[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALABAMA ASSOCIATION OF REALTORS®, *et al.*,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Columbia

REPLY IN SUPPORT OF EMERGENCY MOTION TO VACATE STAY PENDING APPEAL

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INTRODUCTION

Given that the government asks this Court to ignore the views of a majority of the Supreme Court, one would expect a robust defense of the CDC's latest extension of the eviction moratorium. Instead, its opposition offers little more than four pages of argument noteworthy only for what is left uncontested. The government does not deny that the CDC's most recent order is merely an extension of a moratorium that a majority of the Supreme Court has already concluded is likely unlawful. It does not acknowledge, much less explain, its dramatic reversal regarding whether such an extension would be legally permissible. And it does not defend the President's admission that this extension is unlikely to survive judicial scrutiny but would buy the government more time to distribute rental assistance.

Instead, the government urges this Court to leave the stay undisturbed merely because it did so at the start of June—before a majority of the Supreme Court made clear that the moratorium could not remain in place past July 31, before the government repeatedly announced that it lacked authority to adopt even a narrower moratorium, and before the President conceded that the CDC's order (and this litigation) was merely a delay tactic. Nothing in the law-of-the-case doctrine compels such a manifestly unjust result.

ARGUMENT

I. The Government Has Not Met The Criteria For A Stay Pending Appeal.

The government does not deny that it must satisfy all four traditional factors to justify a continuation of the stay. Mot.12. Yet it makes barely any attempt to do so, offering only a handful of points that collapse under scrutiny.

A. On the merits, the government asserts that "'the plain text of 42 U.S.C. § 264(a)'" authorizes the moratorium, Opp.13, but fails to offer a good explanation for how that reading avoids making the rest of § 264 superfluous, Mot.14. At most, it claims that the inspection measures enumerated in § 264(a)'s second sentence "'required express congressional authorization under the Fourth Amendment'" under *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), and *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924). Opp.14. But the Solicitor General declined to press that theory before the Supreme Court, and for good reason. As the Sixth Circuit recently explained, "[n]either case"—one of which was "decided in 1946, two years after the Public Health Act of 1944"—"placed Congress on notice that giving the Secretary authority to order inspections" would even "implicate the Fourth Amendment." *Tiger Lily, LLC v. HUD*, --- F.4th ---, 2021 WL 3121373, at *3 n.2 (6th Cir. July 23, 2021). And even if that account were plausible on its face, it would render "more than half of th[e] text" of § 264 a historical footnote.

TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (applying canon against superfluity to construction that would make text "'insignificant'").

Superfluity aside, the government makes no attempt to square its position with basic federalism and nondelegation canons, and it dismisses the "major-questions doctrine"—the basis of Justice Kavanaugh's concurring opinion—as irrelevant in light of § 264's "plain text." Opp.14 (citations omitted); *see* Mot.14-16. But the major-questions doctrine required Congress to "expressly and specifically delegate" the authority to impose an eviction moratorium, *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari)—a description that does not remotely describe § 264(a)'s delegation to the CDC to "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." The government also suggests that Congress "embrace[d]" the CDC's unlawful action by acknowledging in appropriations legislation that the agency had issued the moratorium "'under'" § 264. Opp.14. But as the Sixth Circuit explained, that legislation at most "gave force to the otherwise-unlawful order" until "January 31"; it "did not purport to alter the meaning of § 264(a)" or "grant the CDC

the power to extend the order further than Congress had authorized." *Tiger Lily*, 2021 WL 3121373, at *5.

B. The government has even less to say on the equities. It does not dispute that a stay would substantially and irreparably injure Plaintiffs, that the public interest rises and falls with the merits, or that the President's acknowledged use of litigation to buy time to extend an unlawful policy is reason alone to end the stay. Mot.17-20. Instead, it emphasizes the uptick in cases from the Delta variant, *see* Opp.16, but never explains why the CDC was evidently willing to tolerate the risks of that strain until August 3. As the government does not deny, the agency was aware of these risks both when it announced in June that the moratorium would expire on July 31 and when it allowed the moratorium to temporarily lapse after that date. Mot.19. In any event, concerns about new variants evidently did not stop the Supreme Court from enjoining the enforcement of part of New York's eviction moratorium, and there is no reason to conclude that those concerns will have any more purchase here. *Compare Chrysafis v. Marks*, No. 21A8, 2021 WL 3560766, at *1 (U.S. Aug. 12, 2021), *with* N.Y. Opp. at 14, *Chrysafis*, *supra* (Aug. 4, 2021).

II. The Law-of-the-Case Doctrine Has No Preclusive Effect Here.

Ultimately, the government's only real argument is that the law-of-the-case doctrine bars this Court from lifting the stay now because a motions panel declined to do so in early June. But that doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided,'" and therefore leaves this Court with "the power to revisit prior decisions of its own or of a coordinate court in any circumstance." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see Halperin v. Kissinger*, 807 F.2d 180, 192 (Scalia, Circuit Justice, D.C. Cir. 1986) ("We have acknowledged in the past that the law of the case is not an inexorable command that rigidly binds a court to its former decisions") (cleaned up). There are at least two reasons why that discretionary doctrine does not bind this Court here.

A. To start, this Court has squarely held that "[a]n order denying preliminary relief"—which unquestionably describes the motions panel's June ruling—"'does not constitute the law of the case.'" *Belbacha v. Bush*, 520 F.3d 452, 458 (D.C. Cir. 2008); *see* Mot.21-22. Accordingly, even the government admits that "[i]t is 'of course' true that the motions panel's conclusions will not bind the merits panel, as the motions panel explicitly recognized." Opp.14.

The government nevertheless insists that these conclusions are binding now because this case is "not before the merits panel." *Id.* But it offers no authority to support that distinction, which is difficult to square with the unqualified language in *Belbacha* and other precedents. *See, e.g.*, *Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012) ("An appellate court *in a later phase of the litigation* … need not bind itself to the time-pressured decision it earlier made") (emphasis added); *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974) ("The decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of *further proceedings*.") (emphasis added).

The distinction also makes little sense. The preliminary-relief "exception to the law-of-the-case doctrine arises from the nature" of the first panel's ruling, *Sherley*, 689 F.3d at 781, not the stage of the proceedings when the case reaches the second panel. Specifically, the exception is based on the fact that in considering a request for "preliminary relief," appellate courts are often left with "briefing and argument abbreviated or eliminated by time considerations" and must merely "predict[] … that the plaintiffs *probably* or *likely* will or will not succeed on the merits." *Id.* at 782. Those concerns exist whether the preliminary-relief decision is invoked at the merits stage or

before. Presumably, that is why a panel considering a preliminary-injunction appeal is not bound by the conclusions of an earlier motions panel staying (or declining to stay) that injunction. *See, e.g.*, *Natural Res. Def. Council, Inc. v. Winter*, 508 F.3d 885 (9th Cir. 2007) (resolving preliminary-injunction appeal and vacating motions panel's stay of the injunction).

B. In any event, a motions panel's order cannot be binding in light of changed circumstances. Mot.22-24. Otherwise, this Court would be powerless to lift the stay even if 99% of the population were vaccinated, the daily average of cases plummeted to levels not seen since February 2020, and the CDC announced that the moratorium would be extended indefinitely until sufficient economic recovery had occurred. *See* Mot.21. The government agrees that the law-of-the-case doctrine must yield in light of intervening developments, but contends that there has been no relevant change in circumstances here—notwithstanding the significant actions taken by the Supreme Court and the Executive Branch in the wake of the motions panel's decision. *See* Opp.15. That position suffers from at least two fundamental flaws.

1. a. To start, the government's request that this Court disregard the views of a majority of the Supreme Court is mystifying. Although the government contends that the Supreme Court's ruling is not technically

"'binding,'" Opp.15, it has no response to the fact that even non-binding authority can constitute a relevant intervening development in the law, *see* Mot.22-23. That may explain why in the days leading up to August 3, the Executive Branch repeatedly stated that it could not extend the moratorium—even in a slightly narrower form—in light of the Supreme Court's ruling. Mot.7-9. Whether or not this Court has the "technical authority" to depart from that ruling, it should not "deny[] the Supreme Court action its obvious and relevant import." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir.) (Wilkinson, J.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020).

To justify its about-face, the government invokes (Opp.15) this Court's approach to *Marks v. United States*, 430 U.S. 188 (1977), but that misses the forest for the trees. Whether or not Justice Kavanaugh's opinion is formally controlling under *Marks*—or whether *Marks* even governs Supreme Court rulings concerning applications for emergency relief—there is no conceivable justification for a lower court to "decide a case contrary to how a majority of the Supreme Court … would decide the case." *United States v. Duvall*, 740 F.3d 604, 617 n.8 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc). Such an approach would not respect "[v]ertical stare

decisis"—either "in letter" or "in spirit." *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (Kavanaugh, J.).

In any event, the government misreads this Court's precedents. According to the government, this Court has held that "the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law." Opp.15 (quoting App.68a). To support that proposition, the government points to the following language from *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc): "[T]he narrowest opinion … must embody a position implicitly approved by at least five Justices who support the judgment." *Id.* at 781; *accord United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013). But as then-Judge Kavanaugh explained, there is no need to "read *King* to direct that we decide a case contrary to how a majority of the Supreme Court in the governing precedent would decide the case." *Duvall*, 740 F.3d at 617 n.8 (Kavanaugh, J., concurring in the denial of rehearing en banc). Rather, all that *King* establishes is that "looking to just the concurrence and dissent alone will never be enough to determine whether one of the opinions is the binding opinion under *Marks*." *Id.* That is because "an opinion is the binding opinion only when it will lead to results with which a majority of the Court would agree in all future cases," and "that analysis can be logically conducted

only by looking at all of the opinions in the Supreme Court case at issue." *Id.* And here, that opinion is plainly Justice Kavanaugh's concurrence—as the White House itself has acknowledged. This Court should therefore "strive to reach the *result* that a majority of the Supreme Court would have reached under the opinions in the governing precedent." *Id.* at 616.

Indeed, by stating that he voted "at this time" to deny Plaintiffs' application, App.56a, Justice Kavanaugh necessarily indicated that Plaintiffs could again ask the Supreme Court to vacate the stay at a later date—a point that the government evidently does not dispute. *See* Opp.5. Yet under the government's view of the law-of-the-case doctrine, Plaintiffs were required to undergo time-consuming proceedings in the lower courts before seeking this relief even though those courts were required to rule against them. This Court should not use a doctrine meant to increase the "efficiency of the judicial process," *Christianson*, 486 U.S. at 816, to compel such a meaningless ritual.

b. The government also suggests that "it is impossible to know" how the Supreme Court would resolve this request to vacate the stay. It should have asked the White House. As the government now tells it, the four dissenting Justices may have voted to vacate the stay solely because they thought that "changed pandemic conditions meant that the eviction

moratorium was no longer necessary to prevent the spread of COVID-19." Opp.15-16. But neither Plaintiffs nor the government ever presented such a reading of § 264(a) to the Supreme Court. To the contrary, the government repeatedly urged the Justices to "defer[]" to the CDC as the "'expert best positioned to determine the need for such preventative measures.'" S. Ct. Opp. 12, 24; *see id.* at 33-34. Otherwise, the CDC's determinations of necessity under § 264(a) would remain subject to perpetual judicial reexamination—a prospect the government presumably wishes to avoid. And the snippets the government quotes from Plaintiffs' Supreme Court application, *see* Opp.15-16, explained why the *equities*—not the *merits*—favored vacating a stay. Plaintiffs have never argued that the moratorium only became unlawful when the public-health situation improved; indeed, they filed this action in late November 2020.

Confirming the point, the Executive Branch—at least until August 3—understood the position of the four dissenting Justices to be perfectly clear: Those Justices (at a minimum) agreed with Justice Kavanaugh "that the CDC could not grant such an extension without clear and specific congressional authorization." Mot.8 (citation omitted); *see* Mot.7-9. The only thing that has changed is that the White House now believes that litigating a fourth extension

of the moratorium will give it "the ability, if we have to appeal, to keep this going for a month at least" and "by that time" presumably "get a lot of" rental assistance out the door. Mot.10 (citation omitted).

2. Finally, even if this Court were somehow free to ignore the views of a majority of the Supreme Court, adhering to the law-of-the-case doctrine here "would work a manifest injustice" given the Executive Branch's misuse of agency action and the judicial process. *Christianson*, 486 U.S. at 817 (citation omitted); *see* Mot.23-24. The government does not even acknowledge, much less respond to, this point.

CONCLUSION

This Court should vacate the stay no later than August 19, 2021.

Dated: August 17, 2021

Respectfully Submitted,

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The undersigned certifies that, on this 17th day of August 2021, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

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