

No. 21-30037

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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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, NORRIS COCKRAN, Acting  
Secretary, U.S. Department of Health and Human Services; CENTERS  
FOR DISEASE CONTROL AND PREVENTION,  
Defendants – Appellees

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

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**CONSENT MOTION FOR LEAVE TO FILE *AMICUS* RESPONSE  
IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION  
PENDING APPEAL**

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*Corporation*

1.

Pursuant to Fed. R. App. P. 29(a)(3) *Amici Curiae* respectfully move for leave to file an *amici curiae* Response in Opposition to Plaintiffs’ recently-filed Motion for Injunction Pending Appeal.

2.

All parties to the litigation have consented to the filing of this Response.

3.

*Amici* were previously granted leave by this Court, with consent of all parties, to file an amicus brief on the merits. Now, *amici* seek leave to supplement with respect to the new issues raised by Plaintiffs’ motion.

4.

As stated in Amici’s original Brief, **Southeast Louisiana Legal Services** (“SLLS”) is the free civil legal aid agency serving low-income families in twenty-two parishes across Southeast Louisiana. It is one of two Louisiana recipients of funds from the Legal Services Corporation

established under 42 U.S.C. 2996-2996l. SLLS's services include eviction defense. Many of SLLS's clients are tenants of companies that are members of Plaintiff Apartment Association of Louisiana, Inc. Many of these clients have qualified for and used CDC declarations to prevent their eviction during the nationwide moratorium.

**Acadiana Legal Service Corporation** ("Acadiana"), the other Louisiana recipient of Legal Services Corporation funds, is the free civil legal aid agency serving low-income families in Louisiana's remaining forty-two parishes, also receiving funds from the Legal Services Corporation. Acadiana's services include eviction defense, with many of Acadiana's clients also being tenants of companies that belong to the Apartment Association of Louisiana. Many of these clients have qualified for and used CDC declarations to prevent being evicted during the nationwide moratorium.

The **Southern Poverty Law Center** ("SPLC") has provided pro bono civil rights representation to low-income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. Since the start of the COVID-19 pandemic, SPLC has been working with community partners to defend against evictions

in several states, including Louisiana. Much of this work has involved disseminating information and advocating for application of the CDC Order to protect communities hardest hit by the pandemic and resulting economic crisis.

The **National Housing Law Project** (NHLP) is a nonprofit organization that works to advance tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. NHLP pursues these goals primarily through technical assistance and support to legal aid attorneys and other housing advocates. For over 40 years, NHLP has coordinated the Housing Justice Network, which now includes more than 1,600 housing advocates throughout the U.S. Its members advise tenants facing eviction proceedings, represent tenants in unlawful detainer cases, and advocate for tenants in many other settings.

5.

*Amici* have a strong interest in this litigation because they advise and represent hundreds of tenants in Louisiana courts. Those tenants could be subject to immediate eviction during a deadly fourth wave of

COVID-19 Delta variant infection should the CDC Order halting certain residential evictions be enjoined pending appeal.

6.

The Response from the *Amici* is desirable because:

- a. *Amici* raise certain legal arguments not covered in the Government's opposition. These include:
  - i. The Plaintiffs' motion, filed first with the Court of Appeals, is procedurally improper;
  - ii. Landlords have not shown a likelihood of irreparable harm due to the current availability of relief in Louisiana state courts; and
  - iii. Congress ratified the CDC's authority to order certain evictions be halted.
- b. *Amici* also represent the perspectives of the families who will be immediately displaced should the CDC order be enjoined, even though many of them are waiting for rental assistance checks that are in the pipeline.
- c. Although the government presents general data, *amici* show that Louisiana, at issue in the Motion, is currently experiencing

one of the worst outbreaks of Delta variant infections in the United States and the world.

7.

Accordingly, *amici* respectfully request that this Court grant leave to file the accompanying *amici curiae* memorandum in opposition for consideration.

Respectfully Submitted:

\_\_\_\_s/ David Williams\_\_\_\_\_  
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---

\* Filed with the consent of Eric Dunn.

### **CERTIFICATE OF SERVICE**

I hereby certify that on August, 23, 2021, I electronically filed the Motion for Leave and attached Response for Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ David Williams  
David Holman Williams

### **CERTIFICATE OF CONSULTATION WITH PARTIES**

The undersigned counsel certifies that he contacted Brian J. Springer, attorney for the Defendants/ Appellees, and Luke Wake, Attorney for the Plaintiffs/Appellants, on August 20, 2021, and received consent to file this amicus response from both parties. Plaintiffs' consent was contingent on filing by 9 a.m. C.D.T. on the 23<sup>rd</sup>.

/s/ David Williams  
David Holman Williams

## CERTIFICATE OF ECF COMPLIANCE

I hereby certify that:

- 1) Required privacy redactions have been made. 5THCIR.R.25.2.13,
- 2) The electronic submission is an exact copy of the paper document that will be filed if authorized by the court. 5THCIR.R.25.2.1; and
- 3) The document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ David Williams  
David Holman Williams



No. 21-30037

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APARTMENT ASSOCIATION OF LOUISIANA, INCORPORATED  
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v.

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

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

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**AMICUS RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION  
FOR INJUNCTION PENDING APPEAL  
ON BEHALF OF SOUTHEAST LOUISIANA LEGAL SERVICES,  
ACADIANA LEGAL SERVICE CORPORATION, SOUTHERN  
POVERTY LAW CENTER, AND NATIONAL HOUSING LAW  
PROJECT**

---

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## **CERTIFICATE OF INTERESTED PERSONS**

No. 21-30037, *Chambless Enterprises, L.L.C. v. Walensky*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Acadiana Legal Service Corporation

Alkcr & Rather, LLC

Akram, Afnan

Allen, Erica, Caddo Parish (referenced Legal Services client)

American Academy of Pediatrics

American Medical Association

Apartment Association of Louisiana, Inc.

Bananno, Cheryl, Orleans Parish (referenced Legal Services client)

Becerra, Xavier

Beckenhauer, Eric

Benfer, Emily A.

Berger, Sherri

Blankenship, Kim M.

Blevins, Ethan W.

Boynton, Brian M.

Brown, Jamyra, St. Charles Parish (referenced Legal Services client)  
Center for Health Policy and Law at Northeastern University School of  
Law

Chambless Enterprises, L.L.C.

Chambless, Joshua

Chen, Katherine L.

Children's Hcalthwatch

Davis, Danielle E.

Desmond, Matthew

Dunn, Eric

Disability Rights Texas

Finger, Davida

GLMA: Health Professionals Advancing LGBTQ Equality

Grandison, Robbie, Jefferson Parish (referenced Legal Services client)

Hepburn, Peter

Jackson, Sha'ron, St. Tammany Parish (referenced Legal Services  
client)

Keene, Danya A.

King, Jihrelle, St. Bernard Parish (referenced Legal Services client)

Klein, Alisa B.

Leblanc, Tyronika, Ascension Parish (referenced Legal Services client)

Leifheit, Kathryn M.

Levy, Michael Z.

Linton, Sabriya L.

Louisiana Fair Housing Action Center

Marcley, Hannah S.

McClatchey Jr., Walter P.

McGreal, Christopher

Myers, Steven A.

National Hispanic Medical Association

National Housing Law Project

National Medical Association

Pacific Legal Foundation

Pollack, Craig E.

Public Health Law Watch

Raifman, Julia

Rather, Jr., James C.

Sauls, Tiffany, Orleans Parish (referenced Legal Services client)

Schwartz, Gabriel L.

Simpson, Steven M.

Singleton, Carlisha, Lafourche Parish (referenced Legal Services client)

Smith, Paige, Jefferson Parish (referenced Legal Services client)

Southeast Louisiana Legal Services

Southern Poverty Law Center

Springer, Brian J.

U.S. Centers for Disease Control and Prevention

U.S. Department of Health and Human Services

Van Hook, Alexander C.

Vigen, Leslie Cooper

Vlahov, David

Wake, Luke A.

Walensky, Rochelle

Williams, David Holman

Zolle, Dayna

The *amici curiae* on this filing are non-profit corporations. None of them has a parent corporation or a publicly held company owning more than 10% of stock in it.

s/ David Williams  
David Williams

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### Cases

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<i>Ala. Ass'n of Realtors v. United States HHS</i> , No. 21-5093, 2021 U.S. App. LEXIS 16630 (D.C. Cir. June 2, 2021)	<b>6, 14-15, 16</b>
<i>Brown v. Sec'y, United States HHS</i> , No. 20-14210, 2021 U.S. App. LEXIS 20795 *14-18 (11th Cir. 7/14/2021)	<b>6</b>
<i>Chrysafis v. Marks</i> , 2021 U.S. LEXIS 3635, at *1 (Aug. 12, 2021)	<b>13-14</b>
<i>Isbrandtsen-Moller Co. v. United States</i> , 300 U.S. 139 (1937)	<b>15</b>
<i>Mattingly v. District of Columbia</i> , 97 U.S. 687 (1878)	<b>15</b>
<i>Shell Oil Co. v. Sec'y, Revenue &amp; Taxation</i> , 683 So.2d 1204 (La. 11/25/96)	<b>5</b>
<i>Skyworks Ltd. v. CDC</i> , No. 5:20-CV-2407, --- F.Supp.3d ---, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021)	<b>16</b>
<i>Swayne &amp; Hoyt v. U.S.</i> , 300 U.S. 297, 302 (1937)	<b>15</b>

### Statutes and Regulations

2020 N. Y. Laws ch. 127, §§1, 2(2)(a)	<b>13-14</b>
Fed. R. App. P. 8(a)	<b>3</b>
Fed. R. App. P. 29	<b>1</b>
Fed. R. Civ. P. 65	<b>4</b>
La. Code Civ. P. art. 1702	<b>6</b>
Pub. L. No. 78-410, § 361(a), 58 Stat. 682, 703 (1944) (codified at 42 U.S.C. § 264(a)) (“PHSA”)	<b>14-15</b>
Pub. L. 116-260, § 501	<b>9, 14-15</b>
Pub. L. 117-2, §3201.	<b>9</b>
Temporary Halt in Residential Evictions, 85 Fed. Reg. 55,292 (Sept. 4, 2020)	<b>11-12, 16</b>
Temporary Halt in Residential Evictions, 86 Fed. Reg. 43,244 (August 6, 2021)	<b>7, 11-12</b>

### Other Authorities

<i>After months of inquiries from WBRZ, state releases breakthrough case percentages for vaccines</i> , WBRZ.COM, Aug. 6, 2021, <a href="https://www.wbrz.com/news/after-months-of-inquiries-from-wbrz-state-releases-breakthrough-case-percentages-for-vaccines/">https://www.wbrz.com/news/after-months-of-inquiries-from-wbrz-state-releases-breakthrough-case-percentages-for-vaccines/</a>	<b>8</b>
Annie Nova, <i>The CDC banned evictions. Tens of thousands have still occurred</i> . CNBC.COM, Dec. 5, 2020, <a href="https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html">https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html</a> (Dec. 5, 2020)	<b>12</b>
<i>Coronavirus in the U.S.: Latest Map and Case Count</i> , N.Y. TIMES, <a href="https://www.nytimes.com/interactive/2021/us/covid-cases.html">https://www.nytimes.com/interactive/2021/us/covid-cases.html</a> (last visited Aug. 21, 2021)	<b>7</b>
<i>COVID-19 Information</i> , LA. DEP'T OF HEALTH, <a href="https://ldh.la.gov/Coronavirus/">https://ldh.la.gov/Coronavirus/</a> (last visited Aug. 22, 2021)	<b>8</b>
Emily A. Benfer, David Vlahov, Marissa Long, Evan Walker-Wells, J.L. Pottenger, Jr., Gregg Gonsalves, & Danya E. Keene, <i>Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy</i> , 98 J. URB. HEALTH 1 (2021), <a href="https://bit.ly/2LcBvRA">https://bit.ly/2LcBvRA</a>	<b>8</b>
<i>HHS/CDC Temporary Halt in Residential Evictions Frequently Asked Questions</i> , CTRS FOR DISEASE CONTROL & PREVENTION (updated Aug. 3, 2021), <a href="https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf">https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf</a>	<b>12</b>
<i>Louisiana COVID numbers: Data on cases, deaths, hospitalizations, vaccines</i> , NOLA.COM, <a href="https://www.nola.com/news/coronavirus/article_7cb2af1c-6414-11ea-b729-93612370dd94.html">https://www.nola.com/news/coronavirus/article_7cb2af1c-6414-11ea-b729-93612370dd94.html</a> (last visited Aug. 21, 2021)	<b>8</b>
<i>Louisiana's Treasury Emergency Rental Assistance Monthly Report July 1-31, 2021</i> , LASTATERENT.COM (July, 2021), <a href="https://b7d5d82d-c0cf-4ce3-9660-5fcb9c232295.filesusr.com/ugd/e37c0b_f665626686534a339fe50a6069c1924d.pdf">https://b7d5d82d-c0cf-4ce3-9660-5fcb9c232295.filesusr.com/ugd/e37c0b_f665626686534a339fe50a6069c1924d.pdf</a>	<b>10</b>
<i>Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts</i> , July	<b>8</b>



2021, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 6, 2021), <a href="https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w">https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w</a>	
Press Release, U.S. Dept. of the Treasury, Treasury Data: Amount of June Emergency Rental Assistance Resources to Households More Than All Previous Months Combined (July 21, 2021), <a href="https://home.treasury.gov/news/press-releases/jy0284">https://home.treasury.gov/news/press-releases/jy0284</a>	<b>10</b>
<i>Program Stats</i> , STATE OF LA. EMERGENCY RENTAL ASSISTANCE PROGRAM, <a href="https://www.lastaterent.com/">https://www.lastaterent.com/</a> (last visited Aug. 20, 2021)	<b>10</b>
<i>Tracking Coronavirus in Louisiana: Latest Map and Case Count</i> , N.Y. TIMES, <a href="https://www.nytimes.com/interactive/2021/us/louisiana-covid-cases.html">https://www.nytimes.com/interactive/2021/us/louisiana-covid-cases.html</a> (last visited Aug. 21, 2021)	<b>7</b>
<i>Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory</i> , CTRS FOR DISEASE CONTROL & PREVENTION, <a href="https://covid.cdc.gov/covid-data-tracker">https://covid.cdc.gov/covid-data-tracker</a>	<b>7, 15</b>
<i>U.S. Department of the Treasury Emergency Rental Assistance Frequently Asked Questions</i> , TREASURY.GOV (Rev. June 24, 2021), <a href="https://home.treasury.gov/system/files/136/ERA_FAQs_6-24-21.pdf">https://home.treasury.gov/system/files/136/ERA_FAQs_6-24-21.pdf</a>	<b>11</b>
<i>U.S. Department of the Treasury Emergency Rental Assistance Program</i> , TREASURY.GOV 6 (Jan. 26, 2021), <a href="https://home.treasury.gov/system/files/136/Emergency-Rental-Assistance-Payments-to-States-and-Eligible-Units-of-Local-Government.pdf">https://home.treasury.gov/system/files/136/Emergency-Rental-Assistance-Payments-to-States-and-Eligible-Units-of-Local-Government.pdf</a>	<b>9, 11</b>
<i>Variant Proportions</i> , CTRS. FOR DISEASE CONTROL & PREVENTION, <a href="https://covid.cdc.gov/covid-data-tracker/#variant-proportions">https://covid.cdc.gov/covid-data-tracker/#variant-proportions</a> (last visited Aug. 21, 2021).	<b>7</b>

## STATEMENT OF INTERESTS OF AMICI CURIAE<sup>1</sup>

No tenants were named as parties to this action. As set out more fully in their accompanying motion for Leave to File and their earlier Amicus Brief on the merits, **Southeast Louisiana Legal Services, Acadiana Legal Service Corporation, the Southern Poverty Law Center, and the National Housing Law Project** all represent the interests of low income tenants in Louisiana, the Southeast, or nationally. They either represent tenants in evictions or assist others who represent tenants. This filing addresses how granting Plaintiff's motion would seriously harm these tenants, and also briefly addresses the grounds for the motion.

These *amici* were granted leave to file their merits Brief and seek to file this response to Plaintiffs' new or reframed arguments. This response is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties.

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<sup>1</sup> For Rule 29(a)(4)(E), undersigned counsel for *amici curiae* certifies this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than amici and their counsel have contributed money for this brief.

## ARGUMENT

### **A. The issue before this Court is pending in the Supreme Court**

Plaintiffs seek a “definitive” ruling on the validity of the CDC Order. Motion at 10, 16. The USDOJ points out that a new motion is pending before the Supreme Court in the very case Plaintiffs cite as “authoritative” and “controlling” (Motion at 16) as to the legality of the CDC Order. The USDOJ Opposition is due August 23rd.<sup>2</sup> Plaintiffs’ claim that the result they seek is controlled by Supreme Court precedent.

The USDOJ Opposition, at 9-10, succinctly explains that one cannot add the unexplained dissents to Justice Kavanaugh’s concurrence to conure “authoritative” and “controlling” precedent. Given the issue is pending in the Supreme Court there is no reason for this Court to surmise the Justices’ past rationales, and their dispositions as to the pandemic’s surge since June -- when those who were vaccinated seemed safe, and those catching Covid seemed to have only themselves to blame.

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<sup>2</sup> USDOJ Response In Opposition To Plaintiffs’ Motion For Injunction Pending Appeal at 10, n. 3.

**B. Plaintiffs improperly skipped the District Court in their bid for a “definitive ruling” in advance of panel argument.**

Fed. R. App. P. 8(a)(2) requires motions for injunctive relief be presented to the District Court first, unless it “would be impracticable.” Plaintiffs’ only explanation of why they did not do this is that they believed, “the District Court is unlikely to alter its conclusion that the Landlords are unlikely to prevail on the merits.” Motion at 11.

This shows little faith in their argument about the Kavanaugh concurrence. It also avoided a hearing and cross-examination on landlords’ and tenants’ hardships, and the current pandemic risks.

Also, this reason would apply to almost any injunction pending appeal of a denied preliminary injunction. It upends, rather than complies with Fed. R. App. P. 8(a)(1).

Plaintiffs’ motion is also inappropriate because of what it is seeking: “a definitive ruling on the Landlord's request to enjoin the CDC's unlawful action.” Motion at 10. A ruling before the October 6th panel argument should hardly be definitive. Even the panel decision should address “substantial likelihood” that plaintiff will prevail rather than definitively address the legality of the CDC Order.

If Plaintiffs were seeking a definitive ruling, they erred in not moving that the District Court consolidate the preliminary injunction with trial on the merits. *Compare* Fed. R. Civ. P. 65(a)(2).

If, as should be the case, the relief sought is only pending the panel's disposition of the merits of the preliminary injunction appeal, questions unaddressed by the motion include: Why wasn't this sought at the time of the appeal and what made the motion "urgent"<sup>3</sup> at this late date? What differing injury is expected between the Court's order on the motion and the panel's decision (which may get expedited per the motion referred to the panel on May 4)?

Plaintiffs previously stated that oral argument was important to "clarify issues of statutory construction, background principles of administrative law, and the Supreme Court's non-delegation doctrine in resolving the *difficult* and profoundly important issues presented." Appellants Brief at *v* (emphasis added). Even their Motion to Expedite requested "oral argument as soon as practicable" after the briefing. Motion to Expedite at 5.

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<sup>3</sup> E-mail from Luke Wake to Dantrell Johnson, Deputy Clerk, U.S. Court of Appeals, Fifth Circuit (Aug. 19, 2021, 11:28 a.m. CST)(on file with author).

Oral Argument should also explore address jurisdictional issues latent in this case before relief is considered. No tenants affected by the CDC Order have been joined to this suit. The Plaintiffs point to no CDC or other federal enforcement action actually taken under the Order.

Instead, Plaintiffs alleged injury comes from difficulty evicting tenants. Residential evictions occur in state court. A Fifth Circuit decision is not treated as binding by Louisiana courts. *See Shell Oil Co. v. Sec'y, Revenue & Taxation*, 683 So.2d 1204, 1210 n. 11 (La. 11/25/96). Interim relief from this Court, especially pending the panel decision, is unlikely to directly affect evictions.

**C. Interim relief is inappropriate because Plaintiffs have not demonstrated the irreparable injury or public interest standards favor relief.**

**1. The landlords have not shown their injury is irreparable**

The primary injuries claimed to need immediate relief are the landlords' rent losses. But as set out above, an interim ruling from this Court would not directly affect those state court proceedings. And landlords can already challenge the CDC Order in their eviction

actions.<sup>4</sup> An opinion from this Court would only provide additional persuasive authority, the absence of which is not “irreparable injury.”

Further, Plaintiffs have other relief available in state court. The tenants at issue had incomes when accepted as tenants. There is no reason to assume their pandemic setbacks will last forever. Filing suit to establish a debt on an open account is a simple procedure in Louisiana. *See* La. Code Civ. P. art. 1702(B)(3); (C). Tenants’ later wages can then easily be garnished. *Accord Brown v. Sec’y, United States HHS*, No. 20-14210, 2021 U.S. App. LEXIS 20795 \*14-18 (11th Cir. 7/14/2021) (reviewing landlord options and finding, “The landlords have given us no reason to think that these substantial collection tools would be inadequate.”); *Ala. Ass’n of Realtors v. United States HHS*, No. 21-5093, 2021 U.S. App. LEXIS 16630 \*9-12 (D.C. Cir. June 2, 2021)(finding irreparable injury not met).

Injuries claimed from a credit denial or inability to upgrade properties and rents are speculative and not sufficiently evidenced to justify the solemn act of invalidating a federal agency Order.

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<sup>4</sup> *See, e.g., Abrimson v. Ethel Kidd Real Estate*, 926 So.2d 568 (La. App. 4 Cir. 01/18/06) (entertaining but rejecting tenant claim that an eviction statute was unconstitutional).

Injuries from alleged denial of the landlords' constitutional rights are intimately tied to the merits, and premature to definitively judge before the panel argument. And the Congressional ratification of the CDC Order in December reduces concerns of whether the agency has exceeded its bounds.

**2. If the CDC Order is enjoined, tenants would suffer harm far greater than landlords.**

As cited in the new CDC Order, the far more transmissible Delta variant of the COVID-19 virus is the predominant strain now circulating in the United States.<sup>5</sup> Louisiana's infection level is currently one of the worst in the world, with 108 cases per 100,000 people, at more than double the national average.<sup>6</sup> In Terrebonne Parish, the current number is nearly 200 cases per 100,000 people.<sup>7</sup> Only 39.5% of

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<sup>5</sup> Temporary Halt in Residential Evictions, 86 Fed. Reg. 43,244, 43,246 (August 6, 2021); *Variant Proportions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last visited Aug. 21, 2021).

<sup>6</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (last visited Aug. 21, 2021).

<sup>7</sup> *Tracking Coronavirus in Louisiana: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/louisiana-covid-cases.html> (last visited Aug. 21, 2021).



Louisianans are fully vaccinated.<sup>8</sup> Approximately 10% of July Louisiana infections were breakthrough infections affecting fully vaccinated individuals.<sup>9</sup> Vaccinated individuals can still spread the virus.<sup>10</sup>

This month Louisiana experienced more COVID-19 related hospitalizations than any other time in the pandemic.<sup>11</sup> There are 470 patients on ventilators as of August 21.<sup>12</sup> A dwindling number of ICU beds are available across the state.<sup>13</sup>

The amicus Brief submitted by the American Academy of Pediatrics *et al* documents how evictions lead to increased COVID-19 infection rates, hospitalizations, and deaths.<sup>14</sup> This threatens the health

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<sup>8</sup> *Louisiana COVID numbers: Data on cases, deaths, hospitalizations, vaccines*, NOLA.COM, [https://www.nola.com/news/coronavirus/article\\_7cb2af1c-6414-11ea-b729-93612370dd94.html](https://www.nola.com/news/coronavirus/article_7cb2af1c-6414-11ea-b729-93612370dd94.html) (last visited Aug. 21, 2021).

<sup>9</sup> *After months of inquiries from WBRZ, state releases breakthrough case percentages for vaccines*, WBRZ.COM, Aug. 6, 2021, <https://www.wbrz.com/news/after-months-of-inquiries-from-wbrz-state-releases-breakthrough-case-percentages-for-vaccines/>.

<sup>10</sup> *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts*, July 2021, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 6, 2021),

[https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s\\_cid=mm7031e2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w).

<sup>11</sup> *Louisiana COVID numbers: Data on cases, deaths, hospitalizations, vaccines*, NOLA.COM, *supra*.

<sup>12</sup> *COVID-19 Information*, LA. DEP'T OF HEALTH, <https://ldh.la.gov/Coronavirus/> (last visited Aug. 22, 2021).

<sup>13</sup> *Louisiana COVID numbers: Data on cases, deaths, hospitalizations, vaccines*, NOLA.COM, [https://www.nola.com/news/coronavirus/article\\_7cb2af1c-6414-11ea-b729-93612370dd94.html](https://www.nola.com/news/coronavirus/article_7cb2af1c-6414-11ea-b729-93612370dd94.html) (last visited Aug. 21, 2021).

<sup>14</sup> *Citing* Emily A. Benfer, David Vlahov, Marissa Long, Evan Walker-Wells, J.L. Pottenger, Jr., Gregg Gonsalves, & Danya E. Keene, *Eviction, Health Inequity, and*

of tenants who end up on the street, in shelters, or in other households as well as the health of others they are near.

The injunction would not maintain the status quo. And no later relief could restore any tenants evicted and exposed to or spreading Covid if the CDC Order were ultimately upheld.

**3. Like jurisdictions across the country, Louisiana needs more time to distribute Emergency Rental Assistance funds.**

Louisiana has received over \$300 million in Emergency Rental Assistance (“ERA”) funds through the Consolidated Appropriations Act of 2021 and the American Rescue Plan.<sup>15</sup> Pub. L. 116-260, § 501; Pub. L. 117-2, §3201. ERA can pay up to twelve months of rent arrears and up to three months of prospective rent. *Id.* at §501(c)(2)(A).

The Louisiana ERA program launched in March and serves all but the state’s seven largest parishes. As of August 18th, it has approved

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*the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. HEALTH 1 (2021), <https://bit.ly/2LcBvRA>.

<sup>15</sup> U.S. Department of the Treasury *Emergency Rental Assistance Program*, TREASURY.GOV 6 (Jan. 26, 2021), <https://home.treasury.gov/system/files/136/Emergency-Rental-Assistance-Payments-to-States-and-Eligible-Units-of-Local-Government.pdf>.

payment to 4,607 of the more than 11,000 tenants who applied.<sup>16</sup>

However, as of the end of July, only 1,370 applicants had actually been assisted.<sup>17</sup> Thousands of tenants wait in the pipeline.

Yet distribution is speeding up. Nationally in June, more households served by ERA programs than in the previous two months combined.<sup>18</sup> At the current rate, the CDC extension until October 3 will allow hundreds of thousands more tenants and small landlords to receive desperately needed rental assistance.

If the CDC Order is stayed, no doubt thousands of tenants will be evicted even though they are simply waiting for an approved check to go in the mail.

Their landlords, too, will lose eligibility for the relief, even if inadvertently. This is because to qualify for ERA the tenant must be in a current lease “where the applicant resides,” and must be *at risk of*

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<sup>16</sup> *Program Stats*, STATE OF LA. EMERGENCY RENTAL ASSISTANCE PROGRAM, <https://www.lastaterent.com/> (last visited Aug. 20, 2021).

<sup>17</sup> *Louisiana’s Treasury Emergency Rental Assistance Monthly Report July 1-31, 2021*, LASTATERENT.COM (July, 2021), [https://b7d5d82d-c0cf-4ce3-9660-5fcb9c232295.filesusr.com/ugd/e37c0b\\_f665626686534a339fe50a6069c1924d.pdf](https://b7d5d82d-c0cf-4ce3-9660-5fcb9c232295.filesusr.com/ugd/e37c0b_f665626686534a339fe50a6069c1924d.pdf)

<sup>18</sup> Press Release, U.S. Dept. of the Treasury, Treasury Data: Amount of June Emergency Rental Assistance Resources to Households More Than All Previous Months Combined (July 21, 2021), <https://home.treasury.gov/news/press-releases/jy0284>.

*homelessness*, not currently homeless.<sup>19</sup>

The good faith circumstances that put illustrative tenants in this situation are detailed in our Amicus Brief, at 18. These hardworking primarily hospitality and service industry workers risk eviction while waiting for Emergency Rental Assistance currently in the pipeline, should the CDC order be lifted prior to expiration.

**D. The protection of the CDC Order is targeted to tenants who lost income and are paying as much rent as they can.**

The CDC Order only protects tenants from being evicted for nonpayment of rent if they deliver a declaration under penalty of perjury that they meet specific requirements. This makes them a “covered person” under the Order.<sup>20</sup> The salient criteria in the declaration are that:

The individual is unable to pay the full rent.

This is caused by a substantial loss of household income or extraordinary out-of-pocket medical expenses.

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<sup>19</sup> *U.S. Department of the Treasury Emergency Rental Assistance Frequently Asked Questions*, TREASURY.GOV 1, 3, 5 (Rev. June 24, 2021), [https://home.treasury.gov/system/files/136/ERA\\_FAQs\\_6-24-21.pdf](https://home.treasury.gov/system/files/136/ERA_FAQs_6-24-21.pdf).

<sup>20</sup> 85 Fed. Reg. 55,292, 55,293 (Sept. 4, 2020); 86 Fed. Reg. 43244, 43245 (August 6, 2021).

The individual is making timely partial rent payment as close to the full rent payment as they can.

They have used best efforts to obtain all available governmental assistance for their rent.<sup>21</sup>

Tenants' swearing under penalty of perjury that they meet the requirements is not the end of the matter. The CDC specifies that, "The Order does not preclude a landlord from challenging the truthfulness of a tenant's declaration in any state or municipal court."<sup>22</sup> Landlords can still move to evict tenants and question them on the stand about what is claimed in their CDC declarations. "The Order is not intended to terminate or suspend the operations of any state or local court."<sup>23</sup>

Court records and statements confirm that even many tenants who signed CDC declarations have been evicted because judges ruled that the tenant did not meet the requirements of the Order.<sup>24</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *HHS/CDC Temporary Halt in Residential Evictions Frequently Asked Questions*, CTRS FOR DISEASE CONTROL & PREVENTION 10 (updated Aug. 3, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>.

<sup>23</sup> *Id.* at p.3 (emphasis added).

<sup>24</sup> *See e.g., Annie Nova, The CDC banned evictions. Tens of thousands have still occurred.* CNBC.COM, Dec. 5, 2020, <https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html> (Dec. 5, 2020) ("Tens of thousands of people have been evicted since September because the CDC's policy has been applied inconsistently across states and some landlords have ignored or challenged their tenants' attempts at using the protection...")

The CDC Order does *not* provide blanket protection to anyone who self-certifies their qualification, unlike the New York state moratorium recently stayed by the Supreme Court. There, Justice Sotomayor wrote:

If a tenant self-certifies financial hardship, Part A of CEEFPA [Covid Emergency Eviction and Foreclosure Prevention Act] generally precludes a landlord from contesting that certification and denies the landlord a hearing. This scheme violates the Court’s longstanding teaching that ordinarily “no man can be a judge in his own case” consistent with the Due Process Clause.<sup>25</sup>

Notably the plaintiffs in that case did not challenge, and the Supreme Court did not strike down, the Tenant Safe Harbor Act (TSHA). Similar to the CDC Order, the TSHA prohibits evicting tenants whom the Court has found to have experienced COVID-19 related financial hardship.<sup>26</sup>

Though not being challenged, the Supreme Court went as far as to specifically state:

This order does not enjoin the enforcement of the Tenant Safe Harbor Act (TSHA), which applicants do not challenge. 2020 N. Y. Laws ch. 127, §§1, 2(2)(a). Among other things, TSHA instructs New York courts to entertain a COVID-related hardship defense in eviction proceedings, assessing a tenant’s income prior to COVID, income during COVID, liquid assets, and ability to obtain government assistance. §2(2)(b). **If the court finds the tenant “has suffered a financial hardship” during a statutorily-**

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<sup>25</sup> *Chrysafis v. Marks*, 2021 U.S. LEXIS 3635, 2021 WL 3560766 at \*1 (Aug. 12, 2021) (quoting *In re Murchison*, 349 U. S. 133, 136 (1952); citing *United States v. James Daniel Good Real Property*, 510 U. S. 43, 53 (1993) (due process generally requires a hearing)).

<sup>26</sup> 2020 N. Y. Laws ch. 127, §§1, 2(2)(a).

**prescribed period, then it “shall [not] issue a warrant of eviction or judgment of possession.” §2(1).<sup>27</sup>**

Like the TSHA, and unlike the CEEFPA, the CDC Order allows a landlord to file an eviction and challenge a tenant’s declaration in Court. It does not allow the tenant to “be the judge of his own case,”

**E. The Congressional extension ratified CDC’s authority to order certain evictions be halted**

Plaintiffs’ concerns about the breadth of CDC authority under the Public Health Service Act (“PHSA”) are understandable. Not reaching the merits, but judging them under a substantial likelihood of prevailing standard, the Circuits have split as to the likely outcome of the question.

But the question pales because Congress specifically enacted the same moratorium for the month of January. In doing so, Congress explicitly stated that the measure was authorized under the referenced section of the PHSA: “...Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium under Section 264..., specifically ... embrac[ing] HHS's action ‘under

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<sup>27</sup> *Chrysafis*, at \*1 (emphasis added).

section 361 of the Public Health Service Act (42 U.S.C. 264)[.]” *Ala. Ass'n of Realtors v. United States HHS*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at \*5 (D.C. Cir. June 2, 2021)(quoting Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, title V, § 502, 134 Stat. 1182, 2078-79 (Dec. 27, 2020)).

Congressional ratification gives effect to executive action even if taken without authorization. *Isbrandtsen–Moller Co. v. United States*, 300 U.S. 139, 147–48 (1937); *see also Swayne & Hoyt v. U.S.*, 300 U.S. 297, 302 (1937) (“It is well settled that Congress may, by enactment not otherwise inappropriate, ‘ratify acts which it might have authorized,’ and give the force of law to official action unauthorized when taken.”), *quoting Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878).

The Congressional extension was not intended to limit the final date of the eviction relief. COVID-19 infections were at a peak—with over 200,000 new cases a day most of December.<sup>28</sup>

One court has recognized that the Act “facilitated the transition between presidential administrations,” giving the new administration

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<sup>28</sup> *See Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, CDC Covid Data Tracker*, [https://covid.cdc.gov/7/#trends\\_dailycases](https://covid.cdc.gov/7/#trends_dailycases) (select “United States” drop-down under “state or territory”, and “Daily Cases” drop-down under “view(left axis)”).



“opportunity to determine its own policies for responding to the pandemic.” *Skyworks Ltd. v. CDC*, No. 5:20-CV-2407, --- F.Supp.3d ---, 2021 WL 911720, at \*12 (N.D. Ohio Mar. 10, 2021). This extension would not make sense if Congress were not accepting CDC’s authority to make further extension or modification.

The short extension is consistent with the PHSA framework under which medical and scientific experts determine and take those steps reasonably necessary to control the spread of infectious diseases. *See* 85 Fed.Reg. at 55296 (temporary halt on evictions “subject to further extension, modification, or rescission, [a]s appropriate.”).

**F. The Nondelegation challenge does not meet the substantial likelihood test**

Plaintiffs’ other challenge, under the rarely invoked nondelegation doctrine, does not satisfy the “substantial likelihood” test, given sparse precedents. The D.C. Circuit has recognized that the unpredictable nature of public health emergencies provides rationale for the very broad authority in the PHSA, and that the power has not been abused here or historically. *Ala. Ass’n of Realtors v. United States HHS*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at \*8-9 (D.C. Cir. June 2, 2021).

Even if the unpredictable nature of public health emergencies did not justify a more lenient review as to the specificity of delegations, Congress has validated the specific exercise.

## CONCLUSION

The injunction should be denied.

Respectfully Submitted,

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\* Filed with the consent of Eric Dunn.

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I hereby certify that on August 23, 2021, I electronically filed this Response of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Court's CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ David Williams  
David Holman Williams

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