[ORAL ARGUMENT NOT YET SCHEDULED]

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

EMERGENCY MOTION TO VACATE STAY PENDING APPEAL AND FOR EXPEDITED BRIEFING

Brett A. Shumate
Charlotte H. Taylor
Megan Lacy Owen
Stephen J. Kenny
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bshumate@jonesday.com

Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

At the outset of the COVID-19 pandemic, Congress and the States adopted temporary moratoria on evictions designed to prevent the spread of the virus. After Congress's moratorium lapsed last July, however, President Trump ordered the Centers for Disease Control and Prevention (CDC) to step in. The agency complied, issuing a moratorium last September that prohibited landlords across the country from evicting certain tenants who fail to pay rent, backed by criminal penalties, including the specter of six-figure fines. In doing so, the CDC shifted the pandemic's financial burdens from the nation's 30 to 40 million renters to its 10 to 11 million landlords—most of whom are individuals and small businesses like plaintiffs—resulting in over $13 billion in unpaid rent per month. Since then, the CDC has repeatedly extended its moratorium, which is currently set to expire on June 30.

As authority for this unlawful nationwide intrusion into the landlord-tenant relationship, the CDC relied solely on a statute from 1944 dealing with quarantines and inspections. The district court rejected that position as reflecting an unsupported and limitless view of the CDC's authority and vacated the moratorium.

The district court nevertheless stayed its own judgment pending appeal. Not because it had second thoughts about merits; the court continued to agree that the CDC had engaged in unlawful action. Nor because it thought that a stay would leave plaintiffs unscathed; the court acknowledged that prolonging the moratorium would exacerbate the severe hardships borne by landlords across the country. Rather, the court decided to allow unlawful agency action to persist because, in its view, the government's appeal raised at least serious legal questions and implicated public-health concerns.

The stay pending appeal should be vacated. As the Sixth Circuit recognized in a unanimous published opinion declining to stay another judgment holding the same moratorium unlawful, there is no need to "consider the remaining stay factors" given that the government is "unlikely to succeed on the merits." *Tiger Lily, LLC v. HUD*, 992 F.3d 518, 524 (2021). Indeed, the government's primary argument for a stay has tellingly *not* been that the CDC had statutory authority as an original matter, but that Congress ratified its overreach after the fact. But either way, the government faces an insuperable hurdle: Under multiple canons of interpretation, Congress must provide a clear statement before it tasks an agency with managing landlord-tenant relationships on a nationwide scale, and neither its 1944 provision

dealing with quarantines and inspections nor its 2020 temporary moratorium comes close to doing so. And binding precedent does not permit unlawful agency actions to remain in effect based solely on equitable considerations—especially where, as here, there are not even serious questions on the merits.

On the equities, the government does not contend that it would suffer an irreparable injury absent a stay. As for the obvious harms that a stay would inflict on plaintiffs, it tries to brush off the moratorium's massive wealth transfer and state-sanctioned unlawful property occupation as a temporary monetary setback—even though sovereign immunity, judgment-proof tenants, and the government's inability to provide timely rental assistance collectively ensure that the harms from the CDC's edict will never be fully undone. And whatever force a public-health justification may have had for an eviction moratorium last September, it can now only be described as pretextual. Vaccines have been available for all American adults since April 19, 2021; the CDC has announced that fully vaccinated individuals may dispense with masks and social distancing indoors in light of "the continuing downward trajectory of cases" and "the performance of our vaccines"; and the President has hailed this development as a "great milestone" made possible

"by the extraordinary success we've had in vaccinating so many Americans."[1] For the government to insist that despite this bright picture, public-health concerns necessitate that landlords continue to provide free housing for tenants who have received vaccines (or passed up the chance to get them) is sheer doublespeak. In reality, the eviction moratorium has become an instrument of economic policy rather than of disease control. And even if that point were debatable, the same could not be said for the lack of any public interest in prolonging unlawful action by the Executive Branch.

Given the moratorium's imminent expiration next month, this Court should order expedited briefing and rule by June 1, 2021, to provide plaintiffs with a meaningful remedy or the opportunity to seek relief from the Supreme Court. To facilitate this Court's prompt review, the government has agreed to the following briefing schedule:

[1] *See* The White House, *Remarks By President Biden on the COVID-19 Response and the Vaccination Program* (May 13, 2021), https://bit.ly/2RcuR17; The White House, *Press Briefing By White House COVID-19 Response Team and Public Health Officials* (May 13, 2021), https://bit.ly/3uY1EFw; Erin Schumaker, *All US Adults Now Eligible for COVID-19 Vaccines*, ABC NEWS (Apr. 19, 2021), https://abcn.ws/3yj21wI.

Plaintiffs' Motion To Vacate	Monday, May 17, 2021
Government's Opposition	By noon on Monday, May 24, 2021
Plaintiffs' Reply	By midnight on Wednesday, May 26, 2021

STATEMENT

1. As part of last March's Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Congress adopted a 120-day eviction moratorium prohibiting landlords of properties covered by federal assistance programs or subject to federally-backed loans from evicting their tenants for failing to pay rent. Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492-94 (2020) (codified at 15 U.S.C. § 9058). In doing so, Congress was joined by at least 43 States and the District of Columbia, which adopted eviction moratoria of their own. *See* App.29a.

After the federal moratorium expired in July 2020 and Congress declined to enact a new one, President Trump directed the CDC to consider issuing an eviction moratorium of its own. *See* Exec. Order No. 13,945, 85 Fed. Reg. 49,935 (Aug. 8, 2020). In September 2020, the CDC did so, promulgating a nationwide moratorium that prohibited landlords from evicting tenants who had submitted a declaration under penalty of perjury affirming that, among other things, they could not pay their rent and would "likely become homeless"

or forced to "live in close quarters" if evicted. *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292, 55,297 (Sept. 4, 2020).

The CDC's moratorium was broader than the congressional one in at least two significant respects. First, it applied to every residential property throughout the country, not just those with a connection to certain federal programs. *Id.* at 55,293. Second, it imposed criminal penalties—enforced by the Department of Justice—of up to a year in jail and/or a fine of $250,000 for individual violators and a fine of $500,000 for organizational ones. *Id.* at 55,296.

As authority for this measure, the CDC invoked Section 361 of the Public Health Service Act, a provision dating from 1944 that stated that the agency could "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" across States or from foreign lands. 42 U.S.C. § 264(a); *see* 85 Fed. Reg. at 55,292.[2] According to the agency, the moratorium was "necessary … to prevent the further spread of COVID-19," 85 Fed. Reg. at 55,296, on the

[2] This authority was originally delegated to the Surgeon General, but has since been transferred to the CDC. *See* 42 C.F.R. § 70.2; App.21a n.1.

theory that the eviction of covered tenants would lead to transmission of the virus in shared living spaces and homeless shelters, *id.* at 55,294-95.

The CDC's moratorium was originally set to expire on December 31, 2020. *Id.* at 55,297. Near the end of that month, however, Congress passed the Consolidated Appropriations Act for 2021 (2021 Appropriations Act), which included a provision extending a moratorium until January 31, 2021. Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79 (2020). When Congress did not take any further action, the CDC repeatedly extended its moratorium itself—first through March 31, 2021, and then through June 30, 2021. *See* 86 Fed. Reg. 16,731 (Mar. 31, 2021); 86 Fed. Reg. 8020 (Feb. 3, 2021).

2. Plaintiffs—two landlords affected by the CDC's order, the businesses they use to manage their properties, and two associations—challenged the lawfulness of the eviction moratorium. Following summary-judgment briefing, the district court vacated the moratorium as exceeding the CDC's statutory authority. App.14a-34a.

The district court rejected the government's assertion that provided the CDC "can make a determination that a given measure is 'necessary' to combat the interstate or international spread of disease, there is no limit to the reach of [its] authority" under the Public Health Service Act. App.29a. As the court

explained, construing Section 361 to "extend[] a nearly unlimited grant of legislative power" to the CDC would not only be in tension with statutory text and structure, but would also "raise serious constitutional concerns." App.28a; *see* App.24a-28a. Because "Congress did not express a clear intent" to confer "such sweeping authority," the court declined to take that step itself. App.28a; *see* App.28a-30a.

The district court also dismissed the argument that Congress had ratified the CDC's authority to ban evictions in the 2021 Appropriations Act. App.31a-33a. As the court noted, that legislation never "expressly approve[d] of the agency's interpretation" of Section 361, but "merely extended" the moratorium until January 31, 2021. App.32a. After that date, the court reasoned, the CDC's continuation of the moratorium "stands—and falls—on the text of the Public Health Service Act alone." *Id.*

3. The district court entered a temporary administrative stay of its vacatur to give it an opportunity to consider the government's motion for a stay. 5/5/21 Minute Order. The government sought a stay pending appeal

from this Court a few days later. *See* 5/7/21 Emergency Mot. for Stay Pending Appeal (Mot.).[3]

The district court then entered a stay pending appeal. App.35a-45a. It acknowledged that the government had failed to show "a substantial likelihood of success on the merits"; that this failure is "[a]rguably … a fatal flaw"; that "the Sixth Circuit denied a similar emergency motion for stay on this ground alone"; and that a stay "will no doubt result in continued"—and "severe"—"financial losses" to plaintiffs. App.42a, 44a (citation omitted). The court nevertheless issued a stay because, in its view, the government had "raised a 'serious legal question on the merits,'" and because "some" of plaintiffs' losses would be recoverable and were outweighed by public-health concerns. App.42a-44a (citation omitted).[4]

[3] Plaintiffs have not responded to the government's stay motion because it was contingent on the district court's vacatur of its administrative stay and is now moot because the district court granted a stay pending appeal. Plaintiffs therefore see no need to file a response to that motion unless this Court asks them to do so.

[4] Plaintiffs have asked the district court to vacate the stay. D. Ct. Doc. 62. We will inform the Court promptly when the district court acts.

ARGUMENT

A stay may remain in place only when the applicant has (1) made "a strong showing that [it] is likely to succeed on the merits" as well as established that (2) it "will be irreparably injured absent a stay," (3) that a stay will not "substantially injure the other parties interested in the proceeding," and (4) that "the public interest" favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted); *see, e.g.*, *Montgomery v. Watson*, 833 F. App'x 438, 439 (7th Cir. 2021) (vacating stay entered by district court because applicant had failed to "make a 'strong showing' of a likelihood of success on the merits"). The government has not shown that any of these factors weigh in favor of a stay, much less all four of them.

I. The Government Is Unlikely To Succeed On The Merits.

A. According to the government, Section 361 of the Public Health Service Act allows the CDC to take any measure imaginable provided it is "aimed at" checking the "spread of communicable disease," Mot. 18—whether it be eviction moratoria, nationwide lockdowns, worship limits, or vaccine mandates. As the Sixth Circuit has explained, "the terms of that statute cannot support" that "broad power." *Tiger Lily*, 992 F.3d at 522.

1. To start, the government's position is a poor fit with the text and structure of the statute. Although the government seizes on the first sentence

of Section 361(a)—which authorizes the CDC "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" on an interstate or international basis, 42 U.S.C. § 264(a)—the statute does not end there. Instead, Section 361(a)'s second sentence explains that "[f]or purposes of carrying out and enforcing such regulations," the CDC "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." *Id.* And other portions of Section 361 provide the CDC with authority, subject to detailed limitations, to adopt regulations concerning "the apprehension and examination" of individuals who could potentially spread disease. *Id.* § 264(d); *see id.* § 264(b)-(d).

These various provisions indicate that Section 361 is limited to disease-control measures involving the quarantine of individuals or the inspection of infected property, not any conceivable action the CDC deems necessary to fight contagion. That reading is confirmed by the fact that Section 361 is found under the caption "Quarantine and Inspection," Pub. L. No. 78-410, § 361, 58 Stat. 682, 703 (1944), and that this provision has never been used to prevent

evictions in its nearly 80-year history. App.30a; *see Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") (internal citation and quotation marks omitted). Indeed, apart from gesturing at Fourth Amendment precedent from the 1940s, *see* Mot. 16, the government has not explained *why* Congress would have gone through the trouble of carefully delineating the CDC's powers over inspections and quarantines if it had meant to grant the agency *carte blanche* to combat contagion.

That contextual understanding of Section 361(a) does not, as the government claimed, render its "first sentence … superfluous." *Id.* Rather, Section 361(a)'s two sentences work together to authorize the CDC to "impose specific restrictions on … property interests," while Section 361(d) authorizes the agency to take certain measures concerning "liberty interests"—namely, quarantines. *Tiger Lily*, 992 F.3d at 522.

Accordingly, as the district court recognized, while Section 361's "enumerated measures are not exhaustive," agency actions taken under this provision must at least "be similar in nature" to the ones Congress identified.

App.25a. And because an eviction moratorium cannot qualify as quarantine measure and is "radically unlike the property interest restrictions listed in § 264(a) (sanitizing, fumigating, etc.)," it "falls outside the scope of the statute." *Tiger Lily*, 992 F.3d at 523-24.

2. Even if the government's expansive view of the CDC's authority could be reconciled with the rest of Section 361, it would remain at war with several interpretive canons. To begin, courts require "a clear indication" from Congress that it meant to "override[] the usual constitutional balance of federal and state powers" before interpreting statutory text—even "expansive language"—"in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 858, 860 (2014) (internal citation and quotation marks omitted). Because the CDC's moratorium amounts to a significant regulation of the landlord-tenant relationship—an area traditionally left to the States, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)—the government must identify "some clear, unequivocal textual evidence of Congress's intent" to authorize such a dramatic intrusion into this area, *Tiger Lily*, 992 F.3d at 523. It cannot do so.

The government's broad reading also raises serious "concerns about the delegation of legislative power to the executive branch." *Id.* The government

candidly admits that its view of Section 361 would allow the CDC to take any imaginable measure "aimed at" checking the "spread of communicable disease." Mot. 18. Other than requiring the CDC to make a "judgment" that such a measure is "necessary" to prevent contagion, Mot. 3—which is no constraint at all—the government offers no factors, standards, or policies that would cabin its discretion. But when the government reads a statute to leave an agency with a "'sweeping delegation of legislative power' that … might be unconstitutional," courts must seek a construction that "avoids this kind of open-ended grant," *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980)—especially when the authority the government claims is immense. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). And that need for a "narrow construction[]" remains even if the government believes the statute itself would survive a facial nondelegation challenge. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (explaining the role of "the nondelegation doctrine" in "the interpretation of statutory texts"); *see* Mot. 18.

The major-questions doctrine—which requires "Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and

political significance,'" *Util. Air*, 573 U.S. at 324—points in the same direction. By the CDC's own estimates, its moratorium could affect "30-40 million" tenants, 85 Fed. Reg. at 55,294-95, and, as "a major rule under the Congressional Review Act," *id.* at 55,296, it will have "an annual effect on the economy of $100,000,000 or more," 5 U.S.C. § 804(2). Without an express statement in Section 361, it is implausible to assume that Congress would have assigned the resolution of this weighty issue to the Executive Branch, and "especially unlikely that Congress would have delegated this decision" to the CDC, "which has no expertise in crafting" landlord-tenant policy. *King v. Burwell*, 576 U.S. 473, 486 (2015). By contrast, Congress has shown that it is quite able to provide the clear statement necessary to regulate this area when it wants to, as evidenced by the moratorium in the CARES Act. *See* 15 U.S.C. § 9058; *see also* 50 U.S.C. § 3951(a)(1) (expressly prohibiting the eviction of service members in certain cases).

3. The government offers little defense of the CDC's authority for the eviction moratorium under Section 361. For instance, its observation that the second sentence in Section 361(a) is "not an exhaustive list," Mot. 15 (citation omitted)—shared by the district court, App.25a—in no way answers whether *this* measure is authorized. Instead, in a telling move, the

government has principally argued that Congress subsequently ratified the CDC's moratorium in the 2021 Appropriations Act, Mot. 12-14, which states:

> The order issued by the [CDC] 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. 55292 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Pub. L. No. 116-260, § 502, 134 Stat. at 2078-79. That theory is no more persuasive.

As the Sixth Circuit observed, "nothing in" this provision "expressly approved the agency's interpretation" of Section 361, *Tiger Lily*, 992 F.3d at 524, much less gave the CDC a blank check to extend its moratorium on evictions indefinitely. Had Congress wanted to ratify the CDC's moratorium, it knew how to do so expressly. *See, e.g.*, *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 505 (D.C. Cir. 1999) (discussing provision stating that an agency fee "is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed"). It did nothing of the sort here.

In any event, even if Congress had ratified the CDC's moratorium, that ratification lasted only until January 31, 2021. "After that date, Congress withdrew its support, and the CDC could rely only on the plain text of 42

U.S.C. § 264." *Tiger Lily*, 992 F.3d at 524. The Appropriations Act therefore cannot justify the CDC's repeated extensions of the moratorium well past Congress's deliberate cut-off date.

The government nevertheless insists that the Appropriations Act "ensured that the CDC could extend the moratorium" further on the theory that congressional "extension" of an agency's action rests on an "essential premise" that that action itself was valid. Mot. 13. But the government has identified no authority establishing that a temporary statutory extension of agency action greenlights the agency to adopt still further extensions, and this case in particular should not be the one to break new ground. The mere fact that Congress "extended" the moratorium does not answer whether it understood that action to implicitly endorse the CDC's authority or to "impose a 30-day moratorium itself." *Cf. id.* The latter is far more likely—both because the CDC's reading of its authority under Section 361 is so implausible, *see Tiger Lily*, 992 F.3d at 524, and because Congress originally thought it necessary to include an eviction moratorium in the CARES Act.

In all events, Congress had to provide a clear statement that it was bestowing such a massive amount of power on the CDC concerning such a significant matter of traditional state concern, not an unstated—and

debatable—"premise." Mot. 13. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power"—and especially where the "interpretation alters the federal-state framework"—courts "expect a clear indication that Congress intended that result," not merely "conjecture" about "congressional acquiescence to," or "incorporat[ion]" of, "administrative interpretations." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169, 171, 172-73 (2001); *see supra* Pt. I.A.2.

B. Despite agreeing with all of this, the district court granted a stay on the premise that a "movant's failure to demonstrate a likelihood of success on the merits does not preclude a stay" so long as the movant "raised a 'serious legal question.'" App.42a (citation omitted). That standard cannot be reconciled with Supreme Court precedent, which holds (1) that a stay requires "a strong showing that [the applicant] is likely to succeed on the merits"; (2) that "[i]t is not enough that the chance of success on the merits be better than negligible"; and (3) that "the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest" only "[o]nce an applicant satisfies the first two factors," which are "the most critical." *Nken*, 556 U.S. at 434-35 (cleaned up). There is no way to reconcile that analysis with a "sliding scale" framework in which "a movant may make up for a lower

likelihood of success on the merits 'with a strong showing as to the other three factors.' " App.37a; *see Nken*, 556 U.S. at 438 (Kennedy, J., concurring) ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other.") (collecting authorities).

While this Court applied the sliding-scale approach in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), *see* App.37a, that approach "is 'no longer controlling, or even viable'" under "the Supreme Court's recent decisions." *Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring). The government agrees. *See, e.g.*, Resp. Br. for Fed. Appellees at 10-13, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 20-2195 (1st Cir. Feb. 16, 2021), 2021 WL 672194. And while this Court appears to have treated the sliding-scale's survival as an open question, it has acknowledged that if an "appeal shows little prospect of success," that is "an arguably fatal flaw for a stay application." *CREW v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018). The Court should resolve that question here, not least because applying the sliding-scale approach would create a split with the Sixth Circuit, which held that because "the government is unlikely to succeed on the merits" in an appeal defending the

moratorium, it had no need to "consider the remaining stay factors." *Tiger Lily*, 992 F.3d at 524.

In any event, even the sliding-scale approach does not help the government. To start, as the Sixth Circuit suggested, the government's defense of the moratorium has not even raised "serious questions going to the merits." *Id.* (citation omitted). The district court thought otherwise based on the "significance" of the moratorium and the fact that two district courts thought it was valid "at the preliminary injunction stage." App.42a-43a. But the *practical significance* of an agency action is in no way correlated to whether its validity presents a serious *legal* question. There are plenty of imaginable measures by the government that would be both plainly significant and plainly unlawful. Nor does a mere division in district-court authority automatically create a serious legal question. *Cf. Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 341 (6th Cir. 2014) (Sutton, J.) ("[D]isagreements between judges at most suggest ambiguity. They do not prove it."). And even if the government had raised a serious question, it could obtain a stay under the sliding-scale approach only upon showing that the three equitable factors "strongly favor" this extraordinary relief. *Holiday Tours*, 559 F.2d at 843. It has not done so. *See infra* Pt. II.

II. The Government Has Not Shown That The Equities Justify A Stay.

Merits aside, the government cannot obtain a stay due to its failure to meet any of the equitable criteria. As a threshold matter, the government makes no effort at all to show that it "will be irreparably injured absent a stay," *Nken*, 556 U.S. at 434 (citation omitted), choosing instead to address only the final two stay factors. *See* Mot. 18-21. Even if that approach could be reconciled with *Nken*—which explained that "the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest" only "[o]nce an applicant satisfies the first two factors," which are "the most critical," 556 U.S. at 434-35—the government's argument concerning the final two factors collapses on its own terms.

A. As stay applicant, the government must establish that plaintiffs will not be substantially harmed from the grant of a stay. *Nken*, 556 U.S. at 434. But instead of tackling that task head on, the government improperly seeks to shift its burden to plaintiffs, faulting them for having "made no claim of irreparable injury." Mot. 19. That will not do where the government is the party seeking extraordinary emergency relief.

In fact, the harms to plaintiffs are substantial. As the government has recognized, "[c]ountless middleclass landlords who rely on rental income to

support their families have also faced deep financial distress [due] to the COVID-19 crisis." U.S. Dep't of Treasury, *Emergency Rental Assistance Fact Sheet* 1 (May 7, 2021), https://bit.ly/33xzRjr. The eviction moratorium simply shifted the economic burdens of the pandemic from tenants to landlords; a stay would keep them there. And by any measure, the magnitude of this wealth transfer is substantial. Landlords continue to lose between $13.8 and $19 billion each month in unpaid rent due to the eviction moratorium, and the cumulative impact of the CDC's order over the course of a year will be close to $200 billion. *See* App.44a; D. Ct. Doc. 6-4, paras. 15, 17. Many of the millions of landlords affected by the moratorium are small business owners, some of whom have not collected rent from some tenants in over a year. *See* D. Ct. Doc. 6-3, para. 7. Even by the CDC's own estimates, the moratorium could affect 30 to 40 million tenants and have an annual impact on the national economy in the nine figures. *See supra* Pt. I.A.2.

Moreover, even if plaintiffs were required to show irreparable harm to oppose the stay—and they are not—their substantial economic harms are unrecoverable (and hence irreparable) in light of the government's sovereign immunity. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). That remains true notwithstanding the government's speculation that landlords

may eventually be able to collect withheld rent from delinquent tenants or obtain rental assistance from Congress. *See* Mot. 18-19. Any tenants covered by the CDC's moratorium will have to swear under oath that they are essentially judgment-proof, and Congress's recent rental-assistance measures have been marred by delays and rollout problems. Indeed, neither of the individual plaintiffs here has received any federal rental assistance to date. And on top of their economic losses, plaintiffs continue to suffer the ongoing irreparable injury of the unlawful physical occupation of their properties. *See, e.g.*, *Girl Scouts of Manitou Council v. Girl Scouts of U.S.A.*, 549 F.3d 1079, 1090 (7th Cir. 2008) ("As a general rule, interference with the enjoyment or possession of land is considered 'irreparable' since land is viewed as a unique commodity").

B. The government is no more persuasive in arguing that a stay is in the public interest. Because there is "no public interest in the perpetuation of unlawful agency action," *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (brackets and citation omitted), the government's failure to show a likelihood of success on the merits renders its discussion of the public interest beside the point. *Cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct.

63, 68 (2020) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten.").

Even setting this basic point aside, the government's insistence that the moratorium remains necessary for public health—based on months-old conclusions from the CDC and judicial decisions from 2020, *see* Mot. 20-21—is pretextual. Whatever force that rationale for the moratorium may have had during the height of the pandemic, it is unsustainable today. As the President recently observed in connection with the CDC's announcement that individuals no longer need to wear masks or practice social distancing indoors if they are fully vaccinated—an option that has been available to all American adults for almost a month now—"nearly 60 percent of … adults in America" have obtained "at least one shot"; "[c]ases are down in 49 of the 50 states"; and "[d]eaths are down 80 percent and also at their lowest levels since April of 2020." *See supra* note 1. The government may wish to prolong the moratorium to see out its economic policy goals, but that does not render its stated justification plausible. When the state of the pandemic has improved to the point that vaccinated individuals no longer need to wear masks in shared living spaces, embracing the theory that a nationwide eviction moratorium is still necessary to prevent an imminent peril to public health would require this

Court "to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

CONCLUSION

This Court should adopt the expedited briefing schedule agreed to by the parties, *see supra* pp. 4-5, and vacate the stay no later than June 1, 2021.

Dated: May 17, 2021

Respectfully Submitted,

/s/ Brett A. Shumate
Brett A. Shumate
Charlotte H. Taylor
Megan Lacy Owen
Stephen J. Kenny
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bshumate@jonesday.com
Counsel for Appellees

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 5,199 words.

2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Expd BT typeface.

/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 17th day of May 2021, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate

ADDENDUM

[Not Scheduled For Oral Argument]

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

ALABAMA ASSOCIATION OF REALTORS® *et al.*, Plaintiffs-Appellees, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*, Defendants-Appellants.	No. 21-5093

CERTIFICATE OF PARTIES AND DISCLOSURE STATEMENT

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 the district court.

B. Disclosure Statement

Pursuant to FRAP 26.1 and Circuit Rule 26.1, Plaintiffs-Appellees Alabama Association of REALTORS® and Georgia Association of REALTORS® are trade associations of real-estate professionals organized under section 501(c)(6) of the Internal Revenue Code. Each organization has members affected by the CDC Eviction Moratorium. Plaintiffs-Appellees Fordham & Associates, LLC, H.E. Cauthen Land and Development, LLC, and Title One Management, LLC are corporations that manage properties that are affected by the CDC Eviction Moratorium. None of these Plaintiffs-Appellees has a parent company, and no publicly held company owns 10% or more of any Plaintiff-Appellee's stock.

Dated: May 17, 2021

Respectfully Submitted,

s/ Brett A. Shumate
Brett A. Shumate
Charlotte H. Taylor
Megan Lacy Owen
Stephen J. Kenny
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bshumate@jonesday.com
Counsel for Appellees

APPENDIX

TABLE OF CONTENTS

Page

APPEAL,CLOSED,STAYED,TYPE−C

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:20−cv−03377−DLF

ALABAMA ASSOCIATION OF REALTORS et al v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES et al
Assigned to: Judge Dabney L. Friedrich
Case in other court: 21−05093
Cause: 05:0706 Judicial Review of Agency Actions

Date Filed: 11/20/2020
Date Terminated: 05/05/2021
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

Plaintiff

ALABAMA ASSOCIATION OF REALTORS

represented by **Autumn Hamit Patterson**
JONES DAY
2727 North Harwood St.
Dallas, TX 75201
214−220−3939
Email: ahpatterson@jonesday.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte Taylor
JONES DAY
51 Louisiana Ave, NW
Washington, DC 20001
202−879−3872
Email: ctaylor@jonesday.com
ATTORNEY TO BE NOTICED

Megan Lacy Owen
JONES DAY
51 Louisiana Ave, NW
Washington, DC 20001
202−879−3404
Email: mlacyowen@jonesday.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brett A. Shumate
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879−3855
Email: bshumate@jonesday.com
ATTORNEY TO BE NOTICED

Plaintiff

DANNY FORDHAM

represented by **Autumn Hamit Patterson**
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte Taylor
(See above for address)
ATTORNEY TO BE NOTICED

Megan Lacy Owen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brett A. Shumate
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

FORDHAM & ASSOCIATES, LLC represented by **Autumn Hamit Patterson**
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte Taylor
(See above for address)
ATTORNEY TO BE NOTICED

Megan Lacy Owen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brett A. Shumate
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

H.E. CAUTHEN LAND AND DEVELOPMENT, LLC represented by **Autumn Hamit Patterson**
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte Taylor
(See above for address)
ATTORNEY TO BE NOTICED

Megan Lacy Owen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brett A. Shumate
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

GEORGIA ASSOCIATION OF REALTORS represented by **Autumn Hamit Patterson**
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte Taylor
(See above for address)
ATTORNEY TO BE NOTICED

Megan Lacy Owen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brett A. Shumate
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

ROBERT GILSTRAP represented by **Autumn Hamit Patterson**
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte Taylor
(See above for address)
ATTORNEY TO BE NOTICED

Megan Lacy Owen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brett A. Shumate
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

TITLE ONE MANAGEMENT, LLC represented by **Autumn Hamit Patterson**
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte Taylor
(See above for address)
ATTORNEY TO BE NOTICED

Megan Lacy Owen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brett A. Shumate
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES represented by **Leslie Cooper Vigen**
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Room 11308
Washington, DC 20005
(202) 305−0727
Fax: (202) 616−8470
Email: leslie.vigen@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven A. Myers
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
(202) 305−8648
Fax: (202) 616−8470
Email: steven.a.myers@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

ALEX M. AZAR, II
in his official capacity as Secretary of Health and Human Services

represented by **Leslie Cooper Vigen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven A. Myers
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

UNITED STATES DEPARTMENT OF JUSTICE

represented by **Leslie Cooper Vigen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven A. Myers
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

WILLIAM P. BARR
in his official capacity as Attorney General

represented by **Leslie Cooper Vigen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven A. Myers
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

CENTERS FOR DISEASE CONTROL AND PREVENTION

represented by **Leslie Cooper Vigen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven A. Myers
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

ROBERT R. REDFIELD
in his official capacity as Director of the Centers for Disease Control and Prevention

represented by **Leslie Cooper Vigen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven A. Myers
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

NINA B WITKOFSKY
in her official capacity as Acting Chief of Staff, Centers for Disease Control and Prevention

represented by **Leslie Cooper Vigen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven A. Myers
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/20/2020	1	COMPLAINT against All Plaintiffs *against All Defendants* (Filing fee $ 400 receipt number ADCDC−7861856) filed by ROBERT GILSTRAP, FORDHAM & ASSOCIATES, LLC, TITLE ONE MANAGEMENT, LLC, DANNY FORDHAM, ALABAMA ASSOCIATION OF REALTORS, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, GEORGIA ASSOCIATION OF REALTORS. (Attachments: # 1 Civil Cover Sheet, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Summons, # 7 Summons, # 8 Summons)(Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	2	NOTICE OF RELATED CASE by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. Case related to Case No. 1:20−cv−3702−WMR (N.D. Ga.); 2:20−cv−02692−MSN−atc (W.D. Tenn.); 6:20−cv−00564 (E.D. Tex.); 5:20−cv−02407−JRA (N.D. Ohio). (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	3	LCvR 26.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by FORDHAM & ASSOCIATES, LLC (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	4	LCvR 26.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by H.E. CAUTHEN LAND AND DEVELOPMENT, LLC (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	5	LCvR 26.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by TITLE ONE MANAGEMENT, LLC (Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	6	MOTION for Summary Judgment *(Expedited)* by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Memorandum in Support, # 2 Declaration Fordham Declaration, # 3 Declaration Gilstrap Declaration, # 4 Declaration Cororaton Declaration, # 5 Declaration Walker Declaration, # 6 Declaration Junkin Declaration, # 7 Proposed Order)(Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	7	MOTION for Leave to Appear Pro Hac Vice :Attorney Name− Megan Lacy Owen, Filing fee $ 100, receipt number ADCDC−7862927. Fee Status: Fee Paid. by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Declaration of Megan Lacy Owen, # 2 Proposed Order)(Shumate, Brett) (Entered: 11/20/2020)
11/20/2020	8	MOTION for Leave to Appear Pro Hac Vice :Attorney Name− Autumn Hamit Patterson, Filing fee $ 100, receipt number ADCDC−7862993. Fee Status: Fee Paid. by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Declaration of Autumn Hamit Patterson, # 2 Proposed Order)(Shumate, Brett) (Entered: 11/20/2020)
11/23/2020		Case Assigned to Judge Dabney L. Friedrich. (zsb) (Entered: 11/23/2020)
11/23/2020	9	SUMMONS (7) Issued Electronically as to ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Attachment: # 1 Notice and Consent)(adh,) (Entered: 11/23/2020)
11/23/2020	10	STANDARD ORDER for Civil Cases. See text for details. Signed by Judge Dabney L. Friedrich on November 23, 2020. (lcdlf2) (Entered: 11/23/2020)
11/23/2020		MINUTE ORDER granting the plaintiffs' 7 Motion for Admission Pro Hac Vice of Attorney Megan Lacy Owen. Counsel should register for e−filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). For instructions visit: https://www.dcd.uscourts.gov/sites/dcd/files/NextGEN_Tutorial_for_Registering_for_E−filing.pdf.

		So Ordered by Judge Dabney L. Friedrich on November 23, 2020. (lcdlf2) (Entered: 11/23/2020)
11/23/2020		MINUTE ORDER granting the plaintiffs' 8 Motion for Admission Pro Hac Vice of Attorney Autumn Hamit Patterson. Counsel should register for e−filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). For instructions visit: https://www.dcd.uscourts.gov/sites/dcd/files/NextGEN_Tutorial_for_Registering_for_E−filing.pdf. So Ordered by Judge Dabney L. Friedrich on November 23, 2020. (lcdlf2) (Entered: 11/23/2020)
11/24/2020	11	NOTICE of Appearance by Autumn Hamit Patterson on behalf of All Plaintiffs (Patterson, Autumn) (Main Document 11 replaced on 11/24/2020) (zeg). (Entered: 11/24/2020)
11/24/2020	12	NOTICE of Appearance by Megan Lacy Owen on behalf of All Plaintiffs (Lacy Owen, Megan) (Main Document 12 replaced on 11/24/2020) (zeg). (Main Document 12 replaced on 11/24/2020) (zeg). (Entered: 11/24/2020)
12/03/2020	13	CERTIFICATE OF SERVICE by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC re 6 MOTION for Summary Judgment *(Expedited) Amended Certificate of Service*. (Shumate, Brett) (Entered: 12/03/2020)
12/03/2020	14	NOTICE of Appearance by Leslie Cooper Vigen on behalf of All Defendants (Vigen, Leslie) (Entered: 12/03/2020)
12/03/2020	15	Joint MOTION for Briefing Schedule by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # 1 Text of Proposed Order)(Vigen, Leslie) (Entered: 12/03/2020)
12/03/2020	16	NOTICE of Appearance by Steven A. Myers on behalf of All Defendants (Myers, Steven) (Entered: 12/03/2020)
12/04/2020		MINUTE ORDER granting the parties' 15 Joint Motion for Briefing Schedule. Accordingly, the defendants shall provide the administrative record to the plaintiffs and file a certified list of its contents on or before December 11, 2020; the defendants shall file their opposition to the plaintiffs' expedited summary judgment motion and their cross−motion for summary judgment on or before December 21, 2020; the plaintiffs shall file any reply in support of their motion and their opposition to the defendants' cross−motion for summary judgment on or before December 28, 2020; and the defendants shall file any reply in support of their cross−motion on or before January 6, 2021. It is FURTHER ORDERED that the defendants' obligation to answer shall be deferred to 30 days following resolution of the cross−motions, if the case remains pending. So Ordered by Judge Dabney L. Friedrich on December 4, 2020. (lcdlf2) (Entered: 12/04/2020)
12/04/2020	17	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. ALEX M. AZAR, II served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	18	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. WILLIAM P. BARR served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	19	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. CENTERS FOR DISEASE CONTROL AND PREVENTION served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	20	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES DEPARTMENT OF JUSTICE served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	21	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	22	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. ROBERT R. REDFIELD served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/04/2020	23	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. NINA B WITKOFSKY served on 11/30/2020 (Shumate, Brett) (Entered: 12/04/2020)
12/11/2020	24	NOTICE *of Filing* by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT

		OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # 1 Exhibit Administrative Record Certification & Index)(Vigen, Leslie) (Entered: 12/11/2020)
12/16/2020	25	NOTICE *of Filing* by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY re 24 Notice (Other), (Attachments: # 1 Exhibit Administrative Record Recertification & Updated Index)(Vigen, Leslie) (Entered: 12/16/2020)
12/21/2020	26	MOTION for Summary Judgment by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # 1 Text of Proposed Order)(Myers, Steven) (Entered: 12/21/2020)
12/21/2020	27	Memorandum in opposition to re 6 MOTION for Summary Judgment *(Expedited)* filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE. (Attachments: # 1 Text of Proposed Order)(Myers, Steven) (Entered: 12/21/2020)
12/28/2020	28	Memorandum in opposition to re 26 MOTION for Summary Judgment filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Shumate, Brett) (Entered: 12/28/2020)
12/28/2020	29	REPLY to opposition to motion re 6 MOTION for Summary Judgment *(Expedited)* filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Shumate, Brett) (Entered: 12/28/2020)
12/31/2020	30	NOTICE *of Congressional Action* by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Vigen, Leslie) (Entered: 12/31/2020)
01/06/2021	31	REPLY to opposition to motion re 26 MOTION for Summary Judgment filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Vigen, Leslie) (Entered: 01/06/2021)
01/06/2021	32	Partial MOTION to Dismiss by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Vigen, Leslie) (Entered: 01/06/2021)
01/07/2021	33	Consent MOTION to Stay by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Text of Proposed Order)(Shumate, Brett) (Entered: 01/07/2021)
01/08/2021		MINUTE ORDER. Upon consideration of the plaintiffs' 33 Consent Motion for a Temporary Stay, it is ORDERED that the motion is GRANTED. The plaintiffs' deadline to respond to the defendants' 32 Partial Motion to Dismiss is STAYED. On or before February 8, 2021, the parties shall file a joint status report advising the Court as to how they wish to proceed in this case. So Ordered by Judge Dabney L. Friedrich on January 8, 2021. (lcdlf2) (Entered: 01/08/2021)
01/08/2021		Set/Reset Deadlines: Status Report due by 2/8/2021 (zjch) (Entered: 01/08/2021)
01/26/2021	34	NOTICE of Appearance by Charlotte Taylor on behalf of All Plaintiffs (Taylor, Charlotte) (Entered: 01/26/2021)

02/01/2021	35	NOTICE *of Extension* by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # 1 Exhibit January 29, 2021 CDC Order)(Vigen, Leslie) (Entered: 02/01/2021)
02/08/2021	36	Joint STATUS REPORT by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Shumate, Brett) (Entered: 02/08/2021)
02/10/2021		MINUTE ORDER. Upon consideration of the parties' 36 Joint Status Report, it is ORDERED that the following schedule shall govern further proceedings: the plaintiffs shall file a response to the defendants' partial motion to dismiss on or before February 15, 2021; the defendants shall file a reply in support of their partial motion to dismiss on or before February 22, 2021; the defendants shall file an updated certified list of the contents of the administrative record on or before February 22, 2021; and the plaintiffs shall file an appendix pursuant to Local Civil Rule 7(n) on or before February 24, 2021. So Ordered by Judge Dabney L. Friedrich on February 10, 2021. (lcdlf2) (Entered: 02/10/2021)
02/10/2021		Set/Reset Deadlines: Administrative Record due by 2/22/2021. Appendix due by 2/24/2021. Dispositive Motions due by 2/15/2021. Reply to Dispositive Motions due by 2/22/2021. (zjch) (Entered: 02/10/2021)
02/15/2021	37	Memorandum in opposition to re 32 Partial MOTION to Dismiss filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # 1 Text of Proposed Order)(Shumate, Brett) (Entered: 02/15/2021)
02/22/2021	38	REPLY to opposition to motion re 32 Partial MOTION to Dismiss filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Vigen, Leslie) (Entered: 02/22/2021)
02/22/2021	39	NOTICE *of Filing* by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # 1 Affidavit Certification of Supplemental Administrative Record, # 2 Supplement Index of Supplemental Administrative Record)(Vigen, Leslie) (Entered: 02/22/2021)
02/24/2021	40	JOINT APPENDIX by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # 1 Index of Joint Appendix, # 2 Joint Appendix Part 1, # 3 Joint Appendix Part 2, # 4 Joint Appendix Part 3)(Shumate, Brett) (Entered: 02/24/2021)
02/26/2021	41	NOTICE OF SUPPLEMENTAL AUTHORITY by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Opinion and Order, # 2 Judgment)(Shumate, Brett) (Entered: 02/26/2021)
02/27/2021	42	RESPONSE re 41 NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Myers, Steven) (Entered: 02/27/2021)
02/28/2021	43	REPLY re 41 NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Shumate, Brett) (Entered: 02/28/2021)

03/10/2021	44	NOTICE OF SUPPLEMENTAL AUTHORITY by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Exhibit A)(Shumate, Brett) (Entered: 03/10/2021)
03/12/2021	45	RESPONSE re 44 NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Vigen, Leslie) (Entered: 03/12/2021)
03/15/2021	46	REPLY re 44 NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Shumate, Brett) (Entered: 03/15/2021)
03/15/2021	47	NOTICE OF SUPPLEMENTAL AUTHORITY by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Exhibit A)(Shumate, Brett) (Entered: 03/15/2021)
03/19/2021	48	RESPONSE re 47 NOTICE OF SUPPLEMENTAL AUTHORITY, filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Vigen, Leslie) (Entered: 03/19/2021)
03/22/2021	49	NOTICE *of Imminent Extension of Eviction Moratorium* by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Shumate, Brett) (Entered: 03/22/2021)
03/29/2021	50	NOTICE *of Extension and Supplemental Authority* by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC (Attachments: # 1 Exhibit A − Extension of Eviction Moratorium, # 2 Exhibit B − Sixth Circuit Order)(Shumate, Brett) (Entered: 03/29/2021)
03/31/2021	51	RESPONSE re 50 Notice (Other), *of Extension and Supplemental Authority* filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Vigen, Leslie) (Entered: 03/31/2021)
04/02/2021		NOTICE of Hearing: Motion Hearing set for 4/14/2021 at 2:00 PM via video before Judge Dabney L. Friedrich. (zjch) (Entered: 04/02/2021)
04/07/2021	52	NOTICE *of Filing* by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY (Attachments: # 1 Declaration Certification of Second Supplemental Administrative Record, # 2 Supplement Index of Second Supplemental Administrative Record, # 3 Supplement Supplement to Certified Administrative Record)(Vigen, Leslie) (Entered: 04/07/2021)
04/08/2021		Set/Reset Hearings: Motion Hearing set for 4/29/2021 at 10:00 AM via video before Judge Dabney L. Friedrich. (zjch) (Entered: 04/08/2021)
04/29/2021		Minute Entry for proceedings held before Judge Dabney L. Friedrich: Motion Hearing held on 4/29/2021 re 32 Partial MOTION to Dismiss filed by NINA B WITKOFSKY, CENTERS FOR DISEASE CONTROL AND PREVENTION, WILLIAM P. BARR, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF JUSTICE, ALEX M. AZAR, II, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, 26 MOTION for Summary Judgment filed by NINA B WITKOFSKY, CENTERS FOR DISEASE CONTROL AND PREVENTION,

		WILLIAM P. BARR, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF JUSTICE, ALEX M. AZAR, II, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. Court Reporter Sara Wick. (zjch) (Entered: 04/29/2021)
05/05/2021	53	ORDER denying the defendants' 26 Motion for Summary Judgment and 32 Partial Motion to Dismiss, and granting the plaintiffs' 6 Motion for Expedited Summary Judgment. See text for details. The Clerk of Court is directed to close this case. Signed by Judge Dabney L. Friedrich on May 5, 2021. (lcdlf1) (Entered: 05/05/2021)
05/05/2021	54	MEMORANDUM OPINION regarding the plaintiffs' 6 Motion for Expedited Summary Judgment and the defendants' 26 Motion for Summary Judgment and 32 Partial Motion to Dismiss. See text for details. Signed by Judge Dabney L. Friedrich on May 5, 2021. (lcdlf1) (Entered: 05/05/2021)
05/05/2021	55	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 54 Memorandum & Opinion, 53 Order on Motion for Summary Judgment,, Order on Motion to Dismiss,,, by WILLIAM P. BARR, ALEX M. AZAR, II, CENTERS FOR DISEASE CONTROL AND PREVENTION, NINA B WITKOFSKY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, ROBERT R. REDFIELD. Fee Status: No Fee Paid. Parties have been notified. (Vigen, Leslie) (Entered: 05/05/2021)
05/05/2021	56	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the appeal was filed by the government re 55 Notice of Appeal to DC Circuit Court,. (eg) (Entered: 05/05/2021)
05/05/2021	57	Emergency MOTION to Stay re 54 Memorandum & Opinion, 53 Order on Motion for Summary Judgment,, Order on Motion to Dismiss,,, *(Emergency Motion for Stay Pending Appeal and Immediate Administrative Stay)* by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Attachments: # 1 Text of Proposed Order)(Myers, Steven) (Entered: 05/05/2021)
05/05/2021		MINUTE ORDER. Before the Court is the defendants' 57 Emergency Motion for a Stay Pending Appeal of this Court's 53 May 5, 2021 Order vacating the national eviction moratorium at 86 Fed. Reg. 16,731. In this emergency motion, the defendants request an immediate administrative stay to give this Court time to consider and rule upon its motion to stay this case pending appeal. Alternatively, the defendants request that the Court stay its 53 May 5, 2021 Order as to all parties except for the plaintiffs. Defs.' Emergency Mot. for a Stay Pending Appeal at 1 n.1, 8−9, Dkt. 57. Although the plaintiffs have not yet filed an opposition to the defendants' motion, which was filed at 6:54 p.m. this evening, the defendants represent that the plaintiffs oppose the motion. Id. at 1 n.1. In order to give the Court time to consider the merits of the defendants' 57 Emergency Motion for a Stay Pending Appeal, and the plaintiffs time to file an opposition to the motion, the Court will grant the defendants' request for a temporary administrative stay. This Minute Order should not be construed in any way as a ruling on the merits of the defendants' motion. The Court notes, however, that, as the Court has explained, see Mem. Op. at 19, Dkt. 54, the law in this Circuit is clear: where a court concludes that an agency has exceeded its statutory authority, as this Court has done here, see Mem. Op. at 17, vacatur of the rule is the proper remedy in this Circuit. See Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Based on this clear authority, courts in this Circuit do not restrict vacatur only to those plaintiffs before the Court. See, e.g., O.A. v. Trump, 404 F. Supp. 3d 109, 152−53 (D.D.C. 2019). Indeed, the government has been unable to point to a single case in which a court in this Circuit has done so. See Mot. Hr'g Rough Tr. at 31. Accordingly, it is ORDERED that the Court's 53 May 5, 2021 Order is administratively STAYED. It is further ORDERED that the plaintiffs shall file any opposition to the defendants' motion on or before May 12, 2021, and the defendants shall file any reply within four days of the date the plaintiffs' opposition is filed. So Ordered by Judge Dabney L. Friedrich on May 5, 2021. (lcdlf1) (Entered: 05/05/2021)
05/05/2021		Set/Reset Deadlines: Responses due by 5/12/2021 (zjch) (Entered: 05/06/2021)
05/05/2021		USCA Case Number 21−5093 for 55 Notice of Appeal to DC Circuit Court, filed by NINA B WITKOFSKY, CENTERS FOR DISEASE CONTROL AND PREVENTION, WILLIAM P. BARR, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF JUSTICE, ALEX M. AZAR, II, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. (eg)

		(Entered: 05/06/2021)
05/07/2021	58	Memorandum in opposition to re 57 Emergency MOTION to Stay re 54 Memorandum & Opinion, 53 Order on Motion for Summary Judgment,, Order on Motion to Dismiss,,, *(Emergency Motion for Stay Pending Appeal and Immediate Administrative Stay)* filed by ALABAMA ASSOCIATION OF REALTORS, DANNY FORDHAM, FORDHAM & ASSOCIATES, LLC, GEORGIA ASSOCIATION OF REALTORS, ROBERT GILSTRAP, H.E. CAUTHEN LAND AND DEVELOPMENT, LLC, TITLE ONE MANAGEMENT, LLC. (Attachments: # 1 Proposed Order)(Shumate, Brett) (Entered: 05/07/2021)
05/11/2021	59	REPLY to opposition to motion re 57 Emergency MOTION to Stay re 54 Memorandum & Opinion, 53 Order on Motion for Summary Judgment,, Order on Motion to Dismiss,,, *(Emergency Motion for Stay Pending Appeal and Immediate Administrative Stay)* filed by ALEX M. AZAR, II, WILLIAM P. BARR, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROBERT R. REDFIELD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF JUSTICE, NINA B WITKOFSKY. (Myers, Steven) (Entered: 05/11/2021)
05/14/2021	60	ORDER granting the defendants' 57 Emergency Motion for Stay Pending Appeal. See text for details. Signed by Judge Dabney L. Friedrich on May 14, 2021. (lcdlf1) (Entered: 05/14/2021)
05/14/2021	61	MEMORANDUM OPINION regarding the defendants' 57 Emergency Motion for Stay Pending Appeal. See text for details. Signed by Judge Dabney L. Friedrich on May 14, 2021. (lcdlf1) (Entered: 05/14/2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that all Defendants (United States Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; United States Department of Justice; Merrick B. Garland, in his official capacity as Attorney General; Centers for Disease Control; Rochelle P. Walensky, in her official capacity as Director, 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), hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's Order of May 5, 2021, along with its Memorandum Opinion of May 5, 2021.

Dated: May 5, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ERIC BECKENHAUER
Assistant Director, Federal Programs Branch

/s/ Leslie Cooper Vigen
LESLIE COOPER VIGEN
Trial Attorney (DC Bar No. 1019782)

STEVEN A. MYERS
Senior Trial Counsel (NY Bar No. 4823043)
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-0727
Fax: (202) 616-8470
E-mail: leslie.vigen@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the defendants' Motion for Summary Judgment, Dkt. 26, and Partial Motion to Dismiss, Dkt. 32, are **DENIED**. It is further

ORDERED that the plaintiffs' Motion for Expedited Summary Judgment, Dkt. 6, is **GRANTED**. It is further

ORDERED that the nationwide eviction moratorium issued by the Centers for Disease Control and Prevention, and currently in effect at 86 Fed. Reg. 16,731, is **VACATED**.

May 5, 2021

DABNEY L. FRIEDRICH
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

MEMORANDUM OPINION

As part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress enacted a 120-day eviction moratorium that applied to rental properties receiving federal assistance, *id.* § 4024(b). After that moratorium expired, the U.S. Department of Health and Human Services (HHS), through the Centers for Disease Control and Prevention (CDC), issued an order implementing a broader eviction moratorium that applied to all rental properties nationwide, 85 Fed. Reg. 55,292 (Sept. 4, 2020), which prompted this suit. Since then, Congress has granted a 30-day extension of the CDC Order, and the CDC has extended the order twice itself. The current order is set to expire on June 30, 2021.

In this action, the plaintiffs raise a number of statutory and constitutional challenges to the CDC Order. Before the Court is the plaintiffs' Motion for Expedited Summary Judgment, Dkt. 6, as well as the Department's Motion for Summary Judgment, Dkt. 26, and Partial Motion to Dismiss, Dkt. 32. For the reasons that follow, the Court will grant the plaintiffs' motion and deny the Department's motions.

I. BACKGROUND

On March 13, 2020, then-President Trump declared COVID-19 a national emergency. *See generally* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). Two weeks later, he signed the CARES Act into law. *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). The CARES Act included a 120-day eviction moratorium with respect to rental properties that participated in federal assistance programs or were subject to federally-backed loans. *See id.* § 4024. In addition, some—but not all—states adopted their own temporary eviction moratoria. Administrative Record ("AR") at 966–72, 986–1024, Dkt. 40. The CARES Act's federal eviction moratorium expired in July 2020.

On August 8, 2020, then-President Trump issued an executive order directing the Secretary of HHS ("the Secretary") and the Director of the CDC to "consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession." Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Executive Order 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020).

Weeks later, on September 4, 2020, the CDC issued the "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19" ("CDC Order"), pursuant to § 361 of the Public Health Service Act, 42 U.S.C. § 264(a), and 42 C.F.R. § 70.2. 85 Fed. Reg. 55,292 (Sept. 4, 2020). In this order, the CDC determined that a temporary halt on residential evictions was "a reasonably necessary measure . . . to prevent the further spread of COVID-19." 85 Fed. Reg. at 55,296. As the CDC explained, the eviction moratorium facilitates self-isolation for individuals

infected with COVID-19 or who are at a higher-risk of severe illness from COVID-19 given their underlying medical conditions. *Id.* at 55,294. It also enhances state and local officials' ability to implement stay-at-home orders and other social distancing measures, reduces the need for congregate housing, and helps prevent homelessness. *Id.* at 55,294.

The CDC Order declared that "a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action shall not evict any covered person." *Id.* at 55,296. To qualify for protection under the moratorium, a tenant must submit a declaration to their landlord affirming that they: (1) have "used best efforts to obtain all available government assistance for rent or housing"; (2) expect to earn less than $99,000 in annual income in 2020, were not required to report any income in 2019 to the Internal Revenue Service, or received a stimulus check under the CARES Act; (3) are "unable to pay the full rent or make a full housing payment 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) are "using best efforts to make timely partial payments"; (5) would likely become homeless or be forced to move into a shared residence if evicted; (6) understand that rent obligations still apply; and (7) understand that the moratorium is scheduled to end on December 31, 2020. *Id.* at 55,297.

Unlike the CARES Act's moratorium, which only applied to certain federally backed rental properties, the CDC Order applied to all residential properties nationwide. *Id.* at 55,293. In addition, the CDC Order includes criminal penalties. Individuals who violate its provisions are subject to a fine of up to $250,000, one year in jail, or both, and organizations are subject to a fine of up to $500,000. *Id.* at 55,296.

The CDC Order was originally slated to expire on December 31, 2020. *Id.* at 55,297. As part of the Consolidated Appropriations Act, however, Congress extended the CDC Order to

apply through January 31, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020). On January 29, 2021, the CDC extended the order through March 31, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021). In this extension, the CDC updated its findings to account for new evidence of how conditions had worsened since the original order was issued, as well as "[p]reliminary modeling projections and observational data" from states that lifted eviction moratoria "indicat[ing] that evictions substantially contribute to COVID-19 transmission." *Id.* at 8022. The CDC later extended the order through June 30, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021).

A. Procedural History

The plaintiffs—Danny Fordham, Robert Gilstrap, the corporate entities they use to manage rental properties (Fordham & Associates, LLC, H.E. Cauthen Land and Development, LLC, and Title One Management, LLC), and two trade associations (the Alabama and Georgia Associations of Realtors)—filed this action on November 20, 2020. Compl., Dkt. 1. They challenge the lawfulness of the eviction moratorium on a number of statutory and constitutional grounds. The plaintiffs allege that the eviction moratorium exceeds the CDC's statutory authority, *id.* ¶¶ 81–84 (Count III), violates the notice-and-comment requirement, *id.* ¶¶ 63–70 (Count I), and is arbitrary and capricious, *id.* ¶¶ 85–91 (Count IV), all in violation of the Administrative Procedure Act (APA). The plaintiffs further allege that the eviction moratorium fails to comply with the Regulatory Flexibility Act. *Id.* ¶¶ 71–78 (Count II). To the extent that the Public Health Service Act authorizes the eviction moratorium, the plaintiffs allege that the Act is an unconstitutional delegation of legislative power under Article I. *Id.* ¶¶ 92–95 (Count V). Finally, the plaintiffs allege that the eviction moratorium constitutes an unlawful taking of

property in violation of the Takings Clause, *id.* ¶¶ 96–103 (Count VI), violates the Due Process Clause, *id.* ¶¶ 96–110 (Count VII), and deprives the plaintiffs of their right of access to courts, *id.* ¶¶ 111–15 (Count VIII). The plaintiffs seek declaratory and injunctive relief, attorneys' fees and costs, and any other relief the Court deems just and proper. *Id.* ¶¶ 116–20.

Before the Court is the plaintiffs' expedited motion for summary judgment, Dkt. 6, and the Department's cross-motion for summary judgment. Also before the Court is the Department's partial motion to dismiss, Dkt. 32, in which the Department argues that Congress ratified the CDC Order when it extended the eviction moratorium in the Consolidated Appropriations Act of 2021. All three motions are now ripe for review.

B. Relevant Decisions

This Court is not the first to address a challenge to the national eviction moratorium set forth in the CDC Order. In the last several months, at least six courts have considered various statutory and constitutional challenges to the CDC Order. Most recently, the Sixth Circuit denied a motion to stay a district court decision that held that the order exceeded the CDC's authority under 42 U.S.C. § 264(a), *see Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, No. 2:20-cv-2692, 2021 WL 1171887, at *4 (W.D. Tenn. Mar. 15, 2021) (concluding that the CDC Order exceeded the statutory authority of the Public Health Service Act), *appeal filed* No. 21-5256 (6th Cir. 2021); *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 520 (6th Cir. 2021) (denying emergency motion for stay pending appeal); *see also Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720, at *12 (N.D. Ohio Mar. 10, 2021) (holding that the CDC exceeded its authority under 42 U.S.C. § 264(a)). Two other district courts, however, declined to enjoin the CDC Order at the preliminary injunction stage, *see Brown v. Azar*, No. 1:20-cv-03702, 2020 WL 6364310, at *9–

11 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. 2020); *Chambless Enterprises, LLC v. Redfield*, No. 20-cv-01455, 2020 WL 7588849, at *5–9 (W.D. La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. 2021). Separately, another district court declared that the federal government lacks the constitutional authority altogether to issue a nationwide moratorium on evictions. *See Terkel v. Ctrs. for Disease Control & Prevention*, No. 6:20-cv-564, 2021 WL 742877, at *1–2, 10–11 (E.D. Tex. Feb. 25, 2021), *appeal filed*, No. 21-40137 (5th Cir. 2021).

II. LEGAL STANDARD

Summary judgment is proper if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A fact is "material" if it has the potential to change the substantive outcome of the litigation. *See id.* at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). And a dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

In a case reviewing agency action, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). "[T]he entire case . . . is a question of law," and the district court "sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks and footnote omitted).

III. ANALYSIS

A. Standing

Article III of the Constitution limits the "judicial Power" of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "[T]here is no justiciable case or controversy unless the plaintiff has standing." *West v. Lynch*, 845 F.3d 1228, 1230 (D.C. Cir. 2017). To establish standing, a plaintiff must demonstrate a concrete injury-in-fact that is fairly traceable to the defendant's action and redressable by a favorable judicial decision. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Since the CDC Order went into effect, the three real estate management company plaintiffs have each had tenants who have stopped paying rent, invoked the protections of the eviction moratorium, and would be subject to eviction but for the CDC Order. *See* Decl. of Danny Fordham ¶¶ 2–5, 9–17, Dkt. 6-2; Decl. of Robert Gilstrap ¶¶ 2, 4–12, Dkt. 6-3. At a minimum, these three plaintiffs have established a concrete injury that is traceable to the CDC Order and is redressable by a decision vacating the CDC Order. *See Summers*, 555 U.S. at 493. "[I]t is immaterial that other plaintiffs might be unable to demonstrate their own standing," *J.D. v. Azar*, 925 F.3d 1291, 1323 (D.C. Cir. 2019), because "Article III's case-or-controversy requirement is satisfied if one plaintiff can establish injury and standing," *id.*

B. The Agency's Statutory Authority

Section 361 of the Public Health Service Act empowers the Secretary to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" either internationally or between states.[1] 42

[1] "Although the statute states that this authority belongs to the Surgeon General, subsequent reorganizations not relevant here have resulted in the transfer of this responsibility to the Secretary." *Skyworks*, 2021 WL 911720, at *5.

U.S.C. § 264(a). "For purposes of carrying out and enforcing such regulations," the Secretary is authorized to "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." *Id.* The Secretary is also authorized to, within certain limits, make and enforce regulations to apprehend, examine, and, if necessary, detain individuals "believed to be infected with a communicable disease" or who are "coming into a State or possession" from a foreign country. *Id.* § 264(b)–(d).

By regulation, the Secretary delegated this authority to the Director of the CDC. 42 C.F.R. § 70.2. Pursuant to this regulation, when the Director of the CDC determines that the measures taken by health authorities of any state or local jurisdiction are insufficient to prevent the spread of communicable disease, "he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection." *Id.*

In determining whether the eviction moratorium in the CDC Order exceeds the Department's statutory authority, the Department urges the Court to apply the familiar two-step *Chevron* framework. *See* Defs.' Mot. for Summ. J. ("Def.'s Cross-Mot.") at 8 (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). While it is true that "the CDC did not follow APA notice-and-comment rulemaking procedures before issuing the Eviction Moratorium," Pl.'s Mem. in Supp. of Expedited Mot. for Summ. J. ("Pl.'s Mem.") at 21, Dkt. 6-1, "*Chevron* deference is not necessarily limited to regulations that are the product of notice-and-comment rulemaking," *Pub. Citizen, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 332

F.3d 654, 660 (D.C. Cir. 2003). The *Chevron* framework applies where "Congress [has] delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226–27 (2001); *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012). Here, the CDC Order was issued pursuant to a broad grant of rulemaking authority, *see* 42 U.S.C. § 264(a) (authorizing the Secretary to "make and enforce" regulations "to prevent the introduction, transmission, or spread of communicable diseases."); 42 C.F.R. § 70.2 (delegating this authority to the Director of the CDC), and was "clearly intended to have general applicability." *Kaufman v. Nielsen*, 896 F.3d 475, 484 (D.C. Cir. 2018). It was also issued "with a lawmaking pretense in mind," *Mead*, 533 U.S. at 233, published in the Federal Register, *see Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007), and backed with the threat of criminal penalties, 85 Fed. Reg. 55,296. Because the CDC Order was clearly intended to have the force of law, the two-step *Chevron* framework applies.[2]

Applying *Chevron* and using the traditional tools of statutory interpretation, a court must first consider at Step One "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If Congress has directly spoken to [an] issue, that is the end of the

[2] The fact that section 361 of the Public Health Service Act is administered by both the CDC and the FDA, *see* Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations, 65 Fed. Reg. 49,906, 49,907 (Aug. 16, 2000), does not preclude application of the *Chevron* framework. While courts "generally do not apply *Chevron* deference when the statute in question is administered by multiple agencies," *Kaufman*, 896 F.3d at 483; *see also, e.g.*, *DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 487 (D.C. Cir. 2013), the FDA and the CDC are both sub-agencies within HHS. Accordingly, "there is nothing special to undermine *Chevron*'s premise that the grant of authority reflected a congressional expectation that courts would defer" to reasonable agency interpretations of the statute, and there is little risk of "conflicting mandates to regulated entities." *Loan Syndications & Trading Ass'n v. Sec. & Exch. Comm'n*, 882 F.3d 220, 222 (D.C. Cir. 2018) (summarizing instances where "*Chevron* is inapplicable due to the multiplicity of agencies").

matter." *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016) (citing *Chevron*, 467 U.S. at 837). "[T]he court, as well [as] the agency, must give effect to the unambiguously expressed intent of Congress." *Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) (quoting *Chevron*, 467 U.S. at 842–43). Only if the text is silent or ambiguous does a court proceed to Step Two. There, a court must "determine if the agency's interpretation is permissible, and if so, defer to it." *Confederated Tribes of Grand Ronde Cmty.*, 830 F.3d at 558. To determine "whether [an] agency's interpretation is permissible or instead is foreclosed by the statute," courts use "all the tools of statutory interpretation," *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014), and "interpret the words [of a statute] consistent with their ordinary meaning at the time Congress enacted the statute," *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (internal quotation marks and alteration omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted.").

The first question, then, is whether the relevant statutory language addresses the "precise question at issue." *Chevron*, 467 U.S. at 842. As noted, the Public Health Service Act provides, in relevant part:

> The [CDC], with the approval of the Secretary, 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 [Secretary] 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.

42 U.S.C. § 264(a). Other subsections of the Act authorize, in certain circumstances, the quarantine of individuals in order to prevent the interstate or international spread of disease. *See id.* § 264(b)–(d). Though the Public Health Service Act grants the Secretary broad authority to

make and enforce regulations necessary to prevent the spread of disease, his authority is not limitless.

Section 264(a) provides the Secretary with general rulemaking authority to "make and enforce *such regulations*," *id.* § 264(a) (emphasis added), that "in his judgment are necessary" to combat the international or interstate spread of communicable disease, *id.* But this broad grant of rulemaking authority in the first sentence of § 264(a) is tethered to—and narrowed by—the second sentence. It states: "For purposes of carrying out and enforcing *such regulations*," *id.* (emphasis added), the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." *Id.*

These enumerated measures are not exhaustive. The Secretary may provide for "other measures, as in his judgment may be necessary." *Id.* But any such "other measures" are "controlled and defined by reference to the enumerated categories before it." *See Tiger Lily*, 992 F.3d at 522–23 (internal quotation marks and alteration omitted); *id.* at 522 (applying the *ejusdem generis* canon to interpret the residual catchall phrase in § 264(a)). These "other measures" must therefore be similar in nature to those listed in § 264(a). *Id.*; *Skyworks*, 2021 WL 911720, at *10. And consequently, like the enumerated measures, these "other measures" are limited in two significant respects: first, they must be directed toward "animals or articles," 42 U.S.C. § 264(a), and second, those "animals or articles" must be "found to be so infected or contaminated as to be sources of dangerous infection to human beings," *id.*; *see Skyworks*, 2021 WL 911720, at *10. In other words, any regulations enacted pursuant to § 264(a) must be directed toward "specific targets 'found' to be sources of infection." *Id.*

The national eviction moratorium satisfies none of these textual limitations. Plainly, imposing a moratorium on evictions is different in nature than "inspect[ing], fumigat[ing], disinfect[ing], sanit[izing], . . . exterminat[ing] [or] destr[oying]," 42 U.S.C. § 264(a), a potential source of infection. *See Tiger Lily*, 992 F.3d at 524. Moreover, interpreting the term "articles" to include evictions would stretch the term beyond its plain meaning. *See* Webster's New International Dictionary 156 (2d ed. 1945) (defining an "article" as "[a] thing of a particular class or kind" or "a commodity"); *see also Skyworks*, 2021 WL 911720, at *10. And even if the meaning of the term "articles" could be stretched that far, the statute instructs that they must be "found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 U.S.C. § 264(a). The Secretary has made no such findings here. The fact that individuals with COVID-19 can be asymptomatic and that the disease is difficult to detect, Mot. Hr'g Rough Tr. at 26,[3] does not broaden the Secretary's authority beyond what the plain text of § 264(a) permits.

The Department reads § 264(a) another way. In the Department's view, the grant of rulemaking authority in § 264(a) is not limited *in any way* by the specific measures enumerated in § 264(a)'s second sentence. Defs.' Cross-Mot. at 18, 19 n.2. According to the Department, Congress granted the Secretary the "broad authority to make and enforce" *any* regulations that "in his judgment are necessary to prevent the spread of disease," *id.* at 11 (internal quotation marks omitted), across states or from foreign countries. In other words, the grant of rulemaking authority in § 264(a)'s first sentence is a congressional deferral to "the 'judgment' of public

[3] The official transcript from the motions hearing held on April 29, 2021 is forthcoming, and this opinion will be updated to include citations to that transcript when it becomes available.

health authorities about what measures they deem 'necessary' to prevent contagion." *Id.* at 9 (quoting 42 U.S.C. § 264(a)).

The Department's interpretation goes too far. The first sentence of § 264(a) is the starting point in assessing the scope of the Secretary's delegated authority. But it is not the ending point. While it is true that Congress granted the Secretary broad authority to protect the public health, it also prescribed clear means by which the Secretary could achieve that purpose. *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). And those means place concrete limits on the steps the Department can take to prevent the interstate and international spread of disease. *See supra* at 11. To interpret the Act otherwise would ignore its text and structure.

At *Chevron*'s first step, this Court must apply the "ordinary tools of the judicial craft," *Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 20 (D.C. Cir. 2019), including canons of construction, *see ArQule, Inc. v. Kappos*, 793 F. Supp. 2d 214, 219–20 (D.D.C. 2011). These canons confirm what the plain text reveals. The Secretary's authority does not extend as far as the Department contends.

First, "[i]t is… a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). Applying that principle here, the Department's broad reading of § 264(a)'s first sentence would render the second sentence superfluous. If the first sentence empowered the Secretary to enact *any* regulation that, in his "judgment," was "necessary" to prevent the interstate spread of communicable disease, *id.*, there would be no need for Congress to enumerate the "measures" that the Secretary "may provide for" to carry out and enforce those regulations, *see id.* Though the surplusage canon "is not absolute," *Lamie v.*

U.S. Tr., 540 U.S. 526, 536 (2004); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006), like the plain language, it supports a narrow reading of the statute.

Second, the canon of constitutional avoidance instructs that a court shall construe a statute to avoid serious constitutional problems unless such a construction is contrary to the clear intent of Congress. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). An overly expansive reading of the statute that extends a nearly unlimited grant of legislative power to the Secretary would raise serious constitutional concerns, as other courts have found. *See, e.g.*, *Skyworks*, 2021 WL 911720, at *9 (noting that such a reading would raise doubts as to "whether Congress violated the Constitution by granting such a broad delegation of power unbounded by clear limitations or principles."); *Tiger Lily*, 992 F.3d at 523 (same); *id.* ("[W]e cannot read the Public Health Service Act to grant the CDC power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress's intent to do so"); *Terkel*, 2021 WL 742877, at *4–6 (holding that the CDC's eviction moratorium exceeds the federal government's power under the Commerce Clause). Congress did not express a clear intent to grant the Secretary such sweeping authority.

And *third*, the major questions doctrine is based on the same principle: courts "expect Congress to speak *clearly* if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (emphasis added)); *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021) (collecting cases). There is no question that the decision to impose a nationwide moratorium on evictions is one "of vast economic and political significance." *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted).

Not only does the moratorium have substantial economic effects,[4] eviction moratoria have been the subject of "earnest and profound debate across the country," *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (internal quotation marks omitted). At least forty-three states and the District of Columbia have imposed state-based eviction moratoria at some point during the COVID-19 pandemic, *see* 86 Fed. Reg. 16,731, 16,734, though, as the CDC noted in its most recent extension of the CDC Order, these protections either "have expired or are set to expire in many jurisdictions," *id.* at 16,737 n.35. Congress itself has twice addressed the moratorium on a nationwide-level—once through the CARES Act, *see* Pub. L. No. 116-136, § 4024, 134 Stat. 281 (2020), and again through the Consolidated Appropriations Act, *see* Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020).

Accepting the Department's expansive interpretation of the Act would mean that Congress delegated to the Secretary the authority to resolve not only this important question, but endless others that are also subject to "earnest and profound debate across the country." *Gonzales*, 546 U.S. at 267 (internal quotation marks omitted). Under its reading, so long as the Secretary can make a determination that a given measure is "necessary" to combat the interstate or international spread of disease, there is no limit to the reach of his authority.[5]

---

[4] In their briefing, the parties dispute the economic impact of the CDC order, *see, e.g.*, Pl.'s Mem. at 2 (estimating the nation's landlords will suffer "$55-76 billion" in losses as a consequence of the initial moratorium); Def.'s Cross-Mot. at 15 n.4 (disputing these figures). Regardless, the economic impact of the CDC Order is substantial. Indeed, the CDC itself estimates that "as many as 30-40 million people in America could be at risk of eviction" absent the CDC's moratorium as well as other State and local protections, 85 Fed. Reg. at 55,294–95. The CDC Order also qualifies as "a major rule under the Congressional Review Act," *id.* at 55,296, which means it is expected to have "an annual effect on the economy of $100,000,000 or more," 5 U.S.C. § 804(2).

[5] The only other potential limitation, imposed by regulation, is that the Director of the CDC would need to conclude that state and local health authorities have not taken sufficient measures to prevent the spread of communicable disease. *See* 42 C.F.R. § 70.2.

"Congress could not have intended to delegate" such extraordinary power "to an agency in so cryptic a fashion." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159. To be sure, COVID-19 is a novel disease that poses unique and substantial public health challenges, *see* Def.'s Cross-Mot. at 14, but the Court is "confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole." *Loving.*, 742 F.3d at 1021; *see also Brown & Williamson*, 529 U.S. at 160.

It is also telling that the CDC has never used § 264(a) in this manner. As the Department confirms, § 264(a) "has never been used to implement a temporary eviction moratorium," and "has rarely [been] utilized . . . for disease-control purposes." *See* Defs.' Cross-Mot. at 13–15, 23. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," the Court must "greet its announcement with a measure of skepticism." *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted).

The Department advances one final counterargument. It notes that subsequent subsections of the statute, § 264(b)–(d), contemplate that the Secretary may, under certain carefully prescribed circumstances, provide for the "apprehension, detention, or conditional release of individuals" who are arriving in the United States from abroad or who are "reasonably believed to be infected with a communicable disease," 42 U.S.C. § 264(b)–(d). And it stresses that enforced quarantines are not listed in—and are different in kind from—the measures enumerated in § 264(a). Defs.' Cross-Mot. at 10–11. Accordingly, the Department contends that the presence of these subsequent subsections demonstrates that the list of means in the second sentence of § 264(a) imposes *no* limits on the Secretary's authority under § 264(a). *Id.*

This argument is not persuasive. No doubt, Congress intended to give the Secretary—and, by extension, health experts in the CDC—the discretion and flexibility to thwart the spread of disease. But the quarantine provisions in § 264(b)–(d) are structurally separate from those in § 264(a). *Tiger Lily*, 992 F.3d at 524 (noting that the provisions in § 264(b)–(d) restrict individual liberty interests, while § 264(a) is concerned exclusively with property interests). And regardless, like the enumerated measures in § 264(a), the quarantine provisions are cabined and directed toward individuals who are either entering the United States or "reasonably believed to be infected," 42 U.S.C. § 264(c)–(d), and "not to amorphous disease spread" more generally, *Skyworks*, 2021 WL 911720, at *10. The quarantine provisions in § 264(b)–(d) therefore do not provide support for the eviction moratorium.

In sum, the Public Health Service Act authorizes the Department to combat the spread of disease through a range of measures, but these measures plainly do not encompass the nationwide eviction moratorium set forth in the CDC Order.[6] Thus, the Department has exceeded the authority provided in § 361 of the Public Health Service Act, 42 U.S.C. § 264(a).

C. Ratification of the CDC Order

In its partial motion to dismiss, the Department argues that Congress ratified the agency's action when it extended the moratorium in the Consolidated Appropriations Act.[7] *See* Defs.' Partial Mot. at 7–9. The initial CDC Order was set to expire on December 31, 2020, *see* 85 Fed.

[6] Because the CDC Order exceeds the Secretary's authority, the Court need not address the plaintiffs' remaining challenges to the eviction moratorium.

[7] The Department initially argued in its partial motion to dismiss that Counts I-V of the complaint were moot in light of Congress's extension of the CDC Order. Defs.' Mem. in Supp. of Partial Mot. to Dismiss ("Defs.' Partial Mot.") at 1, Dkt. 32-1. But this congressional extension of the CDC Order has since expired, so the Department has withdrawn this argument. *See* Joint Status Report at 2, Dkt. 36.

Reg. at 55,297, but Congress extended the expiration date until January 31, 2021, by including § 502 in the Consolidated Appropriations Act. Section 502 provided:

> 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. 55292 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020).

"Congress 'has the power to ratify the acts which it might have authorized' in the first place," *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *United States v. Heinszen & Co.*, 206 U.S. 370, 384 (1907)), "and give the force of law to official action unauthorized when taken," *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–02 (1937). To do so, however, Congress must make its intention explicit. *Heinszen*, 206 U.S. at 390.

Congress did not do so here. When Congress granted a temporary extension of the eviction moratorium by enacting § 502, it acknowledged that the CDC issued its order pursuant to the Public Health Service Act. It did not, however, expressly approve of the agency's interpretation of 42 U.S.C. § 264(a) or provide the agency with any additional statutory authority. *See Tiger Lily*, 992 F.3d at 524; *Skyworks*, 2021 WL 911720, at *12. Instead, Congress merely extended the CDC Order for a limited 30-day duration.

"[C]ongressional acquiescence to administrative interpretations of a statute" is "recognize[d]. . . with extreme care." *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). "[M]ere congressional acquiescence in the CDC's assertion that the [CDC Order] was supported by 42 U.S.C. § 264(a) does not make it so." *Tiger Lily*, 992 F.3d at 524. Because Congress withdrew its support for the CDC Order on January 31, 2021, the order now stands—and falls—on the text of the Public Health Service Act alone. For

all the reasons stated above, *supra* Part III.B., the national eviction moratorium in the CDC Order is unambiguously foreclosed by the plain language of the Public Health Service Act.

D. Remedy

Both parties agree that if the Court concludes that the Secretary exceeded his authority by issuing the CDC Order, vacatur is the appropriate remedy. *See* Mot. Hr'g Rough Tr. at 13, 30–31. Nonetheless, the Department urges the Court to limit any vacatur order to the plaintiffs with standing before this Court. Defs.' Partial Mot. to Dismiss at 23. This position is "at odds with settled precedent." *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019).

This Circuit has instructed that when "regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted); *see also O.A.*, 404 F. Supp. 3d at 109. Accordingly, consistent with the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and this Circuit's precedent, *see Nat'l Mining Ass'n*, 145 F.3d at 1409, the CDC Order must be set aside.

***

The Court recognizes that the COVID-19 pandemic is a serious public health crisis that has presented unprecedented challenges for public health officials and the nation as a whole. The pandemic has triggered difficult policy decisions that have had enormous real-world consequences. The nationwide eviction moratorium is one such decision.

It is the role of the political branches, and not the courts, to assess the merits of policy measures designed to combat the spread of disease, even during a global pandemic. The question for the Court is a narrow one: Does the Public Health Service Act grant the CDC the legal authority to impose a nationwide eviction moratorium? It does not. Because the plain

language of the Public Health Service Act, 42 U.S.C. § 264(a), unambiguously forecloses the nationwide eviction moratorium, the Court must set aside the CDC Order, consistent with the Administrative Procedure Act, *see* 5 U.S.C. § 706(2)(C), and D.C. Circuit precedent, *see National Mining Ass'n*, 145 F.3d at 1409.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for expedited summary judgment is granted and the Department's motion for summary judgment and partial motion to dismiss are denied. A separate order consistent with this decision accompanies this memorandum opinion.

May 5, 2021

DABNEY L. FRIEDRICH
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the defendants' Emergency Motion for Stay Pending Appeal, Dkt. 57, is **GRANTED**. It is further

ORDERED that, pursuant to Federal Rule of Civil Procedure 62(c), this Court's May 5, 2021 Order, Dkt. 53, will remain **STAYED** pending the defendants' appeal in this matter.

DABNEY L. FRIEDRICH
United States District Judge

May 14, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

MEMORANDUM OPINION

Before the Court is the Department of Health and Human Service's ("the Department") Emergency Motion for Stay Pending Appeal. Dkt. 57. Pursuant to Federal Rule of Civil Procedure 62(c), the Department seeks a stay of the Court's May 5, 2021 order vacating the nationwide eviction moratorium issued by the Centers for Disease Control and Prevention ("CDC"). *See* Dkt. 53. For the reasons that follow, the Court will grant the motion.

I. LEGAL STANDARD

A stay pending appeal is an "extraordinary remedy," *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (per curiam), as it "is an intrusion into the ordinary processes of administration and judicial review," *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). Accordingly, it "is not a matter of right." *Id.* (internal quotation marks omitted). "It is instead an exercise of judicial discretion" that "is dependent upon the circumstances of the particular case." *Id.* at 433 (internal quotation marks omitted).

The moving party bears the burden of showing that this extraordinary remedy is warranted upon consideration of 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." *Id.* at 433–34 (internal quotation marks omitted). The first two factors "are the most critical," *id.* at 434, and when the government is a party, its "harm and the public interest are one and the same, because the government's interest *is* the public interest," *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (emphasis in original); *see Nken*, 556 U.S. at 435.

"The manner in which courts should weigh the four factors 'remains an open question' in this Circuit." *Nora v. Wolf*, No. 20-cv-0993, 2020 WL 3469670, at *6 (D.D.C. Jun. 25, 2020) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014)). At least in the context of weighing whether to grant a preliminary injunction, the D.C. Circuit has "suggested, without deciding," that *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), could be read to require a plaintiff "to independently demonstrate both a likelihood of success on the merits and irreparable harm," *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 26 (D.D.C. 2016) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011)). But in the absence of clear guidance, courts in this Circuit have continued to analyze the factors "on a sliding scale whereby a strong showing on one factor could make up for a weaker showing on another." *NAACP v. Trump*, 321 F. Supp. 3d 143, 146 (D.D.C. 2018) (internal quotation marks omitted). Under this framework, a movant may make up for a lower likelihood of success on the merits "with a strong showing as to the other three factors, provided that the issue on appeal presents a 'serious legal question' on the merits." *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 560 (D.D.C. 2018) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Here, the Court will adopt the approach taken by other judges

and "apply th[is] sliding scale approach" to determine whether the Department is entitled to a stay pending resolution of its appeal. *See NAACP*, 321 F. Supp. 3d at 146 (internal quotation marks omitted). To prevail under this standard, the Department "need only raise a serious legal question on the merits" if the "other factors strongly favor issuing a stay." *Id.* (internal quotation marks omitted).

II. ANALYSIS

A. Likelihood of Success

As to the first factor—the likelihood of success on the merits—"[i]t is not enough that the chance of success on the merits [is] better than negligible." *Nken*, 556 U.S. at 434 (internal quotation marks omitted). Rather, it must be "substantial." *Holiday Tours*, 559 F.2d at 843.

Here, the Department has not shown a substantial likelihood of success on the merits. The Public Health Service Act provides, in relevant part:

> The [CDC], with the approval of the Secretary, 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 [Secretary] 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.

42 U.S.C. § 264(a).

The Department continues to argue that this statutory provision vests the Secretary with "broad authority to make and enforce" *any* regulations that "in his judgment are necessary to prevent the spread of disease," Defs.' Mot. for Summ. J. at 11 (internal quotation marks omitted), Dkt. 26, and that the second sentence of § 264(a) imposes no limit on this "broad grant of authority," Defs.' Emergency Mot. for Stay Pending Appeal ("Defs.' Mot. to Stay") at 7–8.

The Court disagrees. Like other courts before it, this Court concluded in its May 5, 2021 Memorandum Opinion that the broad grant of rulemaking authority in the first sentence of § 264(a) is tethered to—and narrowed by—the second sentence, which enumerates various measures the Secretary "may provide for" to carry out and enforce regulations issued under § 264(a): "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 U.S.C. § 264(a); *see* Mem. Op. of May 5, 2021 at 11, Dkt. 54. The Department is correct that this list of measures is not exhaustive, as the Secretary may provide for "other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a). But these "other measures" are "controlled and defined by reference to the enumerated categories before it." *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 522–23 (6th Cir. 2021) (internal quotation marks and alteration omitted).

With that in mind, the statute could be read as requiring that the enumerated measures be directed toward "animals or articles," 42 U.S.C. § 264(a), that are "found to be so infected or contaminated as to be sources of dangerous infection to human beings," *id.*; *see Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720, at *10 (N.D. Ohio Mar. 10, 2021); Mem. Op. of May 5, 2021 at 11–12. Alternatively, the statute could be interpreted to tie the limitations surrounding "animals or articles" solely to "destruction." 42 U.S.C. § 264(a). But even then, the enumerated measures—"inspection, fumigation, disinfection, sanitation, [and] pest extermination," *id.*—are "by their common meanings and understandings. . . tied to specific, identifiable properties," *Skyworks*, 2021 WL 911720, at *9. And under either reading, an eviction moratorium is "radically unlike" the measures enumerated in the statute. *See Tiger Lily*, 992 F.3d at 524 (interpreting 42 U.S.C. § 264(a)). As this Court

and others have noted, to read the enumerated measures in § 264(a) as imposing no limits on the Secretary's authority to "make and enforce regulations" would raise serious constitutional concerns. *See* Mem. Op. of May 5, 2021 at 14 (collecting cases).

The Department also contends it has a "substantial likelihood of success on appeal because Congress ratified the CDC Order in the 2021 Consolidated Appropriations Act." Defs.' Mot. to Stay at 2. In § 502 of that Act, Congress provided:

> 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. 55292 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078–79 (2020).

It is true that Congress may "give the force of law to official action unauthorized when taken." *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–02 (1937). But to ratify such action, Congress must make its intention clear. *See United States v. Heinszen & Co.*, 206 U.S. 370, 390 (1907); *see also Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 n.7 (D.C. Cir. 2006) (noting ratification may occur when there is a "clear statement of congressional approval") (internal citation omitted). While no "magic words are required," Defs.' Reply in Supp. of Partial Mot. to Dismiss at 5, Dkt. 38, Congress must use "clear and unequivocal language," *EEOC v. CBS, Inc.*, 743 F.2d 969, 974 (2d Cir. 1984), to ratify "official action unauthorized when taken," *Swayne & Hoyt*, 300 U.S. at 302.

Congress did not do so here. As other cases illustrate, the language of § 502 falls short of statutory provisions courts have found to ratify agency action. *See, e.g., Thomas v. Network Sols., Inc.*, 176 F.3d 500, 505 (D.C. Cir. 1999) ("is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically

authorized and directed"); *Patchak v. Jewell*, 109 F. Supp. 3d 152, 158 (D.D.C. 2015) ("are ratified and confirmed"), *aff'd,* 828 F.3d 995 (D.C. Cir. 2016), *aff'd sub nom. Patchak v. Zinke*, 138 S. Ct. 897 (2018); *Am. Fed'n of Gov't Emps. v. D.C. Fin. Resp. & Mgmt. Assistance Auth.*, 133 F. Supp. 2d 75, 77–78 (D.D.C. 2001) ("is hereby ratified and approved"); *James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988) ("Congress hereby ratifies and confirms"), *aff'd sub nom. James v. Lujan*, 893 F.2d 1404 (D.C. Cir. 1990); *Heinszen*, 206 U.S. at 381 ("hereby legalized and ratified" and "is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed"); *cf. Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944) (ratification may occur through an appropriation only if the appropriation "plainly show[s] a purpose to bestow the precise authority which is claimed."); *Schism v. United States*, 316 F.3d 1259, 1290 (Fed. Cir. 2002) ("[R]atification ordinarily cannot occur in the appropriations context unless the appropriations bill itself *expressly* allocates funds for a specific agency or activity.") (emphasis added).

By contrast, when Congress enacted § 502 of the Consolidated Appropriations Act, it simply acknowledged that the CDC issued its order pursuant to the Public Health Service Act. Mem. Op. of May 5, 2021 at 18. It did not expressly approve of the agency's interpretation of 42 U.S.C. § 264(a), nor did it provide the agency with any additional statutory authority. *See id.* "All § 502 did was congressionally extend the agency's action until January 31, 2021." *Tiger Lily*, 992 F.3d at 524. Because that date has now passed—and Congress has therefore withdrawn its support—the CDC Order must rely exclusively on the text of the Public Health Service Act. *See id.*

The Department also points to the "nationwide reach of this Court's judgment," Defs.' Reply in Supp. of Mot. to Stay at 7, Dkt. 59, and insists that "traditional principles of equity and

Article III jurisdiction *require* limiting relief to the Plaintiffs," Defs.' Mot. to Stay at 8–9 (emphasis added). This argument, however, is "at odds with settled precedent." *See O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019). The D.C. Circuit has instructed that when a regulation is declared unlawful, "the ordinary result is that the rule[] [is] vacated—not that [its] application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted). In this Circuit, "the law is clear that when a court vacates an agency rule, the vacatur applies to all regulated parties, not only those formally before the court." *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 415 (D.D.C. 2020); *O.A.*, 404 F. Supp. 3d at 152 (collecting cases).

For these reasons and for those stated in the Court's May 5, 2021 Memorandum Opinion, the Department has not shown a substantial likelihood of success on the merits. Arguably, the Department's failure to meet this standard is a fatal flaw for its motion. *See M.M.V. v. Barr*, 459 F. Supp. 3d 1, 4 (D.D.C. 2020) (citing *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (per curiam)). Indeed, in another case challenging the CDC Order, the Sixth Circuit denied a similar emergency motion for stay on this ground alone. *See Tiger Lily*, 992 F.3d at 524 ("Given that the government is unlikely to succeed on the merits, we need not consider the remaining stay factors.").

But, as noted, in this Circuit a movant's failure to demonstrate a likelihood of success on the merits does not preclude a stay if they have raised a "serious legal question on the merits." *See Cigar Ass'n of Am.*, 317 F. Supp. 3d at 560 (internal quotation marks omitted); *Holiday Tours*, 559 F.2d at 843. Although a majority of courts that have addressed the lawfulness of the CDC Order reached the same conclusion as this Court, *see* Mem. Op. of May 5, 2021 at 5 (collecting cases), two have disagreed, at least at the preliminary injunction stage, *see Brown v.*

Azar, No. 20-cv-03702, 2020 WL 6364310, at *9–11 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. 2020); *Chambless Enters., LLC v. Redfield*, No. 20-cv-01455, 2020 WL 7588849, at *5–9 (W.D. La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. 2021). Given the diverging rulings of these courts and the significance of the CDC Order, the Department has met this less demanding standard. *See Cigar Ass'n of Am.*, 317 F. Supp. 3d at 560 (internal quotation marks omitted). The Department therefore can obtain a stay if it makes a sufficiently strong showing as to the remaining stay factors. *See NAACP*, 321 F. Supp. 3d at 146.

B. Remaining Factors

As to the second factor—whether the movant will be irreparably injured absent a stay—the movant must make a strong showing "that the injury claimed is both certain and great." *Cuomo*, 772 F.2d at 976 (internal quotation marks omitted). "Probability of success is inversely proportional to the degree of irreparable injury evidenced." *Id.* at 974. "A stay may be granted with either a high probability of success and some injury, or vice versa." *Id.*

The Department has made a showing of irreparable injury here. As the federal agency tasked with disease control, the Department, and the CDC in particular, have a strong interest in controlling the spread of COVID-19 and protecting public health. The CDC's most recent order is supported by observational data analyses that estimate that as many as 433,000 cases of COVID-19 and thousands of deaths could be attributed to the lifting of state-based eviction moratoria. *See* 86 Fed. Reg. 16,731, 16,734 (Mar. 31, 2021). The CDC Order also cites a mathematical model that "estimate[s] that anywhere from 1,000 to 100,000 excess cases per million population could be attributable to evictions depending on the eviction and infection rates." *Id.* To be sure, these figures are estimates, but they nonetheless demonstrate that lifting the national moratorium will "exacerbate the significant public health risks identified by [the]

CDC." Defs.' Mot. to Stay at 3. Even though "vaccinations are on the rise," Pls.' Opp'n at 2, at least as of last week, the nation was averaging "more than 45,000 new infections per day," Defs.' Mot. to Stay at 5–6, and the recent "emergence of variants" presents yet another potential cause for concern, *see* 86 Fed. Reg. at 16,733. Thus, the risks to public health continue.

As to the third factor—the risk of injury to the plaintiffs—the economic impact of the CDC Order is indeed substantial. *See* Mem. Op. of May 5, 2021 at 15 n.4. The plaintiffs assert that landlords will continue to lose between $13.8 and $19 billion each month in unpaid rent as a result of the CDC Order, and that over the course of the year their cumulative losses will be close to $200 billion. Pl's Opp'n at 7 (citing Decl. of Scholastica Cororaton ¶¶ 15, 17, Dkt. 6-4).

While these financial losses are severe, some are recoverable. *See Brown*, 2020 WL 6364310, at *20 (explaining that the fact "tenants may not currently be able to afford their rent" does not mean that the plaintiffs "will likely never be able to collect a judgment"). The CDC Order itself does not excuse tenants from making rental payments. *See* 86 Fed. Reg. at 16,736. It simply delays them. *See id*. Congress also has taken steps to provide financial relief to tenants and landlords through the Consolidated Appropriations Act, § 501, 134 Stat. at 2070–78, and the American Rescue Plan Act, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (2021). These efforts help mitigate the landlords' financial losses.

A stay to allow the D.C. Circuit time to review this Court's ruling, presumably on an expedited basis, will no doubt result in continued financial losses to landlords. But the magnitude of these additional financial losses is outweighed by the Department's weighty interest in protecting the public. *See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129–30 (6th Cir. 2020).

Finally, the fourth factor—the public interest—weighs in favor of a stay for the public health reasons discussed. The fact that this "litigation presents questions of 'extraordinary public moment' [is] a consideration which [also] militates in favor of a stay." *Al-Adahi v. Obama*, 672 F. Supp. 2d 81, 84 (D.D.C. 2009) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936)).

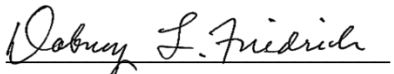
***

Weighing each of the traditional stay factors, the Court will exercise its discretion to grant the Department's Emergency Motion for Stay Pending Appeal. Although the Court believes, as one Circuit has already held, *see Tiger Lily*, 992 F.3d at 524, there is not a substantial likelihood the Department will succeed on appeal, the CDC's nationwide eviction moratorium raises serious legal questions. The Department also has made a sufficiently strong showing as to the remaining factors to justify a stay of this Court's decision.

The Court remains mindful that landlords across the country have incurred substantial economic hardships as a result of the CDC's nationwide moratorium on evictions. The longer the moratorium remains in effect, the more these hardships will be exacerbated. Even so, given the public health consequences cited by the CDC, a stay is warranted.

CONCLUSION

For the foregoing reasons, the Department's Emergency Motion for Stay Pending Appeal is granted. A separate order consistent with this decision accompanies this memorandum opinion.



DABNEY L. FRIEDRICH
United States District Judge

May 14, 2021