,' 'occupy a unit' or 'allow a unit to remain vacant[.]'" The point is that a property owner has every right to reclaim possession of a unit from non-paying tenants and to put it to whatever

use he or she might find most beneficial at that moment. In this case the Government is essentially holding hostage Appellants' right to make any beneficial use of their property for an indeterminate time. And abrogation of the right to quiet enjoyment of one's property is irreparable because not even monetary damages could turn back time to retroactively restore the owner's right to exercise exclusive dominion.

The Government fails to cite a single case predating this controversy suggesting that an abrogation of the right to quiet enjoyment of real property is not irreparable harm. Instead, the Government seeks only to distinguish the cases that Appellants relied on in their opening brief on the view that those cases all concerned "a permanent deprivation or destruction of property." Appellees' Br. at 14. But that is not so. For one, the Third Circuit affirmed a preliminary injunction against the U.S. Forest Service (USFS) in *Minard Run Oil Co. v. U.S. Forest Serv.*, to prevent the USFS from enforcing a policy of withholding authorization for mineral extraction within the Allegheny National Forest until completion of a full environmental impact statement under the National Environmental Policy Act. 670 F.3d 236, 256 (3d. Cir. 2011). Plaintiffs had sought an injunction because the USFS's policy would result in

significant *delays* in obtaining required authorizations. And the Government simply fails to address *E. Tenn. Nat. Gas Co. v. Sage*, wherein the Fourth Circuit found irreparable harm would occur if there was "undue delay" in allowing a public utility to make use of real property. 361 F.3d 808, 829–30 (4th Cir. 2004). This Court should likewise hold that there is irreparable harm here.

C. The Government's Speculation That Appellants Might be Able To Recover from Insolvent Tenants Is Irrelevant

The general rule is that only injunctive relief is available against the Government because one cannot usually recover damages from the Government. *See* 5 U.S.C. § 702 (consenting only to non-monetary suits against federal agencies). *E.g.*, *Am. Farm Bureau Fed'n v. EPA*, 3:15-CV-00165, 2018 WL 6411404, at *1 (S.D. Tex. Sept. 12, 2018) (finding a federal rule caused irreparable harm—notwithstanding obvious economic consequences); *Nevada v. United States Dep't of Labor*, 218 F. Supp. 3d 520, 532 (E.D. Tex. 2016) (same). And consistent with this settled rule, there is irreparable harm here because there is no possibility of redressing economic injuries in the present suit—or for that matter in any federal court proceeding.

The Government is wrong in asserting that the speculative possibility of collecting economic damages in a subsequent *state court* suit—*against third parties*—should defeat Appellant's right to immediate injunctive relief in federal court. The Government does not cite even a single analogous case. In all of the cases the Government relies upon there was a possibility of recovering monetary damages against the named defendants. *E.g., Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262 (5th Cir. 2012) (recognizing plaintiffs could pursue monetary relief against the municipal defendant). But that is not possible here.

Yet even if this Court agrees that the possibility of pursuing a state court collections suit against third parties might somehow defeat Appellants' petition for injunctive relief, that would only be the beginning of the inquiry. The next step would be to decide whether there is irreparable harm *in light of the record*. And in this case the record establishes a simple but determinative fact. The tenants in question have sworn, under penalty of perjury, that that they have no means of satisfying their existing debts and are therefore insolvent. Because it is

impossible to collect damages from an insolvent individual there is irreparable harm here.

Appellants argued in their opening brief that—in light of this record—the burden was on the Government to prove that Appellants are likely to collect from third parties. AOB at 61. The Government fails to respond to that argument. They merely double-down on their assertion that Appellants should have built a more robust record on the view that the tenants may be lying. But this is a peculiar position for the Government when the CDC's Order states that tenants may invoke the protections of the moratorium by submitting a sworn declaration that they are unable to pay rent. On the one hand, landlords and state courts are expected to honor those sworn declarations and to forbear on evictions. But for the purpose of this suit—and merely for the purpose of avoiding an injunction—the Government suggests this Court should assume the tenants are lying to take advantage of the moratorium.

In any event, it is unclear how a landlord in Chambless's position would even go about gathering the information that the Government insists would be necessary to prove the falsehood of the tenants' declarations. Tenants have no legal obligation to answer questions from

landlords as to their continued employment, their health conditions, their savings, or other personal information.[4] And to the extent a landlord should badger a tenant for such information in order to challenge a Declaration, they might risk ruinous fines or possible jail time under the CDC Order, which defines prohibited "eviction[s]" broadly to include "any action by a landlord … to remove or cause the removal of a covered person from a residential property." 85 Fed. Reg. at 55,293.

The Government does not directly confront the point—recognized by several other circuits—that there is irreparable harm where a "[party] is likely to be insolvent at the time of judgment." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995). Instead, they argue that, under the circumstances, it is appropriate to assume that an insolvent tenant might see a windfall because Congress has appropriated money to provide rental assistance. But there are

[4] Nor would a landlord be entitled to such information in a collections action because it would be immaterial to the question of whether the debtor was in breach of contract. And as noted in the opening brief, there is no guarantee that state court would even have jurisdiction over a non-paying tenant after they have vacated a unit. The Government has no answer to the concern that a tenant might abscond to a foreign jurisdiction and that it would then be impossible to pursue a collections suit.

several problems. First, the appropriated funds may run out, especially if the CDC chooses to continue extending its moratorium. *See* Gov. Edwards Announces New Program to Assist Renters and Landlords Impacted by COVID-19, Office of the Governor (Mar. 5, 2021) ("Rental Program"), (acknowledging that Louisiana will prioritize certain applications).[5] *Cf.* Marcio Jose Sanchez, Even the Los Angeles Lakers Got a PPP Small Business Loan, NPR (noting that "money allocated to the Paycheck Protection Program was gone within two weeks, and hundreds of thousands of small businesses were left out.").[6]

Second, even if a landlord obtains monetary relief, an insolvent tenant is likely to fall behind on rent again. And third, the program only provides rental relief to landlords that are willing to waive certain contractual rights. *See* Rental Program (noting conditions that prohibit landlords from evicting non-paying tenants "for at least 60 days after the assistance ends" and requiring forgiveness of "late fees, penalties, interest and court costs.").

[5] https://gov.louisiana.gov/index.cfm/newsroom/detail/2993.
[6] https://www.npr.org/sections/coronavirus-live-updates/2020/04/27/846024717/even-the-la-lakers-got-a-ppp-small-business-loan.

III. An Injunction Is in the Public Interest

"[A] strong public desire to improve the public condition" does not justify "achieving the desire" by unconstitutional means. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Thus, while mitigating the effects of the disease may represent a worthy policy goal, the eviction moratorium does not serve the public interest where the CDC's statutory interpretation would violate the constitution.

The Government looks past this argument just as it ignores the constitutional implications of its position. Likewise, the Government fails to respond to Appellants' argument that the eviction moratorium upsets the judgment of the lawmakers in Louisiana who decided it served the public interest—specifically their goal of maintaining a functioning housing market—to allow for eviction of non-paying tenants. The CDC's judgment cannot trump the State's interest if the moratorium is unlawful.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court.

DATED: May 13, 2021.

Respectfully submitted,

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I hereby certify that on May 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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