APPENDIX
LOWER COURT ORDERS/OPINIONS

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5093 **September Term, 2020**

1:20-cv-03377-DLF

Filed On: August 20, 2021

Alabama Association of Realtors, et al.,

Appellees

v.

United States Department of Health and Human Services, et al.,

Appellants

BEFORE: Pillard, Rao, and Jackson, Circuit Judges

O R D E R

Upon consideration of the emergency motion to vacate stay pending appeal and for immediate administrative vacatur, the opposition thereto, and the reply, it is

ORDERED that the motion to vacate the stay be denied. On June 2, 2021, this court denied a previous motion to vacate the stay imposed by the district court. See Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021); see generally Nken v. Holder, 556 U.S. 418, 434 (2009). The district court has since denied plaintiffs' emergency motion to vacate the stay pending appeal. In view of that decision and on the record before us, we likewise deny the emergency motion directed to this court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Manuel J. Castro
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

MEMORANDUM OPINION AND ORDER

Before the Court is the plaintiffs' Emergency Motion to Enforce the Supreme Court's Ruling and to Vacate the Stay Pending Appeal. Dkt. 67. For the reasons that follow, the Court will deny the motion.

I. BACKGROUND

As part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress enacted a 120-day eviction moratorium that applied to all rental properties receiving federal assistance. *See id.* § 4024(b), 134 Stat. at 492–94. When that moratorium expired, the U.S. Department of Health and Human Services (HHS), through the Centers for Disease Control and Prevention (CDC), imposed a broader eviction moratorium that applied to all rental properties in the United States. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). In December 2020, Congress granted a 30-day extension of that moratorium. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078–79 (2020). The CDC then further extended it, first in January 2021 and then in March 2021. *See* Temporary

Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021).

This Court vacated the CDC's eviction moratorium on May 5, 2021. *See* Mem. Op. of May 5, 2021, Dkt. 54. One week later, the Court issued a stay of vacatur pending appeal. Mem. Op. of May 14, 2021, Dkt. 61. In turn, on June 2, 2021, the D.C. Circuit declined to vacate the stay in an unpublished, *per curiam* judgment. Order of June 2, 2021, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021).

On June 24, 2021, after the plaintiffs asked the Supreme Court to vacate the stay, the CDC again extended the eviction moratorium for a third time. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010 (June 28, 2021). In so doing, the CDC represented both in the extension order itself and to the Supreme Court that, "absent an unexpected change in the trajectory of the pandemic, CDC does not plan to extend the Order [beyond July 31, 2021]." *See id.* at 34,013; Letter from Acting Solicitor General Elizabeth Prelogar to Clerk of Court Scott Harris at 1 (June 24, 2021), *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, No. 20A169.

On June 29, 2021, the Supreme Court denied the plaintiffs' application to vacate the stay, based in part on the CDC's representation that it would not further extend the moratorium. *See Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320 (2021) (Mem.) (Kavanaugh, J. concurring). Four Justices, however, voted to vacate the stay immediately. *Id.* And Justice Kavanaugh, whose vote to leave the stay in place was essential to the Court's disposition, made clear his view that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium." *Id.* at 2320–21. Even so, Justice Kavanaugh

reasoned that "[b]ecause the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriate rental assistance funds," the balance of the equities favored leaving the stay in place. *Id.* Thereafter, Justice Kavanaugh wrote, "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium." *Id.*

In the following weeks, the Biden Administration repeatedly stated that it would not further extend the eviction moratorium in light of the Supreme Court's ruling, which it interpreted to "mak[e] clear" the option "is no longer available." Pls.'s Reply at 1–2, Dkt. 71 (quoting White House, Statement by White House Press Secretary Jen Psaki on Biden-Harris Administration Eviction Prevention Efforts (July 29, 2021)). And the Administration stressed that the CDC agreed with this interpretation, stating that "the CDC Director and her team have been unable to find legal authority, even for a more targeted eviction moratorium that would focus [just] on counties with higher rates of COVID spread." Mot. Hr'g Tr. at 20 (quoting White House, Press Briefing by Press Secretary Jen Psaki and White House American Rescue Plan Coordinator and Senior Advisor to the President Gene Sperling (Aug. 2, 2021)).

Nonetheless, on August 3, 2021, three days after the prior policy lapsed, the CDC renewed a moratorium on evictions in the United States. *See* Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244 (Aug. 6, 2021). Scheduled to run through October 3, 2021, the current moratorium differs from its predecessor in that it applies only "in U.S. count[ies] experiencing substantial or high levels of community transmission levels of SARS-CoV-2 as defined by CDC." *Id.* at 43,245 (citations omitted). Otherwise, as discussed in

greater depth below, the current moratorium is virtually identical to the moratorium that the parties litigated before the Supreme Court. *Compare id.*, *with* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010 (June 28, 2021).

On August 4, 2021, the plaintiffs filed an "Emergency Motion to Enforce the Supreme Court's Ruling and to Vacate the Stay Pending Appeal." Dkt. 67. In their motion in opposition, the government argued that the D.C. Circuit's June 2 judgment is the law of the case and so requires this Court to maintain the stay. Dkt. 69. The plaintiffs' motion is now ripe for review.

II. ANALYSIS

Before addressing the plaintiffs' motion, the Court must first decide whether the current moratorium is an extension or an entirely new policy. Because the current moratorium is an extension, it is subject to the stay and can be challenged in this action. Even so, the law of the case doctrine prevents the Court from lifting the stay, and therefore, the Court will deny the plaintiffs' motion.

A. The Current Eviction Moratorium Is Subject to the Stay

It is well-established that federal courts have the "inherent power to enforce [their] judgments." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *see also Pigford v. Veneman*, 292 F.3d 918, 924 (D.C. Cir. 2002) (noting that district courts' interpretive authority is connected to their enforcement authority); *Pfizer Inc. v. Uprichard*, 422 F.3d 124, 131 (3d Cir. 2005) ("[A] district court has inherent authority to ensure that prevailing parties are able to enforce prior judgments."). Here, the plaintiffs ask the Court to either vacate the current moratorium or "simply clarify[] that [this Court's] original vacatur order covers it." Pls.'s Br. at 2–3, Dkt. 67. Given the procedural posture of this case, and because the plaintiffs seek to "clarify something ambiguous or vague, not to alter or amend," *United States v. Philip Morris USA, Inc.*, 793 F.

Supp. 2d 164, 168 (D.D.C. 2011) (citation omitted), this Court construes the plaintiffs' filing as a motion for clarification of the Court's May 5 vacatur order. To resolve that motion, the Court must "pull back the curtain" to determine whether the current moratorium is "so related" to the prior moratorium that an order vacating the latter also applies to the former. *Wash. Metro. Area Transit Auth. Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 9 (D.C. Cir. 2015).

The Court begins with the moratorium's text. There are two substantive differences between the current moratorium and the moratorium that this Court considered on May 5, 2021. First, the current moratorium is effective through October 3, 2021, and covers all evictions initiated but not finalized before the order's promulgation on August 3, 2021. 86 Fed. Reg. at 43,247, 43,250. Second, the current moratorium applies only "in U.S. counties experiencing substantial and high levels of community transmission levels of SARS-CoV-2 as defined by CDC,"[1] *id.* at 43,250 (citations omitted)—a category that presently includes roughly ninety-one percent of U.S. counties, *see* CDC, *COVID Data Tracker: Integrated Country View*, https://covid.cdc.gov/covid-data-tracker/#county-view (last visited Aug. 13, 2021). In contrast, the previous moratorium applied in all U.S. counties. 86 Fed. Reg. at 34,010. Apart from these differences, the moratoria are virtually identical—the remainder of 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. And the CDC designed the current

[1] The moratorium contains several provisions that further define the scope of its coverage. To begin, the order applies in all counties that experience substantial or high transmission levels "as of August 3, 2021." 86 Fed. Reg. at 43,250. From there, if an additional county experiences those transmission levels, "that county will become subject to this Order as of the date the county begins experiencing substantial or high levels of community transmission." *Id.* Additionally, if a county that is covered by the order "no longer experiences substantial or high levels of community transmission for 14 consecutive days," the order "will no longer apply in that county, unless and until the county again experiences substantial or high levels of community transmission." *Id.*

moratorium to be continuous with its antecedents, insofar as it exempts persons covered under those antecedents from filing new declarations of eligibility. *See* 86 Fed. Reg. at 43,245 n.7.

The minor differences between the current and previous moratoria do not exempt the former from this Court's order. For obvious reasons, extending the effective dates of a vacated order does not evade the effects of the vacatur. Indeed, consistent with that principle, both the government and the Supreme Court already considered one extension of the moratorium *in pari materia* with the version that this Court addressed in May. *See* Letter from Acting Solicitor General Elizabeth Prelogar, *supra*; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2320–21 (Kavanaugh, J., concurring). Further, although the CDC has excluded some counties from the latest moratorium's reach, the policy remains effective nationwide, shares the same structure and design as its predecessors, provides continuous coverage with them, and purports to rest on the same statutory authority. In the analogous context of the voluntary cessation doctrine, courts frown upon attempts to moot out legal challenges by repealing one rule and "replac[ing] it with a policy that is fundamentally similar." *Am. Freedom Defense Inst. v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 362 (D.C. Cir. 2018). Rather, courts treat the replacement policy as merely a renewal of the challenged conduct, such that it is reviewable in the same action. *See id.* So too here. Because the current moratorium is fundamentally similar to its predecessors, it is "so related" to them as to fall within the May 5 vacatur order. *Reliable Limousine Serv.*, 776 F.3d at 9.

The government conceded this point at oral argument. There, it explained that "the statutory basis for the new order is the same as the statutory basis for the previous order," Mot. Hr'g Tr. at 11, and that the few modifications to the former would not "necessarily be relevant under this Court's summary judgment ruling," *id.* at 12. The government also disclaimed any

arguments that this case "was mooted out by the three-day lapse [in] the existence of a moratorium" or that the "plaintiffs needed to bring a new case." *Id.* at 11. Finally, as a necessary predicate to its reliance on the law-of-the-case doctrine, the government argued that both this Court's rulings and "the preceden[ts] of the D.C. Circuit" continue to bind this Court. *Id.*[2]

For these reasons, the Court concludes that the current eviction moratorium is an extension of the vacated moratoria, such that it is subject to this Court's May 5 order and its subsequent stay pending appeal. The plaintiffs' motion to vacate the stay is thus ripe for review.

B. The Law-of-the-Case Doctrine Prevents the Court from Lifting the Stay

"When circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate, the court may lift the stay *sua sponte* or upon motion." *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003). The party seeking continuation of a stay "bears the burden of showing his entitlement to [it]." *Latta v. Otter*, 771 F.3d 496, 498 (9th Cir. 2014) (citation omitted). In assessing whether to lift a stay, a court considers the traditional four stay factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009).

[2] Having argued that the current moratorium is a mere extension of the old moratorium, that it is covered by this Court's May 5 order, and that the plaintiffs need not file a separate action to challenge its terms, the government is presumably estopped from arguing to the contrary on appeal. *See Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) ("Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."); *see also Davis v. Wakelee*, 156 U.S. 680, 689 (1895) (similar).

Rather than address any of these factors on the merits, the government argues that the law-of-the-case doctrine requires the Court to maintain the stay as a matter of law. Defs.'s Br. at 6–8, Dkt. 69. This Court agrees. Because the D.C. Circuit's judgment affirming the stay binds this Court and the Supreme Court did not overrule that judgment, the Court will deny the plaintiffs' motion.

As a general matter, the law-of-the-case doctrine provides that "a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Under the doctrine, "the *same* issue presented a second time in the *same* case in the *same* court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). Additionally, when an appellate court has reached and necessarily decided an issue of fact or law, the doctrine provides that a district court in the same case "has no power or authority to deviate from" the appellate court's conclusion. *Briggs v. Pa. R. Co.*, 334 U.S. 304, 306 (1948); *see also Hodge v. Evans Fin. Corp.*, 823 F.2d 559, 567 (D.C. Cir. 1987) (holding that a "trial court is without power to reconsider issues decided on a previous appeal" (citation omitted)).

"For a ruling or decision to become the law of the case, it must . . . be final as to the matters involved." Bryan A. Garner, et al., *The Law of Judicial Precedent* 448 (2016). Finality in this context does not require a final, appealable judgment. *See Thomas v. Gandhi*, 650 F. Supp. 2d 35, 39 (D.D.C. 2009). Instead, the condition is satisfied whenever an appellate court has "affirmatively decided" a question of fact or law. *Crocker*, 49 F.3d at 739. Here, the government argues that three conclusions in the D.C. Circuit's judgment qualify as the law of the case: first, that the government was likely to succeed on the merits, *see Ala. Ass'n of Realtors*, 2021 WL 2221646, at *1–3; second, that the plaintiffs failed to show irreparable harm, *see id.* at

*3; and third, that "the magnitude of any additional financial losses incurred during appeal is outweighed by HHS's weighty interest in protecting the public health," *id.* at *4 (alterations and citations omitted). Because these are clearly affirmative decisions by that court, *see Crocker*, 49 F.3d at 739, and because the court reached them in this same case, the government is correct that they are binding here.

The plaintiffs argue that those conclusions are not the law of the case because the D.C. Circuit reached them in affirming a grant of emergency relief. For this purpose, the plaintiffs invoke *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974), which held that "[t]he decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings." *Id.* at 518. They also invoke *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008), which found that an "order denying preliminary relief . . . [did] not constitute the law of the case." *Id.* at 458 (citation omitted).

Neither of those holdings apply here. In *Berrigan*, the D.C. Circuit had granted emergency relief to two parolees after finding that their constitutional challenge was likely to succeed on the merits. *See* 499 F.2d at 517. Against that backdrop, *Berrigan* clarified that no law of the case prevented either "the parties from litigating the merits" or the district court from deciding the merits in the non-movants' favor. *Id.* at 518. Likewise, in *Belbacha*, the district court had denied a detainee's motion for a temporary restraining order, and the D.C. Circuit had also denied emergency relief. *See* 520 F.3d at 454–55. *Belbacha* confirmed that neither of those emergency decisions—including their subsidiary determinations that the detainee was unlikely to prevail on the merits—bound the district court in resolving the merits. *See id.* at 458. Both *Berrigan* and *Belbacha*, as the D.C. Circuit later explained, follow from the basic "element[s] of the law-of-the-case rule." *Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012). When an

appellate court "predicts" who "*likely* will or will not succeed on the merits," it does not "affirmatively decide[]" the merits, and so creates no law of the case regarding them. *Id.* The same reasoning does not apply, however, when a district court must decide whether a movant is likely to succeed on the merits after a court of appeals has already resolved that same question in the same case. Neither *Berrigan* nor *Belbacha* suggest that the district court has discretion in that posture. Thus, although "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits," *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), they are binding on further requests for emergency relief.

A contrary approach to the law-of-the-case doctrine would produce absurd results whenever a district court and a court of appeals disagree over emergency relief. For example, if a district court granted a stay and a court of appeals vacated it, the plaintiffs' approach to the law-of-the-case doctrine would allow the district court to reissue an identical stay in the same case. That result would flaunt basic principles of vertical stare decisis—"a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.'" *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (quoting U.S. Const. art. III, § 1). The same principles apply here, where the D.C. Circuit concluded that the government is likely to succeed on the merits and the plaintiffs ask this Court to vacate its stay on the opposite ground.

It is true that the Supreme Court's recent decision in this case strongly suggests that the CDC is unlikely to succeed on the merits. Four Supreme Court Justices voted to vacate the stay, "an action which would have been improbable if not impossible had the government, as the stay applicant, . . . made a strong showing that it was likely to succeed on the merits." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 229 (4th Cir. 2020) (Wilkinson, J.). And while Justice Kavanaugh voted to uphold the stay, he squarely concluded "the Centers for Disease Control and

Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2320 (Kavanaugh, J., concurring).

Other decisions from the federal courts of appeals further suggest that the government is unlikely to prevail. After full briefing and argument, the Sixth Circuit held that § 361 of the Public Health Service Act does not authorize the CDC to impose a nationwide eviction moratorium. *See Tiger Lily, LLC v. U.S. Dep't of Housing & Urban Dev.*, No. 21-5256, 2021 WL 3121373, at *5 (6th Cir. July 23, 2021). The court reasoned that the section's second sentence, which authorizes the "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles" that are "sources of dangerous infection," clarifies the scope of its first sentence, which authorizes the CDC to promulgate regulations "necessary to prevent the introduction, transmission, or spread of communicable diseases." *Id.* at *2–3 (quoting 42 U.S.C. § 264(a)). Because imposing a nationwide eviction moratorium is not "similar to" those enumerated measures, the *ejusdem generis* canon excludes that option from the agency's toolkit. *Id.* at *3. The Sixth Circuit also responded to several arguments in the D.C. Circuit's judgment, including the theory that the second sentence of § 361 serves principally to provide "express congressional authorization under the Fourth Amendment" for the measures it describes. *Ala. Ass'n of Realtors*, 2021 WL 2221646, at *2 (first citing *Oklahoma Press Publ'g Co. v. Walling Wage & Hour Adm'r*, 327 U.S. 186, 201 & n.26–27 (1946), then citing *FTC v. Am. Tobacco Co.*, 364 U.S. 298, 305–06 (1924)). On that point, the court explained that neither case relied upon by the D.C. Circuit would have "placed Congress on notice that giving the Secretary authority to order inspections and fumigations would implicate the Fourth Amendment," particularly as *Oklahoma Press* was published two years *after* the enactment of the Public Health Service Act. *Tiger Lily*, 2021 WL 3121373, at *3 n.2.

The Eleventh Circuit also expressed "doubts" about the CDC's statutory arguments. *See Brown v. Sec'y, U.S. Dep't of Health & Human Servs*., No. 20-14210, 2021 WL 2944379, at *2 (11th Cir. July 14, 2021). Judge Grant, writing for the majority, explained that the CDC's authority to regulate the spread of disease under § 361 is tethered to and narrowed by "the means" specified in its second sentence. *Id.* And Judge Branch, writing separately, concluded that "neither sentence of § [361(a)] authorizes the CDC Order" and that "the Order has not been statutorily authorized through Congressional ratification." *Id.* at *28–29 (Branch, J., dissenting).

These intervening decisions call into question the D.C. Circuit's conclusion that the CDC is likely to succeed on the merits. For that reason, absent the D.C. Circuit's judgment, this Court would vacate the stay.[3] But the Court's hands are tied. The Supreme Court did not issue a controlling opinion in this case, and circuit precedent provides that the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law. *See United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (holding that a *Marks* opinion "must embody

[3] The government has not met its burden of showing that the equities cut strongly in its favor, particularly given its low likelihood of success on the merits. *See Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 560 (D.D.C. 2018) (explaining that if "the issue on appeal presents a serious legal question on the merits," a movant may overcome a lower likelihood of success "with a strong showing as to the other three factors" (cleaned up)). Since this Court issued the stay, the government has had three months to distribute rental assistance; health care providers have administered roughly 65 million additional vaccine doses, *see* CDC, *COVID Data Tracker: Trends in Number of COVID-19 Vaccinations in the US*, https://covid.cdc.gov/covid-data-tracker/#vaccination-trends_vacctrends-total-cum (last visited Aug. 13, 2021); and the total cost of the moratoria to lessors, amounting to as much as $19 billion each month, has only increased, *see* Mem. Op. of May 14, 2014, at 9 (citation omitted). To be sure, the recent rise in Delta variant cases is troubling. But the government has made no attempt to show how many evictions its moratorium actually prevents, considering both the availability of federal rental assistance and the operation of other moratoria at the state level. Nor has the government identified any approach for evaluating when the compounding costs of the federal moratorium will outweigh its residual benefits. Given those omissions, the government has failed to make the necessary "strong showing." And because the absence of that showing warrants lifting the stay pending appeal, this Court need not address the plaintiffs' separate argument that the Administration "appears to have acted in bad faith" throughout this litigation. Pls.'s Br. at 3.

a position implicitly approved by at least five Justices who support the judgment" (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc))). Moreover, because the four dissenting Justices did not explain their votes, it is impossible to determine which proposed disposition—theirs or Justice Kavanaugh's—is the "common denominator" of the other. *Id.* at 348. Further, the decisions of Sixth and Eleventh Circuit do not bind this Court. And although district courts have discretion to reappraise the equities in extraordinary circumstances, this Court lacks the "power or authority" to reach the opposite conclusion of the D.C. Circuit on the same issues, in the same emergency posture, and in the same case. *Briggs*, 334 U.S. at 306.

To lift the stay, the plaintiffs must accordingly seek relief before the D.C. Circuit, which may depart from the law of the case when there is an "intervening change in controlling legal authority," *LaShawn A.*, 87 F.3d at 1393, or when a previous decision was "clearly erroneous and would work a manifest injustice," *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (citation omitted).

CONCLUSION

Accordingly, it is

ORDERED that the plaintiffs' Emergency Motion to Enforce the Supreme Court's Ruling and to Vacate the Stay Pending Appeal, Dkt. 67, is **DENIED**. It is further

ORDERED that the Third Amendment Lawyers Association's Motion for Leave to File Brief as *Amicus Curiae*, Dkt. 70, is **DENIED AS MOOT**.

SO ORDERED.

Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

August 13, 2021

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 20A169

ALABAMA ASSOCIATION OF REALTORS, ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON APPLICATION TO VACATE STAY

[June 29, 2021]

The application to vacate stay presented to THE CHIEF JUSTICE and by him referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE BARRETT would grant the application.

JUSTICE KAVANAUGH, concurring.

I agree with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium. See *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014). Because the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds, I vote at this time to deny the application to vacate the District Court's stay of its order. See *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1305 (1991) (Scalia, J., in chambers) (stay depends in part on balance of equities); *Coleman* v. *Paccar Inc.*, 424 U. S. 1301, 1304 (1976) (Rehnquist, J., in chambers). In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5093 **September Term, 2020**

1:20-cv-03377-DLF

Filed On: June 2, 2021

Alabama Association of Realtors, et al.,

Appellees

v.

United States Department of Health and Human Services, et al.,

Appellants

BEFORE: Millett, Pillard, and Wilkins, Circuit Judges

O R D E R

The United States Department of Health and Human Services, the Centers for Disease Control and Prevention ("CDC"), and other federal agencies and officials (collectively, "HHS") appeal the district court's order entering summary judgment in favor of Appellees and vacating the nationwide temporary eviction moratorium instituted by the CDC in light of the COVID-19 pandemic. Shortly after HHS noticed the appeal, the district court entered an administrative stay of its order, and HHS filed in this court a contingent emergency motion for a stay pending appeal in the event the district court did not grant the stay motion HHS filed in that court. The district court subsequently stayed its own summary judgment order pending appeal. Appellees have filed in this court an emergency motion to vacate that stay pending appeal. Upon consideration of Appellees' emergency motion to vacate the stay pending appeal, the opposition thereto, and the reply, HHS's contingent emergency motion for a stay, and the motion for leave to participate as amicus and the lodged amicus brief, it is

ORDERED that the motion to vacate the stay pending appeal be denied. In evaluating a motion to vacate a stay entered by the district court, this court reviews the district court's decision under the deferential abuse-of-discretion standard of review. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843–44 (D.C. Cir. 1977); see also Sherley v. Sebelius, 644 F.3d 388, 393 (D.C. Cir. 2011).

The district court did not abuse its discretion in granting a stay in this case. Under this court's traditional four-factor test for a stay, we ask whether (1) the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) the

applicant will be irreparably injured absent a stay; (3) issuance of a stay would substantially injure other interested parties; and (4) the public interest favors or disfavors a stay. See Nken v. Holder, 556 U.S. 418, 434 (2009); see also Alabama Ass'n of Realtors v. HHS, No. 20-cv-3377 (DLF), 2021 WL 1946376, at *1 (D.D.C. May 14, 2021). While Appellees object to the district court's use of a sliding-scale analysis, we need not and do not address the propriety of that approach because Appellees have not shown that vacatur is warranted under the likelihood-of-success standard that they would apply.

As to the first factor, while of course not resolving the ultimate merits of the legal question, we conclude that HHS has made a strong showing that it is likely to succeed on the merits. See Nken, 556 U.S. at 434. We do so for the following four reasons.

First, the CDC's eviction moratorium falls within the plain text of 42 U.S.C. § 264(a). Congress expressly determined that responding to events that by their very nature are unpredictable, exigent, and pose grave danger to human life and health requires prompt and calibrated actions grounded in expert public-health judgments. Section 264(a) authorizes the Secretary of HHS "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C. § 264(a).[1] Congress thereby designated the HHS Secretary the expert best positioned to determine the need for such preventative measures, twice stating that it authorizes such measures as the Secretary determines "in his judgment [are] necessary." 42 U.S.C. § 264(a). That text also makes a determination of necessity a prerequisite to any exercise of Section 264 authority, and that necessity standard constrains the granted authority in a material and substantial way.

Here, to ensure that the moratorium was tailored to the necessity that prompted it, HHS carefully targeted it to the subset of evictions it determined to be necessary to curb the spread of the deadly and quickly spreading Covid-19 pandemic. Notably, Appellees do not dispute HHS's determination that the moratorium would "prevent the [interstate] introduction, transmission, or spread" of COVID. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,295 (Sept. 4, 2020) ("The statistics on interstate moves show that mass evictions would likely increase the interstate spread of COVID-19."). The agency reasonably

[1] The Surgeon General's and the Secretary's authority under this provision has been delegated to the Director of the CDC. See Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966); 42 C.F.R. § 70.2.

recognized that evicted people must move, and that a time-limited eviction moratorium would directly promote the self-isolation needed to help control the pandemic. Id. at 55,294–55,295; Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,733 (Mar. 31, 2021). The moratorium also applies only to those renters that the agency determined otherwise would likely need to move to congregate settings where COVID spreads quickly and easily, or would be rendered homeless and forced into shelters or other settings that would increase their susceptibility to COVID, the uncontained spread of the disease, and the adverse health consequences of its contraction. 86 Fed. Reg. at 16,735. In those ways, the moratorium fits within the textual authority conferred by Section 264(a) to adopt measures necessary to prevent the spread of a pandemic.

Second, Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium under Section 264. Last December, rather than enact its own moratorium, Congress deliberately chose legislatively to extend the HHS moratorium and, in doing so, specifically to embrace HHS's action "under section 361 of the Public Health Service Act (42 U.S.C. 264)[.]" Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, title V, § 502, 134 Stat. 1182, 2078–79 (Dec. 27, 2020).

Third, the text and structure of Section 264's additional provisions—beyond the core statutory authority to take action "necessary" to "prevent the introduction, transmission, or spread of communicable diseases" interstate and internationally—reinforce HHS's authority to temporarily suspend evictions. The second sentence of Section 264(a) provides that, "[f]or purposes of carrying out and enforcing such regulations" as are authorized by the provision's first sentence, "the Surgeon General 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." 42 U.S.C. § 264(a). That language makes clear that HHS has even the exceptional authority to take measures carrying out its regulations that Congress in 1944 had reason to believe required express congressional authorization under the Fourth Amendment. See Oklahoma Press Publ'g Co. v. Walling Wage & Hour Adm'r, 327 U.S. 186, 201 & nn.26, 27 (1946) (citing FTC v. American Tobacco Co., 364 U.S. 298, 305–06 (1924)).

Appellees argue that the balance of Section 264(a) constricts the scope of the regulatory authority the statute confers, and that the moratorium exceeds that authority. They argue, in particular, that the regulatory power under the first sentence of Section 264(a) is limited to measures closely akin to those the second sentence enumerates. That is incorrect. By its plain wording, the second sentence applies not to the

substantive scope of the regulatory authority conferred, but to the measures that HHS can deploy to "carry[] out and enforc[e] such regulations[.]" 42 U.S.C. § 264(a). That is language of expansion, not contraction, designed to strengthen HHS's ability to take the measures determined to be necessary to protect the public health from the dangers posed by contagious diseases that respect no boundaries. The ensuing subsections (b), (c), and (d) of Section 264 reinforce that point by their explicit reference to HHS's regulatory power over the movement of persons to prevent the spread of communicable disease. Indeed, contrary to their cramped reading of Section 264(a), appellees acknowledge in their reply brief (at page 5) that Section 264's regulatory power includes the power to prevent the interstate movement "of contagious persons[.]" That is the objective of the eviction moratorium.

Fourth, HHS is likely to succeed notwithstanding the Appellees' other statutory-construction arguments. Appellees suggest that a moratorium reaching rental property should be narrowly construed to avoid intrusion on "an area traditionally left to the States." Appellant Br. 13. But Congress has well-established authority to regulate rental housing transactions because they "substantially affect[]" interstate commerce. Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1066, 1068–70 (D.C. Cir. 2003) (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)); see Russell v. United States, 471 U.S. 858, 862 (1985). Tellingly, under appellees' Commerce Clause theory, even Congress's extension of the moratorium was unconstitutional—a point that Appellees do not even acknowledge, let alone answer.

HHS is also likely to succeed despite Appellants' federalism objection because Congress expressly empowered HHS to act in areas of traditional state authority when necessary to prevent interstate transmission of disease. See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). Appellees' major-questions objection does not change the calculus, given the statute's plain text and Congress's explicit embrace in the Consolidated Appropriations Act of action it referenced HHS having taken under 42 U.S.C. § 264. Cf. Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014). As for Appellees' non-delegation argument, Section 264's requirement that the regulatory measures adopted be "necessary to prevent the introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a), provides an intelligible principle that guides the agency's authority. See Gundy v. United States, 139 S. Ct. 2116, 2129 (2019); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472 (2001); Mistretta v. United States, 488 U.S. 361, 372–73 (1989).

To be sure, HHS has not previously imposed a rental-eviction moratorium under Section 264. But no public health crisis even approaching the scale and gravity of this one has occurred since the Public Health Service Act was passed in 1944. Appellees point to the lack of other eviction moratoria as a reason to question the Secretary's

power here, but the paucity of examples more likely underscores that the statutory constraints on HHS's regulatory authority work. Cf. Appellees' Br. In Supp. of Emergency Mot. to Vacate Stay 11-12; (quoting Utility Air Regulatory Grp., 573 U.S. at 324); Reply Br. 5.

The district court acted within its discretion in concluding that the remaining factors supported its stay of its own order. HHS has demonstrated "that lifting the national moratorium will 'exacerbate the significant public health risks identified by [the] CDC'" because, even with increased vaccinations, COVID-19 continues to spread and infect persons, and new variants are emerging. See Alabama Ass'n of Realtors, 2021 WL 1946376, at *4 (citation omitted). The government's interest in avoiding this harm merges with the public interest factor. See Pursuing America's Greatness v. FEC, 831 F.3d 500, 511 (D.C. Cir. 2016) ("[I]n this case, the FEC's harm and the public interest are one and the same, because the government's interest *is* the public interest." (emphasis in original)).

As for harms to other parties, including Appellees, the record does not show any likelihood of irreparable injury. Appellees' briefs make conclusory reference to general financial harms their declarant suggested could befall landlords nationwide. But the record is devoid of the requisite evidence of irreparable injury likely to befall the landlord parties to this case. In particular, the record does not demonstrate any likelihood that Appellees' themselves will lose their businesses, that an appreciable percentage of their own tenants who would otherwise pay in full will be unable to repay back rent, or that financial shortfalls are unlikely ultimately to be mitigated.

To the contrary, the calibrated design of the moratorium evidences and embodies Section 264's limitations on HHS's authority, ensuring that the steps taken are all "necessary." 42 U.S.C. § 264(a). More specifically, the moratorium imposes several exacting conditions that circumscribe the reach and degree of relief the order provides, and narrowly tailors the imposition on landlords.

For starters, not all tenants qualify for relief. The moratorium applies only to renters (not mortgage holders or hotel guests) (i) who cannot find other non-shared, non-congregate housing, and (ii) whose economic need meets a stated level, arises from specified circumstances, and could not otherwise be abated. See 86 Fed. Reg. at 16,731–16,732 (definition of "Covered person" paragraphs (1)–(3), (5); and definition of "Residential property"). And the order allows landlords to initiate eviction proceedings and even to obtain removal orders—it is only the enforcement of such orders that has been temporarily halted. See 85 Fed. Reg. at 55,293 (defining "[e]vict" in part as "to remove or cause the removal of" a covered person from a residential property); CDC, *HHS/CDC* Temporary Halt in Residential Evictions to Prevent the Further Spread of

COVID-19: Frequently Asked Questions 1, https://go.usa.gov/xHvzV (last visited June 1, 2021) (The moratorium is not "intended to prevent landlords from starting eviction proceedings, provided that the actual physical removal of a covered person for non-payment of rent does NOT take place during the period of the Order.") (emphasis in original).

On top of that, the obligation to pay all rent due remains, and provision has been made to address the interim shortfalls. Even those tenants who do qualify for protection remain obligated to pay their rent, and to make best efforts to promptly pay in part or full. 86 Fed. Reg. at 16,732 (definition of "Covered person" paragraph (4)); id. at 16,738. The order specifically preserves the landlords' legal right to recover all rent owed with interest and penalties. See 85 Fed. Reg. at 55,294–97. In the meantime, Congress has allocated substantial sums of money for rental assistance that is intended and designed to run to landlords like Appellees. See, e.g., Consolidated Appropriations Act, 2021, div. N, title V, § 501, 134 Stat. at 2070-78.

The fact that Appellees waited eleven weeks before bringing their challenge to the moratorium and have not asked this court for an expedited resolution of the merits of the appeal further suggests that the current moratorium extension—from March 31 through June 30, 2021—does not impose irreparable harm supporting vacatur of the stay. Cf. Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975).

Given all of that, the district court properly concluded that Appellees' financial losses are at least partially recoverable, at least partially mitigated through relief from Congress, and "the magnitude" of any "additional financial losses [incurred during appeal] is outweighed by HHS's weighty interest in protecting the public" health, Alabama Ass'n of Realtors, 2021 WL 1946376, at *5—an interest that also satisfies the fourth stay factor, id.

For the foregoing reasons, the district court did not abuse its discretion in staying its order pending appeal. It is

FURTHER ORDERED that the government's emergency motion for a stay be dismissed as moot. It is

FURTHER ORDERED that the motion for leave to participate as amicus be

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5093 **September Term, 2020**

denied without prejudice. The court will entertain motions to participate as amicus that are accompanied by merits briefs.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Tatiana Magruder
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

MEMORANDUM OPINION

Before the Court is the Department of Health and Human Service's ("the Department") Emergency Motion for Stay Pending Appeal. Dkt. 57. Pursuant to Federal Rule of Civil Procedure 62(c), the Department seeks a stay of the Court's May 5, 2021 order vacating the nationwide eviction moratorium issued by the Centers for Disease Control and Prevention ("CDC"). *See* Dkt. 53. For the reasons that follow, the Court will grant the motion.

I. LEGAL STANDARD

A stay pending appeal is an "extraordinary remedy," *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (per curiam), as it "is an intrusion into the ordinary processes of administration and judicial review," *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). Accordingly, it "is not a matter of right." *Id.* (internal quotation marks omitted). "It is instead an exercise of judicial discretion" that "is dependent upon the circumstances of the particular case." *Id.* at 433 (internal quotation marks omitted).

The moving party bears the burden of showing that this extraordinary remedy is warranted upon consideration of four factors: "(1) whether the stay applicant has made a strong

showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 433–34 (internal quotation marks omitted). The first two factors "are the most critical," *id.* at 434, and when the government is a party, its "harm and the public interest are one and the same, because the government's interest *is* the public interest," *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (emphasis in original); *see Nken*, 556 U.S. at 435.

"The manner in which courts should weigh the four factors 'remains an open question' in this Circuit." *Nora v. Wolf*, No. 20-cv-0993, 2020 WL 3469670, at *6 (D.D.C. Jun. 25, 2020) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014)). At least in the context of weighing whether to grant a preliminary injunction, the D.C. Circuit has "suggested, without deciding," that *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), could be read to require a plaintiff "to independently demonstrate both a likelihood of success on the merits and irreparable harm," *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 26 (D.D.C. 2016) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011)). But in the absence of clear guidance, courts in this Circuit have continued to analyze the factors "on a sliding scale whereby a strong showing on one factor could make up for a weaker showing on another." *NAACP v. Trump*, 321 F. Supp. 3d 143, 146 (D.D.C. 2018) (internal quotation marks omitted). Under this framework, a movant may make up for a lower likelihood of success on the merits "with a strong showing as to the other three factors, provided that the issue on appeal presents a 'serious legal question' on the merits." *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 560 (D.D.C. 2018) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Here, the Court will adopt the approach taken by other judges

and "apply th[is] sliding scale approach" to determine whether the Department is entitled to a stay pending resolution of its appeal. *See NAACP*, 321 F. Supp. 3d at 146 (internal quotation marks omitted). To prevail under this standard, the Department "need only raise a serious legal question on the merits" if the "other factors strongly favor issuing a stay." *Id.* (internal quotation marks omitted).

II. ANALYSIS

A. Likelihood of Success

As to the first factor—the likelihood of success on the merits—"[i]t is not enough that the chance of success on the merits [is] better than negligible." *Nken*, 556 U.S. at 434 (internal quotation marks omitted). Rather, it must be "substantial." *Holiday Tours*, 559 F.2d at 843.

Here, the Department has not shown a substantial likelihood of success on the merits. The Public Health Service Act provides, in relevant part:

> The [CDC], with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For 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.

42 U.S.C. § 264(a).

The Department continues to argue that this statutory provision vests the Secretary with "broad authority to make and enforce" *any* regulations that "in his judgment are necessary to prevent the spread of disease," Defs.' Mot. for Summ. J. at 11 (internal quotation marks omitted), Dkt. 26, and that the second sentence of § 264(a) imposes no limit on this "broad grant of authority," Defs.' Emergency Mot. for Stay Pending Appeal ("Defs.' Mot. to Stay") at 7–8.

The Court disagrees. Like other courts before it, this Court concluded in its May 5, 2021 Memorandum Opinion that the broad grant of rulemaking authority in the first sentence of § 264(a) is tethered to—and narrowed by—the second sentence, which enumerates various measures the Secretary "may provide for" to carry out and enforce regulations issued under § 264(a): "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 U.S.C. § 264(a); *see* Mem. Op. of May 5, 2021 at 11, Dkt. 54. The Department is correct that this list of measures is not exhaustive, as the Secretary may provide for "other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a). But these "other measures" are "controlled and defined by reference to the enumerated categories before it." *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 522–23 (6th Cir. 2021) (internal quotation marks and alteration omitted).

With that in mind, the statute could be read as requiring that the enumerated measures be directed toward "animals or articles," 42 U.S.C. § 264(a), that are "found to be so infected or contaminated as to be sources of dangerous infection to human beings," *id.*; *see Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720, at *10 (N.D. Ohio Mar. 10, 2021); Mem. Op. of May 5, 2021 at 11–12. Alternatively, the statute could be interpreted to tie the limitations surrounding "animals or articles" solely to "destruction." 42 U.S.C. § 264(a). But even then, the enumerated measures—"inspection, fumigation, disinfection, sanitation, [and] pest extermination," *id.*—are "by their common meanings and understandings. . . tied to specific, identifiable properties," *Skyworks*, 2021 WL 911720, at *9. And under either reading, an eviction moratorium is "radically unlike" the measures enumerated in the statute. *See Tiger Lily*, 992 F.3d at 524 (interpreting 42 U.S.C. § 264(a)). As this Court

and others have noted, to read the enumerated measures in § 264(a) as imposing no limits on the Secretary's authority to "make and enforce regulations" would raise serious constitutional concerns. *See* Mem. Op. of May 5, 2021 at 14 (collecting cases).

The Department also contends it has a "substantial likelihood of success on appeal because Congress ratified the CDC Order in the 2021 Consolidated Appropriations Act." Defs.' Mot. to Stay at 2. In § 502 of that Act, Congress provided:

> 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. 1182, 2078–79 (2020).

It is true that Congress may "give the force of law to official action unauthorized when taken." *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–02 (1937). But to ratify such action, Congress must make its intention clear. *See United States v. Heinszen & Co.*, 206 U.S. 370, 390 (1907); *see also Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 n.7 (D.C. Cir. 2006) (noting ratification may occur when there is a "clear statement of congressional approval") (internal citation omitted). While no "magic words are required," Defs.' Reply in Supp. of Partial Mot. to Dismiss at 5, Dkt. 38, Congress must use "clear and unequivocal language," *EEOC v. CBS, Inc.*, 743 F.2d 969, 974 (2d Cir. 1984), to ratify "official action unauthorized when taken," *Swayne & Hoyt*, 300 U.S. at 302.

Congress did not do so here. As other cases illustrate, the language of § 502 falls short of statutory provisions courts have found to ratify agency action. *See, e.g.*, *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 505 (D.C. Cir. 1999) ("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"); *Patchak v. Jewell*, 109 F. Supp. 3d 152, 158 (D.D.C. 2015) ("are ratified and confirmed"), *aff'd,* 828 F.3d 995 (D.C. Cir. 2016), *aff'd sub nom. Patchak v. Zinke*, 138 S. Ct. 897 (2018); *Am. Fed'n of Gov't Emps. v. D.C. Fin. Resp. & Mgmt. Assistance Auth.*, 133 F. Supp. 2d 75, 77–78 (D.D.C. 2001) ("is hereby ratified and approved"); *James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988) ("Congress hereby ratifies and confirms"), *aff'd sub nom. James v. Lujan*, 893 F.2d 1404 (D.C. Cir. 1990); *Heinszen*, 206 U.S. at 381 ("hereby legalized and ratified" and "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"); *cf. Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944) (ratification may occur through an appropriation only if the appropriation "plainly show[s] a purpose to bestow the precise authority which is claimed."); *Schism v. United States*, 316 F.3d 1259, 1290 (Fed. Cir. 2002) ("[R]atification ordinarily cannot occur in the appropriations context unless the appropriations bill itself *expressly* allocates funds for a specific agency or activity.") (emphasis added).

By contrast, when Congress enacted § 502 of the Consolidated Appropriations Act, it simply acknowledged that the CDC issued its order pursuant to the Public Health Service Act. Mem. Op. of May 5, 2021 at 18. It did not expressly approve of the agency's interpretation of 42 U.S.C. § 264(a), nor did it provide the agency with any additional statutory authority. *See id.* "All § 502 did was congressionally extend the agency's action until January 31, 2021." *Tiger Lily*, 992 F.3d at 524. Because that date has now passed—and Congress has therefore withdrawn its support—the CDC Order must rely exclusively on the text of the Public Health Service Act. *See id.*

The Department also points to the "nationwide reach of this Court's judgment," Defs.' Reply in Supp. of Mot. to Stay at 7, Dkt. 59, and insists that "traditional principles of equity and

Article III jurisdiction *require* limiting relief to the Plaintiffs," Defs.' Mot. to Stay at 8–9 (emphasis added). This argument, however, is "at odds with settled precedent." *See O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019). The D.C. Circuit has instructed that when a regulation is declared unlawful, "the ordinary result is that the rule[] [is] vacated—not that [its] application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted). In this Circuit, "the law is clear that when a court vacates an agency rule, the vacatur applies to all regulated parties, not only those formally before the court." *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 415 (D.D.C. 2020); *O.A.*, 404 F. Supp. 3d at 152 (collecting cases).

For these reasons and for those stated in the Court's May 5, 2021 Memorandum Opinion, the Department has not shown a substantial likelihood of success on the merits. Arguably, the Department's failure to meet this standard is a fatal flaw for its motion. *See M.M.V. v. Barr*, 459 F. Supp. 3d 1, 4 (D.D.C. 2020) (citing *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (per curiam)). Indeed, in another case challenging the CDC Order, the Sixth Circuit denied a similar emergency motion for stay on this ground alone. *See 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.").

But, as noted, in this Circuit a movant's failure to demonstrate a likelihood of success on the merits does not preclude a stay if they have raised a "serious legal question on the merits." *See Cigar Ass'n of Am.*, 317 F. Supp. 3d at 560 (internal quotation marks omitted); *Holiday Tours*, 559 F.2d at 843. Although a majority of courts that have addressed the lawfulness of the CDC Order reached the same conclusion as this Court, *see* Mem. Op. of May 5, 2021 at 5 (collecting cases), two have disagreed, at least at the preliminary injunction stage, *see Brown v.*

Azar, No. 20-cv-03702, 2020 WL 6364310, at *9–11 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. 2020); *Chambless Enters., LLC v. Redfield*, No. 20-cv-01455, 2020 WL 7588849, at *5–9 (W.D. La. Dec. 22, 2020), *appeal filed,* No. 21-30037 (5th Cir. 2021). Given the diverging rulings of these courts and the significance of the CDC Order, the Department has met this less demanding standard. *See Cigar Ass'n of Am.*, 317 F. Supp. 3d at 560 (internal quotation marks omitted). The Department therefore can obtain a stay if it makes a sufficiently strong showing as to the remaining stay factors. *See NAACP*, 321 F. Supp. 3d at 146.

B. Remaining Factors

As to the second factor—whether the movant will be irreparably injured absent a stay—the movant must make a strong showing "that the injury claimed is both certain and great." *Cuomo*, 772 F.2d at 976 (internal quotation marks omitted). "Probability of success is inversely proportional to the degree of irreparable injury evidenced." *Id.* at 974. "A stay may be granted with either a high probability of success and some injury, or vice versa." *Id.*

The Department has made a showing of irreparable injury here. As the federal agency tasked with disease control, the Department, and the CDC in particular, have a strong interest in controlling the spread of COVID-19 and protecting public health. The CDC's most recent order is supported by observational data analyses that estimate that as many as 433,000 cases of COVID-19 and thousands of deaths could be attributed to the lifting of state-based eviction moratoria. *See* 86 Fed. Reg. 16,731, 16,734 (Mar. 31, 2021). The CDC Order also cites a mathematical model that "estimate[s] that anywhere from 1,000 to 100,000 excess cases per million population could be attributable to evictions depending on the eviction and infection rates." *Id*. To be sure, these figures are estimates, but they nonetheless demonstrate that lifting the national moratorium will "exacerbate the significant public health risks identified by [the]

CDC." Defs.' Mot. to Stay at 3. Even though "vaccinations are on the rise," Pls.' Opp'n at 2, at least as of last week, the nation was averaging "more than 45,000 new infections per day," Defs.' Mot. to Stay at 5–6, and the recent "emergence of variants" presents yet another potential cause for concern, *see* 86 Fed. Reg. at 16,733. Thus, the risks to public health continue.

As to the third factor—the risk of injury to the plaintiffs—the economic impact of the CDC Order is indeed substantial. *See* Mem. Op. of May 5, 2021 at 15 n.4. The plaintiffs assert that landlords will continue to lose between $13.8 and $19 billion each month in unpaid rent as a result of the CDC Order, and that over the course of the year their cumulative losses will be close to $200 billion. Pl's Opp'n at 7 (citing Decl. of Scholastica Cororaton ¶¶ 15, 17, Dkt. 6-4).

While these financial losses are severe, some are recoverable. *See Brown*, 2020 WL 6364310, at *20 (explaining that the fact "tenants may not currently be able to afford their rent" does not mean that the plaintiffs "will likely never be able to collect a judgment"). The CDC Order itself does not excuse tenants from making rental payments. *See* 86 Fed. Reg. at 16,736. It simply delays them. *See id*. Congress also has taken steps to provide financial relief to tenants and landlords through the Consolidated Appropriations Act, § 501, 134 Stat. at 2070–78, and the American Rescue Plan Act, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (2021). These efforts help mitigate the landlords' financial losses.

A stay to allow the D.C. Circuit time to review this Court's ruling, presumably on an expedited basis, will no doubt result in continued financial losses to landlords. But the magnitude of these additional financial losses is outweighed by the Department's weighty interest in protecting the public. *See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129–30 (6th Cir. 2020).

Finally, the fourth factor—the public interest—weighs in favor of a stay for the public health reasons discussed. The fact that this "litigation presents questions of 'extraordinary public moment' [is] a consideration which [also] militates in favor of a stay." *Al-Adahi v. Obama*, 672 F. Supp. 2d 81, 84 (D.D.C. 2009) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936)).

***

Weighing each of the traditional stay factors, the Court will exercise its discretion to grant the Department's Emergency Motion for Stay Pending Appeal. Although the Court believes, as one Circuit has already held, *see Tiger Lily*, 992 F.3d at 524, there is not a substantial likelihood the Department will succeed on appeal, the CDC's nationwide eviction moratorium raises serious legal questions. The Department also has made a sufficiently strong showing as to the remaining factors to justify a stay of this Court's decision.

The Court remains mindful that landlords across the country have incurred substantial economic hardships as a result of the CDC's nationwide moratorium on evictions. The longer the moratorium remains in effect, the more these hardships will be exacerbated. Even so, given the public health consequences cited by the CDC, a stay is warranted.

CONCLUSION

For the foregoing reasons, the Department's Emergency Motion for Stay Pending Appeal is granted. A separate order consistent with this decision accompanies this memorandum opinion.

Dabney L. Friedrich

DABNEY L. FRIEDRICH
United States District Judge

May 14, 2021

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the defendants' Emergency Motion for Stay Pending Appeal, Dkt. 57, is **GRANTED**. It is further

ORDERED that, pursuant to Federal Rule of Civil Procedure 62(c), this Court's May 5, 2021 Order, Dkt. 53, will remain **STAYED** pending the defendants' appeal in this matter.

DABNEY L. FRIEDRICH
United States District Judge

May 14, 2021

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

MEMORANDUM OPINION

As part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress enacted a 120-day eviction moratorium that applied to rental properties receiving federal assistance, *id.* § 4024(b). After that moratorium expired, the U.S. Department of Health and Human Services (HHS), through the Centers for Disease Control and Prevention (CDC), issued an order implementing a broader eviction moratorium that applied to all rental properties nationwide, 85 Fed. Reg. 55,292 (Sept. 4, 2020), which prompted this suit. Since then, Congress has granted a 30-day extension of the CDC Order, and the CDC has extended the order twice itself. The current order is set to expire on June 30, 2021.

In this action, the plaintiffs raise a number of statutory and constitutional challenges to the CDC Order. Before the Court is the plaintiffs' Motion for Expedited Summary Judgment, Dkt. 6, as well as the Department's Motion for Summary Judgment, Dkt. 26, and Partial Motion to Dismiss, Dkt. 32. For the reasons that follow, the Court will grant the plaintiffs' motion and deny the Department's motions.

I. BACKGROUND

On March 13, 2020, then-President Trump declared COVID-19 a national emergency. *See generally* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). Two weeks later, he signed the CARES Act into law. *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). The CARES Act included a 120-day eviction moratorium with respect to rental properties that participated in federal assistance programs or were subject to federally-backed loans. *See id.* § 4024. In addition, some—but not all—states adopted their own temporary eviction moratoria. Administrative Record ("AR") at 966–72, 986–1024, Dkt. 40. The CARES Act's federal eviction moratorium expired in July 2020.

On August 8, 2020, then-President Trump issued an executive order directing the Secretary of HHS ("the Secretary") and the Director of 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 from one State or possession into any other State or possession." Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Executive Order 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020).

Weeks later, on September 4, 2020, the CDC issued the "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19" ("CDC Order"), pursuant to § 361 of the Public Health Service Act, 42 U.S.C. § 264(a), and 42 C.F.R. § 70.2. 85 Fed. Reg. 55,292 (Sept. 4, 2020). In this order, the CDC determined that a temporary halt on residential evictions was "a reasonably necessary measure . . . to prevent the further spread of COVID-19." 85 Fed. Reg. at 55,296. As the CDC explained, the eviction moratorium facilitates self-isolation for individuals

infected with COVID-19 or who are at a higher-risk of severe illness from COVID-19 given their underlying medical conditions. *Id.* at 55,294. It also enhances state and local officials' ability to implement stay-at-home orders and other social distancing measures, reduces the need for congregate housing, and helps prevent homelessness. *Id.* at 55,294.

The CDC Order declared that "a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action shall not evict any covered person." *Id.* at 55,296. To qualify for protection under the moratorium, a tenant must submit a declaration to their landlord affirming that they: (1) have "used best efforts to obtain all available government assistance for rent or housing"; (2) expect to earn less than $99,000 in annual income in 2020, were not required to report any income in 2019 to the Internal Revenue Service, or received a stimulus check under the CARES Act; (3) are "unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses"; (4) are "using best efforts to make timely partial payments"; (5) would likely become homeless or be forced to move into a shared residence if evicted; (6) understand that rent obligations still apply; and (7) understand that the moratorium is scheduled to end on December 31, 2020. *Id.* at 55,297.

Unlike the CARES Act's moratorium, which only applied to certain federally backed rental properties, the CDC Order applied to all residential properties nationwide. *Id.* at 55,293. In addition, the CDC Order includes criminal penalties. Individuals who violate its provisions are subject to a fine of up to $250,000, one year in jail, or both, and organizations are subject to a fine of up to $500,000. *Id.* at 55,296.

The CDC Order was originally slated to expire on December 31, 2020. *Id.* at 55,297. As part of the Consolidated Appropriations Act, however, Congress extended the CDC Order to

apply through January 31, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020). On January 29, 2021, the CDC extended the order through March 31, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021). In this extension, the CDC updated its findings to account for new evidence of how conditions had worsened since the original order was issued, as well as "[p]reliminary modeling projections and observational data" from states that lifted eviction moratoria "indicat[ing] that evictions substantially contribute to COVID-19 transmission." *Id.* at 8022. The CDC later extended the order through June 30, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021).

A. Procedural History

The plaintiffs—Danny Fordham, Robert Gilstrap, the corporate entities they use to manage rental properties (Fordham & Associates, LLC, H.E. Cauthen Land and Development, LLC, and Title One Management, LLC), and two trade associations (the Alabama and Georgia Associations of Realtors)—filed this action on November 20, 2020. Compl., Dkt. 1. They challenge the lawfulness of the eviction moratorium on a number of statutory and constitutional grounds. The plaintiffs allege that the eviction moratorium exceeds the CDC's statutory authority, *id.* ¶¶ 81–84 (Count III), violates the notice-and-comment requirement, *id.* ¶¶ 63–70 (Count I), and is arbitrary and capricious, *id.* ¶¶ 85–91 (Count IV), all in violation of the Administrative Procedure Act (APA). The plaintiffs further allege that the eviction moratorium fails to comply with the Regulatory Flexibility Act. *Id.* ¶¶ 71–78 (Count II). To the extent that the Public Health Service Act authorizes the eviction moratorium, the plaintiffs allege that the Act is an unconstitutional delegation of legislative power under Article I. *Id.* ¶¶ 92–95 (Count V). Finally, the plaintiffs allege that the eviction moratorium constitutes an unlawful taking of

property in violation of the Takings Clause, *id.* ¶¶ 96–103 (Count VI), violates the Due Process Clause, *id.* ¶¶ 96–110 (Count VII), and deprives the plaintiffs of their right of access to courts, *id.* ¶¶ 111–15 (Count VIII). The plaintiffs seek declaratory and injunctive relief, attorneys' fees and costs, and any other relief the Court deems just and proper. *Id.* ¶¶ 116–20.

Before the Court is the plaintiffs' expedited motion for summary judgment, Dkt. 6, and the Department's cross-motion for summary judgment. Also before the Court is the Department's partial motion to dismiss, Dkt. 32, in which the Department argues that Congress ratified the CDC Order when it extended the eviction moratorium in the Consolidated Appropriations Act of 2021. All three motions are now ripe for review.

B. Relevant Decisions

This Court is not the first to address a challenge to the national eviction moratorium set forth in the CDC Order. In the last several months, at least six courts have considered various statutory and constitutional challenges to the CDC Order. Most recently, the Sixth Circuit denied a motion to stay a district court decision that held that the order exceeded the CDC's authority under 42 U.S.C. § 264(a), *see Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, No. 2:20-cv-2692, 2021 WL 1171887, at *4 (W.D. Tenn. Mar. 15, 2021) (concluding that the CDC Order exceeded the statutory authority of the Public Health Service Act), *appeal filed* No. 21-5256 (6th Cir. 2021); *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 520 (6th Cir. 2021) (denying emergency motion for stay pending appeal); *see also Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720, at *12 (N.D. Ohio Mar. 10, 2021) (holding that the CDC exceeded its authority under 42 U.S.C. § 264(a)). Two other district courts, however, declined to enjoin the CDC Order at the preliminary injunction stage, *see Brown v. Azar*, No. 1:20-cv-03702, 2020 WL 6364310, at *9–

11 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. 2020); *Chambless Enterprises, LLC v. Redfield*, No. 20-cv-01455, 2020 WL 7588849, at *5–9 (W.D. La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. 2021). Separately, another district court declared that the federal government lacks the constitutional authority altogether to issue a nationwide moratorium on evictions. *See Terkel v. Ctrs. for Disease Control & Prevention*, No. 6:20-cv-564, 2021 WL 742877, at *1–2, 10–11 (E.D. Tex. Feb. 25, 2021), *appeal filed*, No. 21-40137 (5th Cir. 2021).

II. LEGAL STANDARD

Summary judgment is proper if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A fact is "material" if it has the potential to change the substantive outcome of the litigation. *See id.* at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). And a dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

In a case reviewing agency action, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). "[T]he entire case . . . is a question of law," and the district court "sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks and footnote omitted).

III. ANALYSIS

A. Standing

Article III of the Constitution limits the "judicial Power" of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "[T]here is no justiciable case or controversy unless the plaintiff has standing." *West v. Lynch*, 845 F.3d 1228, 1230 (D.C. Cir. 2017). To establish standing, a plaintiff must demonstrate a concrete injury-in-fact that is fairly traceable to the defendant's action and redressable by a favorable judicial decision. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Since the CDC Order went into effect, the three real estate management company plaintiffs have each had tenants who have stopped paying rent, invoked the protections of the eviction moratorium, and would be subject to eviction but for the CDC Order. *See* Decl. of Danny Fordham ¶¶ 2–5, 9–17, Dkt. 6-2; Decl. of Robert Gilstrap ¶¶ 2, 4–12, Dkt. 6-3. At a minimum, these three plaintiffs have established a concrete injury that is traceable to the CDC Order and is redressable by a decision vacating the CDC Order. *See Summers*, 555 U.S. at 493. "[I]t is immaterial that other plaintiffs might be unable to demonstrate their own standing," *J.D. v. Azar*, 925 F.3d 1291, 1323 (D.C. Cir. 2019), because "Article III's case-or-controversy requirement is satisfied if one plaintiff can establish injury and standing," *id.*

B. The Agency's Statutory Authority

Section 361 of the Public Health Service Act empowers the Secretary to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" either internationally or between states.[1] 42

[1] "Although the statute states that this authority belongs to the Surgeon General, subsequent reorganizations not relevant here have resulted in the transfer of this responsibility to the Secretary." *Skyworks*, 2021 WL 911720, at *5.

U.S.C. § 264(a). "For purposes of carrying out and enforcing such regulations," the Secretary is authorized to "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.* The Secretary is also authorized to, within certain limits, make and enforce regulations to apprehend, examine, and, if necessary, detain individuals "believed to be infected with a communicable disease" or who are "coming into a State or possession" from a foreign country. *Id.* § 264(b)–(d).

By regulation, the Secretary delegated this authority to the Director of the CDC. 42 C.F.R. § 70.2. Pursuant to this regulation, when the Director of the CDC determines that the measures taken by health authorities of any state or local jurisdiction are insufficient to prevent the spread of communicable disease, "he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection." *Id.*

In determining whether the eviction moratorium in the CDC Order exceeds the Department's statutory authority, the Department urges the Court to apply the familiar two-step *Chevron* framework. *See* Defs.' Mot. for Summ. J. ("Def.'s Cross-Mot.") at 8 (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). While it is true that "the CDC did not follow APA notice-and-comment rulemaking procedures before issuing the Eviction Moratorium," Pl.'s Mem. in Supp. of Expedited Mot. for Summ. J. ("Pl.'s Mem.") at 21, Dkt. 6-1, "*Chevron* deference is not necessarily limited to regulations that are the product of notice-and-comment rulemaking," *Pub. Citizen, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 332

F.3d 654, 660 (D.C. Cir. 2003). The *Chevron* framework applies where "Congress [has] delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226–27 (2001); *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012). Here, the CDC Order was issued pursuant to a broad grant of rulemaking authority, *see* 42 U.S.C. § 264(a) (authorizing the Secretary to "make and enforce" regulations "to prevent the introduction, transmission, or spread of communicable diseases."); 42 C.F.R. § 70.2 (delegating this authority to the Director of the CDC), and was "clearly intended to have general applicability." *Kaufman v. Nielsen*, 896 F.3d 475, 484 (D.C. Cir. 2018). It was also issued "with a lawmaking pretense in mind," *Mead*, 533 U.S. at 233, published in the Federal Register, *see Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007), and backed with the threat of criminal penalties, 85 Fed. Reg. 55,296. Because the CDC Order was clearly intended to have the force of law, the two-step *Chevron* framework applies.[2]

Applying *Chevron* and using the traditional tools of statutory interpretation, a court must first consider at Step One "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If Congress has directly spoken to [an] issue, that is the end of the

[2] The fact that section 361 of the Public Health Service Act is administered by both the CDC and the FDA, *see* Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations, 65 Fed. Reg. 49,906, 49,907 (Aug. 16, 2000), does not preclude application of the *Chevron* framework. While courts "generally do not apply *Chevron* deference when the statute in question is administered by multiple agencies," *Kaufman*, 896 F.3d at 483; *see also, e.g.*, *DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 487 (D.C. Cir. 2013), the FDA and the CDC are both sub-agencies within HHS. Accordingly, "there is nothing special to undermine *Chevron*'s premise that the grant of authority reflected a congressional expectation that courts would defer" to reasonable agency interpretations of the statute, and there is little risk of "conflicting mandates to regulated entities." *Loan Syndications & Trading Ass'n v. Sec. & Exch. Comm'n*, 882 F.3d 220, 222 (D.C. Cir. 2018) (summarizing instances where "*Chevron* is inapplicable due to the multiplicity of agencies").

matter." *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016) (citing *Chevron*, 467 U.S. at 837). "[T]he court, as well [as] the agency, must give effect to the unambiguously expressed intent of Congress." *Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) (quoting *Chevron*, 467 U.S. at 842–43). Only if the text is silent or ambiguous does a court proceed to Step Two. There, a court must "determine if the agency's interpretation is permissible, and if so, defer to it." *Confederated Tribes of Grand Ronde Cmty.*, 830 F.3d at 558. To determine "whether [an] agency's interpretation is permissible or instead is foreclosed by the statute," courts use "all the tools of statutory interpretation," *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014), and "interpret the words [of a statute] consistent with their ordinary meaning at the time Congress enacted the statute," *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (internal quotation marks and alteration omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted.").

The first question, then, is whether the relevant statutory language addresses the "precise question at issue." *Chevron*, 467 U.S. at 842. As noted, the Public Health Service Act provides, in relevant part:

> The [CDC], with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For 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.

42 U.S.C. § 264(a). Other subsections of the Act authorize, in certain circumstances, the quarantine of individuals in order to prevent the interstate or international spread of disease. *See id.* § 264(b)–(d). Though the Public Health Service Act grants the Secretary broad authority to

make and enforce regulations necessary to prevent the spread of disease, his authority is not limitless.

Section 264(a) provides the Secretary with general rulemaking authority to "make and enforce *such regulations*," *id.* § 264(a) (emphasis added), that "in his judgment are necessary" to combat the international or interstate spread of communicable disease, *id.* But this broad grant of rulemaking authority in the first sentence of § 264(a) is tethered to—and narrowed by—the second sentence. It states: "For purposes of carrying out and enforcing *such regulations*," *id.* (emphasis added), the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." *Id.*

These enumerated measures are not exhaustive. The Secretary may provide for "other measures, as in his judgment may be necessary." *Id.* But any such "other measures" are "controlled and defined by reference to the enumerated categories before it." *See Tiger Lily*, 992 F.3d at 522–23 (internal quotation marks and alteration omitted); *id.* at 522 (applying the *ejusdem generis* canon to interpret the residual catchall phrase in § 264(a)). These "other measures" must therefore be similar in nature to those listed in § 264(a). *Id.*; *Skyworks*, 2021 WL 911720, at *10. And consequently, like the enumerated measures, these "other measures" are limited in two significant respects: first, they must be directed toward "animals or articles," 42 U.S.C. § 264(a), and second, those "animals or articles" must be "found to be so infected or contaminated as to be sources of dangerous infection to human beings," *id.*; *see Skyworks,* 2021 WL 911720, at *10. In other words, any regulations enacted pursuant to § 264(a) must be directed toward "specific targets 'found' to be sources of infection." *Id.*

The national eviction moratorium satisfies none of these textual limitations. Plainly, imposing a moratorium on evictions is different in nature than "inspect[ing], fumigat[ing], disinfect[ing], sanit[izing], . . . exterminat[ing] [or] destr[oying]," 42 U.S.C. § 264(a), a potential source of infection. *See Tiger Lily*, 992 F.3d at 524. Moreover, interpreting the term "articles" to include evictions would stretch the term beyond its plain meaning. *See* Webster's New International Dictionary 156 (2d ed. 1945) (defining an "article" as "[a] thing of a particular class or kind" or "a commodity"); *see also Skyworks,* 2021 WL 911720, at *10. And even if the meaning of the term "articles" could be stretched that far, the statute instructs that they must be "found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 U.S.C. § 264(a). The Secretary has made no such findings here. The fact that individuals with COVID-19 can be asymptomatic and that the disease is difficult to detect, Mot. Hr'g Rough Tr. at 26,[3] does not broaden the Secretary's authority beyond what the plain text of § 264(a) permits.

The Department reads § 264(a) another way. In the Department's view, the grant of rulemaking authority in § 264(a) is not limited *in any way* by the specific measures enumerated in § 264(a)'s second sentence. Defs.' Cross-Mot. at 18, 19 n.2. According to the Department, Congress granted the Secretary the "broad authority to make and enforce" *any* regulations that "in his judgment are necessary to prevent the spread of disease," *id.* at 11 (internal quotation marks omitted), across states or from foreign countries. In other words, the grant of rulemaking authority in § 264(a)'s first sentence is a congressional deferral to "the 'judgment' of public

[3] The official transcript from the motions hearing held on April 29, 2021 is forthcoming, and this opinion will be updated to include citations to that transcript when it becomes available.

health authorities about what measures they deem 'necessary' to prevent contagion." *Id*. at 9 (quoting 42 U.S.C. § 264(a)).

The Department's interpretation goes too far. The first sentence of § 264(a) is the starting point in assessing the scope of the Secretary's delegated authority. But it is not the ending point. While it is true that Congress granted the Secretary broad authority to protect the public health, it also prescribed clear means by which the Secretary could achieve that purpose. *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). And those means place concrete limits on the steps the Department can take to prevent the interstate and international spread of disease. *See supra* at 11. To interpret the Act otherwise would ignore its text and structure.

At *Chevron*'s first step, this Court must apply the "ordinary tools of the judicial craft," *Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 20 (D.C. Cir. 2019), including canons of construction, *see ArQule, Inc. v. Kappos*, 793 F. Supp. 2d 214, 219–20 (D.D.C. 2011). These canons confirm what the plain text reveals. The Secretary's authority does not extend as far as the Department contends.

First, "[i]t is… a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). Applying that principle here, the Department's broad reading of § 264(a)'s first sentence would render the second sentence superfluous. If the first sentence empowered the Secretary to enact *any* regulation that, in his "judgment," was "necessary" to prevent the interstate spread of communicable disease, *id.*, there would be no need for Congress to enumerate the "measures" that the Secretary "may provide for" to carry out and enforce those regulations, *see id.* Though the surplusage canon "is not absolute," *Lamie v.*

U.S. Tr., 540 U.S. 526, 536 (2004); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006), like the plain language, it supports a narrow reading of the statute.

Second, the canon of constitutional avoidance instructs that a court shall construe a statute to avoid serious constitutional problems unless such a construction is contrary to the clear intent of Congress. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). An overly expansive reading of the statute that extends a nearly unlimited grant of legislative power to the Secretary would raise serious constitutional concerns, as other courts have found. *See, e.g., Skyworks,* 2021 WL 911720, at *9 (noting that such a reading would raise doubts as to "whether Congress violated the Constitution by granting such a broad delegation of power unbounded by clear limitations or principles."); *Tiger Lily*, 992 F.3d at 523 (same); *id.* ("[W]e cannot read the Public Health Service Act to grant the CDC power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress's intent to do so"); *Terkel*, 2021 WL 742877, at *4–6 (holding that the CDC's eviction moratorium exceeds the federal government's power under the Commerce Clause). Congress did not express a clear intent to grant the Secretary such sweeping authority.

And *third*, the major questions doctrine is based on the same principle: courts "expect Congress to speak *clearly* if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (emphasis added)); *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021) (collecting cases). There is no question that the decision to impose a nationwide moratorium on evictions is one "of vast economic and political significance." *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted).

Not only does the moratorium have substantial economic effects,[4] eviction moratoria have been the subject of "earnest and profound debate across the country," *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (internal quotation marks omitted). At least forty-three states and the District of Columbia have imposed state-based eviction moratoria at some point during the COVID-19 pandemic, *see* 86 Fed. Reg. 16,731, 16,734, though, as the CDC noted in its most recent extension of the CDC Order, these protections either "have expired or are set to expire in many jurisdictions," *id.* at 16,737 n.35. Congress itself has twice addressed the moratorium on a nationwide-level—once through the CARES Act, *see* Pub. L. No. 116-136, § 4024, 134 Stat. 281 (2020), and again through the Consolidated Appropriations Act, *see* Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020).

Accepting the Department's expansive interpretation of the Act would mean that Congress delegated to the Secretary the authority to resolve not only this important question, but endless others that are also subject to "earnest and profound debate across the country." *Gonzales*, 546 U.S. at 267 (internal quotation marks omitted). Under its reading, 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.[5]

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[4] In their briefing, the parties dispute the economic impact of the CDC order, *see, e.g.*, Pl.'s Mem. at 2 (estimating the nation's landlords will suffer "$55-76 billion" in losses as a consequence of the initial moratorium); Def.'s Cross-Mot. at 15 n.4 (disputing these figures). Regardless, the economic impact of the CDC Order is substantial. Indeed, the CDC itself estimates that "as many as 30-40 million people in America could be at risk of eviction" absent the CDC's moratorium as well as other State and local protections, 85 Fed. Reg. at 55,294–95. The CDC Order also qualifies as "a major rule under the Congressional Review Act," *id.* at 55,296, which means it is expected to have "an annual effect on the economy of $100,000,000 or more," 5 U.S.C. § 804(2).

[5] The only other potential limitation, imposed by regulation, is that the Director of the CDC would need to conclude that state and local health authorities have not taken sufficient measures to prevent the spread of communicable disease. *See* 42 C.F.R. § 70.2.

"Congress could not have intended to delegate" such extraordinary power "to an agency in so cryptic a fashion." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159. To be sure, COVID-19 is a novel disease that poses unique and substantial public health challenges, *see* Def.'s Cross-Mot. at 14, but the Court is "confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole." *Loving.*, 742 F.3d at 1021; *see also Brown & Williamson,* 529 U.S. at 160.

It is also telling that the CDC has never used § 264(a) in this manner. As the Department confirms, § 264(a) "has never been used to implement a temporary eviction moratorium," and "has rarely [been] utilized . . . for disease-control purposes." *See* Defs.' Cross-Mot. at 13–15, 23. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," the Court must "greet its announcement with a measure of skepticism." *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted).

The Department advances one final counterargument. It notes that subsequent subsections of the statute, § 264(b)–(d), contemplate that the Secretary may, under certain carefully prescribed circumstances, provide for the "apprehension, detention, or conditional release of individuals" who are arriving in the United States from abroad or who are "reasonably believed to be infected with a communicable disease," 42 U.S.C. § 264(b)–(d). And it stresses that enforced quarantines are not listed in—and are different in kind from—the measures enumerated in § 264(a). Defs.' Cross-Mot. at 10–11. Accordingly, the Department contends that the presence of these subsequent subsections demonstrates that the list of means in the second sentence of § 264(a) imposes *no* limits on the Secretary's authority under § 264(a). *Id.*

This argument is not persuasive. No doubt, Congress intended to give the Secretary—and, by extension, health experts in the CDC—the discretion and flexibility to thwart the spread of disease. But the quarantine provisions in § 264(b)–(d) are structurally separate from those in § 264(a). *Tiger Lily*, 992 F.3d at 524 (noting that the provisions in § 264(b)–(d) restrict individual liberty interests, while § 264(a) is concerned exclusively with property interests). And regardless, like the enumerated measures in § 264(a), the quarantine provisions are cabined and directed toward individuals who are either entering the United States or "reasonably believed to be infected," 42 U.S.C. § 264(c)–(d), and "not to amorphous disease spread" more generally, *Skyworks*, 2021 WL 911720, at *10. The quarantine provisions in § 264(b)–(d) therefore do not provide support for the eviction moratorium.

In sum, the Public Health Service Act authorizes the Department to combat the spread of disease through a range of measures, but these measures plainly do not encompass the nationwide eviction moratorium set forth in the CDC Order.[6] Thus, the Department has exceeded the authority provided in § 361 of the Public Health Service Act, 42 U.S.C. § 264(a).

C. Ratification of the CDC Order

In its partial motion to dismiss, the Department argues that Congress ratified the agency's action when it extended the moratorium in the Consolidated Appropriations Act.[7] *See* Defs.' Partial Mot. at 7–9. The initial CDC Order was set to expire on December 31, 2020, *see* 85 Fed.

[6] Because the CDC Order exceeds the Secretary's authority, the Court need not address the plaintiffs' remaining challenges to the eviction moratorium.

[7] The Department initially argued in its partial motion to dismiss that Counts I-V of the complaint were moot in light of Congress's extension of the CDC Order. Defs.' Mem. in Supp. of Partial Mot. to Dismiss ("Defs.' Partial Mot.") at 1, Dkt. 32-1. But this congressional extension of the CDC Order has since expired, so the Department has withdrawn this argument. *See* Joint Status Report at 2, Dkt. 36.

Reg. at 55,297, but Congress extended the expiration date until January 31, 2021, by including § 502 in the Consolidated Appropriations Act. Section 502 provided:

> 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. 1182 (2020).

"Congress 'has the power to ratify the acts which it might have authorized' in the first place," *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *United States v. Heinszen & Co.*, 206 U.S. 370, 384 (1907)), "and give the force of law to official action unauthorized when taken," *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–02 (1937). To do so, however, Congress must make its intention explicit. *Heinszen*, 206 U.S. at 390.

Congress did not do so here. When Congress granted a temporary extension of the eviction moratorium by enacting § 502, it acknowledged that the CDC issued its order pursuant to the Public Health Service Act. It did not, however, expressly approve of the agency's interpretation of 42 U.S.C. § 264(a) or provide the agency with any additional statutory authority. *See Tiger Lily*, 992 F.3d at 524; *Skyworks,* 2021 WL 911720, at *12. Instead, Congress merely extended the CDC Order for a limited 30-day duration.

"[C]ongressional acquiescence to administrative interpretations of a statute" is "recognize[d]. . . with extreme care." *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). "[M]ere congressional acquiescence in the CDC's assertion that the [CDC Order] was supported by 42 U.S.C. § 264(a) does not make it so." *Tiger Lily*, 992 F.3d at 524. Because Congress withdrew its support for the CDC Order on January 31, 2021, the order now stands—and falls—on the text of the Public Health Service Act alone. For

all the reasons stated above, *supra* Part III.B., the national eviction moratorium in the CDC Order is unambiguously foreclosed by the plain language of the Public Health Service Act.

D. Remedy

Both parties agree that if the Court concludes that the Secretary exceeded his authority by issuing the CDC Order, vacatur is the appropriate remedy. *See* Mot. Hr'g Rough Tr. at 13, 30–31. Nonetheless, the Department urges the Court to limit any vacatur order to the plaintiffs with standing before this Court. Defs.' Partial Mot. to Dismiss at 23. This position is "at odds with settled precedent." *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019).

This Circuit has instructed that when "regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted); *see also O.A.*, 404 F. Supp. 3d at 109. Accordingly, consistent with the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and this Circuit's precedent, *see Nat'l Mining Ass'n*, 145 F.3d at 1409, the CDC Order must be set aside.

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The Court recognizes that the COVID-19 pandemic is a serious public health crisis that has presented unprecedented challenges for public health officials and the nation as a whole. The pandemic has triggered difficult policy decisions that have had enormous real-world consequences. The nationwide eviction moratorium is one such decision.

It is the role of the political branches, and not the courts, to assess the merits of policy measures designed to combat the spread of disease, even during a global pandemic. The question for the Court is a narrow one: Does the Public Health Service Act grant the CDC the legal authority to impose a nationwide eviction moratorium? It does not. Because the plain

language of the Public Health Service Act, 42 U.S.C. § 264(a), unambiguously forecloses the nationwide eviction moratorium, the Court must set aside the CDC Order, consistent with the Administrative Procedure Act, *see* 5 U.S.C. § 706(2)(C), and D.C. Circuit precedent, *see National Mining Ass'n*, 145 F.3d at 1409.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for expedited summary judgment is granted and the Department's motion for summary judgment and partial motion to dismiss are denied. A separate order consistent with this decision accompanies this memorandum opinion.

Dabney L. Friedrich

DABNEY L. FRIEDRICH
United States District Judge

May 5, 2021

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the defendants' Motion for Summary Judgment, Dkt. 26, and Partial Motion to Dismiss, Dkt. 32, are **DENIED**. It is further

ORDERED that the plaintiffs' Motion for Expedited Summary Judgment, Dkt. 6, is **GRANTED**. It is further

ORDERED that the nationwide eviction moratorium issued by the Centers for Disease Control and Prevention, and currently in effect at 86 Fed. Reg. 16,731, is **VACATED**.

May 5, 2021

DABNEY L. FRIEDRICH
United States District Judge