No. 20A169

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 FOR A VACATUR OF THE STAY PENDING APPEAL

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INTRODUCTION

The government's opposition confirms that the stay preserving the CDC's eviction moratorium cannot stand. The government does not dispute that in light of divergent rulings from the Sixth and D.C. Circuits, landlords now face federal criminal penalties depending on whether they operate in the Rust Belt or the rest of the country. 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. Nor does it make any attempt to justify the continuation of the moratorium in light of current public-health conditions. And it expressly leaves open the possibility that the CDC will extend its supposedly "temporary" moratorium yet again.

Nine months of overreach is enough. If the moratorium remains "necessary" now—when vaccines have reduced COVID-19 cases and deaths to levels not seen since the pandemic's onset—it is unclear when the "need" for the moratorium will ever cease. In the meantime, American landlords, many of whom are small business owners burdened by the pandemic themselves, will continue to be conscripted into providing free housing for renters who have received vaccines or declined to get them. The stay should be vacated in full.

ARGUMENT

I. THIS COURT SHOULD AND LIKELY WILL GRANT REVIEW

The government does not dispute that the moratorium would merit this Court's review given the significance of that order and the breadth of authority asserted—even if the Fifth, Sixth, Eleventh, and D.C. Circuits ultimately all agree that it is lawful in merits appeals. *See* Appl. 12-13. And it acknowledges (Opp. 31-32) that unanimous panels of the Sixth and D.C. Circuits have already parted ways on the moratorium's validity. While the

government quibbles about the "preliminary" nature of those rulings, Opp. 13, it cannot deny that right now, landlords face up to a year in jail and/or six-figure fines based on where in the country they do business. That alone cries out for this Court's prompt intervention.

In any event, the Sixth Circuit's holding that "42 U.S.C. § 264 … does not authorize the CDC Director to ban evictions," *Tiger Lily, LLC v. HUD*, 992 F.3d 518, 524 (2021), will be "binding" on future panels because it was contained in a published panel opinion. Opp. 14; *see* 6th Cir. R. 32.1(b) ("Published panel opinions are binding on later panels."); *see, e.g.*, *SEIU v. Husted*, 531 F. App'x 755, 755 (6th Cir. 2013) (describing published stay opinion as "precedential"); *Property Mgmt. Connection, LLC v. CFPB*, No. 21-cv-359, 2021 WL 1946646, at *8 (M.D. Tenn. May 14, 2021) (explaining that *Tiger Lily* is "binding on courts within the Sixth Circuit"). The case the government cites, by contrast, concerned an *unpublished* opinion. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 581-83 (6th Cir. 2014).

More generally, a final merits decision on appeal has never been necessary to obtain equitable relief from this Court. To the contrary, this Court has issued even injunctions pending appeal—a remedy granted "only in the most critical and exigent circumstances, and only where the legal rights at issue are indisputably clear," *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (cleaned up)—when the rulings below were interlocutory and even when "[t]he Circuit Courts [were] divided." *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014); *see, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The government is therefore quite wrong to suggest that the circuit split here bars this Court from deciding that the rulings below were "clearly and demonstrably erroneous." Opp. 32 (cleaned up).

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

A. The Government Is Unlikely To Succeed On The Merits

Disavowing a sliding-scale approach, the government contends that it has made the necessary " 'strong showing that it is likely to succeed on the merits.' " Opp. 23; *see* Opp. 22 (calling this "the correct test") (capitalization omitted). Its opposition shows otherwise.

1. While the government makes much of the observation that the "object of the moratorium … is to prevent the 'movement of contagious persons,' " it acknowledges that the CDC's edict is "different" from the limited "quarantine" measures authorized under § 264(b) through (d). Opp. 26. And it certainly does not contend that the moratorium is anything like the six highly specific "inspection" measures enumerated in § 264(a). Opp. 29. One might think that would be the end of the matter when it comes to a statute originally captioned "Quarantine and Inspection," Appl. 16—a point the government does not address. But the government remains undaunted, contending that § 264(a)'s first sentence grants it "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. 24 (cleaned up). There are at least four problems with that reading.

First, it makes the rest of § 264 superfluous. The government still has not explained *why* Congress would have devoted over 330 words in over three subsections to spelling out the CDC's power to adopt specific quarantine and inspection measures if those regulations (and much more) were already authorized by the first 50-plus words of § 264. *See* Appl. 16-17; *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"). At most, it argues 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. 29. But the CDC's quarantine authority comes from subsections (b) through (d). *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. 15; *Tiger Lily*, 992 F.3d at 523-24.

Indeed, that is how the CDC understood § 264 *before* it issued the moratorium. In 2016, it 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 CDC's interpretation is at odds with the federalism clear-statement rule. *See* Appl. 17; *Tiger Lily*, 992 F.3d at 523. The government does not dispute that when an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," there must be "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). Nor does it contest that the CDC's bid to regulate

landlord-tenant relationships under § 264(a) triggers this clear-statement rule. Instead, the government merely notes that Congress has constitutional "authority to respond to an 'interstate epidemic.' " Opp. 30. That misses the point. There is no dispute that Congress *can* adopt an eviction moratorium in response to a pandemic—it did so in the CARES Act. Appl. 17. But the question here is whether Congress *did* in fact authorize the CDC to adopt one. And § 264's first sentence—however capacious it might appear on its face—no more qualifies as a "clear indication" of that intent than the "extremely broad[]" definition of "[c]hemical weapon" in *Bond v. United States*, 572 U.S. 844, 860 (2014).

Third, the government's view runs afoul of the major-questions doctrine, including the rule that "[i]n order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must … expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari) (collecting cases); *see* Appl. 19-21. The government does not even mention this doctrine, much less deny that its reading of § 264(a) would give the CDC authority over all sorts of major policy questions, including but not limited to the federal criminalization of evictions. Nor does it dispute that this trove of authority is apparently a recent find in a statute whose domain had previously been limited to matters such as the sale of baby turtles. *See* Appl. 20. So while the government insists that § 264 must be read expansively to give the CDC "the flexibility" to address "new threats to public health," Opp. 29; *see* Opp. 31, it is telling that the agency has never sought such freedom before, even during past pandemics. *See* Appl. 20.

Fourth, the CDC's interpretation renders § 264(a) an unconstitutional delegation of legislative power. *See* Appl. 18. The government does not dispute that its reading would allow the CDC to take any conceivable measure to prevent the spread of communicable disease—whether school and business closures, worship limits, or stay-at-home orders, all backed by federal criminal penalties. *See* Appl. 13. At most, it urges the Court to defer consideration of whether the CDC could authorize measures "unrelated to movement," such as " 'vaccine mandates.' " Opp. 28. But this suggested movement "limitation appears nowhere in the plain language of the statute," *id.*, and mandating that tenants get vaccines appears far more "necessary to prevent the … spread of communicable disease," 42 U.S.C. § 264(a), than mandating that landlords provide free housing for the vaccinated.

The government also emphasizes that its reading would allow only those "measures that prevent the international or interstate introduction, transmission, or spread of communicable diseases," Opp. 27-28 (cleaned up), but that provides little comfort. Asking that the spread of disease be "international or interstate" does nothing given that communicable diseases do "not respect state boundaries," C.A. Gov't Opp. 18 (May 24, 2021); *accord* D.C. Br. 16. And because *any* activity involving human "movement" or interaction, Opp. 28, threatens "the introduction, transmission or spread of communicable diseases," there would be no area of common life or sector of the economy left outside the CDC's purview. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (noting "a 'strong consensus' that global warming threatens … an increase in the spread of disease").

Nor would the CDC's domain be limited to pandemics: § 264(a) empowers the agency to respond to *any* "communicable diseases"—common cold included—not just

dangerous ones. 42 U.S.C. § 264(a). The CDC has been quite clear on this point: "By its terms, subsection (a) does not seek to limit the types of communicable diseases for which regulations may be enacted, but rather applies to all communicable diseases that may impact human health." 81 Fed. Reg. at 54,233.

That leaves the government with the requirement that the CDC make " 'a determination of necessity' " before taking action. Opp. 28. But the government offers no framework, standards, or guidance courts are to apply in reviewing such determinations of "necessity." To the contrary, it repeatedly urges this Court to "defer[]" to the CDC as the " 'expert best positioned to determine the need for such preventative measures.' " Opp. 12, 24; *see* Opp. 33-34. That confirms that the " 'necessity standard' " is no standard at all. Opp. 28. Indeed, if the eviction moratorium remains "necessary" today—when the widespread availability of vaccines has reduced COVID-19 deaths and infections to levels not seen since March 2020—it is hard to imagine what measures would not be justified.[1]

In short, under the government's reading of § 264(a), both "the degree of agency discretion" and "the scope of the power congressionally conferred" are practically limitless, even though the two should be inversely correlated. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); *see* Appl. 18. By any measure, that is an unconstitutional delegation. While the government invokes (Opp. 31) other capacious phrases that this Court has upheld under its intelligible-principle test, 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*

[1] The government also notes that any use of § 264(a) would remain "subject to review for arbitrariness and capriciousness." Opp. 28. But the same is true for virtually any delegation. Congress did not entomb the nondelegation doctrine by enacting the APA.

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). Those decisions do not suggest that Congress could give an executive officer authority to criminalize any conduct bearing on human interaction or "movement," Opp. 25, based solely on "his judgment" that doing so is "necessary" to prevent the spread of any communicable disease. 42 U.S.C. § 264(a); *cf. Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (acknowledging that if a statute gave " 'plenary power' " to an executive officer to determine a criminal law's applicability to particular offenders, it would pose "a nondelegation question"). Such a statute would not "authorize another branch to 'fill up the details,' " it would not ask for "executive fact-finding," and it would not assign executive officers "certain non-legislative responsibilities." *Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting). It would, however, constitute a "congressional delegation[] to agencies of authority to decide major policy questions." *Paul*, 140 S. Ct. 342. This Court should decline the invitation to transform § 264(a) into a delegation of " 'unprecedented power.' " *Tiger Lily*, 992 F.3d at 523.

2. The government fares no better in relying on § 502 of the 2021 Appropriations Act. Disavowing any claim that this provision "independently confers authority to adopt the moratorium," the government retreats to contending that it provides "context" for construing § 264(a). Opp. 30; *see* Opp. 26-27. But "[a]n agency must defend its actions based on the reasons it gave when it acted," *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020), and it is undisputed that in each of its extensions, the CDC did not contend that § 502 bore on its authority to adopt the moratorium in any respect. And contrary to the government's suggestion (Opp. 30), this newly-minted argument was neither "a necessary

presupposition" nor "the only reasonable reading" of the CDC's extensions. *National R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 420 (1992). It was clever lawyering after the fact. *Cf. Regents*, 140 S. Ct. at 1908 (in evaluating an "elaborat[ion] on the reasons" for agency action, the "explanation 'must be viewed critically' to ensure that the [action] is not upheld on the basis of impermissible '*post hoc* rationalization' ").

In any event, this novel argument fails on its own terms. As the government agrees, the Appropriations Act comes into play only if there is "any doubt" as to whether § 264(a) authorizes the moratorium. Opp. 26; *see* Appl. 22. But under the canons discussed above, any ambiguity in this area must be resolved *against* the government. *See supra* pp. 4-8; Appl. 22. The government does not dispute this, nor does it explain how the use of the chameleon-like term "under" in § 502 provides an explicit statement that the CDC had authority to criminalize evictions. Opp. 26; *see* Appl. 22. Again, Congress's mere *acknowledgement* that the CDC "issued" the moratorium "under" § 264 in no way establishes *agreement* with that assertion of authority. Appl. 23; *see Tiger Lily*, 992 F.3d at 524; *cf. Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627 (2009) (rejecting a reading of "under" to mean that an action was in fact authorized by the statute); *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1539 (2021) (same with respect to "pursuant to").

B. The Government Has Not Satisfied The Equitable Factors

1. Turning to the equities, the government tries to shift its burden to meet the stay factors to applicants, even though it is the party seeking to deprive them of the benefits of their final judgment during the pendency of its appeal. In any event, the government's case on the equities is unpersuasive. The government does not seriously dispute that a stay will " 'substantially' " harm applicants and other landlords throughout the country. *Nken*

v. Holder, 556 U.S. 418, 434 (2009). It contends that the moratorium's effects are "overstated," Opp. 21, but never disowns the CDC's conclusion that it could affect up to 40 million tenants and have an annual impact of at least $100,000,000. Appl. 19, 29. Indeed, Congress's allocation of $46.5 billion in rental assistance to "mitigate" the moratorium's effects suggests the number is far higher. Opp. 17. The government further contends (Opp. 20-21) that the harms to landlords other than applicants are irrelevant, but those landlords are "parties interested in the proceeding" whose burdens factor into an assessment of whether a stay is in "public interest." *Nken*, 556 U.S. at 434. And it fails to offer a compelling reason for why the documented harms to the members of the organizational applicants should be ignored. *Compare* Appl. 28 *with* Opp. 17-18.

Instead, the government principally contends that the stay will not " 'irreparably' " harm applicants. Opp. 15. It does not deny, however, that the stay will require them to continue complying with an agency order held to be unlawful. Nor does it contest that applicants will incur costs—in the form of illegally withheld rent and unlawfully occupied property—in doing so. And given its sovereign immunity, the government does not dispute that "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* Appl. 30.

Rather, the government insists that the CDC's regulation is the exception to this rule on the promise that applicants will—at some unidentified point "in the future"—be able to "mitigate" their losses incurred in obeying an unlawful edict. Opp. 16-17. It fails to substantiate that rosy prediction. While the government assumes that tenants covered by

the moratorium will be *legally* obligated to repay over nine months of back rent, they must be *functionally* judgment-proof to qualify for its protections in the first place. *See* Opp. 16-17. These tenants are thus no different than the sovereign when it comes to their ability to redress applicants' injuries. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (acknowledging that unlawfully disbursed welfare benefits "probably cannot be recouped, since the[] recipients are likely to be judgment-proof").

Moreover, neither the government nor its amici deny that Congress's rental assistance has been plagued with rollout difficulties. *See* Appl. 30-31. For example, the government notes that Georgia "received $552 million in funds, which it began distributing in March 2021," Opp. 18, but the Peach State has disbursed only a little over $4 million so far. Jersualem Demsas, *What Happened to the $45 Billion in Rent Relief?*, VOX (May 24, 2021), https://bit.ly/3fgJhq6. Unsurprisingly, neither the individual landlords here nor their companies have received any federal rental assistance to mitigate the tens of thousands of dollars they have lost in complying with the moratorium, notwithstanding their efforts to obtain it. And the clock is ticking: Despite its snails-pace rollout, "[m]oney from the first round of $25 billion in funding expires Sept. 30, at which point the federal government may repurpose it." Anu Narayanswamy et al., *With Evictions Set to Begin Next Month, Hundreds of Millions in Washington-Area Rental Aid Remains Unspent*, WASH. POST (June 4, 2021), https://wapo.st/3xj2KfS. Given all this, it would require considerable faith in the efficiency of government bureaucrats to believe that applicants will ever be made whole.

In the face of this evidence, the government suggests that applicants must show that that they " 'will lose their businesses' " or that " 'recoupment will be impossible.' " Opp. 19.

But that is not test. While "[n]ormally the mere payment of money is not considered irreparable, … that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Thus, if "it appears that" the "[f]unds spent … will not likely be recoverable," that is enough. *Id.* at 1304-05*; see Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) ("The funds held in escrow … would be very difficult to recover should applicants' stay not be granted."). If the test were otherwise, the government could evade all sorts of equitable restraints on its unlawful conduct merely by contending that the compliance costs of regulated parties could be recouped from other sources or be outweighed by the benefits of the illegal regulation. *Cf. Horne v. Dep't of Agric.*, 576 U.S. 350, 368 (2015) (dismissing argument that a taking of raisins "would 'likely' " give raisin growers "a net gain" because of "other benefits from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards") (cleaned up).[2]

2. As for the public interest, the government does not deny that its ability to satisfy this factor rises and falls with the merits, *see* Appl. 32, making much of its discussion here irrelevant. Nor does it offer any reason to doubt that the CDC's continuation of the moratorium has more to do with economic policy than with public health. *See* Appl. 32-36.

[2] Because some of the district-court decisions the government cites similarly applied an incorrect standard, the "judgment of the lower courts" here carries little weight. Opp. 20; *see Dixon Ventures, Inc. v. HHS*, No. 20-cv-1518, 2021 WL 1604250, at *4 (E.D. Ark. Apr. 23, 2021); *Chambless Enters., LLC v. Redfield*, No. 20-cv-1455, 2020 WL 7588849, at *14 (W.D. La. Dec. 22, 2020).

Indeed, today over half of the nation's eligible population is fully vaccinated, "[c]ase numbers in the United States have fallen to their lowest point since testing became widely available," and "[f]ewer deaths are being reported each day than at any point since March 2020." N.Y. Times, *Coronavirus in the U.S.: Latest Map and Case Count*, https://nyti.ms/2TvLS6U (last visited June 14, 2021); *see* CDC, *COVID Data Tracker*, https://bit.ly/3feqtro (last visited June 14, 2021). Under these circumstances, any suggestion that " 'mass evictions' of renters"—by which the government means only some renters and only for some reasons—will create a public-health crisis cannot be taken seriously. Opp. 35; *see* Opp. 25 (emphasizing the " 'narrowly crafted' " nature of the moratorium). Rather, the end of the moratorium will simply mean that vaccinated tenants (and those who decline to get vaccinated) will no longer be able to enjoy free housing at the expense of others.

Rather than engage with the facts on the ground today, the government looks to the past, invoking data and analysis from January 2021. Opp. 33. But to maintain a stay of a final judgment holding the moratorium unlawful, the government must show that public-health conditions require continued enforcement of the CDC's order *now*. By the same token, the government cannot justify the ongoing suspension of a final judgment on the ground that it would like to have more time—amidst an improving public-health landscape—to come up with some new justification for extending the moratorium in the future. *Cf.* Opp. 34 (urging this Court not to "preempt[]" the CDC's eventual determination "whether … the moratorium should be extended beyond June 30"). Indeed, unless this Court vacates the stay immediately, it is unclear what, if anything, will stop an emboldened CDC from extending its supposedly "temporary" moratorium, Opp. 1, for a yet a third time,

and then again and again until "[e]conomic recovery" is achieved. D.C. Br. 13 (urging that a moratorium would be necessary even if "all [covered] renters were vaccinated").

III. THE GOVERNMENT HAS NOT JUSTIFIED EVEN A PARTIAL STAY

The government's fallback request—a stay that would keep the moratorium in place for all landlords save the three companies here—is no more defensible. Opp. 35-37. While the government tries to make this case about nationwide injunctions, it buries the critical question in the penultimate sentence of its argument—namely, whether the APA permits "an order setting aside a regulation to extend to the entire country." Opp. 37 (cleaned up).

It does. Just last Term, this Court explained that its affirmance of an "order vacating" unlawful agency action under the APA made it "unnecessary to examine the propriety of the nationwide scope of the injunctions" entered by other lower courts. *Regents*, 140 S. Ct. at 1916 n.7. And that distinction between nationwide vacaturs and nationwide injunctions drew no objection from the four dissenting Justices, including those who had not been shy about criticizing nationwide injunctions. *See* Opp. 35-36.

The lack of any apparent controversy over the nationwide vacatur in *Regents* is unsurprising given the APA's text and history. The APA directs courts to "set aside" agency action that is "unlawful," 5 U.S.C. § 706(2), and it is odd to speak of a regulation being "set aside" only as "to the parties found to have standing," Opp. 37. In fact, by the time the APA was enacted in 1946, "lower three-judge federal courts" had "set aside or enjoined the enforcement of rules universally in at least three important cases … under the auspices of statutory language that was later echoed in the APA's judicial review provisions." Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1146 (2020); *see id.*

at 1146-51 (discussing cases). There is no indication that Congress chose to adopt a different rule when it used the same language in the APA.

A party-specific construction of "set aside" would raise another problem as well. No one disputes that unlawful agency actions may be "set aside" on a universal basis "[u]nder an appellate-type special review statute" such as the Hobbs Act. John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 46 n.33 (2020); *see* 28 U.S.C. § 2342. The only question is whether district courts may also apply this remedy in an ordinary APA action. But the Hobbs Act and similar statutes merely "specif[y] the form of proceeding for judicial review" of particular orders; "it is the Administrative Procedure Act (APA) that codifies the nature and attributes of judicial review," *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987), including the rule that unlawful agency actions are to be "set aside," 5 U.S.C. § 706(2); *see id.* § 703. The government's theory would therefore require giving the single phrase "set aside" in the APA different meanings "depend[ing] on the form of proceeding." Harrison, *supra*, at 42. That would "invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

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.

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Respectfully submitted,

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