No. 20A-_____

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 FOR A VACATUR OF THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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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. 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. June 2, 2021) (order denying motion 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.

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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. *See* App. 8a-18a. On June 2, 2021, the United States Court of Appeals for the D.C. Circuit declined to vacate that stay. *See* App. 1a-7a.

INTRODUCTION

At the outset of the COVID-19 pandemic, Congress adopted a limited, temporary moratorium on evictions. After Congress's moratorium lapsed last July, however, President Trump ordered the Centers for Disease Control and Prevention (CDC) to step in. The agency complied, issuing an order on September 4, 2020 that prohibits landlords nationwide from evicting certain tenants who fail to pay rent, backed by criminal penalties, including the specter of six-figure fines. In doing so, the CDC shifted the pandemic's financial burdens from the nation's 30 to 40 million renters to its 10 to 11 million landlords—most of whom, like applicants, are individuals and small businesses—resulting in over $13 billion in unpaid rent per month. Since then, the CDC has twice extended its moratorium, which is currently set to expire on June 30, 2021 (unless extended, yet again).

As authority for this nationwide federal intrusion into the landlord-tenant relationship, the CDC relied exclusively on Section 361 of the Public Health Service Act, a rarely-used statute from 1944 dealing with quarantines and inspections for purposes of stopping the spread of disease on an international or interstate basis. According to the agency, this provision bestowed upon it the unqualified power to take any measure

imaginable to stop the spread of communicable disease—whether eviction moratoria, worship limits, nationwide lockdowns, school closures, or vaccine mandates.

The district court rejected that position as reflecting an unsupported and limitless view of the CDC's authority. As the court explained, that sweeping assertion of agency power not only ignored the unambiguous text and structure of the statute, but also raised serious constitutional concerns involving the police power of the States and the delegation of federal legislative authority to the Executive Branch. In the absence of any clear statement from Congress giving the CDC *carte blanche* to respond to a pandemic, the court declined to take that step itself. It therefore entered a final judgment vacating the moratorium under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*

Upon the government's request, the district court nevertheless stayed that judgment pending appeal. Not because it had second thoughts about the merits; the court continued to agree that the CDC had engaged in unlawful action. Nor because it thought that a stay would leave applicants unscathed; the court acknowledged that prolonging the moratorium would exacerbate the severe hardships borne by landlords across the country. Rather, the court decided to allow unlawful agency action to persist because, applying the D.C. Circuit's "sliding-scale" approach to the stay factors, it concluded that the government was entitled to a stay when it did no more than raise serious legal questions involving agency action of "significance" and cite outdated public-health considerations.

The D.C. Circuit then refused to vacate the stay, principally on the theory that the government was likely to succeed on the merits. In that court's view, Congress had authorized the CDC to combat the spread of disease by any means necessary, limited only

by the requirement that the agency deem those means necessary. In doing so, it did not even mention that the Sixth Circuit had held precisely the opposite in a published opinion, let alone engage with that court's analysis. *See Tiger Lily, LLC v. HUD*, 992 F.3d 518, 522 (2021) (declining to stay another judgment holding the CDC's moratorium unlawful because "the terms of th[e] statute cannot support the broad power that the CDC seeks to exert").

The stay order cannot stand. As both the Sixth Circuit and the district court here recognized, Congress never gave the CDC the staggering amount of power it now claims. Nor do this Court's precedents permit unlawful agency actions to persist throughout the pendency of an appeal merely because the government has raised serious questions on the merits—a standard that will be satisfied in nearly every case where the government's authority has been challenged. Rather, to justify such an intrusion into the ordinary judicial process, the government has the burden to make "a strong showing that [it] is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Otherwise, the government will almost always be able to get away with unlawful temporary action by obtaining a stay until its overreach expires—in other words, the government always wins, even when it loses. Accordingly, as the Sixth Circuit recognized in a parallel challenge, once it is clear "that the government is unlikely to succeed on the merits," there is no need to "consider the remaining stay factors." *Tiger Lily*, 992 F.3d at 524. Especially given that landlords are now subject to different requirements—and federal criminal penalties—depending on where they live, the Court should resolve whether the CDC's moratorium is unlawful.

In any event, the remaining equitable factors cut strongly against a stay that permits unlawful agency action to continue pending appeal. As the district court recognized, its stay will prolong the severe financial burdens borne by landlords under the moratorium for the past nine months. Landlords have been losing over $13 billion every month under the moratorium, and the total effect of the CDC's overreach may reach up to $200 billion if it remains in effect for a year. 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 government-sanctioned unlawful occupation of property) will never be fully undone.

By contrast, whatever force a public-health justification may have had for an eviction moratorium in September 2020, it can now only be described as pretextual. According to the CDC, vaccinated individuals may dispense with masks and social distancing indoors given the downward trend in COVID-19 cases and the effectiveness of vaccines, which have been available to all American adults since April 19, 2021 (and all Americans 12 and older since May 12, 2021). If Americans can safely gather together indoors without adhering to the most basic COVID-19 precautions, then there is no longer any public-health rationale for the moratorium, an extraordinarily intrusive measure premised on the danger of evicted renters gathering with others in shared living spaces. The CDC's continued insistence that public-health concerns necessitate that landlords continue to provide free housing for tenants who have received vaccines (or passed up the chance to get them) is sheer doublespeak. In reality, the eviction moratorium has become an instrument of economic

policy rather than of disease control. And even if that were debatable, the same cannot be said for the lack of any public interest in prolonging unlawful Executive Branch action.

In light of their ongoing injuries and the moratorium's current June 30 expiration date, applicants are seeking expedited relief from this Court. If the CDC declines to extend its moratorium again, a ruling vacating the stay after June 30 (or just before that date) would allow the agency to run out the clock on unlawful action and render applicants' favorable final judgment a hollow victory. And if the CDC is considering extending the moratorium yet again, a ruling from this Court is all the more necessary. In the absence of relief from this Court, the CDC—emboldened by its recent D.C. Circuit victory—will almost certainly extend the moratorium for a third time. The agency has extended the moratorium twice already in the face of adverse judgments holding the moratorium unlawful, and despite the dramatic improvements in the public-health situation, it continues to insist that the moratorium remains essential, *see* C.A. Gov't Opp. 22 (May 24, 2021). In fact, the expiration date on the current CDC declaration for renters invoking the moratorium's protections already says September 30—suggesting that the CDC has already laid the groundwork for an extension. *See* CDC, *Eviction Protection Declaration* (Apr. 1, 2021), https://bit.ly/3ieZ9Lt. "[A]pplicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another [extension]." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68-69 (2020). Every day the stay remains in place, applicants' property continues to unlawfully occupied and their rental income continues to be unlawfully cut off. Nine months of overreach is enough. This Court should vacate the stay.

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. 19a-38a. 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. 8a-17a. The 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. 1a-7a.

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. 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. 40a-89a.

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. 33a.

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 nationwide 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. *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292, 55,297 (Sept. 4, 2020). This executive moratorium was broader than the congressional one in at least two significant respects. First, it applied to every residential property throughout 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. *See* App. 25a n.1) According to the CDC, the eviction 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. Near the end of that month, however, Congress passed the Consolidated Appropriations Act for 2021 (2021 Appropriations Act), which included a provision that extended the moratorium through January 31, 2021. Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2079-80 (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 Temporary Halt in Residential Evictions to Prevent the Further Spread of*

COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021); *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 8020 (Feb. 3, 2021). In doing so, the CDC again relied exclusively on Section 361 of the Public Health Service Act for its statutory authority. *See* 86 Fed. Reg. at 16,738; 86 Fed. Reg. at 8025.

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. 19a-39a.

The district court rejected the government'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 the Public Health Service Act. App. 33a. As the court explained, construing 42 U.S.C. § 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 limits or principles.' " App. 32a; *see* App. 25a-34a. In addition, the court observed, accepting the government'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 nationwide, but "endless others that are also subject to 'earnest and profound debate across the country.' " App. 33a. Because "Congress did not express a clear intent" to confer "such sweeping authority," the court declined to take that step itself. App. 32a; *see* App. 32a-34a.

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. 35a; *see* App. 35a-37a. 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. 36a. 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.*

2. The district court nevertheless entered a stay of its final judgment pending appeal. App. 8a-18a. In doing so, it acknowledged that the government had failed "to demonstrate a likelihood of success on the merits" and that this is "[a]rguably … a fatal flaw for its motion." App. 14a. But relying on D.C. Circuit precedent, the court determined it could employ a " 'sliding scale approach' " under which the government " 'need only raise a serious legal question' if 'the other factors strongly favor issuing a stay.' " App. 9a-10a (citations omitted). In the court's view, the government had "met this less demanding standard" because two other district courts had "disagreed" with the court's analysis, "at least at the preliminary injunction stage," and because the CDC's moratorium was "significan[t]." App. 14a-15a.

Turning to the equities, the district court acknowledged that a stay "will no doubt result in continued financial losses to landlords," which remain "severe." App. 16a. But the court decided that the equities favored the government on the theory that "some" of these losses could be recovered and that "public health" considerations were more important. *Id.* In doing so, the court did not address announcements by President Biden and the CDC,

made the day before, that in light of the dramatically improving public-health situation, vaccinated Americans can gather indoors without taking any precautions. Instead, the court relied on the CDC's "estimates" from March 2021 and the government's recent representations in its emergency stay motion concerning the " 'public health risks' " from a stay. App. 15a.

3. The D.C. Circuit declined to vacate the stay. App. 1a-7a. In doing so, the court of appeals refused to pass on the vitality of its sliding-scale approach because it thought that the CDC was likely to succeed on the merits. App. 2a. Although the court acknowledged that the Secretary had never "imposed a rental-eviction moratorium under Section 264" since that provision "was passed in 1944," it concluded that the statute gave him gave blanket authority "to adopt measures necessary to prevent the spread of a pandemic" so long as he makes "a determination of necessity." App. 2a-4a. It further concluded that Congress had "recognized" this authority in the 2021 Appropriations Act by choosing "to extend the" CDC's moratorium "rather than adopt its own." App. 3a.

On the equities, the D.C. Circuit acknowledged that applicants' "financial losses" resulting from the continued enforcement of the moratorium may only be "partially recoverable," but faulted them for supposedly failing to "show any likelihood of irreparable injury." App. 5a-6a. It also deferred to the district court's conclusion that lifting the moratorium would irreparably harm the government and the public by exacerbating the risk of COVID-19. App. 5a.

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); *see, e.g.*, *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (discussing prior vacatur of stay entered by court of appeals). This case satisfies all of those requirements.

I. THIS COURT SHOULD AND LIKELY WILL GRANT REVIEW

This case merits this Court's review several times over. To start, the D.C. Circuit's decision creates a direct conflict with a published opinion by the Sixth Circuit over the lawfulness of the CDC's eviction moratorium. *See Tiger Lily*, 992 F.3d at 524. And that split is only likely to deepen, as other challenges to the moratorium are currently before the Fifth and Eleventh Circuits. *See Brown v. Becerra*, No. 20-14210 (11th Cir.) (oral argument held on May 14, 2021); *Chambless Enters., LLC v. Walensky*, No. 21-30037 (5th Cir.) (reply brief filed May 12, 2021); *Terkel v. CDC*, No. 21-40137 (5th Cir.) (response brief filed May 26, 2021). This conflict calls out for this Court's review, especially because landlords are currently subject to federal criminal penalties from evicting their tenants depending on where in the country they reside.

This case implicates another conflict within the courts of appeals as well. There is an acknowledged and entrenched circuit split over whether using the sliding-scale approach to grant extraordinary preliminary relief comports with this Court's precedents. *See, e.g.*, *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011) (discussing conflict); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132-34 (9th Cir. 2011) (same). Indeed, by declining to apply a sliding-scale framework, the Sixth Circuit was able to deny a stay

without even "consider[ing] the remaining stay factors" once it determined that Congress did "not authorize the CDC Director to ban evictions." *Tiger Lily*, 992 F.3d at 524. That approach served as the keystone to the district court's stay order, and the D.C. Circuit never disavowed it. *See* App. 2a. This case therefore presents the Court with the rare opportunity to resolve, once and for all, whether the "sliding-scale" approach remains viable.

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. Emergency Stay Mot. (May 7, 2021), perhaps the only thing the parties agree on in this case is the moratorium's "significance," App. 15a. 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—whether it be vaccine mandates, worship limits, school and business closures, or stay-at-home orders. 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* D. Ct. Doc. 6-4, ¶¶ 15, 17 (Nov. 20, 2020) (economist's estimate that the cumulative cost of the CDC's moratorium over the course of a year will be close to $200 billion), *and* 85 Fed. Reg. at 55,294-96 (CDC's estimate that the moratorium will have an annual impact on the economy of at least $100 million and affect 30 to 40 million tenants).

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 government has made (1) "a strong showing that [it] is likely to succeed on the merits" and a showing 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*, 556 U.S. at 434 (citation omitted). The government has not satisfied any of these factors, let alone all four.

A. The Government Is Unlikely To Succeed On The Merits

1. The Moratorium Exceeds The CDC's Statutory Authority

According to the government and the D.C. Circuit, Section 361 of the Public Health Service Act empowers the Secretary to adopt "*any* regulations that 'in his judgment are necessary to prevent the spread of disease' across states or from foreign countries." App. 30a (internal citation omitted); *see* App. 2a. "[T]he terms of that statute cannot support" that remarkable conclusion. *Tiger Lily*, 992 F.3d at 522.

a. To start, the government's sweeping position is contrary to the text and structure of the statute. Although the first sentence of 42 U.S.C. § 264(a) authorizes the Secretary "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" on an interstate or international basis, the statute does not end there. 42 U.S.C. § 264(a). Instead, the second sentence of § 264(a) explains that "[f]or purposes of carrying out and enforcing such regulations," the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so

infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." *Id.* Accordingly, § 264(a)'s two sentences work together to authorize the Secretary to "impose specific restrictions on … property interests"—"measures like 'inspection, fumigation, disinfection, sanitation, pest extermination' and so on." *Tiger Lily*, 992 F.3d at 522-23.

Subsections (b), (c), and (d) of the statute go on to address "the government's limited power to restrict liberty interests—by means of enforced quarantine—in order to prevent the spread of disease." *Id.* at 524. Subsection 264(b) prohibits the Secretary from adopting regulations providing for "the apprehension, detention, or conditional release of individuals" unless they have the purpose of preventing the spread of specific diseases enumerated "in Executive orders." 42 U.S.C. § 264(b); *see, e.g.*, Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003) (listing diseases). Subsection 264(c) further bars the Secretary from adopting regulations providing for the "apprehension, detention, or conditional release of individuals" unless those individuals are either "coming into a State or possession from a foreign country or a possession" or can be quarantined under "subsection (d)." 42 U.S.C. § 264(c). And subsection 264(d) authorizes the Secretary to prescribe "[r]egulations" that "provide for the apprehension and examination" of certain likely contagious individuals who are "moving or about to move from a State to another State" or a "probable source of infection" to other individuals who "will be moving from a State to another State." *Id.* § 264(d).

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 infectious 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. And because an eviction moratorium cannot qualify as a quarantine measure and is "radically unlike the property interest restrictions listed in § 264(a) (sanitizing, fumigating, etc.)," it "falls outside the scope of the statute." *Tiger Lily,* 992 F.3d at 523-24.

Apart from the brief suggestion that the "objective of" the moratorium is to "prevent the interstate movement of contagious persons," App. 4a (citation omitted), the D.C. Circuit never suggested that the CDC's edict is remotely comparable to the targeted inspection and quarantine measures authorized by § 264. Rather, the court concluded 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 HHS's ability to take the measures determined to be necessary to protect the public health." App. 2a-4a (brackets and citation omitted). But in doing so, the court never explained *why* Congress would have gone through the trouble of carefully delineating the CDC'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. 4a—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. At most, the court suggested that § 264(a)'s second sentence was included because "Congress in 1944 had reason to believe" that the enumerated inspection measures "required express congressional authorization under the Fourth Amendment." App. 3a (citing *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 201 & nn.26-27 (1946)). But even if that account were plausible on its face, it would impermissibly 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 § 264, it would remain at war with several clear-statement rules. To begin, this Court requires "a clear indication" from Congress that it meant to "override[] the usual constitutional balance of federal and state powers" before interpreting a statute "in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 858, 860 (2014) (internal citation and quotation marks omitted). And that clear-statement rule applies even when the statute uses "expansive language" that, when "read on its face," could upend the traditional federal-state balance. *Id.* at 857, 860. Because the CDC's moratorium amounts to a significant regulation of the landlord-tenant relationship—an area traditionally left to the States, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)—the government must identify "some clear, unequivocal textual evidence of Congress's intent" to authorize such a dramatic intrusion into this area, *Tiger Lily*, 992 F.3d at 523. It cannot do so.

The CDC's broad reading of § 264 also raises serious constitutional concerns, such as the breathtaking scope of "the delegation of legislative power to the executive branch" it would entail. *Id.* In the government's telling, § 264 is a blanket "congressional deferral to the 'judgment' of public health authorities about what measures they deem 'necessary' to prevent contagion." App. 30a-31a (internal quotation marks omitted). Other than requiring the CDC to make a judgment that such a measure is "necessary" to prevent the spread of disease—which is no constraint at all—the government offers no factors, standards, or policies that would cabin its discretion, even though the authority it claims is immense. App. 4a; *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). "In the absence of a clear mandate" confirming that "Congress intended to give the Secretary the unprecedented power … that would result from the Government's view," this Court should read Section 361 "to avoid[] this kind of open-ended grant." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (plurality opinion). Otherwise, § 264 "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional." *Id.* at 646; *see Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (explaining that this Court often "construe[s] the text of a delegation to place constitutionally adequate 'limits on the [agency's] discretion' "). There is no reason to assume that Congress meant to take that step, much less to specifically empower the CDC to institute a nationwide government-authorized physical occupation of property without providing any compensation. *See Loretto*, 458 U.S. at 421

("[P]hysical occupation of an owner's property authorized by government constitutes a 'taking.' ").

The major-questions doctrine points in the same direction. This Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,' " *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)—a category that indisputably includes the choice of whether to criminalize evictions on a nationwide basis. Even by the CDC's conservative estimates, the moratorium could affect "30-40 million" tenants, 85 Fed. Reg. at 55,294-95, and, as "a major rule under the Congressional Review Act," *id.* at 55,296, 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: In addition to Congress's efforts in the CARES Act and 2021 Appropriations Act, at least 43 States and the District of Columbia have adopted eviction moratoria of their own over the course of the pandemic. *See* App. 33a. Given all that, it is implausible to assume that Congress would have assigned the resolution of this weighty issue to the Executive Branch, and "especially unlikely that Congress 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).

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.

Indeed, the government's own understanding of § 264—at least *before* it adopted the moratorium—confirms that Congress did not task the CDC with managing national housing policy. In 2000, the Secretary subdivided her authority under § 264 between the CDC and the Food and Drug Administration (FDA) by specifying that the "CDC will have authority for interstate quarantine over persons, while FDA will retain regulatory authority over animals and other products that may transmit or spread communicable diseases." *Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations*, 65 Fed. Reg. 49,906, 49,906 (Aug. 16, 2000). In doing so, the Secretary never suggested that § 264 gave her tools to combat the spread of disease outside of those two discrete areas.

Even more 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. 34a (cleaned up). And that is so even though the United States has seen its fair share of diseases during those decades, 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; *cf.* App. 4a. 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.

c. With text, context, and interpretive principles against it, the government has argued—and the D.C. Circuit has concluded—that Congress's decision to extend the CDC's moratorium for one month in the 2021 Appropriations Act authorized the agency to further extend the moratorium as it saw fit. *See* App. 35a-36a; 3a. The problem is that the CDC itself never relied on this provision as authority for its multiple additional extensions of the moratorium. To the contrary, in both its January and March extensions, the CDC continued to rely exclusively on "Section 361 of the Public Health Service Act (42 U.S.C. 264)" as the statutory basis for moratorium. 86 Fed. Reg. at 16,738; 86 Fed. Reg. at 8025. The CDC only mentioned the relevant provision of the 2021 Appropriations Act to note that Congress had "extended the Order until January 31, 2021." *E.g.*, 86 Fed. Reg. at 16,734; 86 Fed. Reg. at 8021. But as this Court has repeatedly made clear, "[a]n agency must defend its actions based on the reasons it gave when it acted," not force "litigants and courts to chase a moving target." *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *see SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Accordingly, "[e]ven if other statutory provisions could support the [CDC]'s asserted authority," the government "cannot supply grounds to sustain the [moratorium] that were not invoked by the [agency]." *Business Roundtable v. SEC*, 905 F.2d 406, 417 (D.C. Cir. 1990); *see, e.g.*, *Connecticut Dep't of Pub. Util. Control v. FERC*, 484 F.3d 558, 560 (D.C. Cir. 2007) (declining to consider agency's "new basis for statutory authority" that "appears nowhere in either of its orders").

Even if the CDC could rely on the Appropriations Act to defend its extensions of the moratorium, that legislation would not aid it. Nothing in the Act altered the scope of the Secretary's authority under 42 U.S.C. § 264, much less did so with the clarity required here. The clear-statement rules discussed above undisputedly apply with at least as much force to the Appropriations Act as they do to § 264. *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 fact, even greater clarity is necessary here. Because this new asserted basis of statutory authority is relevant only if the moratorium was not authorized under § 264, the government's ratification argument necessarily presumes that the Appropriations Act *removed* § 264's limits on the Secretary's authority. But "[t]his Court's aversion to implied repeals is 'especially' strong 'in the appropriations context,' " meaning the government must show that this appropriations legislation "manifestly" transformed § 264 from a narrow delegation to take targeted quarantine and inspection measures into a vast reservoir of power limited only by the Secretary's imagination. *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020).

It cannot carry this heavy burden. Congress knows how to ratify questionable agency action when it wishes to do so. *See, e.g.*, Fiscal Year 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-714, § 8003(a), 112 Stat. 58, 93 ("The 30 percent portion of the fee charged by Network Solutions, Inc. between September 14, 1995 and March 31, 1998 for registration or renewal of an Internet second-level domain name, which portion was to be expended for the preservation and enhancement of the

intellectual infrastructure of the Internet under a cooperative agreement with the National Science Foundation, and which portion was held to have been collected without authority in William Thomas et al. v. Network Solutions, Inc. and National Science Foundation, Civ. No. 97–2412, 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) (discussing similar ratifying provision). It did not do so here. Instead, the relevant provision of the 2021 Appropriations 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 clearly shows that *Congress* decided to regulate landlord-tenant relationships for a limited time (as it had in the CARES Act), *cf.* App. 4a, it does not remotely indicate that it chose to delegate boundless authority over such relationships to *the CDC*. "[N]othing in" this provision "expressly approved the agency's interpretation" of § 264. *Tiger Lily*, 992 F.3d at 524. In stating that the CDC issued the moratorium "under" the Public Health Service Act, Pub. L. No. 116-260, § 502, 134 Stat. at 2078, Congress *acknowledged* "the fact that the CDC claimed 42 U.S.C. § 264(a) as its authority for issuing the order," but did not express *agreement* with that claim of authority. *Tiger Lily*, 992 F.3d at 524; *see Kucana v. Holder*, 558 U.S. 233, 245 (2010) ("The word 'under' is chameleon; it 'has many dictionary definitions and must draw its meaning from its context.' "). Indeed, it

would have been startling for Congress to have done so "given that the plain text of [§ 264] indicates otherwise." *Tiger Lily*, 992 F.3d at 524.

Rather, all that the Appropriations Act reveals is that Congress decided to extend the CDC's moratorium—but only until January 31, 2021. "After that date, Congress withdrew its support, and the CDC could rely only on the plain text of 42 U.S.C. § 264." *Id.* 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. So whatever the relevance of Congress's decision "to extend" the CDC's moratorium "rather than enact its own," App. 3a, the Appropriations Act cannot justify the CDC's repeated extensions of the moratorium well past Congress's deliberate endpoint.

2. The Sliding-Scale Approach Cannot Justify A Stay

a. The government's inability to show that it was likely to succeed on the merits should have ended the stay inquiry, and the district court should have denied relief. *See Nken*, 556 U.S. at 434-35 (explaining that to obtain a stay, an applicant must "satisf[y] the first two factors," which include " 'a strong showing that he is likely to succeed on the merits' "); *Tiger Lily*, 992 F.3d at 524 ("Given that the government is unlikely to succeed on the merits, we need not consider the remaining stay factors."). Instead, despite recognizing the weakness of the government's merits arguments, the district court granted a stay based on D.C. Circuit precedent concluding that a "movant's failure to demonstrate a likelihood of success on the merits does not preclude a stay if" the movant has "raised a 'serious legal question.' " App. 14a (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Whatever its validity as an original matter, that

approach cannot be reconciled with this Court's more recent precedents or the decisions of other courts of appeals. *See, e.g.*, *Tiger Lily*, 992 F.3d at 524.

In *Nken*, this Court held that under the first factor of the traditional stay standard, courts must consider "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." 556 U.S. at 434 (citation omitted). In doing so, the Court emphasized that "[it] is not enough that the chance of success on the merits be 'better than negligible,' " and that "[m]ore than a mere 'possibility' of relief is required." *Id.* The Court then explained that the "stay inquiry calls for assessing the harm to the opposing party and weighing the public interest" only "[o]nce an applicant satisfies the first two factors," which are "the most critical." *Id.* at 434-35.

Requiring a stay applicant to " 'satisfy' " the "first two factors" cannot be reconciled with a "sliding-scale approach … under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa." *Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring). In his concurrence in *Nken*, Justice Kennedy made the point explicitly, observing that "[w]hen considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other." *Nken*, 556 U.S. at 438 (Kennedy, J., concurring) (collecting decisions of Circuit Justices applying the traditional stay factors). The government agrees. *See, e.g.*, Resp. Br. for Fed. Appellees at 10-13, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 20-2195 (1st Cir. Feb. 16, 2021), 2021 WL 672194.

Requiring a stay applicant to make "a strong showing that he is likely to succeed on the merits" reflects the fact that a "stay is an 'intrusion into the ordinary processes of

administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.' " *Nken*, 556 U.S. at 427, 434 (internal citation omitted). Before a court may disrupt proceedings—and temporarily deprive a prevailing party of its legal rights associated with a judgment—it must assure itself that the stay applicant is at least *likely* to carry the day on appeal.

That approach is consistent with this Court's requirements for the entry of a preliminary injunction, which "substantial[ly] overlap" with the traditional stay factors. *Id.* at 434. Whether a stay or a preliminary injunction is involved, "similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* And in the context of preliminary injunctions, it is not enough to merely raise serious legal questions. Rather, "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.' " *Munaf v. Geren*, 553 U.S. 674, 690 (2008). The same is true for a showing of irreparable injury: "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [this Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). There is no compelling reason for holding a party to a lesser standard when seeking a stay, which like a preliminary injunction, has "the practical effect of preventing some action before the legality of that action has been conclusively determined." *Nken*, 556 U.S. at 428.

That is particularly true when the government is the party seeking the stay. If the government can keep an unlawful order in place during the pendency of an appeal merely by identifying a serious legal question on the merits and pointing to disruption associated with the invalidation of a rule, a stay will quickly become " 'a matter of right' " for the sovereign. *Id.* at 427. If the government has decided to appeal the invalidation of a federal agency action, it likely has both a plausible argument on the merits and a plausible description of why the court's order is disruptive to the agency and the public. Accordingly, unless courts force the government to make a clear showing that it is likely to succeed on the merits, agencies will be able to rule by unlawful decree for months, if not years, while the appellate process unfolds. The D.C. Circuit avoided addressing this issue and thereby left in place a district court stay predicated on the wrong standard. *See* App. 2a This Court should clarify the stay standard and hold that the D.C. Circuit precedents on which the district court relied are no longer valid.

b. In any event, the district court should not have granted a stay even under the sliding-scale approach. As the Sixth Circuit indicated, the government's defense of the moratorium has not even raised "serious questions going to the merits." *Tiger Lily*, 992 F.3d at 524 (citation omitted). The district court thought otherwise based on the "significance" of the moratorium and the fact that two district courts thought it was valid "at the preliminary injunction stage." App. 14a-15a. But the *practical significance* of an agency action is in no way correlated to whether its validity presents a serious *legal* question: There are plenty of imaginable measures by the government that would be both plainly significant and plainly unlawful. Nor does a mere division in district-court authority

inherently create a serious legal question. *Cf. General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586, 600 (2004) (concluding that there was "no serious question" about the meaning of a statute, notwithstanding "conflict among the Circuits"). Finally, even if the government had raised a serious question, it has not shown that the equities "strongly favor" a stay here. App. 10a; *see infra* Pt. II.B.

B. The Government Has Not Satisfied The Equitable Factors

1. Applicants' Harms From The Stay Are Severe and Irreparable

a. Merits aside, the government cannot obtain a stay due to its failure to satisfy any of the equitable factors. As stay applicant, the government must show that a stay will not "substantially injure" applicants and other landlords nationwide. *Nken*, 556 U.S. at 434 (citation omitted). But instead of tackling that task head on, the government improperly sought to shift its burden to applicants, faulting them for having "never claimed to suffer irreparable injury." D. Ct. Doc. 57, at 2 (May 5, 2021). The D.C. Circuit followed suit. *See* App. 5a. That will not do when the government is the party seeking extraordinary emergency relief.

In fact, the harms to applicants and other landlords are significant ones. As applicants' unrebutted evidence established, the two individual landlords here had already lost thousands of dollars from the moratorium when they filed suit in November of last year, 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). Members of the organizational applicants have been suffering as well. *See* D. Ct. Doc. 6-5, ¶¶ 6-7 (Nov. 20, 2020); D. Ct. Doc. 6-6, ¶ 6 (Nov. 20, 2020). Landlords collectively continue to lose between $13.8 and $19 billion each month in unpaid rent due to the eviction moratorium, and the cumulative impact of the CDC's order

over the course of a year will be close to $200 billion. *See* D. Ct. Doc. 6-4, ¶¶ 15, 17; App. 16a. And many of the millions of landlords affected by the moratorium are small business owners, some of whom have not collected rent from some tenants in over a year. *See* D. Ct. Doc. 6-3, ¶ 7.

Indeed, the district court directly acknowledged that a stay will "no doubt result in continued financial losses to landlords," App. 16a, and the government itself has recognized that "[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 will keep them there.

By any measure, the magnitude of this wealth transfer is substantial. Even by the CDC's own estimates, the moratorium could affect 30 to 40 million tenants and have an annual impact on the national economy of at least a hundred million dollars. *See supra* Pt. II.A.1.b. Making matters worse, these losses are unrecoverable—and hence irreparable—in light of the government's sovereign immunity. The APA 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 in the Court of Federal Claims, *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"). And on top of their economic losses, landlords will continue to suffer the ongoing irreparable injury of the unlawful physical occupation of their properties. *See, e.g.*, *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 304-05 (1905) (explaining that a "continuing trespass" on a movant's property qualified as an irreparable injury).

b. The district court did not dispute this. Rather, it, along with the court of appeals, concluded that "some" of the landlords' financial losses "are recoverable" on the theory that they may eventually be able to collect withheld rent from delinquent tenants. App. 16a; *see* App. 6a. But any tenants covered by the CDC's moratorium will have to swear under oath that they are essentially judgment-proof, *see* 85 Fed. Reg. at 55,297, and the notion that renters on the verge of homelessness will somehow be able to repay nine months of back rent cannot be taken seriously.

The district court and court of appeals also suggested that rental assistance from Congress would "help mitigate the landlords' financial losses." App. 16a; *see* App. 6a. But Congress's recent rental-assistance measures have been marred by delays and rollout

problems, and, like thousands of landlords nationwide, neither the individual landlords here nor their companies have received any federal rental assistance to date. *See, e.g.*, Andrew Ackerman & Will Parker, *Millions Of Tenants Fall Further Behind On Rent As They Await Federal COVID-19 Assistance*, WALL ST. J. (Mar. 1, 2021), https://on.wsj.com/3o5qKjo; Jersualem Demsas, *What Happened to the $45 Billion in Rent Relief?*, VOX (May 24, 2021), https://bit.ly/3fgJhq6. In any event, even the more than $46 billion Congress has dedicated to rental assistance cannot come close to making whole the nation's landlords, who are losing between $13.8 and $19 billion each month from the moratorium. At that rate, Congress has at most compensated landlords for a little more than three of the nine months of the moratorium's existence.

The court of appeals simply brushed aside applicants' evidence of substantial harm. *Compare* App. 5a (dismissing applicants' "conclusory reference[s] to general financial harms"), *with* D. Ct. Docs. 6-2, 6-3, 6-4, 6-5, 6-6 (attesting to applicants' injuries). For instance, the court faulted applicants for supposedly failing to demonstrate "that financial shortfalls are unlikely ultimately to be mitigated." App. 5a. But that ignored applicants' evidence substantiating that their losses from the moratorium are unrecoverable by, among other things, averring that 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; *see* D. Ct. Doc. 6-5, ¶¶ 6-8 (describing harms in Alabama); D. Ct. Doc. 6-6, ¶¶ 4-6 (describing harms in Georgia).

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. That they chose to pursue their challenge through the orderly process of expedited summary judgment rather than immediately seek preliminary relief—and have not yet moved to expedite *the government's* appeal on the merits so that it could be resolved in less than two months—does not detract from that conclusion. *Cf.* App. 6a (asserting that applicants' litigation strategy suggests a lack of irreparable injury)

2. The Government's Asserted Injuries Are Legally Irrelevant And Pretextual

The government is no more persuasive in arguing 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) (brackets and citation omitted), the government's failure to show a likelihood of success on the merits renders its discussion of the public interest beside the point. And that is true even when COVID-19 is involved. *Cf. Roman Cath. Diocese*, 141 S. Ct. at 68 ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' ").

Even setting this basic point aside, the government's insistence that the eviction moratorium remains necessary for public health is pretextual. Whatever force that rationale may have had during the height of the pandemic, it is unsustainable today. It has been three weeks since the CDC's May 13 announcement that those who are fully

vaccinated—an option available to all American adults for well over a month and to children 12 and older since over three weeks ago—"no longer need to wear a mask or physically distance in any setting," indoors or outdoors. CDC, *Guidance for Fully Vaccinated People* (May 28, 2021), https://bit.ly/3fhLEHO. In connection with this announcement, President Biden observed that "nearly 60 percent of … adults in America" have obtained "at least one shot"; "[c]ases are down in 49 of the 50 states"; and "[d]eaths are down 80 percent and also at their lowest levels since April of 2020." *See* The White House, *Remarks By President Biden on the COVID-19 Response and the Vaccination Program* (May 13, 2021), https://bit.ly/2RcuR17. The CDC's Director has similarly emphasized that the COVID-19 death rate has not been "this low since April of 2020," vaccinated Americans "can start doing the things" they "had stopped doing because of the pandemic," and that now is the "moment when we can get back to some sense of normalcy." The White House, *Press Briefing by White House COVID-19 Response Team and Public Health Officials* (May 13, 2021), https://bit.ly/3w68HMC; *Meet the Press*, NBC News (May 16, 2021), https://nbcnews.to/3uUBKCx.

Matters have only improved since the CDC's May 13 announcement. Today, new infections are down to their lowest level since the onset of the pandemic in March 2020. Sam Baker & Andrew Witherspoon, *COVID-19 Cases Hit Lowest Point in U.S. Since Pandemic Began*, AXIOS (June 3, 2021), https://bit.ly/2TvEys4. Nearly half of the nation's eligible population is fully vaccinated—and thus free to dispense with masks and distancing indoors—and new infections are less than a fifth of what they were when the CDC first issued its moratorium on September 4, 2020. *See* CDC, *COVID Data Tracker*, https://bit.ly/3feqtro (last visited June 3, 2021). The average daily death rate is likewise less than half of

what it was at the beginning of last September. *See id.*; *cf.* 86 Fed. Reg. at 16,736 (defending the March 2021 extension of moratorium 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"). And the CDC's own forecast predicts that by the end of June, new infections will drop to under 80,000 per week (or a little over 11,000 per day) in a nation of almost 330 million people. CDC, *COVID Data Tracker: United States Forecasting*, https://bit.ly/3g7V9tx (last visited June 3, 2021).

The government has offered little justification for why an eviction moratorium remains necessary under these circumstances. It is telling that its stay motion was bolstered not by a single contemporaneous declaration from a public-health official, but by data from March and even January of this year. *See* D. Ct. Doc. 57, at 5. If the moratorium's vacatur truly posed a public-health emergency, one would expect a public-health official to say so. Likewise telling is that state public-health authorities have largely parted ways with the CDC, as the majority of States no longer have eviction moratoria in place. Emily A. Benfer et al., *COVID-19 Eviction Moratoria & Housing Policy: Federal, State, Commonwealth, and Territory*, THE EVICTION LAB, PRINCETON UNIV., https://bit.ly/2SlV0uu (last visited June 3, 2021). And in all events, the CDC's moratorium remains inexplicably underinclusive: The agency's order permits landlords to evict tenants for a host of reasons unrelated to "the timely payment of rent" and provides no protection at all to those who are subject to "foreclosure on a home mortgage" or staying in a "hotel, motel, or other guest house rented to a temporary guest or seasonal tenant." 85 Fed. Reg. at 55,293-94; *see* App. 5a. But COVID-19, unlike the CDC, does not care *why* someone has

lost housing, underscoring that the agency's efforts here are more about housing policy than public health. *Cf. Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("A law does not advance 'an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.' ").

Neither of the courts below advanced any valid reason to allow the government to continue to deploy the sweeping and intrusive moratorium in this rapidly improving public-health landscape. The D.C. Circuit deferred to the district court, App. 5a, which in turn deferred to the CDC's analysis in its March 2021 extension and the government's assertion that "the nation was averaging 'more than 45,000 new infections per day' " in early May, App. 16a. But data from March or even May of this year cannot justify extending the moratorium indefinitely. Indeed, since the district court issued its stay order, the average of new infections per day has plummeted to under 16,000. CDC, *COVID Data Tracker*, *supra*. Unless one adopts the D.C. Circuit's untenable suggestion that the moratorium must remain in place until COVID-19 ceases "to spread and infect persons," App. 5a, there is no basis for prolonging the stay.

When the state of the pandemic has improved to the point where vaccinated Americans can safely gather inside without restriction, embracing the theory that a nationwide eviction ban is still necessary to prevent an imminent peril to public health would require this Court "to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). The government may wish to prolong the moratorium to see out its economic-policy goals, but

that does not render its stated justification plausible. Forcing landlords to provide free housing for vaccinated Americans may be good politics, but it cannot be called health policy.

Finally, to the extent that legitimate public-health concerns do resurface or persist locally, the district court's judgment does not stop the States from reinstating or extending their eviction moratoria, as New York did last month. *See* Matthew Haag, *New York Extends Its Eviction Moratorium Through August*, N.Y. TIMES (May 4, 2021), https://nyti.ms/3y62vpG. Unlike the CDC, the States are the appropriate authorities—as both a constitutional and practical matter—to determine whether continued interference with the landlord-tenant relationship is necessary to mitigate COVID-19. "Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States," *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), not unelected bureaucrats in federal agencies.

CONCLUSION

This Court 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.

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Respectfully submitted,

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