No. 21A23

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.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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INTRODUCTION

The government's opposition confirms that this Court should vacate the stay preserving the fourth extension of the CDC's eviction moratorium. The government does not—and cannot—dispute that this Court should, and very likely will, grant review upon final disposition in the court of appeals. Nor does the government dispute that in light of divergent rulings from the Sixth and D.C. Circuits, landlords face federal criminal penalties depending on where they operate. It does not retreat from the position that the CDC can do anything it deems "necessary" to prevent the spread of any contagious disease, from COVID-19 to the common cold. And it offers no materially new legal arguments in defense of the moratorium, which continues to cost landlords across the country billions of dollars every month.

Tellingly, the government also never explains why the CDC allowed the moratorium to expire three days before the President decided to extend it. The only plausible explanation for the extended moratorium is that it was issued in response to political pressure from Capitol Hill for the express purpose of using litigation delays to distribute more rental assistance. Nearly a year of overreach is enough. This Court should now give effect to the district court's final judgment by lifting the stay pending appeal. At least five Justices would have vacated the stay after July 31. Vacatur is all the more warranted today given the Executive Branch's use of the judicial process to extend an unlawful policy on the basis of a pretextual rationale.

ARGUMENT

I. THE STAY ORDER IS CLEARLY AND DEMONSTRABLY ERRONEOUS AND IRREPARABLY HARMS APPLICANTS

A. The Government Is Unlikely To Succeed On The Merits

As it did before, the government insists that the D.C. Circuit's "evaluation [of the government's likelihood of success on the merits] remains correct—or, at a minimum, not so clearly incorrect as to justify the extraordinary relief applicants seek." Opp. 14. But the government again fails to identify any plausible basis for the sweeping authority that the CDC claims to enjoy.

1. Seeking to shoehorn the moratorium into § 264(a), the government emphasizes that "[t]he very object of the moratorium … is to address the 'movement of contagious persons.'" Opp. 17. But the government acknowledges that the moratorium is "different" from the limited "quarantine" measures authorized under § 264(b) through (d). Opp. 17, 26. And the government does not even try to argue that the moratorium is anything like the six "inspection," "fumigation," and related measures specifically set out in § 264(a). That should be the end of the matter, particularly when interpreting a statute originally captioned "Quarantine and Inspection," a fact the government does not address. Appl. 21. The government nevertheless insists that § 264(a)'s first sentence confers "broad authority" to make any and all "regulations that are in its judgment necessary to prevent" the spread of disease, including but not limited to the nationwide criminalization of evictions. Opp. 14-15 (cleaned up). There are at least four problems with that reading.

First, it makes the rest of § 264 superfluous. The government still has no answer for *why* Congress would have devoted over 330 words in over three subsections to delineating the CDC's power to adopt specific quarantine and inspection measures if those regulations (and much more) were already authorized by the first 53 words of § 264. *See* Appl. 21-22; *cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (rejecting interpretation under which "more than half of [a provision's] text would lie dormant"). The government suggests that these subsections "confirm" that § 264(a) "covers measures relating to movement," Opp. 16, but that is just another way of saying that the subsections are superfluous. The government also claims that limiting § 264(a)'s reach "to inspection and sanitation measures" would "prove[] too much" because that would fail to justify "quarantine measures" as well. Opp. 22-23. But the CDC's quarantine authority comes from subsections (b) through (d), not subsection (a). *See, e.g.*, 42 U.S.C. § 264(d) (instructing that "[r]egulations prescribed under this section may provide for the apprehension and examination" of certain individuals); *see also* Appl. 20-21; *Tiger Lily, LLC v. HUD*, 992 F.3d 518, 523-24 (6th Cir. 2021).

The government complains that applicants' interpretive approach has no basis in "the language of the statute," Opp. 21-22, but this is how the CDC *itself* understood § 264 *before* it issued the moratorium. As our application noted (at 20), the agency previously explained that "section 361(b) (42 U.S.C. 264(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." *Control of Communicable Diseases*, 81 Fed. Reg. 54,230, 54,233 (Aug. 15, 2016); *see Control of Communicable Diseases*, 70 Fed. Reg. 71,892, 71,893 (Nov. 30, 2005) (similar). "That the government let slip"—at least twice—"that it understood the plain import" of § 264's structure "remains telling." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1484 n.5 (2021).

Second, the government's view cannot be sustained under the major-questions doctrine. There can be no doubt that the criminalization of evictions throughout the country with billion-dollar effects throughout the economy constitutes "a major policy question of great economic and political importance." *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (collecting cases). The government *never even mentions* the major-questions doctrine in defending its view of the statutory text. The government *only* claims to satisfy the doctrine in the event that this Court issues "a narrow decision grounded in Congress's subsequent recognition [in the 2021 Appropriations Act] that Section 264 authorizes the eviction moratorium at issue." Opp. 24 (citing *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). For the reasons explained below, *see infra* pp. 7-8, Congress recognized no such thing—and at a minimum, it did not *clearly* do so. Having offered no major-questions defense of § 264(a) standing alone, the government has effectively

conceded that its interpretation of § 264(a) does not satisfy the doctrine. *Cf.* Appl. App. 15a (Kavanaugh, J., concurring).

Third, the CDC's interpretation cannot be squared with the federalism clear-statement rule. *See* Appl. 25-26; *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 671-72 (6th Cir. 2021). In response, the government continues to take aim at an argument that applicants have never made, stating that Congress has constitutional "authority to respond to an 'interstate epidemic.'" Opp. 23 (quoting *United States v. Comstock*, 560 U.S. 126, 142 (2010)). Of course, whether Congress *can* adopt an eviction moratorium in response to a pandemic—indeed, it did so in the CARES Act—is not the question before this Court. Appl. 26. The question is instead whether Congress *did* so through a clear statement of intent in § 264. It did not. *See id.*; *Bond v. United States*, 572 U.S. 844, 860 (2014).

Fourth, as interpreted by the government, § 264(a) is an unconstitutional delegation of legislative authority. Despite repeated opportunities to do so, the government has never offered a reading of the statutory language that would preclude "the CDC [from taking] 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." Appl. 27. To be sure, the government gestures towards limiting principles, but they all prove illusory.

For example, the government parrots § 264(a)'s text and emphasizes that "it applies *only* to measures to 'prevent the [international or interstate] introduction, transmission, or spread of communicable diseases.'" Opp. 20 (quoting 42 U.S.C.

§ 264(a)) (emphasis added). But that does not limit the CDC's putative authority because communicable diseases do not respect state or international borders, and virtually *all* human activity threatens the "introduction, transmission, or spread of communicable diseases"—whether COVID-19 or a common cold. 42 U.S.C. § 264(a); *see also* 81 Fed. Reg. at 54,233 ("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."). Anticipating this response, the government insists without apparent irony that the Court can read § 264(a) to cover only "the movement of potentially contagious individuals" and leave "other measures" for another day. Opp. 21. But that proposed "limitation appears nowhere in the language of the statute." *Id.*

The government also observes that, under § 264(a), the CDC must make "'a determination of necessity'" before taking action. Opp. 20-21. Yet there is no framework, standards, or guidance courts can apply in reviewing such determinations of "necessity." To the contrary, the government says that the Court "owes" the CDC substantial deference given that the CDC is the "'expert best positioned to determine the need for such preventative measures.'" Opp. 13, 15. This unabashed demand for deference confirms that a "'necessity standard'" is no standard at all. Opp. 20.

Finally, the government notes that any use of § 264(a) would remain "subject to review for arbitrariness and capriciousness." Opp. 21. But that is true for virtually

any delegation. Congress did not entomb the non-delegation doctrine by enacting the APA.

As a result, by the government's lights, both "the degree of agency discretion" and "the scope of the power congressionally conferred" are boundless, even though the two should point in opposite directions. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); *see* Appl. 28. That is a textbook unconstitutional delegation of legislative authority. To be sure, the government invokes (Opp. 23) other capacious phrases that this Court has upheld under its intelligible-principle test, but none involved anything close to the scope of authority at stake here. *See Whitman*, 531 U.S. at 472-76 (air-quality standards); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (commodity prices during wartime); *NBC v. United States*, 319 U.S. 190, 225-26 (1943) (regulation of airwaves); *see also* Appl. 28-29. This Court should decline the invitation to transform § 264(a) into a delegation of unprecedented and "near-dictatorial power." *Tiger Lily*, 5 F.4th at 672.

2. Section 502 of the 2021 Appropriations Act cannot save the moratorium either. The government acknowledges that § 502 "did not confer any new statutory authority" on the CDC, but insists that § 502 "makes clear that [§ 264] authorizes an eviction moratorium like the one at issue here." Opp. 17-18. That argument fails on its own terms.

To begin, as the government admits, the Appropriations Act is arguably relevant only if there is "some doubt" as to whether § 264(a) authorizes the moratorium. Opp. 17; *see* Appl. 29. Under the canons discussed above, however, any

ambiguity on this issue must be resolved *against* the government. *See supra* pp. 3-5; Appl. 29. The government does not dispute this, nor does it explain how the term "under" in § 502 provides an explicit statement that the CDC had authority to enact a nationwide moratorium. Opp. 18; *see* Appl. 30. Again, Congress's mere *acknowledgement* that the CDC "issued" the moratorium "under" § 264 in no way constitutes Congress's *agreement* that the CDC had that authority. Appl. 29-30; *see Tiger Lily*, 992 F.3d at 524. Indeed, Congress's attempt and subsequent failure in July to authorize a new eviction moratorium—after the Executive Branch repeatedly conceded that it lacked authority to extend the moratorium in the face of this Court's ruling—suggests that Congress understood that the CDC *does not* have this authority.

The government also claims that the consequence of applicants' position is that § 502 "had no effect at all." Opp. 24. In the government's view, Congress must have "presumed" that the CDC has authority to issue the moratorium because through § 502 "Congress neither imposed a moratorium of its own nor purported to ratify an order that had exceeded the CDC's authority." Opp. 24-25. That is nonsense. In applicants' view, § 502 had the effect of "*impos*[*ing*] an eviction moratorium for a limited time." Appl. 30 (emphasis added). The government's too-clever argument simply denies this commonsense reading. *See* Opp. 24 (stating without explanation that "Congress [did not] impose[] a moratorium of its own"). Section 502 may have been a ratification of CDC's moratorium through January 31; or it may have been an imposition of a new, limited moratorium; but on neither view did it establish (let alone

with the requisite clarity) that the CDC has the sweeping § 264 authority it now claims.

B. The Government Has Not Satisfied The Equitable Factors

1. Turning to the equities, the government does not seriously dispute that leaving the district court's stay in place will "'substantially'" and irreparably harm applicants and other landlords throughout the country—in the form of illegally withheld rent and unlawfully occupied property. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Specifically, the government does not question that applicants' losses are unrecoverable and thus irreparable. *Cf.* Appl. 32-35. Instead, the government disputes whether applicants really are suffering losses. There can be no such dispute.

The government's primary argument is that, following the D.C. Circuit's prior decision, applicants "failed" to "correct[] [perceived] deficiencies by submitting evidence showing substantial and irreparable harm." Opp. 28. This "failure," the government says, "undermines their assertions that they are irreparably harmed and that the balance of equities favors them." *Id.* But applicants had no need to submit new declarations because the district court *credited* their existing declarations, and applicants continue to suffer *the same harms*—harms that, as common sense suggests, have only increased as the district court's stay has remained in place and landlords have been unable to evict tenants who have not paid rent. Appl. App. 31a (holding that "the economic impact [on applicants] is indeed substantial"). Indeed, in the decision below, the district court took this commonsense approach in reweighing the equities and determining that the government could not meet "its burden of showing

that the equities cut strongly in its favor." Appl. App. 13a n.3 (total costs for landlords have "only increased").

It is equally misplaced for the government to argue that landlords' losses of $19 billion each month are irrelevant or "overstated." Opp. 28-29. The district court expressly credited and relied on evidence that "the total cost of the moratoria to lessors[] amount[s] to as much as $19 billion each month." Appl. App. 13a n.3. Applicants' harms as outlined in their declarations are irreparable injuries, and those injuries shared by landlords throughout the country undeniably factor into the related assessment whether a stay is in "'public interest.'" *Nken*, 556 U.S. at 434. As the district court observed, the government "made no attempt" to counter this evidence, nor did the government "identif[y] any approach for evaluating when the compounding costs of the federal moratorium will outweigh its residual benefits." Appl. App. 13a n.3. The government cannot now ask the Court to second-guess the district court's determinations as to the effects of the moratorium on landlords nationwide and on applicants themselves. And this is especially so given that, even under CDC's own conservative estimates, the latest extension will have an annual impact on the economy of at least $100 million. Appl. 23.

2. The public interest, moreover, squarely cuts against the government. That would be true in this case if for no other reason than 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). But it is doubly true because of the government's pretextual reasons. Although the government now contends that this

fourth extension of the eviction moratorium was precipitated by "[t]he trajectory of the pandemic," which changed "unexpectedly, dramatically, and for the worse," Opp. 2, any reasonable observer would know that there is a mismatch between the CDC's action and its explanation.

The government's contention that the rise of "the Delta variant" caught the government unaware on August 3, Opp. 2-3, is belied by the public record—and again by the President's own statements. On June 8, Dr. Fauci warned from the White House about the rise of the Delta variant.[1] A week later, on June 15, the CDC classified the Delta variant as a variant of concern.[2] Three days later, on June 18, the President announced that the Delta variant was "a serious concern," "more easily transmissible, potentially deadlier, and particularly dangerous for young people."[3] On June 22, Dr. Fauci announced at a White House briefing that "the Delta variant is currently the greatest threat in the U.S. to our attempt to eliminate COVID-19."[4] And on June 24, the President announced that the Delta variant was "now the most

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[1] The White House, *Press Briefing by White House COVID-19 Response Team and Public Health Official* (June 8, 2021), https://tinyurl.com/hh487476.

[2] CDC, *Lab Advisory: CDC Classifies SARS-CoV-2 Variant B.1.617.2 (Delta) a Variant of Concern* (June 15, 2021), https://tinyurl.com/nwsj4bnk.

[3] The White House, *Remarks by President Biden on the COVID-19 Response and the Vaccination Program* (June 18, 2021), https://tinyurl.com/2epfwbv7.

[4] The White House, *Press Briefing by White House COVID-19 Response Team and Public Health Officials* (June 22, 2021), https://tinyurl.com/xtbp57h3.

common variant in America."[5] Despite knowing all of this, the government assured this Court on June 24 that the moratorium would not be extended past July 31, Appl. App. 15a (Kavanaugh, J., concurring); Letter to Hon. Scott S. Harris, No. 20A169 (U.S. June 24, 2021), and the President declared independence from COVID-19 on July 4.[6]

The government's explanation for the moratorium's fourth extension is further undermined by the events leading up to August 3. The government has no answer for why the CDC allowed the moratorium to expire on July 31—only to reverse course three days later. In the days leading up to July 31, the White House publicly stated again and again that the Executive Branch lacked the legal authority to extend the moratorium for a fourth time. Appl. 12-13. Indeed, as late as the afternoon of August 3, the White House insisted that this Court "'made clear'" that any extension would require congressional authorization. Appl. 13. But the CDC inexplicably reversed course later that evening. There was no new discovery about the Delta variant during the afternoon of August 3. The only thing that changed was that the White House could no longer withstand the political pressure from Congress. And so the fourth extension was issued.

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[5] The White House, *Remarks by President Biden Highlighting the Importance of Getting Vaccinated and Kicking Off a Community Canvassing Event* (June 24, 2021), https://tinyurl.com/mkm76bfe.

[6] The White House, *Remarks by President Biden Celebrating Independence Day and Independence from COVID-19* (July 4, 2021), https://tinyurl.com/9vx5trb2.

The President's own words betray the Executive Branch's true motive for the fourth extension. When announcing the fourth extension, the President noted that, "'by the time it gets litigated, it will probably give some additional time while we're getting that $45 billion out.'" Appl. 14. Two days later, he again expressed his hope that litigation delays would "'keep this going for a month at least—I hope longer that.'" Appl. 14-15. That gambit has paid off because applicants have spent the past three weeks seeking to end an unlawful policy that the Executive Branch acknowledged it lacked authority to extend.

The government now acknowledges that the Executive Branch extended the moratorium in full awareness "that five Justices would have voted to vacate the stay if the original moratorium had been extended past July 31." Opp. 34. Yet it seeks to launder the statements by the President and his closest advisors through a new statement—on August 13—that the White House now believes the CDC could lawfully extend the moratorium a fourth time. Opp. 33. This Court, however, is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). The fact remains that the President stated that the CDC acted despite this Court's ruling for the express purpose of causing litigation delays.

3. Finally, the district court correctly rejected the government's claim that the fourth extension is a "narrower" moratorium than its predecessors. Opp. 9, 17, 26. As the district court explained, they "are virtually identical"—"their definitions are the same, their exceptions are the same, their applicability provisions are the same,

and the criminal penalties for violating those provisions are the same." Appl. App. 6a. The only difference is that the most recent extension "applies only" in counties experiencing substantial or high levels of community transmission, which at the time of the district court's decision, "include[d] roughly ninety-one percent of U.S. counties." *Id.* That number is now above 95%.[7] The fourth extension thus effectively remains a nationwide moratorium, with 100% of counties in applicants' home states of Georgia and Alabama covered by the moratorium.[8]

The government nonetheless emphasizes that "the moratorium will automatically phase out" as COVID-19 "subsides." Opp. 26. But that is not a "meaningful[] distin[ction]." *Id.* For one thing, whether the moratorium phases out or not, it is unlawful. For another, the government could indefinitely extend the moratorium for as long as COVID-19 exists—even if 100% of Americans were fully vaccinated. As the district court observed, the government has not "identified any approach for evaluating when the compounding costs of the federal moratorium will outweigh its residual benefits." Appl. App. 13a n.3. Because the government "has failed to make the necessary 'strong showing'" to justify a stay pending appeal, *id.*, this Court should now give effect to the district court's judgment.

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[7] CDC, *COVID Data Tracker: COVID-19 Integrated County View*, https://bit.ly/2W0nmNf (last visited Aug. 24, 2021).

[8] *Id.*

CONCLUSION

This Court should vacate the district court's May 14, 2021 order staying its final judgment in full 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 24, 2021

Respectfully submitted,

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