No. 21A-_____

IN THE SUPREME COURT OF THE UNITED STATES

ALABAMA ASSOCIATION OF REALTORS, ET AL.,

Applicants,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

EMERGENCY APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND FOR IMMEDIATE ADMINISTRATIVE VACATUR

BRETT A. SHUMATE
Counsel of Record
CHARLOTTE H. TAYLOR
STEPHEN J. KENNY
J. BENJAMIN AGUIÑAGA
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Phone: (202) 879-3939
bshumate@jonesday.com

Counsel for Applicants

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Applicants are Alabama Association of REALTORS®; Danny Fordham; Fordham & Associates, LLC; H.E. Cauthen Land and Development, LLC; Georgia Association of REALTORS®; Robert Gilstrap; and Title One Management LLC. They were plaintiffs in the district court and appellees in the court of appeals.

Respondents are U.S. Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; U.S. Department of Justice; Merrick B. Garland, in his official capacity as Attorney General; Centers for Disease Control and Prevention; Rochelle P. Walensky, in her official capacity as Director of Centers for Disease Control and Prevention; and Sherri A. Berger, in her official capacity as Acting Chief of Staff for Centers for Disease Control and Prevention. They were defendants in the district court and appellants in the court of appeals.

The related proceedings are:

Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 20-cv-3377 (D.D.C. Aug. 13, 2021) (order denying motion to vacate stay pending appeal)

Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 20-cv-3377 (D.D.C. May 14, 2021) (order granting stay pending appeal)

Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 20-cv-3377 (D.D.C. May 5, 2021) (order granting summary judgment)

Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 21-5093 (D.C. Cir. Aug. 20, 2021) (order denying motion to vacate stay pending appeal)

Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 21-5093 (D.C. Cir. June 2, 2021) (order denying motion to vacate stay pending appeal)

Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 20A169 (U.S. June 29, 2021) (order denying application to vacate stay pending appeal)

RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, applicants hereby submit the following corporate-disclosure statement.

1. Applicants have no parent corporation.

2. No publicly held corporation owns any portion of applicants, and applicants are not a subsidiary or an affiliate of any publicly owned corporation.

TABLE OF CONTENTS

INDEX OF APPENDICES

Page

INDEX OF APPENDICES
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. § 1651, applicants Alabama Association of REALTORS® et al. respectfully apply for an emergency order vacating the stay pending appeal issued May 14, 2021, by the United States District Court for the District of Columbia. App. 23a-33a. On June 2, 2021, the United States Court of Appeals for the D.C. Circuit declined to vacate the stay. App. 16a-22a. On June 29, 2021, this Court declined to vacate the stay. App. 15a. On August 13, 2021, the District Court declined to vacate the stay. App. 2a-14a. On August 20, 2021, the D.C. Circuit again declined to vacate the stay. App. 1a.

INTRODUCTION

This is the second time that this Court has been confronted with the federal eviction moratorium. In June, this Court, by a 5-4 vote, declined to vacate a stay of a final judgment holding the moratorium unlawful. In a concurring opinion, Justice Kavanaugh "agree[d] with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium." App. 15a15a. He nevertheless chose to "vote at this time" not to vacate the stay solely because, as the government had recently informed this Court, "the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds." *Id.* Justice Kavanaugh emphasized, however, that "clear and specific congressional

authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31." *Id.*

In light of that ruling, the Executive Branch repeatedly (and sensibly) confirmed that it could not extend the moratorium and urged Congress to act instead. But when the proponents of the moratorium lost in Congress, they mounted a campaign to pressure the President to take matters into his own hands. While the Executive Branch held firm for a few days and allowed the moratorium to lapse, it ultimately caved to the political pressure on August 3, when the CDC announced that its moratorium would be extended until October 3, 2021. In a remarkable display of candor, the President acknowledged that "[t]he bulk of the constitutional scholarship" concluded that this extension was "not likely to pass constitutional muster," but that "by the time it gets litigated, it will probably give some additional time while we're getting that $45 billion out to people who are, in fact, behind in the rent and don't have the money." The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Aug. 3, 2021), https://bit.ly/3xszwea (August 3 Remarks).

That gamesmanship has paid off so far. Although applicants asked the district court the following day to vacate the stay in light of these developments, it declined to do so. Not because it thought the CDC's latest order was a new moratorium; the court determined that this order was merely an attempt to extend the vacated moratorium and hence covered by its earlier judgment. Nor because it thought that the government was entitled to a stay; the court concluded that the CDC had neither the merits nor the equities on its side. Rather, even though the court made clear that

it would have vacated the stay had it been writing on a blank slate, it thought its hands were tied by the D.C. Circuit's earlier order declining to vacate the stay under the law-of-the-case doctrine. A week later, the D.C. Circuit declined to vacate the stay in an unreasoned, per curiam order.

The stay order cannot stand. As five Members of this Court indicated less than two months ago, Congress never gave the CDC the staggering amount of power it claims. The agency's only purported basis of authority here, 42 U.S.C. § 264, is a rarely-used statute from 1944 whose domain has previously been limited to matters such as the sale of baby turtles. Yet the CDC now claims that this provision endows it with the unqualified power to take any measure imaginable to stop the spread of *any* communicable disease—common cold included—whether it be eviction moratoria, worship limits, nationwide lockdowns, school closures, or vaccine mandates. But Congress must expressly and specifically authorize an agency to resolve major policy questions before it can do so, and § 264 contains no such authorization when it comes to regulating landlord-tenant relationships throughout the country. Indeed, since this Court's ruling in June, the Sixth Circuit has held, and the Eleventh Circuit has strongly suggested, that the moratorium is unlawful. *See Tiger Lily, LLC v. HUD*, 5 F.4th 666 (6th Cir. 2021); *Brown v. Secretary*, 4 F.4th 1220, 1224-25 (11th Cir. 2021).

Nor do the equities justify allowing unlawful agency action to continue pending appeal. As Justice Kavanaugh explained the last time the moratorium was before this Court, the equities would permit a stay only until July 31, at which point "clear and specific congressional authorization (via new legislation) would be necessary for

the CDC to extend the moratorium" further. App. 15a. And even if this Court were inclined to consider the equities afresh, the balance tips even more strongly in applicants' favor than it did the last time around. As the district court observed, in the time since it issued its stay order, "the government has had three months to distribute rental assistance; health care providers have administered roughly 65 million additional vaccine doses; and the total cost of the moratoria to lessors, amounting to as much as $19 billion each month, has only increased." App. 1313a n.3 (internal citation omitted). And due to the government's sovereign immunity, its inability to provide timely rental assistance, and the judgment-proof nature of the tenants covered by the moratorium, that massive wealth transfer (and accompanying state-sanctioned unlawful occupation of property) will never be fully undone. By contrast, given the Executive Branch's recent statements and actions, the CDC's public-health justification for the moratorium can only be described as pretextual. Here, "the disconnect between the decision made and the explanation given," *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019), is apparent because the President has been candid that the latest extension of the moratorium—and its defense in the judicial system—is designed to get as much rental assistance out the door as possible.

In light of the Executive Branch's statement that its litigation efforts are designed to buy time to achieve its economic policy goals—and the fact that landlords are now subject to federal criminal penalties for exercising their property rights depending on where they do business—applicants respectfully ask this Court to issue

relief as soon as possible. Specifically, this Court should issue an immediate administrative order vacating the stay while it considers this motion. It took 26 days for this Court to resolve the previous application in June, and a similar schedule would facilitate the Executive Branch's strategy to use an "appeal[] to keep this going for a month at least." The White House, *Remarks by President Biden on Strengthening American Leadership on Clean Cars and Trucks* (Aug. 5, 2021), https://bit.ly/3juwwZS (August 5 Remarks). Following briefing, this Court should issue an order vacating the stay that explains why the CDC lacks statutory authority here.

It has now been 17 days since the CDC decided to "extend the moratorium past July 31" in the absence of "clear and specific congressional authorization." App. 15a. Presumably, that fortnight-plus has bought the government more time to get "$45 billion out" to at least some Americans. But those weeks have come with a significant cost. Not only to the nation's landlords, who are now coming up on a year of having their properties unlawfully occupied under threat of six-figure criminal penalties. But also to the reputation of all three branches of government. Unless this Court vacates the stay—and does so promptly—Congress will know that it can legislate through pressure campaigns and sit-ins rather than bicameralism and presentment, the Executive Branch will know that it can disregard the views of a majority of Justices with impunity, and this Court will know that its carefully considered rulings will be roundly ignored. No amount of federal rental assistance justifies that cost.

OPINIONS BELOW

The opinion of the district court granting summary judgment to applicants is not yet published in the Federal Supplement but is available at 2021 WL 1779282 and is reproduced at App. 34a-53a. The opinion of the district court staying its judgment pending appeal is not yet published in the Federal Supplement but is available at 2021 WL 1946376 and is reproduced at App. 23a-32a. The opinion of the district court declining to vacate the stay of its judgment pending appeal is not yet published in the Federal Supplement but is available at 2021 WL 3577367 and is reproduced at App. 2a-14a. The first opinion of the D.C. Circuit declining to vacate the stay pending appeal is not published in the Federal Reporter but is available at 2021 WL 2221646 and is reproduced at App. 16a-22a. The second opinion of the D.C. Circuit declining to vacate the stay pending appeal is not published in the Federal Reporter but is reproduced at App. 1a.

JURISDICTION

The district court issued its final judgment on May 5, 2021, and the government filed a notice of appeal the same day. The district court granted the government's emergency motion for a stay pending appeal on May 14, 2021. The D.C. Circuit denied applicants' emergency motion to vacate the stay on June 2, 2021. The district court denied applicants' request to vacate the stay on August 13, 2021. The D.C. Circuit denied applicants' second emergency motion to vacate the stay on August 20, 2021. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in an appendix to this brief. App. 55a-136a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. As part of last March's Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Congress adopted an eviction moratorium prohibiting landlords of properties covered by federal assistance programs or subject to federally backed loans from evicting their tenants for failing to pay rent. Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492-94 (2020) (codified at 15 U.S.C. § 9058). This prohibition on evictions was backed by no apparent penalties and set to expire within 120 days. *See id.* In doing so, Congress was joined by at least 43 States and the District of Columbia, which adopted eviction moratoria of their own. *See* App. 48a.

2. After the CARES Act eviction moratorium expired on July 24, 2020, and Congress declined to enact a new one, President Trump directed the CDC to consider issuing an eviction moratorium of its own. *See* Exec. Order No. 13,945, 85 Fed. Reg. 49,935 (Aug. 8, 2020). President Trump stated that "[w]ith the failure of the Congress to act, my Administration must do all that it can to help vulnerable populations stay in their homes in the midst of this pandemic," and that "[u]nlike the Congress, I cannot sit idly and refuse to assist vulnerable Americans in need." *Id.* The President therefore directed the CDC to "consider whether any measures temporarily halting

residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19." *Id.* at 49,936.

The CDC complied with this directive. On September 4, 2020, it issued a moratorium prohibiting landlords from evicting tenants who had submitted a declaration under penalty of perjury affirming that, among other things, they could not pay their rent and would "likely become homeless" or be forced to "live in close quarters" if evicted. 85 Fed. Reg. 55,292, 55,297 (Sept. 4, 2020). This executive moratorium was broader than the congressional one in at least two respects. First, it applied to every residential property in the country, not just those with a connection to certain federal programs. *Id.* at 55,293. Second, it imposed criminal penalties—enforced by the Department of Justice—of up to a year in jail and/or a fine of $250,000 for individual violators and a fine of $500,000 for organizational ones. *Id.* at 55,296.

As statutory authority for the moratorium, the CDC relied exclusively on Section 361 of the Public Health Service Act. *See id.* at 55,297. Enacted in 1944, this provision delegates to the Secretary of Health and Human Services the authority to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" across States or from foreign lands, 42 U.S.C. § 264(a), who in turn has delegated this power to the CDC, 42 C.F.R. § 70.2. (The statute originally delegated authority to the Surgeon General, but Congress has since transferred that power to the Secretary. App. 40a n.1.) According to the CDC, the moratorium was "a reasonably necessary measure … to prevent the further spread of COVID-19 throughout the United States" on the

theory that "evictions … force people to move, often into close quarters in new shared housing settings with friends or family, or congregate settings such as homeless shelters." 85 Fed. Reg. at 55,296.

3. The CDC's moratorium was originally set to expire on December 31, 2020. *Id.* at 55,297. In the Consolidated Appropriations Act for 2021 (2021 Appropriations Act), however, Congress included a provision that extended the moratorium through January 31, 2021. Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79 (2020). When Congress did not take any further action, the CDC twice extended its moratorium itself—first through March 31, 2021, and then through June 30, 2021. *See* 86 Fed. Reg. 8020 (Feb. 3, 2021); 86 Fed. Reg. 16,731 (Mar. 31, 2021).

B. Procedural History

1. Plaintiffs—two landlords affected by the CDC's action, the businesses they use to manage their properties, and two trade associations—challenged the lawfulness of the eviction moratorium. Following expedited summary-judgment briefing, the district court vacated the moratorium as exceeding the CDC's statutory authority. App. 34a-53a.

The district court rejected the CDC's assertion that so long as the Secretary "can make a determination that a given measure is 'necessary' to combat the interstate or international spread of disease, there is no limit to the reach of his authority" under 42 U.S.C. § 264. App. 48a. As the court explained, construing § 264 to "extend[] a nearly unlimited grant of legislative power" to the Secretary would not only "ignore its text and structure," but would also "raise serious constitutional

concerns," including the legality of "'such a broad delegation of power unbounded by clear limitations or principles.'" App. 47a; *see* App. 40a-49a. In addition, the court observed, accepting the CDC's "expansive interpretation" would require embracing the implausible assumption that Congress "delegated to the Secretary the authority to resolve not only" the momentous decision to criminalize evictions throughout the country, but "endless others that are also subject to 'earnest and profound debate across the country.'" App. 48a. Because "Congress did not express a clear intent" to confer "such sweeping authority," the court declined to take that step itself. App. 47a; *see* App. 47a-49a.

The district court also dismissed the government's argument that Congress had ratified the CDC's authority to ban evictions "when it extended the moratorium" in the 2021 Appropriations Act. App. 50a; *see* App. 50a-52a. As the court noted, that legislation did not "expressly approve of the agency's interpretation" of 42 U.S.C. § 264, but "merely extended" the moratorium until January 31, 2021. App. 51a. After that date, the court reasoned, the CDC's continuation of the moratorium "stands—and falls—on the text of the Public Health Service Act alone." *Id.* The district court nevertheless entered a stay of its final judgment pending appeal based largely on equitable considerations. App. 23a-32a.

2. A motions panel of the D.C. Circuit declined to vacate the stay in an unpublished order on the theory that "[t]he district court did not abuse its discretion in granting a stay." App. 16a; *see* App. 16a-22a. Emphasizing that it was "not resolving the ultimate merits," the D.C. Circuit thought that the government was

"likely to succeed" on appeal and that "[t]he district court acted within its discretion in concluding that the [equitable] factors supported its stay." App. 17a, 20a.

3. Applicants then sought relief from this Court. While their application to vacate the stay was pending, the CDC issued a third extension of the moratorium—this time until July 31. 86 Fed. Reg. 34,010 (June 28, 2021). According to the agency, the latest extension was justified in part because of "continued emergence of new variants," including the "Delta" variant, "for which there is evidence of an increase in transmissibility, more severe disease, reduction in neutralization by antibodies generated during previous infection or vaccination, reduced effectiveness of treatments or vaccines, or diagnostic detection failures." *Id.* at 34,012. The agency explained, however, that "[t]his 30-day extension" was "intended to be the final iteration" of the moratorium. *Id.* at 34,015. The Acting Solicitor General informed the Court of these developments. Letter to Hon. Scott S. Harris, No. 20A169 (U.S. June 24, 2021) (June 24 Letter).

On June 29, this Court declined to vacate the stay by a 5-4 vote. App. 15a. Four Justices—Justices Thomas, Alito, Gorsuch, and Barrett—noted that they would have granted the application. *Id.* Four others—the Chief Justice and Justices Breyer, Sotomayor, and Kagan—did not explain their votes to deny. *Id.* Justice Kavanaugh, the decisive fifth vote to deny the application, issued a concurring opinion. *Id.* Citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014), he "agree[d] with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction

moratorium." App. 15a. But "[b]ecause the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds," Justice Kavanaugh decided to "vote at this time to deny the application" based on a "balance of equities." *Id.* He cautioned, however, that "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31." *Id.*

4. On July 29, the White House announced that the CDC would not extend the moratorium for a fourth time because "the Supreme Court has made clear that this option is no longer available." The White House, *Statement by White House Press Secretary Jen Psaki on Biden-Harris Administration Eviction Prevention Efforts* (July 29, 2021), https://bit.ly/3jm0K17. "In light of the Supreme Court's ruling, the President call[ed] on Congress to extend the eviction moratorium" instead. *Id.*

After a bill to extend the moratorium failed to pass the House of Representatives, the moratorium's congressional supporters mounted a pressure campaign aimed at the White House that included a sit-in on the steps of the U.S. Capitol. *See Protecting Renters from Evictions Act of 2021*, H.R. 4791, 117th Cong. (2021). One Member of Congress publicly urged officials to extend the moratorium, asking, "Who is going to stop them?" @RepMaxineWaters, Twitter (Aug. 2, 2021, 4:19 PM), https://bit.ly/2VhjaIA. And in response to the President's claim that his "hands were legally tied," the Speaker of the House told one of his aides to "'[g]et better

lawyers[.]'" Michael D. Shear et al., *As Democrats Seethed, White House Struggled to Contain Eviction Fallout*, N.Y. TIMES (Aug. 7, 2021), https://nyti.ms/3jV5xaj.

The White House nevertheless stood firm over the next few days. After allowing the moratorium to expire, it confirmed on August 2 that "the Supreme Court declared on June 29th that the CDC could not grant such an extension without clear and specific congressional authorization." The White House, *Press Briefing by Press Secretary Jen Psaki and White House American Rescue Plan Coordinator and Senior Advisor to the President Gene Sperling* (Aug. 2, 2021), https://bit.ly/3xoNzBt (August 2 Briefing). In fact, the White House explained, the President had "asked the CDC to look at whether you could even do [a] targeted eviction moratorium … that just went to the counties that have higher rates," but that the agency had "been unable to find the legal authority for even new, targeted eviction moratoriums." *Id.* It reiterated that "[t]o date, the CDC Director and her team have been unable to find legal authority, even for a more targeted eviction moratorium that would focus just on counties with higher rates of COVID spread." *Id.*

In the early afternoon of August 3, the White House again confirmed that "the Supreme Court … made clear" that when it came to an eviction moratorium, "any further action would need legislative steps." The White House, *Press Briefing by Press Secretary Jen Psaki* (Aug. 3, 2021), https://bit.ly/2WX9vY0 (August 3 Briefing). "[A]s a result" of this Court's ruling, the Executive Branch indicated that the CDC's "third extension of the moratorium … would be the last." *Id.*

5. Yet on the evening of August 3, the CDC announced its fourth extension of the eviction moratorium. 86 Fed. Reg. 43,244 (Aug. 6, 2021). The latest iteration is virtually identical to its predecessors except that its scope is now limited to those counties "experiencing substantial or high rates of transmission" of COVID-19, which as of August 1 amounted to "over 80% of" all counties in the country. *Id.* at 43,244, 43,246. According to the President, the fourth extension of the moratorium "covers close to 90 percent of … renters" in the country. August 3 Remarks. As of this filing, over 94% of counties are subject to this extension, including every county in which applicants or their members own property. *See* CDC, *COVID Data Tracker: COVID-19 Integrated County View*, https://bit.ly/2W0nmNf (last visited Aug. 20, 2021).

In discussing the latest extension, the President acknowledged that the Supreme Court "has already ruled on the present eviction moratorium" and "made it clear that the existing moratorium … wouldn't stand." August 3 Remarks. He then observed that "[t]he bulk of the constitutional scholarship" indicates that any further executive action in this area would "not likely to pass constitutional muster." *Id.* "But," the President explained, extending the moratorium would be "worth the effort" because "by the time it gets litigated, it will probably give some additional time while we're getting that $45 billion out." *Id.*

A few days later, the President again acknowledged that when it came to extending the moratorium, this Court "made it very clear" that "'You can't do that.'" August 5 Remarks. But by issuing "a different moratorium," the President explained, "at least we'll have the ability, if we have to appeal, to keep this going for a month at

least—I hope longer than that. And in the process, by that time, we'll get a lot of (inaudible)." *Id.*

6. Applicants immediately moved to vacate the district court's stay pending appeal. In denying their motion, the district court agreed that its vacatur order covered the latest iteration of the moratorium, noting that "[t]he government conceded this point at oral argument." App. 7a; *see* App. 7a-10a. As the court observed, "although the CDC has excluded some counties from the latest moratorium's reach, the policy remains effective nationwide, shares the same structure and design as its predecessors, provides continuous coverage with them, and purports to rest on the same statutory authority." App. 7a.

The district court also made clear that "absent" the D.C. Circuit's earlier order, "it would vacate the stay." App. 13a. It explained that "the Supreme Court's recent decision in this case strongly suggests that the CDC is unlikely to succeed on the merits" and that "[o]ther decisions from the federal courts of appeals further suggest that the government is unlikely to prevail." App. 11a-12a. The district court also determined that the government had failed to show that "the equities cut strongly in its favor," noting that since it had issued its stay order, "the government has had three months to distribute rental assistance; health care providers have administered roughly 65 million additional vaccine doses; and the total cost of the moratoria to lessors, amounting to as much as $19 billion each month, has only increased." App. 13a n.3 (internal citation omitted). Meanwhile, the court observed, the government "has made no attempt to show how many evictions its moratorium actually prevents,

considering both the availability of federal rental assistance and the operation of other moratoria at the state level," and has not "identified any approach for evaluating when the compounding costs of the federal moratorium will outweigh its residual benefits." *Id.*

The district court nevertheless declined to vacate the stay because it believed its "hands [were] tied" under the law-of-the-case doctrine. App.13a; *see* App.8a-14a. According to the court, the motions panel's earlier unpublished order compelled it "to maintain the stay as a matter of law." App.9a.

7. Another motions panel of the D.C. Circuit declined to vacate the stay in a per curiam, unreasoned order. App. 1a.

REASONS FOR GRANTING THE APPLICATION

A Circuit Justice may "vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the [lower court] is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). This case satisfies all of those requirements.

I. THIS COURT SHOULD AND LIKELY WILL GRANT REVIEW

This case plainly merits this Court's review, as four Justices necessarily concluded in voting to vacate the stay in June. Indeed, the need for this Court's review has only increased since then. To start, the Sixth Circuit—in direct conflict

with the D.C. Circuit's position—recently issued a unanimous merits opinion holding that the moratorium exceeds the CDC's statutory authority. *Tiger Lily*, 5 F.4th 666. That division in authority is only likely to deepen, as other challenges to the moratorium are currently before the Fifth Circuit. *See Chambless Enters., LLC v. Walensky*, No. 21-30037 (5th Cir.) (oral argument set for Oct. 6, 2021); *Terkel v. CDC*, No. 21-40137 (5th Cir.) (oral argument set for Oct. 6, 2021). And while the Eleventh Circuit has yet to address the issue, it too has strongly suggested that the moratorium is unlawful as well. *See Brown*, 4 F.4th at 1224-25 (explaining its "doubts" about "the CDC's statutory authority"); *id.* at 1247-54 (Branch, J., dissenting) (explaining why the moratorium likely is unlawful). This conflict calls out for this Court's review, especially because landlords are currently subject to federal criminal penalties from exercising their rights depending on where in the country they do business.

Circuit conflicts aside, there can be no question that the moratorium's legality presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). As evidenced by the government's swift request for emergency relief in the D.C. Circuit following the district court's final judgment, C.A. Stay Mot. (May 7, 2021), perhaps the only thing the parties agree on in this case is the moratorium's "significance," App. 47a. And beyond the moratorium itself, the CDC's sweeping view of its own domain would, if left unchecked, allow it to adopt future regulations governing nearly all aspects of national life in the name of public health. The government cannot credibly maintain that this Court would decline to have the last word on such an important question of agency authority.

Compare, e.g., *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (reviewing EPA's decision to regulate power plants when its action "cost power plants, according to the Agency's own estimate, nearly $10 billion a year"), *with* App. 13a n.3 (noting that the moratorium is costing landlords "as much as $19 billion each month").

The need for this Court's review is only heightened by the government's recent misuse of executive power and judicial process. The Executive Branch issued the fourth extension of the moratorium a day after admitting that it could not find "legal authority[] even for a more targeted eviction moratorium that would focus just on counties with higher rates of COVID spread." August 2 Briefing. And all evidence available indicates that this rapid reversal was prompted not by the discovery of new authority for the moratorium, but by a growing wave of political pressure that the White House could not sustain. The President then announced that while this latest extension might not hold up under scrutiny, "by the time it gets litigated, it will probably give some additional time while we're getting that $45 billion out." August 3 Remarks. This Court should have the last word on whether that conduct is consistent with the rule of law.

II. THE STAY ORDER IS DEMONSTRABLY ERRONEOUS AND IRREPARABLY HARMS APPLICANTS

The stay here is not only significant, but clearly incorrect as well. A stay may be granted—and remain in place—only when the stay applicant (here, the government) has made (1) "a strong showing that [it] is likely to succeed on the merits" as well as established that (2) it "will be irreparably injured absent a stay," (3) a stay will not "substantially injure the other parties interested in the proceeding," and (4)

"the public interest" favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The government has not satisfied any of these factors, much less all four.*

A. The Government Is Unlikely To Succeed On The Merits

A majority of this Court already has determined, whether explicitly or implicitly, that the CDC "exceeded its existing statutory authority" by issuing the moratorium. App. 15a (Kavanaugh, J., concurring). That is understandable. Both statutory text and interpretive principles confirm that neither 42 U.S.C. § 264 nor the 2021 Appropriations Act permit the CDC to outlaw evictions on pain of six-figure criminal penalties.

1. Section 264 Does Not Authorize The Moratorium

a. The CDC's sole basis of statutory authority here is the first sentence of § 264(a), which empowers the Secretary "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). While that sentence may be "broadly worded," the balance of § 264 reveals that the CDC's "authority is not as capacious as the government contends." *Tiger Lily*, 5 F.4th 666; *see Brown*, 4 F.4th at 1224-25.

ii. Start with the second sentence of § 264(a), which states that "[f]or purposes of carrying out and enforcing such regulations," the Secretary "may provide

* The district court's use of the law-of-the-case doctrine is now beside the point. As this Court has made clear (and as the government agrees), "law of the case cannot bind this Court in reviewing decisions below," and a lower court's "adherence to the law of the case cannot insulate an issue from this Court's review." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (collecting cases); *see* C.A. Stay Opp. 5 (Aug. 16, 2021). Indeed, by stating that he voted "at this time" to deny applicants' request in June, Justice Kavanaugh confirmed that they could again ask this Court to vacate the stay if necessary, App. 15a—a situation that unfortunately has come to pass.

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." 42 U.S.C. § 264(a). Because courts "must give effect to each clause and word" in a statute, § 264(a)'s two sentences are best read to work together to authorize the Secretary to take "measures that are similar to inspection, fumigation, destruction of animals, and the like." *Tiger Lily*, 5 F.4th 666; *see Brown*, 4 F.4th at 1225 ("[T]he second sentence of § 264(a) appears to clarify any ambiguity about the scope of the CDC's power under the first.").

Subsections (b) through (d) of the statute go on to address the Secretary's limited authority over "the apprehension and detention of infected individuals." *Tiger Lily*, 5 F.4th 666; *see* 42 U.S.C. § 264(b)-(d). As the CDC has explained, subsection (b) "authorizes the 'apprehension, detention, or conditional release' of individuals for the purpose of preventing the … spread of a limited subset of communicable diseases … specified in an Executive Order"; "subsection (c) provides the basis for the quarantine, isolation, or conditional release of individuals arriving into the United States from foreign countries"; and "subsection (d) provides the statutory basis for interstate quarantine, isolation, and conditional release measures." 81 Fed. Reg. 54,230, 54,233 (Aug. 15, 2016); *see* 70 Fed. Reg. 71,892, 71,893 (Nov. 30, 2005).

These various provisions indicate that § 264 is limited to disease-control measures involving the inspection and regulation of infected property or the quarantine of contagious individuals, not any conceivable action the government

deems necessary to fight the spread of disease. That reading is confirmed by the fact that § 264 was originally captioned "Quarantine and Inspection," Pub. L. No. 78-410, § 361, 58 Stat. 682, 703 (1944). Accordingly, as the district court recognized, while § 264's "enumerated measures are not exhaustive," agency actions taken under this provision must at least "be similar in nature" to the ones Congress identified. App. 29a. "Plainly, an eviction moratorium does not fit that mold." *Tiger Lily*, 5 F.4th 666.

ii. Apart from a brief suggestion that the "objective of" the moratorium is to "prevent the interstate movement of contagious persons," App. 19 (citation omitted), the D.C. Circuit did not conclude that the CDC's edict is remotely comparable to the targeted inspection and quarantine measures authorized by § 264. Rather, the court determined that the first sentence of § 264(a) authorizes the Secretary to take whatever measures he "determines 'in his judgment are necessary'" to combat the spread of disease, with the balance of the statute serving to "strengthen" his "ability to take the measures determined to be necessary to protect the public health." App. 17a-19a (cleaned up).

The problem with that expansive understanding of agency authority is that it cannot explain *why* Congress would have gone through the trouble of carefully delineating the government's powers over inspections and quarantines if § 264(a)'s first sentence already gave the Secretary limitless authority to adopt any and all "regulatory measures … 'necessary to prevent the introduction, transmission, or spread of communicable diseases,'" App. 19a—quarantine and inspection measures included. Under the D.C. Circuit's theory, Congress could have simply ended the

statute at the end of § 264(a)'s first sentence. The D.C. Circuit's reading therefore "reduces the other provisions in § 264 to mere surplusage." *Tiger Lily*, 5 F.4th 666.

In an effort to cure this fundamental problem, the D.C. Circuit suggested that Congress added § 264(a)'s second sentence because it "had reason to believe" that the enumerated inspection measures "required express congressional authorization under the Fourth Amendment" in light of this Court's decisions in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), and *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924). App. 18a. The government declined to press that theory before this Court in June, and for good reason: "*Oklahoma Press* was decided in 1946, two years after the Public Health Act of 1944, and *American Tobacco* involved a regulatory demand for corporate documents. Neither case placed Congress on notice that giving the Secretary authority to order inspections and fumigations would implicate the Fourth Amendment[.]" *Tiger Lily*, 5 F.4th 666 (internal citations omitted). More fundamentally, even if the D.C. Circuit's account were plausible on its face, it would not explain the relevance of subsections (b) through (d). And even if it somehow could, that theory 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'").

b. Even if the government's expansive view of the CDC's authority could be reconciled with the text and structure of § 264, it would remain at war with at least three basic interpretive principles.

i. First, as Justice Kavanaugh's citation to *Utility Air*, 573 U.S. at 324, in his concurring opinion confirms, the moratorium cannot be reconciled with the major-questions doctrine. App. 15a; *see Tiger Lily*, 5 F.4th 666. Under that doctrine, for an "agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must … expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (collecting cases). There can be no dispute that the decision whether to criminalize evictions throughout the country constitutes "a major policy question of great economic and political importance." *Id.* Even by the CDC's conservative estimates, its latest extension of the moratorium for the next two months alone constitutes "a major rule under … []the Congressional Review Act," 86 Fed. Reg. at 43,252, meaning it will have "an annual effect on the economy of $100,000,000 or more," 5 U.S.C. § 804(2).

And the issue has not escaped public attention: Sit-ins by Members of Congress at the Capitol tend to be about important things. Indeed, Congress has been quite active in this area, the CARES Act, 2021 Appropriations Act, and the unsuccessful bill this July reveal. Beyond the federal level, at least 43 States and the District of Columbia have adopted moratoria of their own over the course of the pandemic. App. 48a. And the CDC's "expansive interpretation of the Act would mean that Congress delegated to the Secretary the authority to resolve not only this important question, but endless others that are also subject to 'earnest and profound

debate across the country.'" App. 48a (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)). Given all that, it is implausible that Congress would have assigned the resolution of these weighty issues to the Executive Branch, and "especially unlikely" that it "would have delegated this decision" to the CDC, "which has no expertise in crafting" landlord-tenant policy. *King v. Burwell*, 576 U.S. 473, 486 (2015).

The D.C. Circuit did not contest that the moratorium triggered the major-questions doctrine, but thought that the "plain text" of § 264(a) satisfied it. App. 19a. The statutory authorization "to make and enforce such regulations as in [the Secretary's] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a), however, can no more be described as an "express[] and specific[]" delegation "to decide the major policy question" here, *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J., respecting the denial of certiorari), than the FDA's statutory authority over "drugs" and "devices" constituted an express and specific delegation to regulate tobacco products, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). By contrast, Congress has shown that it is able to provide the clear statement necessary to regulate in this area when it wants to, as evidenced by the moratorium in the CARES Act and the one-month extension in the 2021 Appropriations Act. *See* 15 U.S.C. § 9058; Pub. L. No. 116-260, § 502, 134 Stat. at 2078-79; *see also* 50 U.S.C. § 3951(a)(1) (expressly prohibiting the eviction of service members in certain situations). It did not do so in § 264.

Likewise telling is the government's acknowledgement that § 264 "has never been used to implement a temporary eviction moratorium, and has rarely been utilized for disease-control purposes" throughout its nearly 80-year history. App. 49a (cleaned up). And that is so even though the United States has seen its fair share of diseases during that time, including the H2N2 pandemic in 1957 (about 116,000 American deaths), the H3N2 pandemic in 1968 (about 100,000 American deaths), and the H1N1 pandemic in 2009 (about 12,500 American deaths). *See* CDC, *Past Pandemics* (Aug. 10, 2018), https://bit.ly/3g8T7JK. Rather, the provision has been sparingly invoked to adopt regulations governing human tissue products, *see United States v. Regenerative Scis., LLC*, 741 F.3d 1314, 1321-23 (D.C. Cir. 2014), or banning the sale of baby turtles, *see Independent Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 618-20 (W.D. La. 2010). Given this history, the government's recent claim "to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'" should be greeted with a healthy "measure of skepticism." *Utility Air*, 573 U.S. at 324.

ii. Second, the moratorium runs headlong into the interpretive principle that when an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," there must be "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). There can be no dispute that the CDC's attempt to "nationalize landlord-tenant law" triggers this rule. *Tiger Lily*, 5 F.4th 666; *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458

U.S. 419, 440 (1982). And nothing in § 264 qualifies as the "exceedingly clear language" necessary "to significantly alter the balance between federal and state power and the power of the Government over private property." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020).

The D.C. Circuit accepted that the moratorium triggered this clear-statement rule, but observed that Congress has "authority to regulate rental housing transactions" under the Commerce Clause. App. 19a. That misses the point. There is no dispute that Congress *can* adopt an eviction moratorium in response to a pandemic—it did so in the CARES Act. But the question here is whether Congress *did* in fact authorize the CDC to adopt one. And § 264(a)'s first sentence—however capacious it might appear on its face—no more qualifies as a "clear statement" of Congress's intent to do so than the "extremely broad[]" definition of "[c]hemical weapon" in *Bond v. United States*, 572 U.S. 844, 860 (2014).

iii. Third, the CDC's view of its own authority, if adopted, would render § 264(a) an unconstitutional delegation of legislative power. *See Tiger Lily*, 5 F.4th 666. In the government's telling, § 264(a) is a blanket "congressional deferral to the judgment of public health authorities about what measures they deem necessary to prevent" the spread of disease. App. 45a-46a (cleaned up); *see Brown*, 4 F.4th at 1224 (noting that "the government was unwilling to articulate any limits to the CDC's regulatory power at oral argument"). "That reading would grant the CDC director near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries as freely as she could ban evictions." *Tiger Lily*, 5 F.4th 666. Indeed,

the government has never disputed that its reading would allow the CDC to take any conceivable measure to prevent the spread of communicable disease—whether school and business closures, worship limits, or stay-at-home orders, all backed by federal criminal penalties.

Nor would the CDC's domain be limited to pandemics: § 264(a) empowers the agency to respond to *any* "communicable diseases"—common cold included. 42 U.S.C. § 264(a). The CDC has been quite clear on this point: "By its terms, subsection (a) does not seek to limit the types of communicable diseases for which regulations may be enacted, but rather applies to all communicable diseases that may impact human health." 81 Fed. Reg. at 54,233. And because *any* activity involving human interaction threatens "the introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a), there would be no area of common life or sector of the economy left outside the CDC's control. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (noting "a 'strong consensus' that global warming threatens … an increase in the spread of disease").

Rather than dispute any of this, the D.C. Circuit asserted that the requirement that the CDC make "a determination of necessity" before taking action "constrains" the agency. App. 17a. But neither that court nor the government has offered any framework, standards, or guidance judges could apply in reviewing such determinations of "necessity." *Id.* To the contrary, the D.C. Circuit asserted that Congress "designated the HHS Secretary the expert best positioned to determine the

need for such preventative measures," thereby confirming that the "necessity standard" is no standard at all. *Id.*

In short, under the CDC's reading of § 264(a), both "the degree of agency discretion" and "the scope of the power congressionally conferred" are practically limitless, even though the two should be inversely correlated. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001). By any measure, that is an unconstitutional delegation. To applicants' knowledge, this Court has never suggested that Congress could give an executive officer authority to criminalize any conduct bearing on human interaction based solely on "his judgment" that doing so is "necessary" to prevent the spread of any communicable disease. 42 U.S.C. § 264(a); *cf. Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (acknowledging that if a statute gave "'plenary power'" to an executive officer to determine a criminal law's applicability to particular offenders, it would pose "a nondelegation question"). Such a statute would not "authorize another branch to 'fill up the details,'" it would not ask for "executive fact-finding," and it would not assign executive officers "certain non-legislative responsibilities." *Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting). It would, however, constitute a "congressional delegation[] to agencies of authority to decide major policy questions." *Paul*, 140 S. Ct. 342. There is no reason "to assume that Congress intended to give" the CDC such "unprecedented power," *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (plurality opinion)—much less authorize the agency to institute a year-long policy of government-authorized physical occupation of property

without any compensation. *Cf. Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (holding that regulation granting "union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year" constitutes "a *per se* physical taking").

2. The 2021 Appropriations Act Does Not Help The CDC

The D.C. Circuit also believed that Congress's decision to extend the CDC's moratorium for one month in the 2021 Appropriations Act "recognized" the agency's purported authority to further extend the moratorium as it saw fit. App. 18a. That conclusion adds little to the analysis. As the government has informed this Court, the Appropriations Act does not "independently confer[] authority to adopt the moratorium" and comes into play only if there is "any doubt" as to whether § 264(a) allows the CDC's order. 20A169 Opp. 26, 30 (June 10, 2021). Under the interpretive principles discussed above, however, any ambiguity in this area must be resolved *against* the government. *See supra* Pt. II.A.1.b; *see, e.g.*, *Lincoln v. United States*, 202 U.S. 484, 498 (1906) (applying constitutional-avoidance canon to reject argument that Congress had ratified executive action).

In any event, the government's reading of the Appropriations Act comes with more doubts than its clarifies. The Act is devoid of any indication, let alone a clear statement, that "Congress … authoritatively agreed with" the CDC's "textually implausible and constitutionally dubious" interpretation of § 264. *Tiger Lily*, 5 F.4th 666. Instead, the relevant provision in the Act consists of the following sentence:

> The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264),

> entitled "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID–19" (85 Fed. Reg. 55292 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Pub. L. No. 116-260, § 502, 134 Stat. at 2078-79. While that language reveals that *Congress* decided to impose an eviction moratorium for a limited time (as it had in the CARES Act), it does not remotely indicate that it chose to delegate unqualified authority in this area to *the CDC*. When Congress wants to ratify dubious agency action, it knows how to do so—namely, by specifying that an action "'is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed.'" *United States v. Heinszen*, 206 U.S. 370, 381 (1907); *accord Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999). It did not do so here. Indeed, if Congress had wanted to give the CDC authority to extend the moratorium indefinitely, it is unclear why Congress would have adopted a January 31 cutoff—or any cutoff at all.

Although the D.C. Circuit found Congress's statement that the CDC issued its moratorium "'under'" 42 U.S.C. § 264 to be telling, App. 18a, that language cannot serve as the clear statement necessary here. As this Court has explained, "[t]he word 'under' is chameleon; it 'has many dictionary definitions and must draw its meaning from its context,'" *Kucana v. Holder*, 558 U.S. 233, 245 (2010), and here, there is no reason to read that word to authorize the CDC to criminalize evictions throughout the country, *cf. Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627 (2009) (rejecting a reading of "under" to mean that an action was in fact authorized by the statute); *BP*

P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. 1532, 1539 (2021) (same with respect to "pursuant to").

B. The Government Has Not Satisfied The Equitable Factors

Merits aside, the government cannot obtain a stay due to its failure to satisfy any of the equitable factors.

1. Applicants' Harms Are Severe and Irreparable

a. To start, the government has failed to show that a stay will not "'substantially injure the other parties interested in the proceeding.'" *Nken*, 556 U.S. at 434. Aside from having their property unlawfully occupied for almost a year now, *cf. Cedar Point*, 141 S. Ct. at 2072, landlords throughout the country have been losing "as much as $19 billion each month" since the moratorium was adopted last September. App. 13a n.3; *see* D. Ct. Doc. 6-4, ¶¶ 15, 17 (Nov. 20, 2020). Even by the CDC's conservative estimates, its latest extension of the moratorium for the next two months alone will have an impact of at least a $100 million. *See supra* p. 23. By any metric, that is a substantial injury.

Such harms would be significant in ordinary times, but they have become especially pronounced during the pandemic. As the government itself has recognized, "[c]ountless middleclass landlords who rely on rental income to support their families have also faced deep financial distress [due] to the COVID-19 crisis," U.S. Dep't of Treasury, *Emergency Rental Assistance Fact Sheet* 1 (May 7, 2021), https://bit.ly/33xzRjr. And that has been particularly true for certain minority landlords, who are more likely to have lower incomes, own fewer rental properties, have mortgages on

those properties, and provide housing to less affluent tenants. *See, e.g.*, Laurie Goodman & Jung Hyun Choi, *Black and Hispanic Landlords Are Facing Great Financial Struggles Because of the COVID-19 Pandemic. They Also Support Their Tenants at Higher Rates*, URBAN INST. (Sept. 4, 2020), https://urbn.is/3uAOBsF. The CDC's moratorium shifted the economic burdens of the pandemic from renters to landlords; the stay is keeping them there.

Applicants' experience has been no different (even though the D.C. Circuit brushed aside their evidence of harm, *see* App. 20a). As their unrebutted evidence established, the two individual landlords here had already lost thousands of dollars from the moratorium when they filed suit in November 2020, with no foreseeable prospect of recovery. *See* D. Ct. Doc. 6-2, ¶¶ 9-17 (Nov. 20, 2020); D. Ct. Doc. 6-3, ¶¶ 6-12 (Nov. 20, 2020). As they explained, they "will be unlikely to obtain any payment or damages from these tenants once the Eviction Moratorium expires," and their "only ability to mitigate loss and obtain rental income from the properties is to evict non-paying tenants and rent the properties to paying tenants." D. Ct. Doc. 6-2, ¶ 17; D. Ct. Doc. 6-3, ¶ 12. Members of the organizational applicants have been suffering as well. *See* D. Ct. Doc. 6-5, ¶¶ 6-8 (Nov. 20, 2020) (describing harms in Alabama); D. Ct. Doc. 6-6, ¶¶ 4-6 (Nov. 20, 2020) (describing harms in Georgia).

b. Making matters worse, these losses are unrecoverable (and hence irreparable) ones. "Normally the mere payment of money is not considered irreparable, but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be

irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (internal citation omitted). Thus, if "it appears that" the "[f]unds … will not likely be recoverable," that is enough to establish irreparable injury. *Id.* at 1304-05; *see Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) ("The funds held in escrow … would be very difficult to recover should applicants' stay not be granted.").

It is quite unlikely that applicants will ever be made whole for nearly a year's worth of illegally withheld rent. The Administrative Procedure Act does not allow applicants to collect "money damages," 5 U.S.C. § 702, and the government has made clear that it will vigorously resist any takings claim brought by landlords, *see* D. Ct. Doc. 26, at 35-39 (Dec. 21, 2020). Accordingly, here as elsewhere, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment); *see, e.g.*, *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) (holding that a company would suffer an irreparable injury from paying allegedly unconstitutional tax because state law provided "no remedy whereby restitution of the money so paid may be enforced").

The D.C. Circuit nevertheless dismissed these harms on the theory that injured landlords may eventually be able to collect withheld rent from their delinquent tenants under the moratorium's terms. App. 20a. But any tenants covered by the moratorium will have to swear under oath that they are essentially judgment-proof, *see* 86 Fed. Reg. at 43,245, and the notion that renters on the verge

of homelessness will somehow be able to repay a year's worth of back rent cannot be taken seriously. These tenants are therefore no different than the sovereign when it comes to their ability to redress applicants' injuries. *See Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 290 (1940) (holding that a preliminary injunction was appropriate when "there were allegations that [the defendant] was insolvent" because "the legal remedy against" the defendant "would be inadequate"); *cf. Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (acknowledging that unlawfully disbursed welfare benefits "probably cannot be recouped, since the[] recipients are likely to be judgment-proof").

The D.C. Circuit also suggested that federal rental assistance could mitigate applicants' injuries. App. 21a. But these rental-assistance measures have been marred by delays and rollout problems—in part due to the Executive Branch's lack of updated guidance to the jurisdictions disbursing the funds—as evidenced by the fact that as late as July 21, "just $3 billion out of $46 billion had been deployed by the states and cities that got the money." Shear, *supra*. In any event, even the $46 billion-plus that Congress has dedicated to rental assistance cannot come close to rectifying the harms suffered by the nation's landlords over the past year, who are losing "as much as $19 billion each month." App. 13a n.3. Given all this, it is simply not realistic to believe that the country's landlords will ever be made whole.

Accordingly, applicants have more than carried any burden to establish that their rights "*may be* seriously and irreparably injured by [a] stay." *Coleman*, 424 U.S. at 1304 (emphasis added). Indeed, this Court did not hesitate to issue an injunction

pending appeal—a remedy use "sparingly and only in the most critical and exigent circumstances," *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (cleaned up)—against enforcement of a portion of New York's eviction moratorium. *Chrysafis v. Marks*, No. 21A8, 2021 WL 3560766, at *1 (U.S. Aug. 12, 2021). And it did so even though that moratorium did "not preclude [landlords] from seeking unpaid rent … in a common-law action" and even though "New York is currently distributing more than $2 billion in aid that can be used in part to pay back rent." *Id.* at *2 (Breyer, J., dissenting from grant of application for injunctive relief). Given that decision, this Court should not blink at allowing the district court's final judgment here to take effect.

2. The CDC's Public-Health Justification Is Legally Irrelevant And Pretextual

The government has also failed to show that a stay is in the public interest. Because there is "no public interest in the perpetuation of unlawful agency action," *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (citation omitted), this factor rises and falls with the merits here. And that is true even though COVID-19 is involved. *Cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten.").

Even setting this basic point aside, the CDC's insistence that the moratorium remains necessary for public health is pretextual. As the President himself has acknowledged, the CDC's latest extension is intended to buy time to distribute rental assistance and mollify certain Members of Congress. *See supra* pp. 12-14. That

development alone means the public interest overwhelmingly supports lifting the stay, for if the Executive Branch is allowed to engage in such tactics, the rule of law—and hence the public—will suffer, both now and in the future.

Although the CDC has sought to justify its latest extension based on "the recent surge in cases brought forth by the highly transmissible Delta variant," 86 Fed. Reg. at 43,247, that explanation does not bear up under scrutiny. The CDC (and this Court) were well aware of the Delta variant—including its greater "transmissibility," the "increase[]" in the number of cases, and its "more severe" nature—when the agency issued the third extension in June. 86 Fed. Reg. at 34,012; *see* June 24 Letter. Yet despite a these risks, the CDC announced that its "30-day extension" until July 31 was "intended to be the final iteration." 86 Fed. Reg. at 34,015. And when July 31 finally arrived, the agency permitted the moratorium to expire. It reversed course three days later not because of an unexpected public-health emergency, but because the political pressure on the White House evidently became too much to bear.

In any event, while the average number of daily cases have increased due to the Delta variant, the average number of deaths per day remains lower than where it was this year when the CDC first adopted the moratorium last September. *See* CDC, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, https://bit.ly/3xGXEKp (last updated August 18, 2021); *cf.* 86 Fed. Reg. at 16,736 (defending the March 2021 extension on the ground that "the number of deaths per day continues at levels comparable to or higher than when this Order was established in September 2020"). These successes

have been driven by the increasing number of vaccinations throughout the United States. Today, nearly 60% of country's eligible population is fully vaccinated, over 70% of that population has received at least one dose, and 81% of the nation's seniors have been fully immunized. *See* CDC, *COVID Data Tracker: COVID-19 Vaccinations in the United States*, https://bit.ly/3s0DklV (last updated Aug. 20, 2021). Indeed, since the district court issued its stay on May 14, over 75 million additional vaccine doses have been administered. *See* CDC, *COVID Data Tracker: Trends in Number of COVID-19 Vaccinations in the US*, https://bit.ly/3y2692J (last updated Aug. 20, 2021). The mere increase in case numbers should not obscure that the public-health situation remains better than what it was when the CDC adopted the moratorium nearly a year ago.

3. The Balance Of The Equities Does Not Justify The Stay

Even if the government could meet all of the other stay factors, "[t]he conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*. Even when they all exist, sound equitable discretion will deny the stay when 'a decided balance of convenience' does not support it." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers) (internal citation omitted). A majority of this Court has already concluded that the balance of the equities did not permit the stay (and hence the moratorium) to remain in place past July 31. Four Justices would have vacated the stay as of June 29, and Justice Kavanaugh was explicit that "clear and specific congressional authorization

(via new legislation) would be necessary for the CDC to extend the moratorium past July 31." App. 15a.

There is no justification for rebalancing the equities now. If anything, that balance weighs more strongly in applicants' favor today than they did when this Court issued its ruling in June. As the district court explained, since the stay was first issued on May 14, "the government has had three months to distribute rental assistance; health care providers have administered roughly 65 million additional vaccine doses; and the total cost of the moratoria to lessors, amounting to as much as $19 billion each month, has only increased." App. 13a n.3 (internal citation omitted). And while that court found "the recent rise in Delta variant cases" to be "troubling," it noted that the government had neither "attempt[ed] to show how many evictions its moratorium actually prevents, considering both the availability of federal rental assistance and the operation of other moratoria at the state level," nor "identified any approach for evaluating when the compounding costs of the federal moratorium will outweigh its residual benefits." *Id.*

The last point is an important one. It has been almost a year since the CDC issued the moratorium on September 4, 2020. Since that time, the agency has extended the moratorium on four separate occasions, each time offering a different theory for why more time was necessary. In January and March, it was that conditions were comparable to or worse than the state of affairs in September 2020. *See* 86 Fed. Reg. at 16,736; 86 Fed. Reg. at 8025. In June, landlords were told they had to continue to provide free housing only for "a final 30 day-period, until July 31,"

to avoid "exacerbating the spread of COVID-19 among the significant percentage of the population that remains unvaccinated." 86 Fed. Reg. at 34,010, 34,016. After the CDC allowed the moratorium to lapse on July 31 and the White House assured the public that the June extension would be "the last," August 2 Briefing, landlords were once again unexpectedly subjected to six-figure criminal penalties. This time they were told they had to wait until October 3 due to "the rise of the Delta variant," notwithstanding the CDC's awareness of that threat in June. 86 Fed. Reg. at 43,245. And given the Executive Branch's remarkable about-face between July 29 and August 31, landlords have scant reason to hope that the CDC will allow the moratorium to expire as the nation heads into the fall, especially now that certain Members of Congress have now realized "the power of … not taking no for answer." Lauren Egan et al., *CDC Announces Targeted Eviction Moratorium After Days of Pressure*, NBC News (Aug. 3, 2021), https://nbcnews.to/3z4NVii (quoting Rep. Ocasio-Cortez). Instead, unless this Court provides relief, there is every reason to fear that, per the D.C. Circuit's suggestion, the moratorium will remain in place until COVID-19 ceases "to spread and infect persons" at all. App. 20a. The government should not be permitted to rely on the balance of equities to maintain the moratorium indefinitely.

Finally, the Executive Branch's conduct since this Court's June ruling has made this case about far more than evictions. After repeatedly acknowledging that in light of this Court's earlier ruling, the government lacked "legal authority[] even for a more targeted eviction moratorium that would focus just on counties with higher rates of COVID spread," August 2 Briefing, the Executive Branch took that action

anyway because "by the time it gets litigated, it will probably give some additional time while we're getting that $45 billion out," August 3 Remarks. That raw use of executive power and the judicial process should not be tolerated while this Court sits.

CONCLUSION

This Court should issue an immediate administrative order vacating the stay while it considers this application. Following briefing, it should vacate the district court's May 14, 2021 order staying its final judgment and leave that judgment in force pending the D.C. Circuit's issuance of a decision on the merits and the opportunity to seek review of that decision from this Court.

Dated: August 20, 2021

Respectfully submitted,

/s/ Brett A. Shumate

BRETT A. SHUMATE
Counsel of Record
CHARLOTTE H. TAYLOR
STEPHEN J. KENNY
J. BENJAMIN AGUIÑAGA
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Phone: (202) 879-3939
bshumate@jonesday.com

Counsel for Applicants