No. 21-5256

IN THE 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 of Tennessee

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

I. This Appeal Will Be Moot When The Eviction Moratorium Expires On July 31

Developments since the filing of our opening brief will soon render this appeal moot. In this action under the Administrative Procedure Act, the district court ruled that the Centers for Disease Control and Prevention (CDC) lacked statutory authority to issue a temporary eviction moratorium to prevent the spread of COVID-19. The district court declared the eviction moratorium unenforceable in the Western District of Tennessee. The government appealed and moved for a stay pending appeal, which this Court denied. *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, 992 F.3d 518 (6th Cir. 2021).

On June 24, 2021, the CDC issued a one-month extension of the moratorium through July 31, 2021. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010 (June 28, 2021). Unlike previous extensions, the June extension indicated that it is "intended to be . . . final," as "absent an unexpected change in the trajectory of the pandemic, [the] CDC does not plan to extend the Order further." *Id*. at 34,013. On June 29, 2021, the Supreme Court entered an order in a separate challenge to the eviction moratorium, effectively

permitting the eviction moratorium to remain in place through July 31. *See Alabama Ass'n of Realtors v. Department of Health & Human Servs.* (*AAR II*), 141 S. Ct. 2320 (2021).

This appeal will be moot when the eviction moratorium expires, as the expiration will give plaintiffs all the relief they sought in this litigation. Once the moratorium expires on July 31, the parties' dispute about its lawfulness will "no longer [be] embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

II. The Eviction Moratorium Was Within The CDC's Statutory Authority

Although this Court will not have occasion to address the issue, the district court's ruling was incorrect for the reasons recently set out by the D.C. Circuit motions panel in the *AAR* case. In *AAR*, the district court set aside the eviction moratorium as exceeding the CDC's statutory authority, but, on the government's motion, the district court stayed its order pending appeal. The D.C. Circuit motions panel denied the plaintiffs' motion to vacate the district court's stay of its order, and the Supreme Court denied the plaintiffs' application to vacate that stay.[1]

[1] Four Justices voted (without explanation) to deny the plaintiffs' application and four Justices voted (without explanation) to grant that

A. In denying the *AAR* plaintiffs' motion, the D.C. Circuit motions panel explained that a temporary eviction moratorium to prevent the spread of COVID-19 was a permissible exercise of the CDC's authority under 42 U.S.C. § 264(a), which allows actions that "in [the agency's] judgment" are "necessary" to "prevent the [interstate] introduction, transmission, or spread of communicable diseases." *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.* (*AAR I*), No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021) (quoting 42 U.S.C. § 264(a)). Acting in this statutorily prescribed role as "the expert best positioned to determine the need for such preventative measures," the CDC "carefully targeted [the moratorium] to the subset of evictions it determined to be necessary to curb the spread of the deadly and quickly spreading [COVID]-19 pandemic." *Id.* at *1-2.

The D.C. Circuit motions panel explained that the eviction moratorium "fits within the textual authority conferred by Section 264(a)." *AAR I*, 2021

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application. Justice Kavanaugh concurred in the denial of the plaintiffs' application, indicating that although he believed the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium," he was voting to deny relief because "the CDC plans to end the moratorium in only a few weeks, on July 31" and "those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds." *AAR II*, 141 S. Ct. at 2320-21 (Kavanaugh, J., concurring); *see also Brown v. Secretary, U.S. Dep't of Health & Human Servs.*, No. 20-14210, 2021 WL 2944379 (11th Cir. July 14, 2021).

WL 2221646, at *2. Wherever the outer limits may lie, the provision, at a minimum, authorizes measures designed to address "the movement of persons." *Id.* Governments have long used restrictions on movement—such as quarantines and travel bans—to prevent people from "carrying contagion about." *Edwards v. California*, 314 U.S. 160, 184 (1941) (Jackson, J., concurring). Plaintiffs' suggestion that the moratorium "has no relationship to quarantine or quarantine related activities," Pls. Br. 18, is incorrect because the moratorium was designed to facilitate compliance with quarantine and other infection-control measures, 86 Fed. Reg. at 34,012.

Moreover, plaintiffs' premise that § 264 is limited to "certain *quarantine* related actions," Pls. Br. 18 (emphasis in original), is also mistaken. That limitation does not appear in the statute's text, which empowers the CDC to adopt "such regulations as in [its] judgment are necessary to prevent" the spread of disease interstate or from a foreign country into the United States. 42 U.S.C. § 264(a). Reading plaintiffs' unwritten constraint into the text would countermand Congress's deliberate decision to grant the government the flexibility needed to address new threats to public health as they emerge. *See Hearing Before a Subcomm. of the Comm. on Interstate & Foreign Commerce on H.R. 3379: A Bill to*

Codify the Laws Relating to the Public Health Service, and for Other Purposes, 78th Cong. 64, 108, 140 (1944) (explaining that § 264's "provisions are written in broader terms in order to make it possible to cope with emergency situations which we cannot now foresee").[2]

Plaintiffs incorrectly urge (Br. 17, 27) that the agency's authority is limited to the actions described in § 264(a)'s second sentence, which authorizes the CDC to provide for "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles" "[f]or purposes of carrying out and enforcing [its] regulations." 42 U.S.C. § 264(a). As the D.C. Circuit motions panel explained, the second sentence does not purport to define "the substantive scope of the regulatory authority conferred" by the first sentence, but instead employs "language of expansion, not contraction." *AAR I*, 2021 WL 2221646, at *2.

Contrary to plaintiffs' suggestion (Br. 21), this interpretation of § 264(a) does not provide a "limitless grant of authority" to the CDC. That authority extends only to measures that "prevent the introduction, transmission, or spread of communicable diseases" interstate or from a

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[2] Other Public Health Service Act provisions illustrate that, when Congress wished to refer only to quarantine regulations, it did so explicitly. *See, e.g.*, 42 U.S.C. § 243(a) (enforcement of "quarantine regulations").

foreign country into the United States. 42 U.S.C. § 264(a). Moreover, the statute "makes a determination of necessity a prerequisite to any exercise of Section 264 authority, and that necessity standard constrains the granted authority in a material and substantial way." *AAR I*, 2021 WL 2221646, at *1.

Nor does that grant of authority raise federalism concerns or implicate the nondelegation doctrine. Section 264(a) authorizes measures to prevent the spread of disease interstate or from a foreign country into the United States, which are familiar areas of federal jurisdiction. *AAR I*, 2021 WL 2221646, at *3. And the flexibility that Congress granted the agency in § 264 accords with "common sense and the inherent necessities of the governmental co-ordination," *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928), as Congress could not foresee in advance what new diseases might emerge and what kinds of measures might be needed to combat them.

B. Furthermore, as the D.C. Circuit motions panel explained, Congress approved the eviction moratorium as an exercise of the § 264 authority in legislation enacted during the pandemic. In that legislation, Congress specified that it was extending the order "issued by the [CDC]

under section 361 of the Public Health Service Act (42 U.S.C. 264)." Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, § 502, 134 Stat. 1182, 2078-79 (2020) (2021 Appropriations Act). "[R]ather than enact its own moratorium, Congress deliberately chose" to "embrace" and "extend" the CDC's moratorium, and thus made clear that the moratorium was a proper exercise of the § 264 authority. *AAR I*, 2021 WL 2221646, at *2.

That language is not, as plaintiffs suggest, merely a "passing mention" of the statutory basis for the CDC's order. Pls. Br. 8. Rather, Congress described the moratorium as having been "issued . . . *under* . . . 42 U.S.C. 264." 2021 Appropriations Act § 502, 134 Stat. at 2078-79 (emphasis added). The word "under," as used here, is most naturally read to indicate that the moratorium was authorized by § 264. *See, e.g.*, *National Ass'n of Mfrs. v. Department of Def.*, 138 S. Ct. 617, 630 (2018) (defining "under" to mean "by reason of the authority of" (quotation marks omitted)); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008) (defining "under" to mean "with the authorization of" (quotation marks omitted)).

That usage is pertinent because "it is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in

isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion) (Scalia, J.); *see Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). When, as here, "it can be gathered from a subsequent statute . . . what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *Branch*, 538 U.S. at 281 (plurality opinion) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845)).

C. Plaintiffs' reliance (Br. 9-10 & n.9, 38) on the motions panel's ruling in this case is misplaced. Motions panel decisions are "not strictly binding" on the merits panel because such decisions "are generally interlocutory in nature." *Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014). Here, the motions panel's predictive analysis regarding whether the government "made a strong showing that [it] is likely to succeed on the merits," *Tiger Lily*, 992 F.3d at 522 (quotation marks omitted), did not conclusively decide the merits. Moreover, the motions panel acted without the benefit of the D.C. Circuit motions panel's reasoning in *AAR*.

III. The District Court Did Not Address Plaintiffs' Other Claims, Which Do Not Provide A Basis For Affirmance

Plaintiffs' other claims were not addressed by the district court and do not provide a basis to affirm its judgment.

Plaintiffs' contentions (Br. 29-35) that the CDC Order was arbitrary and capricious and impermissibly vague are meritless. Like the CDC, many States recognized the need for eviction moratoria to control the spread of COVID-19, as did Congress in extending the CDC Order issuing an eviction moratorium. In issuing and extending the moratorium, the CDC provided a detailed rationale supported by substantial evidence—including a description of the insufficiency of state and local measures, 42 C.F.R. § 70.2—that easily satisfied the agency's obligation to "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And plaintiffs' quarrels with particular terms of the Order fail to demonstrate any issue of fair notice—the Order spoke for itself.

The CDC also complied with the procedures of the Administrative Procedure Act. The Order was "an emergency action taken under the existing authority" of a longstanding and duly promulgated regulation whose purpose was to enable the CDC to act quickly to prevent contagion. 86 Fed.

Reg. at 34,016. Even if the Order were the type of agency action that ordinarily would require notice-and-comment rulemaking, the agency articulated "good cause" to issue the Order without notice and comment because such procedures would be "impracticable" and "contrary to the public interest." 5 U.S.C. § 553(b)(B). As the CDC explained, swift action was necessary because any delay "would defeat the purpose of the Order and endanger the public health" by allowing mass evictions that contribute to the spread of COVID-19. 86 Fed. Reg. at 34,016-17.

Plaintiffs' remaining constitutional claims (Br. 39-40) are not accompanied by argument or case law. Issues raised in such a perfunctory manner are waived, *United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006), and plaintiffs cannot incorporate by reference materials filed in district court, *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 453 (6th Cir. 2003).

CONCLUSION

This appeal will be moot when the eviction moratorium expires on July 31, 2021. But for the impending mootness, the district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,131 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Expd BT 14-point font, a proportionally spaced typeface.

/s/ Brian J. Springer
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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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