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, Monroe Division
Honorable Terry A. Doughty, District Judge

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: April 28, 2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has an interest in ensuring that the Constitution is read, consistent with its text and history, to allow Congress to delegate federal administrative agencies the authority and flexibility to craft effective responses to national crises, such as the COVID-19 pandemic. Accordingly, CAC has a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The Supreme Court has long interpreted that clause to permit Congress to delegate its legislative authority so long as it "lay[s] down . . . an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief.

In cases involving congressional delegations, the Court's "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Only two times, both in 1935, has the Supreme Court struck down statutes on the ground that they impermissibly delegated legislative authority to the executive branch. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down a statute that authorized private parties to impose binding regulations). Thus, "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which . . . enable it to perform its function." *Currin v. Wallace*, 306 U.S. 1, 15 (1939); *see, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (same); *Yakus v. United States*, 321 U.S. 414, 425 (1944) (same).

Appellants' argument in this case—that 42 U.S.C. § 264(a), if interpreted to permit the Centers for Disease Control and Prevention (CDC) to impose a federal eviction moratorium to curb the spread of COVID-19, would constitute an impermissible delegation of legislative authority—is at odds with this precedent. Indeed, Appellants present a vision of the so-called nondelegation doctrine that

would "cripple the government, and render it unequal to the object for which it is declared to be instituted." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824). That object—and the need for technical administrative expertise in carrying it out—is essential in the midst of this global public health crisis.

Not only is Appellants' argument untenable under controlling precedent, but it also has no grounding in the Constitution's text and history. Our nation's robust administrative state dates back to the Founding. When the Framers drafted the Constitution, they empowered Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers" of the federal government, U.S. Const. art. I, § 8, cl. 18, thus ensuring that future legislators would have the flexibility needed to structure the government so it could respond effectively to new challenges. As Chief Justice John Marshall later observed, the Framers made no "unwise attempt" to dictate "the means by which government should, in all future time, execute its powers." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). Their choice reflected an understanding that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id*.

The Framers' desire for nimble and adaptive government is reflected in the decisions of Founding-era Congresses to confer broad delegations of discretionary authority on executive officials to help them tackle some of the most pressing

problems our young nation faced. "From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action." Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 5 (2012). Indeed, the first Congresses experimented with expansive delegations of legislative power in the realms of patents, remittances, military pensions, military development, policing federal territories, managing the national debt, land sales, disaster relief, revenue collection, direct taxes, public subsidies, and quarantine authority, to name a few. *See* Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. (forthcoming 2021) (manuscript at 64), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802760.

Many of those delegations generated almost no debate. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 349 (2021) (calling the lack of objections by members of the First Congress to broad delegations of legislative authority a "silence [that] is deafening"). And when debates on Congress's delegation of its authority did occur, the emerging principle was one of permissiveness and flexibility, resembling the Supreme Court's current nondelegation jurisprudence centered on an "intelligible principle." Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, Ga. L. Rev. (forthcoming

2021) (manuscript at 17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564. Accordingly, to the extent there were any constraints on Congress's authority to delegate broad, discretionary power to executive branch officials at the Founding, *cf.* Mortenson & Bagley, *supra*, at 280 ("the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control"), they were very modest, even when Congress delegated legislative authority to address some of the most "important questions" of the time, *see* Chabot, *supra*, at 17, 48.

Those principles dictate the outcome here, and no relevant text, precedent, or history supports Appellants' argument that if 42 U.S.C. § 264(a) authorizes the eviction moratorium, it violates the nondelegation doctrine. The requirement that a measure be "necessary" in the "judgment" of the CDC Director for the purpose of preventing the "spread of communicable diseases" provides meaningful, judicially reviewable boundaries—*i.e.*, an intelligible principle—to guide the Director's authority. 42 U.S.C. § 264(a). This statute, as understood to authorize implementation of the federal eviction moratorium, is constitutional.

ARGUMENT

I. The Founders Embraced a Robust Administrative State and Permitted Broad Delegations of Legislative Authority to Executive Officials.

The Constitution's three Vesting Clauses parcel out the legislative, executive, and judicial powers to the three branches of government, but their text is silent as to whether these powers may be shared or delegated. *Cf. American Trucking*, 531 U.S. at 489 (Stevens, J., concurring in part and concurring in the judgment) ("[The Vesting] provisions do not purport to limit the authority of [the] recipient of power to delegate authority to others."). In other words, when it comes to the nondelegation doctrine, the Constitution's text only gets us so far. *Accord* Arlyck, *supra*, at 12 ("As conceded on all sides, the constitutional text itself tells us virtually nothing."); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. (forthcoming 2021) (manuscript at 8-9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696860 ("Text . . . and structure may tell us to have *some* limit on delegation, but they tell us basically nothing about [what] that limit should be."). Accordingly, Founding-era debates and analysis of early congressional practices are critical to a proper understanding of the scope of the nondelegation doctrine at the Founding.

Although the Framers barely discussed the precise issue of delegation at the Constitutional Convention, *see* Parrillo, *supra*, at 7-8 & n.38 (noting that "the

pressing issue at that time was legislative self-aggrandizement, not legislative abdication"), their debates touched on concepts important to delegation, and they grappled with the challenge of defining legislative power and its relationship to executive power. For example, James Madison expressed a "strong bias in favor of an en[u]meration and definition of the powers necessary to be exercised by the national Legislature." 1 *The Records of the Federal Convention of 1787*, at 53 (Max Farrand ed., 1911) [hereinafter Farrand]. At the same time, he voiced "doubts concerning [the] practicability" of this undertaking, *id.*, and he was equally concerned about an "unduly limited executive role" in the new nation's government, Chabot, *supra*, at 6. Indeed, Madison moved to include a constitutional provision to clarify that the executive branch has the power not just to "carry into effect[] the national laws" but also "to execute such other powers . . . as may from time to time be *delegated* by the national Legislature." 1 Farrand, *supra*, at 67 (emphasis added). The delegates at the Convention ultimately voted down the amendment because it was "unnecessary"—its "object" (that is, authorizing the delegation of "other powers") was already "included in the 'power to carry into effect the national laws.'" *Id.*

Eventually, Madison wrote in a letter to Thomas Jefferson that "the boundaries between the Executive, Legislative & Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades

of difference." Letter from James Madison to Thomas Jefferson: New York (excerpts) (Oct. 24 & Nov. 1, 1787), *reprinted in Documentary History of the Ratification of the Constitution Digital Edition* 442 (John P. Kaminski et al. eds., 2009) [hereinafter *Documentary History*]. He later reiterated that sentiment in *The Federalist Papers*. *See* James Madison, *The Federalist No. 37* (1788) (Yale Law School Avalon Project, 2008), https://avalon.law.yale.edu/18th_century/fed37.asp ("[N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary."). In an early draft of *Federalist 64*, addressing the power of the executive to make treaties, John Jay similarly remarked: "Some object because the Treaties so made are to have the Force of Laws, and therefore that the makers of them will so far have legislative power[.] This objection is a mere play on the word legislative . . . ." John Jay, *Draft of Federalist No. 64* (Mar. 5, 1788), *reprinted in Documentary History*, *supra*, at 317.

These comments do not merely reflect the Framers' struggles with articulating a precise definition of legislative power, but also their fluid and adaptable understanding of that power and its relationship to other government powers. Indeed, for the Founding generation, "building the administrative capacity needed to fulfill the new national government's critical responsibilities" was a "dynamic" and "improvisational . . . experiment in governance." Arlyck, *supra*, at 6. Congress

was not focused on "trac[ing] out hard constitutional boundaries between the branches." *Id.* Rather, it "sought to mobilize the limited resources available to it in order to meet the myriad challenges the nation faced." *Id.*

Of course, that improvisational state-building took place against the backdrop of eighteenth-century legal and political theory, which informed the Framers' thinking as they crafted our nation's charter. Two aspects of that body of theory bear on our understanding of the Founders' approach to the nondelegation doctrine. First, prevailing eighteenth-century treatises presumed "that competent persons and institutions could delegate their authorities to agents, and that those agents would then exercise those authorities both on behalf and under the ultimate supervision of the original principal." Mortenson & Bagley, *supra*, at 295. For example, William Blackstone's seminal *Commentaries on the Laws of England* discussed the right of a father to "delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis*." 1 William Blackstone, *Commentaries on the Laws of England* 441 (1765). In cases where there was a limit on delegation, sources explicitly noted the limit and provided a justification for it. *See* Mortenson & Bagley, *supra*, at 295 & n.97; *e.g.*, Thomas Rutherforth, *Institutes of Natural Law*, bk. 1, ch. II, § IX, at 37 (J. Bentham ed., 1754) ("Some of our rights are alienable, others are unalienable. Those rights are alienable, which the law does not forbid us to part with. Those only are unalienable, which we cannot part with

consistently with the law."). Delegation was the rule; nondelegation was the exception.

Second, as reflected in the Constitution's opening words—"We the People"—the conventional wisdom at the Founding was that "all lawful authority, legislative, and executive, originates from the people." James Burgh, *Political Disquisitions* bk. I, ch. II, at 3 (London, printed for E. & C. Dilly 1774). Thus, American "government's very existence meant that the 'original legislative power' had already been delegated." Mortenson & Bagley, *supra*, at 296. As James Wilson, the most celebrated jurist at the Constitutional Convention put it, "[a]ll these powers and rights, indeed, cannot, in a numerous and extended society, be exercised personally; but they may be exercised by representation." James Wilson, *Lectures on Law* ch. V, at 557 (1791), *reprinted in* 1 *Collected Works of James Wilson* 412 (Kermit L. Hall & Mark David Hall eds., 2011). In other words, the concept of representative government, embraced wholeheartedly by the Framers, itself assumes that some core governing authority must be delegated in order for republican government to function.

That is not to say that there was *no* limit on the delegation of legislative power at the Founding. James Madison in particular expressed concern about the "*whole* power of one department" being wielded "by the same hands which possess the *whole* power of another department." James Madison, *The Federalist No. 47* (1788)

(Yale Law School Avalon Project, 2008), https://avalon.law.yale.edu/18th_century/fed47.asp. Sometimes referred to as an "anti-alienation principle," *see* Mortenson & Bagley, *supra*, at 307, this idea was grounded in John Locke's *Second Treatise on Government*, which posited that "the legislative cannot *transfer* the power of making laws to any other hands," John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government* (1690), *reprinted in Two Treatises of Government* ch. 11, § 141 (A. Millar et al. eds., 1764) (emphasis added). Advocates for an anti-alienation principle feared that delegation of an *entire* Article I, Section 8 power "might amount to an alienation or impermissible transfer of power in a way that delegation of part of this power would not." Chabot, *supra*, at 8. Those concerns were heightened where an entire power was transferred without the right of reversion or control. *See* Mortenson & Bagley, *supra*, at 307.

Yet the anti-alienation principle advanced by some of the Founders was fundamentally different from the vision of the nondelegation doctrine advanced by Appellants. And arguments for much stricter limits on delegation at the Founding "clearly did not have much purchase," Arlyck, *supra*, at 65, as scholars have uncovered only two pre-ratification arguments along those lines expressed in legal registers, and in both cases, the objections to delegations failed. *See* Mortenson & Bagley, *supra*, at 305-07 (describing Thomas Burke's failed criticism of a proposal

to delegate state fiscal authorities to the national government, and an unsuccessful objection by the Speaker of the 1764 Pennsylvania Assembly to the use of an executive agent to present petitions to the Assembly). Fundamentally, the nondelegation doctrine recognized at the Founding, particularly in the civil administrative setting, was a "limited constraint[]," aligning more closely with the current "intelligible principle" requirement than with any more stringent standard. Chabot, *supra*, at 17.

Examples of broad delegations of legislative authority at the Founding strongly reinforce this permissive and flexible Founding-era approach to congressional delegation, as the Founders attempted to build a functioning administrative state. These "practice[s] of the First Congress [are] strong evidence of the original meaning of the Constitution," *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020), and "[e]arly legislation of Congress may tell us more [than any other source] about the content and stringency of any limit [on delegation] that originally existed, for that legislation is evidence of how practically capacious any such a limit was," Parrillo, *supra*, at 9.

A. Congress Delegated Broad Legislative Authority to Address the National Debt.

Delegation of legislative authority emerged as the First Congress's solution to one of the most urgent problems facing the new nation in the wake of the Revolutionary War: a "potentially insurmountable" national debt. Chabot, *supra*,

at 1. The First Congress recognized that "justice and the support of public credit require[d]" that the government make arrangements "for fulfilling the engagements of the United States in respect to their foreign debt, and for funding their domestic debt." Act of Aug. 4, 1790, ch. 34, 1 Stat. 138, 138. Legislators made payment of that debt possible through broad delegations of borrowing and spending power to the executive branch, endorsed by the likes of Alexander Hamilton and James Madison.

In one of the first laws passed to address the national debt, Congress authorized the President to make "contracts respecting the [] debt *as shall be found for the interest of the said States*," *id.* § 2, 1 Stat. at 139 (emphasis added), and to borrow up to $12 million in "new loans" to pay off foreign obligations, *id.* Twelve million dollars was an immense sum in those days—today, it would equal approximately $1.286 *trillion*. *See* Chabot, *supra*, at 26 & n.204 (considering $12 million as a percentage of the annual gross domestic product in 1790 and then calculating that same percentage of today's gross domestic product). The only limit imposed to guide the President's discretion was "[t]hat no engagement nor contract shall be entered into which shall preclude the United States from reimbursing any sum or sums borrowed within fifteen years." Act of Aug. 4, 1790 § 2, 1 Stat. at 139. Prioritization of lenders was left to the President's discretion. *See id.* The Act was also silent as to interest rates on loans designed to fund payments of principal and

on pre-existing loans, and it did not address commission fees, which at the time could range anywhere from 4.5 to 9 percent. *See* Chabot, *supra*, at 25. In other words, Congress delegated to the President the power "to restructure the country's foreign debt on terms that he thought best, with parties he thought best, under conditions he thought best." Mortenson & Bagley, *supra*, at 344.

During the same legislative session, the First Congress also passed a law to address the domestic debt, and that law too delegated broad legislative authority to the executive branch. *See* Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, 186-87. The law vested the authority to repay debt in the President and a body known as the Sinking Fund Commission, composed of "the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General for the time being." *Id.* § 2, 1 Stat. at 186. Specifically, the President and the Sinking Fund Commission could purchase debt "in such manner, and under such regulations *as shall appear to them best calculated to fulfill the intent of this act*," *id.* (emphasis added), which was both to "effect a reduction in the amount of public debt" and to benefit "creditors of the United States, by raising the price of their stock," *id.* at Preamble, 1 Stat. at 186. While "[a]ny purchase of U.S. securities would serve the Act's first goal of reducing the amount of debt, . . . the second goal of raising the value of U.S. securities required the Commission to exercise great discretion" and to "apply expert financial judgment to determine the timing and

magnitude of purchases needed to raise the value of U.S. securities." Chabot, *supra*, at 29. The only limits Congress imposed on that discretion were that the purchases of securities had to be at market price, "if not exceeding the par or true value thereof," Act of Aug. 12, 1790 § 1, 1 Stat. at 186, and money applied to those purchases was limited to "surplus . . . as shall remain after satisfying the several purposes for which appropriations shall have been made by law," *id.*

To be sure, Congress did not undertake these delegations of legislative authority lightly. For example, Representative William Loughton Smith noted Congress's exclusive power to "borrow Money" and "pay the Debts," U.S. Const. art. I, § 8, cls. 1 & 2, and questioned "whether [Congress is] authorized to delegate such important power," Lloyd's Notes from May 19, 1790, Debates in the House of Representatives [hereinafter *Lloyd's Notes*], *reprinted in* XIII *Documentary History of the First Federal Congress of the United States of America* 1349 (Linda Grant De Pauw et al. eds., 1972). But a majority of the First Congress overruled Smith's objection. *See* Chabot, *supra*, at 21-24. James Madison notably expressed no qualms about the delegation of the borrowing power, even though it was a power that required "great trust" and "the execution of one of the most (important laws)." *Lloyd's Notes*, *supra*, at 1354. Other members of the First Congress also supported delegation of the borrowing power provided that Congress imposed some cap on the total amount to be borrowed. *See* Chabot, *supra*, at 22.

Thus, the First Congress endorsed broad delegations "with the power of the purse, perhaps the subject most tightly bound up with legislative power," Mortenson & Bagley, *supra*, at 345, so long as some intelligible principle supplied a loose guidepost for the exercise of the executive branch's discretion. No one objected that these statutes delegated authority "beyond [that of] determining facts," Appellants' Br. 42, nor did anyone move to have "Congress specify critical parameters such as limits on the interest rate, discounts or commission fees commonly taken out as a percentage of the loans, or which . . . loans to repay first," Chabot, *supra*, at 22. Instead, members of the First Congress—consistent with their experimental and practical approach to self-governance—emphasized the basic pragmatism of delegation to the President in this arena. *See Lloyd's Notes*, *supra*, at 1351 (Rep. Benjamin Huntington) (noting that the President's role might "add to the respectability of the loan"); *id.* at 1348 (Rep. Michael Stone) (asserting that the President's involvement might allow the nation to "get money on easy terms").

Ultimately, the First Congress's delegations of borrowing and spending power enabled then–Secretary of the Treasury Alexander Hamilton—an expert fiscal manager—to shape monetary policy in a "declining market that threatened the long-term viability of U.S. credit." Chabot, *supra*, at 31. Thanks to the First Congress's delegations, Hamilton was able to stave off widespread financial panic when the market crashed in 1792. *See id.* (citing Richard Sylla, Robert E. Wright, & David J.

Cowen, *Alexander Hamilton, Central Banker: Crisis Management during the U.S. Financial Panic of 1792*, 83 Bus. Hist. Rev. 61, 63-65 (2009)).

B. Congress Delegated Broad Legislative Authority Through the Direct Tax of 1798.

Several years after the market crash of 1792, the United States again faced the threat of a fiscal shortfall, prompting Congress in 1798 to exercise for the first time its power to levy a "direct" tax on property. *See* Parrillo, *supra*, at 10. In implementing that tax, Congress again created a statutory scheme that delegated broad legislative authority to what was essentially the equivalent of a massive modern-day administrative agency.

Congress's goal was to raise $2 million nationwide through the direct tax on property. *See id.* To comply with the constitutional requirement that "direct Taxes shall be apportioned among the several States," U.S. Const. art. I, § 2, cl. 3; *see Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796), the Fifth Congress established an "administrative army" with over 1,500 "foot-soldiers" to estimate the value of "literally *all private real estate in every state*, with only minor exemptions," Parrillo, *supra*, at 31 (citing An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves within the United States [hereinafter Valuation Act] § 8, 1 Stat. 580, 585 (1798)).

And to further ensure that valuations were consistent across each state, Congress established a board of federal tax commissioners in each state, appointed

by the President and confirmed by the Senate, and empowered them "to revise, adjust and vary, the valuations of lands and dwelling-houses in any assessment district, by adding thereto, or deducting therefrom, such a rate per centum, *as shall appear to be just and equitable*." Valuation Act § 22, 1 Stat. at 589 (emphasis added). The only further guidepost the statute imposed on the authority of these federal administrators to raise or lower the tax assessments of thousands of property owners was "that the relative valuations of the different lots or tracts of land, or dwelling-houses, in the same assessment district, shall not be changed or affected." *Id.* The statute did not define the phrase "just and equitable," and each federal board's revisions were final and not subject to judicial review, although they directly affected the amount that individual Americans would owe in federal taxes. *See* Parrillo, *supra*, at 11, 14, 89-90.

Not only did the 1798 statute on its face delegate expansive authority to federal tax boards, but historical records also reveal that the boards actually *used* that authority in a "dramatic and sweeping" fashion. *Id.* at 13. The boards were able to do so because the process of real estate valuation was highly discretionary and indeterminate. "Methods based on income estimation required data that were hard to get; methods based on historical sale prices ran into trouble because deeds might not reflect recent or true prices, recent sales were often few, and sales in any event were not a random or representative sample of a district's stock of land." *Id.* at 14.

Moreover, "both methods required contestable guesses about whether past economic data fit with present and future conditions." *Id.* In other words, just about any approach to the valuation endeavor could be classified as "just and equitable." *See* Valuation Act § 22, 1 Stat. at 589.

Nonetheless, there were no objections recorded in the debates that the 1798 law unconstitutionally delegated broad legislative authority to executive officials; indeed, there were no constitutional objections recorded at all. *See* Parrillo, *supra*, at 16-17. Even Thomas Jefferson, who opposed the direct tax as a political matter, never questioned the constitutionality of the tax's administration. *See id.* at 102-03. Thus, the federal direct-tax boards' power to determine "the liabilities of thousands of landowners at a stroke—exercised under a vague statutory mandate to make decisions 'as shall appear to be just and equitable,' facing methodological indeterminacy and empirical uncertainty, suffused with politics, and unconstrained by judicial review—achieved wide, enduring, bipartisan acceptance from 1798 onward." *Id.* at 116. Much like the statute authorizing the executive to implement a federal eviction moratorium, the 1798 direct-tax legislation represented a permissibly broad "congressional delegation of rulemaking authority in a context that was both coercive and domestic." *Id.* at 12.

C. Congress Delegated Broad Legislative Authority in the Nation's First Quarantine Law.

The nation's first quarantine law, enacted in response to a series of yellow fever epidemics in the late eighteenth century, *see* William Hamilton Cowles, *State Quarantine Laws and the Federal Constitution*, 25 Am. L. Rev. 45, 69 (1891), provides yet another example of a Founding-era delegation of legislative authority. As originally proposed in 1796, the first paragraph of the quarantine bill delegated to the President broad authority "to direct at what place or station in the vicinity of the respective ports of entry within the United States, and for what duration and particular periods of time, vessels arriving from foreign ports and places may be directed to perform quarantine." 5 Annals of Cong. 1349 (1796). While opponents of the bill were concerned that granting the federal government such expansive power "would swallow up all the authority of the State Governments," *id.* at 1358 (Rep. Richard Brent), and questioned whether it fit within the federal government's Commerce Clause power, *see* Mortenson & Bagley, *supra*, at 357, there is no record of any objections by the bill's opponents on nondelegation grounds. *See id.* ("If the nondelegation doctrine was a well-understood feature of the original constitutional understanding, the law's opponents could have—and surely would have—invoked it alongside their other constitutional objections. Yet they said nothing about it.").

Although the House of Representatives eventually voted to strike the first paragraph of the bill, succumbing to the opposition from states' rights advocates,

they left intact the bill's second paragraph, which delegated perhaps even *broader* authority to the executive branch, even as it was more sensitive to state power. *See id.* at 358. Specifically, the second paragraph empowered the President "to aid in the execution of quarantine, and also in the execution of the health laws of the states, respectively, *in such manner as may to him appear necessary*." Act of May 27, 1796, ch. 31, 1 Stat. 474, 474 (emphasis added). That loose guidepost in service of the public health—closely resembling 42 U.S.C. § 264(a)'s requirement that a measure "may be necessary" in the judgment of the CDC to prevent the interstate "introduction, transmission, or spread of communicable diseases"—was signed into law in 1796, again "without a hint of delegation-related objections," Mortenson & Bagley, *supra*, at 358.

* * *

These are but a few examples of the many ways in which the Founding generation interpreted the Constitution to permit broad delegations of legislative authority, as they embarked on their experiment in self-governance and began to build a robust administrative state. Though Congress's power to delegate was not without limit, nothing in the text or history of the Constitution suggests that the limit was any more stringent than the flexible intelligible-principle standard used by the Supreme Court today. As the next Section will explain, the vision of the nondelegation doctrine presented by Appellants is at odds with that standard.

II. The Statute at Issue Here, as Understood to Authorize Implementation of the Eviction Moratorium, Does Not Violate the Nondelegation Doctrine.

Appellants assert that if 42 U.S.C. § 264 is interpreted as authorizing the eviction moratorium (as it should be, *see* Appellees' Br. 18-25), the statute's "fathomless scope"—granting the CDC the "discretion to make law concerning any of the wide range of activities that could conceivably lead to the transmission of disease in the United States"—would violate the nondelegation doctrine. Appellants' Br. 41. That argument grossly overstates both the scope of the discretion delegated by the statute (which is broad, but far from "fathomless") and the stringency of the intelligible-principle standard that it purports to follow.

The intelligible-principle standard is, consistent with the Founding-era vision of nimble and adaptive federal government, highly flexible: "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); *see American Trucking*, 531 U.S. at 474-75 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting))); *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 446 (5th Cir. 2020) ("It bears repeating: The Court has found only two delegations to be unconstitutional. Ever. And none in more than eighty

years."), *petition for cert. filed*, No. 20-850 (U.S. Dec. 18, 2020). Rather, a statute is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-73 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

The law at issue here comfortably passes that test. It provides, in pertinent part, that the Secretary of Health and Human Services (HHS) 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 one State or possession into any other State or possession." 42 U.S.C. § 264(a) (emphasis added). It also provides the Secretary with additional authority to enforce such regulations: "the [Secretary] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and *other measures, as in his judgment may be necessary*." *Id.* (emphasis added).

The "general policy" set forth in the statute is "to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession." *Id.* The public official tasked by statute with implementing that policy is the Secretary of HHS, and the Secretary has in turn

delegated that authority to the CDC. *See* 42 C.F.R. § 70.2 (delegating to the CDC Director the power to "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary" when "the measures taken by health authorities of any State . . . are insufficient to prevent the spread of any of the communicable diseases from such State . . . to any other State"). Finally, the statute's mandate that "other measures" taken by the CDC Director must be "in his judgment . . . necessary" to fulfill the statute's specifically articulated policy "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), provides meaningful "boundaries [on] this delegated authority," *Mistretta*, 488 U.S. at 373 (quoting *American Power*, 329 U.S. at 105).

There is no support for Appellants' hyperbolic argument that "[s]ince the risk of disease transmission never sleeps, the statute appears to give the agency extraordinary authority to wield however it wants, whenever it wants." Appellants' Br. 42. To the contrary, as the district court noted, "the Supreme Court has recognized on multiple occasions that the protection of public health and safety are intelligible principles sufficient to make a delegation constitutional." ROA.030. For example, in *Touby v. United States*, the Court held that a provision of the Controlled Substances Act delegating authority to the Attorney General to temporarily designate a drug as a "schedule I" controlled substance "to avoid an imminent hazard

to the public safety," 21 U.S.C. § 811(h)(1), laid down an intelligible principle sufficient to overcome a nondelegation-doctrine challenge, *see Touby*, 500 U.S. at 165. Similarly, in *Whitman v. American Trucking*, the Court held that a statute permitting the Environmental Protection Agency to set primary ambient air-quality standards "requisite to protect the public health" with "an adequate margin of safety," 42 U.S.C. § 7409(b)(1), was constitutional, *see American Trucking*, 531 U.S. at 475-76; *see also, e.g.*, *Big Time Vapes*, 963 F.3d at 444 (upholding delegation of authority to HHS Secretary to decide which additional tobacco products should be governed by the Tobacco Control Act, guided by statutory purpose of "protecting public health" and "preventing young people from accessing (and becoming addicted to) tobacco products").

Here, the statute provides even more guidance: the "measure" taken by the CDC Director must be deemed "necessary" in her judgment "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). Necessity is not an insignificant standard—it bears noting that the CDC has invoked its authority to implement an eviction moratorium only under the unique exigencies of the COVID-19 pandemic, where the threat of person-to-person spread of disease, particularly in homeless shelters and other communal settings where evicted people may be forced to reside, is at unprecedented levels, and more than 570,000

Americans have already lost their lives. *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Apr. 26, 2021), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html. In other words, the rarity with which the CDC has invoked its authority underscores the seriousness with which the agency has taken the intelligible principle embedded in the statute, rather than suggests that the statute is constitutionally defective. *See* Leah M. Litman, *Debunking Antinovelty*, 66 Duke L.J. 1407, 1412 (2017) (arguing that "legislative novelty . . . should not be used as evidence that a statute is unconstitutional on . . . separation-of-powers grounds").

What Appellants really seek from this Court—a more stringent nondelegation standard—comes through in their argument that the statute is invalid because it does not "give the agency instructions on what to do should a certain set of circumstances arise" and fails to offer sufficient "guidance on the nature of the actions that can be taken when factual conditions are met, leaving that to the agency's 'judgment.'" Appellants' Br. 42-43. Those requirements have *never* been held necessary to render a delegation constitutional. Indeed, as illustrated above, Founding-era Congresses regularly, and uncontroversially, delegated legislative authority without conditions even approaching the specific instructions that Appellants seek. This Court should decline Appellants' invitation to adopt a more stringent version of the nondelegation doctrine in this case. Binding Supreme Court precedents, as well as Congress's early

enactments, demonstrate that 42 U.S.C. § 464(a), as understood to authorize implementation of the federal eviction moratorium, constitutes a permissible delegation of Congress's authority.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: April 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 28, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 28th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,287 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 28th day of April, 2021.

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