No. 21A23

IN THE SUPREME COURT OF THE UNITED STATES

ALABAMA ASSOCIATION OF REALTORS, ET AL., APPLICANTS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

RESPONSE IN OPPOSITION TO APPLICANTS' EMERGENCY APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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The Acting Solicitor General, on behalf of the Department of Health and Human Services, et al., respectfully submits this response in opposition to applicants' emergency application to vacate the stay pending appeal entered by the United States District Court for the District of Columbia in this case.

To curb the spread of COVID-19, the Centers for Disease Control and Prevention (CDC) issued an order adopting a temporary moratorium on certain residential evictions in September 2020. Shortly thereafter, Congress extended the effective date specified in the CDC's original order in legislation that recognized that the order was a valid exercise of the CDC's statutory authority. The CDC itself then further extended the original moratorium until

July 31, 2021, based on the evolving public health challenges posed by an unprecedented pandemic.

The order challenged here was issued on August 3, 2021, in response to "recent, unexpected developments in the trajectory of the COVID-19 pandemic, including the rise of the Delta variant." Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,245 (Aug. 6, 2021) (August Order). The August Order is more targeted than the original order and its extensions, but rests on the same statutory 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." 42 U.S.C. 264(a).

In earlier proceedings, the district court held that the original moratorium exceeded the CDC's authority, but stayed vacatur of the moratorium pending appeal. The court of appeals and then this Court denied applicants' emergency motions to vacate the stay. The CDC stated at the time that it planned to end the moratorium on July 31, in the absence of an unexpected change in the trajectory of the pandemic.

The trajectory of the pandemic has since changed -- unexpectedly, dramatically, and for the worse. As of August 19, 2021, the seven-day average of daily new cases is 130,926, nearly

a ten-fold increase over the rate when this Court ruled. See CDC, COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, https://go.usa.gov/xFRXv. Projections suggest that case rates will continue to rise in the coming weeks. See CDC, COVID Data Tracker: United States Forecasting, https://go.usa.gov/xFRFQ. New evidence suggests that the Delta variant is more than twice as transmissible as the original strains of SARS-CoV-2; that even vaccinated individuals who become infected with the Delta variant may transmit the virus to others; and that the Delta variant may increase the risk of breakthrough infections among vaccinated persons. See CDC, Delta Variant, https://go.usa.gov/xFvXXF.

As a result of the Delta variant, hospitalization rates in some States are approaching, if not surpassing, their winter peaks. See CDC, COVID Data Tracker: Prevalent Hospitalizations of Patients with Confirmed COVID-19, https://go.usa.gov/xFnYg. Children under age 12 are not yet eligible for vaccines, and the number of children hospitalized with COVID-19 has hit a record high. See CDC, COVID Data Tracker Weekly Review: Interpretive Summary for August 13, 2021, https://go.usa.gov/xFvXv. As the school year begins, more than 10,000 students and teachers have already been quarantined. See, e.g., Jaclyn Peiser, As schools reopen, more than 10,000 students and teachers across 14 states are quarantined for coronavirus exposure, Wash. Post, https://perma.cc/7T2J-MGZK. Many businesses are delaying return-

to-work plans. See, e.g., Lauren Hirsch, Delays, More Masks and Mandatory Shots: Virus Surge Disrupts Office Return Plans, N.Y. Times (July 23, 2021), https://nyti.ms/2VryVw5. And the CDC is again recommending indoor masking even for fully vaccinated people in areas of substantial or high transmission. See CDC, Interim Public Health Recommendations for Fully Vaccinated People, https://go.usa.gov/xFRX6.

Applicants have nonetheless renewed their effort to lift the district court's stay of its judgment. Applicants have failed to carry their heavy burden to justify vacating that stay, which the court of appeals once again declined to vacate. The CDC has the statutory authority to halt evictions to prevent the spread of communicable disease; Congress has confirmed and relied on that understanding; and the equities weigh even more strongly in favor of allowing the moratorium to remain in place today than they did when this Court last acted. The Court should therefore once again deny the application to vacate the stay.

STATEMENT

A. Factual And Legal Background

1. The COVID-19 pandemic, which has caused more than 600,000 deaths in the United States and more than 4 million deaths throughout the world, is one of the deadliest outbreaks of disease in human history. In September 2020, the CDC sought to prevent the spread of the disease by issuing an order instituting a temporary moratorium on evictions. See Temporary Halt in

Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020) (Eviction Moratorium). The CDC invoked 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." 42 U.S.C. 264(a).

In issuing that order, the CDC explained that evictions could result in "multiple outcomes that increase the risk of COVID-19 spread." Eviction Moratorium, 85 Fed. Reg. at 55,294. First, evicted renters could readily transmit COVID-19 when they "move in with friends or family" or move to "congregate settings" such as "transitional housing" and "domestic violence and abuse shelters." Ibid. Second, evicted individuals often become homeless, and homelessness could "contribute to the further spread of COVID-19" given "inadequate access to hygiene, sanitation facilities, health care, and therapeutics." Id. at 55,295. Finally, because "[t]he virus * * * spreads very easily" and "[a]pproximately 15% of moves [that occur each year] are interstate," "mass evictions would likely increase the interstate spread of COVID-19." Id. at 55,293, 55,295.

The original order instituted under 42 U.S.C. 264 applied "through December 31, 2020, subject to further extension * * * as appropriate." Eviction Moratorium, 85 Fed. Reg. at 55,296. That order was subsequently extended several times. Congress

itself first extended the order "issued by the [CDC] under section 361 of the Public Health Service Act (42 U.S.C. 264)" until January 31, 2021, "notwithstanding the effective dates in such order." Consolidated Appropriations Act, 2021 (2021 Appropriations Act), Pub. L. No. 116-260, § 502, 134 Stat. 2070-2073. In January 2021, the CDC further extended its order through March 31, 2021. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021). In March 2021, the CDC then extended the order through June 30, 2021. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021). Finally, in June 2021, the CDC extended the order through July 31, 2021. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010 (June 28, 2021) (June Order). The CDC stated: "Although this Order is subject to revision based on the public health landscape, absent an unexpected change in the trajectory of the pandemic, CDC does not plan to extend the Order further." Id. at 34,013. That order expired on July 31, 2021.

2. On August 3, 2021, the CDC issued a new order adopting a moratorium on evictions, with modifications. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,247 (Aug. 6, 2021) (August Order). In the August Order, the CDC acknowledged that it had "indicated that the July Order would be the final extension of the nationwide eviction

moratorium absent an unexpected change in the trajectory of the pandemic." Id. at 43,250. But the CDC stated that, "[u]nfortunately, the rise of the Delta variant and corresponding rise in cases in numerous counties in the United States have altered the trajectory of the pandemic." Ibid.

The CDC explained that, currently, "the Delta variant is the predominant SARS-CoV-2 strain circulating in the United States, estimated to account for 82% of cases." August Order, 86 Fed. Reg. at 43,246. The CDC observed that "[t]he Delta variant has demonstrated increased levels of transmissibility compared to other variants" and that "early evidence suggests that people who are vaccinated and become infected with the Delta variant may transmit the virus to others." Ibid. It further observed that "[t]ransmission of the Delta variant has led to accelerated community transmission in the United States." Ibid. Given the "surge in cases brought forth by the highly transmissible Delta variant," the CDC concluded that it was necessary to issue "a new Order temporarily halting evictions." Id. at 43,247.

The CDC's August Order shares many of the features of the original eviction-moratorium order. For example, the August Order applies only to tenants who, if evicted, would likely become homeless or be forced to live in close quarters in a congregate or shared-living setting. 86 Fed. Reg. at 43,245. As under the original order and its extensions, a tenant qualifies for protection only if he provides a sworn declaration to his landlord

attesting, among other things, that he (1) "has used best efforts to obtain all available government assistance for rent or housing"; (2) satisfies certain income requirements; (3) cannot pay 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." Ibid. (footnote omitted). The landlord retains the right to "challeng[e] the truthfulness of a tenant's, lessee's, or resident's declaration in court, as permitted under state or local law." Id. at 43,251; cf. Chrysafis v. Marks, No. 21A8, slip op. (Aug. 12, 2021) (enjoining enforcement of a state eviction-moratorium provision that, unlike the CDC's orders, precluded the landlord from contesting the tenant's certification of financial hardship).

Further, as before, the August Order "does not relieve any individual of any obligation to pay rent * * * or comply with any other obligation." 86 Fed. Reg. at 43,250. And although the order suspends evictions for the failure to pay rent, it permits evictions for "[e]ngaging in criminal activity," "threatening the health or safety of other residents," "damaging * * * property," "violating any applicable building code, health ordinance, or similar regulation," or "violating any other contractual obligation, other than the timely payment of rent." Ibid.

In one important respect, however, the August Order is distinct from the original order: It is "narrower" and "more targeted." 86 Fed. Reg. at 43,250. The original order and its extensions applied nationwide, but the August Order applies only "in U.S. counties experiencing substantial and high levels of community transmission." Ibid. (footnotes omitted). "If a U.S. county that is covered by this Order no longer experiences substantial or high levels of community transmission for 14 consecutive days, then this Order will no longer apply in that county." Ibid. Conversely, "[i]f a U.S. county that is not covered by this Order as of August 3, 2021 later experiences substantial or high levels of community transmission * * * , then that county will become subject to this Order." Ibid. The CDC explained that these requirements ensure that the moratorium applies only in "specific areas of the country where cases are rapidly increasing" and where the pandemic "likely could be exacerbated by mass evictions." Id. at 43,245; see id. at 43,250 (noting that the August Order targets the "hardest hit areas").

3. When Congress extended the CDC's original eviction-moratorium order, it also appropriated substantial sums of money to address rent arrears that have built up because of the pandemic. In Section 501 of the 2021 Appropriations Act -- the section immediately preceding the section extending the order -- Congress allocated $25 billion to state and local governments for rental assistance. § 501(a)(1). Those governments may use the funds to

pay up to 12 months of back rent and an additional three months of future rent for eligible tenants. § 501(c)(2). The funds are payable directly to landlords. § 501(c)(2)(C)(i)(I). In March 2021, Congress appropriated an additional $21.5 billion in rental assistance. See American Rescue Plan Act of 2021, § 3201(a)(1), 135 Stat. 54.

B. Proceedings Below

1. Applicants are two landlords, three companies that they use to manage rental properties in Alabama and Georgia, and two trade associations in Alabama and Georgia. See Compl. ¶¶ 16-22. They filed this action in November 2020 in the United States District Court for the District of Columbia, alleging, as relevant here, that the CDC's original eviction-moratorium order exceeded the CDC's statutory authority. Appl. App. 37a.

In May 2021, the district court granted applicants summary judgment, holding that the original eviction moratorium exceeded the CDC's statutory authority. See Appl. App. 34a-53a. The court concluded that, under circuit precedent, it was required to vacate the original moratorium nationwide, rather than to limit relief to the parties. Id. at 52a. The court, however, then granted the government's motion for a stay of the vacatur order pending appeal. Id. at 23a-32a. The court of appeals denied applicants' motion to vacate the stay. See id. at 16a-22a.

This Court, too, denied applicants' request to vacate the stay. See Appl. App. 15a. In an opinion concurring in the denial, Justice Kavanaugh stated:

> I agree with the District Court and the applicants that the [CDC] exceeded its existing statutory authority by issuing a nationwide eviction moratorium. * * * Because the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds, I vote at this time to deny the application to vacate the District Court's stay of its order. * * * In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.

Ibid. (Kavanaugh, J., concurring). Four Justices would have granted the application. Ibid.

2. After the CDC issued its August Order, applicants filed a motion in the district court styled as an "Emergency Motion to Enforce the Supreme Court's Ruling and to Vacate the Stay Pending Appeal." Appl. App. 2a. The district court denied the motion. Id. at 2a-14a. The court concluded that the August Order constitutes "an extension" of the previous moratorium rather than "an entirely new policy" and thus remains "subject to the stay" it had previously entered. Id. at 5a. The court then determined that, under the law-of-the-case doctrine, the court of appeals' previous ruling declining to vacate the stay required the district court to leave its stay in place. Id. at 8a-14a.

Applicants then moved the court of appeals to vacate the stay. Appl. App. 1a. The court denied that motion in a summary order. Ibid.

ARGUMENT

Invoking the All Writs Act, 28 U.S.C. 1651, applicants ask this Court (Appl. 16-40) to vacate the stay pending appeal that was issued by the district court and that the court of appeals twice declined to vacate. Vacatur of a stay issued below is an extraordinary remedy. "[T]his power should be exercised with the greatest of caution and should be reserved for exceptional circumstances." Holtzman v. Schlesinger, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). An applicant seeking vacatur bears the burden of establishing that (1) the "case could and very likely would be reviewed here upon final disposition in the court of appeals"; (2) the applicant "may be seriously and irreparably injured by the stay"; and (3) the issuance of the stay was "demonstrably wrong" under "accepted standards." Coleman v. Paccar, Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); see Western Airlines, Inc. v. Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). Those accepted standards, in turn, require a court to consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 425-426 (2009) (citation omitted).

In applying those principles, the Circuit Justice or the Court owes "significant deference" to public officials charged with responding to the COVID-19 pandemic. South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (Roberts, C.J., concurring in the partial grant of application for injunctive relief). Legislators and executive officials have the "'background, competence, and expertise to assess public health'" and are "politically accountable" for their decisions. Ibid. (citation omitted). Accordingly, in addressing the many emergency applications that have arisen out of the present pandemic, the Court and individual Justices have often recognized that they should respect the judgments of policymakers charged with protecting the public health. See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo, 141. S. Ct. 63, 68 (2020) (per curiam); FDA v. American College of Obstetricians & Gynecologists, 141 S. Ct. 578, 579 (2021) (Roberts, C.J., concurring in the grant of application for stay); Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in the grant of application for stay).

In this case, applicants have not made the extraordinary showing required to justify vacatur of the stay. They have not shown that the court of appeals was demonstrably wrong in concluding that the government is likely to succeed on the merits.

Nor have they shown that the balance of equities justifies vacating the stay. The application should therefore be denied.

I. The Court Of Appeals Correctly Concluded That The Government Is Likely To Succeed On The Merits

In denying applicants' prior request to vacate the stay, the court of appeals concluded that the government had "made a strong showing that it is likely to succeed on the merits." Appl. App. 16a. That evaluation remains correct -- or, at a minimum, not so clearly incorrect as to justify the extraordinary relief applicants seek.

1. The statute on which the CDC relied, 42 U.S.C. 264(a), provides:

> The Surgeon General, with approval of the Secretary [of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

Although the provision refers to the Surgeon General, later reorganizations have transferred that authority to the Secretary of Health and Human Services, who has in turn delegated it to the CDC. See Appl. App. 17a n.1, 40a n.1.

Section 264(a), by its plain terms, grants the government broad authority that encompasses the CDC's order adopting an

eviction moratorium. The first sentence of Section 264(a) expressly authorizes the CDC to make regulations that are "in [its] judgment" "necessary" to "prevent the introduction, transmission, or spread of communicable diseases" from State to State. 42 U.S.C. 264(a). And by using the phrase "in his judgment" not once but twice in Section 264(a), ibid., Congress "designated the HHS Secretary [as] the expert best positioned to determine the need for such preventative measures," Appl. App. 17a.

Section 264(a)'s expansive language is no accident. The drafters of the statute explained that "these provisions are written in broader terms in order to make it possible to cope with emergency situations which we cannot now foresee." Hearing Before a Subcomm. on Interstate & Foreign Commerce on H.R. 3379: A Bill to Codify the Laws Relating to the Public Health Service, and for Other Purposes, 78th Cong., 2d Sess. 64, 108, 140 (1944). Echoing that view, the then-Surgeon General testified that authority under Section 264 "may be very important because of the possibility that strange diseases may be introduced in the country" and that "[f]lexibility in dealing with such contingencies would be very helpful." Hearing Before a Subcomm. on Education and Labor on H.R. 4624: An Act to Consolidate and Revise the Laws Relating to the Public Health Service, and for Other Purposes, 78th Cong., 2d Sess. 6. (1944).

Wherever Section 264(a)'s outer limits may lie, the provision, at a minimum, authorizes measures designed to address

"the movement of persons to prevent the spread of communicable disease," as the court of appeals reasoned in declining to vacate the stay the first time applicants asked it to do so. Appl. App. 19a. Governments have long used restrictions on movement -- such as quarantines and travel restrictions -- to prevent people from "carrying contagion about." Edwards v. California, 314 U.S. 160, 184 (1941) (Jackson, J., concurring). The "ensuing subsections (b), (c), and (d) of Subsection 264," which contain "explicit reference[s] to HHS's regulatory power over the movement of persons," confirm that Section 264(a) covers measures relating to movement. Appl. App. 19a.

The eviction moratorium thus securely "fits within the textual authority conferred by Section 264(a)." Appl. App. 18a. The CDC has expressly found in issuing its order that the moratorium is "necessary" to prevent the interstate transmission of COVID-19. 86 Fed. Reg. at 43,251. That determination rested on the CDC's findings that the United States faced the risk of an unprecedented wave of evictions; that evicted renters could contribute to the spread of COVID-19 if they moved in with friends and family or moved in to congregate settings; and that evicted renters also could contribute to the spread of COVID-19 if they became homeless. See p. 5, supra.

The CDC "narrowly crafted" the moratorium to address those problems. Appl. App. 18a. For example, the August Order, like the original order and its extensions, limits the suspension of

evictions to renters who "otherwise would likely need to move to congregate [or shared-living] settings where COVID spreads quickly and easily, or would be rendered homeless and forced into shelters or other settings that would increase their susceptibility to COVID." Ibid. And the August Order is even narrower than the original order and its extensions, providing that the moratorium applies only to counties that are "experiencing substantial or high rates of community transmission levels of SARS-CoV-2 as defined by CDC." 86 Fed. Reg. at 43,245.

The very object of the moratorium, moreover, is to address the "movement of contagious persons" that would be caused by circumstances beyond their control. Appl. App. 19a (brackets and internal quotation marks omitted). "Evicted renters must move," and a substantial number of those moves would occur interstate. Eviction Moratorium, 85 Fed. Reg. at 55,294. The moratorium achieves that objective in a different way than a quarantine, but Section 264 allows the government to use new (and tailored) tools to address new diseases. It would be strange to hold that the government may combat infection by prohibiting the tenant from leaving his home, but not by prohibiting the landlord from throwing him out.

2. Even if some doubt remained about the scope of the authority conferred by Section 264 in other contexts, Section 502 of the 2021 Appropriations Act makes clear that it authorizes an

eviction moratorium like the one at issue here. Section 502 provides:

> 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. 5592 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

134 Stat. 2078-2079. In other words, "rather than enact its own moratorium, Congress deliberately chose" to "embrace" and "extend" the original order issued by the CDC. Appl. App. 18a.

In so doing, Congress recognized in express statutory text that the order was issued "under" -- that is, in accordance with -- "42 U.S.C. 264." 2021 Appropriations Act § 502, 134 Stat. 2078; see, e.g., Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 530-531 (2013) (defining "under" as "in accordance with") (brackets and citation omitted). And the essential premise of Congress's action was that the CDC's order was a valid exercise of its authority under Section 264. In Section 502, Congress did not confer any new statutory authority. Instead, it extended the CDC's original order notwithstanding the order's effective date. That step would have been entirely ineffective if, as applicants maintain, the order was not authorized by Section 264 and never had any effect at all.

Congress thus legislated on the understanding that Section 264 authorizes the CDC to impose the eviction moratorium. And that settles the interpretive question in this case. As Justice

Scalia has explained, it is "the most rudimentary rule of statutory construction" that courts must interpret statutes "in the context of the corpus juris of which they are a part, including later-enacted statutes." Branch v. Smith, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.). Where, as here, "it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." Ibid. (quoting United States v. Freeman, 44 U.S. (3 How.) 556, 564-565 (1845)); see, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. * * * That is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.").

At the same time that Congress recognized that the eviction moratorium is within the CDC's authority under Section 264, moreover, it comprehensively addressed the circumstances arising from tenants' inability to pay their rent by enacting a provision appropriating $25 billion to state and local governments for rental assistance, followed by the appropriation of an additional $21.5 billion several months later. See pp. 9-10, supra. Congress did not expect that the money it appropriated would reach landlords immediately. To the contrary, Congress anticipated that it would

take 30 days just to allocate those funds to state and local governments, which in turn would establish programs to distribute the funds to landlords and tenants. See 2021 Appropriations Act § 501(b)(1)(A), 134. Stat. 2070.

Congress's actions, taken together, show that Congress regarded the original CDC order as lawful; that Congress required the order to remain in place through at least January 31; and that the CDC retained the power to extend the order as necessary to prevent a wave of evictions during the pandemic, taking into account the pace of rental-assistance distribution. And by applicants' own account (Appl. 34), only $3 billion of the funds Congress provided had been distributed as of late July, leaving more than $43 billion to compensate landlords and make evictions unnecessary.

3. Applicants' contrary arguments lack merit. First, applicants assert (Appl. 21) that the government's reading of Section 264(a) is "limitless." That charge is unwarranted. Contrary to applicants' portrayal (Appl. 17), Section 264(a) does not authorize any and all measures that relate in some way to "public health"; rather, it applies only to measures to "prevent the [international or interstate] introduction, transmission, or spread of communicable diseases." 42 U.S.C. 264(a). "Th[e] text also makes a determination of necessity a prerequisite to any exercise of Section 264 authority, and that necessity standard constrains the granted authority in a material and substantial

way." Appl. App. 17a. Further, because the object of the eviction moratorium is to deter the movement of potentially contagious individuals, see p. 17, supra, the Circuit Justice or the Court need not consider whether Section 264 would authorize other measures. Finally, contrary to applicants' assertion (Appl. 27) that no legal principles constrain the CDC's determinations of necessity, any invocation of Section 264(a) remains subject to review for arbitrariness and capriciousness under ordinary principles of administrative law. See, e.g., Brown v. Azar, 497 F. Supp. 3d 1270, 1285-1289 (N.D. Ga. 2020) (considering contention that the eviction moratorium is arbitrary and capricious).

Second, applicants argue (Appl. 20) that "[Section] 264 is limited to disease-control measures involving the inspection and regulation of infected property or the quarantine of contagious individuals." But that limitation appears nowhere in the language of the statute. The statute empowers the CDC to adopt "such regulations as in [its] judgment are necessary to prevent" the interstate spread of disease; it does not limit that authority to measures involving inspection and quarantine. 42 U.S.C. 264(a). Other provisions of the Public Health Service Act show that, when Congress wanted to refer to inspection or quarantine regulations, it knew how to do so. See, e.g., 42 U.S.C. 243(a) (enforcement of "quarantine regulations"). The provision at issue here, by contrast, includes no such limit. Reading that unwritten constraint into the text would countermand Congress's deliberate

decision to grant the government the flexibility needed to address new threats to public health as they emerge.

Applicants seek (Appl. 19-20) to infer their proposed limitation from Section 264(a)'s second sentence, which authorizes the CDC to provide for "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles" "[f]or purposes of carrying out and enforcing [its] regulations." 42 U.S.C. 264(a). As the court of appeals explained in denying applicants' first motion to vacate the stay, however, applicants err in arguing that "the regulatory power under the first sentence of Section 264(a) is limited to measures closely akin to those the second enumerates." Appl. App. 18a-19a. The second sentence, by its plain terms, does not purport to define "the substantive scope of the regulatory authority conferred" by the first sentence, id. at 18a; rather, it empowers the CDC to adopt additional measures "[f]or purposes of carrying out and enforcing such regulations." 42 U.S.C. 264(a). "That is language of expansion, not contraction." Appl. App. 19a. And the second sentence itself is not limited to the additional measures specifically enumerated; it encompasses "other measures as in [the CDC's] judgment may be necessary." 42 U.S.C. 264(a). Applicants' argument also proves too much. If taken to its logical conclusion, the argument suggests that Section 264(a) is limited to inspection and sanitation measures; the second sentence contains no reference

to the quarantine measures that even applicants concede are permitted.

Third, applicants (Appl. 23-29) argue that interpreting Section 264 to authorize the CDC eviction-moratorium order raises federalism and non-delegation concerns. Those concerns are misplaced. This Court has explained that Congress's commerce power includes the authority to respond to an "interstate epidemic." United States v. Comstock, 560 U.S. 126, 142 (2010). Section 264(a) authorizes the CDC to adopt measures it judges necessary to prevent the interstate spread of disease, and the CDC has judged that the August Order is necessary to prevent the interstate spread of COVID-19. Similarly, in applying the non-delegation doctrine, the Court has upheld statutes that empower agencies to regulate in the "public interest," see National Broad. Co. v. United States, 319 U.S. 190, 225-226 (1943); to set prices that are "fair and equitable," see Yakus v. United States, 321 U.S. 414, 420 (1944); and to establish air-quality standards to "protect the public health," see Whitman v. American Trucking Ass'n, 531 U.S. 457, 472-476 (2001) (citation omitted). The standard set out in Section 264(a) -- "necessary to prevent the [international or interstate] introduction, transmission, or spread of communicable diseases," 42 U.S.C. 264(a) -- is more specific than those standards.

4. Even if applicants' arguments gave the Court some pause about endorsing the full extent of the CDC's view of its authority under Section 264 -- or if the Court simply preferred to avoid

addressing that consequential question here -- those arguments would pose no obstacle to a narrow decision grounded in Congress's subsequent recognition that Section 264 authorizes the eviction moratorium at issue. A decision resting on that specific congressional action would not even arguably risk granting the CDC "limitless" authority. Appl. 21. It would likewise pose no concern about delegation, for Congress expressly extended the very order under Section 264 that applicants brought this suit to challenge. And Congress's subsequent action also supplies "clear congressional authorization," Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014), for the use of Section 264 to impose an eviction moratorium.

Tellingly, moreover, neither applicants nor the courts that have adopted their reading of Section 264 have offered any persuasive response to Section 502 of the 2021 Appropriations Act. They have understandably resisted the necessary implication of their position, which is that Section 502 had no effect at all. Instead, they have asserted that Section 502 "impose[d] an eviction moratorium for a limited time," Appl. 30, or "g[a]ve force to the moratorium for the period it covers" by "raitf[ying]" an agency action that was "originally unlawful." Tiger Lily, LLC v. HUD, No. 21-5256, 2021 WL 3121373, at *4-5 (6th Cir. July 23, 2021). But that ignores the plain text of the statute. Congress neither imposed a moratorium of its own nor purported to ratify an order that had exceeded the CDC's authority. Just the opposite: In

extending the CDC's original order, Congress presumed that the order was valid and expressly recognized that it was an exercise of the CDC's authority under Section 264.

5. Applicants also invoke (Appl. 23) Justice Kavanaugh's opinion concurring in the denial of their previous emergency application. See Appl. App. 15a. In the district court, applicants argued that the concurring opinion was controlling under Marks v. United States, 430 U.S. 188 (1977), but the district court rejected that contention. See Appl. App. 13a-14a. The district court explained that "[t]he Supreme Court did not issue a controlling opinion," that under circuit precedent "the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law," and that, "because the four dissenting Justices did not explain their votes, it is impossible to determine which proposed disposition -- theirs or Justice Kavanaugh's -- is the 'common denominator' of the other." Ibid.

Applicants do not appear to renew their contention that the concurrence constitutes controlling precedent. They instead rely on it (Appl. 23) only as persuasive authority. For the reasons explained above, we respectfully submit that the CDC's original order and the August Order are authorized by statute, and that any concerns about delegation to an agency of authority to address important political and economic issues are met by the deliberately broad language of Section 264 and by the specific language of Section 502 of the 2021 Appropriations Act.

The August Order, moreover, was issued in light of greatly changed circumstances resulting from the Delta variant. At the same time, the August Order is "narrower" and "more targeted" than the previous moratorium. 86 Fed. Reg. at 43,250. Whereas the previous moratorium applied nationwide, the August Order applies only to counties that are "experiencing substantial or high rates of community transmission levels of SARS-CoV-2 as defined by CDC." Id. at 43,245. "If a U.S. county that is covered by this Order no longer experiences substantial or high levels of community transmission for 14 consecutive days, then this Order will no longer apply in that county." Ibid. Those requirements ensure that the moratorium applies only in "specific areas of the country where cases are rapidly increasing" and where the pandemic "likely could be exacerbated by mass evictions." Ibid.

Applicants emphasize (Appl. 14) that more than 80% of the Nation's counties were experiencing substantial or high levels of community transmission as of August 1, but that is the wrong way to look at it. The fact that more than 80% of the Nation's counties have been hit hard by COVID-19 simply shows that the recent surge in the pandemic is serious and that the threat to which the CDC must respond is widespread. If the surge subsides, so that fewer counties experience such transmission, the moratorium will automatically phase out with it. That meaningfully distinguishes the August Order from the earlier moratorium, which remained

applicable throughout the Nation irrespective of improving conditions.

In short, the CDC's August Order falls within the authority conferred by Congress. At the least, applicants have failed to carry their heavy burden of establishing that the court of appeals was demonstrably wrong in concluding, when it first denied applicants' first request to vacate the stay, that the government was likely to succeed on the merits of the appeal.

II. The Balance Of Equities Also Favors Maintaining The Stay

1. A party seeking vacatur of a stay must show that the stay "seriously and irreparably injure[s]" the party. Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers); see Western Airlines, 480 U.S. at 1305 (O'Connor, J., in chambers). Indeed, because vacatur is an exceptional remedy, the party seeking it "bear[s] an augmented burden of showing * * * irreparable harm." Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas, 448 U.S. 1328, 1331 (1980) (Powell, J., in chambers). Applicants have not made that showing here, and their failure to do so would require denial of the application without a need to consider their likelihood of success. See Garcia-Mir v. Smith, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers) (when the applicant "ha[s] not made a showing of irreparable injury," "[t]here is no need to evaluate [the] likelihood of success on the merits").

When it denied applicants' first request to vacate the district court's stay, the court of appeals observed that "the record [wa]s devoid of the requisite evidence of irreparable injury likely to befall the landlord parties to this case." Appl. App. 20a. It remarked, for instance, that "the record d[id] not demonstrate any likelihood that [applicants] will lose their businesses, that an appreciable percentage of their own tenants * * * will be unable to repay back rent, or that financial shortfalls are unlikely ultimately to be mitigated." Ibid.

In seeking again to have the stay vacated, applicants could have corrected those deficiencies by submitting evidence showing substantial and irreparable harm. They failed to do so. They instead continue to rely (Appl. 31) on the same declarations that the court of appeals already found inadequate. Their failure to submit additional evidence of harm, despite ample opportunity to do so and the court of appeals' previous finding that their showing was inadequate, undermines their assertions that they are irreparably harmed and that the balance of equities favors them.

Applicants instead assert (e.g., Appl. 31) that landlords throughout the country have been losing up to $19 billion a month because of the moratorium and that the rental assistance appropriated by Congress will not suffice to cover that sum. But applicants seeking vacatur of a stay must show that "the rights of the parties * * * may be seriously and irreparably injured"; they may not rely on alleged harms to strangers to the litigation.

Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers) (emphasis added). And as the government has previously explained, the figures cited by applicants are demonstrably overstated. See D. Ct. Doc. 26, at 15 n.4. For example, applicants' estimate, prepared last November, assumes that "12.6 to 17.3 million rental households" will take advantage of the eviction moratorium, D. Ct. Doc. 6, at *6 (Nov. 11, 2020), but more recent government statistics indicate that around 6.4 million renter households have reported being behind on rent. See Department of Housing and Urban Development, Census Household Pulse Survey (Apr. 26, 2021), https://go.usa.gov/xFH4G.

2. On the other side of the ledger, lifting the stay would cause great harm to the government and to the public. "As the federal agency tasked with disease control, the Department [of Health and Human Services], and the CDC in particular, have a strong interest in controlling the spread of COVID-19 and protecting public health." Appl. App. 30a. The CDC has cited -- and the district court credited when it first issued the stay -- "observational data analyses" showing that "lifting the national moratorium will 'exacerbate the significant public health risks'" associated with COVID-19. Ibid. (citation omitted). For example, the CDC has cited data showing that "lifting [state and local] eviction moratoria led to a 40% increased risk of contracting COVID-19 among people who were evicted and those with whom they shared housing"; that "significant increases in COVID-19 incidence

and mortality [occurred] approximately 2-3 months after [state and local] eviction moratoria were lifted"; and that "the incidence of COVID-19 in states that lifted their moratoria was 1.6 times that of states that did not at 10 weeks post-lifting." January Extension, 86 Fed. Reg. at 8022. The CDC has also estimated that "over 433,000 cases of COVID-19 and over 10,000 deaths could be attributed to lifting state moratoria." Ibid.

The concurrence in the denial of the previous application explained that, although it agreed with applicants on the merits, it found that the "balance of equities" favored allowing the moratorium to remain in effect. Appl. App. 15a. The balance of equities tips even more strongly in the government's favor today than it did then.

Since the Court's denial of the previous application, the "trajectory of the COVID-19 pandemic" has changed in "unexpected" ways. August Order, 86 Fed. Reg. at 43,245. At the time of that denial, the Alpha variant was "the predominant SARS-CoV-2 strain circulating in the United States." June Order, 86 Fed. Reg. at 34,012. Now, however, "the Delta variant is the predominant SARS-CoV-2 strain circulating in the United States." August Order, 86 Fed. Reg. at 43,246. More specifically, the Delta variant accounts "for over 82% of cases as of July 17, 2021," ibid. -- compared to around 10% of cases in June and around 2% of cases in May, see June Order, 86 Fed. Reg. at 34,012.

The Delta variant differs in significant ways from other variants of the virus. For example, the CDC has explained that "[t]he Delta variant has demonstrated increased levels of transmissibility compared to other variants." August Order, 86 Fed. Reg. at 43,246. The CDC also has observed that "people who are vaccinated" may suffer breakthrough infections because of the Delta variant and then "transmit the virus to others." Ibid. Further, the CDC has noted that "[t]ransmission of the Delta variant has led to accelerated community transmission in the United States." Ibid. Due in part to the Delta variant, the United States has experienced a "renewed surge in cases of COVID-19." Id. at 43,246. "[C]ase counts rose from 19,000 cases on July 1, 2021 to 103,000 cases on July 30, 2021." Ibid. When issuing the August Order, the CDC noted that "[f]orecasted case counts predict that cases will continue to rise over the next four weeks." Ibid.

The CDC has noted that the "surge of cases spurred by the Delta variant has confirmed that the fundamental public health threat -- of the risk of large numbers of residential evictions contributing to the spread of COVID-19 throughout the United States -- continues to exist." August Order, 86 Fed. Reg. at 43,251. Without the August Order, the CDC has explained, "there is every reason to expect that evictions will increase dramatically at a time when COVID-19 infections in the United States are increasing sharply." Id. at 43,251-43,252. The CDC has warned that the

"public health consequences" of "an increase of evictions" at this time "would be very difficult to reverse." Id. at 43,252.

Applicants dismiss (Appl. 35) the CDC's concerns as "pretextual," but the history of this very case shows why this Court should reject applicants' invitation to second-guess the CDC's expert judgments about the necessity of the moratorium. In their previous application, applicants confidently asserted (20A169 Appl. 33) that "[m]atters have * * * improved." They argued (id. at 33-35) that the Nation was past "the height of the pandemic," that vaccinated Americans were "free to dispense with masks," that "new infections [we]re down to their lowest level since the onset of the pandemic," that "new infections" were projected to "drop" in the coming weeks, and that the "public-health landscape" was "rapidly improving."

Things did not turn out that way. Today, the Nation is experiencing a "renewed surge in cases"; "[f]orecasted case counts predict that cases will continue to rise"; "[t]ransmission of the Delta variant has led to accelerated community transmission"; "early evidence suggests that people who are vaccinated and become infected with the Delta variant may transmit the virus"; and the CDC has recommended that even vaccinated people resume wearing masks indoors in areas of substantial or high transmission. August Order, 86 Fed. Reg. at 43,246. Further, children under the age of 12 are not yet eligible for vaccines, and the number of children who have been hospitalized for COVID-19 has reached a record high.

See p. 3, supra. The sharp contrast between applicants' rosy forecast and the grim reality on the ground confirms the importance of leaving decisions about public health to politically accountable officials who have the "background, competence, and expertise to assess public health." South Bay, 141 S. Ct. at 716 (Roberts, C.J., concurring in the partial grant of application for injunctive relief) (citation omitted).

3. Applicants err in asserting (e.g., Appl. 18, 35-36) that the balance of equities favors them because the government's conduct in this case has been improper or inconsistent with "the rule of law." The CDC issued the August Order based on its determination that, given the rapidly worsening conditions created by the Delta variant, a targeted moratorium is authorized by Section 264 because it is a "reasonably necessary measure" to "prevent the further spread of COVID-19 throughout the United States." 86 Fed. Reg. at 43,251; see id. at 43,252. As the White House has since emphasized, "[t]he Administration believes that the CDC's new moratorium is a proper use of its lawful authority to protect the public health." Statement by Press Secretary Jen Psaki on Eviction Moratorium (Aug. 13, 2021), https://go.usa.gov/xFs4s.

Although they asserted otherwise below, applicants have now abandoned any argument that the moratorium contravenes the order this Court issued on June 29. With good reason: The Court denied applicants' motion to vacate the stay and allowed the moratorium

to remain in effect. And as the district court observed, the Court "did not issue a controlling opinion," Appl. App. 13a -- much less one that held that the moratorium exceeded the CDC's statutory authority.

Applicants quote (e.g., Appl. 2, 5, 12-13) various public statements by the President and other White House officials. Although sometimes articulated in terms of what the Court had declared or made clear, those statements are best understood as an acknowledgment that, at least as things stood on June 29, it appeared likely that five Justices would have voted to vacate the stay if the original moratorium had been extended past July 31. The Executive Branch does not defy "the rule of law," Appl. 18, by adopting a policy that it reasonably believes to be a lawful and urgently needed response to an unprecedented public emergency, even if there are indications that this Court may ultimately disagree. That is especially true where, as here, those indications are found in a short concurring opinion and four unexplained dissenting votes that were cast in a preliminary posture -- and in a decision that preceded material changes to the order itself and a dramatic worsening of the pandemic conditions to which it responds. And having concluded that a moratorium is within its statutory authority, the Executive Branch appropriately took into account the fact that adopting the August Order would "allow for additional and more orderly distribution" of

"congressionally appropriated rental assistance funds." Appl. App. 15a (Kavanaugh, J., concurring).

CONCLUSION

The application to vacate the stay pending appeal should be denied.

Respectfully submitted.

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