CA NO. 21-5256

United States Court of Appeals for the Sixth Circuit

TIGER LILY, LLC, ET AL.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District to Tennessee
2:20-cv-02692 (Norris, J.)

BRIEF FOR THE PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellees, Tiger Lily, LLC, Hunter Oaks Apartments Utah, LLC, North 22nd Flat, LLC, Cherry Hill Gardens, LLC, Churchill Townhomes, LLC, Brittany Railey, and Applewood Property Management, LLC make, the following disclosure:

None of the foregoing Plaintiffs-Appellees is a subsidiary or affiliate of a publicly owned corporation. Likewise, there is no publicly owned corporation that has a financial interest in the outcome of this appeal.

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STATEMENT REGARDING ORAL ARGUMENT

The facts of this case are well known, and the challenges brought against the Defendants has been the source of litigation, not just before the Sixth Circuit, but before District and Circuit courts across the nation. In fact, Judges Norris, Thapar, and Bush, sitting as a panel of this very Court in this very litigation, have already published a lengthy decision denying the Defendants' Motion for Stay and fully analyzing the underlying merits (or lack thereof as the panel found the case to be) of the Defendants' appeal. Plaintiffs believe that this Court can certainly issue its final ruling on the merits of Defendants' appeal without the need for oral argument from Counsel.

However, should this Court believe that oral argument would be helpful to the Court – in any away – Counsel for Plaintiffs would consider it an honor and privilege to appear before, and address, this Court.

STATEMENT OF THE ISSUE

The central question before this Court is whether the CDC's[1] September 4, 2020, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19* (the "Halt Order") is lawful and enforceable. Inherent in that determination is whether 42 U.S.C. § 264 provides the CDC the authority it claims to promulgate a sweeping nationwide eviction ban in derogation of the real property rights of every American and applicable State law. Both the District Court and this Court have determined that the CDC has no such authority. The decisions of the District Court and this Court should now be affirmed and upheld. The CDC advances nothing new in its recent brief to this Court; reciting the same arguments and rationales already rejected by this and other Courts across the nation. The District Court's Order and Judgment, finding the Halt Order to be *ultra vires* and setting it aside as unenforceable, is correct and well-reasoned. This Court should affirm the District Court's Order and Judgment in in all respects.

STATEMENT OF THE CASE

The appeal before this Court finds its genesis in the now infamous Halt Order. *See* 85 Fed. Reg. 55292-55297; (Halt Order, R. 1-12, Page ID## 68-73). From the

[1] For the purposes of brevity, and as the Halt Order is the product of the Centers for Disease Control and Prevention, the Plaintiffs shall simply refer to the "CDC" in lieu of all named defendants.

very outset of this litigation, instituted only days after the CDC's proclaimed effective date of the Halt Order, Plaintiffs argued that despite the nobility of any purported purpose, to be lawful, the CDC's actions "must still be consistent with the fundamental and protected rights of all and cannot be the result of an over-reach of authority or violation of our foundational principles and liberties." (Memorandum of Law in Support of Motion for Preliminary Injunction, R. 12-1, PageID: ##130). Nothing in either the District Court case nor the one presently before this Court on appeal, seeks to minimize the serious gravity of the pandemic; however, this case is not a referendum on the COVID-19 crisis, nor the Government's —state or federal— response thereto and should not be viewed in that light.

The central question for judicial review has been, and remains, whether the CDC had the authority under 42 U.S.C. § 264 (the "Enabling Statute") to issue a sweeping and total national suspension on *all* residential evictions for the non-payment of rent, without regard for state law or any other consideration.[2] This Court previously framed the inquiry succinctly: "[D]id Congress grant the CDC the power it claims?" *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev*., 992 F.3d 518, 522 (6th Cir. 2021). This is the threshold question, and both the District Court

[2] Even if the CDC had the authority to promulgate and enforce the Halt Order, other legal infirmities warrant striking the Halt Order down, including, but not limited to, violations of various constitutional rights, a lack of any meaningful scientific support, fatal ambiguity and vaguery, and the failure to follow mandatory provisions of the Administrative Procedure Act, 5 U.S.C. §§ 501, *et seq*.

and this Court firmly answered the question in the negative – the CDC does not have the power it claims! (Judgment, R. 104, PageID: ##2906-07); *Tiger Lily, LLC*, 992 F.3d at 522.

Indeed, each and every federal court to reach the merits of a challenge to the CDC's Halt Order has —without exception— found the CDC does not have the power it claims and that the Halt Order is either unconstitutional, unlawful, or both. *See, e.g., Skyworks, Ltd. v. Centers for Disease Control and Prevention*, ---F.Supp.3d--- (N.D. Ohio 2021); *Terkel v. Centers for Disease Control and Prevention*, ---F.Supp.3d--- (E.D. Tex. 2021); *Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs*., ---F.Supp.3d--- (D.D.C. 2021).[3]

For reasons that are clear, in its motions and briefs filed during the course of this litigation, the CDC purposely diverts attention from the relevant legal issues; instead, the CDC argues, based not on law, but upon emotion and fear—justifiable emotion and fear considering the health crises— but emotion and fear nonetheless. Before this Court, yet again, the CDC endeavors to overturn the reasoned Order and

[3] As each of the foregoing cases are extremely recent, they have yet to be formally published; however, each is available via Westlaw as: *Skyworks, Ltd. v. Centers for Disease Control & Prevention*, No. 5:20-CV-2407, 2021 WL 911720, at *1 (N.D. Ohio Mar. 10, 2021), order clarified, No. 5:20-CV-2407, 2021 WL 2228676 (N.D. Ohio June 3, 2021); *Terkel v. Centers for Disease Control & Prevention*, No. 6:20-CV-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021); and *Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.*, No. 20-CV-3377 (DLF), 2021 WL 1779282 (D.D.C. May 5, 2021). The CDC appealed each case to the Sixth, Fifth, and D.C. Circuit Courts of Appeals respectively.

Judgment of the District Court[4], and the reasoned decision of this Court[5], by leveraging the health pandemic as a shield for its unlawful and unconstitutional action. But the CDC cannot be permitted to simply invoke the terrible nature of the pandemic alone to justify its unlawful, improper, and unconstitutional actions. As Courts across this nation have agreed, there is no pandemic exception to our system of laws or the Constitution.

The CDC's most recent red herrings regarding subsequent federal funding and Congress' mention of the Halt Order in the 2021 Appropriations Act impliedly concede the unlawful overreach of the Halt Order, but neither alter the legal analysis nor the outcome. Congress' allocation of monetary relief to delinquent tenants, while tangentially germane to questions of fairness or (potentially) the irreparability of harm to owners, does not inform the test for lawful authority. Acts undertaken by executive agencies in excess of delegated legal authority, even if helpful and with good intent, are unlawful. The Court should not be distracted by the CDC's attempt to divert attention from the core issue of authority or, rather, the lack thereof.

This Court has already spoken on the unlawful nature of the Halt Order and rejected the merits of the CDC's appeal. This Court should affirm and uphold the rulings of the District Court and the prior ruling of this Court.

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[4] (R. 103, PageID: ##2886-2905; R. 104, PageID: ## 2906-2907).
[5] *Tiger Lily, LLC*, 992 F.3d 518.

History and Procedural Background

The relief and protections afforded under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (the "Cares Act"), which included a temporary eviction moratorium prohibiting owners of real property with a particular nexus to the federal government[6] from evicting non-paying tenants, effectively expired on August 26, 2020. See 15 U.S.C. § 9058(b) (setting forth time limit of moratorium). After the Congressionally authorized moratorium expired, on September 1, 2020, the acting Chief of Staff of the CDC unilaterally promulgated the Halt Order. *See* 85 Fed. Reg. 55292-55297; (Halt Order, R. 1-12, PageID: ## 68-73). The Halt Order, purportedly issued pursuant to Section 361 of the Public Health Service Act (42 U.S.C. § 264), became effective, without the requisite notice and comment period mandated under the Administrative Procedure Act, 5 U.S.C. §§ 501, *et seq*. (the "APA"), on September 4, 2020. The original termination date of the Halt Order was stated to be December 31, 2020. 85 Fed. Reg, 55292.

[6] The moratorium only applied to covered properties —a so-called "covered property is a property that: (1) participated in a covered housing program, (2) participated in the rural housing voucher program, (3) had a federally backed mortgage, or (4) had a federally backed multifamily mortgage loan. 15 U.S.C. § 9058(a)(2). Thus, Congress implicitly recognized that it almost certainly lacked the authority itself to implement and enforce a nationwide ban on evictions. Congress expressly limited its reach to only properties receiving, in some form or another, federal funding.

Unlike the Cares Act, which restricted its effect to only those covered properties with a nexus to the federal government, the Halt Order imposed a complete and total ban on residential evictions, of every non-paying tenant, without regard for any other consideration or factor. *Id*.

Plaintiffs, a group of West Tennessee real property owners and managers, filed suit against the CDC seeking declaratory and injunctive relief. (*See* Complaint, R. 1, PageID: ##:1-44; Amended Complaint, R. 21, PageID: ##192-243). Plaintiffs asserted that the CDC, in promulgating the Halt Order, violated the APA and the Halt Order itself was both unlawful and unconstitutional in numerous respects. (*See* Complaint, R. 1, PageID: ##23-43).

Plaintiffs sought a preliminary injunction in the District Court below, (Motion for Emergency Hearing and Preliminary Injunction, R. 12, Page ID: ##122-228), and a hearing on Plaintiffs' application for relief occurred on October 30, 2020, (*see* Minutes, R. 67 (text entry only)). Approximately a week later, on November 6, 2020, the District Court denied Plaintiffs' request for injunctive relief solely on the grounds that the District Court believed there was a lack of irreparable harm suffered by the Plaintiffs because: (i) the loss of rental income could be remedied by money, and (ii) the constitutional violations did not rise to the level of irreparability. (Order Denying Preliminary Injunction, R. 69, PageID: ##981). Thereafter, the District Court conducted a scheduling conference, (*see* Minutes, R. 75 (text only entry)),

issued a Scheduling Order setting forth the relevant deadlines for the Parties' merits briefs, and directed the CDC to file —what the CDC claimed to be— the Administrative Record, (*see* Scheduling Order, R. 76, PageID: ##989-991). The CDC filed the Administrative Record on December 11, 2020, (AR, R. 79, 79-1 to 79-5, PageID: ##1086-2115).[7]

Pursuant to the schedule established by the District Court, the Parties filed their competing merits briefs on December 18, 2020; the CDC's filing styled as its Motion for Judgment on the Pleadings, (Motion and Memorandum, R. 82, 82-1, PageID: ##2169-2224), and Plaintiffs styled as its Motion for Judgment on the Administrative Record, (Motion and Memorandum, R. 84, 84-1, PageID: ##2246-2308). Plaintiffs filed their response brief on January 15, 2020. (Response to Motion for Judgment on the Pleadings, R. 88, PageID: ##2545-2570). The same day, the CDC filed a motion seeking leave to exceed the page limits set by rule, attached to which was a copy of the CDC's proposed response to Plaintiffs' Motion for Judgment on the Administrative Record. (Motion for Leave to File Excess Pages, R. 87, 87-1, PageID: ##2498-2544). Thereafter, the Parties each filed reply briefs,

[7] The CDC supplemented the Administrative Record on December 16, 2020, (Supp. AR, R. 81, 81-1, 81-2, PageID: ## 2159-2168), and again on February 23, 2021, (Supp. AR, R. 94, PageID: ##2604-2815). In all, the CDC filed more than 1,200 pages of documents, comprised of, *inter alia*, iterations of the Halt Order, fact sheets, and the "scientific" internet-based studies and information upon which the CDC purportedly based the Halt Order.

(CDC's Reply, R. 91, PageID: ##2574-2580; Plaintiffs' Reply, R. 92, PageID: ##2581-2586), which finalized all arguments on the merits

On March 15, 2021, The District Court issued its comprehensive Order on the merits of the case, finding the CDC's Halt Order to be *ultra vires* —having been promulgated in excess of statutory authority under 42 U.S.C. § 264— and in derogation of non-delegation principals. *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, ---F.Supp.3d--- (W.D. Tenn. 2021)[8]; (Order, R. 103, Page ID: ##2896-2904). The District Court rejected the CDC's ratification argument, holding that Congress' passing mention of the Halt Order, in a singular sentence of the 2021 Appropriations Act, § 502, 134 Stat. at 2078-79, did not ratify the Halt Order, especially into the future. *Tiger Lily, LLC*, 2021 WL 1171887, at *10; (Order, R. 103, Page ID: #2904-2905).

A day after the District Court entered its judgment, on March 16, 2021, the CDC took appeal to this Court. (Notice of Appeal, R. 105, PageID: ##2908-2910). The CDC sought simultaneous emergency stays, both administrative and pending appeal, in the District Court and this Court. (Emergency Motion for Stay, R. 106, PageID: ##2911-2919); *Tiger Lily, LLC*, 992 F.3d at 520. Following expedited briefing by the Parties, this Court issued a published Order denying the CDC's

[8] Available as *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, No. 220CV02692MSNATC, 2021 WL 1171887, at *5-10 (W.D. Tenn. Mar. 15, 2021).

requests for both an administrative stay and stay pending appeal. *Tiger Lily, LLC*, 992 F.3d at 521. But this Court's Order went further.

This Court declared that the "the terms of [42 U.S.C. § 264] cannot support the broad power that the CDC seeks to exert." *Id*. at 522. This Court found the CDC's arguments that a nationwide eviction ban falls within those specific activities —or types of activities— set forth in the Enabling Statute to be meritless. *Id*. Likewise, this Court found that the Halt Order intruded upon the "traditionally State-operated arena of landlord-tenant relations" with no indication that Congress intended to do so through the Enabling Statute. This Court rejected the CDC's arguments giving the Enabling Statute the construction advanced by the CDC as to do so would violate principals of non-delegation. *Id*. at 523. Finally, like the District Court, this Court expressly rejected the CDC's contention that Congress' mention of the Halt Order, and brief extension thereof, constituted an ongoing ratification. *Id*. at 524.

Though this Court was adjudicating a motion seeking administrative stay and stay pending appeal, this Court's Order was published and carries substantial weight[9]

[9] "In the regular course of events, one panel of this court cannot overrule another panel's published decision. While the decisions of motions panels are generally interlocutory in nature (and, thus, not strictly binding upon subsequent panels), they do receive some measure of deference. Later panels cannot simply choose to disregard motions-panel decisions . . . .". *Wallace v. FedEx Corp*., 764 F.3d 571, 583 (6th Cir. 2014) (internal citations omitted). In *Serv. Emps. Int'l Union Local 1 v. Husted*, a merits panel of this Court described a published motions panel order

in speaking with finality, holding that the CDC's arguments were not just *likely* to fail, but that they *do* fail.

SUMMARY OF THE ARGUMENT

1. As The District Court Correctly Held, the Halt Order Exceeds the CDC's Authority Under 42 U.S.C. § 264 and is Therefore Unlawful and Unenforceable

The Halt Order, and its practical effect upon owners of residential real property in the Western District of Tennessee —and nationwide for that matter— is unlawful *in toto*. The Halt Order exceeds the CDC's lawful authority under the Enabling Statute and impermissibly infringes upon guaranteed and protected rights.

2. The CDC's Violation of 42 C.F.R. § 70.2 Likewise Results in The Halt Order being Unlawful and Unenforceable

The Enabling Regulation adds an additional pre-condition requiring the CDC to first determine that "measures taken by local health authorities…are insufficient to prevent the spread of any of communicable diseases" before having the delegated authority to issue or implement any agency action. The CDC offers no evidence that demonstrates that it undertook any investigation into local measures nor any evidence that it made a determination that measures were insufficient, before issuing

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granting an emergency stay of injunctive relief issued by the trial court below as "precedential." It would appear that this Court treats such interlocutory orders as precedential when published. 531 F. App'x 755 (6th Cir. 2012). Such is the case here.

the Halt Order. This failure by the CDC removes from it any authority to act under the Enabling Regulation, rendering the Halt Order a further unlawful exercise.

3. THE HALT ORDER IS ARBITRARY AND CAPRICIOUS

The Halt Order is arbitrary and capricious because, amongst other things, the CDC failed to articulate the relevant data, explanation, and rational connection between the facts the CDC found and the choice the CDC made, as well as because the Halt Order's extreme vagueness and ambiguity presents real life, practical questions, that have posed significant issues, increased damages for landowners, and created confusion in the courts. The Halt Order must be held unlawful and unenforceable under 5 U.S.C. § 706(2)(a).

4. THE CDC VIOLATED THE PROCEDURAL REQUIREMENTS OF THE APA

The CDC failed to strictly adhere to the procedural pre-conditions and mandates enshrined within the APA, namely, the statutory requirement for notice-and-comment. The Halt Order therefore violates the APA's due process pre-conditions, is void *ab initio*, and must be struck down and vacated under 5 U.S.C. § 706.

5. THE DISTRICT COURT CORRECTLY DETERMINED THAT CONGRESS DID NOT RATIFY THE HALT ORDER

As noted by both the District Court and this Court, nothing in the mention of the Halt Order in the 2021 Appropriations Act even implies that it was Congress' intent to ratify the Halt Order or that Congress was absolving the CDC of its

transgressions. All that the 2021 Appropriations Act did was "acknowledge" the Halt Order and congressionally extend the CDC's action until January 31, 2021 -a limited and finite temporal scope. After January 31, 2021, Congress withdrew any support potentially inferred, and the CDC was left to rely only on the Enabling Statute which does not grant the CDC the authority it seeks to exercise in promulgation or enforcement of the Halt Order.

6. IF THE HALT ORDER IS UNLAWFUL; IT IS UNLAWFUL AS TO EVERYONE

When agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed. Accordingly, consistent with the APA, and case law precedent, the effect of vacatur should not be limited to the Plaintiffs in this litigation but should extend to all applicable real property owners and managers suffering from the CDC's clear and judicially determined unlawful conduct.

7. THE HALT ORDER IS UNCONSTITUTIONAL

The Halt Order violates the Takings Clause; is a denial and deprivation of Plaintiffs' rights to substantive and procedural Due Process under the Fifth Amendment; violates the Tenth Amendment and the Anti-Commandeering Doctrine; cannot preempt applicable State law under the Supremacy Clause; impedes Plaintiff-Appellees' fundamental right to access the judiciary; and acts as an unlawful suspension of law. Even if 42 U.S.C. § 264 gave the CDC the authority

it claims, these other breaches of law and constitutional rights provide ample basis for setting aside the Halt Order and rendering it unenforceable.

LAW AND ARGUMENT

I. STANDARDS OF REVIEW

A. Standard for appellate judicial review

At the appellate level, the District Court's ruling and Order are subject to de novo review. *See Smith v. Thomas*, 911 F.3d 378,381 (6th Cir. 2018).

B. Standard for judicial review for strike down and vacatur

Congress provided the framework and the remedy for unlawful and unconstitutional actions by executive agencies through the APA. *See* 5 U.S.C. §§ 501, *et seq*. A "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Upon review, a "court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be[:]"

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity[10];

[10] Courts review questions of constitutionality under a *de novo* standard as the inquiry is typically merely a question of law. *See New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 252 (2d Cir. 2015); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006); *Anderson v. Milwaukee County*, 433 F.3d 975 (7th Cir. 2006); *United States v. Dorris*, 236 F.3d 582, 584 (10th Cir. 2000); *see also Western Energy Co. v. U.S. Dept. of Interior*, 932 F.2d 807 (9th Cir. 1991) (claims that administrative agency violated claimant's constitutional rights is reviewed de novo). While APA claims are analyzed under the APA's framework,

> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court . . . .

5 U.S.C. § 706(2); *see Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 370 (6th Cir. 2010) (acknowledging that Section 706 governs review of agency action). "Courts may invalidate agency adjudication or rulemaking which is 'inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement.'" *Lansing Dairy, Inc. v. E spy*, 39 F.3d 1339, 1350 (6th Cir. 1994) (quoting *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)). Likewise, "where the court determines that, given the intention of Congress to achieve some goal set forth by statute, there are compelling reasons that the agency interpretation is wrong, the court may invalidate the agency's action." *Boettger v. Bowen*, 923 F.2d 1183, 1186 (6th Cir. 1991) (internal quotations omitted). A rule that violates the APA must be vacated. *See Am. Bar Ass'n v. United States Dep't of Educ.*, 370 F. Supp. 3d 1, 40 (D.D.C. 2019) (vacating and remanding for agency to comply with procedural requirements); *Penobscot Indian Nation v.*

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including 5 U.S.C. § 706, challenges raising constitutional claims independent of the APA are examined separately. *See Commercial Drapery Contractors, Inc. v. United States*, 967 F. Supp. 1, 3 (D.D.C. 1997), *aff'd*, 133 F.3d 1 (D.C. Cir. 1998); *U.S. v. White Plume*, 447 F.3d 1067 (8th Cir. 2006).

U.S. Dep't of Hous. & Urban Dev., 539 F. Supp. 2d 40, 54 (D.D.C. 2008) (granting vacatur of HUD rule given the seriousness of the APA violations).

Here, this Court's finding that the Halt Order violates any element of the APA or the Constitution necessitates affirming the strike down and vacatur of the Halt Order.

II. THE ADMINISTRATIVE RECORD

On December 11, 2020, the CDC filed over 1000 pages —purporting to be the Administrative Record[11] — comprised of internet posts and blogs, outdated literary studies, and a handful of eviction moratorium orders instituted, at different times, by eight (8) state legislatures or their governors. Sadly, the totality of the

[11] The APA provides that in reviewing agency action, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (review is to be based on "the full administrative record" that was before the agency at the time of the decision). The court's review is "based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). The administrative record includes "all materials 'compiled' by the agency that were 'before the agency at the time the decision was made.'" *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir.1997) (quoting *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C.Cir.1996)). The agency's designation of the Administrative Record is entitled to a presumption of regularity. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir.1993) ("[D]esignation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity."). "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." *Id*.; *see also United States v. Martin*, 438 F.3d 621, 634 (6th Cir.2006) (noting that agency action is entitled to a presumption of regularity that may be overcome only by "clear evidence").

Administrative Record is available, in under ten minutes, to anyone with internet access and a Google browser. Not a single independent study, email, memorandum, opinion statement, resolution, drafting document, minute entry, agency determination relating to measures taken by local health authorities[12], or Executive Order 13132 Federalism Study, is included by the CDC in its Administrative Record submission. Not a single document included in the "Administrative Record" supports, documents, or justifies the action taken by the CDC or the procedural violations committed by the CDC. Nothing contained in the Administrative Record lends insight into, or substantiates the basis for, the CDC's wholesale infringement upon Plaintiff-s' civil liberties and protected constitutional rights. This gaping void of any meaningful documentation in the Administrative Record stems directly from the CDC's unlawful procedural violations of the APA, namely, the CDC's refusal to undertake the requisite notice and comment period, from which the Administrative Record in these agency actions is always built. Instead, haphazardly stitched together like Frankenstein's monster, the CDC —*ex post facto*— tried to manufacture a record, solely for the purpose of complying with the APA and the Order of the District Court. (Scheduling Order, R.76, PageID: ##989-991).

[12] As required under 42 C.F.R. § 70.2.

III. AS THE DISTRICT COURT CORRECTLY HELD, THE HALT ORDER EXCEEDS THE CDC'S AUTHORITY UNDER 42 U.S.C. § 264 AND IS, THEREFORE, *ULTRA VIRES* AND UNENFORCEABLE

The Order and Judgment of the District Court below was clearly correct and this Court should affirm.

The CDC's purported authority to issue the Halt Order arises out of the Enabling Statute, 42 U.S.C. § 264, which appears within the "Quarantine and Inspection" sections of the Public Health and Welfare Services statutes. The only purpose of the Enabling Statute is to provide the CDC the authority to take certain actions to prevent the "introduction, transmission, or spread of communicable diseases" into the United States from a foreign country or into a State or territory from another State or territory (inter-state spread) "from infected people or animals." 42 U.S.C§ 264(a). To this end, Congress spoke clearly and precisely to delineate specific public health related measures that the CDC is authorized to undertake to prevent the transmission or spread of a communicable disease, namely, "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected and dangerous to human beings . . . and other measures, as in his judgment may be necessary". *Id.*

A. The CDC does not have the authority under the Enabling Statute to issue or enforce the Halt Order. The Halt Order is therefore an unlawful exercise of the CDC's delegated authority

A clear reading of the Enabling Statute evidences Congress' unambiguous intent to *only* delegate to the CDC the authority to take certain quarantine related actions. It is equally clear in the Enabling Statute that Congress unambiguously chose *not* to delegate to the CDC broad and expansive authority to: (1) take the real property of private citizens; (2) exercise authority over individuals, animals, or personal property neither infected with a contagious disease nor even believed to be infected with a contagious disease; (3) exercise authority over the residential housing market; (4) exercise authority over residential evictions which implicate only intra-state concerns and have nothing to do with inter-state or foreign concerns; (5) suppress state rights and state real property laws reserved exclusively to the authority of the state; and (6) create new and drastic criminal conduct. Nothing in the text of the statute permits any of this, and both the District Court and this Court identified that glaring deficiency. The Halt Order simply has no relationship to quarantine or quarantine related activities and does not fit within the text —nor even the intent— of the Enabling Statute.

Equally egregious to the ban itself, without any authority in the Enabling Statute, the CDC instituted criminal penalties —intended by Congress to punish infected individuals who violate individual quarantine orders and, among other

things, infect others[13]— providing for jail time and hundreds of thousands of dollars in fines against owners for doing nothing more than exercising real property rights. This was obviously not Congress' intent in enacting the quarantine statutes.

Without citing any evidence for the proposition, the CDC continues to argue the now vitiated proposition[14] that the authority delegated to it by Congress in the text of the Enabling Statute was implicitly intended to be so broad and so expansive that it would allow the CDC to do *anything* it wanted, even when such action "infringe[s] on personal liberties or property rights."[15] Such a position, if correct, would mean that Congress intended to empower the CDC to unilaterally violate the most basic of liberties simply because the exercise of those liberties *may* result in congregating, and which *might* lead to the spread of COVID-19. If the CDC is correct, it would necessarily be empowered to violate such fundamental rights as suspending in-person voting; closing houses of worship; curtailing congregation for ritual ceremonies; precluding otherwise lawful political rallies; closing schools; and promulgating other orders that regulate business (like the Halt Order), such as requiring grocery stores and pharmacies to allow people claiming financial distress

[13] 42 U.S.C. § 271(a).
[14] (*See*, *e.g.*, CDC's Memorandum in Support of Judgment on the Pleadings, R. 82-1, PageID: ##2193-2195; CDC's Memorandum in Opposition to Preliminary Injunction, R. 29, PageID: ##380-425).
[15] (CDC's Memorandum in Opposition to Preliminary Injunction, R. 29, PageID: #405).

resulting from COVID-19 to take food and medicine off the shelves without having to pay, or requiring hotels and motels to allow people to stay in rooms for months without having to pay. The idea that Congress intended a quarantine statute to authorize the CDC to take any of these actions, without expressly saying so, is preposterous given the plain text of the Enabling Statute –a statute dealing *only* with specifically delineated quarantine measures. However, these examples become critically relevant, if any Court were ever to adopt the CDC's false argument about expansive authority.

The CDC did not have the authority to issue the Halt Order and the sweeping eviction moratorium therein. There is no ambiguity on this point, which is why no fewer than four (4) District Courts have now struck down the Halt Order.[16] The CDC cannot show why any of these rulings was wrong.

Congress' intent as to the authority granted to the CDC in the text of the Enabling Statute, is clear and precise, and does not cover the Halt Order. As the District Court adroitly observed, "If the Director were not limited in his or her authority, why list any specific examples of measures within that authority? Why not simply provide the Director 'is authorized to make and enforce such regulations

[16] (Order, RE 103, PageID: ##2886-2905); *Skyworks, Ltd.*, 2021 WL 911720, at *1; *Terkel*, 2021 WL 742877, at *1; and *Alabama Ass'n of* Realtors, 2021 WL 1779282, at *1.

as in her judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases?" *Tiger Lily, LLC*, 2021 WL 1171887, at *7.

The CDC did not have the authority to issue the Halt Order and the sweeping nationwide eviction moratorium therein. There is no ambiguity on this point.

B. The CDC's interpretation of the Enabling Statute is without any merit because it is inconsistent with controlling jurisprudence and applicable canons of construction

The CDC argues that despite being nowhere in the text of the Enabling Statute, 42 U.S.C. § 264 clearly and unambiguously evidences Congress' intent to vest the CDC with broad authority to take decisive action if required to control the spread of dangerous diseases, but then, turns right around and concedes that this authority is actually *not* contained within the express text of the Enabling Statute and must be inferred from the list of permitted activities.

The CDC's real (but wrong) argument is that Congress' intent is purposely ambiguous as to the breadth of the authority it intended to delegate to the CDC because Congress was conferring a broad and limitless grant of authority upon the CDC in the face of a public health crisis. In other words, the CDC asks this Court to believe that, as long as the CDC veils an action —rightfully or not— in the cloak of a "public health" measure, the Court should find that Congress authorized the CDC to undertake such action.

This is patently untrue and not a permissible construction of the Enabling Statute. Well established guideposts are available to aid a court in its exercise of statutory interpretation: (1) Explicitness; (2) Federalism; (3) Avoidance of Constitutional Problems; (4) Canons of Statutory Interpretation – *Ejusdem Generis* and *Noscitur a Sociis*; and (5) Intent and Context. "The traditional canons of statutory interpretation are useful in determining whether the statutory text is susceptible to more than one reasonable interpretation." *Donovan v. FirstCredit, Inc*., 983 F.3d 246 (6th Cir. 2020). The application of the canons and other principals affecting statutory interpretation render the CDC's interpretation of 42 U.S.C. § 264 if not wholly absurd, then at least certainly incorrect.

The District Court focused its analysis on what the Plaintiffs referred to as the guideposts of "Explicitness" and "Canons of Statutory Interpretation." As such, Plaintiffs will focus the argument here on those elements relied upon by the District Court; however, Plaintiffs fully briefed and argued all five (5) guideposts as grounds for vacatur of the Halt Order and, therefore, incorporate herein by reference the arguments on Federalism; Avoidance of Constitutional Problems, and Intent and Context each of which likewise supports vacatur. (Memorandum in Support of Plaintiffs' Motion for Judgement on the Administrative Record, R.84-1, PageID ## 16-27).

***Explicitness*:**

Congress delegates authority to agencies to address issues of great importance only when saying so explicitly in the text of the enabling statute. If the authority is not explicitly delegated by Congress to the agency in the text of the enabling statute, a court should conclude that Congress purposely intended not to delegate such authority to the agency and such authority does not exist. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000).[17]

Nowhere in the Enabling Statute did Congress grant the CDC authority to regulate the relationships between landlords and tenants or to intrude upon a traditional area of state regulation. This Court agreed. "[W]e cannot read the Public Health Service Act to grant the CDC the power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress's intent to do so. Regulation of the landlord-tenant relationship is historically the province of the states." *Tiger Lily, LLC*, 992 F.3d at 523.

[17] In *Brown*, since the enabling statute did not expressly state that the FDA had the authority to regulate tobacco, the Supreme Court held that Congress did not intend to give the FDA that regulatory authority. This was especially true as tobacco sales comprised a large segment of the economy and regulation of tobacco had great economic effect. Equally salient, the Court found that Congress had spoken on tobacco elsewhere, thus there would be no need to delegate such authority to the FDA. Therefore, the FDA regulations concerning tobacco were found to be invalid and struck down. 529 U.S.

Nothing in the language of the Enabling Statute grants the CDC the authority to expand its action: (1) **from** persons, animals, or personal property **to** real property; (2) **from** infected persons, animals, or personal property **to** those that are neither infected nor even believed to be infected; (3) **from** certain inter-state or foreign spread **to** mere possible intra-state spread; and (4) **from** recognized principles of deference to federalism **to** actions that supersede states' rights and states' real property laws.

The lack of explicit delegation of authority is all the more obvious given the Halt Order's enormous economic impact. According to the CDC itself, the Halt Order affects between 30 and 40 million people[18], at a cost of several billion dollars per month, and constitutes a Major Rule under the Congressional Review Act[19], meaning it has a net effect on the national economy in excess of One Hundred Million Dollars ($100,000,000). If Congress intended to delegate authority to the CDC under the Enabling Statute for this type of broad, unilateral, and hugely impactful economic action, Congress would have explicitly said so. However, because Congress clearly did not delegate this authority to the CDC in the text of the Enabling Statute, this Court should conclude that Congress did not intend to delegate

[18] 85 Fed. Reg. 55295.
[19] *Id*. at 55296.

such expansive authority and that the CDC, therefore, does not have the authority to implement the Halt Order.

***Canons of Statutory Interpretation*:**

The District Court, and this Court in its prior Order, relied upon the doctrine of *ejusdem generis* in interpreting the Enabling Statute. The District Court further relied upon the principal of *noscitur a sociis*. *See Tiger Lily, LLC*, 2021 WL 1171887, at *8; *Tiger Lily*, LLC, 992 F.3d at 522.

Each of these doctrines is well-established and counsel the judiciary that context matters when interpreting a statute like 42 U.S.C. § 264. These particular canons are useful in situations involving enumerated lists.

When the text of an enabling statute contains a list of items accompanied by a conclusory "other measures" catch-all, under e*jusdem generis* the scope of the conclusory "other measures" catch-all is strictly defined by the list that preceded it. Any action taken under authority alleged to have been delegated by the "other measures" catch-all must be consistent with, and fit concisely within, those actions so delegated by Congress in the preceding list.

Moreover, when there is any alleged ambiguity as to the meaning or breadth of a conclusory "other measures" catch-all in the text of an enabling statute, under n*oscitur a sociis* the conclusory "other measures" catch-all must be defined by considering the associated words in the text as a narrowing limitation -keeping any

additional action under the "other measures" catch-all strictly within the same context and confined to substantially similar acts and measures. *Washington Dept of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003).

Throughout the litigation, and continuing here, the CDC has principally relied upon the "other measures, as in his judgment may be necessary" portion of § 264(a). The CDC has persistently but incorrectly argued that the "and other measures, as in his judgment may be necessary" clause in the Enabling Statute is a broad and expansive catch-all provision illustrative of Congress's intent to authorize the CDC to take *any* action it deems "necessary," regardless of whether the action is consistent with, or outside of, the activities and/or actions specifically designated by Congress in the text of the Enabling Statute. Unfortunately for the CDC, this is completely wrong. Well-established rules of statutory construction require the precise opposite conclusion. The reviewing court is to confine and restrict the conclusory "other measures" catch-all by reference to the other terms in the list and find that Congress intended to only delegate the authority to act as either explicitly stated within the Enabling Statute or in ways that embrace objects materially similar to those enumerated in the text of the conclusory "other measures" catch-all.

In response to the necessary application of *ejusdem generis* and *noscitur a sociis*, the CDC has argued that the Halt Order is really "not so different from the actions contemplated in the statute or regulation as to exceed CDC's authority."

(CDC'S Response in Opposition to Motion for Preliminary Injunction, R. 29, PageID: #409). This, perhaps, is the most baffling of all the CDC's problematic statements made in this litigation. The "actions contemplated in the Enabling Statute" allow only for CDC measures sought to curtail inter-state or foreign spread of infection through: (1) inspection; (2) fumigation; (3) disinfection; (4) sanitation; (5) pest extermination; and (6) destruction of animals or articles found to be infected or contaminated.

The conclusory "other measures" catch-all, cannot be augmented to include (1) action involving the taking of real property of private citizens; (2) exercising authority over individuals, animals, or personal property neither infected nor even believed to be infected with a contagious disease; (3) exercising authority over the residential housing market; (4) exercising authority over residential evictions which implicate only intra-state concerns and have nothing to do with interstate or foreign concerns; (5) suppressing and superseding State rights and State real property laws reserved exclusively to the State; or (6) creating new and drastic criminal conduct.

Despite the CDC's unfounded claim, the broad, sweeping, nationwide eviction moratorium involving all tenants and all owners and assessing criminal penalty for noncompliance is not "a comparable imposition" to "inspection," "fumigation," and even "destruction" sought to prevent the disease of actually contaminated individuals.

The CDC's proposed interpretation requires this Court to constructively expand the Enabling Statute to go beyond the meaning of the words Congress used, or ever intended to use.

The District Court correctly identified and addressed the CDC's misapprehension of the limits of its authority under the catch-all. "[T]hose 'other measures' are limited by the specific examples listed. They provide the intelligible principle without which Congress' delegation of authority in this instance would be too broad to withstand Constitutional scrutiny. *Tiger Lily, LLC*, 2021 WL 1171887, at *8. This Court agreed with the District Court's application of *ejusdem generis* to the present case. *See Tiger Lily, LLC*, 992 F.3d at 522 ("This kind of catchall provision at the end of a list of specific items warrants application of the ejusdem generis canon[.]").

So too, contrary to the CDC's claim of unbridled authority, this Court determined that "it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power" of that kind." *Id*. at 523.

Application of the canon is clearly apropos here and produces the same result identified by the District Court and this Court. While Plaintiffs agree the list of measures in § 264(a) is not exhaustive, they certainly provide a framework for limiting the CDC's authority. Nothing in that list even tangentially suggests the CDC has the power to issue the Halt Order.

This Court should confine and restrict the conclusory "other measures" catch-all to the preceding list of authorized actions explicitly delegated in the text of the Enabling Statute. In so doing, the Halt Order is clearly and wholly outside of the CDC's delegated authority, unlawful, and unenforceable.

C. The Halt Order Further Violates the Enabling Regulation as the CDC Failed in its Requirement to Determine the Insufficiency of Local Measures Before Issuing the Halt Order

42 C.F.R. § 70.2, the corresponding regulation to the Enabling Statute, adds an additional pre-condition requiring the CDC to first determine that "measures taken by local health authorities…are insufficient to prevent the spread of any of communicable diseases" before having the delegated authority to issue or implement any agency action. The CDC states in the Halt Order that it found "that measures in state and local jurisdictions . . . do not provide protections for renters equal or greater than the protections provided in the Order"[20] but offers no evidence that demonstrates that it undertook an investigation into local measures in the Western District of Tennessee, nor any evidence that it made a determination that the measures in the Western District of Tennessee were insufficient, before issuing the Halt Order. Likewise, no such evidence was included in the Administrative Record. (*See*, *e.g.*, AR, R. 79, 79-1 to 79-5, PageID: ##1086-2115). Thus, the CDC violated its own regulation in promulgating the Halt Order.

[20] 85 Fed. Reg. at 55296.

While Plaintiffs have not themselves surveyed the health measures taken by local municipalities nationwide, Plaintiffs can offer this Court —as it did the District Court— details of the health measures undertaken in the Western District of Tennessee by Shelby County Government.

Unlike the Halt Order, Shelby County Health Directive No. 14[21] is a local measure that was intentionally designed and implemented to prevent the spread of COVID-19 potentially resulting from evictions. The CDC did not, and has not, made a determination that Shelby County Health Directive No. 14 is insufficient to prevent the spread of COVID-19 through evictions. And because the CDC violated the procedural notice and comment requirement, Shelby County and the landowners residing in Shelby County were denied their due process rights to appear and present evidence of these measures. This is just as true for landowners residing across Tennessee and across the Sixth Circuit generally.

Since the CDC failed to comply with the mandatory pre-condition it established for itself under the Enabling Regulation, any action taken by the CDC through the Halt Order must be deemed an action that exceeds authority and should be deemed unlawful and unenforceable.

[21] Shelby County, Tennessee, Health Department. Health Order and Directive No. 14. 2020.

IV. The Halt Order is Arbitrary and Capricious

"The Administrative Procedure Act embodies a basic presumption of judicial review." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019). Under the APA, if agency action is found to be arbitrary and capricious, it must be held unlawful and set aside. 5 U.S.C. § 706(2)(a); *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1003 (6th Cir. 1995). Section 706 requires the reviewing court to engage in "a substantial inquiry," limited to the administrative record. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

A. The Halt Order is based upon insufficient and nonexistent scientific evidence

For the Halt Order to survive judicial review and an arbitrary and capricious finding, the CDC must articulate the relevant data, explanation, and rational connection between the facts the CDC found and the choice the CDC made. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011). In the case of the Halt Order, the CDC must convince the Court that the "scientific" evidence in the Administrative Record, and upon which the CDC relied in justifying its decisions and actions, is substantial and sufficient. "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion*." Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1068–69 (6th Cir. 2013) (internal quotations omitted).

The CDC's supposed "scientific" evidence upon which it relied in violating the property rights of tens of millions of Americans is a loose confederation of web-

based sources and Google searches, some of which are outdated, some of which are biased, none of which are statistically significant or representative, and none of which were created or verified by the CDC. In promulgating the Halt Order, the CDC relied exclusively on these sources (and nothing more) to manufacture a loose theory that the eviction of non-paying tenants —anywhere and everywhere in the country, and whether contaminated with COVID-19 or not— once evicted, will necessarily become homeless, forcing the evicted tenants to congregate together in homeless shelters or with others, resulting in the spread of COVID-19. Using the scientific equivalent of a Rube Goldberg machine, the CDC tries to piece together disconnected "science" to bootstrap a theory justifying its unilateral nationwide eviction moratorium. In this regard, the CDC engages the classical fallacy of *non causa pro causa*.

The sweeping overbreadth of the Halt Order is not justified by the weak, unsupported, biased, outdated, disconnected, internet citations and other data upon which the CDC purported to rely and, as such, the Halt Order is arbitrary, capricious, and unenforceable.

B. The Halt Order is void for vagueness and ambiguity

The void for vagueness doctrine addresses at least two (2) connected but discrete concerns: first, that regulated parties should know what is required of them so they may act, accordingly; and second, precision and guidance in government

action are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See F.C.C. v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012).

Looking at the plain text of the Halt Order reveals its extreme vagueness and ambiguity. For instance, the Halt Order protects "covered persons"; however, the Halt Order simply defines a covered person as any tenant that provides a Declaration to his or her landlord. 85 Fed. Reg. 55293. The physical act of providing the Declaration makes someone "covered" without regard to whether the Declaration is true or false. Within the Declaration itself, a covered person must attest that he has used his "best efforts to obtain all available government assistance." *Id*. But "best efforts" is never defined. Likewise, what constitutes a "substantial loss of household income?" *Id*. Is this "loss" from the loss of a job, or does it also result from garnishment, tax and/or bank levies, gambling losses, bad investments, child support, other loan obligations, etc.? What does it mean to "expect[] to earn no more than $99,000.00?" *Id*. When does an eviction "likely render the individual homeless" and what sort of living arrangement is considered to be "close quarters," "congregate," and "shared living?" *Id*. How many is too many? What about "best efforts" to make rental payments? How is that determined and by whom? What is an "eviction?" The Halt Order says ''[e]viction means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction

or a possessory action, to remove or cause the removal of a covered person from a residential property." *Id*. The "any action" portion of that definition is of critical importance and yet the CDC offers no clarity as to what was intended. For instance, in the Western District of Tennessee, is filing the Forcible Entry and Detainer ("FED") Warrant considered "any action?" What about serving the FED? Setting a court date? Appearing in court? Arguing the case in court? What about having the clerk issue a Writ of Possession following a judgment? When does protection as a "covered person" for "any action" begin? Can a tenant tender a Declaration after a lawful judgment for possession is issued? Does tendering the Declaration cover the tenant in perpetuity? What if the tenant's financial circumstances greatly improve? What if the individual receives government assistance after using "best efforts" to obtain that assistance and after tendering the Declaration? In yet another example, the CDC claims that landowners retain the right to challenge a Declaration tendered by a tenant. How is a landowner to assert this right to challenge? Who is to preside over this challenge? The vagueness of the Halt Order presents real life, practical questions, that have posed significant issues, increased damages for landowners, and created confusion in the courts.

Finally, the ambiguity in the Halt Order threatens millions of land-owning Americans with prison time and draconian fines for simply taking lawful actions to recover their own real property. But the Halt Order fails to articulate what conduct

is proscribed and subject to penalty. The Halt Order offers no clarity at all and is, therefore, void for vagueness, arbitrary and capricious, and unenforceable.

V. The CDC Violated the Procedural Requirements of the APA

Regulatory action under the APA —like the Halt Order— is legislative in nature and has the force and effect of law despite being promulgated by a federal agency. As these agencies are not elected, in order to ensure due process and protect other fundamental rights, Congress requires that these agencies' actions strictly adhere to certain procedural pre-conditions and mandates enshrined within the APA. *See* 5 U.S.C. §§ 501, *et seq*.

These procedural pre-conditions allow those affected by the proposed rule an opportunity to speak and be heard in order for the agency to understand, acknowledge, and address the potential effects of the proposed rule. The statutory requirement for notice-and-comment is neither a suggestion, nor simply good practice; it is a mandatory due process requirement within the APA, without which the regulatory action is necessarily void *ab initio* and must be struck down.

During the entire pendency of the CARES Act, the CDC did nothing. There is no dispute in this litigation that, instead of complying with these due process mandates, the CDC waited until September 1, 2020 –only three (3) days before the Halt Order's effective date, without undertaking the procedural due process notice-and comment statutory requirement, to address the purported risk inherent in

evictions. The Halt Order is, therefore, in clear violation of the APA's due process pre-conditions, void *ab initio*, and must be struck down and vacated under 5 U.S.C. § 706. *See Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996) ("a rule promulgated by an agency that is subject to the Administrative Procedure Act is invalid unless the agency first issues a public notice of proposed rulemaking, describing the substance of the proposed rule, and gives the public an opportunity to submit written comments").

VI. The District Court Correctly Determined that Congress Did Not Ratify the Halt Order

The CDC contends that Congress' brief reference to the Halt Order in the 2021 Appropriations Act is a *de facto* (indeed, a *de jure*) full ratification of the CDC's unlawful conduct. According to the CDC, it does not matter that it skipped over the due process and substantive protections of the APA, effectively nullified all state law real property possessory statutes, usurped the authority of Congress, unlawfully imposed civil and criminal penalties, and violated the fundamental rights of millions of Americans without verifiable, supporting scientific evidence, because Congress mentioned the Halt Order in a bill some six (6) months later.

As noted by both the District Court and this Court, nothing in the mention of the Halt Order in the 2021 Appropriations Act even implies that it was Congress' intent to ratify the Halt Order or that Congress was absolving the CDC of its transgressions. And while "Congress has the power to ratify the acts which it might

have authorized' in the first place," to do so, Congress "must make its intention explicit.". *Thomas v. Network Sols., Inc*., 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *United States v. Heinszen & Co.*, 206 U.S. 370, 384 (1907)); *Heinszen*, 206 U.S. at 390.

As this Court noted, "mere congressional acquiescence in the CDC's assertion" of delegated authority "does not make it so" and, despite what the CDC claims, here, Congress did not do so. *Tiger Lily, LLC*, 992 F.3d at 524. Nothing in the 2021 Appropriations Act "expressly approved the agency's interpretation" of the Enabling Statute. *Id*. All that the 2021 Appropriations Act did was "acknowledge" the Halt Order and congressionally extend the CDC's action until January 31, 2021 -a limited and finite temporal scope. *Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs*., No. 20-CV-3377 (DLF), 2021 WL 1779282, at *9 (D.D.C. May 5, 2021).

After January 31, 2021, Congress withdrew any support potentially inferred, and the CDC was left to rely only on the Enabling Statute which "does not authorize the CDC Director to ban evictions." *Tiger Lily, LLC*, 992 F.3d at 524.

Congress did not ratify the unlawful conduct of the CDC.

VII. IF THE HALT ORDER IS UNLAWFUL, THEN IT IS UNLAWFUL AS TO EVERYONE

The CDC argues that the District Court's ruling should be limited only to the Plaintiffs in this litigation. This makes neither legal nor logical sense and is plainly

incorrect. As a threshold matter, this Court has already spoken on the Halt Order and found it to be unlawful –this creates precedent for the entire Sixth Circuit and the district courts therein, including the Western District of Tennessee. But the position asserted by the CDC is also at odds with precedent on challenges such as this. When agency "regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

The CDC cites *Camreta v. Greene* for the proposition that the Judgement and Order of the District Court are not binding anywhere else. (Appellant's Brief at pg. 27 (citing 563 U.S. 692, 709 n.7 (2011)). The language in *Camreta* is cherry picked, having nothing to do with the underlying case. In referencing this principal, the Supreme Court was demonstrating its awareness that, unlike a district court, its rulings are binding upon all, especially when speaking upon issues such as clearly established constitutional rights in qualified immunity cases. *Camreta*, 563 U.S. at 709 n.7. The CDC's case authority, including its citation to *Ohio A. Philip Randolph Inst. V. Larose*, 761 F. App'x 506, 513 n.10 (6th Cir 2019), has nothing to do with agency action or the legality of agency action. The CDC's authority really stands for the proposition that, for instance, a judge in the Middle District of Tennessee hearing precisely the same case as *Tiger Lily* is not necessarily bound by the *Tiger Lily* decision in the Western District of Tennessee. But none of what the CDC argues

relates to or impacts the scope of a finding that an agency action that is unlawful is not unlawful as to all.

Accordingly, consistent with the APA, and other precedent, the effect of a set aside should not be limited to the Plaintiffs in this litigation but should extend to all real property owners and managers suffering from the CDC's clear and judicially determined unlawful conduct. If the Halt Order is unlawful in Memphis, Tennessee due the CDC's unlawful conduct in its promulgation and enforcement, it is unlawful everywhere else. It makes little sense to force every citizen in the Western District of Tennessee, the Sixth Circuit, or for that matter the nation, to file a lawsuit to free itself of an agency action that has been declared unlawful.

As it did in *Alabama Ass'n of Realtors*, the District Court ruling here —and the prior decision of this Court— should be given full effect within the Western District, the Sixth Circuit, and perhaps even beyond. 2021 WL 1779282, at *9 (D.D.C. May 5, 2021) (citing *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019)).

VIII. THE HALT ORDER IS UNCONSTITUTIONAL

Though not addressed by the District Court or this Court, primarily because the CDC's substantive and procedural violations of the APA – alone - are more than sufficient to necessitate vacatur, Plaintiffs have argued the Halt Order also violates the Takings Clause; is a denial and deprivation of Plaintiff-Appellees' rights to

substantive and procedural Due Process under the Fifth Amendment; violates the Tenth Amendment and the Anti-Commandeering Doctrine; cannot preempt applicable State law under the Supremacy Clause; impedes Plaintiff-Appellees' fundamental right to access the judiciary; and acts as an unlawful suspension of law. These constitutional arguments with supporting law were detailed in Plaintiffs' Amended Complaint for Declaratory Judgment and Injunctive Relief (Amended Complaint for Declaratory Judgment and Injunctive Relief, R. 21, PageID: ##192-243); Memorandum in Support of Motion for Preliminary Injunction, R. 12-1, Page: ID ##129-169), and oral arguments made before the District Court on October 30, 2020.

Even if 42 U.S.C. § 264 gave the CDC the authority it claims, these other breaches of law and fundamental constitutional rights provide sound bases for vacating the Halt Order and rendering it unenforceable.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the District Court's Order and Judgment below be affirmed and that an opinion enumerating such affirmance issue from this Court. The Plaintiffs pray that the Halt Order be affirmed as *ultra vires* and that the District Court's Order and Judgment declaring that the Halt Order is unlawful and of no further force and effect be affirmed and so declared by this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a), the undersigned hereby certifies that this Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The Brief contains 9,928 words. The Brief is set in Times New Roman, 14-point, and prepared using Microsoft Word.

s/S. Joshua Kahane

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 11, 2021, a copy of the foregoing has been filed electronically and has been served on the Parties by operation of the Court's ECF system:

s/S. Joshua Kahane

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS PURSUANT TO 6 CIR. R. 28(B)(1)(A)(I)

United States District Court for the Western District of Tennessee

Case #: 2-20-cv-02692-MSN-atc

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RELEVANT STATUTES AND REGULATIONS

42 U.S.C. § 264

§ 264. Regulations to control communicable diseases

(a) Promulgation and enforcement by Surgeon General
The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

(b) Apprehension, detention, or conditional release of individuals
Regulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General[.]

(c) Application of regulations to persons entering from foreign countries
Except as provided in subsection (d), regulations prescribed under this section, insofar as they provide for the apprehension, detention, examination, or conditional release of individuals, shall be applicable only to individuals coming into a State or possession from a foreign country or a possession.

(d) Apprehension and examination of persons reasonably believed to be infected

(1) Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State. Such regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary. For

purposes of this subsection, the term "State" includes, in addition to the several States, only the District of Columbia.

(2) For purposes of this subsection, the term "qualifying stage", with respect to a communicable disease, means that such disease

(A) is in a communicable stage; or

(B) is in a precommunicable stage, if the disease would be likely to cause a public health emergency if transmitted to other individuals.

(e) Preemption

Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title.

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42 C.F.R. § 70.2. Measures in the event of inadequate local control.

Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.