No. 21-30037

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Acting Assistant Attorney General

ALEXANDER C. VAN HOOK
Acting United States Attorney

ALISA B. KLEIN
BRIAN J. SPRINGER
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5446

CERTIFICATE OF INTERESTED PERSONS

No. 21-30037, Chambless Enterprises, L.L.C. v. Walensky

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Acadiana Legal Service Corporation

Alker & Rather, LLC

American Academy of Pediatrics

American Medical Association

Apartment Association of Louisiana, Inc.

Becerra, Xavier

Beckenhauer, Eric

Benfer, Emily A.

Berger, Sherri

Blevins, Ethan W.

Boynton, Brian M.

Chambless Enterprises, L.L.C.

Chambless, Joshua

Children's Healthwatch

Desmond, Matthew

Doughty, Terry A., U.S. District Court Judge

Esponge, Tammy

Garland, Merrick

George Consortium

GLMA

Gonsalves, Gregg

Hayes, Karen L., U.S. District Court Magistrate Judge

Health Professionals Advancing LGBTQ Equality

Hepburn, Peter

Kenne, Danya A.

Klein, Alisa B.

Leifheit, Kathryn M.

Levy, Michael Z.

Linton, Sabriya L.

Louisiana Fair Housing Action Center

Marcley, Hannah S.

McClatchey Jr., Walter P.

Myers, Steven A.

National Hispanic Medical Association

National Medical Association

Pacific Legal Foundation

Pollack, Craig E.

Public Health Law Watch

Raifman, Julia

Rather, Jr., James C.

Schwartz, Gabriel L.

Simpson, Steven M.

Southeast Louisiana Legal Services, Amicus Curiae

Springer, Brian J.

U.S. Centers for Disease Control and Prevention

U.S. Department of Health and Human Services

Van Hook, Alexander C.

Vigen, Leslie Cooper

Vlahov, David

Wake, Luke A.

Walensky, Rochelle

Williams, David

s/ Brian J. Springer
Brian J. Springer
Attorney of record for defendants-appellees

STATEMENT REGARDING ORAL ARGUMENT

To curb the spread of COVID-19 and its economic fallout, the federal government has deployed an array of measures, including trillions of dollars of emergency spending. The measure at issue here is a temporary moratorium on 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 moratorium works in tandem with $46 billion that Congress has appropriated in emergency assistance to pay rent and rental arrears, by helping to ensure that millions of renters are not evicted (exacerbating the spread of the virus) while waiting to receive assistance.

The plaintiff landlords challenged the temporary moratorium and moved for a preliminary injunction. The district court denied their motion, concluding that plaintiffs had failed to establish any of the factors necessary to obtain the extraordinary remedy of a preliminary injunction, including the showing of irreparable harm that is a prerequisite to such relief.

The district court did not abuse its discretion in denying a preliminary injunction. Every court to address the issue has concluded that landlords failed to demonstrate that the temporary eviction moratorium was causing harm that is non-compensable and thus irreparable. Accordingly, the denial of a preliminary injunction should be affirmed without oral argument. The government stands ready to present oral argument, however, if this Court would find it useful.

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

I. The Temporary Eviction Moratorium and Related Appropriations 1

II. District Court Proceedings 6

SUMMARY OF ARGUMENT 8

STANDARD OF REVIEW 9

ARGUMENT 9

The District Court's Denial Of Plaintiffs' Motion For A Preliminary Injunction Was Not An Abuse Of Discretion 9

I. The District Court Correctly Found That Plaintiffs Failed To Demonstrate Irreparable Harm 10

A. Plaintiffs Failed To Substantiate Their Claim Of Irreparable Monetary Harm 10

B. Plaintiffs Failed To Establish Their Alternative Theories Of Irreparable Harm 14

II. The District Court Correctly Found That Plaintiffs' Asserted Harms Are Outweighed By The Harm That A Preliminary Injunction Would Cause To Third Parties And The Public Interest 16

III. Plaintiffs Failed To Demonstrate A Likelihood Of Success On The Merits Of Their Claims 18

A. The Temporary Eviction Moratorium Is Within The CDC's Statutory And Regulatory Authority 18

B. Plaintiffs' Constitutional Claims Are Meritless 25

C. The Issuance Of The Temporary Eviction Moratorium Was Procedurally Valid.....32

D. The Temporary Eviction Moratorium Is Not Arbitrary And Capricious.....34

CONCLUSION 36

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases: **Page(s)**

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935) 30

Barber v. Thomas,
560 U.S. 474 (2010) 22

Big Time Vapes, Inc. v. Food & Drug Admin.,
963 F.3d 436 (5th Cir. 2020) 30, 31

Big Tyme Invs., L.L.C. v. Edwards,
985 F.3d 456 (5th Cir. 2021) 9

Brown v. Azar, --- F. Supp. 3d ---,
No. 20-3702, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020), *appeal filed*,
No. 20-14210 (11th Cir. Nov. 9, 2020), *mot. for inj. pending appeal denied*,
No. 20-14210 (11th Cir. Dec. 17, 2020) ..... passim

Camp, In re,
631 F.3d 757 (5th Cir. 2011) 22

Carpenter Tech. Corp. v. City of Bridgeport,
180 F.3d 93 (2d Cir. 1999) 15

Chickasaw Nation v. United States,
534 U.S. 84 (2001) 22

City of Arlington v. FCC,
569 U.S. 290 (2013) 20

Dalton v. Specter,
511 U.S. 462 (1994) 15

Deerfield Med. Ctr. v. City of Deerfield Beach,
661 F.2d 328 (5th Cir. 1981) 15

Dennis Melancon, Inc. v. City of New Orleans,
703 F.3d 262 (5th Cir. 2012) 12

Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,
762 F.2d 464 (5th Cir. 1985) 11, 15

Federal Power Comm'n v. Hope Nat. Gas Co.,
320 U.S. 591 (1944) 31

Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.,
549 F.3d 1079 (7th Cir. 2008) 14

Gonzales v. Oregon,
546 U.S. 243 (2006) 19

Groome Res. Ltd. v. Parish of Jefferson,
234 F.3d 192 (5th Cir. 2000) 25, 27

Gundy v. United States,
139 S. Ct. 2116 (2019) 30, 31

Independent Turtle Farmers of La., Inc. v. United States,
703 F. Supp. 2d 604 (W.D. La. 2010) 21

Jifry v. FAA,
370 F.3d 1174 (D.C. Cir. 2004) 33

Jones v. United States,
529 U.S. 848 (2000) 27

Jordan v. Fisher,
823 F.3d 805 (5th Cir. 2016) 10

K-Mart Corp. v. Oriental Plaza, Inc.,
875 F.2d 907 (1st Cir. 1989) 13

League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer,
814 F. App'x 125 (6th Cir. 2020) (unpub.) 18

Marshall v. United States,
414 U.S. 417 (1974) 20, 35

Minard Run Oil Co. v. U.S. Forest Serv.,
670 F.3d 236 (3d Cir. 2011) 14

Mistretta v. United States,
488 U.S. 361 (1989) 30, 31, 32

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 34

National Broad. Co. v. United States,
319 U.S. 190 (1943) 31

New York Cent. Sec. Corp. v. United States,
287 U.S. 12 (1932) 31

Nken v. Holder,
556 U.S. 418 (2009) 16

Panama Ref. Co. v. Ryan,
293 U.S. 388 (1935) 30

RoDa Drilling Co. v. Siegal,
552 F.3d 1203 (10th Cir. 2009) 13, 14

Russell Motor Car Co. v. United States,
261 U.S. 514 (1923) 22

Russell v. United States,
471 U.S. 858 (1985) 27

Sebelius v. Cloer,
569 U.S. 369 (2013) 22

Skyworks, Ltd. v. Centers for Disease Control & Prevention, --- F. Supp. 3d ---,
No. 20-2407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021) 20

South Bay United Pentecostal Church v. Newsom,
140 S. Ct. 1613 (2020) 10, 35

Swain v. Junior,
961 F.3d 1276 (11th Cir. 2020) 16

Tate v. American Tugs, Inc.,
634 F.2d 869 (5th Cir. 1981) 8, 9, 10

Taylor v. United States,
136 S. Ct. 2074 (2016) 28

Terkel v. Centers for Disease Control and Prevention, --- F. Supp. 3d ---,
No. 20-0564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), *appeal filed*,
No. 21-40137 (5th Cir. Feb. 27, 2021) 25

Texans for Free Enter. v. Texas Ethics Comm'n,
732 F.3d 535 (5th Cir. 2013) 18

Thomas v. Network Sols., Inc.,
176 F.3d 500 (D.C. Cir. 1999) 24

Tiger Lily LLC v. U.S. Dep't of Hous. & Urban Dev.:
--- F. Supp. 3d ---, No. 20-2692, 2020 WL 7658126
(W.D. Tenn. Nov. 6, 2020) 11
--- F. Supp. 3d ---, No. 20-2692, 2021 WL 1171887
(W.D. Tenn. Mar. 15, 2021), *mot. for stay pending appeal denied*,
--- F.3d ---, No. 21-5256, 2021 WL 1165170 (6th Cir. Mar. 29, 2021) 20
--- F.3d ---, No. 21-5256, 2021 WL 1165170 (6th Cir. Mar. 29, 2021) 20

Touby v. United States,
500 U.S. 160 (1991) 32

United States v. Comstock,
560 U.S. 126 (2010) 27

United States v. Heinszen,
206 U.S. 370 (1907) 24

United States v. Kaluza,
780 F.3d 647 (5th Cir. 2015) 22

United States v. Lopez,
514 U.S. 549 (1995) 28

United States v. Morrison,
529 U.S. 598 (2000) 28

United States v. Oakland Cannabis Buyers' Co-op.,
532 U.S. 483 (2001) 22

United States v. Powell,
423 U.S. 87 (1975) 22

U.S. Steel Corp. v. EPA,
595 F.2d 207 (5th Cir. 1979) 33

Wallace v. FedEx Corp.,
764 F.3d 571 (6th Cir. 2014) 20

White v. Carlucci,
862 F.2d 1209 (5th Cir. 1989) 11

Whitman v. American Trucking Ass'ns,
531 U.S. 457 (2001) 31

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 16

Yakus v. United States,
321 U.S. 414 (1944) 31

U.S. Constitution:

Art. I, § 8, cl. 3 ..... 26, 27

Art. I, § 8, cl. 18 26

Statutes:

Administrative Procedure Act:
5 U.S.C. § 553(b)(B) 33
5 U.S.C. § 702 1

American Rescue Plan Act of 2021,
Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 .....4, 13, 28

Consolidated Appropriations Act, 2021,
Pub. L. No. 116-260, 134 Stat. 1182 (2020) 28
Div. N, tit. V, § 501, 134 Stat. at 2070-78 ..... 3, 13
Div. N, tit. V, § 502, 134 Stat. at 2078-79 .....3, 23, 24, 34

Coronavirus Aid, Relief, and Economic Security Act,
Pub. L. No. 116-136, 134 Stat. 281 (2020) 27, 28

Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020,
Pub. L. No. 116-123, 134 Stat. 146 (2020) 27

Families First Coronavirus Response Act,
Pub. L. No. 116-127, 134 Stat. 178 (2020) 27

Paycheck Protection Program and Health Care Enhancement Act,
Pub. L. No. 116-139, 134 Stat. 620 (2020) 28

Public Health Service Act,
Pub. L. No. 78-410, § 361(a), 58 Stat. 682, 703 (1944)
(codified at 42 U.S.C. § 264(a)) 2

20 U.S.C. § 3508(b) 2

28 U.S.C. § 1292(a)(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 264(a) ..... passim

42 U.S.C. § 264(b) 21, 23

42 U.S.C. § 264(c) 21, 23

42 U.S.C. § 264(d) 21, 23

42 U.S.C. § 264(e) 30

Regulation:

42 C.F.R. § 70.2 ..... passim

Legislative Materials:

167 Cong. Rec. H1281 (daily ed. Mar. 10, 2021) 4, 13, 25

H.R. Rep. No. 78-1364 (1944) 19

H.R. Rep. No. 116-420 (2020) 1, 26

Other Authorities:

CDC, *Domestic Travel During COVID-19*, https://go.usa.gov/xHDTx (last updated Apr. 2, 2021) 26

CDC, *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions*, https://go.usa.gov/x7dhb (last visited Apr. 21, 2021) 6

CDC, *Testing and International Air Travel*, https://go.usa.gov/xH9nV (last updated Feb. 18, 2021) 26

Aaron Klein and Ember Smith, *Explaining the Economic Impact of COVID-19: Core Industries and the Hispanic Workforce* (Feb. 4, 2021) 26

Louisiana Hous. Corp. & La. Office of Cmty. Dev., *State of Louisiana's U.S. Treasury Emergency Rental Assistance Program*, https://www.lastaterent.com (last visited Apr. 21, 2021) 14

Order, *KBW Inv. Props. LLC v. Azar*, No. 20-4852 (S.D. Ohio Sept. 25, 2020), ECF No. 16 11

Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966), *reprinted in* 80 Stat. 1610 (1966) 2

Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021) 34

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

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021) ..... passim

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021) ..... passim

U.S. H. 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 Apr. 21, 2021) 3, 4, 13, 25

11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2013) 7

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. § 1331. The district court denied plaintiffs' motion for a preliminary injunction on December 22, 2020. ROA.011. Plaintiffs filed a notice of appeal on January 22, 2021. ROA.009. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in determining that plaintiffs had failed to establish the factors necessary to obtain the extraordinary remedy of a preliminary injunction, including the showing of irreparable harm that is a prerequisite to such relief.

STATEMENT OF THE CASE

I. The Temporary Eviction Moratorium and Related Appropriations

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. *See, e.g.*, H.R. Rep. No. 116-420, at 2-3 (2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,732-33 (Mar. 31, 2021). To curb the pandemic and its economic fallout, the federal government has deployed an array of measures, including trillions of dollars of emergency spending. Recognizing that the pandemic has made it difficult for many individuals and families to continue to make regular rental payments, Congress has appropriated more than $46 billion to

help pay rent and rental arrears, thus assisting landlords and reducing the number of renters who might face eviction.

The measure at issue here—a temporary moratorium on certain evictions—forms another part of the multi-pronged effort to address evictions and their impact on 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 Centers for Disease Control and Prevention (CDC) first issued the moratorium in September 2020 pursuant to its longstanding statutory 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 foreign countries into the States or possessions, or 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 in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

[1] The Public Health Service Act assigned authority to the Surgeon General, but these statutory powers and functions 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 issuing the moratorium, the CDC discussed 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. Maintaining social distance is difficult in these settings, and "[e]xtensive outbreaks of COVID-19 have been identified in homeless shelters," including in Seattle, Boston, and San Francisco. *Id.* at 55,295. The CDC also explained that the homeless population is at particular risk of requiring hospitalization from COVID-19, *see id.* at 55,295-96, and later noted that "increases in unsheltered homelessness may lead to further strains on the healthcare system," Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020, 8023 (Feb. 3, 2021) (citing estimates that homeless persons use the emergency department at nearly five times the rate of the general population).

In December 2020, Congress extended the moratorium and, in the immediately preceding section of the same legislation, appropriated $25 billion in emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, §§ 501, 502, 134 Stat. 1182, 2070-79 (2020) (2021 Appropriations Act). This appropriation works in tandem with the moratorium, helping to "ensure that millions of renters across America are not evicted while waiting to receive assistance." U.S. H. 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 Apr. 21, 2021).

The CDC extended the moratorium in January 2021 and again in March 2021. *See* 86 Fed. Reg. 8020; 86 Fed. Reg. 16,731.

Also in March 2021, Congress appropriated an additional $21.5 billion in funding for emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent due to the pandemic. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (American Rescue Plan Act). Like the $25 billion provided by the 2021 Appropriations Act, this additional funding is meant to work together with the temporary eviction 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 (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").

In extending the moratorium through June 30, 2021, the CDC emphasized the 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," even as "vaccines continue to be distributed." 86 Fed. Reg. at 16,733. As of March 25, 2021, nearly 30 million COVID-19 cases, resulting in more than 540,000

deaths, had been reported in the United States. *Id.* at 16,732. Although transmission has decreased since a peak in January 2021, the number of cases per day has remained almost twice as high as the initial peak in April 2020 and transmission rates are similar to the second peak in July 2020. *Id.* Elevated rates of transmission are continuing, with 37% of U.S. counties experiencing "high" transmission, 30% of counties experiencing "substantial" transmission, and no counties free of spread as of the moratorium's most recent extension. *Id.* at 16,733. The CDC emphasized that new variants of the virus make continued vigilance especially important. *Id.*

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.* (footnote omitted).

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 eviction 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/x7dhb (last visited Apr. 21, 2021) (stating that landlords are not prevented from "starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order").

II. District Court Proceedings

Plaintiffs are a company and a trade association with members who own and manage rental properties in Louisiana. In November 2020, they filed this action in district court, challenging the CDC's temporary eviction moratorium on statutory and constitutional grounds. They alleged that the moratorium exceeds the CDC's statutory authority and is arbitrary and capricious, that a broad reading of the statute

amounts to an unconstitutional delegation of legislative power, and that the CDC failed to comply with notice-and-comment procedures. ROA.016.

Plaintiffs moved for a preliminary injunction, which the district court denied. The district court determined that plaintiffs had failed to establish the factors necessary to obtain a preliminary injunction. *See* ROA.042-043. The court emphasized that "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." ROA.035 (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2013)). The court concluded that plaintiffs failed to show (among other things) that their harms were non-compensable and thus irreparable. *See* ROA.038-040. Furthermore, the court concluded that plaintiffs' "harm pales in comparison to the significant loss of lives that . . . could occur" if the temporary eviction moratorium were enjoined. ROA.042 (quotation marks omitted); *see* ROA.041 (emphasizing public interest in controlling the spread of COVID-19).

The court also concluded that plaintiffs were unlikely to succeed on the merits, noting that the statute "is unambiguous and evinces a legislative determination to defer to the 'judgment' of public health authorities about what measures they deem 'necessary' to prevent contagion." ROA.020. The court concluded that plaintiffs' nondelegation challenge had little chance of success because preventing the interstate

spread of disease provides an intelligible principle for the agency to follow. *See* ROA.029-031. And the court determined that the Administrative Procedure Act's rulemaking provisions were inapplicable and, in any event, that the CDC had good cause to forgo notice and comment in this emergency situation "where delay could result in serious harm" to public health. ROA.032-033.

SUMMARY OF ARGUMENT

To curb the spread of COVID-19 and its economic fallout, the federal government has deployed an array of measures, including trillions of dollars of emergency spending. The measure at issue here is a temporary moratorium on 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. Although the moratorium temporarily bars the actual eviction of such individuals for nonpayment of rent, it does not excuse a tenant's obligation to pay rent or prohibit a landlord from pursuing other legal avenues to collect unpaid rent. The moratorium thus works in tandem with Congress's appropriation of $46 billion for rent and rental arrears, by helping to ensure that renters are not evicted while they await emergency assistance.

The sole issue presented on appeal is whether the district court abused its discretion in finding that plaintiffs failed to establish the preliminary-injunction factors, including the showing of irreparable injury that is an "indispensable prerequisite to issuance of a preliminary injunction." *Tate v. American Tugs, Inc.*, 634

F.2d 869, 870 (5th Cir. 1981). Consistent with the decisions of every court to address the issue, the district court correctly found that plaintiffs failed to demonstrate that the temporary moratorium was causing them harm that was non-compensable and thus irreparable. Furthermore, the district court properly found that plaintiffs' asserted harm is far outweighed by the public's interest in controlling the spread of COVID-19, and that plaintiffs are unlikely to succeed on the merits of their claims. As the district court explained, the moratorium is authorized by the plain language of 42 U.S.C. § 264(a). And Congress itself removed any doubt about whether § 264 authorizes the CDC to adopt an eviction moratorium when it ratified and extended the CDC's original order.

Plaintiffs provide no basis to deem the district court's weighing of the preliminary-injunction factors an abuse of discretion. The order denying a preliminary injunction should therefore be affirmed.

STANDARD OF REVIEW

The denial of a preliminary injunction is reviewed for an abuse of discretion. *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 463 (5th Cir. 2021).

ARGUMENT

The District Court's Denial Of Plaintiffs' Motion For A Preliminary Injunction Was Not An Abuse Of Discretion

To obtain the "extraordinary remedy" of a preliminary injunction, plaintiffs had the burden to show: (1) that they had a substantial likelihood of success on the merits;

(2) that a preliminary injunction was necessary to prevent irreparable harm; (3) that such harm outweighed the harm that a preliminary injunction would inflict on other parties; and (4) that a preliminary injunction was not contrary to the public interest. *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (quotation marks omitted). A preliminary injunction "should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Id.* (quotation marks omitted). Courts have been especially reluctant to enjoin emergency measures designed to address an evolving pandemic. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) ("The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."). The district court acted well within its discretion in concluding that plaintiffs failed to make the required showing.

I. The District Court Correctly Found That Plaintiffs Failed To Demonstrate Irreparable Harm

A. Plaintiffs Failed To Substantiate Their Claim Of Irreparable Monetary Harm

Plaintiffs failed to establish that they would suffer irreparable harm in the absence of a preliminary injunction. That deficiency is fatal to their request for injunctive relief. This Court has recognized irreparable harm as an "indispensable prerequisite to issuance of a preliminary injunction." *Tate v. American Tugs, Inc.*, 634 F.2d 869, 870 (5th Cir. 1981). Thus, "[w]hen the movant fails to prove that, absent

the injunction, irreparable injury will result, . . . the preliminary injunction should be denied." *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985); *see White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (affirming denial of preliminary injunction that addressed only the lack of irreparable harm).

Every federal court to address the issue has concluded that plaintiff landlords faced no irreparable injury as a result of the CDC's temporary eviction moratorium.[2] Indeed, in one of the cases on which plaintiffs rely, Br. 8, the district court found that the landlords' "temporary monetary harm" was "the antithesis" of "irreparable harm." *Tiger Lily LLC v. U.S. Dep't of Hous. & Urban Dev.*, --- F. Supp. 3d ---, No. 20-2692, 2020 WL 7658126, at *8 (W.D. Tenn. Nov. 6, 2020) (denying a preliminary injunction).

As the district court here explained, plaintiffs failed to substantiate their claim that their asserted monetary harms would be non-compensable. Plaintiffs identified tenants who could be evicted for nonpayment of rent, but plaintiffs did not show that the rent owed by those tenants would be uncollectible. *See* ROA.038-040. The temporary eviction moratorium does not excuse the tenants' obligations to pay rent or preclude landlords from suing their tenants for unpaid rent, 85 Fed. Reg. at 55,294,

[2] *See Tiger Lily LLC v. U.S. Dep't of Housing & Urban Dev.*, --- F. Supp. 3d ---, No. 20-2692, 2020 WL 7658126 (W.D. Tenn. Nov. 6, 2020); *Brown v. Azar*, --- F. Supp. 3d ---, No. 20-3702, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. Nov. 9, 2020), *mot. for inj. pending appeal denied*, No. 20-14210 (11th Cir. Dec. 17, 2020); Order, *KBW Inv. Props. LLC v. Azar*, No. 20-4852 (S.D. Ohio Sept. 25, 2020), ECF No. 16.

and "an injury is irreparable only 'if it cannot be undone through monetary remedies,'" *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quotation marks omitted).

The sole evidence that plaintiffs mustered was that some tenants indicated that they were incapable of making full rent payments during the pandemic despite exercising best efforts. Br. 62. But as the district court noted, a temporary inability to pay did not mean that such tenants were or would remain insolvent. ROA.039. Moreover, plaintiffs did not produce any evidence regarding their collection efforts, "the occupation of any of the tenants, whether they are employed or unemployed (and, if unemployed, their prospect for reemployment), whether they are (or have been) sick, whether they have money in the bank, [or] whether they qualify for some type of government assistance." ROA.039 (quotation marks omitted). The district court acted well within its discretion in finding that plaintiffs' lack of evidence precluded a finding of irreparability because even "[t]he possibility that adequate compensatory . . . relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Dennis Melancon*, 703 F.3d at 279 (alteration and quotation marks omitted).

To the extent that plaintiffs claimed harm from lost opportunity, *cf.* Br. 60-61, they did not identify any prospective tenant who was willing and able to pay. Nor did they show that the monthly rent fails to provide a quantifiable measure of damages. *See* ROA.045-046. Thus, this case is unlike those in which movants built an extensive

record establishing that their damages were incalculable. *See, e.g., RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989) (explaining that the losses at issue "def[ied] precise dollar quantification").

Furthermore, the district court correctly anticipated that plaintiffs' "tenants may become eligible for various government benefits." ROA.039. As discussed above, Congress has since appropriated more than $46 billion of emergency assistance to pay rent and rental arrears. *See* 2021 Appropriations Act, div. N, tit. V, § 501, 134 Stat. at 2070-78 ($25 billion); American Rescue Plan Act, § 3201(a)(1), 135 Stat. at 54 ($21.5 billion). Congress relied on the ongoing moratorium in enacting these massive appropriations, recognizing that the moratorium would "help ensure that millions of renters across America are not evicted while waiting to receive assistance." U.S. H. 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 Apr. 21, 2021); 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").

Plaintiffs' brief fails to acknowledge these massive appropriations. Although plaintiffs insist that they have been irreparably harmed by the government's COVID-control measures, they do not disclose the extent to which they have benefited from the government's emergency assistance or may benefit in the future. *See, e.g.*,

Louisiana Hous. Corp. & La. Office of Cmty. Dev., *State of Louisiana's U.S. Treasury Emergency Rental Assistance Program*, https://www.lastaterent.com (last visited Apr. 21, 2021) (noting that rental assistance funds remain available and encouraging landlords and tenants to apply).

B. Plaintiffs Failed To Establish Their Alternative Theories Of Irreparable Harm

Unable to demonstrate irreparable monetary harm, plaintiffs retreat to categorical contentions. They contend that any interference with access to their property automatically qualifies as irreparable harm. Br. 59-61. But the out-of-circuit precedent on which they rely counsels against "assum[ing] the existence of irreparable harm [when] dealing with interests in real property" because "the Supreme Court has rejected the application of categorical rules in injunction cases." *RoDa Drilling*, 552 F.3d at 1210.

The district court correctly reasoned that it is insufficient for plaintiffs to rest solely on the abstract notion that real property is unique. ROA.037. Plaintiffs rely on cases where the irreparable harm stemmed from a permanent deprivation or destruction of property. *See, e.g.*, *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) (deprivation of "unique oil and gas extraction opportunities afforded [owners] by their mineral rights"); *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1095 (7th Cir. 2008) ("loss of real property"); *Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (condemnation

and taking of real property). These examples are a far cry from the temporary eviction moratorium for nonpayment of rent at issue here.

Plaintiffs presented no evidence that they were "in danger of losing [their] properties" or "title to their property." ROA.037-038 (quotation marks omitted). Nor did they claim that they "actually reside" or "seek to reside" in their properties but have been "prevented from doing so." ROA.038. Plaintiffs' speculation that some landlords may wish to "renovate a unit," "occupy a unit," or "allow a unit to remain vacant," Br. 59-60, does not transform their temporary monetary loss into irreparable injury.

Plaintiffs' alternative contention—that alleged constitutional violations always satisfy the irreparable harm requirement, Br. 56-59—is similarly unavailing. Plaintiffs primarily assert statutory claims in this case, ROA.036, and they are mistaken in equating their statutory claims with constitutional claims, Br. 56-57. The Supreme Court has rejected the proposition that an act "in excess of . . . statutory authority is *ipso facto* in violation of the Constitution." *Dalton v. Specter*, 511 U.S. 462, 472 (1994). In any case, the doctrine to which plaintiffs refer pertains to First Amendment claims or invasions of privacy whose intangible nature renders monetary compensation inadequate. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). No such constitutional claims are asserted here. Because plaintiffs failed "to prove that, absent the injunction, irreparable injury will result, . . . the preliminary injunction should be denied." *Enterprise Int'l*, 762 F.2d at 472.

II. The District Court Correctly Found That Plaintiffs' Asserted Harms Are Outweighed By The Harm That A Preliminary Injunction Would Cause To Third Parties And The Public Interest

The district court also correctly concluded that plaintiffs' asserted harm "pales in comparison to the significant loss of lives that . . . could occur" if the temporary eviction moratorium were enjoined. ROA.042 (quoting *Brown v. Azar*, --- F. Supp. 3d ---, No. 20-3702, 2020 WL 6364310, at *23 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. Nov. 9, 2020), *mot. for inj. pending appeal denied*, No. 20-14210 (11th Cir. Dec. 17, 2020)). Thus, the balance of equities and public interest precluded a preliminary injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (considering the balance of equities and public interest together "when the Government is the opposing party"); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23-24, 26 (2008) (concluding that preliminary injunction was unwarranted based on the balance of equities and the public interest).

The gravity of the pandemic is undeniable, and "it doubtlessly advances the public interest to stem the spread of COVID-19." *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020). No one disputes that COVID-19 is "easily transmissible, potentially serious, and sometimes fatal." ROA.041. At the time of the district court's order, the disease had already infected over fourteen million and claimed the lives of over 280,000 persons within the United States. ROA.041. And the situation worsened in the months leading up to the March extension: the agency's recent order indicates that, as of March 25, 2021, the total number of reported cases was nearly 30 million

and the number of deaths exceeded 540,000. *See* 86 Fed. Reg. at 16,732. In December 2020 and January 2021, "the number of deaths per day from COVID-19 consistently exceeded any other cause." *Id.* at 16,732-33.

At the time of the March extension, the number of cases per day was "almost twice as high as the initial peak in April 2020 and transmission rates [were] similar to the second peak in July 2020." 86 Fed. Reg. at 16,732. Nearly 70 percent of counties in the United States were experiencing "high" or "substantial" transmission, while "no counties [were] considered free of spread." *Id.* at 16,733. Although vaccines are being distributed, the CDC found that maintaining COVID-19 precautions "remains critical" in order "to avoid further rises in transmission" and prevent "another increase in the rates of new infections." *Id.* And the order emphasized the recent emergence of new variants of the virus that show "increased transmissibility as well as possible increased mortality." *Id.* The CDC identified evidence of a likely rise in infections if displaced tenants move into crowded living quarters or homeless shelters, where compliance with public health measures, such as social distancing and self-quarantining, may not be possible. *See* 85 Fed. Reg. at 55,294; *see also* 86 Fed. Reg. at 8022 (citing newly available scientific evidence that evictions exacerbate the spread of COVID-19).

In short, the district court correctly joined numerous "federal courts across the country [that] have routinely concluded that undoing orders deemed necessary by public health officials and experts to contain a contagious and fast-spreading disease

would result in comparatively more severe injury to the community." ROA.041-042 (quoting *Brown*, 2020 WL 6364310, at *22, and citing cases). Indeed, other courts have recognized that the interest in protecting public health amidst the COVID-19 pandemic overcomes even serious harms. *See, e.g.*, *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129 (6th Cir. 2020) (unpub.) ("Though Plaintiffs bear the very real risk of losing their businesses, the Governor's interest in combatting COVID-19 is at least equally significant.").

III. Plaintiffs Failed To Demonstrate A Likelihood Of Success On The Merits Of Their Claims

Because plaintiffs failed to show "a substantial threat of irreparable injury outweighing the harms of granting the preliminary injunction," the denial of a preliminary injunction would properly be affirmed even if plaintiffs could show a likelihood of success on the merits. *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (explaining that likelihood of success on the merits "is only a necessary, not a sufficient, condition for a preliminary injunction"). In any event, plaintiffs also failed to make that showing.

A. The Temporary Eviction Moratorium Is Within The CDC's Statutory And Regulatory Authority

1. The temporary eviction moratorium falls within the plain terms of the authority vested in the CDC by statute and regulation. Congress authorized the Secretary of Health and Human Services to "make and enforce such regulations as in his 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). As the district court explained, "Congress' intent, as evidenced by the plain language of [§ 264(a)], is clear: Congress gave the Secretary of HHS broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases." ROA.020 (quoting *Brown*, 2020 WL 6364310, at *7); *see Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006) (characterizing similar language authorizing "necessary" action as granting "an agency broad power to enforce all provisions" (quotation marks omitted)).

The regulations promulgated by the Secretary delegate authority to the CDC Director to act in the event that state health measures are insufficient to prevent the interstate spread of disease. In that circumstance, the CDC Director may "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary." 42 C.F.R. § 70.2. Like the statute itself, the regulation employs broad, flexible language to delineate the CDC Director's power. So long as the predicate of inadequate state measures is met, the CDC Director may enact preventative measures that the CDC Director "deems reasonably necessary."

These provisions do not confer unbounded authority, as plaintiffs suggest, *e.g.*, Br. 11, but they provide substantial flexibility for the CDC to act to prevent the interstate spread of disease. *See* H.R. Rep. No. 78-1364, at 24 (1944) (codifying the federal government's "basic authority to make regulations to prevent the spread of disease into this country or between the States"). Courts must give effect to

Congress's choice of broad language because "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). It is commonplace for "legislative options [to] be especially broad" in areas implicating "medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427 (1974).

The contrary rulings on which plaintiffs rely mistakenly failed to give effect to § 264(a)'s first sentence. *See Skyworks, Ltd. v. Centers for Disease Control & Prevention*, --- F. Supp. 3d ---, No. 20-2407, 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"); *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, --- F. Supp. 3d ---, No. 20-2692, 2021 WL 1171887, at *6 (W.D. Tenn. Mar. 15, 2021), *mot. for stay pending appeal denied*, --- F.3d ---, No. 21-5256, 2021 WL 1165170 (6th Cir. Mar. 29, 2021). For example, the interlocutory order issued by a Sixth Circuit motions panel focused on § 264(a)'s second sentence. *Tiger Lily*, 2021 WL 1165170, at *3-4.[3]

As the district court here explained, however, the broad grant of authority in the first sentence of § 264(a) is not implicitly narrowed by that provision's second sentence. The second sentence indicates that, "[f]or purposes of carrying out and

[3] The motions panel's ruling is "not strictly binding upon subsequent panels" of the Sixth Circuit. *Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014).

enforcing . . . regulations" promulgated under the first sentence, the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of [infected or contaminated] animals or articles . . . , and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a).

The suggestion that this enumerated list is exhaustive is foreclosed by other subsections of § 264 itself. For example, § 264(b), (c), and (d) place restrictions on the circumstances in which the agency may provide for the "apprehension, detention, examination, or conditional release of individuals." 42 U.S.C. § 264(c); *see id.* § 264(b), (d). These subsections make plain that the broad grant of authority in the first sentence of § 264(a) is not restricted to the specific actions described in the second sentence. As the district court observed, "[t]he 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 Secretary of HHS." ROA.023 (quotation marks omitted). Other courts have reached the same conclusion. *See Brown*, 2020 WL 6364310, at *8 (concluding that § 264(a)'s second sentence is illustrative, not exhaustive); *Independent Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 619-20 (W.D. La. 2010) (same).

2. Plaintiffs never come to terms with the statutory language discussed above. Their invocation of various canons of statutory interpretation (Br. 13-18, 27-37) cannot override that clear statutory text. The Supreme Court and this Court have emphasized that courts should not resort to such rules of thumb when the statute is

clear. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013); *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *In re Camp*, 631 F.3d 757, 759 (5th Cir. 2011).

These canons come into play only when the meaning of statutory text is not apparent on its face. For example, the noscitur a sociis and ejusdem generis canons are "useful rule[s] of construction" that look to neighboring terms "where words are of obscure or doubtful meaning." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923) (noscitur a sociis); *see United States v. Powell*, 423 U.S. 87, 91 (1975) (ejusdem generis); *United States v. Kaluza*, 780 F.3d 647, 658 (5th Cir. 2015) (applying ejusdem generis only after concluding that the "text of the statute is ambiguous"). Similarly, "the canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). And the rule of lenity is reserved for provisions imposing criminal penalties that contain a "grievous ambiguity or uncertainty." *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (quotation marks omitted).

Here, the plain text of § 264(a) is conclusive—it leaves no room for plaintiffs' narrow reading. Plaintiffs assert that § 264(a) is "limited to specific sites, objects, or animals that are suspected to be infected with a disease." Br. 21. But there is no such limitation in the first sentence of § 264(a), which authorizes the Secretary to "make and enforce such regulations as in his 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).

Plaintiffs emphasize that under different subsections of § 264, there are special requirements concerning the authority "to restrict human activity" and "to detain people." Br. 22 (citing 42 U.S.C. § 264(b)-(d)). But those subsections are irrelevant here because the temporary eviction moratorium does not authorize the apprehension or examination of individuals. The moratorium is an exercise of the authority to "prevent the introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a), which does not confine the agency to taking action only with respect to suspected sources of infection. As the CDC explained, such a limitation would undermine the efficacy of the temporary eviction moratorium because individuals infected by COVID-19 may be pre-symptomatic or asymptomatic and appear the same as uninfected counterparts. *See* 85 Fed. Reg. at 55,292.

3. Ultimately, however, the Court need not definitively resolve the scope of the CDC's authority under § 264(a) in other contexts, because Congress itself has confirmed that the statute authorizes the CDC to adopt the moratorium at issue here. In the 2021 Appropriations Act, Congress specifically extended the CDC Order issued "under section 361 of the Public Health Service Act (42 U.S.C. 264)." 2021 Appropriations Act, div. N, tit. V, § 502, 134 Stat. at 2078-79. By extending the CDC Order—and by expressly cross-referencing the agency's existing statutory authority—Congress confirmed that a temporary eviction moratorium is a permissible exercise of the CDC's authority under § 264.

Congress "ha[s] [the] power to ratify the acts which it might have authorized" as an initial matter. *United States v. Heinszen*, 206 U.S. 370, 384 (1907). As relevant here, a claim challenging agency action cannot be sustained where Congress intended to ratify the underlying action and could have authorized the action in the first instance. *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *Heinszen*, 206 U.S. at 384).

Plaintiffs miss the point when they declare that "Congress did not offer an ongoing ratification to CDC's actions simply by imposing a one-month moratorium." Br. 37. Congress did not impose a one-month moratorium itself, and it did not grant the CDC any new authority. Instead, Congress specifically extended the CDC's order issued "under section 361 of the Public Health Service Act (42 U.S.C. 264)." 2021 Appropriations Act, div. N, tit. V, § 502, 134 Stat. at 2078-79. Congress thus ratified, in express statutory text, the CDC's authority to issue an eviction moratorium under § 264. Indeed, Congress's extension of the Order's effective date would have been a nullity if, as plaintiffs maintain, the CDC had lacked the authority to issue the Order in the first place. Plaintiffs (and the court rulings on which they rely) disregard both the necessary premise of Congress's action and Congress's explicit reference to the agency's statutory authority under § 264.

Furthermore, as explained above, Congress relied on the ongoing moratorium in enacting massive appropriations to pay rent and rental arrears, recognizing that the moratorium would "help ensure that millions of renters across America are not

evicted while waiting to receive assistance." U.S. H. 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 Apr. 21, 2021). Consistent with Congress's objectives, the CDC "extend[ed] the federal eviction moratorium" so that "grantees have time to distribute assistance to renters in need." 167 Cong. Rec. H1281 (statement of Rep. Waters).

B. Plaintiffs' Constitutional Claims Are Meritless

Plaintiffs argue that, by authorizing and extending the CDC's temporary eviction moratorium, Congress exceeded its commerce power, altered the balance of federal and state authority, and failed to provide an intelligible principle for the agency to follow. Br. 30-35, 40-51. None of these claims has any merit.

1. Relying on the district court's decision in *Terkel v. Centers for Disease Control and Prevention*, --- F. Supp. 3d ---, No. 20-0564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), *appeal filed*, No. 21-40137 (5th Cir. Feb. 27, 2021), plaintiffs argue that Congress lacked authority to authorize or extend the CDC's temporary eviction moratorium. Br. 30-32. But as the district court here recognized, the objective of the temporary eviction moratorium, and the means that it employs, fall well within Congress's Commerce Clause power. *See* ROA.027; *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000) (explaining that Congress has the authority "'to regulate Commerce . . . among the several states,' and [the] concomitant power to protect the

nation's commerce by enacting such laws as it deems 'necessary and proper'" (quoting U.S. Const. art. I, § 8, cls. 3, 18)).

The COVID-19 pandemic's devastating impact on "industries that depend on the movement of people," as well as the "unprecedented restrictions on interstate and foreign travel," are well-documented. *See* 86 Fed. Reg. at 16,733; H.R. Rep. No. 116-420, at 2-3. The pandemic has devastated industries that depend on the movement of people, such as the travel, leisure, and hospitality industries. *See* Aaron Klein and Ember Smith, *Explaining the Economic Impact of COVID-19: Core Industries and the Hispanic Workforce* 1, 4 (Feb. 4, 2021).[4] Ten months after the initial wave of closures due to COVID-19, over 16 percent of the hospitality and leisure sector's labor force was unemployed. *Id.* at 5. And the pandemic has triggered unprecedented restrictions on interstate and foreign travel. For example, many states require travelers arriving from other states to obtain negative test results and/or quarantine for extended periods. *See* CDC, *Domestic Travel During COVID-19*, https://go.usa.gov/xHDTx (last updated Apr. 2, 2021). For international travel, passengers—including U.S. citizens—must obtain a negative test result or show proof of recovery before they may board a flight to the United States. *See* CDC, *Testing and International Air Travel*, https://go.usa.gov/xH9nV (last updated Feb. 18, 2021). Surges in COVID-19 cases also impose critical "strains on the healthcare system" when large numbers of infected

[4] https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1001&context=brookings_policybriefs_reports.

individuals seek hospitalization and emergency care that overwhelm healthcare providers' resources. 86 Fed. Reg. at 8023-24, 8024 n.38.

There is no doubt that Congress can act to control such an "interstate epidemic," and the temporary eviction moratorium is a means "reasonably adapted" to that legitimate commerce-power end. *United States v. Comstock*, 560 U.S. 126, 134-35, 142, 148 (2010) (quotation marks omitted) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause)). The moratorium regulates the terms of contracts for "rental of real estate," which, the Supreme Court has 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)); *accord Groome*, 234 F.3d at 206 (recognizing that "rent[ing] a house" is "a transparently commercial action"). Evictions, which serve as 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.

The temporary eviction moratorium also forms part of the federal government's multi-pronged effort to control the COVID-19 pandemic and its economic fallout. That effort includes more than $5 trillion of federal spending that Congress authorized in a series of enactments. *See* Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136,

134 Stat. 281 (2020); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); 2021 Appropriations Act, Pub. L. No. 116-260; American Rescue Plan Act, Pub. L. No. 117-2. And as discussed above, the 2021 Appropriations Act and the American Rescue Plan Act collectively appropriated more than $46 billion in emergency assistance for rent and rental arrears—appropriations that work together with the moratorium, which helps ensure that millions of renters are not evicted while waiting to receive assistance.

The CDC's temporary eviction moratorium bears no resemblance to the statutes at issue in *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison*, 529 U.S. 598 (2000). Those statutes regulated noneconomic activities—possession of a gun near a school (*Lopez*) and gender-motivated violence (*Morrison*)—and formed no essential part of any broader protection of interstate commerce. By contrast, the CDC moratorium regulates economic activities (evictions) in order to curb a pandemic that has shuttered major sectors of the domestic economy.[5]

2. Contrary to plaintiffs' contention, Br. 33-35, the CDC's temporary eviction moratorium does not alter the balance of federal and state power. Under the

[5] The district court's observation in *Terkel* that evictions are local activities is irrelevant, because "Congress is empowered to regulate and protect . . . interstate commerce . . . *even though the threat may come only from intrastate activities*." *Lopez*, 514 U.S. at 558 (emphasis added); *see also Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) (noting that the commerce power extends to "attempts to affect even the intrastate sale of marijuana grown within the State," and upholding a federal conviction for attempting to steal marijuana from a local drug dealer's private home).

longstanding regulation, the CDC may take action when the CDC Director "determines that the measures taken by health authorities of any State . . . are insufficient to prevent the spread of any of the communicable diseases" between or among States. 42 C.F.R. § 70.2.

The federal government is not required to rely on state and local eviction moratoria to curb the spread of COVID-19. The impact of the pandemic is not limited to persons or activities within a state—instead, because of the nature of the COVID-19 virus, the effects are quickly felt by individuals and enterprises across the nation.

The CDC's findings showed that state efforts at establishing moratoria have proven inadequate to curb the risks posed by evictions. The importance of the CDC moratorium is highlighted by the experience in states that imposed their own moratoria and then rescinded the restrictions. Data comparing COVID-19 spread in states that lifted eviction moratoria with states that maintained eviction moratoria "showed significant increases in COVID-19 incidence and mortality approximately 2-3 months after eviction moratoria were lifted." 86 Fed. Reg. at 8022. The data indicated that "over 433,000 cases of COVID-19 and over 10,000 deaths could be attributed to lifting state moratoria." *Id.* And based on mathematical modeling, the CDC found that lifting eviction moratoria led to a 40 percent increased risk of contracting COVID-19 among evicted persons and family or friends with whom they shared housing after eviction. *Id.* Moreover, the same models predicted an increase

in overall community transmission even among those who did not share housing when evictions occur. *Id.*

The CDC Order sets minimum protections, and it allows state and local authorities to "impos[e] additional requirements that provide greater public-health protection and are more restrictive," in accordance with § 264's express preemption provision. 85 Fed. Reg. at 55,292, 55,294 (citing 42 U.S.C. § 264(e)). As the district court observed, the CDC Order "acts as a straightforward application of the Supremacy Clause" in an area that has long been subject to federal regulation. ROA.026-027.

3. Plaintiffs' contention that the CDC's authority to control the interstate spread of disease amounts to an unconstitutional delegation of legislative power, Br. 40-51, is equally meritless. This argument is especially unfounded after Congress endorsed the very agency action in question. Moreover, even apart from Congress's validation of the CDC's action, plaintiffs' claim lacks doctrinal basis.

"Only twice in this country's history" (and only in 1935) has the Supreme Court "found a delegation excessive—in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.) (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989), and citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935)); *see Big Time Vapes, Inc. v. Food &*

Drug Admin., 963 F.3d 436, 446 (5th Cir. 2020) ("The Court has found only two delegations to be unconstitutional. Ever. And none in more than eighty years.").

"By contrast," the Supreme Court has "over and over upheld even very broad delegations." *Gundy*, 139 S. Ct. at 2129. For example, the Court has "approved delegations to various agencies to regulate in the 'public interest.'" *Id.* (citing *National Broad. Co. v. United States*, 319 U.S. 190, 216 (1943), and *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)). The Court has "sustained authorizations for agencies to set 'fair and equitable' prices and 'just and reasonable' rates." *Id.* (quoting *Yakus v. United States*, 321 U.S. 414, 422 (1944), and *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 595 (1944)). And it has "more recently affirmed a delegation to an agency to issue whatever air quality standards are 'requisite to protect the public health.'" *Id.* (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001)). In such decisions, the Supreme Court has made clear that Congress's delegations are valid so long as they provide an "intelligible principle" to which the agency must conform. *Mistretta*, 488 U.S. at 372 (quotation marks omitted).

As the district court explained, "the protection of public health and safety are intelligible principles sufficient to make a delegation constitutional." ROA.030; *see Big Time Vapes*, 963 F.3d at 443-45 (considering statutory purpose of protecting public health in rejecting nondelegation challenge to statute delegating to the Food and Drug Administration the power to "deem" which tobacco products should be regulated). Section 264(a) permits only measures aimed at preventing the introduction,

transmission, 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 directions to agencies upheld by the Supreme Court in other cases. *See* ROA.030-031.

As in district court, plaintiffs on appeal fail to focus on the intelligible principle standard, opting instead to "rehash their argument regarding the alleged breadth of the authority granted." ROA.031. Plaintiffs misapprehend the inquiry: "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v. United States*, 500 U.S. 160, 165 (1991). Rather, Congress remains free to "delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. Section 264(a) easily passes muster under the proper standard. And whatever might be the outer reaches of § 264, the temporary moratorium adopted to combat an unprecedented deadly pandemic plainly falls within the agency's power to take action to "prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a).

C. The Issuance Of The Temporary Eviction Moratorium Was Procedurally Valid

The CDC complied with the procedures of the Administrative Procedure Act in issuing the Order. The temporary eviction moratorium was issued pursuant to a longstanding regulation that was promulgated pursuant to notice-and-comment rulemaking and that permits the agency to issue "measures to prevent [the] spread of the diseases as [the CDC Director] deems reasonably necessary." 42 C.F.R. § 70.2.

The CDC Order is "an emergency action taken under th[at] existing authority." 85 Fed. Reg. at 55,296. As the district court explained, no additional procedures were required. *See* ROA.032. Indeed, requiring an additional round of notice and comment before the agency's measures can take effect would undermine the purpose of the regulation to enable the CDC to act quickly to prevent contagion.

In any event, even if the Order were the type of agency action that ordinarily would require notice-and-comment rulemaking, the agency articulated "good cause" to issue the Order without notice and comment because such procedures would be "impracticable" and "contrary to the public interest." 5 U.S.C. § 553(b)(B). As the CDC explained, immediate action was necessary to prevent mass evictions that would "further contribute to the spread of COVID-19." 85 Fed. Reg. at 55,296. The CDC took swift action because any "delay in the effective date of the Order . . . would defeat the purpose of the Order and endanger the public health." *Id.* Courts have not hesitated to uphold findings of good cause in emergency situations where delay could result in serious harm. *See Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004); *accord U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (describing the good cause exception as "an important safety valve to be used where delay would do real harm").

Plaintiffs do not seriously dispute the pressing public health threat posed by COVID-19, but they contend that the CDC could have "started the rulemaking process earlier" and left time for a full notice-and-comment period. Br. 53. Contrary to plaintiffs' suggestion, the CDC had to determine that state and local measures were

insufficient to prevent the interstate spread of disease, *see* 42 C.F.R. § 70.2, not simply that "there would be no national uniformity in eviction rules," Br. 53. As the district court explained, the CDC's judgment about the necessity of the Order depended on the lapse of similar federal and state eviction moratoria enacted early in the pandemic. *See* ROA.034 (citing 85 Fed. Reg. at 55,294 & n.14, 55,296 & n.36). And the landscape remained dynamic through the time of the CDC's two extensions, as Congress itself extended the CDC's Order at the beginning of this year. *See* 2021 Appropriations Act, div. N, tit. V, § 502, 134 Stat. at 2078-79. That other rules not specifically directed to controlling COVID-19 went through notice and comment in the same period, *see* Br. 53-54 (citing Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021)), does not change the nature of the emergency here. Rather, by the time that the CDC had sufficient information to determine what steps to take, urgent action was necessary to curb a raging pandemic.

D. The Temporary Eviction Moratorium Is Not Arbitrary And Capricious

Finally, plaintiffs are wrong to assert that the CDC's approach was arbitrary and capricious. Br. 54-56. Agency action may not be overturned on that ground unless the agency failed to "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Deference is especially warranted where, as here, officials entrusted with protecting public health and safety "undertake to act in

areas fraught with medical and scientific uncertainties." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (alteration omitted) (quoting *Marshall*, 414 U.S. at 427). The CDC easily satisfied its obligation by providing detailed rationales supported by substantial evidence to justify issuing the CDC Order.

Notably, plaintiffs do not challenge the CDC's findings that eviction moratoria reduce the spread of COVID-19 and that, absent a moratorium, 30 to 40 million people in the United States could be at risk of eviction, with a significant portion likely forced to move into the types of congregate housing that have seen extensive outbreaks of COVID-19. 85 Fed. Reg. at 55,294-95. Instead, plaintiffs claim that the agency failed to acknowledge that the moratorium could lead landlords to stop renting to low-income tenants or to stop renting altogether. *See* Br. 54-55. But the CDC was not enacting "housing policy" to ensure that tenants have a place to live, as plaintiffs suggest, Br. 54—the agency issued a public health measure targeted at preventing the spread of COVID-19. The CDC properly focused on protecting human life from the "historic threat to public health." 85 Fed. Reg. at 55,292.

Plaintiffs do not fare any better in arguing that the agency was required to provide an "objective standard guiding its decision as to whether to extend the moratorium." Br. 55. Plaintiffs cite no case supporting that proposition. Given the evolving nature of the pandemic and possibility of legislative relief, the agency prudently reserved its ability to revisit the need for the moratorium at short intervals.

See 85 Fed. Reg. at 55,297 (providing that the moratorium would "remain in effect, unless extended, modified, or rescinded"); *see also* 86 Fed. Reg. at 16,738 (providing that the moratorium is "subject to revision based on the changing public health landscape"). With each iteration, the CDC has provided a thorough explanation for why the protections are necessary to prevent the interstate spread of COVID-19.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ALEXANDER C. VAN HOOK
Acting United States Attorney

ALISA B. KLEIN

s/ Brian J. Springer
BRIAN J. SPRINGER
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5446
brian.j.springer@usdoj.gov

April 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brian J. Springer
Brian J. Springer

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,019 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer
Brian J. Springer