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

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

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

v.

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

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statutes:

Regulatory Material:

Legislative Material:

Other Authorities:

INTRODUCTION

In March 2021, the Centers for Disease Control and Prevention (CDC) extended, through June 30, a moratorium on certain residential evictions as a critical component of the country's ongoing fight against COVID-19. The district court vacated the CDC Order for lack of statutory authority but stayed its order pending appeal. Plaintiffs now ask the Court to grant relief that would permit landlords across the country to evict tenants immediately. Their motion should be denied. Plaintiffs' challenge to the moratorium has no merit, and the balance of equities overwhelmingly favors the government.

To curb the spread of COVID-19, the moratorium temporarily bars the eviction of certain individuals who would likely move into settings, such as homeless shelters, where it is impractical to adhere to the CDC's guidance on quarantine, isolation, and social distancing. The moratorium does not excuse a tenant's obligation to pay rent, nor does it prevent a landlord from initiating eviction proceedings as long as the tenant is not physically removed while the moratorium is in place.

The moratorium was first issued by the CDC in September 2020 pursuant to section 361 of the Public Health Service Act, 42 U.S.C. § 264, which authorizes the agency to take actions as necessary to prevent the

interstate spread of communicable disease. In December 2020, Congress extended, through January 31, 2021, the effective date of "[t]he order issued by the [CDC] under section 361 of the Public Health Service Act (42 U.S.C. 264)." Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, § 502, 134 Stat. 1182, 2078-79 (2020) (2021 Appropriations Act).

At the same time, Congress appropriated $25 billion to help pay rent and rental arrears. *See id.* § 501, 134 Stat. at 2070-78. Congress later appropriated another $21.5 billion for that purpose. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54. These appropriations are meant to work in tandem with the eviction moratorium, which helps to "ensure that millions of renters across America are not evicted while waiting to receive assistance." U.S. House Comm. on Fin. Servs., *COVID-19 Stimulus Package: Temporary Extension of the CDC Eviction Moratorium & Emergency Rental Assistance*, https://go.usa.gov/xss3y (last visited May 23, 2021); *see also* 167 Cong. Rec. H1281 (daily ed. Mar. 10, 2021) (statement of Rep. Waters) (urging the CDC to "again extend the federal eviction moratorium that expires on March 31, 2021 so that grantees have time to distribute assistance to renters in need").

Plaintiffs nonetheless insist that the moratorium must be terminated immediately. That contention is baseless. The moratorium falls within § 264's plain terms. By approving the moratorium as an exercise of the § 264 authority, Congress ensured that the CDC could extend the moratorium as required by the conditions of the pandemic, and that renters would not be evicted while awaiting the emergency assistance that Congress provided.

The balance of equities likewise precludes the relief that plaintiffs seek. As the district court explained, research amassed by the CDC showed that evictions exacerbate the spread of COVID-19, and that 30-40 million people could be at risk of eviction in the absence of a moratorium. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,733 (Mar. 31, 2021). Moreover, although plaintiffs emphasize that vaccines are being distributed, most Americans are not yet fully vaccinated. Plaintiffs provide no basis to second-guess the CDC's expert judgment that lifting the moratorium under such circumstances would be premature. *See id.*

Nor do plaintiffs identify any significant countervailing interest. Every court to consider the question has found that landlords suffer no irreparable injury as a result of the moratorium. Indeed, the publication on which

plaintiffs rely (Mot. 21-22) announced the allocation of the second wave of federal rental assistance and emphasized that "[t]his infusion of additional support will benefit both renters and landlords." U.S. Dep't of Treasury, *Emergency Rental Assistance Fact Sheet* 1 (May 7, 2021), https://go.usa.gov/xH73R. Plaintiffs' statement that "neither of the individual plaintiffs here has received any federal rental assistance to date," Mot. 23, suggests that their companies may have received such assistance already. Regardless, plaintiffs cannot dispute that Congress appropriated $46.5 billion designed to reach landlords whose tenants have fallen behind on rent due to the pandemic.

The Court should, at a minimum, deny plaintiffs' motion insofar as it seeks relief for non-parties. Doing so will not prejudice plaintiffs, and there is no sound reason to effectively preempt the similar cases now pending before the Fifth, Sixth, and Eleventh Circuits.

STATEMENT

I. The Temporary Eviction Moratorium And Related Appropriations For Emergency Rental Assistance

A. The COVID-19 pandemic has killed more than half a million Americans, devastated industries that depend on the movement of people, and resulted in unprecedented restrictions on interstate and foreign travel.

To curb the pandemic and mitigate its economic fallout, the federal government has deployed an array of measures, including trillions of dollars of emergency spending.

The measure at issue here—a moratorium on certain evictions—forms a crucial part of a multi-pronged effort to prevent the spread of COVID-19. The moratorium temporarily bars the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thereby increasing the spread of COVID-19. The CDC first issued the moratorium in September 2020, pursuant to its authority to "make and enforce such regulations as in [the agency's] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession," Public Health Service Act, Pub. L. No. 78-410, § 361(a), 58 Stat. 682, 703 (1944) (codified at 42 U.S.C. § 264(a)); *see also* 42 C.F.R. § 70.2 (delegating enforcement authority to the CDC).[1] *See* Temporary Halt

[1] The Public Health Service Act assigned authority to the Surgeon General, but these powers were later transferred to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services. *See* Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966), *reprinted in* 80 Stat. 1610 (1966); *see also* 20 U.S.C. § 3508(b).

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

In issuing the moratorium, the CDC relied upon research indicating that as many as 30 to 40 million people in the United States could be at risk of eviction in the absence of state and local protections and that "mass evictions would likely increase the interstate spread of COVID-19." 85 Fed. Reg. at 55,295. The CDC explained how congregate living situations, such as homeless shelters, exacerbate the spread of COVID-19. *See id.* at 55,294-95. Adherence to infection-control measures such as quarantine and social distancing is difficult in these settings, *see id.* at 55,292, and "[e]xtensive outbreaks of COVID-19 have been identified in homeless shelters," including in Seattle, Boston, and San Francisco, *id.* at 55,295.

In December 2020, Congress extended the moratorium through January 31, 2021. In relevant part, that legislation 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.

2021 Appropriations Act, § 502, 134 Stat. at 2078-79.

In the immediately preceding section of the same legislation, Congress appropriated $25 billion in emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent due to the pandemic. *See* 2021 Appropriations Act, § 501, 134 Stat. at 2070-73. This appropriation works together with the moratorium, which helps "ensure that millions of renters across America are not evicted while waiting to receive assistance." U.S. House Comm. on Fin. Servs., *COVID-19 Stimulus Package: Temporary Extension of the CDC Eviction Moratorium & Emergency Rental Assistance*, *supra*.

The CDC extended the moratorium in January 2021 and March 2021. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021); 86 Fed. Reg. 16,731. Also in March 2021, shortly before the CDC's most recent extension of the moratorium, Congress appropriated an additional $21.5 billion in rental assistance. *See* American Rescue Plan Act, § 3201(a)(1), 135 Stat. at 54. Like the $25 billion provided by the 2021 Appropriations Act, this additional funding is meant to work together with the moratorium to help ensure that renters are not evicted (exacerbating the spread of the virus) before emergency assistance is received. *See*, *e.g.*, 167 Cong. Rec. H1281 (statement

of Rep. Waters) (urging the CDC to "again extend the federal eviction moratorium that expires on March 31, 2021 so that grantees have time to distribute assistance to renters in need").

In extending the moratorium through June 30, 2021, the CDC found an ongoing need to "maintain COVID-19 precautions to avoid further rises in transmission and to guard against yet another increase in the rates of new infections," "[e]ven as COVID-19 vaccines continue to be distributed." 86 Fed. Reg. at 16,733. As of March 25, 2021 (the time of the extension), nearly 30 million COVID-19 cases, resulting in more than 540,000 deaths, had been reported in the United States. *Id.* at 16,732. The CDC concluded that continued vigilance was particularly important because new variants of the virus showed "increased transmissibility as well as possible increased mortality." *Id.* at 16,733. In light of "the persistent and dynamic nature of the pandemic," the CDC found it necessary to continue the protections of the eviction moratorium to control the spread of COVID-19. *Id.* at 16,733-34.

B. While the temporary eviction moratorium remains in effect, landlords may not evict covered persons from residential properties for the nonpayment of rent. *See* 85 Fed. Reg. at 55,292, 55,297. The moratorium applies only to individuals who, if evicted, would likely become homeless or

be forced to live in close quarters in a congregate or shared living setting. *Id.* at 55,293. To qualify as a "[c]overed person," a tenant must provide a sworn declaration to her landlord indicating that she (1) "has used best efforts to obtain all available government assistance for rent or housing"; (2) satisfies certain income requirements; (3) "is unable to pay the full rent . . . due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses"; (4) "is using best efforts to make timely partial payments that are as close to the full payment as . . . permit[ted]"; and (5) "has no other available housing options" and therefore would likely become homeless or be forced to "live in close quarters in a new congregate or shared living setting" if evicted. *Id.*

Although the moratorium temporarily protects covered persons from eviction for failure to pay rent, it does not excuse their obligations to pay rent or to comply with other obligations of their lease. 85 Fed. Reg. at 55,294. And even if a tenant qualifies as a covered person, the moratorium does not bar a landlord from commencing a state-court eviction proceeding, provided that actual physical removal does not occur while the moratorium remains in effect. *See id.* at 55,293 (defining "[e]vict" as "to remove or cause the removal of"); *see also* CDC, *HHS/CDC Temporary Halt in Residential*

Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions 1, https://go.usa.gov/xHvzV (last visited May 23, 2021) (stating that landlords are not prevented from "starting eviction proceedings, provided that the actual physical removal of a covered person for non-payment of rent does NOT take place during the period of the Order").

II. Proceedings Below

Plaintiffs are two individual landlords, the businesses they use to manage Georgia or Alabama properties, and two associations in those States. Compl. ¶¶ 16-21 (Dkt. No. 1). As relevant here, plaintiffs alleged that the temporary eviction moratorium exceeds the CDC's statutory authority.

The district court vacated the CDC Order as "unambiguously foreclosed by the plain language of the Public Health Service Act." Op. 19 (Dkt. No. 54). However, the court granted the government's motion for a stay pending appeal. The court reasoned that there is a serious legal question on the merits; that the government made a strong showing of irreparable harm; and that the landlords' economic losses are, at least in part, recoverable and mitigated by Congress's appropriations for rental assistance. *See* Stay Op. 7-9 (Dkt. No. 61). The court concluded that any

additional financial losses arising from a stay pending appeal are outweighed by the government's "weighty interest in protecting the public." *Id.* at 9.

ARGUMENT

Plaintiffs ask this Court to grant relief that would allow landlords across the country to evict tenants immediately. There is no basis for such extraordinary relief. Plaintiffs' challenge to the moratorium is meritless, and the balance of equities overwhelmingly favors the government.

I. Plaintiffs' Challenge To The Moratorium Is Meritless

A. Plaintiffs acknowledge (Mot. 1) that Congress and the States have relied on temporary eviction moratoria to curb the pandemic, and they conceded below that "a moratorium on evictions may prevent the spread of COVID-19." Dkt. No. 6-1, at 1. Nonetheless, they contend that the CDC lacked authority to extend its moratorium. That contention is meritless.

In issuing and extending the moratorium, the CDC relied on its authority under 42 U.S.C. § 264(a), which allows the agency "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" from State to State or from foreign countries into the United States. *See* 86 Fed. Reg. at 16,732-33. That is precisely the judgment that the CDC made in issuing the

moratorium. And before the CDC issued any extension, Congress had not only extended the initial moratorium (through January 31, 2021) but also specified that it was extending the order issued by the CDC "under section 361 of the Public Health Service Act (42 U.S.C. 264)." 2021 Appropriations Act, § 502, 134 Stat. at 2078-79.

By extending the order issued as an exercise of the § 264 authority, Congress ensured that the CDC could further extend its moratorium as public-health conditions required. The CDC's authority to extend the moratorium was not, as the district court suggested, an "elephant" hidden in a "mousehole." Op. 16. Congress specifically described the moratorium as an exercise of the CDC's § 264(a) authority and—in the adjacent provision of the same legislation—appropriated tens of billions of dollars for emergency rental assistance that was meant to work in tandem with the moratorium.

Even if the scope of § 264(a) had been unclear, Congress could clarify it going forward. *See Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality op.) (statutory interpretation includes "later-enacted statutes"). The district court mistakenly declared that "Congress merely extended the CDC Order for a limited 30-day duration." Op. 18. That overlooks *how* Congress accomplished the extension. Congress did not impose a 30-day moratorium

itself; Congress extended the effective date of the order that the CDC had issued under § 264 and thus confirmed the CDC's ability to further extend it.

The case law cited by the district court is inapposite, because the issue here is not whether Congress gave "the force of law to official action unauthorized when taken." Stay Op. 5. Plaintiffs seek prospective relief, and the only question is whether Congress confirmed in § 502 of the 2021 Appropriations Act that the CDC could extend the moratorium going forward as an exercise of its § 264 authority. For reasons just discussed, the text and context of § 502 made the CDC's authority to extend the moratorium clear. Indeed, plaintiffs provide no other explanation for the language that Congress used in § 502 and no reason that Congress would have wanted the moratorium to terminate on January 31. Clearly, Congress did not expect the pandemic to end by January 31, nor did Congress expect the rental assistance it appropriated in § 501 to reach landlords and tenants by that date. On the contrary, Congress anticipated that it would take 30 days just to allocate those funds to state and local governments, which in turn would establish programs to distribute the funds to landlords and tenants. *See* 2021 Appropriations Act, § 501(b)(1)(A), 134 Stat. at 2070; *see also, e.g.*, Georgia Dep't of Community Affairs, *State of Georgia's U.S.*

Treasury Emergency Rental Assistance Program, https://georgiarentalassistance.ga.gov/ (last visited May 23, 2021) (stating that Georgia began distributing its rental assistance allotment in March 2021). Accordingly, Congress's enactment left no doubt that the CDC could further extend the moratorium as necessary to control the pandemic.

B. In any event, the moratorium falls within the plain terms of § 264(a). As other courts have recognized, "Congress' intent, as evidenced by the plain language" of that provision's first sentence, "is clear: Congress gave the [agency] broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases." *Chambless Enters., LLC v. Redfield*, --- F. Supp. 3d ---, No. 20-cv-1455, 2020 WL 7588849, at *5 (W.D. La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. Jan. 22, 2021) (quoting *Brown v. Azar*, 497 F. Supp. 3d 1270, 1281 (N.D. Ga. 2020), *appeal filed*, No. 20-14210 (11th Cir. Nov. 9, 2020)).

Those decisions explained why the district court here was wrong to conclude that "the broad grant of rulemaking authority in the first sentence of § 264(a) is tethered to—and narrowed by—the second sentence." Stay Op. 4. The second sentence "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.'" *Id.* But the structure of § 264 shows that the authority granted by § 264(a) is not tethered to its second sentence. Sections 264(b)–(d) restrict the circumstances in which the CDC may provide for the "apprehension, detention, examination, or conditional release of individuals," but those subsections contain no affirmative grant of authority. "The presence of the additional sub[s]ections governing detainment of individuals means that the list contained in the first sub[s]ection is not an exhaustive list of the permissible measures available" to the agency. *Chambless*, 2020 WL 7588849, at *7 (quoting *Brown*, 497 F. Supp. 3d at 1282). The district court here mistakenly regarded "the quarantine provisions in § 264(b)–(d)" as "structurally separate from those in § 264(a)." Op. 17 (citing *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, 992 F.3d 518, 524 (6th Cir. 2021) (motions panel order denying stay)).[2] Subsections 264(b)–(d) place limits on,

[2] The motions panel's order in *Tiger Lily* is "not strictly binding upon subsequent panels." *Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014). Merits briefing in *Tiger Lily* is underway.

but provide no affirmative authority for, involuntary quarantine. That quarantine authority is located in § 264(a).

Nor is the eviction moratorium "'radically unlike' the measures enumerated in the statute." Stay Op. 4 (quoting *Tiger Lily*, 992 F.3d at 524). On the contrary, the moratorium facilitates compliance with quarantine and other infection-control measures. Because COVID-19 is widespread and even asymptomatic people may be infected, the CDC has relied largely on self-quarantine, self-isolation, and social distancing. *See, e.g.*, CDC, *COVID-19: When to Quarantine*, https://go.usa.gov/xHuYW (last visited May 23, 2021). As the CDC explained, the moratorium applies to individuals who, if evicted, would be thrust into settings that make it difficult to adhere to these infection-control measures. *See* 85 Fed. Reg. at 55,292.

The district court expressed concern that the broad language in § 264(a)'s first sentence makes "the second sentence superfluous." Op. 13. Even if that were correct, "the canon against superfluity" assists "only where a competing interpretation gives effect 'to every clause and word of a statute.'" *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). Here, the district court's interpretation would make § 264(a)'s first sentence superfluous. *See Skyworks, Ltd. v. CDC*, --- F. Supp. 3d ---, No. 20-cv-2407,

2021 WL 911720, at *9 (N.D. Ohio Mar. 10, 2021) (acknowledging that § 264(a)'s "first sentence sweeps broadly and appears to support [the government's] argument"), *appeal filed*, No. 21-3443 (6th Cir. May 7, 2021).

In any event, the government's position results in no superfluity. Under the Supreme Court precedent in effect when the Public Health Service Act was enacted, explicit statutory text was required to authorize measures implicating the Fourth Amendment, including administrative inspections. *See, e.g.*, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 201-02 & nn.26, 27 (1946). It is thus unsurprising that, in the 1944 legislation, Congress enumerated measures that could entail intrusions on private property, such as the inspection and fumigation of ships believed to be carrying infected fleas or rats, and specifically addressed the circumstances in which individuals could be involuntarily detained.

C. The district court's reliance on the canon of constitutional avoidance was misplaced because the temporary eviction moratorium does not raise any serious constitutional issue. The court cited another district court's ruling that the moratorium exceeds Congress's Commerce Clause power. *See* Op. 14 (citing *Terkel v. CDC*, --- F. Supp. 3d ---, No. 20-cv-0564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), *appeal filed*, No. 21-40137 (5th Cir. Mar. 3,

2021)). That ruling is foreclosed by Supreme Court precedent. Congress undoubtedly can act to control an "interstate epidemic" that has killed more than half a million Americans and devastated domestic industries. *United States v. Comstock*, 560 U.S. 126, 148 (2010) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause)). And the moratorium regulates contracts for the "rental of real estate," which the Supreme Court held is "unquestionably" an activity affecting interstate commerce. *Jones v. United States*, 529 U.S. 848, 856 (2000) (quoting *Russell v. United States*, 471 U.S. 858, 862 (1985)). Evictions—which are a contractual remedy for failure to abide by the terms of rental arrangements—are as much a part of that economic activity as the other transactions associated with the rental market. Plaintiffs' assertion that the moratorium "override[s] the usual constitutional balance of federal and state powers," Mot. 13, is meritless. COVID-19 does not respect state boundaries, and § 264 expressly authorizes actions necessary to prevent the interstate spread of communicable disease.

The district court's suggestion that the moratorium implicates the nondelgation doctrine, *see* Op. 14, is equally unfounded. As an initial matter, Congress itself approved the moratorium as an exercise of the § 264(a) authority. No plausible nondelegation claim can be asserted under these

circumstances. Moreover, by its terms, § 264(a) permits only actions necessary to prevent the introduction or spread of communicable disease from State to State or from foreign countries into the United States. That standard is at least as intelligible as the standards upheld by the Supreme Court in other cases, which the district court did not address. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.) (explaining that the Supreme Court has "over and over upheld even very broad delegations," including delegations to agencies to regulate in the "'public interest'"; to set "'fair and equitable' prices and 'just and reasonable' rates"; and to issue air quality standards as "'requisite to protect the public health'").[3]

II. The Balance Of Equities Overwhelmingly Favors The Government

Every federal court to consider the issue has found that landlords suffer no irreparable injury as a result of the temporary eviction

[3] Plaintiffs argue that the district court could not issue a stay pending appeal unless it concluded that the government was likely to prevail on appeal. But if that were the standard, a district court could never issue a stay pending appeal. Plaintiffs' argument has no practical effect here, however, because their challenge fails on the merits.

moratorium.[4] The moratorium does not excuse a tenant's obligation to pay rent, and temporary monetary harms are not irreparable. As other courts have explained, a tenant's inability to remain current on rent during the pandemic does not mean that the tenant will be unwilling or unable to pay in the future. And Congress appropriated two rounds of funding for rental assistance that directly benefits landlords like plaintiffs. For example, in Georgia (where some plaintiffs do business), the State received $552 million under § 501 of the 2021 Appropriations Act. *See* Georgia Dep't of Community Affairs, *State of Georgia's U.S. Treasury Emergency Rental Assistance Program*, https://georgiarentalassistance.ga.gov/. Georgia explained that these funds "will be distributed directly to landlords" and that "eligible applicants will receive up to 12 months of payment relief." *Id.* The second round of federal funding ($21.5 billion) was allocated to state and local

[4] *See Brown*, 497 F. Supp. 3d 1270 (denying preliminary injunction), *appeal filed*, No. 20-14210 (11th Cir. Nov. 9, 2020), *mot. for inj. pending appeal denied*, No. 20-14210 (11th Cir. Dec. 17, 2020); *Tiger Lily LLC v. U.S. Dep't of Hous. & Urban Dev.*, --- F. Supp. 3d ---, No. 20-cv-2692, 2020 WL 7658126 (W.D. Tenn. Nov. 6, 2020) (denying preliminary injunction); *Chambless*, 2020 WL 7588849 (denying preliminary injunction), *appeal filed*, No. 21-30037 (5th Cir. Jan. 22, 2021); *Dixon Ventures, Inc. v. Department of Health & Human Servs.*, No. 20-cv-1518, 2021 WL 1604250 (E.D. Ark. Apr. 23, 2021) (denying preliminary injunction); *KBW Inv. Props. LLC v. Azar*, No. 20-cv-4852 (S.D. Ohio Sept. 25, 2020) (denying temporary restraining order).

governments on May 7, and "[t]his infusion of additional support will benefit both renters and landlords." U.S. Dep't of Treasury, *Emergency Rental Assistance Fact Sheet* 1, https://go.usa.gov/xH73R.

Plaintiffs represent to this Court that "neither of the individual plaintiffs here has received any federal rental assistance to date." Mot. 23. This statement suggests that their companies may have received such assistance already. But even if they or their companies have not received assistance "to date," *id.*, they may do so in the future.[5]

Whereas plaintiffs failed to show irreparable harm, courts have consistently recognized that enjoining the eviction moratorium during the pandemic is contrary to the public interest. *See, e.g.*, *Brown*, 497 F. Supp. 3d at 1298. Although plaintiffs insist that the moratorium has outlived its usefulness, *see* Mot. 24, they provide no basis to second-guess the CDC's judgment that lifting the moratorium would be premature. As of May 23, only 39.2% of the population is fully vaccinated. *See* CDC, *COVID Data Tracker: COVID-19 Vaccinations in the United States*,

[5] Plaintiffs overstate the nationwide economic impact of the moratorium. *See* Dkt. No. 26, at 15 n.4.

https://go.usa.gov/xHJCe (last visited May 23, 2021). The country is still averaging more than 24,000 new infections per day. *See* CDC, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, https://go.usa.gov/xHJCz (last visited May 23, 2021). And many counties are still experiencing substantial or high rates of transmission. *See* CDC, *COVID Data Tracker: COVID-19 Integrated County View*, https://go.usa.gov/xHJrq (last visited May 23, 2021). It was eminently reasonable for the CDC to conclude that lifting the moratorium under such circumstances could lead to community spread during a time when large segments of the population are unprotected. *See* 86 Fed. Reg. at 16,733.

III. At A Minimum, The Court Should Deny Relief To Non-Parties

At a minimum, the Court should deny plaintiffs' motion insofar as it seeks relief for non-parties. Such a denial would cause plaintiffs no prejudice while protecting the public health.

The Supreme Court has emphasized that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and equitable relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,"

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). And it is axiomatic that a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed. 2011)).

"Nothing in the language of the [Administrative Procedure Act (APA)]" requires "an order setting aside [an invalid] regulation for the entire country." *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393-94 (4th Cir. 2001). Nationwide relief creates "an absurd situation in which" the agency "must prevail in every single case brought against [an agency action] in order for its interpretation to prevail." *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 474 (6th Cir. 2021). Such orders "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump. v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

Nor should "one circuit's statutory interpretation" foreclose "review of the question in another circuit." *Holland v. National Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002). That concern is acute here because challenges to the eviction moratorium are pending before the Fifth, Sixth, and Eleventh Circuits. Indeed, the Eleventh Circuit heard oral argument in *Brown* on May 14.

The district court understood this Court's decision in *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), to leave it with no choice but to issue a nationwide vacatur. *See* Op. 20; 5/5/2021 Minute Order. However, that decision need not and should not be read to reject bedrock principles of standing and equity or to prohibit the judges in this Circuit from extending comity to the judges of other circuits. Although *National Mining* described vacatur as the "ordinary result" of a successful APA action, 145 F.3d at 1409, the Court relied in part on the concern that limiting relief to the plaintiffs would trigger "a flood of duplicative litigation" in the District of Columbia, *id.* Assuming that such a concern could provide a basis to grant relief to non-parties, it is not present here. Some landlords have challenged the moratorium in their home circuits, and many others have not brought suit, perhaps because the government's efforts to control the

pandemic and mitigate its economic fallout have left them better off than they would be without the government's interventions. In any event, there is no reason to anticipate a flood of new litigation.[6]

CONCLUSION

Plaintiffs' motion should be denied.

Respectfully submitted,

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MAY 2021

[6] Indeed, in *Skyworks*, the parties agreed that members of the plaintiff trade association could claim the benefit of the district court's March 10 judgment if they identified themselves. *See* Pls.' Mem. 3 n.1, *Skyworks, Ltd. v. CDC*, No. 20-2407, Dkt. No. 58 (N.D. Ohio Apr. 7, 2021). To date, no landlord has done so.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 5152 words. The motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word 2016 in proportionally spaced 14-point Century Expd BT typeface.

/s/ Alisa B. Klein
ALISA B. KLEIN

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
ALISA B. KLEIN

ADDENDUM

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

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

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

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

B. Rulings Under Review

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

C. Related Cases

This case was not previously before this Court. Related issues are pending before the courts of appeals in *Brown v. Azar*, No. 20-14210 (11th Cir.) (oral argument heard on May 14); *Chambless Enterprises, LLC v. Walensky*, No. 21-30037 (5th Cir.) (fully briefed as of May 12); *Terkel v. CDC*, No. 21-40137 (5th Cir.) (response brief due May 26); *Tiger Lily, LLC v. U.S. Department of Housing and Urban Development*, No. 21-5256 (6th Cir.) (response brief due June 11); and *Skyworks, Ltd. v. CDC*, No. 21-3443 (6th Cir.) (in abeyance pending the district court's action on the plaintiffs' Rule 59(e) motion).

/s/ Alisa B. Klein
ALISA B. KLEIN