No. 20A169

IN THE SUPREME COURT OF THE UNITED STATES

ALABAMA ASSOCIATION OF REALTORS, ET AL., APPLICANTS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

RESPONSE IN OPPOSITION TO APPLICANTS' EMERGENCY APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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UNITED STATES OF AMERICA

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The Acting Solicitor General, on behalf of the Department of Health and Human Services, et al., respectfully submits this response in opposition to applicants' emergency application in this matter.

Federal law authorizes the Secretary of Health and Human Services, through the Centers for Disease Control and Prevention (CDC), to adopt "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, ch. 373, § 361(a), 58 Stat. 703 (42 U.S.C. 264(a)). Invoking that authority, the CDC has issued a temporary moratorium on residential

evictions for nonpayment of rent. The CDC explained that the COVID-19 pandemic has created a risk of widespread evictions; that such evictions would increase the risk of spreading COVID-19 by forcing evicted renters to move to shared-living or congregate settings or to become homeless; and that the moratorium is necessary to prevent the interstate spread of the disease.

Applicants -- a group of landlords, real-estate companies, and real-estate trade associations in Alabama and Georgia -- challenged the moratorium in court. The district court granted them summary judgment, but stayed its order pending appeal. The court of appeals left the stay in place, explaining that the government had made a strong showing that it was likely to succeed on the merits and that the equities favored the stay. Applicants now ask the Circuit Justice or the Court to vacate the stay.

Under this Court's precedents, vacatur of a stay issued below is an exceptional remedy. The district court and court of appeals are ordinarily responsible for deciding whether orders should be stayed pending appeal, and the Circuit Justice or the Court should interfere with their decisions only "upon the weightiest considerations." O'Rourke v. Levine, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers).

Applicants have not satisfied the demanding standard for vacatur of a stay. First, they have not established that this Court would likely review the case after final disposition in the court of appeals. Second, they have not shown that the stay causes

them irreparable harm. Third, they have not shown that the court of appeals' decision is clearly and demonstrably erroneous. The application should be denied and the district court's stay of its own order should be left in place.

STATEMENT

A. Facts And Legal Background

1. The COVID-19 pandemic, which has caused around 600,000 deaths in the United States and more than 3.7 million deaths throughout the world, is one of the deadliest outbreaks of disease in human history. In March 2020, the President declared the outbreak a national emergency. See Declaring A National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). Then, in August 2020, the President issued an Executive Order directing the federal government to "consider whether any measures temporarily halting residential evictions * * * are reasonably necessary to prevent the further spread of COVID-19." Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Exec. Order No. 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 14, 2020).

Weeks later, in September 2020, the CDC issued a temporary moratorium on evictions. See Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020) (Eviction Moratorium). The CDC invoked 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." 42 U.S.C. 264(a).

In issuing the moratorium, the CDC explained that, because of the economic effects of the pandemic, "as many as 30-40 million people in America could be at risk of eviction" in the absence of eviction moratoria. Eviction Moratorium, 85 Fed. Reg. at 55,295. "A wave of evictions on that scale would be unprecedented in modern times." Ibid.

The CDC found that such mass evictions could result in "multiple outcomes that increase the risk of COVID-19 spread." Eviction Moratorium, 85 Fed. Reg. at 55,294. First, "[e]victed renters must move." Ibid. Renters often "move in with friends or family members," and "COVID-19 transmission occurs readily within households." Ibid. Renters also often move to "congregate settings" (such as "transitional housing" and "domestic violence and abuse shelters"), but residents in such locations "often gather closely or use shared equipment," and "an influx of new residents at [such] facilities * * * could potentially overwhelm staff and * * * lead to exposures." Ibid. Second, evicted individuals often become homeless. Id. at 55,295. "Extensive outbreaks of COVID-19 have been identified in homeless shelters," and "unsheltered homelessness" could likewise "contribute to the further spread of COVID-19" given "inadequate access to hygiene,

sanitation facilities, health care, and therapeutics." Ibid. Finally, because "[t]he virus * * * spreads very easily" and "[a]pproximately 15% of moves [that occur each year] are interstate," "mass evictions would likely increase the interstate spread of COVID-19." Id. at 55,293, 55,295 (emphasis added).

In light of those findings, the CDC temporarily prohibited evictions from residential properties for nonpayment of rent. Eviction Moratorium, 85 Fed. Reg. at 55,297. The moratorium applies only to tenants who, if evicted, would likely become homeless or be forced to live in close quarters in a congregate or shared-living setting. Id. at 55,293. To qualify for protection, the tenant must provide a sworn declaration to his landlord attesting that he (1) "has used best efforts to obtain all available government assistance for rent or housing"; (2) satisfies certain income requirements; (3) cannot pay rent "due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses"; (4) is "using best efforts to make timely partial payments that are as close to the full payment as * * * permit[ted]"; and (5) "has no other available housing options." Ibid. (footnote omitted).

The moratorium "does not relieve any individual of any obligation to pay rent * * * or comply with any other obligation." Eviction Moratorium, 85 Fed. Reg. at 55,294. Further, although the moratorium suspends evictions for the

failure to pay rent, it permits evictions for "[e]ngaging in criminal activity," "threatening the health or safety of other residents," "damaging * * * property," "violating any applicable building code, health ordinance, or similar regulation," or "violating any other contractual obligation, other than the timely payment of rent." Ibid. Landlords may initiate "eviction proceedings" against a protected renter, as long as "the actual physical removal" does not take place while the moratorium is in effect. CDC et al., HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions 1, https://go.usa.gov/xHvzV; see Eviction Moratorium, 85 Fed. Reg. at 55,293 (defining "[e]vict as "to remove or cause the removal of").

2. The eviction moratorium originally applied "through December 31, 2020, subject to further extension * * * as appropriate." Eviction Moratorium, 85 Fed. Reg. at 55,296. The moratorium has since been extended three times. In December 2020, Congress extended the moratorium by one month in Section 502 of the Consolidated Appropriations Act, 2021 (2021 Appropriations Act), Pub. L. No. 116-260, 134 Stat. 2070-2073.

Then, in January 2021, the CDC further extended the eviction moratorium through March 31, 2021. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021) (January Extension). In doing so, the CDC observed that the conditions that had prompted the

issuance of the original moratorium "continue[d] to exist -- indeed, ha[d] worsened." Id. at 8024. It also explained that "newly available modeling projections and observational data from * * * states that have implemented and lifted eviction moratoria * * * clearly demonstrate the need for this Order." Id. at 8021. Specifically, the CDC cited data and models showing that "lifting eviction moratoria led to a 40% increased risk of contracting COVID-19 among people who were evicted and those with whom they shared housing"; that "significant increases in COVID-19 incidence and mortality [occurred] approximately 2-3 months after [state and local] eviction moratoria were lifted"; that "the incidence of COVID-19 in states that lifted their moratoria was 1.6 times that of states that did not at 10 weeks post-lifting"; that "anywhere from 1,000 to 100,000 excess cases per million population could be attributable to evictions"; and that, throughout the United States "over 433,000 cases of COVID-19 and over 10,000 deaths could be attributed to lifting state moratoria." Id. at 8022.

Finally, in March 2021, the CDC extended the moratorium through June 30, 2021. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021) (March Extension). As of the time of the extension, nearly 30 million COVID-19 cases and more than 540,000 COVID-19 deaths had been reported in the United States. Id. at 16,732. Further, "new variants * * * ha[d] also emerged globally," and "[e]pidemiological evaluation of these variants

show[ed] increased transmissibility as well as possible increased mortality." Id. at 16,733. In those circumstances, 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." Ibid.

The CDC has not yet determined whether, in light of current public-health conditions, the moratorium should be extended, modified, or allowed to expire after June 30, 2021. The government will advise this Court promptly if a decision is made while the present application remains pending.

3. Congress has appropriated substantial sums of money to address rent arrears that have built up because of the pandemic. In Section 501 of the 2021 Appropriations Act -- the section immediately preceding the provision extending the eviction moratorium -- Congress allocated $25 billion to state and local governments for rental assistance. § 501(a)(1). Those governments may use the funds to pay up to 12 months of back rent and an additional three months of future rent for eligible tenants. § 501(c)(2). The funds are payable directly to landlords. § 501(c)(2)(C)(i)(I). Congress appropriated an additional $21.5 billion in rental assistance in March 2021, shortly before the CDC's most recent extension of the moratorium. See American Rescue Plan Act of 2021, § 3201(a)(1), 135 Stat. 54.

B. Proceedings Below

1. Applicants are two landlords, three companies that they use to manage rental properties in Alabama and Georgia, and two trade associations in Alabama and Georgia. See Compl. ¶¶ 16-22. They filed this action in November 2020 in the United States District Court for the District of Columbia, alleging, as relevant here, that the temporary eviction moratorium exceeded the CDC's statutory authority. Appl. App. 22a.

In May 2021, the district court granted applicants summary judgment, holding that the eviction moratorium exceeded the CDC's statutory authority. Appl. App. 19a-38a. The court concluded that, under circuit precedent, it was required to vacate the moratorium nationwide, rather than to limit relief to the parties. Id. at 37a.

The district court then granted the government's motion for a stay of the vacatur order pending appeal. Appl. App. 8a-17a. Applying a "'sliding scale approach,'" the court concluded that, although in its view the government "ha[d] not shown a substantial likelihood of success on the merits," the government should receive a stay because it had raised a "'serious legal question on the merits'" and had made a "strong showing" on the equities. Id. at 10a, 14a-15a (citation omitted). In particular, the court found that the government had shown that the denial of a stay would result in irreparable injury; that applicants' economic losses were at least partly recoverable and were mitigated by

congressional appropriations for rental assistance; and that a stay was in the public interest. Id. at 15a-17a.

2. The court of appeals denied applicants' motion to vacate the district court's stay. Appl. App. 1a-7a.

The court of appeals observed that applicants had objected to the district court's use of a sliding-scale approach, but stated that it "need not and d[id] not address the propriety of that approach." Appl. App. 2a. The court of appeals explained that the government had "made a strong showing that it is likely to succeed on the merits," making vacatur unwarranted even under the "standard that [applicants] would apply." Id. at 2a-3a. The court emphasized that the moratorium "falls within the plain text of 42 U.S.C. § 264(a)"; that "the text and structure of Section 264's additional provisions" reinforced that conclusion; and that "Congress * * * expressly recognized that the agency had the authority to issue its narrowly crafted moratorium" when Congress "extend[ed] the * * * moratorium" in December 2020. Ibid.

The court of appeals then determined that "[t]he district court acted within its discretion in concluding that the remaining factors supported its stay of its own order." Appl. App. 5a. The court of appeals found that the government had demonstrated that "lifting the national moratorium will 'exacerbate the significant public health risks identified by the CDC.'" Ibid. (brackets and citation omitted). The court also noted that "the record does not show any likelihood of irreparable injury" to the landlords. Ibid.

ARGUMENT

Invoking the All Writs Act, 28 U.S.C. 1651, applicants seek (Appl. 11-36) vacatur of the stay pending appeal issued by the district court and sustained by the court of appeals. Vacatur of a stay issued below is an extraordinary remedy. "[T]his power should be exercised with the greatest of caution and should be reserved for exceptional circumstances." Holtzman v. Schlesinger, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). An applicant seeking vacatur bears the burden of establishing that (1) the "case could and very likely would be reviewed here upon final disposition in the court of appeals"; (2) the applicant "may be seriously and irreparably injured by the stay"; and (3) the issuance of the stay was "demonstrably wrong" under "accepted standards." Coleman v. Paccar, Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); see Western Airlines, Inc. v. Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers).

In applying that test, the Circuit Justice or the Court owes "great deference" to the court of appeals' decision that a stay is warranted. Garcia-Mir v. Smith, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). The issuance of a stay "is an exercise of judicial discretion" that "depend[s] upon the circumstances of the particular case," Virginian Ry. Co. v. United States, 272 U.S. 658, 673 (1926), and deference is particularly warranted when, as here, "the District Court and * * * a unanimous panel of the Court of Appeals" agree as to the propriety

of a stay, Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers).

The Circuit Justice or the Court also owes "significant deference" to public officials in the context of responses to the COVID-19 pandemic. South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (Roberts, C.J., concurring in the partial grant of application for injunctive relief). Legislators and executive officials have the "'background, competence, and expertise to assess public health'" and are "politically accountable" for their decisions. Ibid. (citation omitted). Accordingly, in addressing the many emergency applications that have arisen out of the present pandemic, the Court and individual Justices have often recognized that they should respect the judgments of policymakers charged with protecting the public health. See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo, 141. S. Ct. 63, 68 (2020) (per curiam); FDA v. American College of Obstetricians & Gynecologists, 141 S. Ct. 578, 579 (2021) (Roberts, C.J., concurring in the grant of application for stay); Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in the grant of application for stay).

In this case, applicants have not made the extraordinary showing needed to overcome the combined deference owed to the court of appeals, the district court, and the CDC. They have not shown that the Court would likely grant certiorari, that they face irreparable harm, or that the court of appeals' decision to

maintain the stay was demonstrably wrong. The application should therefore be denied.

I. APPLICANTS HAVE NOT ESTABLISHED THE REQUISITE LIKELIHOOD THAT THE COURT WOULD GRANT CERTIORARI

The All Writs Act allows this Court and the lower courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. 1651(a) (emphasis added). To satisfy the "in aid of jurisdiction" requirement, the party seeking vacatur of a stay must show that the case "could and very likely would be reviewed here upon final disposition in the court of appeals." Coleman, 424 U.S. at 1303-1304 (Rehnquist, J., in chambers). Applicants have not made that showing.

Applicants argue (Appl. 12) that the decision below "creates a direct conflict" with the Sixth Circuit's decision in Tiger Lily, LLC v. HUD, 992 F.3d 518 (2021), about the lawfulness of the eviction moratorium. That is incorrect. In both this case and Tiger Lily, motions panels rendered preliminary decisions about the government's likelihood of success on the merits but did not definitively resolve the lawfulness of the moratorium. In this case, a motions panel of the D.C. Circuit concluded that that the government had "made a strong showing that it is likely to succeed on the merits," but cautioned that the panel was "of course not resolving the ultimate merits of the legal question." Appl. App. 2a. And in Tiger Lily, a motions panel of the Sixth Circuit denied a stay pending appeal on the ground that the government was

"unlikely to succeed on the merits," 992 F.3d at 524, but merits briefing is now underway because "the decisions of motions panels are * * * not strictly binding upon subsequent panels," Wallace v. FedEx Corp., 764 F.3d 571, 583 (6th Cir. 2014). Applicants' assertion of a circuit conflict is thus premature.

Applicants also argue (Appl. 12) that this case "implicates * * * an acknowledged and entrenched circuit split over * * * the sliding-scale approach to grant extraordinary preliminary relief." That, too, is incorrect. The court of appeals acknowledged that applicants "object[ed] to the district court's use of a sliding-scale analysis," but explained that it "need not and d[id] not address the propriety of that approach because [applicants] ha[d] not shown that vacatur is warranted under the likelihood-of-success standard that they would apply." Appl. App. 2a. Further, the cases cited by petitioners acknowledge disagreement among the courts of appeals about the proper test for granting a "preliminary injunction" -- not the proper test for granting a stay. Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011); see Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132-1134 (9th Cir. 2011). Although "[t]here is substantial overlap between [the stay factors] and the factors governing preliminary injunctions," the two are not "one and the same." Nken v. Holder, 556 U.S. 418, 434 (2009).

II. APPLICANTS HAVE NOT ESTABLISHED THAT THE STAY CAUSES THEM IRREPARABLE INJURY

A party seeking vacatur of a stay must show that the stay "seriously and irreparably injure[s]" the party. Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers); see Western Airlines, 480 U.S. at 1305 (O'Connor, J., in chambers). Indeed, because vacatur is an exceptional remedy, the party seeking it "bear[s] an augmented burden of showing * * * irreparable harm." Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas, 448 U.S. 1328, 1331 (1980) (Powell, J., in chambers). When the applicant "ha[s] not made a showing of irreparable injury," denial is appropriate on that ground alone; "[t]here is no need to evaluate [the] likelihood of success on the merits." Garcia-Mir, 469 U.S. at 1313 (Rehnquist, J., in chambers). And because applicants bear the burden of persuasion, "any lingering uncertainty" is "enough to defeat [their] application." Pereida v. Wilkinson, 141 S. Ct. 754, 761 (2021); see South Bay, 141 S. Ct. at 717 (Barrett, J., concurring in the partial grant of application for injunctive relief) (voting to deny relief in relevant part because "[t]he applicants bore the burden" and "the record [wa]s uncertain"). In this case, the court of appeals found that "the record does not show any likelihood of irreparable injury" to applicants. Appl. App. 5a. No sound basis exists to overturn that conclusion.

1. The "calibrated design of the moratorium * * * imposes several exacting conditions that circumscribe the reach and degree of relief the order provides, and narrowly tailors the imposition on landlords." Appl. App. 5a. Most importantly, the moratorium applies only to tenants who, if evicted, have "no other available housing options" and thus would likely be forced to live in close quarters in a congregate or shared-living setting or become homeless. Eviction Moratorium, 85 Fed. Reg. at 55,293. It applies only to tenants "whose economic need meets a stated level, arises from specified circumstances, and could not otherwise be abated." Appl. App. 5a. It applies only to evictions for nonpayment of rent; landlords may continue to evict tenants for other reasons, such as "[e]ngaging in criminal activity." Eviction Moratorium, 85 Fed. Reg. at 55,294. And it does not prevent the initiation of eviction proceedings; rather, it stops only the actual physical removal. Appl. App. 5a-6a.

Even with respect to tenants covered by the moratorium, moreover, "the obligation to pay all rent due remains." Appl. App. 6a. Tenants who qualify for protection under the moratorium must still use "best efforts to promptly pay in part or full." Ibid. And even when "tenants [are] not currently * * * able to afford their rent," landlords retain the ability to collect back rent in the future, because the moratorium "specifically preserves the landlords' legal right to recover all rent owed with interest and penalties." Id. at 6a, 16a (citation omitted). Further,

"Congress has allocated substantial sums of money" -- $46.5 billion -- "for rental assistance" that would be available to mitigate the moratorium's effects on landlords. Ibid.; see p. 8, supra.

Against that backdrop, "the record does not show any likelihood of irreparable injury." Appl. App. 5a. The district court found that three applicants have Article III standing: the two real-estate companies that belong to applicant Danny Fordham and one real-estate company that belongs to applicant Robert Gilstrap. Ibid. Fordham's companies manage 75 properties in Montgomery County, Alabama. See D. Ct. Doc. 6-2 ¶ 2. Fordham's declaration names two tenants whose evictions the moratorium has prevented, id. ¶ 9, and states without further elaboration that he would like to evict "[a]t least seven other tenants" who have fallen behind on rent, id. ¶ 14. The declaration asserts Fordham's "belief" that he "will be unlikely to obtain any payment or damages from these tenants once the Eviction Moratorium expires," id. ¶ 17, but that statement was made in November 2020, and thus does not account for Congress's subsequent appropriation of billions of dollars in rental assistance. The federally funded rental-assistance program in Montgomery County, Alabama urges landlords to "apply now" and specifies that assistance is available for up to 11 months of past due bills and up to three months of expected

rent. Montgomery County, Alabama, Emergency Rental Assistance Montgomery County.[1]

Meanwhile, Gilstrap's company manages more than 400 properties in Georgia. See D. Ct. Doc. 6-3 ¶ 2. Gilstrap's declaration identifies two properties whose tenants have fallen behind on rent and whom Gilstrap wishes to evict. Id. ¶¶ 6-11. But it is at best unclear whether the moratorium is responsible for Gilstrap's inability to evict one of those sets of tenants; Gilstrap explained that he "believe[s] that the [tenants] are not 'covered persons' under the Eviction Moratorium," but that the "Georgia courts refuse[d] to hold a hearing" anyway. Id. ¶ 7. The declaration asserts Gilstrap's "belief" that he "will be unlikely to obtain any payment or damages from these tenants," id. ¶ 12, but again, that statement was made in November 2020, before Congress appropriated funds for rental assistance. Georgia received $552 million in funds, which it began distributing in March 2021. Georgia Dep't of Community Affairs, Georgia Rental Assistance Program.[2] Georgia explains that the funds "will be distributed directly to landlords" and that "eligible applicants will receive up to 12 months of relief." Ibid.

In sum, "the record is devoid of the requisite evidence of irreparable injury likely to befall the landlord parties to this case." Appl. App. 5a. "[T]he record does not demonstrate any

[1] https://www.mc-ala.org/services/emergency-rental-assistance-montgomery-county.

[2] https://georgiarentalassistance.ga.gov/.

likelihood that [applicants] will lose their businesses, that an appreciable percentage of their own tenants * * * will be unable to repay back rent, or that financial shortfalls are unlikely ultimately to be mitigated [through federal assistance]." Ibid. The record instead indicates that the moratorium "simply delays" applicants' receipt of rental payments. Id. at 16a. It is well settled, however, that "the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." Sampson v. Murray, 415 U.S. 61, 90 (1974). Indeed, even the "possibility" of recovery "weighs heavily against a claim of irreparable harm." Ibid. (citation omitted); see Conkright v. Frommert, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (finding no irreparable harm, notwithstanding the applicants' claim that "they may have trouble recouping any funds," because the applicants "d[id] not establish that recoupment will be impossible").

As the court of appeals noted, applicants' conduct in this litigation reinforces that conclusion. Appl. App. 6a. Applicants "waited eleven weeks before bringing their challenge to the moratorium." Ibid. Even then, they did not seek a preliminary injunction; rather, they litigated the case on the merits. Id. at 23a. Applicants' delay undermines their claims that the injuries they face are irreparable.

Finally, every other federal court to consider the issue -- regardless of its views on the legal merits of the challenge to

the eviction moratorium -- has agreed that the moratorium does not cause irreparable injury to landlords. See Brown v. Azar, 497 F. Supp. 3d 1270, 1282 (N.D. Ga. 2020) (denying preliminary injunction), appeal pending, No. 20-14210 (11th Cir. Nov. 9, 2020); Tiger Lily LLC v. United States Dep't of Housing & Urban Development, 499 F. Supp. 3d 538, 552 (W.D. Tenn. 2020) (denying preliminary injunction); Chambless Enters., LLC v. Redfield, No. 20-cv-1455, 2020 WL 758849 (W.D. La. Dec. 22, 2020) (denying preliminary injunction), appeal pending, No. 21-30037 (5th Cir. Jan. 22, 2021; Dixon Ventures, Inc. v. Department of Health and Human Services, 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); see also Tiger Lily, 992 F.3d at 524 (finding it unnecessary to consider harm to the landlords). Applicants identify no good reason to overturn the unanimous judgment of the lower courts on that point.

2. Applicants' contrary arguments lack merit. Applicants principally contend (Appl. 28-29) that "millions" of "other landlords" throughout the nation will "lose between $13.8 and $19 billion each month in unpaid rent due to the eviction moratorium," resulting in a "cumulative impact" of "close to $200 billion." But applicants seeking vacatur of a stay must show that "the rights of the parties * * * may be seriously and irreparably injured"; they may not rely on alleged harms to strangers to the litigation.

Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers) (emphasis added). The court of appeals thus correctly noted that applicants cannot properly rely on "conclusory reference to general financial harms [that] could befall landlords nationwide." Appl. App. 5a.

In addition, as the government previously explained, the figures cited by applicants are demonstrably overstated. See D. Ct. Doc. 26, at 15 n.4. In arriving at those figures, applicants have assumed that all households at risk of eviction are likely to take advantage of the moratorium, and then multiplied the number of households by the median monthly gross rent nationwide. Ibid. That oversimplified math fails to account for, among other things, the fact that the moratorium applies only to tenants who meet specified criteria and only to evictions based on nonpayment of rent. Ibid.

Applicants thus have not shown that the stay causes them irreparable harm. That alone justifies denying the application.

III. APPLICANTS HAVE NOT SHOWN THAT THE STAY WAS CLEARLY AND DEMONSTRABLY ERRONEOUS

To obtain vacatur of a stay pending appeal, applicants must show that the court of appeals "clearly and demonstrably erred in its application of accepted standards." Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring) (citation and internal quotation marks omitted); see id. at 1063 ("clear violation of accepted legal standards"). "[I]nterference with an interim order

of a court of appeals cannot be justified solely because a Circuit Justice disagrees" with the decision to grant a stay. Doe v. Gonzales, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers) (brackets omitted). Applicants have not shown clear and demonstrable error here.

A. The Court Of Appeals Applied The Correct Test

Under "the 'traditional' standard for a stay," "a court considers 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.'" Nken, 556 U.S. at 425-426 (citation omitted). The court of appeals considered precisely those factors here. See Appl. App. 2a-5a (discussing likelihood of success on the merits); id. at 5a (discussing irreparable injury to the government, injury to applicants, and the public interest).

Applicants complain that "the district court granted a stay" under a "'sliding-scale approach'" without requiring the government to establish a likelihood of success on the merits. Appl. 24-25 (emphasis added; citation omitted). But the Circuit Justice or the Court need not consider whether the district court's approach was correct. The court of appeals acknowledged that applicants "object to the district court's use of a sliding-scale analysis," but found no need to "address the propriety of that

approach." Appl. App. 2a. It determined that the government "ha[d] made a strong showing that it is likely to succeed on the merits," satisfying the "standard that [applicants] would apply." Ibid.

B. The Court Of Appeals Correctly Concluded That The Government Is Likely To Succeed On The Merits

The court of appeals concluded that the government had "made a strong showing that it is likely to succeed on the merits." Appl. App. 2a. That evaluation was correct. At the very least, it was not so clearly and demonstrably erroneous that vacatur is justified.

1. The statute on which the CDC relied, 42 U.S.C. 264(a), provides:

> The Surgeon General, with approval of the Secretary [of Health and Human Services], 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 Surgeon General 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.

Although the provision refers to the Surgeon General, later reorganizations have transferred that authority to the Secretary of Health and Human Services, who has in turn delegated it to the CDC. See Appl. App. 2a n.1, 25a n.1.

Section 264(a), by its plain terms, grants the government broad authority. The first sentence of Section 264(a) expressly authorizes the CDC to make regulations that are "in [its] judgment" "necessary" to "prevent the [interstate] introduction, transmission, or spread of communicable diseases." 42 U.S.C. 264(a). And by using the phrase "in his judgment" not once but twice, ibid., Congress "designated the HHS Secretary [as] the expert best positioned to determine the need for such preventative measures," Appl. App. 2a.

Section 264(a)'s expansive language is no accident. The drafters of the statute explained that "these provisions are written in broader terms in order to make it possible to cope with emergency situations which we cannot now foresee." Hearing Before a Subcomm. on Interstate & Foreign Commerce on H.R. 3379: A Bill to Codify the Laws Relating to the Public Health Service, and for Other Purposes, 78th Cong., 2d Sess. 64, 108, 140 (1944). Echoing that view, the then-Surgeon General testified to Congress that authority under Section 264 "may be very important because of the possibility that strange diseases may be introduced in the country" and that "[f]lexibility in dealing with such contingencies would be very helpful." Hearing Before a Subcomm. on Education and Labor on H.R. 4624: An Act to Consolidate and Revise the Laws Relating to the Public Health Service, and for Other Purposes, 78th Cong., 2d Sess. 6. (1944).

Wherever Section 264(a)'s outer limits may lie, the provision, at a minimum, authorizes measures designed to address "the movement of persons." Appl. App. 4a. Governments have long used restrictions on movement -- such as quarantines and travel bans -- to prevent people from "carrying contagion about." Edwards v. California, 314 U.S. 160, 184 (1941) (Jackson, J., concurring). The "ensuing subsections (b), (c), and (d) of Subsection 264," which contain "explicit reference[s] to HHS's regulatory power over the movement of persons," confirm that Section 264(a) covers measures relating to movement. Appl. App. 4a.

The eviction moratorium "fits within the textual authority conferred by Section 264(a)." Appl. App. 3a. The CDC has expressly found in issuing and then in extending the order that the moratorium is "necessary" to prevent the interstate transmission of COVID-19. That determination rested on the CDC's findings that the United States faced the risk of an unprecedented wave of evictions; that evicted renters could contribute to the spread of COVID-19 if they moved in with friends and family or moved in to congregate settings; and that evicted renters also could contribute to the spread of COVID-19 if they became homeless. See pp. 4-5, supra. The CDC also "narrowly crafted" the moratorium to address those problems, for example by limiting the moratorium to renters who "otherwise would likely need to move to congregate [or shared-living] settings where COVID spreads quickly and easily, or would be rendered homeless and forced into shelters or

other settings that would increase their susceptibility to COVID." Appl. App. 3a. The very object of the moratorium, moreover, is to prevent the "movement of contagious persons," id. at 4a (brackets and internal quotation marks omitted); "[e]victed renters must move," and a substantial number of those moves would occur interstate, Eviction Moratorium, 85 Fed. Reg. at 55,294. The moratorium achieves that objective in a different way than a quarantine, but Section 264 allows the government to use new (and tailored) tools to address new diseases.

To the extent any doubt remains about whether Section 264(a) authorizes the eviction moratorium, Section 502 of the 2021 Appropriations Act resolves it. Section 502 provides:

> 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. 5592 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

§ 502, 134 Stat. 2078-2079. In other words, "rather than enact its own moratorium, Congress deliberately chose" to "embrace" and "extend" the CDC's moratorium. Appl. App. 3a.

Tellingly, Congress described the moratorium as having been "issued * * * under * * * 42 U.S.C. 264." 2021 Appropriations Act § 502, 134 Stat. 2078 (emphasis added). The word "under," as used here, is most naturally read to indicate that the moratorium was authorized by Section 264. See, e.g., National Ass'n of Mfrs. v. Department of Defense, 138 S. Ct. 617, 630 (2018) (defining

"under" to mean "by reason of the authority of") (citation omitted); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 530 (2013) (defining "under" as "in accordance with") (brackets and citation omitted); Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 39 (2008) (defining "under" to mean "with the authorization of"). That usage is pertinent here because "it is, of course, the most rudimentary rule of statutory construction * * * that courts do not interpret statutes in isolation, but in the context of the corpus juris of which they are a part, including later-enacted statutes." Branch v. Smith, 538 U.S. 254, 281 (2003) (plurality opinion) (Scalia, J.); see FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). When, as here, "it can be gathered from a subsequent statute * * * what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." Branch, 538 U.S. at 281 (plurality opinion) (quoting United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845)).

2. Applicants' contrary arguments lack merit. First, applicants assert (Appl. 2) that the government's reading of Section 264(a) is "limitless." That charge is unwarranted. Contrary to applicants' portrayal (Appl. 13), Section 264(a) does not authorize any and all measures that relate in some way to "public health"; rather, it applies only to measures that "prevent the [international or interstate] introduction, transmission, or

spread of communicable diseases." 42 U.S.C. 264(a). "Th[e] text also makes a determination of necessity a prerequisite to any exercise of Section 264 authority, and that necessity standard constrains the granted authority in a material and substantial way." Appl. App. 2a. Further, because the object of the eviction moratorium is to restrict the movement of potentially contagious individuals, see p. 26, supra, the Circuit Justice or the Court need not consider whether Section 264 would authorize other measures unrelated to movement, such as "vaccine mandates," Appl. 13. Finally, any invocation of Section 264(a) remains subject to review for arbitrariness and capriciousness under ordinary principles of administrative law. See, e.g., Brown, 497 F. Supp. 3d at 1285-1289 (considering contention that the eviction moratorium is arbitrary and capricious).

Second, applicants argue (Appl. 15-16) that "[Section] 264 is limited to disease-control measures involving the inspection and regulation of infected property or the quarantine of contagious individuals." But that limitation appears nowhere in the plain language of the statute. The statute empowers the CDC to adopt "such regulations as in [its] judgment are necessary to prevent" the interstate spread of disease; it does not limit that authority to measures involving inspection and quarantine. 42 U.S.C. 264(a). Other provisions of the Public Health Service Act show that, when Congress wanted to refer to inspection or quarantine regulations, it knew how to do so. See, e.g., 42 U.S.C. 243(a) (enforcement of

"quarantine regulations"). The provision at issue here, by contrast, includes no such limit. Reading that unwritten constraint into the text would countermand Congress's deliberate decision to grant the government the flexibility needed to address new threats to public health as they emerge.

Applicants seek (Appl. 14-15) to infer their proposed limitation from Section 264(a)'s second sentence, which authorizes the CDC to provide for "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles" "[f]or purposes of carrying out and enforcing [its] regulations." 42 U.S.C. 264(a). As the court of appeals explained, however, applicants err in arguing that "the regulatory power under the first sentence of Section 264(a) is limited to measures closely akin to those the second enumerates." Appl. App. 3a. The second sentence, by its plain terms, does not purport to define "the substantive scope of the regulatory authority conferred" by the first sentence, id. at 3a-4a; rather, it empowers the CDC to adopt additional measures "[f]or purposes of carrying out and enforcing such regulations." 42 U.S.C. 264(a). "That is language of expansion, not contraction." Appl. App. 4a. Applicants' argument also proves too much. If taken to its logical conclusion, the argument suggests that Section 264(a) is limited to inspection and sanitation measures; the second sentence contains no reference to the quarantine measures that even applicants concede are permitted.

Third, turning to Section 502 of the 2021 Appropriations Act, applicants contend (Appl. 21) that the government may not rely on it here because "the CDC itself never relied on this provision as authority for its multiple additional extensions of the moratorium." But the CDC did cite Section 502 when extending the moratorium. See January Extension, 86 Fed. Reg. at 8024; March Extension, 86 Fed. Reg. at 16,734, 16,737. The government in any event does not argue here that Section 502 independently confers authority to adopt the moratorium. The government instead argues that Section 502 forms part of the context against which Section 264 must be interpreted. See pp. 26-27, supra. An agency regulation is not meant to be a brief; although the agency must identify the grounds of its action, it is not required to detail all the textual and contextual arguments supporting its legal position. See, e.g., National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 420 (1992). Whether the CDC discussed Section 502 is thus beside the point.

Fourth, applicants (Appl. 17-21) argue that interpreting Section 264 to authorize the eviction moratorium raises federalism and nondelegation concerns. Those concerns are misplaced. This Court has explained that Congress's commerce power includes the authority to respond to an "interstate epidemic." United States v. Comstock, 560 U.S. 126, 142 (2010). Section 264(a) authorizes the CDC to adopt measures it judges necessary to prevent the spread of interstate disease, and the CDC has judged that the eviction

moratorium is necessary to prevent the interstate spread of COVID-19. Section 264(a), on its face and as applied here, falls squarely within Congress's authority under the Commerce Clause.

Similarly, in applying the non-delegation doctrine, the Court has upheld statutes that empower agencies to regulate in the "public interest," see National Broad. Co. v. United States, 319 U.S. 190, 225-226 (1943); to set prices that are "fair and equitable," see Yakus v. United States, 321 U.S. 414, 420 (1944); and to establish air-quality standards to "protect the public health," see Whitman v. American Trucking Ass'n, 531 U.S. 457, 472-476 (2001) (citation omitted). The standard set out in Section 264 -- "necessary to prevent the [international or interstate] introduction, transmission, or spread of communicable diseases," 42 U.S.C. 264(a) -- is more specific than those standards. In addition, the line between a permissible grant of discretion to the executive and an impermissible delegation of legislative power "must be fixed according to common sense and the inherent necessities of the governmental coordination." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (Taft, C.J.). Common sense suggests that a statute such as Section 264 must use flexible language; Congress cannot foresee in advance what new diseases might emerge and what kinds of measures might be needed to combat them.

Finally, applicants emphasize (Appl. 27) that a panel of the Sixth Circuit concluded that the government was unlikely to succeed

on the merits. But a unanimous panel of the court of appeals in this case concluded that the government is likely to succeed on the merits, and district courts in two other cases have reached similar conclusions at the preliminary-injunction stage. See Appl. App. 2a; Brown, 497 F. Supp. 3d at 1279-1285; Chambless, 2020 WL 7588849, at *5-*9. That pattern undercuts any contention that the court of appeals' evaluation of the merits was "clearly and demonstrably err[oneous]." Planned Parenthood, 571 U.S. at 1061 (Scalia, J., concurring) (citation and internal quotation marks omitted).

C. The Court Of Appeals And District Court Properly Evaluated The Remaining Stay Factors

In staying its own order, the district court found that the government had "made a showing of irreparable injury," that the injury "outweighed" any "financial losses to [the] landlords," and that "the public interest * * * weighs in favor of a stay." Appl. App. 15a-17a. The court of appeals, in turn, determined that "[t]he district court acted within its discretion in concluding that [those] factors supported its stay." Id. at 5a. Those determinations were correct -- or, at a minimum, not so clearly and demonstrably incorrect that the Circuit Justice or the Court should vacate the stay.

"As the federal agency tasked with disease control, the Department [of Health and Human Services], and the CDC in particular, have a strong interest in controlling the spread of

COVID-19 and protecting public health." Appl. App. 15a. The CDC has cited -- and the district court credited -- "observational data analyses" showing that "lifting the national moratorium will 'exacerbate the significant public health risks'" associated with COVID-19. Ibid. (citation omitted). For example, the CDC has cited data showing that "lifting [state and local] eviction moratoria led to a 40% increased risk of contracting COVID-19 among people who were evicted and those with whom they shared housing"; that "significant increases in COVID-19 incidence and mortality [occurred] approximately 2-3 months after [state and local] eviction moratoria were lifted"; and that "the incidence of COVID-19 in states that lifted their moratoria was 1.6 times that of states that did not at 10 weeks post-lifting." January Extension, 86 Fed. Reg. at 8022. The CDC has also estimated that "over 433,000 cases of COVID-19 and over 10,000 deaths could be attributed to lifting state moratoria." Ibid.; see Appl. App. 15a (relying on the same estimate). Given the CDC's expert judgments on those points, the district court properly determined that lifting the moratorium would cause irreparable injury to the government and to the public and that the harms that would be caused by lifting the moratorium outweigh the harms caused by leaving it in place. Id. at 15a-16a.

Applicants assert (Appl. 32-33) that the moratorium is no longer justified (and that leaving it in place would be "pretextual") because "[m]atters have * * * improved," "new

infections are down to their lowest level since the onset of the pandemic," and "[n]early half * * * the eligible population is fully vaccinated." The CDC, however, most recently extended the eviction moratorium in March 2021, before the factual developments that applicants emphasize. The CDC has not yet determined whether, in light of those developments, the moratorium should be extended beyond June 30, modified, or allowed to expire. See p. 8, supra. A court should not preemptively decide -- before the CDC has had the opportunity to address the factual developments applicants cite -- that the moratorium is no longer needed. The text of Section 264(a) "designate[s] the HHS Secretary [as] the expert best positioned to determine the need for such preventative measures." Appl. App. 2a. And "Members of this Court * * * should respect the judgment of those with special expertise and responsibility in this area." Roman Catholic Diocese, 141 S. Ct. at 68.

Applicants also argue (Appl. 34) that the moratorium is "inexplicably underinclusive," noting, for example, that the moratorium does not apply to persons facing foreclosure or to hotel guests. The moratorium, however, works in conjunction with the efforts of other federal agencies to control the pandemic, and other federal agencies have taken steps to address foreclosures. See, e.g., News Release, Federal Housing Finance Administration, FHFA Extends COVID-19 Multifamily Forbearance through September

30, 2021 (June 3, 2021).[3] The CDC, moreover, specifically tied the moratorium to the risks posed by "mass evictions" of renters for failure to pay rent. Eviction Moratorium, 85 Fed. Reg. at 55,295. Applicants do not claim that the circumstances of hotel guests are comparable.

In the final analysis, even if "[r]easonable minds [could] disagree about whether the [lower courts] should have granted a stay in this case," "there is no doubt that the applicants have not carried their heavy burden of showing that doing so was a clear violation of accepted legal standards." Planned Parenthood, 571 U.S. at 1061 (Scalia, J., concurring). The application should therefore be denied.

IV. AT A MINIMUM, ANY RELIEF SHOULD BE LIMITED TO THE PARTIES FOUND TO HAVE STANDING

In the order that was stayed, the district court vacated the eviction moratorium nationwide; citing circuit precedent, it declined to limit relief to the parties before it. Appl. App. 37a. Even if the Circuit Justice or the Court were to conclude that the stay should be vacated, that relief should be limited to the parties found to have standing. See id. at 25a (identifying parties with standing in this case).

For several reasons, a universal or nationwide injunction, vacatur, or decree that extends beyond the parties found to have standing would be improper. See Department of Homeland Sec. v.

[3] https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-19-Multifamily-Forbearance-through-September-30-2021.aspx.

New York, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring in the grant of stay); Trump v. Hawaii, 138 S. Ct. 2392, 2424-2429 (2018) (Thomas, J., concurring). Under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018). Under traditional principles of equity, 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) (citation omitted). An injunction or vacatur of universal application also impermissibly enables plaintiffs to circumvent the prerequisites for class actions set out in Federal Rule of Civil Procedure 23. See Michael T. Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 39 Harv. J.L. & Pub. Pol'y 487, 534-535 (2016).

In practical terms, such sweeping universal orders create "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 also "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." Hawaii, 138 S. Ct. at 2425 (Thomas,

J., concurring). And "[n]othing in the language" of the Administrative Procedure Act requires "an order setting aside [a] regulation" to extend to "the entire country." Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 393-394 (4th Cir. 2001). Accordingly, if the Circuit Justice or the Court were to vacate the district court's stay in this case, the effect of the vacatur should be limited to the parties found to have standing.

CONCLUSION

The application to vacate the stay pending appeal should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

JUNE 2021