

No. 21-30037

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION
FOR INJUNCTION PENDING APPEAL**

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CERTIFICATE OF INTERESTED PERSONS

No. 21-30037, Chambliss 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.

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Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010 (June 28, 2021)6

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 (Aug. 6, 2021)..... 1, 6, 7

INTRODUCTION

To curb the spread of COVID-19, the Centers for Disease Control and Prevention (CDC) issued and extended a temporary moratorium on certain residential evictions. The current moratorium was issued on August 3, 2021, “in order to respond 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).

Plaintiffs are Chambless Enterprises, LLC, which owns and rents residential properties in Ouachita Parrish, Louisiana; and the Apartment Association of Louisiana (AAL). *See* Pl. Mot. 1, 7. Plaintiffs challenged the CDC’s original eviction moratorium on various grounds and moved for a preliminary injunction, which the district court denied. Plaintiffs appealed that order, and the appeal is fully briefed. Pursuant to plaintiffs’ request for oral argument, *see* Pl. Br. v, this case is calendared for October 6, 2021.

In the motion before the Court, plaintiffs contend that changed circumstances warrant an immediate issuance of an injunction that would prevent the CDC from enforcing the current moratorium against Chambless Enterprises, LLC, or AAL’s members. Mot. 1. Plaintiffs contend that, in an order issued on June 29, “it became clear that five justices on the U.S. Supreme Court recognize that the moratorium is

unlawful.” *Id.* (citing *Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Servs.*, 141 S. Ct. 2320 (2021) (*AAR*)). However, in the cited order, the Supreme Court *denied* the emergency relief that the landlords had requested. *See AAR*, 141 S. Ct. at 2320. Concurring in that denial, Justice Kavanaugh indicated that he believed that the CDC “exceeded its existing statutory authority by issuing a nationwide eviction moratorium” but was voting to leave the stay in place because the CDC planned to end the moratorium on July 31. *Id.* at 2320-21 (Kavanaugh, J., concurring).

Plaintiffs’ argument here depends on combining the views of “Justice Kavanaugh and the four dissenting justices.” Mot. 15. This Court, however, has recognized that a binding ruling cannot be created by combining the views of dissenting Justices with those of a concurring Justice. *See Whole Woman’s Health v. Paxton*, --- F.4th ---, No. 17-51060, 2021 WL 3661318, at *5 (5th Cir. Aug. 18, 2021) (en banc) (plurality op.) (explaining that when the Supreme Court issues a fragmented opinion, this Court looks to whether there is a “common denominator upon which all of the justices *of the majority* can agree” (emphasis added) (quoting *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013))).

Doing so here would be especially problematic, because the Justices who dissented in *AAR* did not provide their reasoning. The plaintiffs’ Supreme Court application in *AAR* offered a variety of grounds for the emergency relief sought, including “the downward trend in COVID-19 cases,” “the effectiveness of vaccines,” and the CDC’s guidance that “vaccinated individuals may dispense with masks and

social distancing indoors.” Pls.’ Emergency Appl. for Vacatur at 4, No. 20A169 (June 3, 2021), <https://go.usa.gov/xFNup>. One or more dissenting Justices could have found such arguments persuasive at the time the Supreme Court acted on June 29.

Since that time, however, the trajectory of the pandemic has changed dramatically 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 the Supreme 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> (last visited Aug. 22, 2021). Case trends are expected to continue rising over the coming weeks. *See* CDC, *COVID Data Tracker: United States Forecasting*, <https://go.usa.gov/xFRFQ> (last visited Aug. 22, 2021). 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/xFvXF> (last updated Aug. 19, 2021).

The CDC is thus again recommending indoor masking even for fully vaccinated people. *See* CDC, *Interim Public Health Recommendations for Fully Vaccinated People*, <https://go.usa.gov/xFRX6> (last updated Aug. 19, 2021). 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> (last visited Aug. 22, 2021), with hospitals across the South stretched to capacity fighting outbreaks, *see, e.g.*, Gabriella Borter, *Children hospitalized with COVID-19 in U.S. hits record number*, Reuters (Aug. 14, 2021), <https://perma.cc/VFA5-BC6Z>. Children under age 12 are not yet eligible for vaccines, and the number of children hospitalized with COVID-19 recently hit a record high. *See id.*; *see also* CDC, *COVID Data Tracker Weekly Review: Interpretive Summary for August 20, 2021*, <https://go.usa.gov/xFvXv> (last visited Aug. 22, 2021). Tens of thousands of students and teachers have been quarantined soon after starting school, *see, e.g.*, Timothy Bella, *Pandemic has never been worse in Mississippi, top doctor says as 20,000 students are quarantined*, Wash. Post (Aug. 19, 2021), <https://perma.cc/3SPY-DM4N>, and 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>; Chip Cutter, *Remote Work May Now Last for Two Years, Worrying Some Bosses*, Wall St. J. (Aug. 22, 2021), <https://perma.cc/CC8Z-SWBP>.

Plaintiffs' motion rests on the incorrect premise that the Supreme Court in *AAR* resolved a statutory question in their favor. Indeed, after that Supreme Court order was issued, the Eleventh Circuit affirmed the denial of a preliminary injunction in a case analogous to this one, and in *AAR* itself, the district court and D.C. Circuit recently denied the landlords' renewed motion for emergency relief. Plaintiffs' motion likewise should be denied.

STATEMENT

I. The CDC's Temporary Eviction Moratorium

Because of the COVID-19 pandemic, millions of Americans have fallen behind on rent. Congress appropriated \$46.5 billion to help pay rent and rental arrears, and state and local governments are in the process of distributing these funds to landlords and tenants.¹ This rental assistance is meant to work in tandem with the CDC's eviction moratorium, which curbs the spread of COVID-19 and helps to “ensure that millions of renters across America are not evicted while waiting to receive assistance.”² In issuing the original moratorium in September 2020, the CDC explained that “mass evictions would likely increase the interstate spread of COVID-19” by forcing people into congregate living situations, such as homeless shelters. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,294-95 (Sept. 4, 2020). Adherence to infection-control measures such as quarantine and social distancing is difficult in these settings, *see id.* at 55,292, and extensive outbreaks of COVID-19 have occurred in homeless shelters, *see id.* at 55,295.

¹ *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, § 501, 134 Stat. 1182, 2070-78 (2020) (appropriating \$25 billion for rental assistance); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (appropriating an additional \$21.5 billion).

² U.S. House Comm. on Fin. Servs., *COVID-19 Stimulus Package: Temporary Extension of the CDC Eviction Moratorium & Emergency Rental Assistance*, <https://go.usa.gov/xss3y> (last visited Aug. 22, 2021).

The CDC extended the moratorium several times and anticipated that it would expire on July 31, “absent an unexpected change in the trajectory of the pandemic.” Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010, 34,013 (June 28, 2021). After the moratorium expired briefly on July 31, the CDC issued a new moratorium on August 3 “in order to respond to recent, unexpected developments in the trajectory of the COVID-19 pandemic, including the rise of the Delta variant.” 86 Fed. Reg. at 43,245. 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.” *Id.* at 43,246. As the CDC described, “[t]he Delta variant has demonstrated increased levels of transmissibility compared to other variants”; “early evidence suggests that people who are vaccinated and become infected with the Delta variant may transmit the virus to others”; and “[t]ransmission of the Delta variant has led to accelerated community transmission in the United States.” *Id.* 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.

In significant respects, the current moratorium contains many of the same features as the CDC’s original moratorium. For example, the current moratorium 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. To qualify for protection, the tenant must provide a sworn declaration to his landlord

attesting, among other things, that the tenant (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 rent payments that are as close to the full rent payment as . . . permit[ted]”; and (5) “has no other available housing options.” *Id.* (footnote omitted). The moratorium “does not relieve any individual of any obligation to pay rent . . . or comply with any other obligation.” *Id.* at 43,250. And unlike the New York law that was at issue in *Chrysafis v. Marks*, No. 21A8, 2021 WL 3560766 (U.S. Aug. 12, 2021), the moratorium does “not preclude a landlord challenging the truthfulness of a tenant’s, lessee’s, or resident’s declaration in court, as permitted under state or local law.” 86 Fed. Reg. at 43,251.

The current moratorium is more targeted than the original moratorium because the original moratorium applied nationwide, whereas the current moratorium applies only “in U.S. counties experiencing substantial and high levels of community transmission.” 86 Fed. Reg. at 43,250 (footnotes omitted). However, the current moratorium rests on the same statutory authority as the original moratorium—the CDC’s authority under the Public Health Service Act 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).

II. Prior Proceedings

Plaintiffs are Chambless Enterprises, LLC, which owns and rents residential properties in Ouachita Parrish, Louisiana; and the Apartment Association of Louisiana. *See* Pl. Mot. 1, 7. They filed this action in November 2020, challenging the CDC’s original moratorium on various grounds, including a claim that the moratorium exceeded the CDC’s statutory authority.

Plaintiffs moved for a preliminary injunction, which the district court denied in December 2020. The district court determined that plaintiffs had failed to establish the factors necessary to obtain a preliminary injunction. *See* ROA.042-043. Recognizing that irreparable harm is a critical prerequisite to a preliminary injunction, *see* ROA.035, the court concluded that plaintiffs failed to show (among other things) that their harms were non-compensable and thus irreparable, *see* ROA.038-040. The court also concluded that plaintiffs’ asserted harm “pales in comparison to the significant loss of lives that . . . could occur” if the temporary eviction moratorium were enjoined. ROA.042 (quotation marks omitted). And the court concluded that plaintiffs were unlikely to succeed on the merits. *See* ROA.016-035.

ARGUMENT

Plaintiffs’ appeal of the district court’s denial of a preliminary injunction is fully briefed and set for oral argument on October 6. Plaintiffs now contend that the Supreme Court’s action on June 29 in the *AAR* litigation requires that an injunction

be entered immediately in their favor. Their argument rests on a basic misunderstanding of the Supreme Court's action.

In *AAR*, the Supreme Court *denied* the landlords' application for relief. *See* 141 S. Ct. at 2320 ("The application to vacate stay presented to THE CHIEF JUSTICE and by him referred to the Court is denied."). Plaintiffs urge this Court to combine the views of Justice Kavanaugh with the views that plaintiffs attribute to "the four dissenting justices." Mot. 15. But this Court has recognized that a binding ruling cannot be created by combining the views of dissenting Justices with those of a concurring Justice. *See Whole Woman's Health v. Paxton*, --- F.4th ---, No. 17-51060, 2021 WL 3661318, at *5 (5th Cir. Aug. 18, 2021) (en banc) (plurality op.); *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013).

Doing so here would be especially problematic, because the dissenting Justices in *AAR* did not provide their reasons for their votes. The *AAR* plaintiffs' Supreme Court application offered a variety of bases for seeking emergency relief, including "the downward trend in COVID-19 cases," "the effectiveness of vaccines," and the CDC's guidance that "vaccinated individuals may dispense with masks and social distancing indoors." Pls.' Emergency Appl. for Vacatur at 4, No. 20A169 (June 3, 2021), <https://go.usa.gov/xFNup>. One or more dissenting Justices could have found such arguments persuasive when the Supreme Court acted on June 29. However, as explained above, the trajectory of the pandemic has changed dramatically for the worse since that time. *See supra* pp. 3-4.

Accordingly, in *AAR* itself, the district court recently denied the landlords' renewed request for emergency relief because "the four dissenting Justices did not explain their votes," making it "impossible to determine which proposed disposition—theirs or Justice Kavanaugh's—is the 'common denominator' of the other." *AAR*, --- F. Supp. 3d ---, No. 20-CV-3377, 2021 WL 3577367, at *6 (D.D.C. Aug. 13, 2021) (quotation marks omitted). The D.C. Circuit too denied the landlords' motion for emergency relief, in view of the district court decision and record before it. *See AAR*, No. 21-5093 (D.C. Cir. Aug. 20, 2021).³ And, after the Supreme Court had issued its *AAR* order, the Eleventh Circuit affirmed the denial of a preliminary injunction in a case analogous to this one. *See Brown v. Secretary, U.S. Dep't of Health & Human Servs.*, 4 F.4th 1220 (11th Cir. 2021). Plaintiffs' motion for an injunction pending appeal should likewise be denied.

³ The *AAR* plaintiffs filed an emergency application in the Supreme Court on Friday, August 20, and the government's response is due by noon Eastern Time on Monday, August 23. *See AAR*, No. 21A23 (S. Ct.).

CONCLUSION

This Court should deny plaintiffs' motion for an injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,436 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer

Brian J. Springer

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2021, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brian J. Springer

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