

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

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

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

v.

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

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

**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO VACATE
THE DISTRICT COURT'S STAY PENDING APPEAL**

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
STATEMENT	6
A. The CDC’s Temporary Eviction Moratorium.....	6
B. Prior Proceedings.....	9
ARGUMENT	12
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Belbacha v. Bush</i> , 520 F.3d 452 (D.C. Cir. 2008)	15
<i>Berrigan v. Sigler</i> , 499 F.2d 514 (D.C. Cir. 1974)	15
<i>Christianson v. Colt Indus. Operating Corp.</i> , 486 U.S. 800 (1988)	5
<i>Chrysafis v. Marks</i> , No. 21A8, 2021 WL 3560766 (U.S. Aug. 12, 2021)	8
<i>Crocker v. Piedmont Aviation, Inc.</i> , 49 F.3d 735 (D.C. Cir. 1995)	5, 12-13
<i>FTC v. American Tobacco Co.</i> , 364 U.S. 298 (1924)	14
<i>King v. Palmer</i> , 950 F.2d 771 (D.C. Cir. 1991)	15
<i>LaShawn A. v. Barry</i> , 87 F.3d 1389 (D.C. Cir. 1996)	5, 15
<i>Oklahoma Press Publ'g Co. v. Walling Wage & Hour Adm'r</i> , 327 U.S. 186 (1946)	14
<i>United States v. Epps</i> , 707 F.3d 337 (D.C. Cir. 2013)	5, 12, 15, 16
Statutes:	
American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54	6

Consolidated Appropriations Act, 2021,
 Pub. L. No. 116-260, div. N, tit. V, § 501,
 134 Stat. 1182, 2070-78 (2020).....6

42 U.S.C. § 264(a).....1, 9

Legislative Material:

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>6

Agency Material:

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, 7, 8, 9

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).....6

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010 (June 28, 2021)7

CDC, *COVID Data Tracker: Prevalent Hospitalizations of Patients with Confirmed COVID-19*, <https://go.usa.gov/xFnYg> (last visited Aug. 16, 2021)3

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. 16, 2021)..... 2-3

CDC, *COVID Data Tracker: United States Forecasting*, <https://go.usa.gov/xFRFQ> (last visited Aug. 16, 2021)3

CDC, <i>COVID Data Tracker Weekly Review: Interpretive Summary for August 13, 2021</i> , https://go.usa.gov/xFvXv (last visited Aug. 16, 2021).....	4
CDC, <i>Delta Variant</i> , https://go.usa.gov/xFvXF (last updated Aug. 6, 2021).....	3
CDC, <i>Interim Public Health Recommendations for Fully Vaccinated People</i> , https://go.usa.gov/xFRX6 (last visited Aug. 16, 2021).....	3
Other Materials:	
Gabriella Borter, <i>Children hospitalized with COVID-19 in U.S. hits record number</i> , Reuters (Aug. 14, 2021), https://perma.cc/VFA5-BC6Z	3, 4
Lauren Hirsch, <i>Delays, More Masks and Mandatory Shots: Virus Surge Disrupts Office-Return Plans</i> , N.Y. Times (July 23, 2021), https://nyti.ms/2VryVw5	4
Jaclyn Peiser, <i>As schools reopen, more than 10,000 students and teachers across 14 states are quarantined for coronavirus exposure</i> , Wash. Post (Aug. 13, 2021), https://perma.cc/7T2J-MGZK	4
U.S. Court of Appeals for the D.C. Cir., <i>Update to Court Operations</i> (Aug. 13, 2021), https://go.usa.gov/xFvDu	4

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 CDC order at issue here 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) (August Order). The August Order is more targeted than the prior CDC orders and fulfills the same statutory charge 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 prior proceedings, the district court held that the moratorium exceeded the CDC’s statutory authority and vacated the moratorium nationwide, but stayed its judgment pending appeal. This Court denied plaintiffs’ emergency motion to vacate the stay, ruling for reasons detailed in the order that the government made a strong showing that it is likely to

succeed on the merits, 2021 WL 2221646, at *1-3; that plaintiffs failed to show irreparable harm, *id.* at *3-4; and that plaintiffs' harm was outweighed by the government's strong interest in protecting the public health, *id.* at *4.

Plaintiffs then asked the Supreme Court to vacate the stay and offered a variety of bases for doing so, 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>. On June 29, the Supreme Court denied plaintiffs’ application. 141 S. Ct. 2320 (2021). Four Justices voted to grant the application but did not provide their reasoning. Justice Kavanaugh concurred in the denial of the application, indicating that he believed that the CDC “exceeded its existing statutory authority by issuing a nationwide eviction moratorium,” but that he was voting to leave the stay in place because the CDC planned to end the moratorium on July 31. *Id.* at 2320-21.

Since the time of the Supreme Court’s action, the trajectory of the pandemic has changed dramatically for the worse. The seven-day average of daily new cases is now 119,523—nearly a nine-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. 16, 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. 16, 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. 6, 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 visited Aug. 16, 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. 16, 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 13, 2021*, <https://go.usa.gov/xFvXv> (last visited Aug. 16, 2021). More than 10,000 students and teachers have been quarantined within the first few days of starting school. *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 (Aug. 13, 2021), <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 many courts have suspended in-person proceedings, *see, e.g.*, D.C. Circuit, *Update to Court Operations* (Aug. 13, 2021), <https://go.usa.gov/xFvDu>.

Nonetheless, plaintiffs have renewed their motion to lift the stay of the district court's judgment in this case. The district court correctly denied that motion as barred by the law-of-the-case doctrine, which provides that "a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases." App. 64a

(quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995)). That doctrine prohibits a motions panel from reaching conclusions opposite to those reached by the prior motions panel “on the same issues, in the same emergency posture, and in the same case.” App. 69a.

Contrary to plaintiffs’ premise, “the Supreme Court’s ruling” denying their prior application does not free this Court “to consider the matter afresh.” Mot. 22. As the district court explained, “circuit precedent provides that the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law.” App. 68a (citing *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013)). “Moreover, 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.” App. 69a (quoting *Epps*, 707 F.3d at 348). This Court’s “adherence to the law of the case” does not “insulate an issue from [the Supreme] Court’s review,” but this Court should “be loath to” reverse its own prior ruling. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). “[T]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.” *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc).

STATEMENT

A. The CDC's Temporary Eviction Moratorium

Because of the 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, 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,

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. 16, 2021).

and extensive outbreaks of COVID-19 have occurred in homeless shelters, *see id.* at 55,295.

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.” August Order, 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. The CDC explained that “[t]he Delta variant has demonstrated increased levels of transmissibility compared to other variants”; that “early evidence suggests that people who are vaccinated and become infected with the Delta variant may transmit the virus to others”; and that “[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 CDC’s August Order contains many of the same features as the CDC’s original moratorium. For example, the 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. August Order, 86 Fed. Reg. at 43,245. To qualify for protection, the tenant is required to 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

CDC’s 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 August Order is more targeted than the original moratorium because the original moratorium applied nationwide, whereas the August Order applies only “in U.S. counties experiencing substantial and high levels of community transmission.” 86 Fed. Reg. at 43,250 (footnotes omitted). However, the August Order 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).

B. Prior Proceedings

1. Plaintiffs are two individual landlords, the businesses they use to manage Georgia and Alabama properties, and two associations in those States. Compl. ¶¶ 16-21 (Dkt. No. 1). The district court granted summary judgment for plaintiffs, holding that the eviction moratorium exceeded the CDC’s statutory authority. 2021 WL 1779282, at *10. The district court

concluded that, under circuit precedent, it was required to vacate the moratorium nationwide, rather than to limit relief to the parties. *Id.* at *9. However, the court granted the government’s motion for a stay of the vacatur order pending appeal. 2021 WL 1946376, at *5.

A unanimous panel of this Court denied plaintiffs’ motion to vacate that stay. 2021 WL 2221646. “[W]hile of course not resolving the ultimate merits of the legal question,” the motions panel concluded that the government had “made a strong showing that it is likely to succeed on the merits” for four reasons that the motions panel set forth in the order. *Id.* at *1-3. The motions panel also determined that the district court acted within its discretion in concluding that the remaining factors supported its stay of its order, for reasons that the motions panel described. *See id.* at *3-4.

The Supreme Court denied plaintiffs’ application to vacate the stay by a 5-4 vote. 141 S. Ct. 2320. Concurring in the denial of the application, Justice Kavanaugh indicated that he “agree[d] with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium,” but that he was voting to leave the stay in place “[b]ecause 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.” *Id.* at 2320-21.

Justice Kavanaugh stated that, in his view, “clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.” *Id.* at 2321.

2. After the CDC issued the August Order, plaintiffs once again asked the district court to vacate the stay of its final judgment. The district court first concluded (without objection from the government) that the August Order is sufficiently related to the prior moratorium as to be encompassed by the district court’s prior vacatur order and the stay pending appeal. App. 60a-63a. The district court then concluded that the law-of-the-case doctrine precluded it from lifting that stay. App. 63a-69a. The district court explained that, in refusing to lift the stay, this Court affirmatively decided that the government was likely to succeed on the merits; that the plaintiffs failed to show irreparable harm; and that the magnitude of any additional financial losses incurred during appeal is outweighed by the government’s weighty interest in protecting the public health. App. 64a-65a. The district court explained that, although those rulings would not prevent the merits panel

from issuing a decision in plaintiffs' favor, "they are binding on further requests for emergency relief." App. 66a.

The district court rejected plaintiffs' contention that the Supreme Court's order denying plaintiffs' emergency application was an intervening development that gave the court license "to reach the opposite conclusion of the D.C. Circuit on the same issues, in the same emergency posture, and in the same case." App. 69a. The district court explained that "circuit precedent provides that the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law." App. 68a (citing *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013)). "Moreover, 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." App. 69a (quoting *Epps*, 707 F.3d at 348).

ARGUMENT

The district court correctly held that plaintiffs' emergency motion is barred by the law-of-the-case doctrine, which provides that "a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc.*,

49 F.3d 735, 739 (D.C. Cir. 1995). The relief that plaintiffs now seek is identical to the relief that they previously sought from this Court: an emergency order that would vacate the stay pending appeal of the district court's final judgment.

In denying plaintiffs' previous motion, this Court correctly ruled that the government had "made a strong showing that it is likely to succeed on the merits" for reasons that the motions panel detailed in its order. 2021 WL 2221646, at *1. For example, the motions panel concluded that "the CDC's eviction moratorium falls within the plain text of 42 U.S.C. § 264(a)"; that the CDC "carefully targeted [the moratorium] to the subset of evictions it determined to be necessary to curb the spread of the deadly and quickly spreading Covid-19 pandemic"; that "Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium under Section 264"; and that the "text and structure of Section 264's additional provisions . . . reinforce [the CDC's] authority to temporarily suspend evictions." *Id.* at *1-3.

Plaintiffs' contrary arguments reiterate the arguments that they made previously and fail for the reasons that the motions panel gave. For example, plaintiffs incorrectly assert that the government's interpretation of the first

sentence of Section 264 “renders the rest of § 264 superfluous.” Mot. 14. On the contrary, “the text and structure of Section 264’s additional provisions . . . reinforce [the CDC’s] authority to temporarily suspend evictions” by making “clear that [the CDC] has even the exceptional authority to take measures carrying out its regulations that Congress in 1944 had reason to believe required express congressional authorization under the Fourth Amendment.” 2021 WL 2221646, at *2 (citing *Oklahoma Press Publ’g Co. v. Walling Wage & Hour Adm’r*, 327 U.S. 186, 201 & nn.26, 27 (1946) (citing *FTC v. American Tobacco Co.*, 364 U.S. 298, 305–06 (1924))). Plaintiffs’ reliance on the “major-questions doctrine” (Mot. 14) “does not change the calculus, given the statute’s plain text and Congress’s explicit embrace in the Consolidated Appropriations Act of action it referenced [the CDC] having taken under 42 U.S.C. § 264.” *Id.* at *3.

It is “of course” true that the motions panel’s conclusions will not bind the merits panel, as the motions panel explicitly recognized. 2021 WL 2221646, at *1. But plaintiffs are not before the merits panel; they are once again seeking emergency relief pending appeal. And it is well settled that “the *same* issue presented a second time in the *same case* in the *same court*

should lead to the *same result*.” *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc).³

Plaintiffs do not seriously argue otherwise. The thrust of their argument is that the Supreme Court’s *denial* of their emergency application is an “intervening change in controlling legal authority” that permits this Court to reverse course. *LaShawn A.*, 87 F.3d at 1393; see Mot. 22-24. But as the district court explained, this Court’s precedent “provides that the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law.” App. 68a (citing *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (holding that a *Marks* opinion “must embody a position implicitly approved by at least five Justices who support the judgment” (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)))).

Doing so here would be especially problematic. Plaintiffs’ Supreme Court application offered a variety of reasons for vacating the stay, including the argument that changed pandemic conditions meant that the eviction

³ As the district court explained, the cases on which plaintiffs rely simply confirmed that a motions panel’s ruling that the movant was likely to succeed on the merits did not bind “the district court in resolving the merits.” App. 65a (discussing *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974); and *Belbacha v. Bush*, 520 F.3d 452, 458 (D.C. Cir. 2008)).

moratorium was no longer necessary to prevent the spread of COVID-19.

Emphasizing “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,” plaintiffs argued that there was “no longer any public-health rationale for the moratorium.” Pls.’ Emergency Appl. for Vacatur, at 4, No. 20A169 (June 3, 2021), <https://go.usa.gov/xFNup>.

Since the time of the Supreme Court’s actions, the trajectory of the pandemic has changed dramatically for the worse, and the CDC guidance that plaintiffs emphasized in their Supreme Court application has likewise changed. *See supra*, pp. 2-4, 7-8. Because “the four dissenting Justices did not explain their votes,” it is impossible to know which line of argument one or more of them found persuasive. App. 69a. It is likewise “impossible to determine which proposed disposition—theirs or Justice Kavanaugh’s—is the ‘common denominator’ of the other.” *Id.* (quoting *Epps*, 707 F.3d at 348). Thus, the Supreme Court’s denial of plaintiffs’ application is not license for this Court to “reach the opposite conclusion of the” prior panel “on the same issues, in the same emergency posture, and in the same case.” *Id.*

CONCLUSION

Plaintiffs' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the response contains 3,390 words. The response complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word 2016 in proportionally spaced 14-point Century Expd BT typeface.

/s/ Alisa B. Klein

ALISA B. KLEIN

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein

ALISA B. KLEIN

ADDENDUM

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

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

Defendants-appellants are U.S. Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; U.S. Department of Justice; Merrick B. Garland, in his official capacity as Attorney General; Centers for Disease Control and Prevention; Rochelle P. Walensky, in her official capacity as Director of Centers for Disease Control and Prevention; and Sherri A. Berger, in her official capacity as Acting Chief of Staff for Centers for Disease Control and Prevention.

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

B. Rulings Under Review

The rulings under review were entered in *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-3377 (D.D.C.), by the Honorable Dabney L. Friedrich. They are the May 5, 2021 opinion and order granting summary judgment for plaintiffs (Dkt. Nos. 53, 54), the May 14, 2021 opinion and order granting the government's motion for a stay pending appeal (Dkt. Nos. 60, 61); and the August 13, 2021 order denying plaintiffs' motion to vacate the stay pending appeal (Dkt. No. 74).

C. Related Cases

This case was not previously before this Court. Related issues are pending in *Brown v. Azar*, No. 20-14210 (11th Cir.) (plaintiffs' petition for rehearing en banc filed Aug. 13); *Chambless Enterprises, LLC v. Walensky*, No. 21-30037 (5th Cir.) (scheduled to be heard the week of Oct. 4); *Terkel v. CDC*, No. 21-40137 (5th Cir.) (scheduled to be heard the week of Oct. 4); and *Skyworks, Ltd. v. CDC*, Nos. 21-3443, 21-3563 (6th Cir.) (opening brief currently due Aug. 30).

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